

Case C-775/23

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:

15 December 2023

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

6 October 2023

Applicant:

Bursa Română de Mărfuri SA

Defendant:

Autoritatea Națională de Reglementare în Domeniul Energiei (ANRE)

Interveners:

European Federation of Energy Traders

London Energy Brokers' Association –LEBA

European Venues & Intermediaries Association – EVIA

Subject matter of the main proceedings

Action by which the applicant Bursa Română de Mărfuri SA is asking the Curtea de Apel București (Bucharest Court of Appeal, Romania), first, to annul the letter by which the defendant, Autoritatea Națională de Reglementare în Domeniul Energiei (National Energy Regulatory Authority, Romania; 'ANRE') refused to grant it a licence for the organisation and operation of the centralised electricity markets and, second, to order the defendant to grant it that licence.

Subject matter and legal basis of the request

In accordance with Article 267 TFEU, the referring court is seeking clarification as to the interpretation of Articles 35, 49 and 56 TFEU and Articles 102 and 106(1) TFEU, the latter two articles in conjunction with Article 4(3) TEU, in order to determine whether those provisions preclude national legislation requiring the grant of a single licence for the operation of the electricity market and requiring national and European electricity producers to offer for sale all electricity available to them on the platforms managed by the only national electricity market operator.

Questions referred for a preliminary ruling

1. Does a national provision that requires the grant of a single licence for the operation of the electricity market constitute an infringement of the freedom of establishment laid down in Article 49 of the Treaty on the Functioning of the European Union or of the freedom to provide services laid down in Article 56 of the Treaty on the Functioning of the European Union?
2. Should Article 35 of the Treaty on the Functioning of the European Union be interpreted as meaning that national legislation requiring national and European electricity producers to offer for sale all the electricity available to them on the platforms managed by the only operator designated for national electricity market trading services constitutes a measure having equivalent effect to a quantitative restriction on exports that cannot be justified on grounds of public security connected to the security of energy supply, in so far as such legislation is not proportionate to the objective pursued?
3. Should Articles 102 and 106(1) of the Treaty on the Functioning of the European Union, read in conjunction with Article 4(3) of the Treaty on European Union, be interpreted as meaning that national legislation which provides that, at the level of that Member State, one single licence may be granted for the purposes of carrying out intermediation services in respect of offers to sell and bids to buy electricity on the forward wholesale market, constitutes a restriction of competition for the purposes of those provisions?

Provisions of European Union law and case-law relied on

Article 4(3) TEU and Articles 35, 49, 56, 102 and 106 TFEU

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity

Judgment of 2 March 2023, *Bursa Română de Mărfuri* (C-394/21)

Judgment of 15 November 2016, *Ullens de Schooten* (C-268/15)

Provisions of national law and case-law relied on

Legea energiei electrice și a gazelor naturale nr. 123/2012 (Electricity and Natural Gas Law), Article 10(2)(a) to(f), in the version in force on 21 September 2021

‘The competent authority shall issue licences for:

- a) the commercial exploitation of electricity production capacities and energy storage facilities added to production capacity;
- b) the commercial exploitation of electricity and heat production capacity from combined heat and power plants and energy storage facilities added to production capacity;
- c) the provision of the electricity transmission service;
- d) the provision of the system service;
- e) the provision of the electricity distribution service;
- f) the operation of the centralised markets – a single electricity market operator’s licence and a single balancing market operator’s licence shall be granted.’

Legea energiei electrice și a gazelor naturale nr. 123/2012 (Electricity and Natural Gas Law), Article 10(2)(a) to (f), as amended on 28 December 2021 by Decree-Law No 143/2021

‘ANRE shall issue licences for:

- a) the commercial exploitation of production capacities and, where applicable, energy storage facilities added to the corresponding production capacities;
- b) the commercial exploitation of electricity and heat production capacity from combined heat and power plants and, where applicable, energy storage facilities added to the corresponding production capacities;
- c) the provision of the electricity transmission service and grid-balancing services;
- d) the provision of the electricity distribution service;
- e) the activities of the electricity market operator;

f) electricity supply activities.’

