

Case C-290/20**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:**

30 June 2020

Referring court:

Satversmes tiesa (Constitutional Court, Latvia)

Date of the decision to refer:

11 June 2020

Applicant:

AS Latvijas Gāze

Other parties to the proceedings:

Saeima (Latvian Parliament)

Sabiedrisko pakalpojumu regulēšanas komisija (Public Services Regulatory Commission)

Subject matter of the main proceedings

Action for a declaration of unconstitutionality concerning the conformity of the rules governing connection to the natural gas transmission network adopted by the Sabiedrisko pakalpojumu regulēšanas komisija (Public Services Regulatory Commission) with the provisions of the Satversme (Constitution) and the Enerģētikas likums (Law on Energy), and concerning the conformity of the provisions of the Law on Energy with the Constitution, and seeking a ruling on the appropriateness of a regulatory framework enacted by a Member State which permits any user of natural gas to connect to the natural gas transmission network.

Purpose and legal basis of the request for a preliminary ruling

On the basis of Article 267 TFEU, the referring court seeks an interpretation of Article 2(3), Article 23 and Article 32(1) of Directive 2009/73 in order to

determine whether users of natural gas must be able to connect to the natural gas transmission network (and, if so, which category of such users).

Questions referred for a preliminary ruling

- 1) Must Article 23 and Article 32(1) of Directive 2009/73/EC be interpreted as meaning that Member States must adopt a regulatory framework permitting any final customer to choose which type of network — transmission or distribution — he wishes to connect to and imposing on the network operator an obligation to allow him to connect to the network in question?
- 2) Must Article 23 of Directive 2009/73/EC be interpreted as meaning that Member States have an obligation to adopt a regulatory framework permitting only a non-household final customer (that is to say, only an industrial customer) to connect to the natural gas transmission network?
- 3) Must Article 23 of Directive 2009/73/EC, in particular the concept of ‘new industrial customer’, be interpreted as meaning that that article lays down an obligation for Member States to adopt a regulatory framework permitting only a non-household final customer (that is to say, only an industrial customer) who has not previously been connected to the distribution network to connect to the natural gas transmission network?
- 4) Must Article 2(3) and Article 23 of Directive 2009/73/EC be interpreted as meaning that they preclude a regulatory framework enacted by a Member State according to which the transmission of natural gas includes the transmission of natural gas directly to the final customer’s natural gas supply network?

Provisions of EU law relied on

Treaty on the Functioning of the European Union (TFEU), Article 2(2) and Article 4(2)(a) and (i).

Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, recitals 1, 3, 6, 8 and 48, Article 2(3), (5), (24) and (25) to (27), Article 23(1) and (2) and Article 32(1).

Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Articles 2 and 20.

Case-law of the Court of Justice

Judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraphs 45, 47 and 49.

National legal framework

Constitution of the Republic of Latvia, Articles 1, 64, 89 and 105, first sentence.

Law on Energy, Article 1, points 7, 12, 13, 15, 16, 32 and 35, Article 45(2) and (7), Article 84¹(1) and Article 111(1), point 1, and (2).

Decision No 1/7 of the Council of the Public Services Regulatory Commission of 18 April 2019, ‘Dabaszgāzes pārvades sistēmas pieslēguma noteikumi biometāna ražotājiem, sašķidrīnātās dabaszgāzes sistēmas operatoriem un dabaszgāzes lietotājiem’ (Rules on connection to the natural gas transmission network for producers of biomethane, operators of liquefied natural gas networks and users of natural gas).

Brief presentation of the facts and the main proceedings

- 1 The statutory provision at issue — Article 84¹(1) of the Law on Energy — was introduced into that Law by amendments made in 2016 that were necessary, inter alia, in order to comply with the requirements of Directive 2009/73, which creates an effective internal market aimed at enabling natural gas to be sold on equal terms and without discrimination or restrictions in the European Union, and at ensuring economically reasonable and effective access to the natural gas network for third parties.
- 2 That statutory provision states that the Public Services Regulatory Commission is to approve the rules on connection to the natural gas transmission network that are laid down by the operator of the natural gas transmission network for producers of biomethane, operators of liquefied natural gas networks and users of natural gas, and the rules on connection to the natural gas distribution network that are laid down by the operator of the natural gas distribution network for users of natural gas. What is more, under the Law on Energy, the transmission of natural gas includes the transmission of natural gas through the transmission networks not only to the natural gas distribution network but also directly to the users of natural gas. The distribution of natural gas also includes the transmission of natural gas from the natural gas transmission network to the natural gas users’ energy supply network.
- 3 On 18 April 2019 the Council of the Public Services Regulatory Commission adopted Decision No 1/7 concerning ‘rules on connection to the natural gas transmission network for producers of biomethane, operators of liquefied natural gas networks and users of natural gas’. According to those rules, any user of

natural gas may connect to the natural gas transmission network without the intervention of a distribution network operator.

