Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 October 2021 *

(Reference for a preliminary ruling – Common rules for the internal market in electricity – Directive 2009/72/EC – Article 3(2) and (6) – Imposition of public service obligations – Financing of a regulated discount for the purpose of the protection of vulnerable consumers – Requirements of transparency and non-discrimination)

In Case C-683/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 9 July 2019, received at the Court on 16 September 2019, in the proceedings

Viesgo Infraestructuras Energéticas SL, formerly E.ON España SLU,

v

Administración General del Estado,

Iberdrola SA,

Naturgy Energy Group SA, formerly Gas Natural SDG SA,

EDP España SAU, formerly Hidroeléctrica del Cantábrico SA,

CIDE Asociación de Distribuidores de Energía Eléctrica,

Endesa SA,

Agri-Energía SA,

Navarro Generación SA,

Electra del Cardener SA,

Serviliano García SA,

Energías de Benasque SL,

Candín Energía SL,

* Language of the case: Spanish.

Cooperativa Eléctrica Benéfica Catralense,

Cooperativa Valenciana,

Eléctrica Vaquer SA,

Hijos de José Bassols SA,

Electra Aduriz SA,

El Gas SA,

Estabanell y Pahisa SA,

Electra Caldense SA,

Cooperativa Popular de Fluid Electric Camprodón SCCL,

Fuciños Rivas SL,

Electra del Maestrazgo SA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, C. Lycourgos (Rapporteur), President of the Fourth Chamber, and M. Ilešič, Judge,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Viesgo Infraestructuras Energéticas SL, formerly E.ON España SLU, by N. Encinar Arroyo and G. Rubio Hernández-Sampelayo, abogados, and by M.J. Gutiérrez Aceves, procuradora,

– Iberdrola SA, by J. Giménez Cervantes, M. García, and C.A.F. Lowhagen, abogados,

– Naturgy Energy Group SA, by F. González Díaz and B. Martos Stevenson, abogados,

– EDP España SAU, by J. Expósito Blanco and J. Fernández García, abogados,

– Endesa SA, by A.J. Sánchez Rodríguez and J.J. Lavilla Rubira, abogados,

– Agri-Energía SA, Navarro Generación SA, Electra del Cardener SA, Serviliano García SA, Energías de Benasque SL, Cooperativa Eléctrica Benéfica Catralense, Cooperativa Valenciana, Eléctrica Vaquer SA, Hijos de José Bassols SA, Electra Aduriz SA, El Gas SA, Estabanell y Pahisa

SA, Electra Caldense SA, Cooperativa Popular de Fluid Electric Camprodón, SCCL, Fuciños Rivas SL and Electra del Maestrazgo SA, by I. Bartol Mir, abogada,

– the Spanish Government, by J. Ruiz Sánchez and S. Centeno Huerta, acting as Agents,

– the European Commission, by O. Beynet and M. Jáuregui Gómez, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 The request has been made in proceedings between Viesgo Infraestructuras Energéticas SL ('Viesgo'), formerly E.ON España SLU ('E.ON'), and the Administración General del Estado (General State Administration, Spain) and Spanish companies operating in the electricity sector, concerning the lawfulness of the system for financing a public service obligation relating to a reduction in the price of electricity enjoyed by certain vulnerable consumers.

Legal context

European Union law

3 According to recitals 7, 45, 50 and 53 of Directive 2009/72:

'(7) The Communication of the Commission of 10 January 2007 entitled "An Energy Policy for Europe" highlighted the importance of completing the internal market in electricity and of creating a level playing field for all electricity undertakings established in the [Union]. The Communications of the Commission of 10 January 2007 entitled "Prospects for the internal gas and electricity market" and "Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)" showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well-functioning internal market.

…

(45) … Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system. …

(50) The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. 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. 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. …

…

(53) Energy poverty is a growing problem in the [Union]. Member States which are affected and which have not yet done so should therefore develop national action plans or other appropriate frameworks to tackle energy poverty, aiming at decreasing the number of people suffering such situation. In any event, Member States should ensure the necessary energy supply for vulnerable customers. In doing so, an integrated approach, such as in the framework of social policy, could be used and measures could include social policies or energy efficiency improvements for housing. At the very least, this Directive should allow national policies in favour of vulnerable customers.'

