Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

2 April 2020*

(Reference for a preliminary ruling — Directive 2003/55/EC — Common rules for the internal market in natural gas — Consumer protection — Article 3(3) and point (b) of Annex A — Transparency of contractual terms and conditions — Obligation to give consumers adequate notice directly of an increase in charges)

In Case C-765/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Koblenz (Regional Court, Koblenz, Germany), made by decision of 1 October 2018, received at the Court on 6 December 2018, in the proceedings

Stadtwerke Neuwied GmbH

v

RI,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb (Rapporteur), President of the Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Stadtwerke Neuwied GmbH, by J. Müller, Rechtsanwalt,

– the European Commission, by O. Beynet and M. Noll-Ehlers, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), read in conjunction with points (b) and (c) of Annex A thereto.

2 The request has been made in proceedings between Stadtwerke Neuwied GmbH, as gas supplier, and its customer RI concerning the payment of arrears following a number of increases in the price of gas.

Legal context

European Union law

3 Recitals 2 and 3 of Directive 2003/55 are worded as follows:

> '(2) Experience in implementing this Directive shows the benefits that may result from the internal market in gas, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, significant shortcomings and possibilities for improving the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field and to reduce the risks of market dominance and predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force, and ensuring that the rights of small and vulnerable customers are protected.
>
> (3) At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieving a fully operational internal market. The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, requested the Commission to adopt a detailed timetable for the achievement of accurately defined objectives with a view to gradually but completely liberalising the energy market.'

4 According to recital 27 of that directive:

> 'The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the observance of [EU] law.'

5 Article 2 of Directive 2003/55 contains the following definitions:

> 'For the purposes of this Directive:
>
> …
>
> 25. "household customers" means customers purchasing natural gas for their own household consumption;
>
> …

27. “final customers” means customers purchasing natural gas for their own use;

…’

6 Article 3 of that directive, headed ‘Public service obligations and customer protection’, provides, in paragraph 3:

‘Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regards at least household customers these measures shall include those set out in Annex A.’

7 Annex A to that directive lays down the measures on consumer protection as follows:

‘Without prejudice to [EU] rules on consumer protection, in particular Directive 97/7/EC of the European Parliament and of the Council [of 20 May 1997 on the protection of consumers in respect of distance contracts — Statement by the Council and the Parliament re Article 6(1) — Statement by the Commission re Article 3(1), first indent (OJ 1997 L 144, p. 19)] and Council Directive [93/13/EEC] [of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)], the measures referred to in Article 3 are to ensure that customers:

…

(b) are given adequate notice of any intention to modify contractual conditions and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider;

(c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;

…’

German law

8 Paragraph 36(1) and (2) of the Energiewirtschaftsgesetz (Law on energy, ‘the EnWG’) is worded as follows:

‘Duty to provide a basic supply

(1) Energy supply undertakings shall be required, for areas of the distribution system in which they provide the basic supply for household customers, to make public the standard terms and conditions and prices relating to low voltage or low pressure supply and to publish these on the internet, and to

supply all household customers in accordance with those terms and conditions and prices. The duty to provide a basic supply shall not apply where, for economic reasons, such supply is not feasible for the energy supply undertaking.

(2) The basic suppliers for the purposes of subparagraph 1 shall be those energy supply undertakings which supply most household customers in a general distribution area …'

9 Paragraph 1(1) of the Verordnung über allgemeine Bedingungen für die Gasversorgung von Tarifkunden (Regulation on general terms and conditions for the supply of gas to standard rate customers) of 21 June 1979 (BGBl. 1979 I, p. 676) ('the AVBGasV') provides:

'The standard terms and conditions in accordance with which gas supply undertakings … must connect any person to their distribution network and supply him or her at standard rate prices are laid down in Paragraphs 2 to 34 of the present Regulation. Those terms and conditions shall form part of the supply contract.'

10 Under Paragraph 4(2) of the AVBGasV, adjustments to the terms and conditions and to the standard rates are to become effective only after they have been published.

