Case C-251/24

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:

9 April 2024

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

28 February 2024

Applicant:

Axpo Energy Romania SA

Defendants:

Agenția Națională de Administrare Fiscală

Guvernul României

Subject matter of the main proceedings

Action involving, as its principal claim, the payment of compensation for the loss allegedly suffered by the applicant Axpo Energy Romania SA in 2022 and 2023 following payment of the levy to the Energy Transition Fund in respect of its trading activity, plus interest, and the payment of compensation for the loss allegedly suffered by the applicant following the application of the price cap mechanism for natural gas and electricity supplied to final consumers.

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, the interpretation is sought of Articles 28, 30, 35, 101 and 102, Article 107(1) and Article 108(3) TFEU, as well as of certain provisions of Directive 2019/944, Regulation 2019/943, Regulation 2022/1854 and Directive 2006/112.

Questions referred for a preliminary ruling

1. Must the provisions of Article 3(1), (3) and (4) and Article 9(2) of Directive (EU) 2019/944, in conjunction with Article 101(1) TFEU, according to which Member States must ensure a level playing field and non-discriminatory conditions for electricity market participants, be interpreted as precluding a Member State from creating an additional tax liability, such as the levy on trading under Government Emergency Order No 27/2022, on a differentiated basis, solely for certain participants engaged in transactions on wholesale energy markets, such as suppliers involved in trading, and not other categories of participants, such as producers of electricity and heat from cogeneration, and producers whose production capacity was commissioned after 1 April 2022?

2. Must the provisions of Articles 101 and 102 TFEU, according to which Member States may not adopt measures preventing, restricting or distorting competition within the internal market, or limiting or controlling production or markets or applying dissimilar conditions to equivalent transactions with other trading parties, be interpreted as precluding a Member State from creating an additional tax liability, such as the levy on trading under Government Emergency Order No 27/2022, solely for certain participants engaged in transactions on wholesale energy markets, such as suppliers involved in trading, and not other categories of participants, such as producers of electricity and heat from cogeneration, and producers whose production capacity was commissioned after 1 April 2022, thereby placing those participants who are liable for the levy at a competitive disadvantage?

3. Must the provisions of Articles 107(1) and 108(3) TFEU on the requirement for Member States to notify State aid be interpreted as meaning that national legislation, such as the levy on trading under Government Emergency Order No 27/2022, constitutes State aid for those who are exempt from paying the levy, which is therefore subject to the notification requirement?

4. Must the provisions of Article 3(a), (b), (h) and (p) and Article 10(1), (4) and (5) of Regulation 2019/943, in conjunction with [recitals] 22 and 23 of the preamble to the Regulation, Article 5(1), (3) and (4) of Directive 2019/944 and Article 8 of Regulation 2022/1854, which govern the principles of price formation on the wholesale energy market, be interpreted as precluding a Member State from creating an additional tax liability such as the levy on trading under Government Emergency Order No 27/2022? In interpreting those provisions, can the levy be considered proportional if it does not take into account the operating expenses of market participants involved in trading? Furthermore, can the levy be considered non-discriminatory if it applies only to certain wholesale market participants who buy and sell energy?

5. Must the provisions of Articles 28, 30 and 35 TFEU, Article 3 of Regulation 2019/943 and Article 3 of Directive 2019/944, which prohibit the introduction of legislative barriers to cross-border electricity flows between

Member States, be interpreted as precluding the creation by a Member State of an additional tax liability, such as the levy on trading under Government Emergency Order No 27/2022, which in the period between 1 September and 16 December 2022 provided for a more onerous formula for export transactions, in which no profit was recognised, whereas a theoretical 2% profit was recognised for domestic sales? In interpreting those provisions, does EU law preclude the creation of such a levy which, as of 16 December 2022, imposes the levy only on the sale of energy designated for export, and not on imported energy?

