Case C-633/23

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:

23 October 2023

Referring court:

Cour d'appel de Bruxelles (Belgium)

Date of the decision to refer:

18 October 2023

Applicants:

Electrabel SA

Fédération belge des entreprises électriques et gazières

Organisatie voor Duurzame Energie Vlaanderen ASBL

Wind4Wallonia 2 SA

Luminus SA

EDF Belgium SA

Activent Wallonie SCRL

Eol'Wapi

Lumiwind C

Luminus Wind Together SC

Defendant:

Commission de Régulation de l'Électricité et du Gaz (CREG)

Intervener:

État belge

Subject matter of the main proceedings

Annulment of the décision de la Commission de Régulation de l'Électricité et du Gaz (B)2511 du 28 février 2023 sur le modèle de déclaration à introduire par les débiteurs du prélèvement instauré dans le cadre du plafond sur les recettes issues du marché des producteurs d'électricité (Decision (B)2511 of the Commission for Electricity and Gas Regulation [('the CREG')] of 28 February 2023 on the model declaration to be completed by debtors of the levy introduced in connection with the cap on market revenues of electricity producers) ('the contested decision'). The contested decision is available at the following internet address: https://www.creg.be/fr/publications/decision-b2511.

Succinct presentation of the facts and procedure in the main proceedings

1 By adopting Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, the Council of the European Union intended, in the context of an upsurge in prices, 'to mitigate the effects of high energy prices through exceptional, targeted and time limited measures' (Article 1 of that regulation). With regard to the energy market, that regulation provides, inter alia, for a mandatory cap on market revenues and lays down rules on the distribution of surplus revenues (see Chapter II, Section 2, in particular Articles 6 and 7 of that regulation).

2 In accordance with Article 2(5) of Regulation 2022/1854, '"market revenue" means realised income a producer receives in exchange for the sale and delivery of electricity in the Union, regardless of the contractual form in which such exchange takes place, including power purchase agreements and other hedging operations against fluctuations in the wholesale electricity market and excluding any support granted by Member States'. 'Surplus revenues' means a 'positive difference between the market revenues of producers per MWh of electricity and the cap on market revenues of 180 EUR per MWh of electricity provided for in Article 6(1)' (Article 2(9) of Regulation 2022/1854).

3 Article 6(1) of that regulation provides that 'market revenues of producers obtained from the generation of electricity from the sources referred to in Article 7(1) [namely nuclear, wind, solar and geothermal energy, hydropower without reservoir, biomass excluding biomethane, waste, lignite, crude petroleum products and peat] shall be capped to a maximum of 180 EUR per MWh of electricity produced'.

4 The principle adopted is therefore that the electricity market participants which benefit from its exceptionally high prices in view of the system for determining electricity prices on the daily wholesale market without incurring a corresponding increase in costs will have their revenue exceeding a certain ceiling taken by the States so as to enable them to finance measures targeted in favour of users. The ceiling adopted is distinctly higher than the average peak prices on the market before February 2022, the idea being that when the market participants took their

initial investment decisions, they did not expect that they would be able to receive such levels of revenue, which is therefore extraordinary revenue resulting from a windfall.

5 On 22 December 2022, the Belgian legislature, in implementation of Regulation 2022/1854, inserted into the loi du 29 avril 1999 relative à l'organisation du marché de l'électricité (Law of 29 April 1999 on the organisation of the electricity market; 'the Electricity Law') a Chapter Vb entitled 'Cap on market revenues of electricity producers', consisting of an Article 22b and an Article 22c. That amendment was introduced by the loi du 16 décembre 2022 modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et introduisant un plafond sur les recettes issues du marché des producteurs d'électricité (Law of 16 December 2022 amending the Law of 29 April 1999 on the organisation of the electricity market and introducing a cap on the market revenues of electricity producers; 'the Law of 16 December 2022').

