

Case C-394/21

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 June 2021

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

3 June 2021

Appellant:

Bursa Română de Mărfuri SA

Respondent:

Autoritatea Națională de Reglementare în domeniul Energiei (ANRE)

Intervening party:

Federația Europeană a Comercianților de Energie (European Federation of Energy Traders)

Subject matter of the main proceedings

Appeal by which the appellant, the Bursa Română de Mărfuri (Romanian Commodities Exchange), submits that the Curtea de Apel București (Court of Appeal, Bucharest) should order the respondent, the Autoritatea Națională de Reglementare în domeniul Energiei (National Energy Sector Regulatory Authority, Romania) (ANRE), to issue to it, pursuant to Regulation (EU) 2019/943, a licence to organise and operate centralised electricity markets.

Subject matter and legal basis of the request for a preliminary ruling

An interpretation of Regulation (EU) 2019/943, Directive (EU) 2019/944, Article 4(3) TEU, Articles 101 and 102 TFEU, and Article 106(1) TFEU, is sought pursuant to Article 267 TFEU.

Questions referred

(1) Having regard to the provisions of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, does Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, in particular Article 1(b) and Article 3 thereof, prohibit, from the time of its entry into force, a Member State from continuing to grant one single licence to organise and operate the centralised electricity markets? Is there an obligation on the Romanian State, as of 1 January 2020, to bring to an end an existing monopoly on operation of the electricity market?

(2) Does the scope *ratione personae* of the principles of free competition laid down in Regulation (EU) 2019/943, in particular in Article 1(b) and (c) and in Article 3 respectively, include the operator of an electricity market such as a commodities exchange? Is it relevant to this answer that, for the definition of the electricity market, point (40) of Article 2 of Regulation (EU) 2019/943 refers to the definition of electricity markets set out in point (9) of Article 2 of Directive (EU) 2019/944?

(3) Must the grant by a Member State of one single licence to operate the electricity market be regarded as constituting a restriction of competition within the meaning of Articles 101 and 102 TFEU, in conjunction with Article 4(3) TEU and Article 106(1) TFEU?

Provisions of EU law cited

Article 4(3) TEU, Articles 101 and 102 TFEU, and Article 106(1) TFEU

Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, Article 1(b) and (c), Article 2, point (25), Article 3, Article 10(4) and (5)

Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, recitals 2 and 3, Article 2, points (9), (18) and (57)

Provisions of national law cited

Legea energiei electrice și a gazelor nr. 123/2012 (Law No 123/2012 on electricity and natural gas), Article 10(2)(f), under which the competent authority is to grant a single licence for the operator of the electricity market and one for the operator of the balancing market

Ordinul ANRE nr. 12/2015 privind aprobarea Regulamentului pentru acordarea licențelor și autorizațiilor în sectorul energiei electrice (ANRE Order No 12/2015 approving the regulations for granting licences and authorisations in the electricity sector)

Succinct presentation of the facts and of the main proceedings

- 1 Under the Legea privind bursele de mărfuri nr. 357/2005 (Law No 357/2005 on commodities exchanges), the appellant has had, since 1992, the status of autonomous institution with general competence to operate markets of public interest.
- 2 On 20 August 2020, the appellant applied to ANRE, pursuant to Regulation 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 Following ANRE's refusal to issue that licence, the appellant brought an appeal before the Curtea de Apel București seeking an order requiring the respondent to issue the licence in question.
- 4 In its appeal, the appellant claimed that Regulation 2019/943, in conjunction with Directive 2019/944, requires national regulatory authorities actually to ensure competition between operators of electricity markets.
- 5 In the view of the appellant, the principles of free competition established by the regulation do not exclude the electricity market operator defined in point (7) of Article 2 thereof.
- 6 ANRE pleaded in its defence, relying on Article 10(2)(f) of Law No 123/2012 and arguing that, on the date of the entry into force of that law, the company Operatorul Pieței de Energie Electrică și Gaze Naturale 'OPCOM' S. A. already held a licence to operate the centralised electricity markets, which had been issued in 2001 for a period of 25 years, and that therefore that operator held an exclusive monopoly in that regard.
- 7 The respondent further submits that Regulation 2019/943 lays down the general principles aimed at participants in the electricity market and that that notion does not include, according to the definition in point (25) of Article 2 of the regulation, the operator of the electricity market.