Legea nr. 554/2004 a contenciosului administrativ (Law No 554/2004 on administrative disputes), Article 1, which establishes that any person who believes that his or her right or legitimate interest has been infringed by a public authority through an administrative act or because he or she has not received a reply to a request within the mandated time limit has the right to bring an action before the competent administrative disputes body; Articles 8(1) and 8(1¹), according to which natural and legal persons may bring actions for the protection of a legitimate public interest only in the alternative, where the injury to the legitimate public interest is logically derived from the infringement of a subjective right or legitimate private interest; and Article 2(1)(r), which defines a legitimate public interest as an interest relating to the legal system and constitutional democracy, the guaranteeing of the fundamental rights, freedoms and duties of citizens, the fulfilment of Community requirements, and the fulfilment of the tasks of public authorities.

Decizia nr. 53/2014 a Curții Constituționale (Decision No 53/2014 of the Romanian Constitutional Court), which held that Article 10(2)(f) of Law No 123/2012, the Electricity and Natural Gas Law, is constitutional with regard to the criticisms made by Bursa Română de Mărfuri SA in Case No 9.657/2/2012 before the Bucharest Court of Appeal.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In accordance with *Legea privind bursele de mărfuri nr. 357/2005* (Law No 357/2005 on commodities exchanges), the applicant has had, since 1992, the status of an autonomous institution with general competence to operate markets of public interest.
- 2 On 20 August 2020, the applicant applied to ANRE, in accordance with Regulation No 2019/943, for a licence to organise and operate centralised electricity markets, and submitted all of the documentation required by ANRE Order No 12/2015.
- 3 By action registered before the Curtea de Apel București (Bucharest Court of Appeal) No 5366/2/2020, the applicant sought annulment of Notice No 73800/21.09.2020 issued by ANRE and an order that that public authority issue a licence to it for the organisation and operation of centralised electricity markets.
- 4 In the pleas stated in its application, the applicant argued, on the basis of Regulation No 2019/934, that ANRE was obliged not only to allow, but also to effectively ensure competition between electricity market operators, in order to avoid the emergence of an anti-competitive monopoly.

- 5 ANRE justified its refusal to grant the licence applied for by invoking the provisions of Article 10(2)(f) of Law No 123/2012 on Electricity and Natural Gas, which establishes that there exists in Romania a statutory monopoly on the operation of the centralised electricity markets exercised by the Operatorul Pieței de Energie Electrică și de Gaze Naturale (Electricity and Natural Gas Market Operator), OPCOM SA, a public undertaking and subsidiary of the national electricity transmission system operator Transelectrica. It also stated that Regulation No 2019/943 does not contain any provision requiring the Member States to designate more than one operator to perform the task of organising and operating centralised electricity markets for the purposes of wholesale electricity trading.
- 6 For its part, the European Federation of Energy Traders, based in Amsterdam in the Netherlands, and which claims to represent the interests of more than 100 energy market companies operating in more than 27 European states, intervened in the case in support of the applicant, and pointed out that its access to the Romanian electricity market is restricted due to ANRE's unjustified refusal to process its application for a licence to organise and operate centralised electricity markets. Moreover, as it is required to act solely on the platform operated by OPCOM, its trading operations are severely restricted both in Romania and across borders, which has serious economic consequences.
- 7 In the course of the proceedings, the Bucharest Court of Appeal referred a question to the Court of Justice for a preliminary ruling. The Court gave its ruling on 2 March 2023 in *Bursa Română de Mărfuri* (C-394/21).
- 8 While the Court of Justice was dealing with Case C394/21, Article 10 of Law No 123/2012 was amended on 28 December 2021 by Decree-Law No 143/2021.
- 9 On 20 March 2022, ANRE issued licence No 2314 to the applicant for the activity of electricity market operator, in accordance with Article 10(2)(e) of Law No 123/2012, as amended by Decree-Law No 143/2021.
- 10 Following the resumption of the case, the London Energy Brokers' Association (LEBA) and the European Venues and Intermediaries Association (EVIA) intervened in support of the applicant, stating that their members, which represent a significant part of the European energy trading network, are unable to independently provide brokering services in the energy market because the only market operator is OPCOM, which is regulated by the State.
- 11 The London Energy Brokers' Association explained that it is a division of the European Venues and Intermediaries Association and that it represents European brokerage firms operating at a European level, both on organised markets regulated by Regulation (EU) No 1227/2011 and in organised trading systems regulated by Regulation (EU) No 600/2014.