6. Do the provisions of Article 401 of Directive 2006/112, which prohibit Member States from imposing turnover taxes or charges in addition to value added tax, preclude a Member State from creating an additional tax liability for market participants involved in trading, such as the levy on trading under Government Emergency Order No 27/2022?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union: Articles 28, 30, 35, 101, 102 and 107 and Article 108(1) and (3)

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: Article 3(1), (3) and (4), Article 5(1), (3) and (4) and Article 9(2)

Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity: recitals 22 and 23, Article 3(a), (b), (h) and (p) and Article 10(1), (4) and (5)

Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices: Article 8

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: recitals 4 and 7 and Article 401

Provisions of European Union case-law relied on

Judgments of 6 October 1982, *CILFIT and Others* (283/81, EU:C:1982:335); of 21 November 1991, *Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 10 and 14); of 12 April 1994, *Halliburton Services* (C-1/93, EU:C:1994:127, paragraph 15); of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448, paragraphs 30 to 32); of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 42); of 7 September 2006, *Marrosu and Sardino* (C-53/04, EU:C:2006:517, paragraph 54); of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644,

paragraph 39); of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 76); of 25 February 2021, *Novo Banco* (C-712/19, EU:C:2021:137, paragraph 45); of 27 January 2022, *Fondul Proprietatea* (C-179/20, EU:C:2022:58, paragraphs 84 and 85); and of 7 April 2022, *Autonome Provinz Bozen* (C-102/21 and C-103/21, EU:C:2022:272, paragraphs 58 and 59); Opinion of Advocate General Kokott delivered on 5 September 2013 in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 89).

Provisions of national law relied on

Ordonanța de urgență a Guvernului nr. 27/2022 privind măsurile aplicabile clienților finali din piața de energie electrică și gaze naturale în perioada 1 aprilie 2022-31 martie 2023, precum și pentru modificarea și completarea unor acte normative, cu modificările și completările ulterioare (Government Decree-Law No 27/2022 laying down measures applicable to final customers in the electricity and natural gas market in the period from 1 April 2022 to 31 March 2023 and amending and supplementing certain regulatory acts, as amended) ('Government Emergency Order No 27/2022'), ratified by Law No 206/2022: Article 15(1), (2) and (5) provides as follows:

– a specific 80% tax, calculated according to a specific methodology, is to be levied on the additional revenue earned by electricity and natural gas producers;

– the tax does not apply to additional revenue generated from production capacity commissioned after the effective date of the decree-law or by companies providing public heating services that generate electricity from cogeneration;

– the tax is to be paid into a separate revenue account of the State budget by the 25th of the month following the month for which it is due.

Ordonanța de urgență a Guvernului nr. 119/2022 pentru modificarea și completarea OUG nr. 27/2022, precum și pentru modificarea și completarea unor acte normative din domeniul energiei, aprobată prin Legea nr. 357/2022 (Government Decree-Law No 119/2022 amending and supplementing Government Emergency Order No 27/2022 and amending and supplementing certain regulatory acts in the energy sector, ratified by Law No 357/2022) ('Government Emergency Order No 119/2022'): Article I(13), which amends Article 15 of Government Emergency Order No 27/2022, essentially provides as follows:

– the tax introduced by Government Emergency Order No 27/2022 is to be replaced by the levy paid to the Energy Transition Fund ('the levy');

– from 1 September 2022, the levy must be paid by electricity producers, aggregate electricity production entities, traders, suppliers involved in trading and aggregators trading electricity and/or natural gas on the wholesale market;

– the levy does not apply to production capacity commissioned after 1 September 2022 or to companies providing public heating services that generate electricity from cogeneration;

– parties to bilateral contracts agreed on the wholesale market through direct negotiation must notify the Autoritatea Națională de Reglementare în Domeniul Energie (Romanian National Energy Regulatory Authority) within two working days of those contracts being agreed;

– the seller must calculate, declare and pay the levy on a monthly basis, by the 25th of the month following the month for which it is due;

– the levy (C) is calculated as follows: C = (Pmt - Pa) × Qt × 100%, where: Qt = quantity of energy traded for export or supplied; Pmt – average purchase price of energy in the day-ahead market, valid for the day before the transaction; Pa – purchase price.

Annex 3 to Government Emergency Order No 119/2022 (now Annex 6.1 to Government Emergency Order No 27/2022) essentially provides as follows:

– the levy is calculated on the basis of the difference between: (a) the monthly weighted average selling price of electricity/natural gas supplied during the reference month and (b) the monthly weighted average purchase price of electricity/natural gas supplied during the reference month, plus 2% of the profit;

– when calculating the quantity supplied, all quantities traded for supply in the reference month are taken into consideration, regardless of the date on which the contract was agreed.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant operates in the electricity and natural gas market. It is involved in the supply of energy to the final consumer and in trading – in other words, the purchase and wholesale of electricity and natural gas by means of financial and/or physical supply contracts.

