Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

27 January 2022*

(Reference for a preliminary ruling – Internal market in electricity – Directive 2009/72/EC – Article 15(4) – Priority of dispatching – Security of supply – Article 32(1) – Free third-party access – Guaranteed access to the transmission systems – Directive 2009/28/EC– Article 16(2) – Guaranteed access – Article 107(1) TFEU – Article 108(3) TFEU – State aid)

In Case C-179/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 3 March 2020, received at the Court on 7 April 2020, in the proceedings

Fondul Proprietatea SA

v

Guvernul României,

SC Complexul Energetic Hunedoara SA, in liquidation,

SC Complexul Energetic Oltenia SA,

Compania Națională de Transport al Energiei Electrice 'Transelectrica' SA,

intervener:

Ministerul Economiei, Energiei și Mediului de Afaceri,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, C. Lycourgos, President of the Fourth Chamber, I. Jarukaitis (Rapporteur) and M. Ilešič, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 2 June 2021,

* Language of the case: Romanian.

EN

after considering the observations submitted on behalf of:

– Fondul Proprietatea SA, by C. Dontu, D. Petrache and J. Anghel, avocați,

– SC Complexul Energetic Oltenia SA, by D. Burlan, V. Bobei, V. Boca and L. Diaconu Pintea,

– the European Commission, by O. Beynet, L. Nicolae, A. Bouchagiar and K.-Ph. Wojcik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107(1) and Article 108(3) TFEU, and of Article 15(4) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

2 The request has been made in proceedings between, on the one hand, Fondul Proprietatea SA and, on the other, the Guvernul României (Romanian Government); SC Complexul Energetic Hunedoara SA, in liquidation ('CE Hunedoara'), represented by its insolvency administrator Expert Insolvență SPRL; SC Complexul Energetic Oltenia SA ('CE Oltenia'); and the Compania Națională de Transport al Energiei Electrice 'Transelectrica' SA (national electricity transmission company Transelectrica; 'Transelectrica') concerning an application for annulment of a decision of the Romanian Government adopting measures for the security of electricity supply.

Legal context

European Union law

Directive 2005/89/EC

3 Recital 5 of Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ 2006 L 33, p. 22) stated:

'When promoting electricity from renewable energy sources, it is necessary to ensure the availability of associated back-up capacity, where technically necessary, in order to maintain the reliability and security of the network.'

Directive 2009/28/EC

4 Recital 60 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16) stated:

‘Priority access and guaranteed access for electricity from renewable energy sources are important for integrating renewable energy sources into the internal market in electricity, in line with Article 11(2) and developing further Article 11(3) of Directive 2003/54/EC [of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37)]. Requirements relating to the maintenance of the reliability and safety of the grid and to the dispatching may differ according to the characteristics of the national grid and its secure operation. Priority access to the grid provides an assurance given to connected generators of electricity from renewable energy sources that they will be able to sell and transmit the electricity from renewable energy sources in accordance with connection rules at all times, whenever the source becomes available. In the event that the electricity from renewable energy sources is integrated into the spot market, guaranteed access ensures that all electricity sold and supported obtains access to the grid, allowing the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid. …’

5 Article 16 of that directive, entitled ‘Access to and operation of the grids’, provided, in paragraph 2 thereof:

‘Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

…

(b) Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources; …’

Directive 2009/72

6 Recitals 3 and 5 of Directive 2009/72 stated:

‘(3) The freedoms which the Treaty guarantees the citizens of the Union – inter alia, the free movement of goods, the freedom of establishment and the freedom to provide services – are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

…

(5) A secure supply of electricity is of vital importance for the development of European society, the implementation of a sustainable climate change policy, and the fostering of competitiveness within the internal market. To that end, cross-border interconnections should be further developed in order to secure the supply of all energy sources at the most competitive prices to consumers and industry within the [European Union].’

7 Article 1 of that directive, entitled 'Subject matter and scope', provided:

'This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the [European Union]. …'

8 Article 2 of that directive, entitled 'Definitions', stated:

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

…

3. "transmission" means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply;

4. "transmission system operator" means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;

…

16. "economic precedence" means the ranking of sources of electricity supply in accordance with economic criteria;

17. "ancillary service" means a service necessary for the operation of a transmission or distribution system'.