- 12 LEBA members represent a considerable share of the European energy trading network, as they handle more than half of the gas, electricity and wholesale emissions trading activity.
- 13 At the request of the applicant, the Bucharest Court of Appeal decided to refer the matter to the Court of Justice again with a request for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 14 According to the applicant, ANRE's refusal to liberalise the energy market significantly harms the interests of all market participants. Moreover, since OPCOM SA does not offer futures products or other derivative instruments specifically for energy markets, it deprives these operators of the possibility of using financial instruments specifically for the wholesale market.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 15 The referring court states that one of the pleas in law in the application is that, in the period between 21 September 2020 and 20 March 2022, the applicant's rights and legitimate interests were infringed as a result of the respondent's refusal to issue it with the requested licence.
- 16 The latter also complained of the impairment of a legitimate public interest, claiming that, in the absence of effective competition on the market, product costs remain subject to an upper limit and are dictated by a single economic actor, a circumstance likely to make it more difficult for participants with limited resources to access the exchange and the products traded on it, which significantly harms the interests of all market participants.
- 17 The Court of Appeal adds that, following the registration of the dispute, the intervener the European Federation of Energy Traders lodged a complaint against OPCOM with the European Commission on 3 November 2020, in which it alleged that electricity producers and traders are prevented from marketing customised wholesale products as well as flexibility services in Romania, due to the isolating effect of the Romanian market in relation to the regional market resulting from the obligation to trade through OPCOM.
- 18 The same intervener also stated that all OPCOM's current operations on the electricity market, with the exception of the day-ahead and intraday market, should be released from the mandatory trading regime and operators should be allowed to trade bilaterally off-exchange, so that they are free to choose the exchange, platform or service provider.
- 19 Furthermore, the European Federation of Energy Traders added, on the one hand, that OPCOM is a public undertaking within the meaning of Article 106(1) TFEU, is the only undertaking authorised to operate an electricity brokerage platform in

Romania, and benefits from exclusive rights, and, on the other hand, that OPCOM engages in abusive market behaviour, and that the provisions of Article 102 TFEU are applicable to that entity.

- 20 The effects of the infringement of Articles 102 and 106 TFEU on the Romanian energy market as a result of the application of the provisions of Article 10(2)(f) of Law No 123/2012 are as follows: (i) energy brokers and traders are prevented from providing independent brokerage services on the Romanian wholesale electricity market; (ii) electricity traders are deprived of the possibility of choosing the trading mode, exchange or platform; (iii) electricity market participants are deprived of the possibility of trading directly over the counter (OTC) at national level; (iv) electricity traders are deprived of the possibility of purchasing electricity directly from producers, which prevents any bilateral cross-border trading of electricity; (v) customised wholesale products cannot be traded in Romania; and (vi) Romanian producers are required to sell all electricity generated through OPCOM, as electricity cannot be exported without first being traded through OPCOM, which constitutes a measure having an effect equivalent to a quantitative export restriction.
- 21 Indeed, the obligation to trade via OPCOM makes the activities of traders established in other Member States less advantageous, restricting the freedom of brokers to supply and the freedom of market participants to acquire electricity trading services, in breach of Articles 56, 102 and 106 TFEU.
- 22 For their part, the London Energy Brokers' Association (LEBA) and the European Venues and Intermediaries Association (EVIA) lodged a complaint against OPCOM with the European Commission on 7 October 2020. They argued that OPCOM's monopoly infringes the freedom to provide brokering services throughout the European Union and that wholesale brokering is a commercial activity that takes place for remuneration and can be considered a service within the meaning of Article 56 TFEU.
- 23 Furthermore, the obligation to trade through OPCOM completely blocks any brokerage services in the energy sector, affecting the cross-border provision of brokerage services to market participants in the Romanian domestic energy markets due to the limitation of electricity supply options normally offered to participants in OTC markets elsewhere.
- 24 Similarly, since domestic electricity producers are required to market all the electricity they produce directly and exclusively through OPCOM, they cannot enter into medium-term or long-term contracts to export the electricity they produce directly to other Member States or to access the centralised markets of other Member States.
- 25 The intervener the London Energy Brokers' Association also pointed out that mandatory and exclusive trading through OPCOM restricts the free movement of electricity throughout the European Union and is a measure having an effect