4 Article 2 of that directive, headed 'Definitions', provided:

'For the purposes of this Directive, the following definitions apply:

…

21. "vertically integrated undertaking" means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity;

…'

5 Article 3(2), (6) and (7) of the Directive laid down:

'2. Having full regard to the relevant provisions of the [FEU Treaty], in particular Article [106] 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 [European Union] to national consumers. …

…

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.

7. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. …'

Spanish law

6 Under the heading 'Vulnerable consumers', Article 45 of Ley 24/2013 del Sector Eléctrico (Law 24/2013 on the electricity sector) of 26 December 2013, in the version applicable to the main proceedings ('Law 24/2013'), provided:

'1. Electricity consumers shall be regarded as vulnerable customers if they meet social, consumption and purchasing power characteristics to be determined. In any event, the measure is restricted to natural persons in their habitual residence.

The definition of vulnerable consumers and the requirements which they must satisfy, as well as the measures to be adopted for that group, are laid down by regulation by the government.

2. The regulated discount shall apply to vulnerable consumers who meet the social, consumption and purchasing power characteristics determined by Royal Decree of the Council of Ministers. … To that end, a threshold referring to an income indicator per member of the household is set. In any event, the measure is restricted to natural persons in their habitual residence.

3. The regulated discount shall cover the difference between the value of the voluntary price intended for low-usage consumers and a base value, referred to as "tariff of last resort", and shall be applied by the relevant reference supplier to the invoices of consumers entitled to the regulated discount.

The Ministro de Industria, de Energía y de Turismo [(Minister for Industry, Energy and Tourism)], after agreement of the Comisión Delegada del Gobierno para Asuntos Económicos [(Government Delegation for Economic Affairs)], sets the tariff of last resort.

4. The regulated discount shall be treated as a public service obligation within the meaning of Directive [2009/72], and shall be borne by the parent companies of company groups or, where applicable, by companies that simultaneously carry on electricity production, distribution and retail activities.

The apportionment percentage of the sums to be financed shall be calculated, for each company group, on the basis of the relationship between, on the one hand, the total of the annual average number of supplies connected to the distribution companies' distribution networks and the number of customers of the retailers held by the group, and, on the other hand, the total of all the annual average supply and customer values of all the company groups that are to be taken into account for the purposes of that apportionment.

That apportionment percentage shall be calculated annually by the Comisión Nacional de los Mercados y la Competencia [(National Commission on Markets and Competition)], in accordance with the procedure and conditions laid down by regulation. To that end, that commission shall publish on its internet page, in November of each year, information relating to

the previous rolling year covering the annual averages of the number of supplies connected to the distribution networks of the distribution companies and the number of customers of the retailers, together with a list of the groups of companies or, where appropriate, of the companies which satisfy the criterion laid down in the first subparagraph of this paragraph.

The abovementioned commission shall submit before 1 December of each year a proposal to fix the percentages of financing corresponding to each of the parent companies, which it is for the Minister for Industry, Energy and Tourism to approve by order published in the "*Boletín Oficial del Estado*".

In any event, the contributions that each of those companies must make shall be paid into a specific deposit account created for that purpose by the administrative body responsible for its management.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 On 18 December 2014, E.ON, the predecessor-in-law of Viesgo, brought administrative law proceedings before the Tribunal Supremo (Supreme Court, Spain) seeking annulment of Real Decreto 968/2014, por el que se desarrolla la metodología para la fijación de los porcentajes de reparto de las cantidades a financiar relativas al bono social (Royal Decree 968/2014 laying down the methodology for fixing the apportionment percentages of the sums to be financed for the regulated discount) of 21 November 2014 ('Royal Decree 968/2014').

8 E.ON claimed that the system for financing the regulated discount, provided for in Article 45(4) of Law 24/2013 and implemented by Articles 2 and 3 of Royal Decree 968/2014, was incompatible with Directive 2009/72.

9 By judgment of 24 October 2016, the Tribunal Supremo (Supreme Court) upheld the action brought by E.ON and ruled that that system for financing did not apply on the ground that it was incompatible with Article 3(2) of Directive 2009/72. That court explains that it reached its conclusion on the basis of the Court's 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). In particular, it considered that the grounds set out in that judgment, which concerns national rules on gas prices, could be fully transposed to the electricity sector, since Article 3(2) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) and Article 3(2) of Directive 2009/72 are comparable. Consequently, in accordance with the doctrine of 'acte éclairé', it decided not to refer a question to the Court for a preliminary ruling.