11 Paragraph 32(1) and (2) of the AVBGasV provides:

'(1) The contractual relationship shall continue without interruption until either of the two parties gives one month's notice, at the end of a calendar month, of termination …

(2) If the gas supply undertaking adjusts its standard rates or its terms and conditions on the basis of the present Regulation, the customer may give two weeks' notice, at the end of the calendar month following publication, of termination of the contractual relationship.

…'

12 The AVBGasV was repealed by the Gasgrundversorgungsverordnung (Regulation on the basic supply of gas) of 26 October 2006 (BGBl. 2006 I, p. 2396), as amended by the Law of 29 August 2016 (BGBl. 2016 I, p. 2034). Paragraph 5(2) and (3) of the Regulation on the basic supply of gas provides:

'(2) Adjustments to the standard prices or additional terms and conditions shall come into effect at the beginning of the relevant month, but only after publication thereof, which must take place at least six weeks before the planned adjustment. The basic supplier is required, at the same time as publishing the planned adjustments, to send written notification of those adjustments to the customer and to publish them on its website; in so doing the basic supplier must specify the extent of and reasons and preconditions for the adjustment and provide, in clear terms, a reference to the customer's rights under subparagraph 3 and the information referred to in point 7 of the first sentence of Paragraph 2(3).

(3) In the event of any adjustment to the standard prices or additional terms and conditions the customer shall have the right to terminate the contract, without observing a notice period, upon the entry into effect of those adjustments …'

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

13 Stadtwerke Neuwied is a natural gas supplier incorporated in the form of a company governed by German private law but subject, as a municipal undertaking responsible for the supply of services of general interest for the benefit of a public body, to the control of the State, the town of Neuwied (Germany) being its sole shareholder and the mayor of that town being a member of its supervisory board.

14 RI has been a customer of Stadtwerke Neuwied since 28 July 2004. This gas supplier has performed its supply obligations pursuant to a contract for a basic supply. In the period from January 2005 to September 2011, Stadtwerke Neuwied introduced tariff increases corresponding to the rise in the cost of acquisition of natural gas, whilst taking into account savings in other areas of the gas sector. It now claims payment from RI of the sum of EUR 1 334.71, corresponding to the arrears owed as a result of those tariff adjustments. RI was not personally notified of those adjustments, although Stadtwerke Neuwied published its standard prices and tariffs, as well as the contractual adjustments, on its website. The tariff increases were also published in the regional press.

15 RI submitted before the referring court that the supply contract concluded with Stadtwerke Neuwied did not contain an effective price review clause and disputed Stadtwerke Neuwied's claims. He takes the view, in particular, that Stadtwerke Neuwied was not legally entitled to adjust its prices, that the price of consumption claimed was unreasonable and that, even if it did exist, the unilateral right to determine prices under Paragraph 4 of the AVBGasV lacked transparency. RI concluded from this that the gas price increases were invalid. Furthermore, RI brought a counterclaim by which he sought a finding that the prices set by the supplier were unreasonable and void, and reimbursement of part of the sums which he had paid to Stadtwerke Neuwied in the period from 1 January 2005 to 31 December 2011.

16 The referring court considers that the outcome of the dispute before it depends on the interpretation of the provisions of Directive 2003/55.

17 In its view, the failure of Stadtwerke Neuwied to give adequate notice of the gas price increases directly to the consumer may call into question the validity of those increases, because the requirements relating to transparency that arise under Article 3(3) of Directive 2003/55 and points (b) and (c) of Annex A thereto are directly applicable in a dispute such as that of the main proceedings, notwithstanding the fact that that directive was not transposed into German law during the period at issue.

18 The referring court explains, however, that its approach presupposes that, taking that failure to transpose into account, the requirement relating to transparency laid down by Directive 2003/55 is directly applicable and may be relied upon by an individual as against a private-law company such as Stadtwerke Neuwied, and that compliance with that requirement is a condition for the validity of the price increase.

