Case C-580/21

Request for a preliminary ruling

Date lodged:

22 September 2021

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

6 July 2021

Applicant and appellant on a point of law:

EEW Energy from Waste Großräschen GmbH

Defendant and respondent in the appeal on a point of law:

MNG Mitteldeutsche Netzgesellschaft Strom GmbH

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

ORDER

[…]

Issued on:

6 July 2021

[…]

in the case of

EEW Energy from Waste Großräschen GmbH, […] Großräschen,

applicant and appellant on a point of law,

[…]

v

MNG Mitteldeutsche Netzgesellschaft Strom GmbH, […] Kabelsketal,

defendant and respondent in the appeal on a point of law

[…]

Intervener in support of the defendant:

50Hertz Transmission GmbH, […] Berlin,

[…]

Following the hearing held on 20 April 2021 […], the Cartel Panel of the Bundesgerichtshof (Federal Court of Justice)

made the following order:

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling concerning the interpretation of Article 16(2) of 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 (OJ 2009 L 140, p. 16 et seq.):

1. Is Article 16(2)(c) of Directive 2009/28/EC, read in conjunction with Article 2(a) and (e) thereof, to be interpreted as meaning that priority in respect of the feeding of electricity into the grid must also be given to generating installations in which electricity is produced by means of thermal recovery from mixed waste, whereby the waste contains a variable proportion of industrial and municipal biodegradable waste?

2. If Question 1 is answered in the affirmative, is the giving of priority in respect of the feed-in of electricity pursuant to Article 16(2)(c) of Directive 2009/28/EC dependent on the proportion of biodegradable waste used in the production of electricity in the manner described in Question 1?

3. If Question 2 is answered in the affirmative, is there a materiality threshold for the proportion of biodegradable waste below which the rules applicable to electricity from renewable energy sources do not apply to the electricity produced?

4. If Question 3 is answered in the affirmative, what is the level of that threshold, or how is the threshold to be determined?

5. If Questions 1 and 2 are answered in the affirmative, when applying the rules on electricity from renewable energy sources to electricity which has been produced only partly from biodegradable waste, can the legal rationale underlying the second subparagraph of Article 5(3) of Directive 2009/28/EC be applied in such a way that those rules apply only to the part of electricity produced from renewable energy sources, and that part is calculated on the basis of the energy content of the individual energy sources?

Grounds:

1 The applicant operates a waste incineration plant by means of which it produces electricity and heat. In the plant, a biogenic proportion, the amount of which varies and, according to the applicant's submission, reaches up to 50%, is recovered by means of incineration, unseparated from other constituents. The applicant feeds part of the electricity produced in the plant into the distribution network of the defendant, to which it is bound by a connection and feed-in contract.

2 In the years 2011 to 2016, the defendant, acting in the performance of its network security management tasks, requested the applicant to curtail the feed-in of electricity on a temporary basis on a number of occasions due to network congestion. Consequently, the applicant seeks compensation of EUR 2.24 million from the defendant, which it bases inter alia on the 'hardship rules' under the Gesetz für den Vorrang erneuerbarer Energien (Law for the priority of renewable energy sources) in the versions applicable between 1 January 2011 and 31 July 2014, and the Gesetz für den Ausbau erneuerbarer Energien (Law on the development of renewable energies) in the version applicable between 1 August 2014 and 31 December 2016 (hereinafter referred to collectively as the 'Law on renewable energies').

3 II. Provisions of the German Law on renewable energies in three different versions, which are identical in content or correspond to each other in terms of their normative content, are of decisive importance for the purposes of the ruling on the appeal on a point of law. Those provisions, in one of the versions of the Law on renewable energies applicable to the present dispute, which was in force between 1 January 2012 and 31 July 2014 ('the 2012 EEG'), read as follows:

Paragraph 3 Definitions

For the purposes of the present law,

1. 'Installation' means any facility for producing electricity from renewable energies (…)

3. 'Renewable energy' (…) means energy from biomass (…) and from the biodegradable fraction of industrial and municipal waste (…)

Paragraph 5 Connection

(1) Network operators shall be obliged to connect installations for producing electricity from renewable energy sources (…) to their network on a priority basis without undue delay (…)

Paragraph 8 Purchase, transmission and distribution

(1) Subject to Paragraph 11, network operators shall be obliged to purchase, transmit and distribute, on a priority basis without undue delay, all electricity from renewable energies which is offered. (…)