10 The General State Administration brought an appeal before the Tribunal Constitucional (Constitutional Court, Spain) seeking to ensure the protection of fundamental rights and freedoms (*recurso de amparo*) against that judgment.

11 On 26 March 2019, the latter upheld the appeal. Accordingly, it set aside that judgment, holding that the Tribunal Supremo (Supreme Court) had infringed the right to a trial with all the safeguards provided for in Article 24(2) of the Spanish Constitution by ruling out the application of the domestic legislation on the ground that it was incompatible with Article 3(2) of Directive 2009/72 without first requesting a preliminary ruling from the Court of Justice. It also ordered that the procedure before the court resume at the stage preceding delivery of the judgment, in

order for the Tribunal Supremo (Supreme Court) to make a new ruling. It is apparent from the order for reference that the Tribunal Constitucional (Constitutional Court) held that the conditions for applying the 'acte éclairé' doctrine were not satisfied in the present case and that, therefore, the Tribunal Supremo (Supreme Court) was not exempt from the obligation to refer a question for a preliminary ruling.

12 In compliance with that judgment, the Tribunal Supremo (Supreme Court) decided to submit the present request for a preliminary ruling to the Court, setting out in the form of questions the reasons which had led it to rule that the Spanish legislation was incompatible with Directive 2009/72.

13 The Tribunal Supremo (Supreme Court) notes that the regulated discount, provided for in Article 45 of Law 24/2013, was conceived as a service with strong social character and the nature of which corresponded to a public service obligation, intended to protect certain consumers of electricity who benefit from the tariff of last resort and who have particular social, consumption and purchasing power characteristics, related to the cost of electricity for their habitual residence.

14 That court states that it is apparent from the recitals of Real decreto-ley 9/2013, por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico (Royal Decree-Law 9/2013 adopting urgent measures to guarantee the financial stability of the electricity system) of 12 July 2013, which preceded Law 24/2013, that the system for financing the regulated discount, provided for in Article 45(4) of that law, is consistent with the objective consisting in contributing to the necessary and urgent reduction in the costs of the system by requiring, by way of a public service obligation, that the cost of the regulated discount be borne by the parent companies of companies or company groups that carry on electricity production, distribution and retail activities, and which are vertically integrated groups. According to the national legislature, imposing such an obligation on those parent companies would, even indirectly, allow that burden to be distributed among the main commercial activities of the electricity sector.

15 The referring court notes, in that regard, that the question that arises in the present case is whether such justifications satisfy the requirements laid down in Article 3(2) of Directive 2009/72, according to which public service obligations must, first, be clearly defined, transparent, non-discriminatory and verifiable, and, second, guarantee equality of access for electricity undertakings of the European Union to national consumers.

16 It points out that the national legislature is criticised for having decided that, of the actors operating in three sectors of the electricity network – production, distribution and retail – only companies or groups of companies which carry on those three activities simultaneously and which are vertically integrated groups bear the cost of financing that public service obligation, whereas all companies or groups of companies whose activities are limited to one or even two of those sectors are exempt from that liability.

17 In the view of the referring court, it is apparent from the Orden IET/350/2014, por la que se fijan los porcentajes de reparto de las cantidades a financiar relativas al bono social correspondientes a 2014 (Decree IET/350/2014 fixing the apportionment percentages of the sums to be financed under the regulated discount for 2014) of 7 March 2014, which identified the entities concerned and fixed the apportionment percentages of the sums to be financed under the regulated discount for 2014, that only five groups of companies or companies are assigned significant coefficients or percentages, which moreover vary noticeably (Endesa SA (41.612696%), Iberdrola SA (38.474516%), Gas Natural SDG SA (14.185142%), Hidroeléctrica del Cantábrico (2.649114%)

and E.ON (2.368956%). It follows that those five companies alone contribute 99.290424% of the financing of the regulated discount, whereas the remaining 23 companies identified are allocated significantly reduced coefficients, all of which are considerably lower than 1%.

18 Moreover, that court is uncertain as to whether the national legislation at issue in the main proceedings infringes the principle of proportionality, since the obligation to finance the regulated discount is not established on an exceptional basis or limited in time, but indefinitely and with no refund or compensatory measure.

