Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 19 September 2019[1]

Case C-523/18

Engie Cartagena S.L.
v
Ministerio para la Transición Ecológica,
joined parties:
Endesa Generación SA,
EDP España SAU,
Bizkaia Energía SL,
Iberdrola Generación SAU,
Tarragona Power SL,
Bahía de Bizkaia Electricidad SL,
Viesgo Generación SL

(Request for a preliminary ruling from the Audiencia Nacional (National High Court, Spain))

(Reference for a preliminary ruling — Common rules for the internal market in electricity — Directive 2003/54 — Article 3(2) — Directive 2009/72 — Article 3(2) — Applicability — Concept of 'public service obligation')

1. This request for a preliminary ruling concerns the interpretation of Article 3(2) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37) and Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

2. This request was made in the context of a dispute between Engie Cartagena S.L. ('the applicant') and the Ministerio para la Transición Ecológica (Ministry for Ecological Transition, Spain) concerning the legality of the contribution that electricity companies are required to make to finance a national action programme on energy saving and efficiency.

3. This request for a preliminary ruling gives the Court the opportunity to clarify the definition of the concept of 'public service obligation' (PSO) as laid down in Article 3(2) of both Directive 2003/54 and Directive 2009/72. It may, however, be convenient first to lay down the relevant EU legislation.

1 Original language: English.

I. Legal context

A. EU law

1. Directive 2003/54

4. Article 3 of Directive 2003/54, headed 'Public service obligations and customer protection', provided in paragraph 2:

'Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non- discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system.'

2. Directive 2009/72

5. Directive 2003/54 was repealed by Directive 2009/72. According to Article 48 of Directive 2009/72, that repeal took effect on 3 March 2011 and references to the repealed directive are to be read as references to Directive 2009/72.

6. Article 3 of Directive 2009/72 provides:

'1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the [EU] to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

…

6. Where financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 are provided, this shall be done in a non-discriminatory and transparent way.

…

14. Member States may decide not to apply the provisions of Articles 7, 8, 32 and/or 34 insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the [EU]. The interests of the [EU] include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

…'

B. National law

7. Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico (Royal Decree-Law 14/2010 of 23 December laying down urgent measures for correction of the tariff deficit in the electricity sector) (BOE No 312 of 24 December 2010, p. 106386) is part of a package of measures to combat the 'tariff deficit', broadly understood as the misalignment between the costs of the electricity system and the revenue received from electricity prices (in their various legal names) regulated by the Kingdom of Spain.[2] In order to reduce this deficit, Royal Decree-Law 14/2010 temporarily places, for the years 2011, 2012 and 2013, the financing of energy saving and energy efficiency plans at the expense of certain companies designated in the third additional provision.

8. The recitals of Royal Decree-Law 14/2010 state that:

'Secondly, in order to reduce the costs attributable to the tariff, it is expected that the producing companies under the ordinary regime will finance the 2008-2012 Action Plan, adopted by decision of the Council of Ministers on 8 July 2005 which implements the measures provided for in the document "Strategy for Energy Savings and Efficiency in Spain for the period 2004-2012". Moreover, the percentages of each company's contribution to its financing are fixed, the provisions of the Ley de Presupuestos Generales del Estado de 2011 [General State Budget Act for 2011] being amended accordingly.'

2 Of the measures adopted by the legislature to reduce the deficit, the following are the most important: (i) the regulation of costs attributable to the system and of payments by those involved in that system; (ii) the approval of charges and the regulated tariff; (iii) the levying of financial, fiscal and non-fiscal contributions; and (iv) the assumption of certain costs by the general State budget.