Paragraph 11 Feed-in management

(1) Network operators shall (…) be entitled, by way of exception, to regulate installations (…) directly or indirectly connected to their network, in so far as

1. failure to do so would give rise to network congestion in the relevant part of the network, including the upstream network;

2. priority is given to electricity from renewable energy sources (…), unless other installations for producing electricity must remain connected to the network in order to ensure the security and reliability of the electricity supply system; (…)

Paragraph 12 Hardship rules

(1) If the feed-in of electricity from installations for producing electricity from renewable energy sources (…) is reduced due to network congestion within the meaning of Paragraph 11(1), the operators affected by the measure shall (…) be compensated for 95 per cent of the lost revenue plus any additional expenses and less any expenses saved. (…)

Paragraph 16 Entitlement to remuneration

(1) System operators must remunerate installation operators for electricity from installations using only renewable energies (…) in accordance with, as a minimum, Paragraphs 18 to 33. (…)

4 The abovementioned provisions correspond to Paragraph 3(1), points 1 and 3, Paragraph 5(1), Paragraph 8(1), Paragraph 11(1), Paragraph 12(1) and Paragraph 16(1) of the Law on renewable energies in the version in force between 1 January 2009 and 31 December 2011 (‘the 2009 EEG’) and Paragraph 5(1), points 1 and 14, Paragraph 8(1), Paragraph 11(1), Paragraph 14(1), Paragraph 15(1) and Paragraph 19(1) of the Law on renewable energies in the version in force between 1 August 2014 and 31 December 2016 (‘the 2014 EEG’).

5 III. The success of the appeal on a point of law hinges on the answers to the questions referred. Before a decision can be given, it is therefore necessary to stay the proceedings and to seek a preliminary ruling from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.

6 1. The court that ruled on the appeal on the merits rejected the applicant's claims for payment on the basis of the hardship rules under Paragraph 12(1) of the 2009 EEG, Paragraph 12(1) of the 2012 EEG and Paragraph 15(1) of the 2014 EEG (hereinafter collectively referred to as 'the hardship rules'). It held that, since the electricity produced in the applicant's installation is not obtained exclusively from renewable energy sources, the installation is not to be categorised as an 'installation for producing electricity from renewable energy sources' ('EEG installation') within the meaning of the hardship rules.

7 2. The appeal on a point of law brought against that decision would be successful if the applicant's installation were to be categorised as an EEG installation within the meaning of the hardship rules. The installation recovers mixed waste containing variable proportions of municipal and industrial biodegradable waste. Therefore, it also uses 'renewable energy' as defined in Paragraph 3, point 3, of the 2009 EEG and 2012 EEG and Paragraph 5, point 14, of the 2014 EEG – albeit in a proportion not exceeding 50%.

8 a) Contrary to the view taken by the court that ruled on the appeal on the merits, the application of those hardship rules is not excluded on the ground that the applicant's installation does not produce electricity exclusively from renewable energy sources.

9 aa) It is true that the scope of the Law on renewable energy sources, in its first version, which entered into force in 2000, was limited to electricity produced exclusively from hydropower, wind power, solar radiation energy, geothermal energy, landfill gas, sewage gas, mine gas or biomass. However, in implementation of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, the scope of the Law on renewable energies was extended in 2004 (see the Draft Law prepared by the Federal Government (BT- Drucksache (Bundesrat document)) 15/04, p. 33). That directive defined 'electricity produced from renewable energy sources' in Article 2(c) as electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources. Since then, the Law on renewable energies has distinguished between, on the one hand, the obligation of remuneration and support, which is based on the principle of exclusive use of renewable energy sources ('*Ausschließlichkeitsprinzip*') (see Paragraph 16(1) of the 2009 EEG and 2012 EEG, Paragraph 19(1) of the 2014 EEG), and, on the other hand, the rules on the obligation of connection, purchase, transmission and distribution (Paragraphs 5, 8 and 11 of the 2009 EEG and 2012 EEG,

Paragraphs 8, 11 and 14 of the 2014 EEG), which apply to all installations for producing electricity from renewable energies within the meaning of Directive 2001/77/EC.

