

Case C-391/23

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:

27 June 2023

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

7 February 2023

Appellant:

Brăila Winds SRL

Respondents:

Direcția Regională a Finanțelor Publice București – Administrația Fiscală pentru Contribuabili Mijlocii București

Ministerul Finanțelor

Președintele Agenției Naționale de Administrare Fiscală

Agenția Națională de Administrare Fiscală

Subject matter of the main proceedings

Administrative proceedings by which Brăila Winds SRL, the appellant company, seeks, against the respondents, the Direcția Generală Regională a Finanțelor Publice București – Administrația Fiscală pentru Contribuabili Mijlocii București (Regional Directorate-General of Public Finances of Bucharest – Bucharest Tax Authority for Medium-sized Taxpayers), the Ministerul Finanțelor (Ministry of Finance), the Președintele Agenției Naționale de Administrare Fiscală (President of the National Agency of Tax Administration) and the Agenția Națională de Administrare Fiscală (National Agency of Tax Administration, ‘ANAF’), the annulment of certain tax administrative acts.

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, the court seeks the interpretation of Articles 49, 56, 107, 108 and 191(2) TFEU, Articles 9 and 58(c) of Directive 2019/944, Directive 2003/96 and the European Green Deal.

Questions referred for a preliminary ruling

1. Must the provisions of Articles 107 and 108 TFEU be interpreted as meaning that national legislation such as that introduced by Legea nr. 259/2021 (Law No 259/2021), which imposes a tax only on certain producers of electricity, constitutes State aid granted to exempt persons, which is subject to notification requirements? Is that legislation discriminatory if it applies only to certain producers of electricity, including those producing electricity from renewable energy sources?
2. Must the provisions of Articles 49 and 56 TFEU and those of Article 17 of the Charter of Fundamental Rights of the European Union be interpreted as precluding national legislation, such as that introduced by Law No 259/2021, which imposes a high amount of tax only on certain producers of electricity (including those producing electricity from renewable sources), to the exclusion of other categories of producer?
3. Prior to Regulation 2022/1854, does Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU preclude national legislation which could result in the fixing of selling prices or a restriction on the freedom to set selling prices, such as the legislation introduced by Law No 259/2021?
4. Do the provisions of Article 191(2) TFEU concerning the precautionary principle and the principles that preventive action should be taken, that pollution should be rectified at source and that the polluter should pay preclude national legislation such as that introduced by Law No 259/2021? Does that undermine the European objectives of achieving climate neutrality by 2050 and the European Union's policy on energy taxation?

Provisions of European Union law relied on

Articles 49, 56, 107, 108(1) and (3) and 191(2) TFEU

Article 17(1) of the Charter of Fundamental Rights of the European Union

Articles 9 and 58(c) 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

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity

European Green Deal, published by the European Commission on 11 December 2019.

Provisions of national law relied on

Legea nr. 259/2021 pentru aprobarea Ordonanței de urgență a Guvernului nr. 118/2021 privind stabilirea unei scheme de compensare pentru consumul de energie electrică și gaze naturale pentru sezonul rece 2021-2022, precum și pentru completarea Ordonanței Guvernului nr. 27/1996 privind acordarea de facilități persoanelor care domiciliază sau lucrează în unele localități din Munții Apuseni și în Rezervația Biosferei „Delta Dunării” (Law No 259/2021 converting Decree-Law No 118/2021 on the establishment of a compensation scheme for the consumption of electricity and natural gas for the cold season 2021-2022 and supplementing Decree-Law No 27/1996 on the granting of discounts to persons residing or working in certain localities in the Apuseni Mountains and in the Biosphere Reserve ‘Danube Delta’) (‘Law No 259/2021’), Article II, under which during the period between 1 November 2021 and 31 March 2022 the additional income generated by producers of electricity resulting from the difference between the average monthly electricity selling price and the price of RON 450 (Romanian lei)/MWh is taxed at 80% [(paragraph 1)], a tax from which producers of electricity from fossil fuels, including cogeneration, are exempt [(paragraph 2)], and the detailed rules for the application of the tax are to be laid down by order of the President of the ANAF [(paragraph 3)]

Ordonanța de urgență a Guvernului nr. 11/2022 privind modificarea și completarea Legii nr. 259/2021 („OUG nr. 11/2022”) (Decree-Law No 11/2022, amending and supplementing Law No 259/2021) (‘OUG No 11/2022’), Article III(3), under which producers of electricity from biomass are also exempt from the provisions of Article II(1) of Law No 259/2021, starting with additional income generated after 1 January 2022.