9. According to the third additional provision of Royal Decree-Law 14/2010 entitled 'Financing of energy saving and efficiency programs for the years 2011, 2012 and 2013':

'1. The amounts payable from the electricity system for the purpose of funding the 2008-2012 Action Plan, approved [by] Acuerdo de Consejo de Ministros de 8 de julio de 2005, por el que se concretan las medidas del documento de "Estrategia de ahorro y eficiencia energética en España 2004-2012" aprobado por Acuerdo de Consejo de Ministros de 28 de noviembre de 2003 (Decision of the Council of Ministers of 8 July 2005 giving concrete expression to the measures referred to in the document entitled "Savings and Energy Efficiency Strategy in Spain, 2004-2012", approved by Decision of the Council of Ministers of 28 November 2003), forecast for the years 2011 and 2012 as EUR 270 million and EUR 250 million respectively, shall be financed through a contribution from each generating undertaking in the proportions set out in the following table:

Undertaking	Percentage
Endesa Generación, SA	34.66
Iberdrola Generación, SA	32.71
GAS Natural SDG, SA	16.37
Hidroeléctrica del Cantábrico, SA	4.38
E.ON Generación, SL	2.96
AES Cartagena, SRL	2.07
Bizkaia Energía, SL	1.42
Castelnou Energía, SL	1.58
Nueva Generadora del Sur, SA	1.62
Bahía de Bizkaia Electricidad, SL	1.42
Tarragona Power, SL	0.81
Total	100.00

2. The amounts payable from the electricity system for the Plan approved by decision of the Council of Ministers, on the basis referred to in paragraph 1, shall be financed in 2013 by contributions from the producing companies, in accordance with the percentages provided for in paragraph 1, up to a maximum amount of EUR 150 million.'

II. Facts

10. The 2008-2012 Action Plan, approved by Decision of the Council of Ministers of 8 July 2005 giving concrete expression to the measures referred to in the document entitled 'Savings and Energy Efficiency Strategy in Spain, 2004-2012' ('the Action Plan') was based on the promotion of savings and energy efficiency as a basis for social welfare, sustainable development and industrial competitiveness. Its strategic objectives were, inter alia, the inclusion of savings and energy efficiency in all national strategies, particularly the Spanish climate change strategy; the promotion of competition in the market under the guiding principle of savings and energy efficiency; and the consolidation of the Kingdom of Spain's position at the forefront of savings and energy efficiency.

11. At first, the costs generated by the Action Plan were covered by the access charges for natural gas and electricity. However, Royal Decree-Law 14/2010 modified that situation by providing that the Action Plan was to be funded exclusively by electricity-generating undertakings. The third additional provision of Royal Decree-Law 14/2010 lists the 11 undertakings liable to contribute and their share as a percentage.

12. Orden IET/75/2014, de 27 de enero, por la que se regulan las transferencias de fondos, con cargo a las empresas productoras de energía eléctrica, de la cuenta específica de la Comisión Nacional de los Mercados y la Competencia al Instituto para la Diversificación y Ahorro de la Energía, en el año 2013, para la ejecución de las medidas del Plan de Acción de Ahorro y Eficiencia Energética 2011-2020, y los criterios para la ejecución de las medidas contempladas en dicho plan (Ministerial Order IET/75/2014 (of the Ministry of Industry, Energy and Tourism) of 27 January, governing transfers of funds, payable by electricity-generating undertakings, from the specific account of the National Markets and Competition Commission to the Institute for Diversification and Energy Saving in 2013 for the implementation of measures under the Savings and Energy Efficiency Action Plan 2011-2020, and criteria for the implementation of the measures set out in that plan) (BOE No 25 of 29 January 2014, p. 5875; 'the contested order') was adopted on the basis of the third additional provision of Royal Decree-Law 14/2010.

13. Article 2 of the contested order states that the amount earmarked for the Action Plan for 2013 is EUR 150 000 000. Engie Cartagena SL, which was mentioned under its former name AES Cartagena, SRL, was to pay EUR 3 105 000 since, under the third additional provision of Royal Decree-Law 14/2010, it was responsible for covering 2.07% of the total cost.

14. On 31 January 2014, the applicant (then named GDF Suez Cartagena Energía SL) brought an administrative action against the contested order before the Audiencia Nacional (National High Court, Spain). In its application, the applicant sought the annulment of the order and recognition of the right to recover the sums paid under that order by way of compensation. In particular, Engie Cartagena disputed the percentage (2.07%) that it had to pay for the financing of the Action Plan, which was implemented by Royal Decree-Law 14/2010.