Principal arguments of the parties to the main proceedings

- 8 The appellant considers that the obligation on national regulatory authorities to ensure competition between electricity market operators forms the basis of Regulation 2019/943 and arises from Article 1(b) thereof. That article of the regulation, in conjunction with Article 3 and Article 10(4) and (5) thereof, requires ANRE to prevent any anti-competitive monopoly.
- 9 On the basis of Article 1(b) and (c) and of Article 3 of the regulation, the appellant further submits that the principles of free competition established by the regulation do not in any way exclude the electricity market operator as defined in point (7) of Article 2 of the regulation.
- 10 Since the market operator is the entity which carries out the aggregation, it argues, the definition of ‘market participant’ in point (25) of Article 2 includes the operator of the electricity market.
- 11 ANRE takes the view that there is no need to refer the case to the Court of Justice.
- 12 It contends that, since the Romanian market is not large, the creation of two separate markets would merely lead to the bids submitted by the same tenderers being distributed across those two markets, something which would clearly constitute an infringement of competition.
- 13 The respondent recalls that the appellant also brought a similar action in 2014, which was dismissed and in which the appellant also raised a plea of unconstitutionality of Article 10(2)(f) of Law No 123/2012, which in turn was dismissed by the Curtea Constituțională (Constitutional Court).
- 14 As regards the questions referred, ANRE considers that they are not necessary for the purposes of resolving the case and that the regulation is clear and can therefore be applied by the court.
- 15 ANRE further takes the view that the monopoly permitted by the national legislation is not contrary to the regulation since the latter contains no provision requiring the Member States to designate several economic operators charged with organising and operating the centralised electricity markets for wholesale trading in electricity, but rather sets out general principles aimed at participants in the electricity market which, according to the definition in point (25) of Article 2, do not include network operators or the operator of the electricity market.
- 16 In the view of the respondent, Article 1(b) of the regulation, on which the appellant relies, is clarified in recital 13 of Directive 2019/944, with the result that the term ‘resources providers’ means providers of electricity from various energy sources (for example, wind, solar, geothermal, hydro-electric, wave and tidal energy, etc.), and not providers of services (such as a market management service), just as the term ‘facilitating aggregation of distributed demand and

supply’ means facilitating the market entry of aggregators as a separate entity engaged solely in aggregating activities.

- 17 The appellant further considers that the comparison of [the appellant], in particular, or an operator of the electricity market, in general, to an aggregator within the meaning of the definition given in the directive appears forced and without foundation in the present legislative context. The aggregators are not, and will not be, a competitive market mechanism or a mechanism for operating electricity markets.
- 18 With regard to Article 3 invoked by the appellant, the respondent states that it relates to the rule on competitive pricing, based on supply and demand, irrespective of the number of operators who must apply it. The use of the term ‘market operators’ in the plural is due to the fact that the text in question relates to the legal entities of the Member States, which does not mean that several market operators must operate in each Member State.
- 19 The respondent also recalls that, following the entry into force of Law No 123/2012, OPCOM was designated, on the basis of Regulation 2015/1222, as the nominated electricity market operator (NEMO) of the day-ahead market (DAM) and of the intraday market (IM) for electricity for the bidding zone of Romania.
- 20 By way of derogation from the competition model governed by Article 4 of Regulation (EU) 2015/1222, Article 5 of that regulation offers the possibility of applying the monopoly model by designating a single NEMO, and that decision is left to the discretion of the Member State concerned, subject to notification thereof to the Commission.

Succinct presentation of the reasons for the request for a preliminary

- 21 The referring court, the Curtea de Apel București, takes the view that, in order to resolve the dispute before it, it is necessary for the Court of Justice to give a preliminary ruling on whether Regulation 2019/943 is applicable to the operator of an energy market, whether that regulation, possibly interpreted in conjunction with Directive 2019/944, prohibits – from the date of its entry into force – a Member State from issuing one single licence to operate the internal electricity market of that Member State, and whether the grant of one single licence is contrary to Articles 101 TFEU and 102 TFEU, in conjunction with Article 4(3) TEU and Article 106(1) TFEU.
- 22 As regards the need to refer the matter to the Court of Justice, the referring court notes, on the one hand, that the provisions of EU law to which the questions refer have not yet been interpreted and, on the other, that the correct application of EU law in the present case is not so obvious as to leave no scope for any reasonable doubt. Furthermore, the case-law of the Court of Justice, on which the respondent relies, predates the regulation.