

**Case C-179/20****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

7 April 2020

**Referring court:**

Curtea de Apel București (Romania)

**Date of the decision to refer:**

3 March 2020

**Applicant:**

Fondul Proprietatea SA

**Defendants:**

Guvernul României

SC Complexul Energetic Hunedoara SA, in liquidation

SC Complexul Energetic Oltenia SA

Compania Națională de Transport al Energiei Electrice  
'Transelectrica' SA**Intervener:**

Ministerul Economiei, Energiei și Mediului de Afaceri

**Subject matter of the main proceedings**

Administrative action for the annulment of Hotărârea Guvernului României nr. 138/2013 privind adoptarea unor măsuri pentru siguranța alimentării cu energie electrică (Decision No 138/2013 of the Romanian Government on the adoption of measures for the security of electricity supply, 'Decision No 138/2013'). The dispute concerns the questions of whether State aid was granted by means of that act and of whether that act is contrary to Directive 2009/72.

## **Subject matter and legal basis of the request for a preliminary ruling**

Pursuant to Article 267 TFEU, interpretation is sought of Articles 107 and 108(3) TFEU and of Article 15(4) of Directive 2009/72.

## **Questions referred**

(a) Does the adoption by the Romanian State of a legislative act which, for the benefit of two companies of which the State is the majority shareholder, provides for:

a.1. the grant of priority access to dispatching and an obligation for the transmission system operator to purchase ancillary services from those companies, and

a.2. the grant of guaranteed access to the electricity grid for the electricity produced by those two companies, such as to ensure that they can operate continuously,

constitute State aid within the meaning of Article 107 TFEU, that is to say, is it a measure funded by the State or through State resources, is it selective in nature and may it affect trade between Member States? If so, is such State aid subject to notification as provided for by Article 108(3) TFEU?

(b) Is the grant by the Romanian State of a right of guaranteed access to the electricity grid to two companies of which the State is the majority shareholder, such as to ensure that they can operate continuously, consistent with the provisions of Article 15(4) of Directive 2009/72/EC?

## **Provisions of EU law cited**

Articles 107 and 108(3) TFEU;

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC: Article 15(4);

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC: recital 60, Article 16(2)(b);

Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment: recital 5.

### **Provisions of national law cited**

**Hotărârea Guvernului României nr. 138/2013** privind adoptarea unor măsuri pentru siguranța alimentării cu energie electrică (Decision No 138/2013 of the Romanian Government on the adoption of measures to safeguard security of electricity supply). Pursuant to this act, guaranteed access to the electricity grid was granted for the electricity produced by the thermal power stations owned by the defendants, SC Complexul Energetic Hunedoara SA ('CEH') and SC Complexul Energetic Oltenia SA ('CEO'). In addition, an obligation was imposed on the Compania Națională de Transport al Energiei Electrice 'Transelectrica' SA (the national electricity transmission company, 'Transelectrica'), in its capacity as transmission system operator, to guarantee the priority dispatching of the electricity produced by the two companies, in accordance with the conditions laid down in the regulations issued by the Autoritatea Națională de Reglementare în Domeniul Energiei (the national regulatory authority for the energy sector, 'ANRE'). Lastly, in order to maintain the level of security of the national electricity system, an obligation was imposed on the two companies to provide Transelectrica with ancillary services at a specified electrical capacity, in accordance with the conditions laid down in the regulations issued by ANRE. Those measures were applied during the period from 15 April 2013 to 1 July 2015 and were subsequently extended, with regard to CEH alone, to 31 December 2017.

**Legea nr. 123/2012 a energiei electrice și a gazelor naturale** (Law No 123/2002 on electricity and natural gas, 'Law No 123/2012'): Article 5(3), which transposes Article 15(4) of Directive 2009/72 into Romanian law and provides the legal basis for Decision No 138/2013: 'For reasons relating to the security of electricity supply, guaranteed access to the electricity grid may be granted, by government decision, for the electricity produced by power plants which use domestically produced fuels, up to an annual limit corresponding to primary energy of not more than 15% of the total quantity of equivalent fuel needed to produce electricity corresponding to gross national final consumption.'