III. The request for a preliminary ruling

15. The applicant argued in particular that the criteria and principles established by the judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637), which govern the imposition of public service obligations, were not fulfilled by the national legislation.

16. The referring court explains that the validity of the contested order which is at issue in the main proceedings, depends on the conformity of the Royal Decree-Law 14/2010 with Union law and, in practice, on whether that Royal Decree-Law respects the principles laid down in Article 3(2) of Directive 2003/54 and in Article 3(2) of Directive 2009/72.

17. In this regard, the referring court considers that, since the mandatory contribution referred to in Royal Decree-Law 14/2010 aims at financing an efficiency plan, the objective and direct purpose of which is to take measures related to environmental protection, including energy efficiency and climate protection, that mandatory contribution is to be considered as constituting a PSO.

18. However, this court has doubts about the compatibility of the third additional provision of Royal Decree-Law 14/2010 with EU law, since the mandatory contribution laid down in that provision is not defined in a transparent, non-discriminatory and verifiable manner, and thereby does not guarantee equality of access for companies to consumers, as required by Article 3(2) of Directive 2003/54 and Article 3(2) of Directive 2009/72. In particular, the national legislation does not contain any indication

as to why only some undertakings must contribute to the financing of the Action Plan, or any information about the criterion which was applied for determining the contributors' percentages of contributions. [3]

19. In that context, the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

'1. Does the statutory provision laid down in the third additional provision of Real Decreto-Ley 14/2010 Financiación de planes de ahorro y eficiencia energética para los años 2011, 2012 y 2013 (Royal Decree-Law 14/2010 on the funding of savings and efficiency plans for the years 2011, 2012 and 2013) constitute a public service obligation for the purposes of Article 3(2) of Directives 2003/54/EC and 2009/72/EC [?]

2. If that provision does actually constitute a public service obligation, is that obligation clearly defined, transparent, non-discriminatory and verifiable?'

IV. Analysis

20. The first question raised concerns the interpretation of Article 3(2) of Directive 2003/54 and of Article 3(2) of Directive 2009/72.

21. From the outset, it must be noted that Article 3(2) of Directive 2009/72 reproduces in similar terms the provisions of Article 3(2) of Directive 2003/54. [4] For reasons of convenience, therefore, I propose to confine my analysis to Article 3(2) of Directive 2009/72. This analysis applies, nevertheless to both provisions.

22. By its first question, the referring court asks, in substance, whether Article 3(2) of Directive 2009/72 must be interpreted as meaning that an obligation to finance the various measures of an action plan, such as the one referred to in the third additional provision of Royal Decree-Law 14/2010, may constitute a PSO within the meaning of that article.

23. In this regard, it should be recalled that Article 3(2) of Directive 2009/72 provides that 'having full regard to the relevant provisions of the Treaty, in particular Article 86 [now Article 106 TFEU] thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection'. [5]

24. Although neither Directive 2003/54 nor Directive 2009/72 define the concept of a PSO, it is quite clear that the definition of this concept is not a matter of national law.

3 In its judgment of 15 November 2016 (167/2016), the Tribunal Constitucional (Constitutional Court, Spain) ruled that the third additional provision of the Royal Decree-Law 14/2010 does not breach the principle of non-discrimination.

4 The main differences between the two provisions are that, first, Directive 2009/72, unlike Directive 2003/54, expressly states that the objective of environmental protection, which a PSO may pursue, includes measures to improve energy efficiency, energy from renewable resources and climate protection and, secondly, that long-term planning that States are entitled to introduce, may aim to fulfil goals for energy from renewable resources. These differences are not relevant to answer the questions referred to the Court.

5 This list of modes of action is not exhaustive. See, by analogy, judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637, paragraph 50), and Opinion of Advocate General Mengozzi in *ANODE* (C-121/15, EU:C:2016:248, point 52).