6 The new Article 22b of the Electricity Law introduces a cap on the market revenues of electricity producers by means of a State levy amounting to 100% of the 'surplus' revenues realised between 1 August 2022 and 30 June 2023 ('the levy'). 'Surplus revenues' means revenues exceeding a cap of EUR 130 per MWh of electricity (Article 22b(4) of the Electricity Law). Article 22b(5) of that law defines market revenues as the income realised for each transaction by the debtors concerned, in exchange for the sale and delivery of electricity during the period in question. The second subparagraph of that provision provides for presumptions (according to the type of production installation) for the purpose of determining those revenues. Those presumptions are based, in essence, on the transactions which the debtor is deemed to have made (see paragraph 10 et seq. of this summary).

7 Article 22b(6) of the Electricity Law makes the CREG responsible for devising the model declaration and the format of documents to be sent by debtors of the levy for the purpose of establishing that levy. Pursuant to paragraph 7 of the same article, the CREG must propose the levy due from each debtor, each proposal then being sent to the Service public fédéral Économie (Federal Public Service for the Economy) (paragraph 8). The CREG is also responsible for auditing the declarations of the debtors (Article 22c(1) of the Electricity Law). Upon receiving the CREG's proposal, the Federal Public Service for the Economy determines the amount of the levy to be paid (Article 22c(2) of that law). If the declaration is not filed by a debtor within the prescribed deadline or in the event of an incomplete declaration, the CREG may propose a levy on an *ex officio* basis (second subparagraph of Article 22b(7) of that law).

8 Pursuant to the Electricity Law, the CREG adopted the contested decision which the applicants in the main proceedings, namely companies active in the electricity production and supply sector and business federations in the sector, are requesting the referring court to annul, in particular on the ground that that decision is not in conformity with Regulation 2022/1854.

The essential arguments of the parties in the main proceedings and the reasoning of the referring court

Use of presumptions for the purpose of determining revenue

9 The applicants in the main proceedings criticise the use of presumptions for the purpose of determining the market revenues of electricity producers. The contested decision adopts, at the level of documents/information to be sent in accordance with the model declaration that it establishes, the presumptions established in the second subparagraph of Article 22b(5) of the Electricity Law. Accordingly, the user, when declaring its revenue on the platform provided for that purpose by the CREG, must 'select the appropriate presumption(s) from a drop-down menu […]' (paragraph 83 of the contested decision).

10 The first and second presumptions (provided for in points 1 and 2 of the second subparagraph of Article 2b(5) of the Electricity Law) apply respectively to the Doel 3 and 4 and Tihange 2 and 3 nuclear power stations, and the Tihange 1 nuclear power station. They are irrebuttable.

11 The third presumption (point 3 of the second subparagraph of Article 2b(5) of the Electricity Law) applies to installations that are not referred to in the first two presumptions and whose production is covered by a power purchase agreement.

12 The fourth presumption (point 4 of the second subparagraph of Article 2b(5) of the Electricity Law) applies to installations that are not referred to in the first three presumptions and that benefit from a production support scheme (unless that scheme provides that the amount of support does not depend upon the evolution of the electricity market price).

13 The fifth presumption (point 5 of the second subparagraph of Article 2b(5) of the Electricity Law) applies to installations that are not referred to in the first four presumptions.

14 The first to fifth presumptions are based, in essence, on the fiction that the electricity is deemed to have been sold on an electricity exchange platform on a daily basis at the electricity price on each of those days if the electricity is sold on a fixed-term basis, and on an hourly basis if the electricity is sold on the one-day market.

15 The third to fifth presumptions are rebuttable if the debtor can provide the evidence that the market revenues are different from those determined under those presumptions as well as a justification for a different sales strategy from the one envisaged in the presumption that it intends to rebut (point 6 of the second subparagraph of Article 22b(5) of the Electricity Law and paragraph 142 of the contested decision). However, rebutting that presumption is administratively very cumbersome, in so far as it requires the debtor to provide evidence of its actual market revenues 'for its entire production park', which therefore covers the

installations subject to the levy system as well as the other installations (for example, gas and coal technologies).

16 Moreover, new, irrebuttable presumptions are applied to the rebuttable nature of those presumptions.

17 First, under point 6(a) of the second subparagraph of Article 22b(5), intra-group sales 'shall be deemed to have been concluded for the purposes of applying [that] article on the basis of a price [corresponding to the] day market price of the transaction for the delivery period concerned by the transaction, as published by an energy block exchange platform operating in Belgium'. However, an intra-group transaction can take place at a lower cost than a market price (lack of margin and/or limitation of costs linked to production and consumption on a shared site), or depend on a market price not published in Belgium.