### **Succinct presentation of the facts and the main proceedings**

- 1 The applicant, Fondul Proprietatea SA, is a minority shareholder in Hidroelectrică SA, a company which produces electricity from renewable sources and is the principal supplier of ancillary services in Romania. The majority shareholder of Hidroelectrică is the Romanian State. The defendants CEH and CEO are two companies of which the Romanian State is the majority shareholder and which produce electricity from non-renewable sources using domestically produced fuels. The defendant Transelectrica is a company of which the State is the majority shareholder. It is the only transmission system operator in Romania.
- 2 The Note de fundamentare (preparatory acts) for Decision No 138/2013 set out the reasons which led to the adoption of that act. They state that the security of the

national electricity system meant that it was necessary to have and to maintain a mixture of fuels for the production of electricity to satisfy national energy consumption. In achieving that mixture, the Romanian Government attached particular importance to the priority use of domestic energy resources, so as to guarantee energy security and independence.

- 3 The exponential increase in recent years in the capacity to produce electricity from renewable sources, which is expected to continue in years to come, meant that it was necessary to adopt measures to guarantee the supply of electricity, in line with the reasoning set out in recital 5 of Directive 2005/89.
- 4 So as to ensure the adequacy of the system and to satisfy in secure conditions the demand for electricity, it was necessary that there should be, within the national electricity system, a certain guaranteed available capacity at electricity power stations significantly higher than the power consumed at peak consumption. It was also necessary to ensure that the system operator should at all times have at its disposal an operational reserve that could balance the continual variations in load. Such variations had significantly increased as a result of the exponential increase in the production of electricity from renewable sources, since the availability of such energy producers is limited and their production difficult to control. Consequently, it was absolutely necessary that there should be an associated reserve capacity, in order to ensure that the system functioned adequately.
- 5 Thus, the reduction in the potential associated reserve capacity resulting from the removal from operation of certain electricity generation capacities that used conventional fuels adversely affected the security of supply within the national electricity system and indeed the country's energy security.
- 6 The preparatory acts also mention the launch, in November 2014, of the '4M — Market Coupling' project for coupling the markets in the Czech Republic, Slovakia, Hungary and Romania. The growth in capacity in cross-border interconnections on the western Romanian grid meant that significant production capacity in that area would be needed in the future.
- 7 Power plants producing electricity from non-renewable sources, especially those using coal, were recording increasingly high costs due to the fact that they were unable to operate continuously and, when they were not operating, they were unable to provide ancillary services because of the long start-up times and considerable costs associated with that operation. Such power plants were therefore unable to be competitive in the market and their contribution to meeting energy needs had diminished, which had had repercussions for the mining industry, with less coal being used in the process of electricity production.
- 8 In those circumstances, it was found that the operation of certain power plants producing electricity from non-renewable sources was necessary to ensure the security of supply to the national electricity system and the country's energy independence. That was true for the thermal power plants belonging to CEH and

CEO, which used domestically produced fuels and were contributing significantly to the security of certain areas of the national electricity system that had a high deficit. However, given the long start-up times for thermal power plants, the two companies were not able to respond to orders from energy dispatchers to provide ancillary services, unless they were operating at a certain electrical capacity.

- 9 For those reasons, on the basis of Article 5(3) of Law No 123/2012, the Romanian Government adopted Decision No 138/2013, by which it granted guaranteed access to the electricity grid for the electricity produced by CEH and CEO, guaranteed the priority dispatching of the electricity produced by those two companies and imposed an obligation on them to provide ancillary services at a specified electrical capacity.
- 10 The applicant took the view that that act was damaging to its position as a shareholder in Hidroelectrica SA and initiated an administrative action by which it seeks the annulment of Decision No 138/2013, alleging, *inter alia*, that unlawful State aid has been granted. The Ministerul Economiei, Energiei și Mediului de Afaceri (Ministry of the Economy, Energy and the Business Environment) intervened in the proceedings in support of the defendant, the Romanian Government. The Curtea de Apel București (Court of Appeal, Bucharest) ruled on the action. An appeal against that judgment was brought before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), which set aside the judgment under appeal, on the ground that not all of the pleas alleging unlawfulness raised by the applicant had been examined on the merits, and referred the case back to the Curtea de Apel București, which decided to refer to the Court of Justice the request for a preliminary ruling in the present case.