25. Admittedly, recital 50 of Directive 2009/72 states that 'the public service requirements should be defined at national level, taking into account national circumstances; [EU] law should, however, be respected by the Member States'. However, such an indication only implies that it is for Member States to decide whether or not to impose a PSO on certain undertakings, provided that such obligations are compatible with Union law.[6] In the absence of express reference to the law of the Member States for the purpose of determining the meaning of that concept, the latter must necessarily be given an autonomous and uniform interpretation throughout the European Union.[7]

26. According to the Court's case-law interpreting Article 3(2), a measure must satisfy two conditions in order to qualify as a PSO, namely, first, to be directed towards achieving an objective of general economic interest[8] and, secondly, to have the effect of requiring the undertakings concerned to adopt specific conduct which they would not have adopted in a situation of open competition.[9]

27. In the main proceedings, the applicant claims that as soon as a measure satisfies these two conditions related to the purpose and the effect of that measure, it is to be qualified as a PSO. It contends that since an obligation to finance an action plan has the effect of requiring the recipients of that obligation to adopt specific conduct, such an obligation should be considered as forming a PSO, insofar as it underpins the achievement of a service of general economic interest.

28. For my part, I do not share this view. Indeed, I believe that in order to be considered a PSO within the meaning of Article 3(2) of Directive 2009/72, a measure does not only need to fulfil the two above-mentioned conditions, but also to oblige undertakings to deliver or provide specific services or goods as part of that obligation. A simple obligation to pay money to the State or a state entity by way of tax, charge or para-fiscal measure cannot in itself be regarded as a PSO in this sense.[10]

29. In my view, this results from the usual meaning given to the concept of PSO under EU law, as well as from the wording, the context and the objectives pursued by Article 3(2) of Directive 2009/72.

30. With regard to the usual meaning given to the concept of PSO under EU law, neither the TFEU nor the TEU refer to this concept. The Treaties do refer, however, to 'services of general economic interest', the achievement of which, as pointed out above, should be the objective of any PSO.[11]

6 Judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637, paragraph 44).

7 See, for example, judgment of 6 March 2008, *Nordania Finans and BG Factoring* (C-98/07, EU:C:2008:144, paragraph 17). In the present case, the need for a uniform application is compounded by the fact that Article 3(14) of Directive 2009/72 (formerly Article 3(8) in Directive 2003/54) provides that the qualification of a national measure as a PSO in the meaning of Article 3(2) of that directive allows that measure to derogate from certain provisions of that directive. The derogations concern the authorisation procedure for new capacity (Article 7), the tendering procedure for new capacity (Article 8), third-party access to the transmission and distribution systems (Article 32) and the supply of customers through a direct line (Article 34).

8 See judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637, paragraph 36); see, by analogy, with regard to Directive 2003/55/EC, judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 22) and, with regard to Directive 2003/54/EC, judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 42).

9 See, to that effect, judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637, paragraph 30) and, by analogy, judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 42). The Court held, with regard to Directive 2009/73, which mirrors Directive 2009/72 for the gas sector, that if Member States are required, pursuant to Article 3(9) of Directive 2003/54 (similar to Article 3(15) in Directive 2009/72), to inform the Commission of all measures adopted to fulfil public service obligations, the absence of notification is not sufficient in itself to demonstrate that the legislation at issue does not constitute a PSO. Judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 39).

10 In this respect, contrary to the argument put forward by the applicant, the fact that the *ANODE* judgment does not directly refer to this condition is irrelevant. Indeed, when the Court gives a preliminary ruling, it does so in response to the questions raised and not in order to set out, in an exhaustive manner, the legal regime of the measures in question. Since in that case the Court had not been expressly asked about the definition of the concept of PSO, nor even whether a measure such as that at issue in that case was a PSO, the Court was not required to specify, in an exhaustive manner, the conditions for qualifying a measure as a PSO.

11 See also Articles 14 and 93 TFEU, Article 36 of the Charter of Fundamental Rights of the European Union, as well as Protocol (No 26) on services of general interest.