18 Second, according to point (b) of that provision, 'any volume of electricity produced and sold, but not sold on a fixed-term basis, shall be deemed to be sold at the market reference price' defined in Article 2, point 40, of the Electricity Law as a daily market price (and hence very sensitive to price fluctuations which may result in the ceiling being exceeded more frequently and, accordingly, in a higher levy). However, a volume of electricity not sold on a fixed-term basis may have been sold on a contractual basis without reference to a market or to a daily market.

19 Third, point (d) of that provision provides that 'the volume of electricity sold on a one-day market shall be deemed to have been the subject of a transaction for each delivery period of one hour'. That presumption may lead to unrealised revenues being taken into account (see paragraph 21 of this summary).

20 In view of those three presumptions applicable to the rebuttal of the third to fifth presumptions mentioned above, the applicants consider that the whole system is governed by presumptions and that it does not therefore allow revenues actually obtained to be taken into account.

21 Therefore, according to them, that system results in fictitious revenues being taken into account without the electricity producers being able to prove their actual revenues, since those presumptions are ultimately irrebuttable. Thus, the presumptions would give rise to a levy where the ceiling is exceeded on one day or one hour of the period, even though the price actually received is a lower average price than the ceiling or a fixed price lower than the ceiling. The real aim of that system is to increase the tax regardless of the revenues actually realised.

22 However, they submit that the cap established by Regulation 2022/1854 relates to the revenues actually obtained by electricity producers and is applicable per transaction. In accordance with the mandatory nature and direct effect of that regulation and the principles of the primacy and effectiveness of EU law, the CREG was obliged to apply that regulation and had to disapply the national provisions (in this case, the presumptions) contrary to the rules of EU law.

23 According to the CREG, the objective of Regulation 2022/1854 is to establish a mandatory maximum ceiling for electricity market revenues, but without harmonisation: the Member States have therefore retained the power to adopt different measures, which they have done, since the measures adopted vary considerably from one Member State to another as regards, in particular, the level of the cap and the application periods.

24 Moreover, recital 37 of Regulation 2022/1854 expressly provides that the Member States have the possibility to use reasonable estimates for the calculation of the cap on market revenues.

25 That is what the legislature did when having recourse to the presumptions at issue which were necessary, since it is technically impossible to precisely link each electron of electricity fed in to one transaction with one price.

26 That system does not result in fictitious revenues but provides estimates in order to establish the revenue cap, which is, in any event, much higher than what the producers could hope to obtain on the market before the energy crisis.

27 Although the CREG does not dispute that the presumptions concerning nuclear power stations are effectively irrebuttable, it maintains that those presumptions are consistent with the sales strategies previously adopted in agreements with the power stations concerned and applied for years (for the purpose of levying charges), which cannot be regarded as unreasonable.

28 The other presumptions are rebuttable under point 6 of the second subparagraph of Article 22b(5) of the Electricity Law. Although the evidence of actual revenues must be provided for the entire production park (hence, not only for the installations subject to the levy), it is a reasonable requirement intended to prevent artificial transfers of revenues between installations. That provision also serves to prevent debtors belonging to the same group from circumventing the levy by establishing an artificial transaction price which is lower than the cap (a strategy, moreover, provided for in Article 6(3) of Regulation 2022/1854). The other rules laid down in point 6 of the second subparagraph of Article 22b(5) of the Electricity Law do not amount to imposing fictitious revenues, but are intended to enable the levy to be applied per transaction.

29 The État belge (Belgian State) adds that Regulation 2022/1854 did not, itself, lay down any specific rule for calculating the amount of surplus revenues and that the Commission gave no guidance about that, contrary to what was provided for in the regulation. It is therefore for the Member States to establish such a rule, and it follows from recital 37 of that regulation that, in order to do so, they were authorised to use reasonable estimates such as the presumptions at issue.

30 The recourse to presumptions helps to alleviate the technical difficulties involved in precisely determining the price for each MWh sold and delivered during the period of application of the levy. It is also intended to alleviate the administrative burden of debtors and of public entities responsible for applying the levy.