9 Article 3 of that directive, entitled 'Public service obligations and customer protection', stated, in paragraph 14 thereof:

'Member States may decide not to apply the provisions of Articles 7, 8, 32 and/or 34 in so far as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the [European Union]. The interests of the [European Union] include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article [106 TFEU].'

10 Article 15 of Directive 2009/72, entitled 'Dispatching and balancing', provided, in paragraphs 1 to 4 thereof:

'1. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the transmission system operator shall, where it has such a function, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which shall be approved by national regulatory authorities where competent and which must be objective, published and applied in a non-discriminatory manner, ensuring the proper functioning of the internal market in electricity. The criteria shall take into

account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.

3. A Member State shall require system operators to act in accordance with Article 16 of Directive [2009/28] when dispatching generating installations using renewable energy sources. They also may require the system operator to give priority when dispatching generating installations producing combined heat and power.

4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding, in any calendar year, 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.'

11 Article 32 of Directive 2009/72, entitled 'Third-party access', stated, in paragraph 1 thereof:

'Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies – where only methodologies are approved – are published prior to their entry into force.'

Romanian law

Law No 123/2012

12 The Legea energiei electrice și a gazelor naturale nr. 123/2012 (Law No 123/2012 on electricity and natural gas) of 10 July 2012 (*Monitorul Oficial al României*, Part I, No 485 of 16 July 2012), in the version applicable to the dispute in the main proceedings ('Law No 123/2012'), provides in Article 5(3):

'For reasons relating to the security of electricity supply, guaranteed access to the electricity grids may be granted, by Government decision, for the electricity produced by power plants which use indigenous fuels, up to an annual limit corresponding to primary energy of not more than 15% of the total quantity of equivalent fuel needed to produce electricity corresponding to gross national final consumption.'

Government Decision No 138/2013

13 The Hotărârea Guvernului nr. 138/2013 privind adoptarea unor măsuri pentru siguranța alimentării cu energie electrică (Decision No 138/2013 of the Romanian Government on the adoption of measures to safeguard security of electricity supply) of 3 April 2013 (*Monitorul Oficial al României*, Part I, No 196 of 8 April 2013) ('Decision No 138/2013'), adopted on the basis of Article 5(3) of Law No 123/2012, stated in Article 1:

'Guaranteed access to the electricity grids shall be granted for electricity produced by the Mintia thermal electricity power station owned by [CE Hunedoara], which shall ensure its continuous operation at an average electrical power of at least 200 MW.'

14 Article 2 of that decision stated:

‘Guaranteed access to the electricity grids shall be granted for electricity produced by [CE Oltenia], which shall ensure its continuous operation at an average electrical power of at least 500 MW.’

15 Article 3 of that decision stated:

‘[Transelectrica], in its capacity as the distribution grid operator, shall be required to guarantee the priority dispatching of electricity produced by the thermal electricity power stations referred to in Articles 1 and 2 on the conditions laid down by the regulations adopted by the Autoritatea Națională de Reglementare în Domeniul Energiei [National Energy Sector Regulatory Authority].’

16 Article 4 of that decision provided:

‘In order to maintain the security level of the national electro-energy system, [CE Hunedoara] shall be required to provide ancillary services to the transmission grid manager of electric power of at least 400 MW, in accordance with the regulations adopted by the Autoritatea Națională de Reglementare în Domeniul Energiei [National Energy Sector Regulatory Authority].’

17 Article 5 of Decision No 138/2013, as amended, was worded as follows:

‘In order to maintain the safety level of the national electro-energy system, [CE Oltenia] shall be required to provide ancillary services to the transmission system operator with a power rating of at least 600 MW, in accordance with the regulations adopted by the Autoritatea Națională de Reglementare în Domeniul Energiei [National Energy Sector Regulatory Authority].’

18 Article 6 of that decision provided:

‘The measures laid down in this Decision shall apply from 15 April 2013 until 1 July 2015.’

19 By Government Decision No 941/2014, the period prescribed for the application of the measures laid down in Articles 1, 3 and 4 of Decision No 138/2013 to CE Hunedoara was extended until 31 December 2017.