31. In particular, Article 106 TFEU (formerly Article 90 of the EEC Treaty and then Article 86 of the EC Treaty) provides that undertakings entrusted with the operation of such services are subject to the rules contained in the Treaties only to the extent that the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks they are assigned. [12]

32. In this respect, the Court held that, on the one hand, this provision is designed to reconcile the Member States' interest in using certain undertakings as an *instrument of economic or social policy* with the Union's interest in ensuring compliance with the rules on competition and preservation of the unity of the single market. [13]

33. On the other hand, in order for the derogation to the application of the rules of the Treaty set out in Article 106(2) TFEU to take effect, the undertakings in question must have been entrusted by the public authorities with the *operation* of a service of general economic interest and it must be shown that the application of the rules of the Treaty obstructs the *performance of the particular tasks* assigned to those undertakings and that the interests of the Union are not affected. [14]

34. Both the objective and content of Article 106 TFEU therefore support the idea that the achievement of a service of general economic interest may require the imposition of certain obligations on undertakings in order to compel them to perform tasks which serve the general economic interest.

35. As it happens, there appears to be a broad agreement that the term 'services of general economic interest' refers to services of an economic nature which the Member States or the EU subject to specific public service obligations by virtue of a general interest criterion. These services are part of 'services of general economic interest', sometimes referred to as 'public service', although this last term may sometimes refer to the fact that a service is offered to the general public or that a service has been assigned a specific role in the public interest or to the ownership or status of the entity providing the service. [15]

36. The expression 'public service' is used in the TFEU in Article 93 (formerly Article 77 of the EEC Treaty and later in Article 73 of the EC Treaty) concerning transport. Indeed, this provision mentions that 'aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of *certain obligations inherent in the concept of a public service*'. [16]

37. It is in the context of the application of this provision that the concept of PSO has emerged. [17]

12 In essence, this provision marks the recognition that 'sometimes markets fail to deliver socially desirable objectives and, as a result, services are underprovided by the market [and] … in such cases public sector intervention may be necessary'. Commission's Report of 17 October 2001 to the Laeken European Council on services of general interest (COM (2001) 598 final, paragraph 3).

13 See judgments of 21 September 1999, *Albany* (C-67/96, EU:C:1999:430, paragraph 103); of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 28); and of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 41).

14 Judgment of 10 December 1991, *Merci convenzionali Porto di Genova* (C-179/90, EU:C:1991:464, paragraph 26).

15 Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, White Paper on services of general interest, COM(2004) 374 final of 12 May 2004, Annex 1. The term 'services of general economic interest' covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

16 Emphasis added.

17 It seems that the semantic shift between 'obligations inherent in the concept of a public service' and PSO is the result of the jargon used by some experts in this sector, who were not lawyers, but engineers or economists. See Ziani, S., *Du service public à l'obligation de service public*, LGDJ, 2015, p. 104.

38. First, in its Decision of 13 May 1965, the Council referred to the existence of 'obligations inherent in the concept of public service imposed on transport undertakings'.[18] Then, in Regulation (EEC) No 1191/69, the Council used the shorter expression 'PSO' and gave the first definition of this notion in Article 2(1) of the said regulation, namely 'obligations which [an] undertaking …, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions'.[19]

39. In this respect, it should be noted that the examples of PSOs given in Article 2(2) of that regulation — namely, the obligation to operate, the obligation to carry and tariff obligations — all concern the performance of a specific service.

40. In addition, Article 7 of Regulation No 1191/69 stipulates that the decision to maintain a PSO may be subject to 'conditions designed to *improve the yield of the operations affected by the obligation in question*' and that the decision to terminate a PSO 'may provide for the introduction of *an alternative service*'.[20]

41. In view of these clarifications, it is evident that, within the meaning of Regulation No 1191/69, a PSO referred solely to obligations to provide a particular service[21].

42. Since Regulation No 1191/69 served as a model for all network services and then for all public services, the meaning given to the concept of PSO under Regulation No 1191/69, has become the one which is commonly accepted under EU Law.[22] When Directive 2009/72 was adopted, the most recent definition of the concept of PSO under EU law was the one mentioned in Regulation (EC) No 1370/2007,[23] which remains fairly close to the definition given to that concept in Regulation No 1191/69.[24] Indeed, Article 2(e) of Regulation No 1370/2007 defines PSO as 'a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward'.