10 bb) The hardship rules, which take precedence over any claims for compensation or remuneration arising from curtailment of the feed-in of electricity generation installations under energy industry law, apply to all installations for producing electricity from renewable energies in the abovementioned broader sense under EU law, that is to say, also to installations that do not use only renewable energy sources. This follows on the one hand from the wording of the law – the absence of the adverb 'only' – and on the other hand from the schematic context of the law: the hardship rules introduced into the Law on renewable energies govern the granting of compensation for installations for producing electricity from renewable energies where feed-in management measures are taken in respect of them in accordance with Paragraph 11(1) of the 2009 EEG and 2012 EEG and Paragraph 14(1) of the 2014 EEG. As is apparent from Paragraph 8(1) of the 2009 EEG and 2012 EEG and Paragraph 11(1) of the 2014 EEG, feed-in management measures constitute an exception to the obligation of system operators to give priority to the purchase of electricity from renewable sources (see explanatory memorandum to the draft law prepared by the Federal Government for the version of the Law on renewable energies that entered into force in 2009, Bundestag document 16/8148, p. 46). Therefore, if 'electricity from renewable energies' is produced in an installation and is to be fed into the grid on a priority basis in accordance with the provisions of the Law on renewable energies, a reduction or interruption of the purchase of electricity by the network operator within the framework of feed-in management triggers the obligation to pay compensation under the hardship rules.

11 b) Despite that departure – in line with EU law – from the principle of exclusive use of renewable energy sources, it is unclear whether, under German law, every electricity generation installation that uses renewable energy sources in any proportion, no matter how small, is to be categorised as an EEG installation, with the result that priority of connection and feed-in applies to it. Since the German legislature intended to implement the requirements of Directive 2001/77/EC in the 2004 EEG and there is nothing to suggest that it intended to go beyond those requirements in doing so, the concept of 'electricity produced from renewable energy sources' (Article 2(c) of Directive 2001/77/EC) is the starting point for the interpretation of the provisions of German law that are relevant in the present case. The Court of Justice of the European Union has not yet considered the interpretation of that provision. Nor can it be interpreted in such a way as to leave no scope for doubt.

12 aa) According to Article 2(c) of Directive 2001/77/EC, electricity produced from renewable energy sources is electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources. The term 'hybrid plant' is not explained in the directive. Nor is it unambiguously

clear. However, generally speaking, a plant is referred to as a hybrid plant in engineering if it uses several different technologies (such as solar energy and gas) to produce energy. On the basis of such an understanding, the term 'hybrid plant' would not cover plants that merely use a combination of different energy sources – renewable and conventional – in the same electricity production process. This is the case both in the scenario where the different energy sources (such as wood pellets and coal) are first combined for the purpose of producing energy and in the scenario where – as is the case with the waste incineration plant at issue in the present case – renewable and fossil energy sources in an already existing, variable mixture over which it is not possible to have any influence are used in the plant to generate electricity. Accordingly, the latter two types of plant would not be categorised as renewable energy plants to which the rules of the Law on renewable energies on feed-in priority and compensation in cases of hardship apply.

13 bb) However, the above-described definition of 'hybrid plant' under Article 2(c) of Directive 2001/77/EC might be precluded by the fact that that directive itself defines biomass as a renewable energy source (Article 2(a) of Directive 2001/77/EC, and also Article 2(a) of Directive 2009/28/EC), and, moreover, also includes the 'biodegradable fraction of industrial and municipal waste' in the definition of the term 'biomass' (Article 2(b) of Directive 2001/77/EC, and also Article 2(e) of Directive 2009/28/EC). This might militate in favour of the possibility that the electricity produced through the combustion of that fraction is to be regarded as electricity from renewable energy sources and that the energy generation installation concerned would have to be categorised as an EEG installation under German law, which is to be given priority with regard to feed-in.

14 Account must also be taken of the fact that Directive 2001/77/EC has since been repealed and replaced by Directive 2009/28/EC. That directive had to be transposed by the Member States by 5 December 2010, that is to say, before the period relevant in the present case, 2011 to 2016. German law must therefore be interpreted in conformity with Directive 2009/28/EC in the present case. The question therefore arises as to whether 'generating installations using renewable energy sources' within the meaning of Article 16(2)(c) of Directive 2009/28/EC is to be understood as including not only installations that use several different technologies to produce energy (that is to say, hybrid plants in the abovementioned sense), but also installations that produce electricity from energy sources that are mixed from the outset, such as mixed waste containing variable proportions of industrial and municipal biodegradable waste (Question 1). If that question is answered in the affirmative, the further question arises as to whether such an installation is to be given priority with regard to the feed-in of electricity in accordance with Article 16(2)(b) even where the energy produced in the plant does not originate predominantly from the biodegradable fraction of the waste (Question 2).

