Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 April 2018,[1]

Case C-561/16

Saras Energía, SA and Others
v
Administración del Estado

(Request for a preliminary ruling
from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Directive 2012/27/EU — Promotion of energy efficiency — Energy efficiency obligation scheme — Other policy measures — Energy Efficiency National Fund — Obligation to contribute — Obligated energy distributors and/or retail energy sales companies — Justification)

I. Introduction

1. Climate protection takes place not only by transitioning to renewable sources of energy supply, but also by saving energy. Therefore — and for other reasons — the European Union has set the target of achieving savings of 20% by the end of 2020. The Energy Efficiency Directive[2] is intended to contribute towards this.

2. One instrument for saving energy is the introduction of savings targets for energy distributors and/or retail energy sales companies envisaged in Article 7(1) of the Energy Efficiency Directive. In that respect, the transposition of the directive in Spain has led to the present request for a preliminary ruling.

3. It essentially involves two questions — first, whether the Energy Efficiency Directive allows companies to be obliged to make contributions to an energy savings fund without their being given the opportunity to achieve the savings targets themselves instead and, secondly, which undertakings may be obliged in the first place — as well as the justification for the selection of the obligated undertakings.

1 Original language: German.

2 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1), as amended by Council Directive 2013/12/EU of 13 May 2013 (OJ 2013 L 141, p. 28).

II. Legal context

A. EU law

4. A number of definitions in Article 2 of the Energy Efficiency Directive are of importance in the present proceedings:

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

…

14. "obligated party" means an energy distributor or retail energy sales company that is bound by the national energy efficiency obligation schemes referred to in Article 7;

…

18. "policy measure" means a regulatory, financial, fiscal, voluntary or information provision instrument formally established and implemented in a Member State to create a supportive framework, requirement or incentive for market actors to provide and purchase energy services and to undertake other energy efficiency improvement measures;

…

20. "energy distributor" means a natural or legal person, including a distribution system operator, responsible for transporting energy with a view to its delivery to final customers or to distribution stations that sell energy to final customers;

…

22. "retail energy sales company" means a natural or legal person who sells energy to final customers;

…'

5. Article 7 of the Energy Efficiency Directive governs the energy efficiency obligation scheme on which the present dispute is based:

'1. Each Member State shall set up an energy efficiency obligation scheme. That scheme shall ensure that energy distributors and/or retail energy sales companies that are designated as obligated parties under paragraph 4 operating in each Member State's territory achieve a cumulative end-use energy savings target by 31 December 2020, without prejudice to paragraph 2.

…

2. …

3. …

4. Without prejudice to the calculation of energy savings for the target in accordance with the second subparagraph of paragraph 1, each Member State shall, for the purposes of the first subparagraph of paragraph 1, designate, on the basis of objective and non-discriminatory criteria, obligated parties amongst energy distributors and/or retail energy sales companies operating in its territory and may include transport fuel distributors or transport fuel retailers operating in its territory. The amount of energy savings to fulfil the obligation shall be achieved by the obligated parties among final customers, designated, as appropriate, by the Member State …

5. — 8. …

9. As an alternative to setting up an energy efficiency obligation scheme under paragraph 1, Member States may opt to take other policy measures to achieve energy savings among final customers, provided those policy measures meet the criteria set out in paragraphs 10 and 11. The annual amount of new energy savings achieved through this approach shall be equivalent to the amount of new energy savings required by paragraphs 1, 2 and 3. Provided that equivalence is maintained, Member States may combine obligation schemes with alternative policy measures, including national energy efficiency programmes.The policy measures referred to in the first subparagraph may include, but are not restricted to, the following policy measures or combinations thereof:

(a) energy or CO_2 taxes that have the effect of reducing end-use energy consumption;

(b) financing schemes and instruments or fiscal incentives that lead to the application of energy-efficient technology or techniques and have the effect of reducing end-use energy consumption;

(c) regulations or voluntary agreements that lead to the application of energy-efficient technology or techniques and have the effect of reducing end-use energy consumption;

(d) standards and norms that aim at improving the energy efficiency of products and services, including buildings and vehicles, except where these are mandatory and applicable in Member States under Union law;

(e) energy labelling schemes, with the exception of those that are mandatory and applicable in the Member States under Union law;

(f) training and education, including energy advisory programmes, that lead to the application of energy-efficient technology or techniques and have the effect of reducing end-use energy consumption.

