

JUDGMENT OF THE COURT (Grand Chamber)

20 April 2010*

In Case C-265/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 15 April 2008, received at the Court on 19 June 2008, in the proceedings

Federutility,

Assogas,

Libarna Gas SpA,

Collino Commercio SpA,

Sadori Gas Srl,

* Language of the case: Italian.

Egea Commerciale Srl,

E.On Vendita Srl,

Sorgenìa SpA

v

Autorità per l'energia elettrica e il gas,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, K. Lenaerts, J.-C. Bonichot (Rapporteur) and E. Levits, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, G. Arestis, M. Ilešič, J. Malenovský, U. Löhmus, A. Ó Caoimh and J.-J. Kasel, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2009,

after considering the observations submitted on behalf of:

- Federutility, by T. Salonico, D. Bonvegna and G. Candeloro, avvocati,

- Assogas, by G. Ferrari and F. Todarello, avvocati,

- Libarna Gas SpA, Collino Commercio SpA, Sadori Gas Srl and Egea Commerciale Srl, by F. Todarello and F. Novelli, avvocati,

- Sorgenia SpA, by P.G. Torrani, O. Torrani and G. Malonchini, avvocati,

- the Italian Government, by I. Bruni, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

- the Estonian Government, by L. Uibo, acting as Agent,

- the Polish Government, by M. Dowgielewicz, acting as Agent,

- la Commission of the European Communities, by V. Di Bucci, B. Schima and S. Schønberg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2009,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation 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).

- ² That request was made in the context of disputes between Federutility, Assogas, Libarna Gaz SpA, Collino Commercio SpA, Sadori Gas Srl, Egea Commerciale Srl, E.On Vendita Srl and Sorgenia SpA, which are undertakings and associations of undertakings active on the natural gas market in Italy, and the Autorità per l'energia elettrica e il gas ('the AEEG') on the subject of measures whereby the latter defined 'reference prices' for the supply of natural gas which the undertakings are required to state in their commercial offers to part of their clientele.

Legal context

Community law

3 The 2nd, 3rd, 4th, 18th, 26th and 27th recitals of Directive 2003/55 are worded as follows:

- (2) Experience in implementing [Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1)] 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 ... 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) The freedoms which the Treaty guarantees European citizens – free movement of goods, freedom to provide services and freedom of establishment – are only

possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

- (18) Gas customers should be able to choose their supplier freely. None the less a phased approach should be taken to completing the internal market for gas, coupled with a specific deadline, to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose their supplier.
- (26) In order to ensure the maintenance of high standards of public service in the Community, all measures taken by Member States to achieve the objectives of this Directive should be regularly notified to the Commission. ...

Member States should ensure that when they are connected to the gas system customers are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices. Measures taken by Member States to protect final customers may differ according to households and small- and medium-sized enterprises.

(27) [Compliance with] 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 ... 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 Community law.

4 Article 2(7) of Directive 2003/55 defines the activity of ‘supply’ as follows:

“supply” means the sale, including resale, of natural gas ...’

5 Article 2(27) of Directive 2003/55 defines ‘final customers’ as follows:

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

6 Article 2(28) of that directive defines ‘eligible customers’ in the following terms:

“eligible customers” means customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 23 of this Directive.’

7 Article 3 of that directive provides:

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

2. Having full regard to the relevant provisions of the Treaty [on the Functioning of the European Union (TFEU)], in particular Article [106] thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to the ... price of supplies Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU gas companies to national consumers. ...

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. ... [Member States] 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 ... household customers these measures shall include those set out in Annex A.

...

6. Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil public service obligations, including consumer and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from the provisions of this Directive. They shall notify the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.’

8 Under Article 23(1) of Directive 2003/55:

‘Member States shall ensure that the eligible customers are:

...

(c) from 1 July 2007, all customers.’

