

Case C-205/23**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:**

28 March 2023

Referring court:

Tribunalul București (Romania)

Date of the decision to refer:

24 February 2023

Appellant:

Engie România SA

Respondent:

Autoritatea Națională de Reglementare în Domeniul Energiei

Subject matter of the main proceedings

Appeal against the judgment of the Judecătoria Sectorului 4 București (Court of First Instance, District 4, Bucharest, Romania) rejecting as unfounded the complaint (plângerea contravențională) lodged by Engie România SA against a report finding and imposing a fine for administrative infringements, drawn up by the Autoritatea Națională de Reglementare în Domeniul Energiei (ANRE) (the National Energy Sector Regulatory Authority).

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, interpretation is sought of Article 3(1) of Directive 2009/73/EC, of Article 50 and Article 52(1) and (3) of the Charter of Fundamental Rights of the European Union, and of the principle of proportionality.

Questions referred for a preliminary ruling

1. Can an alleged breach of the duty of transparency incumbent on natural gas suppliers in their dealings with household consumers, which has been implemented in national legislation and is treated under that legislation as an administrative offence (*contravenția*), also result in the competent national authority's requiring a natural gas supplier to apply, in dealings with consumers, a price imposed by administrative means that takes no account of the principle of freedom to fix prices in the natural gas market, that principle being established by Article 3(1) of Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC?

2. Can the fact that a natural gas supplier has been fined both by the consumer protection authority and by the energy sector regulatory authority, by means of two separate reports of offences imposing the same measures on the supplier (duplication of administrative acts imposing measures), be regarded as a justified restriction of the principle *ne bis in idem*, under the provisions of Article 52 of the Charter of Fundamental Rights of the European Union, or is it a breach of that principle?

Does such a combination of acts imposing the same measures on the basis of the same facts, drawn up by different authorities, comply with the principle of proportionality?

Provisions of EU law relied on

Charter of Fundamental Rights of the European Union: Article 50 and Article 52(1) and (3)

Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC: Article 3(1)

Provisions of national law relied on

Legea nr. 363/2007 privind combaterea practicilor incorecte ale comercianților în relația cu consumatorii și armonizarea reglementărilor cu legislația europeană privind protecția consumatorilor (Law No 363/2007 on combating improper commercial practices on the part of traders in dealings with consumers and harmonising regulations with European consumer protection legislation)

Legea nr. 123/2012 a energiei electrice și a gazelor naturale (Law No 123/2012 on electricity and natural gas):

- Article 143(1)(k) provides that natural gas suppliers are, inter alia, under an obligation to provide final customers with clear information on the prices and tariffs applied, as well as on the conditions of access to and use of the services

which they offer; failure to comply with this obligation constitutes an administrative offence (contravenția) (Article 194(24¹)) punishable by a fine of between 20 000 Romanian lei (RON) and RON 400 000 [(Article 195(2(c))];

- Article 194(33) provides that failure to comply with the provisions on informing consumers of natural gas constitutes an administrative offence (contravenția) punishable by a fine of between RON 10 000 and RON 200 000 [(Article 195(2(b))].

Regulamentul privind furnizarea gazelor naturale la clienții finali, aprobat prin Ordinul ANRE nr. 29/2016 (Regulation on the supply of natural gas to final customers, approved by ANRE Decision No 29/2016):

- Article 22(1) provides that, in a competitive market, natural gas is to be supplied on a competitive basis, under a supply contract concluded between the supplier and the final customer, at a supply price and on commercial terms negotiated between them or established in standard offers.

Ordinul ANRE nr. 106/2014 privind modalitățile de informare a clienților finali de către furnizorii de gaze naturale cu privire la condițiile comerciale de furnizare a gazelor naturale (ANRE Decision No 106/2014 establishing the methods by which natural gas suppliers are to inform final customers of the commercial terms of the supply of natural gas):

- Article 4(1), (2), (5) and (6) provides that final customers may conclude a supply contract either by direct negotiation or by accepting a standard offer drawn up by the supplier; in the latter case, the supplier is under an obligation to include in the contract, as a minimum, all the information contained therein, which must be drafted and presented in a simple, clear, legible and accessible fashion that is easy to understand.