Member States shall notify to the Commission, by 5 December 2013, the policy measures that they plan to adopt for the purposes of the first subparagraph and Article 20(6), following the framework provided in point 4 of Annex V, and showing how they would achieve the required amount of savings. In the case of the policy measures referred to in the second subparagraph and in Article 20(6), this notification shall demonstrate how the criteria in paragraph 10 are met. In the case of policy measures other than those referred to in the second subparagraph or in Article 20(6), Member States shall explain how an equivalent level of savings, monitoring and verification is achieved. The Commission may make suggestions for modifications in the three months following notification.'

6. The setting up of an energy efficiency fund is governed by Article 20(4) of the Energy Efficiency Directive:

'Member States may set up an Energy Efficiency National Fund. The purpose of this fund shall be to support national energy efficiency initiatives.'

7. Financing by undertakings obligated to make savings is addressed in Article 20(6) of the Energy Efficiency Directive:

'Member States may provide that obligated parties can fulfil their obligations set out in Article 7(1) by contributing annually to the Energy Efficiency National Fund an amount equal to the investments required to achieve those obligations.'

8. The Council and Parliament are currently discussing a Commission proposal to amend the Energy Efficiency Directive. [3]

B. Spanish law

9. In accordance with Article 7 of the Energy Efficiency Directive, Article 69 of Ley 18/2014, de 15 de octubre, de aprobación de medidas urgentes para el crecimiento, la competitividad y la eficiencia (Law 18/2014 of 15 October 2014 on urgent measures for growth, competitiveness and efficiency) sets up a national energy efficiency obligation scheme directed, in so far as it relates to electricity and gas, at retail companies, to which 'an annual national energy savings quota, referred to as savings obligations' is to be assigned.

10. As the primary means of fulfilling the annual savings obligations, Article 71(1) of Law 18/2014 provides for the payment of an annual contribution to the Energy Efficiency National Fund, which, in accordance with Article 20(4) of the Energy Efficiency Directive, is set up by Article 72 of Law 18/2014. Only in the alternative does Article 71(2) provide that the government may establish an accreditation mechanism for the achievement of effective energy saving. The government has not yet made use of this regulatory option accorded to it.

11. On the other hand, the requirements for the collection of the contributions were established by Order IET/289/2015 of 20 February 2015 determining the obligations to contribute to the Energy Efficiency National Fund for the year 2015.

III. Facts and request for a preliminary ruling

12. Saras Energía, SA, a Spanish company from the energy sector, challenged Order IET/289/2015 before the Tribunal Supremo, the Spanish Supreme Court. In this context, it claims that the Order was contrary to the aforementioned Energy Efficiency Directive in two respects: first, because it was obliged to fulfil the energy savings obligations by means of a contribution to an energy efficiency fund without being able to fulfil those obligations through the implementation of savings measures and, secondly, because the obligation to contribute was imposed only on gas and electricity retail companies and wholesalers of petroleum products and liquefied petroleum gases, but not gas and electricity distributors and retailers of petroleum products and liquefied petroleum gases.

13. The Tribunal Supremo (Supreme Court) therefore decided, on 25 October 2016, to refer the following request for a preliminary ruling, which was received on 7 November 2016, to the Court of Justice:

'(1) Is legislation of a Member State establishing a national energy efficiency obligation scheme whose main method of compliance consists in an annual financial contribution to an Energy Efficiency National Fund established under the provisions of Article 20(4) of [the Energy Efficiency Directive] compatible with Article 7(1) and (9) of that directive?

3 Legislative procedure 2016/0376 (COD).

(2) Is national legislation which provides for the possibility of fulfilling the energy savings obligations through the accreditation of savings as an alternative to the financial contribution to the Energy Efficiency National Fund compatible with Articles 7(1) and 20(6) of [the Energy Efficiency Directive]?

(3) If the above question is answered in the affirmative, is the provision of that alternative possibility for the fulfilment of the energy savings obligations compatible with the abovementioned Articles 7(1) and 20(6) of the directive when its actual existence depends on whether the Government establishes it on a discretionary basis through legislation?

In that respect, is such legislation compatible when the Government does not implement that alternative?