9 Annex A to Directive 2003/55, to which Article 3(3) of that directive refers, states:

‘Without prejudice to Community rules on consumer protection, ... the measures referred to in Article 3 are to ensure that customers:

...

- (g) connected to the gas system are informed about their rights to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices.⁷

National law

- ¹⁰ Shortly before 1 July 2007, the deadline for the full liberalisation of the market for the sale of natural gas to final customers, the Italian authorities adopted Decree-Law No 73 of 18 June 2007 (GURI No 139, of 18 June 2007, p. 4), which allocated to the AEEG the power to define 'reference prices' for the sale of gas to certain customers. That Decree-Law, converted into a Law, after amendment, by Law No 125 of 3 August 2007 (GURI No 188, of 14 August 2007, p. 6), provides in Article 1(3) as follows:

'To comply with the Community law provisions on universal service, [the AEEG] shall set standard terms for the supply of the service and establish, on a transitory basis and based on the actual costs of the service, reference prices ... for supplies of natural gas to domestic customers, which distributors or suppliers shall, within the scope of their public service obligations, incorporate into their commercial offerings (providing also the possibility of a choice between differentiated tariff packages and time tariffs). Article 1, paragraph 375, of Law No 266 of 23 December 2005 ... authorises, within sixty days of the date of entry into force of the law converting this decree, of measures for the protection of consumers in particular circumstances of health or economic

disadvantage. The powers of supervision and intervention of the Authority to protect the rights of consumers are also maintained, including in cases of established and unjustified price increases and variations in the terms of service to customers who have not yet exercised their right of choice.’

- ¹¹ On 29 March 2007, the AEEG adopted Decision No 79/07 revising the economic conditions for the supply of natural gas for the period from 1 January 2005 to 31 March 2007 and fixing the criteria for updating certain economic conditions. According to point 1.3.1 of that decision, the calculation formulae adopted for the purposes of variable remuneration in relation to wholesale marketing had to be applied until 30 June 2008. Point 1.3.2 of that decision permits the AEEG to verify whether the conditions are fulfilled for extending that power until 30 June 2009.

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

- ¹² The applicants in the main proceedings have applied to the Tribunale amministrativo regionale per la Lombardia for the annulment of Decision No 79/07 of 29 March 2007, and of the decisions subsequent thereto.
- ¹³ They argue in particular that as from 1 July 2007, the date of full liberalisation of the natural gas market provided for in Article 23(1)(c) of Directive 2003/55, the sale price of natural gas must be determined solely by the interplay of supply and demand. They consider, therefore, that the definition by the AAEG of ‘reference prices’ for the

supply of natural gas, at issue in the main proceedings, infringes Community law in so far as it applies beyond the second quarter of 2007.

¹⁴ In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following questions to the Court:

‘1. On a proper interpretation, in accordance with the principles enshrined in the EU Treaty, of Article 23 of Directive 2003/55 of the European Parliament and of the Council of 26 June 2003, which regulates the opening up of the gas market, is it contrary to that provision and to the principles of Community law for a national provision (and measures adopted in pursuance thereof) to maintain in effect after 1 July 2007 the power of the national regulatory authority to set reference prices for the supply of natural gas to domestic customers (an open-ended category not defined in the legislation and which does not of itself entail particular circumstances of socio-economic disadvantage such as might justify the setting of such reference prices), which distributors or suppliers, within the scope of their public service obligations, are bound to include in their commercial offers?

or

2. Is the provision in question (Article 23) to be read in conjunction with Article 3 of Directive 2003/55 (which provides that Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate inter alia to the price of supplies) as meaning that it is not contrary to those provisions of Community law for a national provision which, having regard to the particular circumstances of the market, still characterised by an absence of conditions of “effective competition”, at least in the

wholesale sector, to allow a public authority to set a reference price for natural gas which has to be quoted by every supplier in its commercial offers to its domestic customers within the scope of the universal service concept, despite the fact that all customers must be treated as “free”?