- 4 The applicant brought an action for a declaration of unconstitutionality before the Satversmes tiesa (Constitutional Court) on the ground that those rules and Article 84¹(1) of the Law on Energy infringed, in particular, its right to property.
- 5 As part of the action for a declaration of unconstitutionality brought by the applicant, the Satversmes tiesa (Constitutional Court, Latvia) must give a ruling on: (1) the conformity of the rules on connection to the natural gas transmission network with Articles 1, 64, 89 and 105, first sentence, of the Constitution of the Republic of Latvia and with Articles 45(7) and 84¹(1) of the Law on Energy; and (2) the conformity of Article 84¹(1) of the Law on Energy with Article 64 of the Constitution of the Republic of Latvia.

Main arguments of the parties to the dispute in the main proceedings

- 6 **According to the applicant**, the contested rules do not comply with Articles 64 and 105, first sentence, of the Constitution; they infringe the principles of good administration, good legislation, the protection of legitimate expectations and legal certainty which derive from Articles 1 and 89 of the Constitution; and they are also not consistent with Articles 45(7) and 84¹(1) of the Law on Energy. Article 84¹(1) of the Law on Energy is itself not in conformity with Article 64 of the Constitution.
- 7 The applicant claims that, up until 3 April 2017, it alone, as a vertically integrated undertaking, ensured the purchase, storage, transmission, distribution and marketing of natural gas on the Latvian market in natural gas. In the process of the liberalisation of the market in natural gas in Latvia, [the Latvian Government] created, as an entity separate from the applicant, the public limited liability company Conexus Baltic Grid, to which it transferred, in particular, the national infrastructure for the transmission of natural gas and the single network for the transmission of natural gas. The applicant is not a shareholder in that public limited liability company. [The Latvian Government] also created, as a subsidiary separate from the applicant, the public limited liability company Gaso, which provides, under licence, a natural gas distribution service in the territory of Latvia. The applicant is the only shareholder in that public limited liability company and continues to market natural gas. Pursuant to its licence, the public limited liability company Gaso is the sole operator of the natural gas distribution network in Latvia, ensuring the supply of natural gas from the transmission network to final consumers. The natural gas distribution segment is one of the most important business segments in the applicant's group. The contested rules on connection to the natural gas transmission network allow any user of natural gas to connect to the natural gas transmission network without the intervention of the distribution network operator. This restricts the right, acquired by licence, of the public limited

liability company Gaso, which is a member of the applicant's group, to pursue a business activity within the natural gas distribution network.

- 8 According to the applicant, the adoption of the rules at issue has had the effect of diminishing the value of the applicant's group and, as a result, the right to property which it enjoys under Article 105 of the Constitution has been infringed. Given that the contested rules were adopted under Article 84¹(1) of the Law on Energy, the right to property is infringed by that provision of the Law on Energy too.
- 9 In the view of the applicant, it follows from an examination of Article 84¹(1) of the Law on Energy in the light of the nature and purpose of that Law, that the legislature did not authorise the Public Services Regulatory Commission to adopt rules allowing any user of natural gas to disconnect from the natural gas distribution network and connect directly to the natural gas transmission network. Account must be taken of Directive 2009/73 in this regard.
- 10 According to the applicant, it follows from Directive 2009/73 that operators of the natural gas distribution network are to be independent of, and separate from, operators of the natural gas transmission network. Users of natural gas have a right of access to the natural gas network but they do not have a right to connect to a particular type of network — distribution or transmission. As a rule, a user of natural gas connects to the natural gas network via the natural gas distribution network, which is managed by the operator of the natural gas distribution network.
- 11 The applicant submits that, in accordance with Article 23 of Directive 2009/73, legislation enacted by a Member State may allow users of natural gas to connect directly to the natural gas transmission network only if the operator of the natural gas distribution network refuses to connect them to the network on account of technical or operational limitations or if there are other objective reasons making it necessary for a user of natural gas to connect directly to the natural gas transmission network. What is more, that article is concerned with only one specific group of natural gas users: new industrial customers.
- 12 **The body which issued the contested measure — the Public Services Regulatory Commission** — states that the rules at issue are in conformity with the Constitution, with Article 45(7) of the Law on Energy and with the contested provision in that Law — Article 84¹(1) of the Law on Energy.
- 13 In its view, Article 84¹(1) of the Law on Energy transposes Article 23 of Directive 2009/73, under which Member States must ensure the non-discriminatory connection of facilities of industrial customers to the natural gas transmission network.
- 14 The fact that the contested rules provide for the right of the bodies referred to in Article 84¹(1) of the Law on Energy, including users of natural gas, to request the connection of their facilities to the natural gas transmission network, impose an obligation on the operator of the natural gas transmission network to make such a