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

20 Fondul Proprietatea, a company which was a minority shareholder of S.P.E.E.-H. Hidroelectrica SA, brought an action before the Curtea de Apel București (Court of Appeal, Bucharest, Romania) for annulment of Decision No 138/2013, on the ground that, by that decision, unlawful State aid had been granted to CE Hunedoara and to CE Oltenia, two electricity generators using indigenous primary energy fuel sources in which the State has the majority shareholding.

21 It is apparent from the request for a preliminary ruling that Decision No 138/2013 established a series of measures for the benefit of those two companies which were applied from 15 April 2013 to 1 July 2015 in the case of CE Oltenia and until 31 December 2017 in the case of CE Hunedoara. First of all, Articles 1 and 2 of Decision No 138/2013 granted guaranteed access to the electricity grids for electricity produced by the thermal power plants of those two companies in order to ensure that they could operate continuously at an average power of at least 200 megawatts (MW) for the power plant owned by CE Hunedoara and of at least 500 MW for the power plant owned by CE Oltenia. Next, in accordance with Article 3 of that decision, Transelectrica, the sole transmission system operator, was required to guarantee the priority of dispatching of electricity

produced by those two companies' thermal electricity power plants. Lastly, Articles 4 and 5 of that decision introduced a requirement for CE Hunedoara and CE Oltenia to provide Transelectrica with ancillary services of an electric power of at least 400 MW and 600 MW respectively.

22 By judgment of 10 March 2015, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) dismissed Fondul Proprietatea's action. That company then brought an appeal in cassation against that judgment before the Înalta Curte de Casație și Justiție – Secția de Contencios Administrativ și Fiscal (High Court of Cassation and Justice – Administrative and Fiscal Litigation Division, Romania), which set aside in part the judgment under appeal, by judgment of 22 May 2018, on the ground that the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) had not assessed all the grounds put forward by Fondul Proprietatea. The Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) therefore referred the case back to the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) so that it could examine all of those grounds.

23 In the course of the examination of the action for annulment, following that referral back, before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), Fondul Proprietatea requested that that court refer questions to the Court of Justice for a preliminary ruling.

24 Fondul Proprietatea states, in that regard, before the referring court, that Decision No 138/2013 is likely to constitute State aid within the meaning of Article 107(1) TFEU.

25 In particular, Fondul Proprietatea observes that Transelectrica, a company in which the State has the majority shareholding, is required at all times to ensure the balance of the national electro-energy system, that is to say, the balance between the production and consumption of electricity. In that regard, Fondul Proprietatea claims that it purchases ancillary services under procurement procedures according to which the bids submitted by the electricity generators are classified in ascending order, starting with the lowest price bid. Generators with low production costs and which can offer those ancillary services at competitive prices are those which, as a general rule, provide them.

26 According to Fondul Proprietatea, the power plants owned by CE Hunedoara and CE Oltenia have high production costs such that those power plants do not operate continuously and do not sell a large quantity of electricity. When they are shut down, their chances of providing ancillary services are substantially reduced, since restarting them takes a considerable amount of time and involves additional costs. Thus, if the economic criteria had been observed, those companies would not have been able to sell such ancillary services. In those circumstances, the Romanian State intervened by granting those companies guaranteed access to the transmission systems and priority access with the obligation to purchase ancillary services.

27 Fondul Proprietatea considers that those measures confer on those two companies a selective economic advantage financed through State resources to the detriment of other electricity generators on the market. Those measures, it argues, circumvent the mechanism of guaranteed access, created to encourage production of electricity from renewable non-polluting sources, since that access has been granted to two companies which produce electricity from polluting sources. The guaranteed access was granted by Decision No 138/2013 solely in order to enable the generating installations that benefit from that access to operate continuously so that they could provide ancillary services and produce electricity at a better price.

28 The Romanian Government, the defendant in the main proceedings, contends before the referring court that the obligation for Transelectrica to give priority to the dispatching of the electricity produced by CE Hunedoara and CE Oltenia under Article 3 of Decision No 138/2013 is intended to apply Article 15(4) of Directive 2009/72 at national level.