2 For its trading activity, the applicant trades electricity and natural gas by entering into sales or purchase contracts on the wholesale market, thereby meeting the need for liquidity and stability of other energy market participants, who buy energy and natural gas from traders to make up for any shortages or to mitigate risks.

3 The applicant's trading activity offers market participants medium and long-term protection against price volatility in the energy sector. Using market analyses and expert forecasts, the applicant enters into short, medium and long-term contracts for the sale or purchase of significant quantities of electricity, thereby meeting the

need for stability of both producers and suppliers delivering electricity to consumers, wholesale electricity customers or other traders.

4 By contrast, the energy supply activity involves the sale of electricity or natural gas to final customers, as well as the wholesale purchase of volumes supplied to final customers.

5 In the former capacity, the applicant is subject to Government Emergency Order No 119/2022 and Government Emergency Order No 27/2022, by which the Romanian Government introduced measures aimed at protecting final consumers by setting a cap on the electricity prices they can be charged, while creating a special additional tax liability for traders and producers of electricity and natural gas.

6 By its action lodged on 5 December 2022, the applicant requested the Curtea de Apel București (Court of Appeal, Bucharest, Romania), the referring court in the present case, in proceedings brought against the Guvernul României (Romanian Government) and the Agenția Națională de Administrare Fiscală (Romanian National Tax Administration Agency; 'ANAF'), defendants:

– to order the defendants to pay, by way of damages and following a preliminary assessment, the amount of 8 983 755 Romanian lei (RON) as compensation for the loss that the applicant suffered or claims to have suffered in 2022 and 2023 after paying the levy on trading, plus the statutory interest on that amount;

– to order the defendants to pay compensation for the loss that the applicant suffered or allegedly suffered in 2022 and 2023 following the introduction of the natural gas and electricity price cap mechanism for final consumers;

– to refer the plea of unconstitutionality of certain provisions of Government Emergency Order No 27/2022 to the Curtea Constituțională (Constitutional Court, Romania);

– to set aside Ordinul președintelui ANAF nr. 1635/2022 privind modificarea și completarea Ordinului președintelui ANAF nr. 587/2016 pentru aprobarea modelului și conținutului formularelor utilizate pentru declararea impozitelor și taxelor cu regim de stabilire prin autoimpunere sau reținere la sursă (Decree No 1635/2022 of the President of ANAF amending and supplementing Decree No 587/2016 of that president ratifying the model and content of the forms used for the tax return under the self-assessment or withholding tax system) ('Decree No 1635/2022'), as a secondary act adopted for the implementation of allegedly unconstitutional national provisions and an administrative act adopted in breach of primary national legislation.

7 In their defence, the defendants raised several preliminary objections and, on the substance, contend that the action is unfounded and should be dismissed.

8 In the course of the proceedings, the applicant requested the referring court to refer questions to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

9 The *applicant* submits that certain provisions of EU law are applicable and that the introduction of the obligation to pay the levy infringes provisions of the TFEU, Regulations 2022/1854 and 2019/943 and Directives 2019/944 and 2006/112.

10 The applicant states that it is required to pay a levy on profits which does not take into account all of its activity, given that the price cap mechanism forces it to incur losses since the formula for calculating the levy does not factor in the market situation and the way in which trading takes place.

11 According to the applicant, the levy actually amounts to a confiscation of fictitious profits with adverse consequences for its business, since it only takes into account profitable months and not loss-making months or the expenditure necessary to carry on its business.

12 In addition, because it applies to all wholesale transactions linked to trading, regardless of when the transactions are agreed, the levy has retroactive effect, contrary to the principles of legal certainty and the predictability of tax expenses. In practice, most wholesale transactions are agreed by means of forward contracts long before the levy entered into force, at a time when market participants were unable to account for the effects of the levy.

13 Moreover, introducing excessive notification requirements for bilateral transactions on the wholesale market within two days of their conclusion, and imposing fines of up to 5% of turnover for unlawful acts that are not clearly regulated, prevent the applicant from having sufficient freedom and foreknowledge to pursue its economic activity.

14 *ANAF* contends that the request for a preliminary ruling referred to the Court of Justice should be declared inadmissible, asserting that all of the questions referred by the applicant concern only the provisions of Government Emergency Order No 27/2022 and not Decree No 1635/2022, which the applicant claims should be set aside in the present case. According to ANAF, the applicant is in fact seeking guidance from the Court of Justice on how the referring court should determine the case. Furthermore, the questions asked by the referring court pertain exclusively to particular aspects of the case before it, such that the conditions of admissibility provided for in Article 267 TFEU are not satisfied.