The questions referred for a preliminary ruling

- 15 As a preliminary observation, it is apparent from the question referred and from the documents on the Court’s file that the dispute at issue in the main proceedings concerns the possibility of the AEEG determining the extent to which costs connected with the wholesale marketing of natural gas must be taken into account in the determination of the price of supply of natural gas, by means of the definition of the ‘reference price’ for the supply of natural gas which undertakings must propose to some of their customers. It is also apparent from the observations and replies sent to the Court that while those undertakings merely have to propose those prices in their commercial offers, those prices are in practice lower than those which would result from the operation of supply and demand. Those ‘reference prices’ are therefore in principle accepted by the customers to which they are proposed, and they are binding in practice in the contractual relationship. It follows that, by the definition of ‘reference prices’ at issue in the main proceedings, the AEEG determines the price level for the supply of natural gas to certain customers.
- 16 In its two questions, which should be examined together, the referring court asks, in essence, whether Articles 3(2) and (3) and 23 of Directive 2003/55 preclude national legislation such as that at issue in the main proceedings which allows the determination, in the conditions set out in the previous paragraph, of the level of the price of the supply of natural gas by the definition of ‘reference prices’, such as those at issue in the main proceedings, after 1 July 2007.

The principle of State intervention

- 17 Article 23(1)(c) of Directive 2003/55 provides that Member States must ensure that all customers are free to buy natural gas from the supplier of their choice as from 1 July 2007.
- 18 Although it is not explicitly stated in that provision, or indeed in any other provisions of that directive, that the price for the supply of natural gas must, as from 1 July 2007, be determined solely by the operation of supply and demand, that requirement follows from the very purpose and the general scheme of that directive, which, as its 3rd, 4th and 18th recitals state, is designed progressively to achieve a total liberalisation of the market for national gas in the context of which, in particular, all suppliers may freely deliver their products to all consumers.
- 19 Article 3(1) of Directive 2003/55 therefore requires Member States to ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that natural gas undertakings are operated in accordance with the principles of that directive with a view to achieving, inter alia, a ‘competitive market in natural gas.’
- 20 However, and as is apparent from the 26th and 27th recitals, Directive 2003/55 is also designed to ensure that, in the context of that liberalisation, ‘high standards’ of public service are maintained and the final consumer is protected.
- 21 In order to meet those latter objectives, Article 3(1) of Directive 2003/55 states that it applies ‘without prejudice’ to Article 3(2), which expressly permits Member States to

impose ‘public service obligations’ on undertakings operating in the gas sector, which may in particular concern the ‘price of supply’.

- 22 It follows from the wording of Article 3(2) that measures adopted on the basis thereof must be adopted in the general economic interest, be clearly defined, transparent, non discriminatory and verifiable, and guarantee equality of access for EU gas companies to national consumers. The same provision adds that Member States must thereby have ‘full regard’ to the relevant provisions of the Treaty on the Functioning of the European Union, and in particular of Article 106 TFEU.
- 23 It should be noted that that power is exercised subject to the review of the Commission, since Member States are required under Article 3(6) of Directive 2003/55 to inform the Commission of all measures taken to fulfil public service obligations and their possible effects on national and international competition, whether or not such measures require a derogation from the provisions of that directive, and to notify the Commission every two years of any changes to such measures.
- 24 Thus, provided the conditions which it sets out are met, Directive 2003/55 permits State intervention in the determination of price for the supply of natural gas to final consumers after 1 July 2007.

The conditions for State intervention

- 25 In the light of the above, it is necessary to examine in turn the conditions for the State intervention made possible by Article 3(2) of Directive 2003/55 and set out in that provision.