29 As regards ancillary services, that government points out that it is stated in Decision No 138/2013 that the obligation of the two generators, CE Hunedoara and CE Oltenia, to provide ancillary services is subject to the conditions laid down in the regulations issued by the Autoritatea Națională de Reglementare în Domeniul Energiei (National Energy Sector Regulatory Authority; 'ANRE'), the authority which draws up, adopts and ensures the application of the compulsory rules necessary for the functioning of the energy sector at national level.

30 With regard to the national measures at issue in the main proceedings, the Romanian Government contends that they do not constitute State aid.

31 The Ministerul Economiei, Energiei și Mediului de Afaceri (Ministry of the Economy, Energy and the Business Environment), intervener before the referring court, states that Decision No 138/2013 includes measures necessary for the safe functioning of the national electro-energy system and that that decision was made by taking into account various considerations. First of all, the strong growth in production capacity from renewable sources made it necessary for the Romanian Government to take measures to safeguard security of electricity supply in accordance with recital 5 of Directive 2005/89.

32 Next, the operation of power plants using conventional energy sources was considered necessary to cover the load curve of electricity consumption.

33 Furthermore, the studies on the security and adequacy of the national electro-energy system indicated that it was necessary for local power plants located throughout the territory of the country to be in operation, since those power plants provide ancillary services and ensure that the supply of electricity matches demand. In that context, the view was taken that CE Hunedoara could contribute significantly to the security of the central and north-western part of the national electro-energy system.

34 Lastly, at the time when Decision No 138/2013 was adopted, the increase in cross-border trade at the western border and the reduction of losses in the transmission system, which are in direct proportion to the distance between producers and consumers, required the existence of significant production capacity in that area and CE Hunedoara was the only major producer in the central and north-western part of the country.

35 It was on the basis of those considerations that the Romanian Government adopted Decision No 138/2013, which provides for the grant of guaranteed access to the transmission systems for electricity produced by the installations of CE Hunedoara and CE Oltenia, in order to ensure continuous operation at an electric power of at least 200 MW and of at least 500 MW respectively, on the understanding that those values represented a right for recipient generators and not an obligation to operate at those capacities.

36 Transelectrica submits before the referring court that, in order to ensure the adequacy of the system and to cover electricity demand, the national electro-energy system must have a certain available capacity, guaranteed by power plants, that is higher than the power consumed at peak consumption. Similarly, it is necessary to ensure that an operational reserve that could balance the continual variations in load is maintained at all times.

37 Furthermore, the national electro-energy system reports a significant increase in the number of power plants producing electricity from renewable energy sources, the production of which is unpredictable and intermittent. Moreover, power plants using conventional sources, in particular those using coal, report increasing costs since they cannot operate on a continuous basis and, when they are shut down, they are unable to provide any ancillary services in view of the length of their restarting times and of the considerable costs associated with that operation.

38 Thus, those power plants are unable to be competitive on the market, but their operation as power plants producing electricity from conventional energy sources remains necessary to cover the load curve for electricity consumption and to guarantee ancillary services. The security of the national electro-energy system also requires the use of different fuels in order to produce the electricity needed to cover national energy consumption. In that regard, the Romanian Government attaches particular importance to the priority use of domestic energy resources, so as to guarantee energy independence.

39 Transelectrica also contends before the referring court that Fondul Proprietatea confuses the balancing market with the market for ancillary services. According to Transelectrica, in the market for ancillary services, reserves are purchased from specialist providers classified for that purpose and those reserves may or may not be activated in the balancing market. The activation of reserves in the balancing market is not guaranteed for any provider of ancillary services and is triggered in accordance with market rules. Those rules also apply to the generators concerned by Decision No 138/2013 and there is no guarantee that the balancing energy which they provide in preference to other providers will in fact be used.

40 Furthermore, the national market for ancillary services is highly concentrated and competition on that market is weak. Given that there is a limited supply, the prices for ancillary services on the competitive market are very high and the weighted average offer prices often exceed the regulated prices. It cannot therefore be said with certainty that the purchase price of the reserves would be lower in the absence of the provisions of Decision No 138/2013.