#### **Essential arguments of the parties to the main proceedings**

- 11 **The applicant**, in so far as concerns the grant of **unlawful State aid** by means of Decision No 138/2013, maintains that all of the conditions referred to in Article 107 TFEU are met.
- 12 As regards the condition that the *measure must be funded by the State or through State resources*, the applicant argues, essentially, that, as a result of the grant of guaranteed access to the electricity grid, CEH and CEO are able to sell the electricity they produce in priority over their competitors. The re-direction, by means of the government's decision, of the sources of funding coming from the energy market toward certain producers is a form of funding through State resources. In addition, in the purchase of ancillary services from CEH and CEO, use is made of public resources from among the assets of Transelectrica, the majority shareholder of which is the State. In the case of State-owned companies, the Court of Justice has held that the State is able, by exercising its dominant influence, to direct the use of their resources to fund specific advantages favouring certain undertakings.

- 13 As regards the condition relating to the *existence of a selective advantage*, the applicant maintains that that is clear from the facts of the case. The power plants targeted by Decision No 138/2013 do not operate continuously because they do not have purchasers of energy which can ensure that they operate without interruption. From a technical point of view, because of the long start-up times, the power plants operated by CEH and CEO are capable of providing certain ancillary services only if the plants are already in operation at the time when a request is made by Transelectrica. Furthermore, very significant costs are incurred in starting up the power plants.
- 14 In order to make good these deficiencies, the Romanian State, by Decision No 138/2013, granted a selective advantage by means of a complete package, which includes guaranteed access to the electricity grid and priority access to dispatching, as well as a guarantee of the provision of ancillary services. To that effect, Decision No 138/2013 establishes priority dispatching for the two companies, along with an ‘obligation’ on their part to provide ancillary services. In practice, that means that Transelectrica is obliged to purchase such services, in priority, from CEH and CEO, without regard to the order of economic merit. That benefit represents a selective advantage conferred on the two companies. In the absence of Decision No 138/2013, ancillary services would be purchased on the basis of competitive criteria, by reference to the lower offer price.
- 15 In addition, the Romanian State granted the two companies guaranteed access to the electricity grid. That means that CEH and CEO can be certain of supplying a given quantity of electricity, such that they can be guaranteed continuous operation. Decision No 138/2013 provides CEH and CEO with a ‘safety net’, in the sense that electricity providers will be obliged to purchase from them a proportion of the electricity that they supply to consumers.
- 16 According to the applicant, the mechanism of guaranteed access was created for renewable energy, in order to promote environmentally friendly, non-polluting sources of production. The Romanian State, however, has implemented that system for the benefit of CEH and CEO (which produce thermal energy, which is highly polluting), in order to offer them the abovementioned advantages. Consequently, as a result of the adoption of these measures, the two companies have a commercial advantage over their competitors.
- 17 As regards the condition relating to an *effect on trade between Member States and the distortion of competition*, the applicant maintains that the distortion of competition results from the adverse effects of the measure in question, which are suffered by operators in the energy market, which are placed at a disadvantage by not having guaranteed access to the electricity grid. The only producers to have been granted that right are CEH and CEO. In addition, the obligation on Transelectrica to purchase ancillary services from CEH and CEO takes no account of the high price of the energy produced by those two companies, and thus disregards the criteria of competitiveness.