19 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In accordance with the case-law established by the Court of Justice, inter alia, in the judgments of 20 April 2010, *Federutility and Others* (C-265/08; EU:C:2010:205), and of 7 September 2016, *ANODE* (Case C-121/15, EU:C:2016:637) is national legislation – such as that established in Article 45(4) of [Law 24/2013] and subsequently implemented by Articles 2 and 3 of [Royal Decree 968/2014] – under which the financing of the ["social discount"] [regulated discount for electricity for certain vulnerable consumers; "the regulated discount"] falls on certain actors in the electricity system, namely the parent companies of company groups or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities, compatible with the requirements laid down in Article 3(2) of Directive [2009/72], where some of those actors carry very little weight in the sector as a whole, and where, by contrast, other entities or company groups that may be in a better position to bear that cost, either due to their turnover, relative size in a business sector or because they carry on two of those activities simultaneously on an integrated basis, are exempt from that burden?

(2) Is national legislation according to which the obligation to finance the regulated discount is not established on an exceptional basis or limited in time, but indefinitely and with no refund or compensatory measure whatsoever, compatible with the requirement of proportionality established in Article 3(2) of Directive [2009/72]?'

Jurisdiction of the Court and the admissibility of the reference for a preliminary ruling

20 Viesgo, Iberdrola and Endesa consider, in essence, that, in the light of the circumstances which gave rise to the request for a preliminary ruling and the information provided by the referring court, the Court should either declare that it has no jurisdiction or consider that request to be inadmissible. They submit, in particular, that the reasons which led the referring court to make that request do not fall within the scope of EU law; the referring court considered itself bound, under national procedure and case-law, to refer a question for a preliminary ruling although it has no doubts in the present case as to the correct interpretation in law. They consider that such a situation undermines the primacy and effectiveness of EU law.

21 The referring court states that the Tribunal Constitucional (Constitutional Court) set aside the judgment which it delivered on 24 October 2016, taking the view that it had set out insufficient reasons as to why it had relied on the 'acte éclairé' doctrine. However, it considers that the real reason for that annulment lies in the fact that the Tribunal Constitucional (Constitutional Court) applies to decisions of national courts a different, and stricter, standard of review for the

interpretation and application of EU law, where those courts exclude the application of a national law on the ground that they consider it to be contrary to EU law, than when they decide that national legislation is consistent with EU law.

22 Without there being any need to examine the compatibility with EU law of the judicial practice of the Tribunal Constitucional (Constitutional Court) referred to by the referring court, it should be noted, first, that the request for a preliminary ruling concerns a rule of European Union law, namely Article 3(2) of Directive 2009/72, which the Court has jurisdiction to interpret.

23 Second, it follows from the settled case-law of the Court that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it appears that the interpretation sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 73 and the case-law cited).

24 In the present case, first of all, the questions referred for a preliminary ruling bear a clear relation to the object of the dispute in the main proceedings since, by those questions, the referring court seeks to determine whether the national provisions whose legality is being challenged before it are compatible with the obligations which Article 3(2) of Directive 2009/72 imposes on Member States in the electricity sector. Next, it does not appear that the problem which it raises is hypothetical. Finally, the referring court set out in its request for a preliminary ruling sufficient legal and factual material to enable the Court to give a useful answer to those questions.

25 It should be stated in that regard that, unlike the case which gave rise to the judgment of 16 December 1981, *Foglia* (244/80, EU:C:1981:302), invoked by some of the parties to the main proceedings, the present reference responds to an objective requirement inherent in the resolution of a dispute before the referring court.

26 Third, it should be observed that those circumstances in no way prevent a national court from referring questions for a preliminary ruling to this Court, the answer to which, in the submission of one of the parties to the main proceedings, leaves no scope for reasonable doubt. Accordingly, even if that were the case, the reference for a preliminary ruling containing such questions does not thereby become inadmissible (see, to that effect, judgment of 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, EU:C:2020:343, paragraph 45 and the case-law cited).

27 Consequently, it follows from the foregoing considerations that the Court has jurisdiction to answer the request for a preliminary ruling and that it is admissible.

Consideration of the questions referred

The first question

28 By its first question, the referring court asks, in essence, whether Article 3(2) of Directive 2009/72 must be interpreted as precluding the cost of a public service obligation consisting in supplying electricity at a reduced rate to certain vulnerable consumers from being borne only by the parent companies of company groups or, where applicable, of companies that simultaneously carry on electricity production, distribution and retail activities.