41 In addition, Article 3 of Decision No 138/2013, according to which Transelectrica is required to give priority to the dispatching of the electricity produced by the power plants of CE Hunedoara and CE Oltenia, constitutes, according to Transelectrica and the Romanian Government, an implementation of Article 15(4) of Directive 2009/72, transposed into national law by Article 5(3) of Law No 123/2012. In that regard, ANRE asserted, before the adoption of that decision, that the proposed measures comply both with the applicable Romanian legislation and with the applicable EU law, while the Romanian Competition Council stated that those measures do not distort the electricity market and do not engender anti-competitive treatment.

42 The referring court notes that the Romanian State may have implemented a system for the benefit of CE Hunedoara and of CE Oltenia in order to offer more advantages to those two companies, that is to say, the guaranteed sale of electricity produced by the continuous operation of power

plants and the production of electricity at a better price resulting from the elimination of the restarting costs of power plants, which is liable to constitute State aid within the meaning of Article 107(1) TFEU.

43 The referring court considers that it is necessary to obtain clarification as to whether Article 5(3) of Law No 123/2012 amounts to an incorrect transposition of Article 15(4) of Directive 2009/72. According to the referring court, the wording of that latter provision refers to the same type of electricity generators as those referred to by that law, that is to say, those which use combustible indigenous primary energy fuels sources, and it lays down an identical limit, that is to say, 15% of all the primary energy needed to produce electricity. However, there is a difference between that directive and the Romanian legislation which transposes it, since that directive does not relate to the guaranteed access referred to in Article 5(3), but to the grant of priority dispatching.

44 The referring court considers that it is therefore necessary to assess whether Article 15(4) of Directive 2009/72 constitutes an exception, requiring strict application, which permits only the grant of priority dispatching to the transmission systems, but not the grant of guaranteed access to them, as provided for in Decision No 138/2013.

45 In the light of the provisions of that directive, the referring court notes that guaranteed access to the systems is granted only in the case of energy produced from renewable sources. Consequently, it takes the view that the guaranteed access granted for the electricity produced by CE Hunedoara and CE Oltenia may constitute an infringement of Article 15(4) of Directive 2009/72.

46 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) … Does the adoption by the Romanian State of a legislative act which, for the benefit of two companies of which the State is the majority shareholder, provides for:
   (a) the grant of priority access to dispatching and an obligation for the transmission system operator to purchase ancillary services from those companies, and
   (b) the grant of guaranteed access to the electricity grid for the electricity produced by those two companies, such as to ensure that they can operate continuously,

   constitute State aid within the meaning of Article 107 TFEU, that is to say, is it a measure funded by the State or through State resources, is it selective in nature and may it affect trade between Member States? If so, is such State aid subject to notification as provided for by Article 108(3) TFEU?

(2) … Is the grant by the Romanian State of a right of guaranteed access to the electricity grid to two companies of which the State is the majority shareholder, such as to ensure that they can operate continuously, consistent with the provisions of Article 15(4) of Directive [2009/72]?’

Consideration of the questions referred

The second question

47 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 15(4) of Directive 2009/72 must be interpreted as precluding national legislation which grants guaranteed access to the transmission systems to certain electricity generators, the installations of which use indigenous primary energy fuel sources, in order to safeguard security of electricity supply.

48 Under Article 15(4) of Directive 2009/72, a Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding, in any calendar year, 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

49 As a preliminary point, it should be noted that it is apparent from the material submitted by the referring court that Article 5(3) of Law No 123/2012 is designed to transpose Article 15(4) of Directive 2009/72 into Romanian law. As stated by the referring court, Article 5(3) of Law No 123/2012 covers the same generating installations using indigenous primary energy fuel sources and the same limit as that in Article 15(4) of Directive 2009/72. However, that national provision does not provide for the possibility of granting priority dispatching, but for the possibility of granting guaranteed access to the electricity grids for the electricity produced. Although Directive 2009/72 does not contain any express reference to such guaranteed access, it should be noted that, first, Article 15(3) of that directive refers to Article 16 of Directive 2009/28, paragraph 2(b) of which refers, inter alia, to guaranteed access to the grid-system for electricity produced from renewable energy sources and, second, Article 32(1) of Directive 2009/72 lays down the principle of free third-party access to the systems.