Ordinul ANRE nr. 27/2020 pentru stabilirea unor măsuri privind furnizarea gazelor naturale la clienții casnici în perspectiva eliminării prețurilor reglementate (ANRE Decision No 27/2020 establishing measures for the supply of natural gas to household customers in view of the abolition of regulated tariffs):

- Article 7(1) provides that, in the event that a household customer does not assert his or her right of eligibility by 30 June 2021, and has not concluded a contract for the supply of natural gas with his or her current supplier or with another supplier on a competitive basis, the offer made by the current supplier is deemed accepted and the contract relating to that offer is deemed to have been tacitly accepted under the conditions laid down in the Codul civil (Civil Code), unless the customer informs the supplier before that date of his or her refusal to conclude the contract or of his or her wish to amend or supplement the terms of the contract.

Regulamentul de constatare, notificare și sancționare a abaterilor de la reglementările emise în domeniul energiei, aprobat prin Ordinul ANRE

nr. 62/2013 (Regulation on establishing, notifying and imposing fines for infringements of the regulations in the energy sector, approved by ANRE Decision No 62/2013):

- Article 21(1) and (2) provides that, when a fine is imposed for an administrative offence (sanctiunea contravențională), compliance measures and deadlines are to be established for restoring legality and/or for the correct application of the regulations and for remedying the existing irregularity and that, by the deadline set in the report finding and imposing a fine for an administrative offence, the offending party must remedy the irregularity found by complying with the compliance measures ordered.

Ordonanța Guvernului (OG) nr. 2/2001 privind regimul juridic al contravențiilor (Government Decree No 2/2001 establishing the legal rules applicable to administrative offences):

- Article 5(7) provides that a single administrative offence (contravenția) may attract only one main penalty (sanctiunea contravențională) and one or more ancillary penalties.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In a report finding and imposing a fine for an administrative offence, dated 11 October 2021 ('the report of 11 October 2021'), ANRE found that the appellant [before the Tribunalul București (Regional Court, Bucharest, Romania)], as a licensed supplier of natural gas, had committed numerous infringements of the rules governing the obligations of natural gas suppliers toward final customers.
- 2 In the first place, ANRE found irregularities in the content of some standard offers for the supply of natural gas, consisting in: (i) a failure to state the date on which the offer was drawn up, (ii) a failure to state the period of validity and (iii) a failure to state any alternative to the sending of bills by electronic means.
- 3 In the second place, ANRE found a failure in some standard offers to state expressly that, under certain circumstances, the price for the supply of natural gas could change, even though the contractual terms contained such a provision and household customers were duly informed in connection with the duty to provide information and in connection with relevant options, such that a price change could occur as a consequence of external, unforeseeable events.
- 4 Customers were in fact informed of the 'abolition of ANRE-regulated prices for the supply of natural gas to household customers' and were also informed of the increase in the price for the supply of natural gas, which customers had agreed to on 1 July 2021, from RON 155.24/MWh, exclusive of VAT, to RON 175/MWh, exclusive of VAT, with effect from 1 November 2021. The latter communication also included an addendum for the increase in the price for the supply of natural gas to that figure.