connection, and enable users of natural gas users to obtain natural gas from the natural gas transmission network after that connection has been made, does not make the transmission of natural gas through the transmission network a distribution of natural gas.

- 15 [The body in question] submits that, during the drafting of the contested rules, the interested parties asked that restrictions be imposed on the connection of facilities of users of natural gas to the natural gas transmission network. However, neither the national legislation nor Article 23(1) of Directive 2009/73 attaches restrictions to that right. Furthermore, if certain industrial customers of natural gas decided to withdraw their facilities from the natural gas distribution network and to connect them to the natural gas transmission network, the impact on what other users of natural gas pay for the distribution of natural gas would be relatively minor.

Brief presentation of the reasons for the request for a preliminary ruling

- 16 In the case at issue, it is necessary to determine whether Directive 2009/73 precludes a regulatory framework enacted by a Member State permitting any user of natural gas to connect to the natural gas transmission network.
- 17 According to the *Satversmes tiesa* (Constitutional Court, Latvia), it follows at first sight from Directive 2009/73 that the transmission of natural gas does not include the transmission of natural gas through a section of the network that forms part of the high-pressure pipelines used primarily to distribute natural gas locally for the purposes of supply to final customers. Natural gas is, after all, transmitted to the network supplying natural gas to final customers directly from the natural gas distribution network, not via the natural gas transmission network.
- 18 It nonetheless follows from Article 23 of Directive 2009/73 that industrial customers, or at least new industrial customers, can connect to the natural gas transmission network. Directive 2009/73 does not define the concept of ‘industrial customer’. Of the categories of customer mentioned in Article 2(24) of Directive 2009/73, the concept of ‘industrial customer’ might be classified under that of ‘final customer’, inasmuch as it would seem from the drafting history of that directive that the concept of ‘industrial customer’ could refer to consumers of natural gas. The *Satversmes tiesa* (Constitutional Court, Latvia) considers that, given that the final customer referred to in Article 2(27) of Directive 2009/73 can be both a household and a non-household customer, an industrial customer can only be a non-household customer within the meaning of Article 2(26) of the Directive.
- 19 The view might thus be taken that it follows from Article 23 of Directive 2009/73 that Member States have an obligation to enact a regulatory framework allowing at least non-household customers to connect directly to the natural gas transmission network, or that such a scheme might be in conformity with the Directive.