31 The referring court, for its part, notes that, in view of the differences in the manner in which wholesale electricity markets are organised in the Member States and specific local characteristics, the Member States are assigned a role in Regulation 2022/1854 in respect of the manner in which the cap is implemented, which means that that regulation had to be the subject of national measures in each Member State.

32 The referring court also notes, in that regard, the lack of Commission guidance on the implementation of the mandatory cap, which was, however, provided for in Article 6(5) of Regulation 2022/1854.

33 It nevertheless finds that the system introduced by the Belgian legislature in Article 22b of the Electricity Law on which the contested decision bases its model declaration of revenues, which constitutes the stage prior to the setting of the levy due from each debtor, is based on a set or cascade of presumptions from which the debtor can never completely escape, with the result that it is unable to declare the revenues that it has actually obtained. The presumptions are based on theoretical sales strategies which bear no relation to the actual strategies and sales of producers, whereas the provisions of Regulation 2022/1854 appear to indicate that the calculation of surplus revenues is based on market receipts actually obtained. The referring court relies, in that regard, on the wording of the following provisions of that regulation (emphasis added by the referring court):

– Article 2(5) defines 'market revenue' as '**realised income** a producer receives in exchange for the sale and delivery of electricity in the Union, regardless of the contractual form in which such exchange takes place, including power purchase agreements and other hedging operations against fluctuations in the wholesale electricity market and excluding any support granted by Member States';

– Article 2(9) defines 'surplus revenues' as 'a positive difference **between the market revenues of producers** per MWh of electricity and the cap on market revenues of 180 EUR per MWh of electricity provided for in Article 6(1)';

– Article 6, entitled 'Mandatory cap on market revenues', provides:

> '1. **Market revenues of producers obtained** from the generation of electricity from the sources referred to in Article 7(1) shall be capped to a maximum of 180 EUR per MWh of electricity produced.
>
> 2. Member States shall ensure that the cap on market revenues targets all the market revenues of producers […]';

– Article 7, entitled 'Application of the cap on market revenues to electricity producers', provides:

> ‘The cap on **market revenues** provided for in Article 6 shall apply to the **market revenues obtained from the sale** of electricity produced from the following sources: […]’.

34 Moreover, the very philosophy of the system introduced, namely the establishment of a cap on market revenues and the possibility for the Member States of collecting revenues higher than that cap, appears to relate necessarily to revenues actually realised. The collection of unrealised revenue might appear to be a contradiction.

35 According to the referring court, this seems to be confirmed in particular by recital 30 of Regulation 2022/1854:

> ‘The cap on market revenues should be set on market revenues rather than on total generation revenues (including other potential sources of revenues such as feed-in premium), to avoid significantly impacting the initial expected profitability of a project. Regardless of the contractual form in which the trade of electricity may take place, **the cap on market revenues should apply to realised market revenues only. This is necessary to avoid harming producers who do not actually benefit from the current high electricity prices** due to having hedged their revenues against fluctuations in the wholesale electricity market. **Hence, to the extent that existing or future contractual obligations**, such as renewable power purchase agreements and other types of power purchase agreements or forward hedges, **lead to market revenues from the production of electricity up to the level of the cap on market revenues, such revenues should remain unaffected by this Regulation**. The measure introducing the cap on market revenues should therefore not deter market participants from entering into such contractual obligations.’ (emphasis added by the referring court).

36 That court points out that recital 37 states, on the other hand, that:

> ‘In order to ensure an effective enforcement of the cap on market revenues, the producers, intermediaries and relevant market participants should provide the necessary data to the competent authorities of Member States and, where appropriate, to the system operators and nominated electricity market operators. **In view of the large number of individual transactions for which competent authorities of Member States have to ensure the enforcement of the cap on market revenues, those authorities should have the possibility to use reasonable estimates for the calculation of the cap on market revenues**.’ (emphasis added by the referring court).

37 Besides the fact that the referring court does not see how a recital may override the provisions of a regulation, it is still not convinced that the possibility mentioned of allowing the Member States to use estimates authorises them to provide for a system based solely on irrebuttable presumptions or on partly rebuttable presumptions in a manner which allows (irrebuttable) elements

theoretically predetermined by the Member States to remain, regardless of the revenues actually obtained.