50 In those circumstances, in order to give a useful answer to the question raised by the referring court, it is necessary to interpret Article 15(3) and (4) and Article 32(1) of Directive 2009/72 as well as Article 16(2)(b) of Directive 2009/28.

51 As regards, in the first place, the interpretation of Article 15(4) of Directive 2009/72, it is necessary to examine the meaning to be given to the possibility that 'priority be given to the dispatch' of an installation.

52 In that regard, it must be borne in mind that the need to ensure a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (judgment of 9 September 2021, *Bundesamt für Fremdenwesen und Asyl (Subsequent application for international protection)*, C-18/20, EU:C:2021:710, paragraph 32 and the case-law cited).

53 Since Article 15(4) of Directive 2009/72 does not contain any reference to the national law of the Member States, the wording of that provision must be given an independent and uniform interpretation.

54 In that regard, it must be noted that the Court has already held that dispatching enables the electricity system operator to dispatch the generating installations in a specific area in order to, inter alia, procure the energy that it uses to cover energy losses and reserve capacity in its system, balance the distribution system and ensure the proper functioning of the internal market in electricity (see, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 63).

55 Under Article 15(2) of Directive 2009/72, the generating installations dispatched on that occasion are to be determined on the basis of criteria which are to be objective, published and applied in a non-discriminatory manner, and which take into account, in particular, the criterion of economic precedence.

56 The words 'priority to be given' used in Article 15(4) of Directive 2009/72 indicate that the priority dispatching departs from the rules on dispatching set out in Article 15(2) of that directive. Thus, as the Advocate General observed in point 29 of his Opinion, priority dispatching consists, for the transmission system operator, in dispatching generating installations on the basis of criteria other than economic precedence.

57 In that regard, it should be noted that, by Article 15(3) and (4) of Directive 2009/72, the EU legislature established two types of priority dispatching, that is to say, a priority dispatching for generating installations using renewable energy sources and for installations producing combined heat and power under Article 15(3) of that directive, based on the objective of protection of the environment, as well as a priority dispatching for generating installations using indigenous primary energy fuel sources under Article 15(4) of that directive, based on the objective of security of supply.

58 As regards, in the second place, the interpretation of Article 16(2)(b) of Directive 2009/28, which requires Member States to grant either priority access or guaranteed access to the grid for the electricity produced from renewable energy sources, it should be noted that that provision makes no express reference to the law of the Member States for the purpose of determining its meaning and scope. Therefore, the terms in that provision must be interpreted in an independent and uniform manner throughout the territory of the European Union, in accordance with the case-law recalled in paragraph 52 of the present judgment.

59 It follows from the Court's case-law that access to the system includes the right to use the electricity grids (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 42).

60 However, that access is not unlimited, since it depends on the maximum capacity that the transmission system may have.

61 Recital 60 of Directive 2009/28 states that, in the event that the electricity from renewable energy sources is integrated into the spot market, guaranteed access ensures that all electricity that is sold and subsidised has access to the grid, allowing the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid. It follows, as the Advocate General observed in point 35 of his Opinion, that guaranteed access, as set out in recital 60, is a mechanism that ensures that generating installations using renewable energy sources have access to the grids in order to transmit the electricity produced.

62 The guaranteed access provided for in Article 16(2)(b) of Directive 2009/28 is intended to integrate renewable energy sources into the internal market in electricity by ensuring that all electricity produced from renewable energy sources has access to the grids, thus allowing the use of a maximum quantity of electricity produced from renewable energy sources.

63 However, that Article 16(2) states that guaranteed access to electricity produced from renewable energy sources is not unconditional. That provision provides for such guaranteed access for electricity produced from renewable energy sources, subject to compliance with the requirements relating to the maintenance of the reliability and security of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities.

64 It thus follows from the interpretation of Article 15(4) of Directive 2009/72 and of Article 16(2)(b) of Directive 2009/28, as the European Commission stated, in essence, in its written pleadings and at the hearing before the Court, that the rules on dispatching determine which electricity generating installations are to produce electricity at a certain time of the day, whereas the rules on access determine which generator has access to the electricity grids in the event of physical congestion of the grid when there is insufficient capacity.