Intervention justified in the general economic interest

- 26 Regarding the condition concerning the existence of a general economic interest, Directive 2003/55 gives no definition of that expression, but the reference in Article 3(2) of that directive, both to that condition and to Article 106 TFEU, which concerns undertakings entrusted with the management of a service of general economic interest, implies that that condition should be interpreted in the light of that latter provision of the Treaty.
- 27 It is important to bear in mind in that respect that Article 106(2) TFEU provides, first, that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and, secondly, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
- 28 As the Court has stated, that provision is designed to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market (see, to that effect, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 103 and case-law cited).
- 29 In that context, Member States are entitled, while complying with the law of the Union, to define the scope and the organisation of their services in the general economic interest. In particular, they may take account of objectives pertaining to their national policy (see, to that effect, *Albany*, paragraph 104).
- 30 In this case, as regards the organisation of the internal market in natural gas, it follows expressly from the 27th recital of Directive 2003/55 that the latter lays down only minimal common rules as regards public service obligations and that the requirements

concerning the public service must be capable of being interpreted, subject to the observance of the law of the Union, ‘on a national basis’, and ‘taking into account national circumstances’.

- 31 It is also noteworthy that the 26th recital of Directive 2003/55 states that Member States should ensure that when they are connected to the gas system customers are informed about their rights to be supplied with natural gas of a specified quality at ‘reasonable prices’.
- 32 It follows from the above that Directive 2003/55 allows Member States to assess whether, in the general economic interest, after 1 July 2007, it is necessary to impose on undertakings operating in the gas sector public service obligations in order, in particular, to ensure that the price of the supply of natural gas to final consumers is maintained at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued, as mentioned in paragraphs 18 and 20 of this judgment, by the Union legislature.

Compliance with the principle of proportionality

- 33 It follows from the very wording of Article 106 TFEU that the public service obligations which Article 3(2) of Directive 2003/55 allows to be imposed on undertakings must comply with the principle of proportionality and that, therefore, after 1 July 2007, those obligations may compromise the freedom to determine the price for the supply of natural gas only in so far as is necessary to achieve the objective in the general economic interest which they pursue and, consequently, for a period that is necessarily limited in time.

- 34 It is for the referring court to assess, in the context of the dispute in the main proceedings, whether that requirement of proportionality is fulfilled. It is, however, for the Court of Justice to provide all the necessary indications for that purpose having regard to the law of the Union.
- 35 First, such an intervention must be limited in duration to what is strictly necessary in order to achieve its objective, in order, in particular, not to render permanent a measure which, by its very nature, constitutes an obstacle to the realisation of an operational internal market in gas. In that respect, the mere fact that the national law in question labels the intervention as temporary is not in itself sufficient for a finding that it is proportionate from the point of view of its duration. It is for the national court to assess whether national legislation such as that at issue in the main proceedings, which permits determination of the price level for the supply of natural gas by the adoption of 'reference prices' such as those at issue in the main proceedings, independently of free market forces, fulfils such a requirement. In that context, the referring court should examine whether and to what extent the relevant national law requires the administration to make a periodic re-examination, at close intervals, of the need for it to intervene in the gas sector and the manner of its doing so, having regard to the development of that sector.
- 36 Secondly, the method of intervention used must not go beyond what is necessary to achieve the objective which is being pursued in the general economic interest.
- 37 On that point, the observations submitted to the Court in these proceedings indicate that the purpose of defining 'reference prices', such as those at issue in the main proceedings, for the supply of natural gas is to limit the impact of the increase in the price of petroleum products on international markets, which, in a context where competition on the natural gas market is not effective, especially on the wholesale market, would in the absence of intervention have a major impact on the sale price offered to final customers. It is for the referring court to verify whether that is the case, taking account in particular of the objective of establishing a fully operational internal

market for gas and of the investments necessary in order to exert effective competition in the natural gas sector.