(4) Is a national scheme that regards as parties subject to energy saving obligations only gas and electricity retail companies and wholesalers of petroleum products and liquefied petroleum gases, but not gas and electricity distributors or retailers of petroleum products and liquefied petroleum gases, compatible with Article 7(1) and (4) of [the Energy Efficiency Directive]?

(5) If the answer to the above question is in the affirmative, is the designation of gas and electricity retail companies and wholesalers of petroleum products and liquefied petroleum gases as "obligated parties", without the reasons being determined for gas and electricity distributors and retailers of petroleum products and liquefied petroleum gases not being so defined, compatible with Article 7(1) and (4) of [the Energy Efficiency Directive]?'

14. On 24 January, 21 February and 15 March 2017, the Court of Justice received decisions of the Tribunal Supremo (Supreme Court) in which the latter designated Endesa, SA, Endesa Energía, SA and Endesa Energía XXI, SLU; Viesgo Infraestructuras Energéticas, SL; Hidroeléctrica del Cantábrico, SAU; Nexus Energía, SA, and Nexus Renovables, SLU; Engie España, SL; Villar Mir Energía, SL, and Enérgya VM Gestión de Energía, SLU; Estaciones de Servicio de Guipúzcoa, SA; Acciona Green Energy Developments, SLU; and Fortia Energía, SL, as other parties to the national proceedings.

15. Acciona Green Energy Developments, Endesa, Engie España, Fortia Energía, Saras Energía, Viesgo Infraestructuras Energéticas, Villar Mir Energía and Enérgya VM Gestión de Energía, as parties to the main proceedings, and the Grand Duchy of Luxembourg, the Kingdom of Spain and the European Commission submitted written observations in the proceedings before the Court. Written submissions of Nexus Energía, Nexus Renovables and Estaciones de Servicio de Guipúzcoa were not received by the Court until after the stipulated time limits and were therefore rejected as late. With the exception of Endesa, Fortia Energía and Luxembourg, the same parties that commented in the written procedure commented in the oral procedure of 7 March 2018.

IV. Legal analysis

16. The request for a preliminary ruling relates to two issues, namely, on the one hand, the compatibility with the Energy Efficiency Directive of a mandatory obligation to contribute (B) and, on the other hand, the selection of the obligated undertakings (C). Firstly, however, a brief discussion on the admissibility of the request for a preliminary ruling is required (A).

A. Admissibility of the request for a preliminary ruling

1. The objections of Spain

17. In the oral procedure, Spain objected to the admissibility of the fourth and the fifth questions in so far as these go beyond the petroleum product sector. This is because the national proceedings taken by Saras Energía related only to petroleum products. Undertakings from the other sectors referred to in the questions — gas, liquefied petroleum gas and electricity — were merely granted leave to intervene in support of Saras Energía and could not extend the subject matter of the dispute.

18. However, it is not necessary to declare parts of the request for a preliminary ruling to be inadmissible for the reasons given by Spain. This is because neither the questions nor the grounds therefor contain information that would make it possible to differentiate between the various sectors. The fourth question must therefore be understood as seeking to ascertain whether subjecting only certain undertakings of the supply chain concerned to energy efficiency obligations but not other undertakings of the same supply chain is compatible with Article 7(1) and (4) of the Energy Efficiency Directive. The fifth question, therefore, is to clarify whether the Member State must provide reasons for the selection of the obligated undertakings.

2. Overall relevance of the request for a preliminary ruling

19. Doubts as to the admissibility of the request for a preliminary ruling may arise, however, from the fact that the Energy Efficiency Directive does not preclude certain undertakings from being obliged to make contributions to a fund but, on the contrary, obliges the Member States to take measures to achieve certain energy savings. Undertakings under an obligation to contribute would therefore be unable to invoke the directive against that obligation. This therefore raises the question of whether the answer to the request for a preliminary ruling is immaterial to the resolution of the dispute in the main proceedings and the request is thereby inadmissible.

20. Upon closer examination, however, it cannot be determined that the request lacks relevance. This is because, according to the request for a preliminary ruling, the participating undertakings do not directly challenge the obligation to contribute; rather, they assert that the legislation giving rise to the obligation to contribute is invalid. The purpose of that legislation is to transpose the Energy Efficiency Directive, and it does not seem far-fetched that one could challenge implementing provisions under national law because they do not meet the requirements of the directive which is to be transposed.