43. Besides, several Commission documents confirm that this understanding is the one prevailing in general. For example, in its 2004 White Paper on services of general interest,[25] the Commission points out that the concept of PSO refers 'to specific requirements that are imposed by public authorities on the provider of the *service* in order to ensure that certain public interest objectives are met …'.[26] In its

18 Council Decision 65/271/CEE on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition, 1965, Series I, p. 67).

19 Regulation of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition, 1969(I), Series I, p. 276). According to the Court's case-law, the purpose of Regulation No 1191/69 was to establish a system which the Member States must comply with when they consider imposing a PSO on undertakings in the land transport sector; see judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 53).

20 Emphasis added. Moreover, one may note that Article 6(2) of that regulation specifies that the 'decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom'. Since it would be illogical to require Member States to provide for compensation in the event of the termination of a financing obligation, it can be inferred that, for this reason too, the concept of PSO does not cover financing obligations.

21 The notion of 'service' should be understood here in a non-legal context and as such refers to offering a service or goods under certain terms and conditions different from those of the market.

22 See, for example, Article 2(o) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8) and Article 2(4) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

23 Regulation of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

24 Nor does this definition seem to have evolved subsequently. See for example, Article 2(14) of Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ 2017 L 57, p. 1).

25 Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, White Paper on services of general interest, COM(2004) 374 final of 12 May 2004, Annex 1.

26 Emphasis added. COM(2004) 374 final of 12 May 2004, p. 23.

document titled 'A Quality Framework for Services of General Economic Interest in Europe', published in 2011, the Commission defines the concept of 'Service of general interest' as '*services* that public authorities of the Member States classify as being of general interest and, therefore, *subject to specific public service obligations* (PSO)'.[27] Similarly, in its 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest', the Commission explains that PSO 'is imposed … on the basis of a general interest criterion which ensures that the *service* is provided under conditions allowing it to fulfil its mission'.[28]

44. Last, but not least, in the document entitled 'Note of DG Energy & transport on Directives 2003/54/EC and 2003/55/EC on the Internal Market in Electricity and Natural Gas', which expressly concerns the sector at issue in the main proceedings, the Commission points out, on page 2, under the heading 'Reminder of the legal definition of PSOs', that the concept of PSO the Commission applied in the energy sector has the same meaning as under Article 2 of Council Regulation No 1191/69, Article 86(2) EC (now Article 106(2) TFEU) and in the case-law of this Court.

45. Although none of the documents from the Commission cited above have the force of law, it may nonetheless be observed that, when Commission documents refer to PSOs, they always do so to designate the supply of specific services or goods.[29]

46. In contrast, when secondary legislation and court judgments refer to the existence of financing obligations, they do not present these obligations as PSOs, but rather as compensation intended to finance PSOs assumed by some other undertakings.[30] For example, according to Article 2(g) of Regulation No 1370/2007, 'public service compensation' means any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period'. Similarly, the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*,[31] far from recognising a broad interpretation of the concept of PSO, refers to financial obligations as not falling under the category of PSO, but rather as compensation for PSO. It is necessarily implicit in all of this that a PSO requires the operator to do or to provide something for which it is sometimes compensated, thereby once again underscoring the fact that a mere obligation to pay a fiscal charge (however described) is in itself not a PSO.

47. In view of the above, it is clear that, as commonly understood under EU law, the notion of PSO refers to measures by which one or more undertakings are compelled to provide services or to supply goods which those undertakings would not have provided or supplied — or at least not to the same extent or under the same conditions — if they had not been required to do so by a Member State to achieve an objective of general economic interest.

48. Financing obligations are separate and distinct from PSO obligations: they constitute, among others, one way of financing the achievement of economic services of general interest. Since economic services of general interest may be carried out by a Member State itself, there may be financing obligations without a PSO having been imposed upon some undertaking or there may be PSOs which are not counterbalanced by financing obligations.

