Case C-760/23 [Shanov] [i]

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:

8 December 2023

Referring court:

Rayonen sad Plovdiv (Bulgaria)

Date of the decision to refer:

28 September 2023

Applicant:

‘EVN Bulgaria Toplofikatsia’ EAD

Defendant:

OZ

Subject matter of the main proceedings

Action seeking payment for the supply of thermal energy to an apartment

Subject matter and legal basis of the request

Compatibility of national legislation on calculating thermal energy consumption in buildings in co-ownership with Articles 101, 107 and 169 TFEU, Article 13 of Directive 2006/32 and Article 9(3) of Directive 2012/27; legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

1. Do Article 9(3) of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, and Article 169 TFEU preclude the payment of costs for thermal energy radiated from a building's installation if staircases and corridors are not equipped with radiators?

2. Do Article 9(3) of Directive 2012/27/EU and Article 169 TFEU preclude the possibility of a district heating supplier demanding consideration, on the basis of national legislation, for the consumption of heat from a building's installation, where the quantity of thermal energy is determined according to a formula developed by the administration which

– introduces a factor determining the share of the total capacity of the heating system accounted for by the installed capacity of the building's installation, without it being clear how that factor is established;

– is based on an installed capacity of the building's installation which takes no account of what capacity is actually installed;

– takes no account of the temperature of the heat transfer medium in the building's installation;

– assumes that the installation is constantly run at full capacity;

– takes no account of the specific mode of operation of the various types of heating system (Tichelmann in the present case) and treats them as identical with regard to mode of operation;

– automatically assumes an average temperature of 19 °C for buildings in co-ownership?

3. Do Article 9(3) of Directive 2012/27 and Article 169 TFEU preclude the possibility of a district heating supplier demanding consideration, on the basis of national legislation, for the consumption of heat for hot water, where the quantity of thermal energy is determined according to a formula developed by the administration which takes no account of the temperature to which the water is to be heated and supplied to subscribers or of the thermal energy required to heat it, does not take into account how many cubic metres of hot water the subscribers have consumed, and is applied in such a way that the quantity of water calculated for the winter heating period is always double the quantity calculated in summer?

4. Do Article 13 of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, Article 9(3) of Directive 2012/27 and Article 169 TFEU preclude the possibility of a district heating supplier demanding consideration, on the basis of national legislation, for the consumption of heat from the installation of a building in co-ownership in proportion to the heatable volume of the apartments

according to the floor plan, without taking into account the quantity of thermal energy actually emitted in line with the technical capacity of the heating systems in the respective apartments?

For the purpose of answering that question, is it relevant that, under national legislation, the thermal energy of a building's installation is a component in the algorithm for calculating the final amount to be paid by users for the total heat (the sum of the amounts for thermal energy emitted from the building's installation, for heating and for hot water), whereby the amount to be paid for heating an apartment is derived from the difference between the total thermal energy (minuend) and the sum of the thermal energy from the installation, the thermal energy emitted by the radiators in the common parts of the building and the thermal energy for hot water (subtrahend)?

5. Does national legislation under which consumers pay for the supply of thermal energy emitted from a building's installation in proportion to the heatable volume of the apartments according to the floor plan, without consideration of the amount of heat actually emitted to the individual apartments, infringe the prohibition of abuse of a dominant position under Article 101 TFEU and the prohibition on granting unlawful State aid under Article 107 TFEU[?]

Provisions of European Union law and case-law relied on

Articles 101(1), 107(1) and 169(1) TFEU

Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, Article 13

Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, recitals 64 and 65, Article 9(1) and (3) and Article 10

Provisions of national law relied on

Zakon za energetikata (Law on energy), Articles 38a(1), 38b(1), 125(3), 139(1), 140(1), 140a, 141, 142 and 150; Paragraph 1(1), (16), (27), (37), (38), (39), (50), (57) and (58) of the additional provisions

Naredba za toplosnabdyavaneto (Order on district heating) No 16-334 of 6 April 2007, Articles 38(1), (2) and (3), 49(1) to (4), 51(1) and (2), 52(1) to (8), 57 and 58; Paragraph 1(1), (2a), (3), (8), (12) and (13a) of the additional provisions and Paragraphs 2 and 3 of the transitional and final provisions; annex to Article 61(1)

of that order entitled ‘Calculation method for the allocation of thermal energy consumption in buildings in co-ownership’

Pokazateli za kachestvoto na toplosnabdyavaneto (Indicators for the quality of thermal energy supply), adopted on 30 September 2004 by the Darzhavna komisia za energiyno i vodno regulirane (State Commission for Energy and Water Regulation)

Metodika na Darzhavnata komisia za energiyno i vodno regulirane za opredelyane na dopustimite razmeri na tehnologichnite razhodi na toplinna energia pri prenos na toplinna energia (State Commission for Energy and Water Regulation methodology for the determination of permissible means of measuring the technological costs of thermal energy during transmission)

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant submits that, as an energy supplier within the meaning of the Law on energy, it is licensed to generate thermal energy and transmit it to the points of delivery of buildings for the purposes of heating and hot water supply.