- 20 It follows from the rules at issue in this case, and from Article 1, points 13 and 15, of the Law on Energy that, in Latvia, any user of natural gas, even one who is not a new industrial customer, may connect to the natural gas transmission network. In this instance, therefore, it is necessary to determine whether such a scheme is contrary to Articles 2(3) and 23 of Directive 2009/73.
- 21 In this case, account must be taken of Article 2(2) TFEU, concerning the respective areas of competence of the European Union and the Member States in certain fields. According to Article 4(2)(a) and (i)[TFEU], the European Union and the Member States share competence in the areas of the internal market and energy.
- 22 When adopting Directive 2009/73, the European Parliament and the Council essentially exercised the European Union's competence in the areas of the internal market and energy. In this case, however, there is some uncertainty as to the meaning, in the context of the exercise of competence shared between the European Union and the Member States, of the principle of third-party access recognised in Article 32(1) of Directive 2009/73.
- 23 It follows from recitals 1, 3, 6 and 8 of Directive 2009/73/EC that the European Union internal market in natural gas aims to give real choice for all consumers of the European Union, be they citizens or businesses. Without effective separation of networks from activities of production and supply, there is a risk of discrimination in the operation of the network. Such discrimination may arise where a vertically integrated economic operator pursues activities involving the production or supply of natural gas while at the same time operating a natural gas transmission and distribution network. In such circumstances, the vertically integrated economic operator may have no interest in providing any competitors on the market in the production or supply of natural gas with access to the natural gas transmission and distribution networks which it operates. This would hamper the exercise of the freedoms guaranteed by the FEU Treaty by failing to allow all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers, despite the fact that, according to recital 48 of Directive 2009/73, consumer interests should be at the heart of that directive.
- 24 In the view of the Satversmes tiesa (Constitutional Court, Latvia), it follows from the foregoing recitals that Directive 2009/73 aims to protect the interests of consumers by ensuring that the traders in, or suppliers of, natural gas that are chosen by the relevant consumers — the final customers — are protected against discrimination in access to natural gas transmission and distribution networks. Final customers, after all, are the intermediate beneficiaries of the principle of third-party access recognised in Article 32(1) of Directive 2009/73.
- 25 The Court of Justice of the European Union expressed a similar view when assessing the principle of third-party access to the internal market in electricity provided for in Article 20 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal

market in electricity and repealing Directive 96/92/EC. Paragraph 1 of that article provided in particular that Member States were to ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. What is more, although Directive 2003/54 did not contain a provision analogous to that contained in Article 23 of Directive 2009/73, Article 2 of Directive 2003/54 provided that transmission included the transport of electricity not only to distributors but also to final customers.

- 26 In this regard, the Court of Justice concluded that, by including system users within its purview, Article 20(1) of Directive 2003/54 also conferred on eligible customers a right of non-discriminatory access to the systems. Member States retained a certain flexibility in steering system users, including eligible customers, towards one or another type of system, provided, however, that they did so for non-discriminatory reasons and in accordance with objective considerations. System users thus had a right of access to the electricity system but Member States could decide that that the connection was to be made on one or another type of system. In the light of those considerations, the Court of Justice held that Article 20 of Directive 2003/54 was to be interpreted as defining the Member States' obligations only in respect of the access and not the connection of third parties to the electricity transmission and distribution systems and as not laying down that the system of network access that the Member States were required to establish must allow an eligible customer to choose, at his discretion, the type of system to which he wishes to connect (judgment of the Court of Justice of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraphs 45, 47 and 49).
- 27 The aforementioned judgment of the Court of Justice concerns the principle of third-party access to the internal market in electricity, but that same principle of third-party access is recognised in the internal market in natural gas. It could therefore be concluded that Article 32(1) of Directive 2009/73 defines the obligations incumbent on Member States as regards access and not as regards the connection of third parties to the natural gas transmission and distribution networks, and that it does not lay down that the system of network access that the Member States are required to establish must allow the final customer to choose, at his discretion, the type of network to which he wishes to connect.
- 28 The foregoing considerations might support the inference of various conclusions, namely:
- 1) Article 32(1) of Directive 2009/73 imposes on Member States obligations as regards access and not as regards the connection of third parties to the natural gas supply networks, and Member States retain a certain flexibility in steering network users, including final customers, to one or another type of network, whereas the requirements which Article 23 of the Directive imposes on Member States as regards the connection of industrial customers to the natural gas

transmission network apply only to cases where a Member State has steered final customers towards the natural gas transmission network.

2) Article 23 and Article 32(1) of Directive 2009/73 impose on Member States obligations as regards access and the connection of third parties to the natural gas supply networks, and provide in particular for the connection of industrial customers both to natural gas transmission networks and to natural gas distribution networks.

29 In this case, the Satversmes tiesa (Constitutional Court, Latvia) has already found that there is a link between the provisions of the Law on Energy and Directive 2009/73 and the content of the provisions of the latter. The Court of Justice has not yet laid down any case-law on the questions raised in this order. The circumstances of this case therefore justify the submission of a request for a preliminary ruling to the Court of Justice of the European Union.

WORKING DOCUMENT