- 18 Lastly, as regards the *notification obligation*, given that the conditions for the existence of State aid are met, the measure in question should have been notified to the Commission so that it could determine whether it was compatible or incompatible with the competition. The mere fact that it was not notified means that the measure is unlawful.
- 19 As regards **the implementation of Article 15(4)** of Directive 2009/72 by Article 5(3) of Law No 123/2012, the applicant maintains that, while both provisions concern the same type of energy producer, namely those which use indigenous fuels as their primary source, and lay down the same limit, specifically 15% of all the primary energy needed for electricity generation, there is nevertheless a significant difference between the two provisions: while the directive contemplates, as an exceptional measure, the grant of priority access to certain producers on certain strict conditions, Article 5(3) of Law No 123/2012 provides for guaranteed access to the electricity grid.
- 20 Moreover, the concept of guaranteed access is an autonomous concept of EU law, defined in recital 60 of Directive 2009/28. In addition, Article 16(2)(b) of that directive states that the Member States are to provide that electricity produced from renewable energy sources should have priority access or guaranteed access to the grid-system. Therefore, according to the applicant, guaranteed access is to be granted only for electricity produced from renewable sources and should not be allowed for electricity produced from non-renewable energy sources, as is the case with the energy produced by CEH and CEO. Accordingly, the granting of guaranteed access for the electricity produced by those two companies appears to constitute an infringement of the provisions of Article 15(4) of Directive 2009/72.
- 21 **The defendants and the intervener** submit that the conditions for the existence of State aid laid down by Article 107 TFEU are not met, so that it was not necessary to notify the measure, and that Article 15(4) of Directive 2009/72 was correctly transposed by Article 5(3) of Law No 123/2012.
- 22 Accordingly, **the Romanian Government** argues that ANRE is the competent authority to draw up, approve and monitor the application of the mandatory regulations at national level that are needed in order for the electricity sector and market to function efficiently, competitively and transparently, while ensuring consumer protection. On the basis of EU legislation (in particular, Directives 2009/28, 2012/27 and 2009/72) and Law No 123/2012, ANRE correlated the provisions concerning guaranteed or priority access and priority dispatching with the existing rules in the balancing market, in accordance with which Dispatchable Units (DUs) are used in accordance with the criterion of order of merit.
- 23 Decision No 138/2013 specifies that Transelectrica is under an obligation to give priority to the dispatching of electricity produced by CEH and CEO under the conditions set out in the regulations issued by ANRE. Similarly, the obligation upon the two companies to provide ancillary services is subject to the conditions laid down in ANRE's regulations. The costs associated with the provision of

ancillary services are justified by the producers and certified by ANRE, in compliance with the applicable EU and national regulations and in accordance with the methods for fixing regulated tariffs approved by decision of ANRE.

- 24 The intervener, **the Ministry of the Economy, Energy and the Business Environment**, refers to the preparatory acts for Decision No 138/2013 and asserts that that act was adopted to ensure the secure operation of the national electricity system and to ensure the security of electricity supply.
- 25 Decision No 138/2013 refers to dispatching by generating installations for the purpose of balancing the national electricity system. To that end, at the request of the transmission system operator (Transelectrica), CEH and CEO can provide ancillary services under the conditions laid down by ANRE. ANRE fixes a regulated price for the provision of those services, following its own methodology. The approved price for the provision of ancillary services is comparable to the weighted average purchase price of ancillary services in the competitive market.
- 26 In accordance with Directive 2009/72 and national legislation, ANRE establishes objective, transparent and non-discriminatory criteria for all producers, so as not to undermine the proper functioning of the electricity market or affect the activities of the other producers operating in that market. Neither the applicable legislative framework nor Decision No 138/2013 can have the effect of harming the interests of the other participants in that market. The application of these measures does not create distortions in the electricity market and does not engender anti-competitive treatment, given that ancillary services are determined objectively, by reference to existing market conditions, and the price at which such services are provided is regulated by ANRE.
- 27 The intervener maintains that, in light of those circumstances, the existence of State aid must be ruled out.
- 28 The defendant **Transelectrica** states that every producer that has concluded a contract with it for the provision of ancillary services in the relevant market (competitive or regulated) is under an obligation to offer on the balancing market at least the contractually stipulated quantity. The activation of reserves in the balancing market is not guaranteed for any provider of ancillary services, but is triggered in accordance with market rules, on the basis of order of merit. That rule is applied equally to the producers concerned by Decision No 138/2013, which have no guarantee that the balancing energy which they provide in preference to other providers (otherwise than by order of merit) will in fact be used.
- 29 The market for ancillary services in Romania is highly concentrated, but not highly competitive, regardless of the type of reserves. Given that there is a limited supply, the prices of such services on the competitive market are high and, in many cases, the weighted average offer price exceeds the regulated price. In such



a context, it cannot be said with certainty that the purchase price of reserves would be significantly lower in the absence of the provisions of Decision No 138/2013.