Ordinul președintelui ANAF nr. 64/2022 privind aplicarea prevederilor articolului II din Legea nr. 259/2021 precum și 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 („Ordinul nr. 64/2022”) (Order of the President of the ANAF No 64/2022 on the application of the provisions of Article II of Law No 259/2021 and amending and supplementing Order of the President of the ANAF No 587/2016 approving the model and content of the forms used for the declaration of tax and taxes subject to the self-assessment or withholding tax regime (‘Order No 64/2022’), Article I, under which the tax on additional income generated by electricity producers is calculated for the period from 1 November 2021 to 31 March 2022, and Article II,

under which the tax provided for in Article I is to be declared to the State budget by electricity producers on a monthly basis, up to and including the 25th day of the month following the month in which the tax is due, by completing and submitting Form 100 ‘Declarație privind obligațiile de plată la bugetul de stat’ (Declaration of payment obligations to the State budget).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant Brăila Winds SRL is one of the subsidiaries of the ENGIE group in Romania. The shareholders of the appellant company are Engie Dezvoltare & Consultanță Srl and Engie Romania SA, the latter having a 99.99% shareholding. Engie Romania SA is the main subsidiary of the ENGIE group in Romania.
- 2 The appellant produces wind power through a wind turbine it owns in the Brăila district.
- 3 As of 1 November 2021, Article II of Law No 259/2021 introduced a tax of 80% levied on the additional income generated by electricity producers resulting from the difference between the average monthly selling price of electricity and the price of RON 450/MWh. Producers of electricity from fossil fuels, including cogeneration, and, from 1 January 2022, producers of electricity from biomass have been exempted from paying the tax.
- 4 Pursuant to Article II of Law No 259/2021 and Order No 64/2022, the appellant, as a producer of electricity from renewable sources, filed a tax declaration and paid the tax at issue covering the period from November 2021 to March 2022, amounting to RON 11 643 217.
- 5 Following the rejection by the ANAF of the prior administrative complaint against Order No 64/2022 and of the tax claim lodged by the appellant, on 27 April 2022 the latter brought an action before the referring court – the Curtea de Apel București (Bucharest Court of Appeal) – asking it to: **(i)** annul Order No 64/2022; **(ii)** annul the tax declarations and revised declarations submitted by the appellant in respect of the tax introduced by Article II of Law No 259/2021; **(iii)** annul Decision No 551/10.03.2022 issued by the ANAF – Direcția Generală de Soluționare a Contestațiilor (Directorate-General for the settlement of complaints), rejecting the administrative appeal against the tax declarations and the response to the claim against the tax declaration for March 2022; **(iv)** annul decision/solution (Referatul de soluționare) No A GVB 154/23.03.2022 of the ANAF – Direcția Generală Proceduri pentru Administrarea Veniturilor (Directorate-General for revenue management), rejecting the prior administrative complaint against Order No 64/2022; **(v)** order the respondents to repay to the appellant the sum of RON 11 643 217 paid for the months of November 2021 to March 2022 by way of tax on the basis of Order No 64/2022; and **(vi)** order the respondents to pay tax interest on the sums thus paid.

- 6 According to the appellant, the contested administrative acts were unlawful because the tax introduced by Article II of Law No 259/2021 is unlawful on the following grounds: (i) it infringes the principle of the fair assessment of the tax burden and the principle of the avoidance of double taxation in conjunction with the principle of legality, non-discrimination/neutrality in taxation, equality before the law, equity in taxation and certainty in taxation; (ii) it infringes the principle of non-retroactivity and predictability of taxation in conjunction with the principle of legal certainty and protection of legitimate expectations, non-discrimination/neutrality in taxation and equality before the law; (iii) it constitutes State aid unlawfully granted to producers of electricity from fossil fuels, including cogeneration, and to producers of electricity from biomass, starting with the additional income generated after 1 January 2022, [aid] which is contrary to Article 107(1) TFEU; (iv) it creates obstacles to the freedom of establishment and the freedom to provide services which are contrary to Articles 49 and 56 TFEU; (v) it runs counter to the European objectives on achieving climate neutrality by 2050, as well as EU policy on energy taxation; (vi) it also results in the fixing of the selling price/a restriction of the freedom to set the selling price which is contrary to Directive 2019/944; (vii) it infringes the provisions of Article 135 of the Romanian Constitution and Article 8 of the Legea concurenței (Law on competition) prohibiting unjustified restrictions on the freedom of trade or the autonomy of business owners; (viii) it is established on the basis of Order No 64/2022, which is vitiated by a number of defects of legality; and (ix) it is established on the basis of Article II of Law No 259/2021, which is vitiated by a number of constitutional defects.
- 7 At the appellant's request, the Bucharest Court of Appeal decided to request a preliminary ruling from the Court of Justice.

The essential arguments of the parties in the main proceedings

- 8 According to the appellant, the windfall tax measure at issue in the main proceedings constitutes State aid, in respect of which the Member State has failed to comply with its obligation to initiate the prior review procedure provided for in Article 108(3) TFEU.
- 9 Furthermore, given the high level of the tax introduced by Article II of Law No 259/2021, the measure at issue constitutes a restriction prohibited by Articles 49 and 56 TFEU. Therefore, in the appellant's view, the different treatment of electricity producers on the basis of the production source they use discourages them from maintaining their activity in the renewable electricity market in Romania.

