Case C-648/18

Request for a preliminary ruling

Date lodged:

17 October 2018

Referring court:

Tribunalul București (Romania)

Date of the decision to refer:

26 January 2017

Appellant and defendant at first instance:

Autoritatea Națională de Reglementare în Domeniul Energiei (ANRE)

Respondent and applicant at first instance:

Societatea de Producere a Energiei Electrice în Hidrocentrale Hidroelectrica SA

REQUEST FOR A PRELIMINARY RULING

The Tribunalul București (Regional Court, Bucharest), upon the application of the respondent, Societatea de Producere a Energiei Electrice în Hidrocentrale Hidroelectrica SA, ... in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU), requests

THE COURT OF JUSTICE OF THE EUROPEAN UNION

to answer the following question for a preliminary ruling, which concerns the interpretation of Article 35 TFEU, such a ruling being necessary for the resolution of the case before the national court, which is registered at the Tribunalul București, Secția a II-a Contencios Administrativ și Fiscal (Section IIa administrative and fiscal contentious section) ...:

Does Article 35 TFEU preclude an interpretation of Article 23(1) and Article 28(c) of the Legea energiei electrice și a gazelor naturale nr. 123/2012 according to which electricity producers in Romania are obliged to trade all the electricity they produce exclusively on a centralised competitive market in

Romania, given that there is the possibility of exporting energy, albeit not directly but through trading companies?

The subject-matter of the dispute and the relevant facts

1. By application registered at the Judecătoria Sectorului 1 București (Court of First Instance, Bucharest — Sector 1), the applicant, Societatea de Producere a Energiei Electrice în Hidrocentrale Hidroelectrica SA ('Hydroelectric'), brought an action (plângere contravențională) against the Autoritatea Națională de Reglementare în Domeniul Energiei (National Energy Sector Regulatory Authority, 'the ANRE'), seeking the annulment of the minutes of 11 May 2015, No 36119, recording the finding of, and sanctioning an administrative office, and the consequential recognition of the lawfulness of the export operations carried out by Hydroelectrica between December 2014 and February 2015.

2. In its application, the applicant has asserted that ANRE sanctioned Hydroelectrica for having exported electricity to another State of the European Union. The minutes are null and void, as they violate the principle of the free movement of goods within the Union. The minutes were adopted on the basis of an interpretation in the form of a press release published by ANRE on its own web page, after Hydroelectrica had reported the exports made. ANRE's interpretation has no legal basis, is contrary to mandatory Community rules and is contradicted by the Consiliul Concurenței (the national competition authority), as well as by ANRE's own statutes and previous interpretations. In addition, it applies retrospectively to the established facts.

3. In its defence, by way of counterclaim lodged on 24 June 2015, the defendant ANRE has asserted that, between December 2014 and February 2015, the applicant did not offer for sale in a transparent manner on the competitive electricity market in Romania all the electricity available to it, but had instead exported some of the electricity it had produced to the Hungarian electricity market, in breach of the legislation in force.

The decision at first instance

By civil judgment … handed down by the Judecătoria Sectorului 1 București, Hydroelectrica's action against the defendant ANRE was upheld. The minutes of 11 May 2017, No 36119, finding and sanctioning the administrative offence were annulled. The applicant was relieved of the obligation to pay a fine in the sum of RON 50 000.

It was held that trading outside the centralised platforms of OPCOM SA did not necessarily constitute an infringement of the provisions of Article 23(1) of the Legea energiei electrice și a gazelor naturale nr. 123/2012 (Law No 123/2012 on electricity and natural gas, 'Law No 123/2012'). Since it was apparent from the evidence produced in the proceedings that the applicant had not infringed the provisions of Article 23(1) of Law No 123/2012, it followed that there was no

breach of the conditions attaching to its license and that the constituent elements of the administrative offence (contravenția) under Article 93(1)(4) of the same law were not established.

The defendant's appeal

ANRE appealed against the judgment at first instance, maintaining that, in the civil judgment … which the Judecătoria Sectorului 1 București had handed down, it had misapplied the law.

The request for a reference to the Court of Justice

The applicant/respondent has requested that a question be referred to the Court of Justice for a preliminary ruling, in order to obtain clarification of the provisions of Article 35 of the Treaty on the Functioning of the European Union.

4. In so far as the facts are concerned, it is observed that Hydroelectrica is a Romanian private-law company of which the State is the majority shareholder. Its business includes the production, transport and distribution of electricity. The company holds licenses for both the production and the supply of electricity.

Hydroelectrica holds a trading license issued by the Hungarian energy regulatory authority. After obtaining that license, from December 2014 onwards, the company concluded electricity sale contracts via a centralised trading platform in Hungary, which is one of the markets recognised by the Agency for the Cooperation of Energy Regulators.