21. However, it appears appropriate to point out that national legal protection against inadequate transposition of EU law should not have an additional adverse effect on the transposition.[4] It is thus conceivable that the repeal of legislation that only partly and therefore inadequately implements a directive would worsen the situation with regard to the objectives of the directive. This is because an inadequate transposition may make more progress towards those objectives than if there were no transposition at all.

22. Against this background, the following will investigate, as per the wording of the questions referred, whether legislation along the lines of the Spanish provisions at issue brings about the transposition of the Energy Efficiency Directive and is thus compatible with that directive and not whether the directive precludes the national legislation.

4 See judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraphs 56 to 58), and of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraphs 34 to 36), both in relation to Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).

B. Dispensing with direct fulfilment of savings obligations

23. With the first three questions, which are to be answered together in the light of the dispute in the main proceedings, the Tribunal Supremo (Supreme Court) would like to ascertain whether obliging certain undertakings to achieve energy savings targets but only allowing them to fulfil those obligations by making contributions to a national energy savings fund is compatible with Article 7(1) and (9) and Article 20(6) of the Energy Efficiency Directive. An ancillary aspect of this issue is the envisaged option of affording the obligated undertakings the opportunity of achieving the energy savings targets themselves in the future, instead of making the contribution, but which option is at the discretion of the Spanish authorities.

24. Article 7 of the Energy Efficiency Directive imposes two different obligations on the Member States. First, they must achieve a particular result ('obligation de résultat'), namely, certain savings in primary energy sales to final customers by the end of 2020. Secondly, the Member States must adopt certain rules on the means by which that result is to be achieved ('obligation de moyens').

25. This question concerns this second obligation of the Member States. In this respect, the Energy Efficiency Directive mentions various measures by which the savings targets can be achieved.

26. Pursuant to Article 7(1) of the Energy Efficiency Directive, the Member States should in principle oblige certain energy companies to achieve the savings targets. In this regard, it is for the companies to decide how they achieve the savings targets. However, it is clear from the overall context of the directive, for instance recitals 20 and 47 or Article 8, that the European Union considers measures such as the promotion of energy audits (in order to identify energy-saving potential) or the creation of a market for energy services (as an alternative to the sale of energy) to be suitable for contributing to the required savings.

27. In addition, pursuant to Article 20(6) of the Energy Efficiency Directive, Member States may allow obligated undertakings to fulfil their obligations under Article 7(1) by contributing to the Energy Efficiency National Fund.

28. Finally, pursuant to Article 7(9) of the Energy Efficiency Directive, as an alternative to setting up an energy efficiency obligation scheme, Member States may opt to take *other* policy measures to achieve corresponding energy savings among final customers.

29. The obligation of energy companies to make contributions to an energy efficiency fund without having the possibility of achieving the savings targets instead is clearly incompatible with Article 7(1) of the Energy Efficiency Directive.

30. It is therefore necessary to examine whether this provision is compatible with Article 20(6) of the Energy Efficiency Directive or may constitute a measure within the meaning of Article 7(9).

1. Article 20(6) of the Energy Efficiency Directive

31. Pursuant to Article 20(6) of the Energy Efficiency Directive, Member States may provide that obligated parties *can* fulfil their obligations under Article 7(1) by contributing annually to the Energy Efficiency National Fund an amount equal to the investments required to achieve those obligations.

32. This regulatory option does not provide for a mandatory obligation to make a financial contribution, but rather only the possibility of making such a contribution. It also assumes that there are obligations under Article 7(1) of the Energy Efficiency Directive. These obligations would involve the energy efficiency obligation scheme under which the participating companies have to achieve an energy savings target.

33. Accordingly, Article 20(6) is based on the assumption that the obligated undertakings are able, at least in theory, to achieve the required savings instead of making the contribution.

34. The companies participating in the proceedings are therefore correct to take the view that an obligation to contribute without the savings alternative is not consistent with Article 20(6) of the Energy Efficiency Directive.

2. Article 7(9) of the Energy Efficiency Directive

35. The disputed mandatory obligation to contribute is therefore only compatible with the Energy Efficiency Directive if it is to be regarded as an 'other policy measure' within the meaning of Article 7(9) of the Energy Efficiency Directive.