19 It points out in that regard that the Bundesgerichtshof (Federal Court of Justice, Germany) has held that the national provisions in force at the material time could not be interpreted in conformity with Directive 2003/55. Having, moreover, found that that directive was not directly applicable, the Bundesgerichtshof (Federal Court of Justice) concluded that such a situation did not have to lead to the invalidity of the price increases at issue and acknowledged that Stadtwerke Neuwied had the right to adjust its prices on the basis of a further interpretation of the gas supply contract.

20 The referring court queries whether the combined provisions of Article 3(3) of Directive 2003/55 and points (b) and (c) of Annex A thereto must be interpreted as meaning that direct notification of the customer in relation to the tariff increase is a condition for the validity of that increase. It also queries whether those provisions are directly applicable because, in accordance with the case-law of the Court of Justice, they could be considered to be unconditional and sufficiently precise and are being relied upon as against an entity, namely Stadtwerke Neuwied, which could be considered, again according to the case-law of the Court of Justice, to be subject to the authority or control of the State or to have special powers beyond the provisions applicable to relations between individuals.

21 In those circumstances, the Landgericht Koblenz (Regional Court, Koblenz, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 3(3) of Directive [2003/55], read in conjunction with points (b) and (c) of Annex A thereto, to be interpreted as meaning that failure to give gas customers timely and direct notice of the preconditions, reasons for and extent of an imminent change in the tariff for gas supplies precludes the effectiveness of such a change in tariff?

(2) If that question is answered in the affirmative:

Has Article 3(3) of Directive [2003/55], read in conjunction with points (b) and (c) of Annex A thereto, had direct effect since 1 July 2004 in respect of a supply company incorporated under private law (as a German GmbH), because the abovementioned provisions of that directive are unconditional, so far as their subject matter is concerned, and can therefore be applied without any further implementing act, and confer rights on citizens vis-à-vis an organisation which, despite its private-law legal form, is subject to the authority of the State because the State is the sole shareholder in the undertaking?’

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Article 3(3) of Directive 2003/55, read in conjunction with points (b) and (c) of Annex A thereto, must be interpreted as meaning that, where tariff changes which have not been personally notified to customers are implemented by a gas supplier of last resort with the sole aim of passing on the increase in the cost of acquisition of natural gas without any profit being sought, it is a condition for the validity of the tariff changes concerned that that supplier fulfil the obligations of transparency and information referred to in those provisions.

23 It should be borne in mind that the aim of Directive 2003/55 is to improve the functioning of the internal market in gas. In that regard, non-discriminatory, transparent and fairly priced network access is necessary for competition to function and of paramount importance in completing the internal electricity and gas market (judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317, paragraph 39).

24 In that context, consumer protection concerns underpin the provisions of Directive 2003/55 and are closely linked both to the liberalisation of the markets in question and to the objective, also pursued by that directive, of ensuring a stable gas supply (judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317, paragraph 40).

25 It is in the light of that objective and of those concerns that Article 3 of Directive 2003/55, relating to public service obligations and customer protection, provides, in paragraph 3, that Member States are to take appropriate measures to protect final customers and to ensure high levels of consumer protection. In addition, Member States may appoint a supplier of last resort to ensure security of supply for customers connected to the gas network. In any event, those measures include, with regard at least to household customers, those set out in Annex A to that directive.

26 Point (b) of Annex A to Directive 2003/55 states that the measures referred to in Article 3(3) are in particular to ensure that service providers notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. In addition, according to that provision, Member States are to ensure that customers are free to withdraw

from contracts if they do not accept the new conditions for the supply of gas. Under point (c) of Annex A to that directive, customers are to receive transparent information on applicable prices and tariffs.

27 It must be noted that the wording of those provisions does not, however, indicate whether compliance with gas suppliers' obligations of transparency and information is a condition for the validity of tariff changes in respect of the supply of gas.

28 Nevertheless, the Court has held that it is in order to be able to benefit fully and effectively from their rights and to take an informed decision as to whether to terminate the contract or to challenge the adjustment of the supply price that customers must be given adequate notice, before that adjustment takes effect, of the reasons and preconditions for the adjustment, and its scope (judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317, paragraph 47).