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

15 The referring court states that the referral is necessary to determine the case in the light of both the applicant's arguments as to the unlawfulness of the levy, and the effects of the provisions of EU law concerning State aid and the compatibility of the tax with fundamental freedoms, the general principles of EU law and policies on the taxation of renewable energy.

16 In the light of the case-law of the Court of Justice (*Marrosu and Sardino*, paragraph 54, and *Eon Aset Menidjmunt*, paragraph 76) and the fact that, in the present case, the interpretation is sought of the compliance of certain national provisions and practices of a national authority with the general provisions and principles of EU law, the referring court affirms that there is an undisputed link with EU law. It also points out that the questions referred have not already been the subject of a preliminary ruling in a similar case and have not been examined previously by the Court of Justice. Accordingly, in the light of the criteria set out by the Court in *CILFIT and Others*, the referring court finds that the correct application of EU law is not so clear as to leave no scope for any reasonable doubt as to the solution.

(a) The first and second questions

17 According to the referring court, an interpretation from the Court of Justice is necessary in order to determine to what extent the levy imposed solely on certain traders and suppliers involved in trading is compatible with the general principles of equality and non-discrimination and with the obligation of Member States to ensure a level playing field and non-discriminatory conditions for electricity market participants. The principle of equality means the absence of discrimination and the equal treatment of persons who are in identical and comparable situations. In line with that principle, the principle of fiscal neutrality has been developed at EU level, requiring Member States not to discriminate unduly between taxable persons.

18 In the energy sector specifically, the provisions of EU law relied on govern the obligation for Member States to ensure a level playing field and non-discriminatory conditions for electricity producers (Article 3 of Directive 2019/944), and not to distort competition by placing certain market participants at a competitive disadvantage.

19 The referring court observes that the applicant submitted that, for the period from 1 September to 16 December 2022, the method of calculating the levy on export transactions meant that no profit was recognised in the case of energy exports within the European Union, while domestic transactions were eligible for a theoretical profit margin of 2%, such that competition was manifestly distorted in the European Union's internal market. The reduction in profit and competitiveness has been arbitrarily imposed on traders and suppliers involved in trading, even though they are not the only operators buying and selling electricity in the energy

market – energy producers and, more importantly, producers of energy from renewable sources also do so, separately from trading the energy they generate themselves.

20 In addition, the producers and production capacity not subject to the levy have a competitive advantage over any supplier involved in trading, such as the applicant, as regards the trading of energy on the wholesale market.

21 The applicant also argues that electricity producers and trading companies both operate on the same markets at EU and/or national level. They are therefore competitors and in a comparable situation as regards the trading of electricity. By applying different treatment to operators that are in comparable situations, a selective and discriminatory system is established, thus limiting competition.

22 Accordingly, the referring court, having regard in particular to paragraph 15 of *Halliburton Services*, considers it necessary to refer the matter to the Court of Justice in order to determine whether the EU legal acts governing the principles of equality and non-discrimination and the obligation for Member States to ensure a level playing field and non-discriminatory conditions for electricity market participants preclude Member States from introducing the levy, on a differentiated basis, by exempting certain categories of producers from the obligation to pay that levy.

(b) The third question

23 The referring court holds that this question is necessary in order to determine to what extent the levy constitutes State aid for electricity producers exempt from paying the levy and that it must be notified to the European Commission pursuant to Article 108(3) TFEU.

24 The referring court points out that under Article 108(2) TFEU, although the assessment of the compatibility of State aid with the internal market falls within the exclusive competence of the Commission (*Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, paragraph 14, and *Unicredito Italiano*, paragraph 42), national courts must nonetheless ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission has been infringed (*Autonome Provinz Bozen*, paragraph 59). They are also competent to interpret the concept of State aid and to determine whether or not a measure adopted by a Member State constitutes State aid (*Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, paragraph 10, and *Transalpine Ölleitung in Österreich*, paragraph 39).

25 In the light of the case-law of the Court of Justice, the referring court also observes that, in the area of State aid, the Court has jurisdiction to give the national court guidance on interpretation in order to enable it to determine whether

a national measure may be classified as State aid under EU law (*Fondul Proprietatea*, paragraph 84). Moreover, the obligation not to implement aid before it has been notified to the Commission and before the Commission has carried out its preliminary examination under Article 108(3) TFEU has direct effect (*Pearle and Others*, paragraphs 30 to 32).