15 c) Having regard also to EU law, the present Chamber is inclined to take the view that the provisions of the Law on renewable energies on feed-in priority and thus also on the hardship rules are to be interpreted as meaning that they are applicable to installations that do not exclusively use renewable energy sources only where such installations utilise renewable and conventional energy sources in separate systems. However, feed-in priority and the hardship rules should in any event apply to installations which utilise a pre-existing variable mixture, over which it is not possible to have any influence, of renewable and conventional energy sources – as in the case of the production of electricity by means of waste incineration – only where the proportion of renewable energy sources exceeds, on average, the proportion of conventional energy sources.

16 aa) It would be consistent with the spirit and purpose of the Law on renewable energies for an electricity generation installation using a pre-existing variable mixture, over which it is not possible to have any influence, of renewable and conventional energy sources to be given connection and feed-in priority, and to be granted the associated compensation under the hardship rules in the event of a feed-in reduction, only where that installation uses renewable energy sources at least predominantly. In the case of such installations – unlike those that combine two or more technologies to produce energy – the connection and feed-in priority would inevitably benefit not only the proportion of electricity that comes from renewable energy sources, but also the electricity produced from conventional sources. This is because, in situations where network security requires a reduction of the feed-in of electricity, such an installation has no possibility to limit electricity production to the proportion consisting of renewable energy sources, for example by continuing to operate its wind turbine and switching off its gas turbine. This would have the consequence that the network operator would have to give such a ‘mixed installation’ as a whole, and together with all the electricity generated in it, preference over conventional power plants in the context of feed-in management measures. It would also have to connect them to its network on a priority basis. This could have the consequence, in the case of limited network capacity, that the connection of a installation using only renewable energy sources which is constructed at a later point in time would be prevented or at least delayed. It appears all the more questionable whether such privileged treatment is justified even in the case of an installation that does not produce electricity at least predominantly from renewable energy sources.

17 bb) In the present dispute, such an understanding would have the consequence that the applicant would not have a claim under the hardship rules of the Law on renewable energies. This is because its installation does not combine different technologies in order to produce energy, that is to say, it is not a hybrid plant in the abovementioned sense, but, rather, it uses mixed energy sources in proportions that are variable from the outset, whereby, according to its submission, the proportion consisting of renewable energy sources is not the predominant component.

18 d) If ‘generating installations using renewable energy sources’ within the meaning of Article 16(2)(c) of Directive 2009/28/EC were to be understood as being not only hybrid plants in the above sense, but also installations that generate electricity from energy sources that are mixed from the outset, such as mixed waste that contains a proportion of industrial and municipal biodegradable waste, without the biodegradable waste being the predominant component, the further question arises, in the light of the spirit and purpose of the Law on renewable energies, as to whether, in the case of the abovementioned mixed installations, there is in any event a materiality threshold for the proportion of renewable energy sources utilised, below which such a mixed installation would no longer be regarded as a ‘generating installation using renewable energy sources’ (Question 3).

19 e) If Question 3 is also answered in the affirmative, clarification is required as to what proportion that threshold is, or how the threshold is to be determined (Question 4).

20 f) Lastly, if Questions 1 and 2 are answered in the affirmative, and the applicant’s installation is able to exceed a given materiality threshold in accordance with the answers to Questions 3 and 4, the question arises as to whether, when applying the rules on electricity from renewable energy sources to electricity which has been produced only partly from biodegradable waste, the legal rationale underlying the second subparagraph of Article 5(3) of Directive 2009/28/EC can be applied in such a way that those rules apply only to the part of electricity produced from renewable energy sources, and that part is calculated on the basis of the energy content of the individual energy sources (Question 5). That question is important against the background that, in the present case, it will be necessary to rule, in accordance with German law, which is to be interpreted in the light of EU law, on the question as to whether the claim for compensation under the hardship rules relates to the lost revenue for all the electricity produced in the applicant’s installation or only to the portion of the electricity that is produced from the biogenic proportion of the waste mixture, whereby that proportion would then have to be determined.

[…]