- 38 If, following those verifications, it were to be shown that such an intervention is capable of being justified in that way, the requirement of proportionality would imply in particular that it be limited in principle to the price component directly influenced upwards by those specific circumstances.
- 39 Thirdly, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure, and, more particularly, its beneficiaries.
- 40 In that regard, it should be emphasised that that requirement does not prevent ‘reference prices’ for the supply of natural gas, such as those at issue in the main proceedings, from being applied to all customers whose consumption of natural gas is above a certain threshold rather than being limited to the circle of those, expressly referred to in Article 3(3) of Directive 2003/55, who must necessarily be protected on account of their vulnerability.
- 41 If, as some of the applicants in the main proceedings maintain before the Court, the definition of ‘reference prices’ for the supply of natural gas, such as those at issue in the main proceedings, applies also to undertakings irrespective of their size, which it is for the referring court to verify, it should be noted that Directive 2003/55 does not in principle exclude the possibility that the latter may also benefit, as final consumers of gas, from the public service obligations which Member States may adopt in the context of Article 3(2) of that directive. The 26th recital of that directive states in particular that measures taken by the Member States to protect final consumers

may differ according to whether they are addressed to households or to small- and medium-sized undertakings.

- 42 In that case, however, it would be necessary to take account, in assessing the proportionality of the national measure in question, of the fact that the situation of undertakings is different from that of domestic consumers, the objectives pursued and the interests present being not necessarily the same and also of objective differences between the undertakings themselves, according to their size.
- 43 In those circumstances, apart from the specific case, referred to at the hearing, of management companies of apartment blocks, the requirement of proportionality referred to above would not, in principle, be complied with if the definition of ‘reference prices’ for the supply of natural gas, such as those at issue in the main proceedings, were to benefit individuals and undertakings in an identical manner, in their capacity as final consumers of gas.

The requirement that public service obligations be clearly defined, transparent, non discriminatory and verifiable, and that they guarantee equal access for EU gas companies to consumers

- 44 Finally, the other conditions mentioned in Article 3(2) of Directive 2003/55, requiring that the public service obligations adopted under that provision be clearly defined, transparent, non discriminatory and verifiable, and that they guarantee equal access for EU gas companies to consumers, must also be fulfilled.
- 45 As regards the requirement that those obligations must not be discriminatory, it is for the referring court to verify whether, having regard to the whole of the measures

which may have been taken in that area by the Member State concerned, the definition of ‘reference prices’ for the supply of natural gas, such as those at issue in the main proceedings, which applies in an identical manner to all undertakings supplying natural gas, must nevertheless be regarded as discriminatory.

⁴⁶ It would be so if such intervention were to lead in reality to imposing the financial burden arising from the intervention mainly on some of those undertakings, in this case those not also carrying on the business of producing/importing natural gas.

⁴⁷ The answer to the questions referred must therefore be that Articles 3(2) and 23(1) of Directive 2003/55 do not preclude national legislation, such as that at issue in the main proceedings, which permits determination of the price level for the supply of natural gas by the definition of ‘reference prices’, such as those at issue in the main proceedings, after 1 July 2007, provided that such intervention:

- pursues a general economic interest consisting in maintaining the price of the supply of natural gas to final consumers at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued by Directive 2003/55;

- compromises the free determination of prices for the supply of natural gas after 1 July 2007 only in so far as is necessary to achieve such an objective in the general economic interest and, consequently, for a period that is necessarily limited in time;

- is clearly defined, transparent, non discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers.

Costs

- ⁴⁸ 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 (Grand Chamber) hereby rules:

Articles 3(2) and 23(1) 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 do not preclude national legislation such as that at issue in the main proceedings, which permits determination of the price level for the supply of natural gas by the definition of 'reference prices', such as those at issue in the main proceedings, after 1 July 2007, provided that such intervention:

- **pursues a general economic interest consisting in maintaining the price of the supply of natural gas to final consumers at a reasonable level having regard to the reconciliation which Member States must make, taking account**

of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued by Directive 2003/55;

- **compromises the free determination of prices for the supply of natural gas after 1 July 2007 only in so far as is necessary to achieve such an objective in the general economic interest and, consequently, for a period that is necessarily limited in time;**

- **is clearly defined, transparent, non discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers.**

[Signatures]