27 Emphasis added. COM(2011) 900 final of 20 December 2011, p. 3.

28 Emphasis added. SWD(2013) 53 final/2 of 29 April 2013, p 21.

29 See, for example, Article 1(18) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), or Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

30 Judgments of 22 November 2001, *Ferring* (C-53/00, EU:C:2001:627, paragraph 26); of 7 May 2009, *Antrop and Others* (C-504/07, EU:C:2009:290, paragraph 20); and, in the electricity sector, of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 80 and 86).

31 Judgment of 24 July 2003 (C-280/00, EU:C:2003:415, paragraphs 87 et seq.).

49. In respect of Article 3(2) of Directive 2009/72, neither the wording, nor the objective of that directive, nor the context support of the view that the concepts of 'PSO' and 'financing obligation' have different meanings under that provision than under the rest of EU law.

50. Concerning the wording of Article 3(2), it explicitly refers to Article 86 of the EC Treaty (now Article 106 TFEU), which shows that the EU legislature did not intend to depart from the meaning usually given to PSO under EU law.

51. As regards the objectives, it can be inferred from recital 3 of Directive 2009/72 that the objective of this directive is to achieve a fully open and competitive internal market in electricity in which all consumers can freely choose their supplier and in which all suppliers can freely supply their products. However, a priori, unlike obligations to provide a given service or to deliver particular goods, financing obligations are not likely to undermine such an objective, and even if they do, they are likely at least to do so to a much lesser extent.

52. Moreover, recital 50 of Directive 2009/72 stipulates that this directive aims to strengthen 'the public service requirements … and the common minimum standards that follow from them … to make sure that all consumers … are able to benefit from competition and fair prices' and that 'the citizens of the Union and, where Member States deem it appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard to security of supply, and reasonable prices …'. It follows that a PSO, within the meaning of Directive 2009/72, is an obligation capable of generating common minimum standards and which benefits an unidentified class of persons, even though they may not necessarily be final consumers. In contrast thereto, financing obligations do not generate common minimum standards and they also assist an identified group of beneficiaries, namely, either Member States, when they decide to provide the service of general economic interest at stake themselves, or the undertakings in charge of carrying out that service.

53. As regards the context, it should be noted that Article 3 of Directive 2009/72 is headed 'Public service obligations and customer protection'. The fact that Directive 2009/72 deals with PSOs together with consumers also tends to reinforce the idea that PSOs are obligations to provide particular goods or services, mainly, to consumers.

54. I would also note that, according to Article 3(6) of Directive 2009/72, 'where financial compensation, other forms of compensation and exclusive rights which a Member State grants for *the fulfilment of the obligations set out in paragraphs 2 and 3 are provided*, this shall be done in a non-discriminatory and transparent way'.[32] This demonstrates that a financial obligation is not in itself a PSO, but rather aims at providing a compensation to undertakings that must fulfil a PSO.

55. Finally, in the light of the specific circumstances of the case in the main proceedings, I would draw attention to the fact that Directive 2009/72 was adopted on the sole basis of Article 95 EC (now Article 114 TFEU), whose second paragraph provides that that article cannot be used for the adoption of EU tax measures. Since financing obligations, such as the one at issue in the main proceedings, which are imposed by a Member State for the purpose of covering public expenses and without any immediate benefit for the undertaking concerned, are tax measures in the meaning of EU law, Directive 2009/72 should be interpreted, except in specific situations, as not covering such obligations.[33]

32 Emphasis added.

33 See Opinion of Advocate General Hogan in *UNESA and Others* (C-105/18 to C-113/18, EU:C:2019:395, point 35). During the hearing, in the present case, the representative of the Spanish Government mentioned that, under the national legislation, the financing obligation at issue constitutes a public law patrimonial performance under Article 31 of the Spanish constitution and as such, has a fiscal nature. However, it must be borne in mind that the nature of a tax, duty or charge must be determined by the Court, under EU law, according to the objective characteristics by which it is levied, irrespective of its classification under national law. See judgment of 18 January 2017, *IRCCS — Fondazione Santa Lucia* (C-189/15, EU:C:2017:17, paragraph 29).