(a) Subsumption under Article 7(9) of the Energy Efficiency Directive

36. As already stated, as an alternative to setting up an energy efficiency obligation scheme pursuant to Article 7(1) of the Energy Efficiency Directive, Article 7(9) of the Energy Efficiency Directive allows Member States to take other policy measures to achieve energy savings among final customers.

37. Article 2, point 18 of the Energy Efficiency Directive defines 'policy measures' as a regulatory, financial, fiscal, voluntary or information provision instrument formally established and implemented in a Member State to create a supportive framework, requirement or incentive for market actors to provide and purchase energy services and to undertake other energy efficiency improvement measures. The mandatory obligation to contribute is part of a financial instrument to establish a supportive framework and incentives. This is because it can be assumed that the resources from the energy efficiency fund are used to provide incentives for energy efficiency improvement measures.

38. The obligation to contribute therefore falls under Article 7(9), second subparagraph, (b), of the Energy Efficiency Directive, in which financing instruments that lead to the application of energy-efficient technology or techniques and have the effect of reducing end-use energy consumption are given as an example of other policy measures.

(b) Non-special nature of Article 20(6) of the Energy Efficiency Directive

39. The Tribunal Supremo (Supreme Court) and various participating companies take the view that the incompatibility of a mandatory obligation to contribute with Article 20(6) of the Energy Efficiency Directive also rules out basing it on Article 7(9). This would require Article 20(6) to be an exhaustive special provision on contributions of obligated undertakings.

40. However, the third subparagraph of Article 7(9) of the Energy Efficiency Directive shows that measures under Article 7(9) and Article 20(6) are not mutually exclusive but can be taken together. This is because, according to that provision, Member States are to notify to the Commission which policy measures they are adopting on the basis of these provisions.

41. Nor does the objective of Article 20(6) of the Energy Efficiency Directive result in this provision being regarded as *lex specialis* vis-à-vis Article 7(9). Article 20 sets out different options for financing energy-saving measures. As also confirmed by recital 50, the levying of contributions as an alternative to energy-saving measures pursuant to Article 20(6) is just one possible source of funds among others. In particular, it is not clear that the possible sources of funds in Article 20 are supposed to form an exhaustive list.

42. Finally, such a special nature would run counter to the objective of Article 7(9) of the Energy Efficiency Directive. As is the case with many other provisions in Article 7, this provision is intended, pursuant to recital 20, to provide the Member States with a significant degree of flexibility in achieving the binding savings targets. They are intended to take fully into account the national organisation of market actors, the specific context of the energy sector and the habits of the final customers. This flexibility was previously established in the predecessor directive [5] and it is intended to strengthen it further in the ongoing procedure to amend the directive. [6] Excluding a specific measure — mandatory contribution to a fund — from the scope of other possible policy measures pursuant to Article 7(9) would run counter to the objective of flexibility.

43. Article 20(6) does not therefore conflict with the reasoning behind an obligation to contribute on the basis of Article 7(9).

(c) Direct achievement of savings

44. The Tribunal Supremo (Supreme Court) does have doubts, however, as to the applicability of Article 7(9) of the Energy Efficiency Directive because the measures mentioned by way of example in the second subparagraph would directly lead to savings. It maintains that this does not apply to contributions to an energy efficiency fund.

45. However, the Tribunal Supremo (Supreme Court) thus overlooks the fact that the mandatory obligation to contribute is part of a financing system pursuant to Article 7(9), second subparagraph, (b), of the Energy Efficiency Directive, and that system is intended to lead to savings.

46. Irrespective of this, the first sentence of the first subparagraph of Article 7(9) of the Energy Efficiency Directive is worded in such a way that other policy measures do not necessarily have to lead to savings directly. This is because these measures need only 'achieve energy savings among final customers'. This includes savings achieved indirectly.

47. In terms of practical implementation also, it would appear to be difficult, if not impossible, to distinguish between measures that achieve savings directly and measures that have such effects only indirectly.