- 5 On the basis of its findings in the report of 11 October 2021, ANRE decided to fine the appellant a total of RON 800 000 and, in one specific case, to issue a warning.
- 6 In addition, ANRE imposed certain compliance measures on the appellant, with which it was required to comply within 15 days of the communication of the report of 11 October 2021. Those compliance measures consisted in notifying the final customers identified in the report and in identifying and notifying all final customers who had accepted standard offers at a fixed price applicable throughout the relevant period that the fixed price for natural gas to which the appellant had committed itself by virtue of the standard offers would be maintained, and in the annulment of the addenda sent to customers increasing the price for the supply of natural gas.
- 7 Before the report of 11 October 2021 was drawn up, the appellant had been made the subject of an inspection by the Autoritatea Națională pentru Protecția Consumatorilor (ANPC) (the National Authority for Consumer Protection). That inspection concluded with a report of 14 September 2021 finding and imposing a fine for an administrative offence, in which that authority found that, in the conduct of its economic activity, the appellant had employed misleading and aggressive commercial practices, thereby infringing the provisions of Law No 363/2007.
- 8 According to ANPC, the practices in question consisted in sending consumers communications containing initial offers that stipulated a certain price and certain conditions, valid for 12 months, which were tacitly accepted by consumers, followed three months later by new communications containing offers at a different price. In this way, the appellant had misled consumers, inasmuch as the price change occurred during the period of validity of the initial offers.
- 9 On the basis of its finding of those improper commercial practices, the ANPC, by decision of 14 September 2021, imposed measures on the appellant requiring it to cease those practices, to suspend its business until it had ceased them and to refrain from changing the price for the supply of natural gas to household customers.
- 10 By a complaint (plângerea contravențională) registered on the roll of the Court of First Instance, District 4, Bucharest, the appellant challenged the report of 11 October 2021.
- 11 By judgment of 14 March 2022, that court rejected the complaint as unfounded and confirmed the report of 11 October 2021.
- 12 The appellant lodged an appeal against the judgment of 14 March 2022 and the matter was thus brought before the referring court, which will be required to give final judgment in the case. In the appeal proceedings, the appellant requested that the matter be referred to the Court of Justice for a preliminary ruling on the issues described in the questions submitted.

The essential arguments of the parties in the main proceedings

- 13 In the report of 11 October 2021, ANRE found, first, that the appellant had not fulfilled its legal obligation to make available to its final customers, in an open, explicit and transparent fashion, clear information on the prices that it charged for the supply of natural gas to locations where it is used.
- 14 Secondly, ANRE found that the standard offers accepted by customers, on the basis of which contracts were concluded, stipulated a fixed price valid for a period of 12 months, without specifying that the supplier reserved the right to change or update the price proposed during that period, although that option was provided for in the contracts that were concluded.
- 15 Consequently, ANRE found that, since any price change made after the conclusion of a contract relating to a standard offer constituted an infringement by the natural gas supplier of its duty of transparency under Article 143(1)(k) of Law No 123/2012, the facts established constituted administrative offences (contravenția) under Article 194(24¹) of that same law.

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

- 16 The referring court first of all notes that ANPC, on the one hand, and ANRE, on the other, have imposed penalties on the appellant in respect of the same acts, which the two authorities have nevertheless characterised differently, ANPC treating them as an infringement of a legal obligation owed to consumers laid down by Law No 363/2007 and ANRE treating them as a breach of the duty of transparency laid down by Article 143(1)(k) of Law No 123/2012.
- 17 The referring court then notes that both authorities imposed on the appellant the same obligation to remedy the situation, namely reversion to the price fixed in its standard offers in April 2021, which is significantly lower than the purchase price of natural gas in the open market, given the changes in that price on the market during the period from July to September 2021 and subsequently.
- 18 Thus, by its first question, the referring court asks the Court of Justice to interpret Article 3(1) of Directive 2009/73, which has been transposed into national law by Title II of Law No 123/2012, which forms the basis on which the Report of 11 October 2021 was drawn up.
- 19 The referring court states, in this connection, that the reference to the Court of Justice is necessary in order to clarify whether it is possible for the regulatory authority of a Member State to impose on a natural gas supplier a different price from the market price regulated by Article 3(1) of Directive 2009/73 in a context in which that authority imputes to the supplier in question a breach of its duty of transparency toward customers on the basis of legislation transposing that directive into national law.

- 20 By its second question, the referring court asks the Court of Justice to interpret Article 50 and Article 52(1) and (3) of the Charter, the answer to that question being necessary in order to clarify whether the application of the principle *ne bis in idem* (which, in the present case, is also governed by national law, under Government Decree No 2/2001) may be restricted in the case where two penalties are imposed, on different legal bases (Law No 123/2012 and Law No 363/2007), in respect of the same facts.

WORKING DOCUMENT