29 It follows that the obligations of transparency and information laid down in points (b) and (c) of Annex A to Directive 2003/55 are intended to ensure, in accordance with the objective of consumer protection, that the customer can exercise his or her right to withdraw from the contract or to challenge the change in the price of supply.

30 It would not be possible to ensure that customers could exercise that right, and the provisions of points (b) and (c) of Annex A to Directive 2003/55 would be deprived of any practical effect, if the gas supplier were to fail to fulfil its obligations of transparency and information by failing, in particular, to inform its customers personally of the planned tariff change.

31 However, it must be recalled that, in the particular circumstances of the case in the main proceedings, Stadtwerke Neuwied was acting as 'supplier of last resort' within the meaning of Article 3(3) of Directive 2003/55, and that the tariff changes made by that supplier were intended only to pass on the rise in the cost of acquisition of natural gas, without any profit being sought.

32 The Court has held that as such a supplier of gas is required, in the framework of the obligations imposed by the national legislation, to enter into contracts with customers who request this and who are entitled to the conditions laid down in that legislation, the economic interests of that supplier must be taken into account in so far as it is unable to choose the other contracting party and cannot freely terminate the contract (judgment of 23 October 2014, *Schulz and Egbringhoff*, C-359/11 and C-400/11, EU:C:2014:2317, paragraph 44).

33 In those circumstances, it must be held that, where the gas supplier's tariff changes are limited to passing the rise in the cost of acquisition of gas on to the price of provision and the supplier is not seeking to make any profit, the invalidity of those changes as a result of the failure to notify customers personally could seriously jeopardise the economic interests of the gas supplier.

34 Consequently, in so far as the supplier is obliged to ensure security of supply for its customers, the validity of an increase in tariffs that effectively passes on the rise in the cost of acquisition of gas cannot depend on those customers being notified personally. Were that not the case, the economic risk that would be borne by the gas supplier could jeopardise the security of supply objective of Directive 2003/55 and disproportionately damage the economic interests of that supplier.

35 Since the failure to notify the tariff changes personally does, even in that situation, undermine consumer protection, customers of that supplier must be able to terminate the contract at any time and, moreover, in so far as gas is supplied at a tariff which the customer could not have been aware of before it came into effect, the appropriate remedies must be available to the customer so that he or she can seek compensation for damage that may have been incurred as a result of his or her inability to exercise the right, in a timely fashion, to change supplier in order to have the benefit of a more favourable tariff. It is for the referring court to verify these points.

36 Having regard to the foregoing considerations, the answer to the first question is that Article 3(3) of Directive 2003/55, read in conjunction with points (b) and (c) of Annex A thereto, must be interpreted as meaning that, where tariff changes which have not been personally notified to customers are implemented by a gas supplier of last resort with the sole aim of passing on the increase in the cost of acquisition of natural gas without any profit being sought, it is not a condition for the validity of the tariff changes in question that that supplier fulfil the obligations of transparency and information referred to in those provisions, provided that the customers are able to terminate the contract at any time and have the appropriate remedies available to obtain compensation for damage that may have been incurred as a result of the failure to notify the changes personally.

The second question

37 In view of the answer given to the first question referred, there is no need to answer the second question.

Costs

38 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 (Seventh Chamber) hereby rules:

Article 3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, read in conjunction with points (b) and (c) of Annex A thereto, must be interpreted as meaning that, where tariff changes which have not been personally notified to customers are implemented by a gas supplier of last resort with the sole aim of passing on the increase in the cost of acquisition of natural gas without any profit being sought, it is not a condition for the validity of the tariff changes in question that that supplier fulfil the obligations of transparency and information referred to in those provisions, provided that the customers are able to terminate the contract at any time and have the appropriate remedies available to obtain compensation for damage that may have been incurred as a result of the failure to notify the changes personally.

[Signatures]