equivalent to a quantitative restriction on exports, within the meaning of Article 35 TFEU.

- 26 In its view, the monopolistic designation of ‘market platform operators’, as OPCOM is, does not allow its members to provide REMIT and MiFID brokerage services on emerging wholesale markets. OPCOM’s current monopoly infringes the freedom to provide brokering services throughout the European Union and mainly affects electricity brokers, operators and producers. The Romanian legislation should therefore first be assessed in the light of Article 56 TFEU.
- 27 Moreover, according to that intervener, the restriction imposed on Romanian energy producers, which cannot export electricity directly, for example, through a brokerage company, and their obligation to trade their electricity first through OPCOM, which is contrary to Article 35 TFEU, is not justified, as it is not possible to establish the existence of public policy objectives such as those relating to security of electricity supply, harmful business practices, ensuring market liquidity and ensuring the stability of the national energy sector.
- 28 OPCOM’s monopoly generates systemic risks in the regional electricity market due to a total lack of hedging opportunities. As a result, Romania has become one of the riskiest markets in the European Union for participants in the physical energy market.
- 29 The referring court points out that the dispute before it seeks to establish not only an infringement of the applicant’s private rights and interests, but also an infringement of the legitimate public interest, the fundamental components of which are the guarantee of the fundamental rights and freedoms of citizens, the fulfilment of Community requirements and the fulfilment of the tasks of the public authority.
- 30 The way marketing and brokering services are provided on the electricity market in Romania can affect energy transaction prices, having a significant impact on investments in the energy system and the overall functioning of the electricity market in Romania.
- 31 The applicant and the three interveners have claimed that there is a cross-border interest in this domestic dispute, in that Article 10(2)(f) of Law No 123/2012 resulted, during the period from 21 September 2020 to 31 December 2021, in an infringement of the freedom of establishment and the freedom to provide services for brokerage firms, traders and other entities engaged in electricity trading in the other Member States of the Union.
- 32 The Bucharest Court of Appeal considers that the premises developed by the Court of Justice in paragraphs 50 and 51 of its judgment of 15 November 2016 in Case C268/15, *Ullens de Schooten*, are satisfied in the present case, since it cannot be ruled out that the members of the intervener associations, which are nationals of other Member States, were interested in making use of those fundamental

freedoms in order to engage in electricity trading and brokering activities in Romania.

- 33 Moreover, ANRE applied the national provisions in question indiscriminately to nationals and citizens of other Member States, and therefore these provisions can produce legal effects not limited to Romania alone.
- 34 The cross-border interest of the dispute is, moreover, dictated both by the fact that the interveners in support of the applicant lodged a complaint with the European Commission in 2020, and by the fact that electricity may be traded across borders and that the marketing and brokering services on the energy market at issue in the main proceedings may be provided by participants established in other Member States, including members of the Federation and the intervener associations.
- 35 The preliminary ruling to be given by the Court of Justice will also have an impact on a case pending before the Ninth Chamber of the Administrative Disputes Division of the Bucharest Court of Appeal, a case that has been suspended until the referring court has given its ruling in the present case in which Bursa Română de Mărfuri SA sought an order requiring ANRE to pay compensation as a result of the refusal to grant a licence for the organisation and operation of centralised electricity markets for the period from 21 September 2020 to 21 September 2021.

WORKING DOCUMENT