(d) Requirements for other policy measures

48. Member States do not, however, have complete freedom when having recourse to Article 7(9) of the Energy Efficiency Directive. On the contrary, the other policy measures pursuant to the first subparagraph of Article 7(9) must be equivalent to an energy efficiency obligation scheme in terms of the energy savings achieved and, moreover, must meet the criteria set out in Article 7(10) and (11).

49. In addition, there are information requirements vis-à-vis the Commission, as the second sentence of the third subparagraph of Article 7(9) requires that Member States explain to the Commission, by 5 December 2013, how the criteria in Article 7(10) are to be met. The Commission can then make suggestions for modifications within the three months following the notification.

5 See Articles 4 and 6 of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services (OJ 2006 L 114, p. 64).

6 See Article 7(6) and Article 7b of Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency (COM(2016) 761 final, p. 9 et seq.) and Council draft of 24 January 2018 (Council document 11119/1/17 REV 1, pp. 17, 19 and 20). Parliament's first opinion of 17 January 2018 (Council document 5355/18) does not propose any amendments that would call this flexibility into question.

50. The statements of the Tribunal Supremo (Supreme Court), according to which Spain had not considered basing the mandatory obligation to contribute on Article 7(9) of the Energy Efficiency Directive, raise doubts as to whether Spain complied with this obligation to provide an explanation. Nevertheless, it is not clear that the Commission considered that it lacked sufficient information. Moreover, the request for a preliminary ruling does not contain sufficient information to enable the Court of Justice to conduct an examination of this procedural requirement.

51. The same ultimately applies to the examination of the substantive compatibility of the mandatory obligation to contribute with Article 7 of the Energy Efficiency Directive. It requires an investigation of the equivalence of the savings achieved and the criteria provided for in Article 7(10) and (11). The Court is however unable to verify this owing to a lack of corresponding information in the request for a preliminary ruling.

52. The examination of the procedural and substantive requirements for the mandatory obligation to contribute therefore remains — subject to a new request for a preliminary ruling — the task of the national court.

(e) The principle of proportionality

53. Finally, various participating undertakings raise the objection that the mandatory obligation to make a contribution is disproportionate.

54. They are right that Member States must observe the principle of proportionality when transposing a directive and in particular when availing themselves of any room to manoeuvre.[7] According to that principle, implementing measures may not exceed the bounds of what is appropriate and necessary to attain the objectives legitimately pursued by the legislation in question. If there is a choice between several appropriate measures, recourse must be had to the least onerous; furthermore, the disadvantages caused must be proportionate to the aims pursued.[8]

55. If it is demonstrated, however, that the mandatory obligation to contribute guarantees an equivalent level of savings to that achieved by the energy efficiency obligation scheme pursuant to Article 7(1) of the Energy Efficiency Directive, it is at least suitable for achieving the established objectives of the directive.

56. As far as the necessity and the relationship between the disadvantages and the aims are concerned, Member States are in principle to be granted wide room for manoeuvre because that assessment requires complex forecasting. This was implicitly recognised by the EU legislature by virtue of the fact that, with Article 7(9) of the Energy Efficiency Directive, it allowed Member States to deviate from the directive's regulatory model.

57. In particular, the Member State will be granted this room to manoeuvre as long as the obligation to contribute is based on the criterion of Article 20(6) of the Energy Efficiency Directive, according to which the amount of the contribution is to be equal to the investments required to achieve savings obligations. An infringement of the principle of proportionality is therefore not apparent.

7 See judgments of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraph 87); of 11 June 2009, *Nijemeisland* (C-170/08, EU:C:2009:369, paragraph 41); and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86).

8 Judgment of 11 June 2009, *Nijemeisland* (C-170/08, EU:C:2009:369, paragraph 41).

3. Interim conclusion

58. As an interim conclusion, it remains to be stated that legislation of a Member State establishing a national energy efficiency obligation scheme in which the obligated undertakings can fulfil their obligations only by means of an annual financial contribution to an Energy Efficiency National Fund established under the provisions of Article 20(4) of the Energy Efficiency Directive can be an 'other policy measure' within the meaning of Article 7(9) of that directive if that legislation guarantees an equivalent level of savings to that achieved by the energy efficiency obligation scheme pursuant to Article 7(1) of that directive and, moreover, the requirements under Article 7(10) and (11) are met.

59. However, the question of whether the national law makes provision for the (as yet unused) possibility of allowing the obligated undertakings to demonstrate savings as an alternative to the contribution is immaterial to the examination of the first three questions.