26 The referring court finds that that is the situation in the present case, since the applicant submits that the measure introducing the levy constitutes State aid, in respect of which the notification requirement has not been satisfied. In those circumstances, although the national court cannot rule on the compatibility of the aid with the internal market, it must nevertheless find that the aid is unlawful if it has not been notified in accordance with Article 108(3) TFEU, since the direct effect of that provision requires the rights of the person concerned to be thus protected.

27 The referring court therefore sees a need for the interpretation by the Court of Justice of the criteria for assessing potential State aid, and in particular the selective advantage criterion introduced by the contested measure, given that certain categories of electricity producers are exempt from paying the levy.

(c) The fourth question

28 The referring court observes that the question of the classification of the levy arises in the present case in so far as it represents a measure that has the effect of setting the selling price or limits the freedom to set the selling price, possibly contrary to the provisions of Directive 2019/944 and Regulations 2019/943 and 2022/1854, taking into account the principle of proportionality, the conditions under which interventions in price setting on the wholesale market are allowed, the absence of an impact assessment and the necessary measures taken at EU level at a time of rising energy prices.

29 The applicant asserts that the levy represents an intervention in free price formation on the market which infringes the principles of Regulation 2019/943, since it is not likely to stabilise prices but, on the contrary, is likely to destabilise the market as a whole. At the same time, the levy clearly breaches the limits of intervention in supply prices, since it (i) imposes price caps on the wholesale market and not on the retail market, (ii) indirectly sets price caps for non-domestic consumers beyond the limits permitted by Directive 2019/944, and (iii) imposes additional costs in a discriminatory manner with the levy having to be paid solely by suppliers and traders, and not by all market participants who buy and sell electricity on the wholesale market.

30 Since the applicant claims that the price control mechanism introduced by the levy is contrary to Regulation 2022/1854 and breaches its limits, as a measure capable of affecting the functioning of the internal energy market, jeopardising security of supply and leading to further price increases, the referring court holds that the Court's interpretation is necessary in order to determine to what extent the

national provisions governing the levy have a significant impact on market conduct and affect free price formation, as provided for in Directive 2019/944 and Regulations 2019/943 and 2022/1854.

(d) The fifth question

31 The referring court notes that, in the present case, the question of the classification of the levy arises in so far as it represents a measure that entails direct restrictions or that has an equivalent effect on trade between Member States, contrary to the provisions of EU law relied on.

32 In the period between 1 September and 16 December 2022, Government Emergency Order No 27/2022 established a different tax treatment for domestic transactions compared with export transactions, since the profit margin on the sale of electricity for export or for intra-Community supply from Romania was practically abolished, with a 100% levy applied to the difference between the trading price of energy on the day-ahead market, valid for the day before the transaction (and not the actual sale price), and the purchase price. This calculation method essentially meant that no profit was recognised for energy exports to the European Union, while trading within Romania benefited from a theoretical 2% profit margin.

33 The different calculation formula applied to export transactions was abolished as of 16 December 2022. However, after that date energy exports were limited indirectly, with much more onerous transaction terms for exports than for imports: electricity imports were no longer subject to the levy, which was set at a prohibitive amount, whereas energy exports entailed the obligation to pay tax on any amount above 2% of the energy purchase price, amounting to a restriction with equivalent effect for exports.

34 It is necessary therefore to clarify the compatibility of the national provisions governing the levy with EU law on the free movement of goods.

(e) The sixth question

35 The referring court holds that an interpretation from the Court of Justice is necessary in order to determine whether the provisions of Article 401 of Directive 2006/112 allow Member States to impose a turnover tax, such as the levy, given that the tax does not take into account the costs associated with trading or the actual profit made.

36 The referring court observes that in order to carry on their business, trading companies, in addition to the cost of purchasing electricity or natural gas, incur significant operating costs, given the complexity of the energy market (for example, the costs of highly qualified personnel, the costs of computer programs, tariffs and trading fees on centralised markets managed by the electricity and natural gas market operator, interest on financing, and so on). However, the

provisions of Government Emergency Order No 27/2022 on the method of calculating the levy do not take into account the deduction of those costs from the tax base.

37 In accordance with the Court's settled case-law, the maintenance or introduction by a Member State of taxes, duties or charges is authorised only on condition that they cannot be assimilated to a turnover tax (*Novo Banco*, paragraph 45).