38 As to the arguments put forward by the CREG and the Belgian State regarding technical difficulties and alleviation of the administrative burden of debtors, the referring court considers that, although they may justify the use of presumptions (or rather estimates), they cannot explain the irrebuttable nature of those presumptions and debtors should be authorised to document their real sales strategies and their actual revenues, in any event where a link can be established between technical installations and sales conditions.

39 The referring court also notes that it is not in any way apparent from the Commission's report that all the Member States have adopted a system based on presumptions, Belgium appearing to be relatively alone in making that choice.

40 The system of presumptions for the purpose of theoretically determining revenues used as a basis for calculating the levy, as introduced by Article 22b of the Electricity Law, on which the contested decision is based, raises the question of how to interpret Articles 6, 7 and 8, read in conjunction with Article 2(5) and (9) of Regulation 2022/1854, in order to establish whether those provisions authorise such a system. The referring court therefore considers it necessary, in order to deliver its judgment, to seek a ruling from the Court on that point.

The period covered by the contested decision

41 Some applicants rely on the illegality of the contested decision inasmuch as it establishes a model declaration and the format of documents to be submitted 'for the period from 1 August to 31 December 2022 inclusive', whereas, under Article 22(2)(c), Regulation 2022/1854 imposes a cap on revenues only from 1 December 2022 (unlike the proposal for a regulation which allowed Member States to provide for early application).

42 They claim that early application of the cap constitutes an infringement of the general EU law principles of legal certainty and legitimate expectations. Such early application has, moreover, considerable practical consequences, since the month of August 2022 was the month when electricity prices were at their highest.

43 They add that the legislature did not state why it intended to give early effect to Regulation 2022/1854.

44 The CREG contends that, in the area of economic policy, the European Union's intervention (in this case, that of the Council under Article 122(1) TFEU in the event of difficulties in the supply of certain products, notably in the area of energy) is limited to coordination of economic policies which leaves intact the sovereign power of Members States in the field of taxation, with the result that the Belgian national legislature could intervene in that field by adopting an 'additional' measure by virtue of its fiscal autonomy.

45 Moreover, Regulation 2022/1854 does not, itself, bring about uniform taxation of surplus revenues, but is limited to coordinating the reactions of Member States, which continue to enjoy a broad discretion to make an effective response to the situation, in view of the specific characteristics of their national energy markets.

46 The Belgian State submits that that regulation did not prohibit Belgium from adopting tax measures applicable to a period before 1 December 2022, in this case, the period beginning on 1 August 2022.

47 The legitimacy of Belgium's exercise of its own fiscal powers in respect of that period is consistent with the principles of subsidiarity and proportionality.

48 The Belgian State also refers to Article 8(1) of Regulation 2022/1854, under which Member States may 'maintain or introduce measures that further limit the market revenues of producers generating electricity from the sources listed in Article 7(1), including the possibility to differentiate between technologies, as well as the market revenues of other market participants, including those active in electricity trading', and hence also extend the cap to a period earlier than that provided for in that regulation.

49 The fact that the possibility of voluntary early application of that regulation provided for in the proposal for a regulation was not retained in the final text may be explained by the redundancy of such an express provision and does not constitute evidence that the EU legislature intended to prohibit earlier application of the revenue cap system.

50 The referring court finds that the period referred to in the contested decision follows from Article 22b(1) of the Electricity Law, which provides that 'this article establishes a cap on revenues […] realised between 1 August 2022 and 30 June 2023 […]' and that the preamble to that law states that it 'ensures the partial implementation of […] Regulation [2022/1854]', since the 'partial' nature of the implementation is apparent from the fact that the Law of 16 December 2022 is only intended to ensure the implementation of Regulation 2022/1854 as regards electricity (Chapter II of that regulation), and not as regards petroleum, gas and coal (Chapter III of that regulation).

51 The referring court notes that the Belgian legislature did not state the reason why it intended to set the date of entry into force of the levy on a date other than that provided for in Regulation 2022/1854, and that the argument put forward by the CREG and the Belgian State that the levy system is hybrid in nature (national measure from 1 August to 30 November 2022, followed by implementation of Regulation 2022/1854 from 1 December 2022) is also not apparent from an examination of the *travaux préparatoires*.