C. Inclusion of energy distributors and/or retail energy sales companies

60. With the fourth question, the Tribunal Supremo (Supreme Court) would like to ascertain whether subjecting only certain undertakings of the supply chain concerned to energy efficiency obligations, but not other undertakings of the same supply chain, is compatible with Article 7(1) and (4) of the Energy Efficiency Directive. The fifth question seeks to ascertain whether that decision requires a justification.

61. It has just been determined that the Spanish legislation in its currently applicable form does not directly serve to transpose Article 7(1) of the Energy Efficiency Directive, but merely constitutes an 'other policy measure' within the meaning of Article 7(9) of that directive. Nevertheless, the provisions of Article 7(1) and (4) are not therefore immaterial. On the contrary, these provisions constitute the starting point for the identification of the undertakings that are also obliged under the Spanish legislation. They must therefore be taken into account.

1. The fourth question — obligated undertakings

62. It cannot be ruled out that the fourth question is largely based on the Spanish version of Article 7(4) of the Energy Efficiency Directive since, according to that version, each Member State is to designate obligated parties amongst energy distributors *and* retail energy sales companies operating in its territory. By contrast, according to the German, French, English and Portuguese versions, for instance, these obligated parties are to be designated from among energy distributors *and/or* retail energy sales companies. Moreover, in the oral procedure, the Commission referred to various language versions in which only the term 'or' is used.

63. The Spanish version could therefore be interpreted to mean that Member States must oblige both energy distributors and retail energy sales companies, whereas the other language versions referred to allow a choice to be made.

64. Irrespective of the language version, however, the legislative context shows that, in actual fact, Member States can (and must) decide whether they oblige energy distributors or retail energy sales companies.

65. In the Spanish version too, Article 7(4) of the Energy Efficiency Directive provides that Member States must select which companies *amongst* the aforementioned groups are to be obligated. Furthermore, in the Spanish version too, Article 7(1) of the Energy Efficiency Directive states that the obligated undertakings can come from the group of energy distributors *and/or* retail energy sales companies. In this respect, the definition of 'obligated party' in Article 2, point 14 and recital 20 even dispenses with the 'and', and uses only 'or' — including in the Spanish version.

66. Recital 20 subsequently clarifies that Member States should in particular be allowed not to impose the obligation on small energy distributors, small retail energy sales companies and small energy sectors to avoid disproportionate administrative burdens.

67. Moreover, it would appear to be practically difficult to assign appropriately the respective obligations in the case of a cumulative obligation on the part of energy distributors and retail energy sales companies to save energy among final customers.

68. According to the definition in Article 2(20) of the Energy Efficiency Directive, an 'energy distributor' is responsible for transporting energy with a view to its delivery to final customers or to distribution stations that sell energy to final customers, whereas, pursuant to Article 2(22), a 'retail energy sales company' sells energy to final customers. Energy distributors and retail energy sales companies can therefore be part of the same supply chain or else combined in a single undertaking. If, however, two members of the supply chain were subject to the same savings obligation, the overall volume of required savings among the final customers would be doubled.

69. Although the possibility of responding to this doubling with appropriate rules could not be ruled out, it would surely be easier to impose the savings obligation on just one undertaking in the chain. That undertaking will generally pass on the costs associated with the obligation to the next undertakings in the chain, meaning that they would ultimately be met by the final customers.

70. The situation is no different with the contribution to the energy efficiency fund. As stated by Endesa, consideration of a further stage in the distribution chain would lead to a double payment of the contribution.

71. As a result, subjecting only certain members of a supply chain to energy efficiency obligations, but not other members of the same chain at the same time, is compatible with Article 7(1) and (4) of the Energy Efficiency Directive.

72. The question of whether the selection made by Spain is compatible with Article 7(1) and (4) of the Energy Efficiency Directive depends on whether the selection is based on objective and non-discriminatory criteria, as required by Article 7(4). However, the request for a preliminary ruling does not contain sufficient information to enable the Court of Justice to examine this question. It is therefore left to the discretion of the Tribunal Supremo (Supreme Court).