On 13 February 2015, ANRE published on its website a communiqué entitled 'Interpretarea ANRE a prevederilor Legii energiei electrice și gazelor naturale nr. 123/2012 cu privire la posibilitățile de export [de] energie electrică ale producătorilor' (ANRE's interpretation of the provisions of Law No 123/2012 in relation to the question whether producers may export electricity). In that communiqué, ANRE expressed its own position on how it would interpret Articles 23 and 28 of Law No 123/2012: 'according to ANRE's interpretation, all available electricity must be offered for sale in a transparent manner, publicly, without discrimination and centrally on Opcom's platforms', that is to say, on Romania's centralised electricity market.

On 11 May 11 2015, ANRE sent to Hydroelectrica the minutes in which an administrative fine (amendă contravențională) was imposed on the company for not having offered for sale in a transparent manner on the competitive electricity market in Romania all the electricity available to it and having exported some of the electricity it had produced to the Hungarian electricity market, in breach of the legislation in force (page 1, paragraph 3 of the minutes).

In sanctioning Hydroelectrica, ANRE relied on the provisions of Article 23(1) and Article 28(c) of Law No 123/2012, which it interpreted as meaning that the obligation on national electricity producers to offer publicly and on a non-

discriminatory basis on the competitive market all the electricity available to them meant that producers must offer for sale all the electricity they produce on the centralised national electricity market.

Consequently, according to ANRE's interpretation and application of Law No 123/2012, producers do not have the right to export electricity directly within the European Union. To do so would constitute an infringement of national law and, implicitly, of the conditions attaching to a production licence, which may be sanctioned with an administrative penalty or fine. In accordance with Article 93(4) of Law No 123/2012, the repeated commission of an administrative offence (contravenția) attracts a fine of between 1% and 5% of turnover for legal persons operating in the electricity market. According to the law, an administrative offence is committed repeatedly if the same actions which constitute the office are taken three or more times in the course of a year.

Therefore, the consequence of treating the direct export of electricity as an administrative offence is that that activity is effectively prevented, given the severe sanctions that may be adopted by the authorities.

On 27 May 2015, Hydroelectrica brought an action, registered at the Judecătoria Sectorului 1 București, seeking the annulment of the minutes and of the sanction adopted by ANRE. In support of its action, the company essentially makes the following points:

(i) The minutes are unlawful in that they infringe Article 35 TFEU and amount in fact to an administrative measure restricting the free movement of electricity within the European Union. That measure has not been justified by ANRE by reference to any of the exceptions set out in Article 36 TFEU.

(ii) The restriction of distribution channels, consisting in the obligation to conduct transactions exclusively through certain operators supervised or authorised by the State, is incompatible with European Union law.

(iii) The minutes are unlawful in that they infringe national law, Article 23(1) and Article 28(c) of Law No 123/2012 containing no express restriction on exports within the European Union applicable to energy producers and no reference even to the territory of Romania. By means of the sanction adopted and recorded in the minutes, ANRE is restricting the freedom of trade of economic agents in the absence of an express legal prohibition, which is contrary to the principles of interpretation of Romanian law.

(iv) In its report on the results of the sectoral inquiry into the electricity market of January 2014, the Romanian competition authority stated that 'the provisions contained in [Law No 123/2012], which requires market participants to enter into wholesale transactions only on centralised markets must be interpreted as meaning that electricity producers are free to make export sales directly (or through companies within their group).

(v) By the measure which it has adopted, ANRE is unlawfully discriminating between Romanian producers and producers from other Member States: while the former may, according to ANRE's interpretation, act only in the centralised Romanian market, the latter are free to trade, and actually do trade, both in the centralised market of their Member State of origin and on the centralised markets of other Member States, including Romania.

Applicable national provisions and relevant national case-law

5. The substantive law applicable to the dispute is Law No 123/2012.

Article 2(c): Activities in the sector of electricity and heat produced in cogeneration shall be carried out in order to achieve the following basic objectives: to create and ensure the operation of competitive electricity markets.

Article 2(h): Improving the competitiveness of the internal electricity market and active participation in the formation of both the regional market and the internal energy market of the European Union and participation in the development of cross-border exchanges.

Article 3(49): For the purposes of this Title, the terms and expressions set out below shall have the following meanings: centralised electricity market — the framework within which trading in electricity is carried out between various economic operators, with the involvement of the electricity market operator or the manager of the transmission system, on the basis of specific rules, approved by the competent authority.

Article 20(1): The electricity market is composed of the regulated market and the competitive market, and energy transactions shall be either wholesale or retail.

Article 23(1): Trading in electricity shall be conducted on the competitive market, in a transparent, public, centralised and non-discriminatory manner.

Article 28(c): Producers shall, principally, have the following obligations: to trade electricity and technological system services on the regulated and competitive market in a transparent and non-discriminatory manner.