- 30 In the applicable regulations issued by ANRE, the concept of priority dispatching is taken from EU legislation, albeit the original meaning of the concept has not been retained. Indeed, in the case of ANRE regulations, priority dispatching refers only to situations in which a decrease in capacity is necessary in order to balance the national electricity system when there is a significant surplus of capacity under certain particular circumstances. This priority dispatching relates strictly to the order of merit established in the balancing market, does not confer any competitive advantage on participants in that market and applies only from a certain level of daily balancing market offers.
- 31 The power plants concerned by Decision No 138/2013 do not benefit from priority dispatching in the way that renewable sources and cogeneration energy do, as actually provided for by the legislation in force. They only have priority where the price of daily balancing market offers falls below 0.1 Lei/MWh and only where contracts have been concluded in the electricity market.
- 32 Lastly, the defendants emphasise that the draft on which Decision No 138/2013 was based was examined by the Consiliul Concurenței (the national competition authority), which expressed a favourable opinion, stating that measures adopted to ensure the security of electricity supply take precedence over State aid rules. In addition, ANRE has stated that the measures in question comply with applicable legislation and do not contravene the regulatory framework which it instituted.

#### **Succinct presentation of the reasons for the request for a preliminary ruling**

- 33 The referring court states that, at the present stage of the proceedings, following the appeal in cassation and the referral back from the higher court, the court having jurisdiction as to the substance of the matter is bound by the findings made in the judgment on cassation. It is clear from the judgment of the Înalta Curtea de Casație și Justiție (High Court of Cassation and Justice) that what now must be examined is the issue of whether or not State aid has been granted. In addition, the referring court shares the concerns expressed by the applicant regarding the correct transposition of Article 15(4) of Directive 2009/72.
- 34 As regards **the first question**, reiterating the applicant's arguments, the referring court states that the Romanian State appears to have adopted Decision No 138/2013 with the aim of conferring additional benefits on CEH and CEO, specifically, a guarantee of selling the electricity produced by its power plants operating continuously, a reduction in the costs of providing ancillary services resulting from the elimination of the costs of starting up the power plants and the production of energy at a lower cost, which can then be sold on the competitive or regulated market.

- 35 The need for a reference to be made to the Court of Justice is apparent from the circumstances of the case, inasmuch as the advantage conferred on the producers concerned by Decision No 138/2013 is not one that is derived from the simple transfer of a sum or money, or goods or other assets, but one derived from the complex mechanism governing the functioning of the energy market.
- 36 As regards **the second question**, the referring court notes that Decision No 138/2013 was adopted on the basis of Article 5(3) of Law No 123/2012, which transposes Article 15(4) of Directive 2009/72 into national law. Despite that, there is a difference between the two provisions, inasmuch as Article 15(4) of the directive concerns the giving of priority to dispatching, whereas Article 5(3) of Law No 123/2012 concerns guaranteed access to the electricity grid.
- 37 It is therefore necessary to establish whether Article 15(4) of the directive is an exceptional provision requiring strict application, which permits only the granting of priority access, not the granting of guaranteed access as governed by Decision No 138/2013, especially since the concept of guaranteed access is an autonomous concept defined in recital 60 of Directive 2009/28. Also, it is apparent from the content of that directive that guaranteed access is to be granted only in the case of electricity produced from renewable sources and is not permitted in the case of electricity produced from non-renewable sources. The grant of guaranteed access for the electricity produced by CEH and CEO appears to constitute an infringement of the provisions of Article 15(4) of Directive 2009/72.
- 38 Consequently, it is necessary to determine whether, under that provision, a Member State may grant certain undertakings producing electricity from non-renewable sources guaranteed access to the grid.