29 In that regard, it should be noted that the measure at issue in the main proceedings consists of the obligation to pay a financial contribution that covers the cost of the regulated discount – which is a regulated reduction in the electricity consumption bill and which retail undertakings are required to apply to certain consumers described as 'vulnerable'. The amount of that reduction corresponds to the difference between the value of the voluntary price of electricity intended for low-usage consumers and a reduced rate, referred to as 'tariff of last resort', set by a public authority.

30 In the first place, it is necessary to examine whether that mandatory financial contribution amounts to a public service obligation within the meaning of Article 3(2) of Directive 2009/72 and, thereby, falls within the scope of that provision.

31 First, the Court has held that the concept of 'public service obligations', within the meaning of that provision, corresponds to public intervention measures in the functioning of the electricity market, which require undertakings operating in the electricity sector, for the purpose of pursuing a general economic interest, to act on that market on the basis of criteria imposed by the public authorities. The freedom of those undertakings to act on that market is thus limited, in that, solely having regard to their own commercial interest, they would not have supplied certain goods or services, or would not have supplied them to the same extent or under the same conditions (judgment of 19 December 2019, *Engie Cartagena*, C-523/18, EU:C:2019:1129, paragraph 45).

32 In the light of that definition, it should be noted that the obligation falling, in the present case, on retail undertakings, to supply electricity at a reduced rate to certain vulnerable consumers corresponds to a public service obligation within the meaning of Article 3(2) of Directive 2009/72.

33 On the one hand, those undertakings are under an obligation to act themselves in order to meet the objective of general economic interest of protection of vulnerable consumers which is pursued by the national legislature which imposed the regulated discount and which reflects an objective pursued by the Union legislature, as is apparent from recitals 45, 50 and 53 of Directive 2009/72. On the other hand, the freedom of those undertakings to act on the electricity market is limited since, solely having regard to their own commercial interest, they would not have supplied electricity to the consumers in question, or would not have supplied it at that price.

34 Second, it is apparent from the first subparagraph of Article 45(4) of Law 24/2013 that the cost of a regulated discount is borne by the parent companies of groups of companies or, as the case may be, by companies which simultaneously carry on electricity production, distribution and retail activities.

35 In accordance with the second subparagraph of Article 45(4) of that law, the apportionment percentage of the sums to be financed shall be calculated, for each company group, on the basis of the relationship between, on the one hand, the total of the annual average number of supplies connected to the distribution companies' distribution networks and the number of customers of the retailers held by the group, and, on the other, the total of all the annual average supply and customer values of all the company groups that are to be taken into account for the purposes of that apportionment.

36 As is apparent from the order for reference, the apportionment percentage of the sums to be financed therefore depends both on the number of supplies connected to the distribution networks of the companies concerned and on the number of customers to whom the retail activity is supplied by those companies.

37 It thus follows from the first and second subparagraphs of Article 45(4) of Law 24/2013 that all parent companies of a group of companies and all the companies referred to in that provision, on which the burden of financing the regulated discount falls, carry on, either directly or through a company belonging to such a group of companies, the activity of electricity retail and are therefore required to apply the reduction in the price of electricity to vulnerable consumers which stems from that regulated discount. The system thus provided for by the Spanish legislature therefore imposes a public service obligation, the cost of which is passed on to some of the companies and of the groups of companies responsible for providing such a service.

38 Third, it is apparent from the fifth subparagraph of Article 45(4) of Law 24/2013 that the contributions which each of those companies must make under the financial obligation relating to the regulated discount are paid into a special deposit account created for that purpose by the administrative body responsible for its management. In that regard, as the Spanish Government stated in its reply to the written questions put by the Court, the sole purpose of such an obligation is to finance the regulated discount.

39 Accordingly, it follows from those elements that the sum of those contributions is allocated exclusively to the financing of the regulated discount. The cost of that discount determines the total amount to be levied, by means of that financial contribution, on the electricity undertakings which must bear it. It follows that the examination of whether the public service obligation which the regulated discount represents is in conformity with the rules of Directive 2009/72 cannot be distinguished from the same examination of the financial contribution which constitutes the way in which it is financed (see, by analogy, judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraphs 67 and 68).

40 It follows that the public service obligation imposed by the regulated discount consists of two elements, namely, first, the reduction in the price of electricity supplied to certain vulnerable consumers and, second, the financial contribution intended to cover the cost of that price reduction, which are inextricably linked.

41 Consequently, it must be held that the mandatory financial contribution at issue in the main proceedings, as it forms an integral part of the public service obligation relating to the regulated discount, falls within the scope of Article 3(2) of Directive 2009/72.