2 The defendant is the owner of a heated apartment and has an obligation, as a customer, to pay the amounts owed to the applicant for the supply of heat under the general terms and conditions on a monthly basis.

3 The applicant submits that it supplied thermal energy worth 519 leva (BGN) between 1 May 2018 and 31 October 2020, which has not been paid for. It further submits that, as a result of the delay in payment, interest amounting to BGN 78.20 is owed for the period from 3 July 2018 to 5 April 2021.

4 Since the defendant did not pay the abovementioned amounts, the applicant obtained an order for payment, against which the defendant lodged an objection, leaving the applicant obliged under national law to make its claim by means of the present action.

5 The defendant contests the claim, including the actual use of thermal energy and thermal consumption, the accuracy of the calculated and allocated energy, the adequacy of the meters and the proper functioning of the point of delivery, the correctness of the accounting entries and the size of the amounts claimed.

6 He considers that the formula used to calculate the thermal energy for a building’s installation infringes EU law. He submits that no consumption of heat occurred in the apartment during the period in question, since the radiators were not able to emit that heat, so the amounts are not owed.

7 The court has obtained a technical expert opinion in which the expert notes, in particular, that

– the point of delivery was in operation during the period in question,

– the common thermal energy meter of the point of delivery and its sensors were installed correctly, and the number and installation of the meters at the point of delivery fulfilled requirements,

– the thermal energy meters used were of an approved type, had been tested for metering accuracy and were suitable for commercial metering,

– the quantity of thermal energy supplied to the point of delivery was measured using the thermal energy meter at the beginning of each month, the data being read at 0.00 on the first day of the month,

– the technological costs were subtracted from the quantity read and the difference was divided up among all users,

– that division and allocation was done correctly and in line with the requirements of the established methodology.

8 However, the expert makes the following clarifications:

– the point of delivery was in poor condition and the quantity of thermal energy which the heating supplier determined had been consumed at the point of delivery cannot be correct;

– the thermal energy meters at the point of delivery had seals placed on them when they were installed and were found without seals when they were later removed, which is not permitted, since it makes it possible to manipulate the meter;

– the quantity of energy determined by the supplier for heating one cubic metre physically cannot be correct and is far too high;

– the formula used by the supplier for its calculations is based on system output at temperatures which were not actually reached, meaning it assumes that the system is run at maximum capacity;

– it is not possible to consume the quantity allocated in the particular building in question.

9 The expert notes that the calculations made using that methodology ultimately result in users who use no thermal energy paying part of the amounts owed by those users who do consume thermal energy, because the invoices issued to the non-consuming users contain part of the costs owed for thermal energy for heating.

10 The expert’s findings have not been disputed by the parties.

The essential arguments of the parties in the main proceedings

11 The defendant disputes in its entirely the manner in which thermal energy consumption was determined and submits that the national legislation does not comply with the EU requirement that consumers pay for their actual energy consumption.

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

12 The principal issues in the present case concern the permissibility of determining heat consumption in accordance with the methodology provided for in national law. A number of factors taken into account in the calculation of actual heat consumption give the referring court cause for doubt.

13 In the view of the referring court, the formula used for that purpose is unclear and obliges a user who uses no thermal energy in his or her apartment to pay for the transmission of energy to other users. The formula for calculating the heat emitted by the building's installation includes values determined under design conditions without taking into account whether the heating systems are actually run under design conditions and under what conditions those systems are actually run. The individual characteristics of the buildings, and their thermal and structural properties, are also not taken into account.

14 Under Article 9(3) of Directive 2012/27, if the quantity of energy consumption cannot be determined accurately, transparent rules can be introduced, such rules including guidelines on the way to allocate costs for heat and/or hot water that is used as follows:

(a) hot water for domestic needs;

(b) heat radiated from the building installation and for the purpose of heating the common areas (where staircases and corridors are equipped with radiators);

(c) for the purpose of heating apartments.

15 Under the formula provided for in Bulgarian law, however, consumers who use no thermal energy are required to pay amounts payable by those who do use heating.

16 The referring court also includes in its considerations the expert's finding that the actual output does not correspond to the installed heating capacity of the building. In the present case, it is apparent from the submitted design of the heating system that the manufacturer itself determined the capacity of the system on the basis of parameters (hot water temperature of 95 °C, drainage water temperature of 70 °C and ambient temperature of 20 °C) which are not in place in practice. The output of the heating system is consequently not that which was defined under design conditions, since the heating system is not actually run under design conditions.

17 The referring court points out that radiators marked ‘zero’ were not read. Where a thermostatic valve is present, any user can interrupt the heat input to those devices if he or she so wishes. It is not known and cannot be foreseen by whom and when the input of heat to the radiators will be interrupted, which may significantly reduce the actual output at which the heating system is run.

18 It is also unclear why it is assumed that the average temperature for buildings in co-ownership is 19 °C, while the design conditions were calculated on the basis of 20 °C. Moreover, the material of the pipes and its thermal parameters were not taken into account.