56. If it were considered that the concept of PSO includes such an obligation, this would mean indeed that any tax measure or State aid would also have to be analysed in the context of Article 3(2), which is plainly not the purpose of that provision.

57. In view of these considerations, I believe that under Article 3(2) of Directive 2009/72, PSO is to be understood in the meaning usually given to that concept under Union law, namely as referring to an obligation, for an undertaking, to provide a specific service (or good) under conditions (price, quantity, quality, continuity of service, etc.) that this undertaking would not have applied if it were not obliged to do so by the national legislation so that a service of general economic interest is ensured. PSOs are therefore only a way of regulating economic activities in the general interest and a method of appointing third parties to carry out these activities. [34]

58. This conclusion is fully consistent with the existing Court judgments concerning Article 3(2) of Directive 2009/72. Indeed, in *Renerga*, [35] the Court inferred the absence of a public service obligation imposed on an undertaking from the fact that the national legislation at issue did not provide for a mandatory obligation on that undertaking to produce and supply electricity from renewable energy sources. In *Achema and Others*, [36] to determine whether some subsidies should be considered as compensation for services provided by the beneficiary companies to fulfil public service obligations, the Court examined, among other elements, whether these subsidies related to the provision of services which would be provided to final consumers or operators in the electricity sector.

59. Therefore, I fully share the Commission's view that in order for a measure to be qualified as a PSO under Article 3(2) of Directive 2009/72, it is not sufficient that the measure was imposed on one or more undertakings to compel them to adopt specific conduct which is necessary to achieve the purpose of carrying out a service of general economic interest, but also that such a measure needs to constrain those undertakings to perform a specific service or to deliver a specific good under terms and conditions that are not common practice on such a market.

60. Accordingly, an obligation, such as the one at issue in the main proceedings, to finance an action plan to encourage energy saving and efficiency measures [37] cannot be regarded as constituting a PSO within the meaning of Article 3(2) of Directive 2009/72, even if the measures financed aim at carrying out a service of general economic interest. This does not mean that none of the financial obligations in question — which, in some respects at least, appear to partake of the nature of a special tax imposed on specific energy undertaking — are likely to fall under some other rules of EU law, but rather simply that they do not fall under Article 3(2) of Directive 2009/72, which is the question asked by the referring court.

61. Consequently, I propose that the first question be answered to the effect that Article 3(2) of Directive 2003/54 and Article 3(2) of Directive 2009/72 must not be interpreted as meaning that an obligation to finance the various measures of an action plan, such as the one referred to in the third additional provision of Royal Decree-Law 14/2010, constitutes a 'public service obligation' within the meaning of those provisions.

62. In the light of the answer to the first question, there is no need to answer the second question.

34 The other way of appointing third parties is the conclusion of a public service contract. A public service contract may define a PSO. See, to that effect, judgment of 10 May 2005, *Italy* v *Commission* (C-400/99, EU:C:2005:275, paragraph 65). However, the technique used is radically different.

35 Judgment of 14 November 2018 (C-238/17, EU:C:2018:905, paragraph 26).

36 Judgment of 15 May 2019 (C-706/17, EU:C:2019:407, paragraph 112).

37 In this respect, the objective of the Action Plan should not be confused with that of the third additional provision, which concerns only the decision to make the financing of this plan the responsibility of companies.

V. Conclusion

63. In the light of the foregoing considerations, I propose that the Court should answer the first question asked by the Audiencia Nacional (National High Court, Spain) as follows:

Article 3(2) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC and Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal electricity market and repealing Directive 2003/54/EC must not be interpreted as meaning that an obligation to finance the various measures of an action plan, such as the one referred to in the third additional provision of Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico (Royal Decree-Law 14/2010 of 23 December laying down urgent measures for correction of the tariff deficit in the electricity sector), constitutes a 'public service obligation' within the meaning of those provisions.