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

- 10 The referring court notes that several actions for the annulment of Order No 64/2022 have been brought before the Bucharest Court of Appeal, all of which are currently pending.
- 11 In the present case, the referring court decided, on 31 January 2022, to submit to the Curtea Constituțională (Constitutional Court) a plea that Article II of Law No 259/2021 is unconstitutional, and the relevant proceedings are pending before the Constitutional Court.
- 12 By its first question for a preliminary ruling, the referring court asks whether the measure imposing a windfall tax on the additional income generated by some electricity producers may be classified as State aid granted to electricity producers exempt from taxation, [aid] which, pursuant to Article 108(3) TFEU, should have been notified to the Commission.
- 13 On the basis of the case-law of the Court of Justice on this matter, and specifically the judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, EU:C:1991:440, paragraphs 10 and 14; the judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 42; the judgment of 7 April 2022, *Autonome Provinz Bozen*, C-102/21 and C-103/21, EU:C:2022:272, paragraphs 58 and 59; the judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 39; the judgment of 22 January 2022, *Fondul Proprietatea*, C-179/20, EU:C:2022:58, paragraphs 83 and 84; and the judgment of 15 July 2004, *Pearle and Others*, C-345/02, EU:C:2004:448, paragraphs 30 to 32, the referring court states that it needs the Court of Justice's guidance as regards the criteria for assessing potential State aid, in particular in relation to the criterion of selective advantage laid down by the measure at issue, bearing in mind the fact that certain specific categories of electricity producer have been exempted from the measure at issue.
- 14 The second question for a preliminary ruling concerns the effects produced by the windfall tax introduced by Article II of Law No 259/2021 on the freedom of establishment and the free movement of services, in view of the fact that that tax could discourage the ENGIE group, of which the appellant company forms part, from continuing to produce electricity from renewable sources in the territory of Romania.
- 15 In the present case, there is a cross-border element, since the appellant forms part of the ENGIE group, whose head office is in Paris and which is engaged in the supply and distribution of natural gas, the supply of electricity and the generation of electricity.
- 16 The referring court considers that the tax at issue does not discriminate against foreign nationals as compared with nationals, but notes that the tax applies differently to electricity producers depending on the source of production they

use. The referring court recalls in this context the judgments of 7 July 1988, *Stanton v Inasti*, C-143/87, and of 15 February 1996, *Kemmler*, C-53/95, in which the Court of Justice held that rules that did not discriminate directly or indirectly on grounds of nationality were nevertheless inadmissible because they constituted unjustified obstacles to the pursuit of activities in more than one Member State, and the judgment of 24 March 2011, *Commission v Spain*, C-400/08, EU:C:2011:172, paragraph 64, in which the Court of Justice held that the concept of ‘restriction’ for the purposes of Article 43 EC covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade.

- 17 With regard to the conditions that national measures liable to hinder or discourage the exercise of fundamental freedoms guaranteed by the Treaty must satisfy in order to be considered compatible with the Treaty, the referring court considers that the present case poses the question of the disproportionate nature of the tax at issue.
- 18 By its third question, the Bucharest Court of Appeal raises the issue of the classification of the tax as a measure resulting in the fixing of the selling price/restriction of the freedom to set the selling price, which could be contrary to the provisions of Directive 2019/944, in particular those of Article 58(c) concerning the national regulatory authority’s obligation to eliminate restrictions on trade in electricity between Member States, in conjunction with the provisions of Article 9, since those provisions have direct effect.
- 19 In that context, the referring court recalls the appellant’s claims that the measure at issue significantly distorts competition on the electricity market, since it results in additional costs for energy producers and reduces security of supply by preventing prices being set on the basis of supply and demand, leading either to artificially high prices to compensate for the tax imposed or to a reduction in production, since the additional tax on income equates to a risk for producers in terms of covering their production costs. Furthermore, in the light of Article 9 of Directive 2019/944, the national measure at issue is, in the appellant’s view, neither appropriate nor proportionate.
- 20 In relation to the fourth question referred for a preliminary ruling, the Bucharest Court of Appeal states that, in view of the fact that the appellant has relied on the precautionary principle and the principles that preventive action should be taken, that pollution should be rectified at source and that the polluter should pay, enshrined in Article 191(2) TFEU, it is necessary to determine whether those principles have direct effect and whether they are infringed by the introduction of a tax that applies to producers of electricity from renewable sources, but not to producers of electricity from fossil fuels.
- 21 In addition, since the applicant has also submitted that, by imposing a windfall tax primarily on producers of energy from renewable sources, the tax introduced by

Law No 259/2021 runs counter to both EU policy on energy taxation –specifically Directive 2003/96 – and to the European climate neutrality objectives set out in the European Green Deal published by the Commission on 11 December 2019, it is necessary to assess the relevant effects of those acts, as well as the compatibility of the above-mentioned tax with such acts.

WORKING DOCUMENT