2. The fifth question — justification for the selection decision

73. With the fifth question, the Tribunal Supremo (Supreme Court) would like to ascertain whether designating the obligated parties without providing a justification explaining why other undertakings of the supply chain concerned are not included is compatible with Article 7(1) and (4) of the Energy Efficiency Directive.

74. In this respect, it should first be stated that Article 7(1) and (4) of the Energy Efficiency Directive does not contain an express provision regarding the reasons for the selection.

75. However, the requirement to provide a justification has its roots in the principle of the rule of law,[9] which, according to Article 2 TEU, is common to all Member States and is also a principle on which the European Union is based.[10] In relation to the Union institutions, the obligation to state reasons is specifically provided for in Article 296 TFEU[11] and is envisaged as an element of the right to good administration pursuant to Article 41 of the Charter of Fundamental Rights of the European Union.[12] However, the right to good administration, in so far as it reflects a general principle of EU law, has requirements that must be met by the Member States when they implement EU law.[13]

76. Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions.[14] Furthermore, it promotes self-control on the part of the public authority taking action and also performs a pacification function.[15]

77. However, in principle, there is no obligation to state reasons for a Member State's legislative measures of general application.[16] Even at Union level, moreover, in the case of measures of general application, the justification may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve.[17]

78. However, the transposition of Article 7(4) of the Energy Efficiency Directive is subject to more far-reaching requirements. This is because this provision requires that, for the purposes of the first subparagraph of Article 7(1), each Member State designate, on the basis of objective and non-discriminatory *criteria*, obligated parties.

79. The Member State must disclose this criteria in some way, for example, in the *travaux préparatoires*. Otherwise, it would not be possible to check whether the criteria applied are in fact objective and non-discriminatory and also whether they were applied correctly. This would cause undue difficulties in ensuring effective legal protection.[18]

80. According to the arguments of the various parties, however, the selection of the obligated parties was justified at least in the preamble to Law 18/2014. It is for the national court to assess whether such a justification exists and, if so, whether it is sufficient to prove that objective and non-discriminatory criteria were applied.

81. Consequently, the designation of certain undertakings as obligated parties pursuant to Article 7(1) and (4) of the Energy Efficiency Directive requires disclosure of the criteria that led to them being included but other undertakings not being obligated.

9 Opinion of Advocate General Reischl in *Bonu* v *Council* (89/79, EU:C:1980:37, p. 566).

10 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 30 and 31). See, regarding the concept of a community based on the rule of law or union based on the rule of law, previous judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23); of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 281 and 316); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 90); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 60).

11 Judgment of 17 June 1997, *Sodemare* (C-70/95, EU:C:1997:301, paragraph 19).

12 Judgment of 17 July 2014, *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67).

13 Judgments of 8 May 2014, *N* (C-604/12, EU:C:2014:302, paragraphs 49 and 50), and of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 39).

14 Judgment of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 40), see previous judgments of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15); of 15 February 2007, *BVBA Management, Training en Consultancy* (C-239/05, EU:C:2007:99, paragraph 36); and of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 53).

15 See my Opinion in *Mellor* (C-75/08, EU:C:2009:32, points 31, 32 and 33).

16 Judgment of 17 June 1997, *Sodemare* (C-70/95, EU:C:1997:301, paragraph 19).

17 Judgments of 17 March 2011, *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 59); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 29); and of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 130).

18 See, in that sense, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15).

V. Conclusion

82. I therefore propose that the Court give the following answer to the request for a preliminary ruling:

(1) Legislation of a Member State establishing a national energy efficiency obligation scheme in which the obligated parties can fulfil their obligations only by means of an annual financial contribution to an Energy Efficiency National Fund established under the provisions of Article 20(4) of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC can be an 'other policy measure' within the meaning of Article 7(9) of that directive if that legislation guarantees an equivalent level of savings to that achieved by the energy efficiency obligation scheme pursuant to Article 7(1) of that directive and, moreover, the requirements under Article 7(10) and (11) are met.

(2) Subjecting only certain members of a certain supply chain to energy efficiency obligations, but not other members of the same chain at the same time, is compatible with Article 7(1) and (4) of Directive 2012/27.

(3) The designation of certain undertakings as obligated parties pursuant to Article 7(1) and (4) of Directive 2012/27 requires disclosure of the criteria that led to them being included but other undertakings not being obligated.