42 In the second place, it should be recalled that, in accordance with that provision, having full regard to the relevant provisions of the EU Treaty, in particular Article 106 TFEU, 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. Such obligations must be clearly defined, transparent, non-discriminatory, verifiable and must guarantee equality of access for electricity undertakings of the European Union to national consumers.

43 In that regard, it should be noted, as a preliminary point, that, since Article 3(2) of Directive 2009/72 and Article 3(2) of Directive 2009/73 are, in essence, identical and those two directives have as their principal objective, as the European Commission states, the harmonisation of the legal framework of their respective regulated economic sector in order to ensure a fully open and competitive internal market, the Court's case-law on that latter provision can be applied to Article 3(2) of Directive 2009/72.

44 That being said, it is clear from the settled case-law of the Court that, although State intervention in the fixing of electricity prices constitutes an obstacle to the achievement of a competitive electricity market, that intervention may nonetheless be accepted within the framework of Directive 2009/72 if three conditions are satisfied. First, that intervention must pursue an objective of general economic interest, second, it must comply with the principle of proportionality and, third, the public service obligations that it lays down must be clearly defined, transparent, non-discriminatory and verifiable, and guarantee equality of access for EU electricity undertakings to national consumers (see, by analogy, judgment of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 36, and of 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, EU:C:2020:343, paragraph 56).

45 As regards the latter condition, in particular the requirement that public service obligations must not be discriminatory – the sole condition at issue in the context of the first question referred – Article 3(2) of Directive 2009/72 allows public service obligations to be imposed 'on undertakings operating in the electricity sector' in general, not on certain undertakings specifically. In those circumstances, the system for designating which undertakings will have public service obligations cannot exclude a priori any of the undertakings operating in the electricity sector. Therefore, any difference in treatment which may arise must be objectively justified (see, by analogy, judgment of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 71, and of 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, EU:C:2020:343, paragraph 80).

46 Accordingly, although the public service obligation relating to the regulated discount is imposed on all electricity undertakings retailing electricity on the Spanish market, since the financial burden of that obligation, intended to cover the costs of the reduction in the price of electricity provided for by the regulated discount, does not affect all those electricity undertakings, it is for the referring court to ascertain whether the differentiation made between undertakings which must bear that burden and those that are exempt is objectively justified (see, by analogy, judgment of 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, EU:C:2020:343, paragraph 82 and the case-law cited).

47 In that regard, it is apparent from the order for reference that the national legislature considered that the burden of that cost falling on the parent companies of groups of companies or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities allows, even indirectly, for that burden to be distributed among the main commercial activities of the electricity sector and thereby to minimise the economic consequences of the cost that the public service obligation relating to the regulated discount represents.

48 In the light of the objective thus pursued of distribution of that burden, the referring court considers that the financial contribution at issue in the main proceedings is discriminatory and, accordingly, fails to comply with the requirements of Article 3(2) of Directive 2009/72.

49 According to that court, some of the companies affected by that contribution carry very little weight in the Spanish electricity sector as a whole, whereas other companies or groups of companies which may be in a better position to bear that contribution are exempt, either due to their turnover, relative size in a business sector or because they carry on two of the activities of production, distribution and retail of electricity simultaneously on an integrated basis.

50 It must be observed, in that regard, that the differentiation criterion chosen by the national legislature is not objectively justified in so far as, in principle, in the light of the objective pursued by that legislature consisting in distributing the cost of the regulated discount among the main commercial activities of the electricity sector, all undertakings which carry on at least one of those main activities should contribute to financing such a cost.

51 In particular, in the light of such an objective, the difference between companies carrying on the three activities of production, distribution and retail of electricity and those carrying on only the latter activity and one of the other two activities, as regards their respective ability to bear the financial cost brought about by the regulated discount, is not clear. In that regard, the referring court states that, in the main proceedings, the representative of the Administración del Estado (State Administration, Spain) recognised that the integration of electricity production and retail activities also promotes synergies and economies of scale.

52 In those circumstances, although, as the Spanish Government states, the system of financial support for the regulated discount amounts to imposing over 99% of the cost of the latter on the five largest operators on the Spanish electricity market, the fact remains that the criterion chosen by the national legislature in order to distinguish between companies which must bear, to a greater or lesser degree, that cost and those which are wholly exempt from it results in a difference in treatment which is not objectively justified between the various companies operating on that market.