6. With reference to those legal provisions, in a similar case concerning the annulment of the minutes in which another producer of electricity was sanctioned by ANRE for the alleged infringement of Article 23(1) and Article 28(c) of Law No 123/2012, the Judecătoria Sectorului 2 București (Court of First Instance, Bucharest — Sector 2) held … as follows:

'*... the defendant [ANRE — note of the referring court] has not proved and has not reasonably argued that the applicant has infringed the provisions of Article 23(1) of Law No 123/2012.*

The fact that the applicant's trade with CEZ a.s. was concluded outside the centralised platforms of OPCOM is true and undisputed. However, despite the assertion which the defendant makes in its counter-claim that Article 23(1) requires that trading is conducted in a transparent, public, centralised and non-discriminatory manner, on OPCOM's centralised platforms, the court notes that the text in question refers solely to the characteristics of transparency, publicness, centralisation and non-discrimination, and not to any obligation to trade only on the centralised platforms of OPCOM.

In the minutes, the defendant explained that 'outside the competitive market' meant outside the centralised platforms of OPCOM, but neither in the minutes nor before this court has the defendant proven or argued that the centralised platforms of OPCOM constitute the only competitive market. This court also notes that Law No 123/2012 itself does not define the concept of competitive market ...

Indeed, the defendant itself, in its position paper of 9 January 2013, asserted that any broader interpretation of the provisions of Article 23(1) of Law No 123/2012 was liable to create an administrative barrier to cross-border trade in electricity, knowing that the related activities are subject to Community legislation on the removal of any constraints on the creation of the internal electricity market.

This court therefore holds that trading outside OPCOM's centralised platforms does not necessarily constitute an infringement of Article 23(1) of Law No 123/2012.

It follows that, in order to substantiate the allegation that the act in question constituted an administrative offence, it was necessary for the defendant to prove or argue that the applicant's transaction with CEZ a.s. was concluded outside the competitive market, in a manner that was not transparent, public, centralised and non-discriminatory.

The defendant has not, however, put forward arguments or proof to that effect and has instead constructed its defence on the notion that trading outside OPCOM's centralised markets is prohibited by law, which is an assertion that, as shown above, this court considers to be incorrect.'

Applicable provisions of European Union law

7. Article 35 TFEU (ex Article 29 TEC): 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.'

8. Article 36 [TFEU] (ex Article 30 TEC): The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the

protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

The reasons that have led the referring court to request a preliminary ruling

9. Hydroelectrica was sanctioned for '*not having offered for sale in a transparent manner on the competitive electricity market in Romania all the electricity available to it and having exported some of the electricity it had produced to the Hungarian electricity market, in breach of the legislation in force*'.

At the same time, Article 35 TFEU, which is one of the legal bases of the action, prohibits quantitative restrictions on exports and measures having equivalent effect. Therefore, a preliminary question intended to clarify the compatibility with the TFEU of the interpretation given by ANRE of Law No 123/2012 is decisive to the outcome of the case.

10. The Court of Justice of the European Union ('the CJEU') has not thus far analysed the compliance with the provisions of the TFEU of a law, regulation or administrative practice which restricts exports by requiring producers to sell energy solely through a trading platform registered in their home State.

11. In accordance with [the second paragraph of] Article 267 TFEU, if a preliminary question is raised in a case pending before a court or tribunal, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon.

However, for the uniform application of European Union law in the Member States, it is necessary, where there is a doubt as to the compatibility with the Treaties of a given practice or national legislation, for the court hearing the case to refer a question to the CJEU for a preliminary ruling.

On the other hand, there is an exception to this rule, one that must be interpreted narrowly: if a particular interpretation is certain, beyond any reasonable doubt, the national court may consider that the question is not necessary and directly apply European Union law.

A situation of this kind was referred to, in the *CILFIT* case-law, as 'the theory of acte clair'. The objective of this theory is to avoid congesting the CJEU with purely theoretical questions or questions unrelated to the settlement of a dispute.

However, national courts cannot claim that a provision of the Treaty is clear unless it has been clarified in the case-law of the CJEU. If a national court refuses to refer a question to the CJEU, invoking the 'theory of acte clair', without any basis in the case-law, that could entail a violation of the right to a fair trial enshrined in Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms. To that effect, in *Ullens de Schooten and*

Rezabek v. Belgium, the European Court of Human Rights held that a refusal by a national court to use the preliminary reference mechanism could infringe the fairness of proceedings, even if the court is not ruling at last instance.

Notwithstanding, in so far as it has any doubts as to the interpretation of the [FEU] Treaty and the compatibility of a domestic law with its provisions, the court must refer a question to the CJEU for a preliminary ruling. In other words, while the action could be upheld even without making a reference for a preliminary ruling, it could not be dismissed without first obtaining clarification, by means of a preliminary reference, of the compatibility of ANRE's interpretation with Community law. Otherwise, Hydroelectrica's right to a fair trial would be violated.

...

... [Signatures]

Bucharest, 26 January 2017