52 According to the referring court, Article 22(2) of the regulation which, by establishing the date of entry into force of the cap on surplus revenues as 1 December 2022, ensures coordination between the Member States, may preclude national measures implementing the system from an earlier date.

53 That court refers in that regard to recital 11 of that regulation, which states that 'uncoordinated caps on market revenues from electricity […] may lead to significant distortions between generators in the Union'. It also refers to the principles of the primacy and effectiveness of EU law and to the principle of sincere cooperation between the European Union and the Member States.

54 As regards Article 8(1)(a) of Regulation 2022/1854, it is not clear to the referring court whether the possibility available to the Member States of 'maintain[ing] or introduc[ing] measures that further limit the market revenues of producers generating electricity' includes that of implementing a cap system before the entry into force of that regulation, precisely because the provisions of that regulation relating to the cap (including Article 8 thereof) apply only from 1 December 2022 to 30 June 2023.

55 In those circumstances, the referring court considers it necessary to request a ruling from the Court on the interpretation of Articles 6, 7, 8 and 22 of Regulation 2022/1854, together with the principles of the primacy and effectiveness of EU law and the principle of sincere cooperation, in order to determine whether those provisions preclude national measures providing for the implementation of a cap on the surplus revenues of electricity producers from a date earlier than the date provided for in that regulation.

Questions referred for a preliminary ruling

(1) Must Articles 6, 7 and 8 of Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, read in conjunction with Article 2(5) and (9) thereof, in the light of its recitals as a whole, and in conjunction with, in particular, Article 288 TFEU and Article 6 TEU, be interpreted as precluding the application of national measures, such as those contained in Article 22b of the Electricity Law, and in particular the second subparagraph of paragraph 5 thereof, which provide that the cap laid down in Article 6 of the regulation is to be reflected in the form of a levy on surplus revenues of electricity producers, where the surplus nature of the revenues in respect of the cap set is established on the basis of market revenues determined, for certain installations, on the basis of irrebuttable presumptions calculating theoretical revenues (see points 1 and 2 of the second subparagraph of Article 22b(5) of the Electricity Law), preventing the debtors of the levy from declaring and being assessed on the basis of their actual revenues?

(2) Must Articles 6, 7 and 8 of Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, read in conjunction with Article 2(5) and (9) thereof, in the light of its recitals as a whole, and in conjunction with, in particular, Article 288 TFEU and Article 6 TEU and with the principle of proportionality, be interpreted as precluding the application of national measures, such as those contained in

Article 22b of the Electricity Law, in particular the second subparagraph of paragraph 5 thereof, which provide that the cap laid down in Article 6 of the regulation is to be reflected in the form of a levy on surplus revenues of electricity producers, where the surplus nature of the revenues in respect of the cap set is established on the basis of market revenues determined, for certain installations (see points 3, 4, 5 and 6 of the second subparagraph of Article 22b(5) of the Electricity Law), on the basis of presumptions presented as rebuttable but which can be rebutted only, first, by the provision of evidence of their actual revenues from all their installations, including installations not coming within the scope of the regulation, and, second, by the continued recourse to certain presumptions, thereby preventing debtors of the levy from declaring and being assessed on the basis of their actual revenues?

(3) Must Articles 6, 7, 8 and 22 of Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, read in conjunction with the principles of the primacy and effectiveness of EU law and the principle of sincere cooperation (Article 4(3) TEU), with, in particular, Article 288 TFEU, and in the light of its recitals, be interpreted as precluding the application of national measures taken after the entry into force of that regulation, such as Article 22b(1) of the Electricity Law, inserted by the Law of 16 December 2022, and providing for the implementation of the system applying a cap on electricity producers' market revenues from a date earlier than 1 December 2022, such as the date of 1 August 2022?

Request for an expedited procedure

56 Since, in its examination of the applications submitted to it, the referring court is sitting, in accordance with Article 29a of the Electricity Law, in summary proceedings, it requests an expedited procedure, in accordance with Article 105 of the Rules of Procedure of the Court of Justice.