53 In the light of the foregoing considerations, the answer to the first question is that Article 3(2) of Directive 2009/72 must be interpreted as precluding the cost of a public service obligation consisting in supplying electricity at a reduced rate to certain vulnerable consumers from being borne solely by the parent companies of groups of companies or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities, since that criterion, chosen by the national legislature in order to distinguish among companies which must bear that cost and those which are exempted entirely from that burden, results in a difference in treatment which is not objectively justified between the various companies operating on that market.

The second question

54 By its second question, the referring court asks, in essence, whether Article 3(2) of Directive 2009/72 must be interpreted as precluding the system for financing a public service obligation consisting in the supply of electricity at a reduced rate to certain vulnerable consumers from being established without any temporal limit and without any compensatory measure.

55 In the first place, it is necessary to determine whether the absence of a temporal limit on such a public service obligation infringes the principle of proportionality. As recalled in paragraph 44 of the present judgment, compliance with that principle is one of the conditions allowing State intervention in the fixing of electricity prices to be accepted under Directive 2009/72. The Court has held that that intervention may compromise the freedom to determine the price only in so far as is necessary to achieve the objective of general economic interest being pursued and, consequently, for a period that is necessarily limited in time. This entails periodic re-examination of the need for the intervention (see, by analogy, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraphs 33 and 35).

56 In that regard, it is for the national courts to ascertain whether, and to what extent, the administration is bound, under national law, to conduct a periodic review at sufficiently frequent intervals of the necessity and means of its intervention in the price of electricity, having regard to the development of the electricity sector (see, by analogy, judgment of 30 April 2020, *Overgas Mrezhi and Balgarska gazova asotsiatsia*, C-5/19, EU:C:2020:343, paragraph 71).

57 However, that periodic review obligation concerns only the necessity of intervention in electricity prices and the means of such intervention. It does not, however, relate to the system for financing that measure of intervention on prices, namely, in this case, the regulated discount. It is true that that financing system is an element which is inseparably linked to the intervention measure on prices, but which does not affect electricity prices autonomously. Furthermore, it is indeed the intervention measure on prices, and not that system for financing, which seeks to achieve the objective of general economic interest in the light of which compliance with the principle of proportionality must be examined in step with developments in the electricity sector.

58 Consequently, although it is apparent from the answer to the first question that the system for financing a public service obligation, consisting in an obligation to supply electricity at a reduced price, must comply with the principle of non-discrimination laid down in Article 3(2) of Directive 2009/72, the requirement of compliance with the principle of proportionality, which stems from the Court's case-law on that provision, cannot, by contrast, be interpreted as meaning that the Member States are required to review periodically and frequently such a system for financing.

59 In the second place, as regards the absence of compensatory measures, it should be noted, first, that Article 3(2) of Directive 2009/72 makes no mention of a possible obligation to pay compensation where the Member States impose public service obligations on undertakings in the electricity sector pursuant to that provision. Second, in accordance with 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 Article 3(2) and (3) of that directive are provided, this must be done in a non-discriminatory and transparent way.

60 Accordingly, it follows from Article 3(2) and (6) of Directive 2009/72 that the Member States are not obliged to grant financial compensation when they decide to impose public service obligations under Article 3(2). The same is necessarily true as regards the system for financing those obligations, which, as is apparent from the examination of the first question, is part of those obligations. Consequently, the absence of such compensation under that system for financing a public service obligation is not in itself contrary to that provision.

61 It follows from the foregoing considerations that Article 3(2) of Directive 2009/72 must be interpreted as not precluding the system for financing a public service obligation consisting in the supply of electricity at a reduced rate to certain vulnerable consumers from being established without any temporal limit and without any compensatory measure.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **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 must be interpreted as precluding the cost of a public service obligation consisting in supplying electricity at a reduced rate to certain vulnerable consumers from being borne solely by the parent companies of groups of companies or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities, since that criterion, chosen by the national legislature in order to distinguish among companies which must bear that cost and those which are exempted entirely from that burden, results in a difference in treatment which is not objectively justified between the various companies operating on that market.**

2. **Article 3(2) of Directive 2009/72 must be interpreted as not precluding the system for financing a public service obligation consisting in the supply of electricity at a reduced rate to certain vulnerable consumers from being established without any temporal limit and without any compensatory measure.**

[Signatures]