65 Consequently, since Article 15(4) of Directive 2009/72 provides solely for the possibility of granting a right of priority dispatching, that provision cannot serve as a legal basis for Member States to introduce a guaranteed right of access to the transmission systems. As for Article 16(2)(b) of Directive 2009/28, it does, it is true, refer to the possibility of establishing 'guaranteed access', but only as regards green electricity. It therefore cannot also serve as a legal basis for national provisions relating to guaranteed access for non-renewable energy generating installations.

66 However, it is important, in the third place, in order to determine whether national legislation may grant guaranteed access to the transmission systems for the electricity produced from indigenous primary energy fuel sources, to also take into account the third-party access to the systems provided for in Article 32(1) of Directive 2009/72. In accordance with that provision, Member States have, in principle, the obligation to implement a system of third party access to the transmission and distribution systems which must be based on published tariffs and be applicable to all eligible customers and applied objectively and without discrimination between system users.

67 As the Court has already repeatedly pointed out, free access to those systems for third parties, established in Article 32(1) of Directive 2009/72, constitutes one of the essential measures that Member States are required to implement in order to bring about the completion of the internal market in electricity (judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 54 and the case-law cited).

68 As is apparent from recital 3 of Directive 2009/72, that directive aims to achieve a fully open market which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

69 In that regard, it should be noted that non-discriminatory, transparent and fairly priced access to the transmission and distribution systems is necessary for competition to function and is of paramount importance (judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 40 and the case-law cited).

70 Article 32(1) of Directive 2009/72, which requires that the action of the State in creating access to the system should not be discriminatory, is a specific expression of the general principle of equality (see, by analogy, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 79 and the case-law cited).

71 In accordance with settled case-law, the prohibition of discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 80 and the case-law cited).

72 A difference in treatment is justified if it is based on an objective and reasonable criterion, that is to say, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 81 and the case-law cited).

73 While it is for the referring court to determine whether a difference in treatment, such as that at issue in the main proceedings, is justified, it is nevertheless for the Court of Justice to provide the referring court for this purpose with all the points of interpretation of EU law which will enable it to reach a decision.

74 In the present case, it is apparent from the information in the file submitted to the Court that guaranteed access is granted pursuant to Decision No 138/2013 only in respect of electricity produced by two installations using indigenous primary energy fuel sources. That decision does not apply to other electricity generators using indigenous primary energy fuels or to electricity generators using renewable energy sources, and it constitutes a difference in treatment since, on the one hand, those electricity generators and, on the other, those referred to in that decision are in a comparable situation with regard to access to the transmission systems.

75 As regards the possible justification for such a difference in treatment, it must be noted that the objective of Decision No 138/2013 was to ensure security of supply. It is apparent from the information available to the Court that the measures taken pursuant to that decision were intended to ensure the adequacy of the system by creating reserve capacity for peak consumption periods and were necessary to resolve the problems relating to the balancing of the system resulting from the increase in production capacity from renewable energy sources and to respond to the increase in cross-border trade. That decision was also intended to ensure the use of different fuels for producing electricity by attaching a particular importance to the priority use of domestic energy resources, so as to guarantee energy independence.

76 There is no doubt that the objective of security of supply is legitimate. As is apparent from recital 5 of Directive 2009/72, a secure supply of electricity is of vital importance for the development of European society, the implementation of a sustainable climate change policy, and the fostering of competitiveness within the internal market.

77 As regards the objective and reasonable criterion accounting for the difference in treatment in relation to the objective pursued, it should be noted, in the present case, that such a criterion, which would make it possible to distinguish between the two installations benefiting from the guaranteed access to the transmission systems and those which do not benefit from it, is not apparent from the information made available to the Court. That being so, it is for the referring

court to determine whether other generators using primary energy fuel sources or other sources of energy located in the same geographical area would have been in a better position to participate in the creation of production capacity and to access the transmission systems.

78 Next, it is necessary to ascertain whether the guaranteed access to the transmission systems is, in accordance with the principle of proportionality, appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary in order to attain that objective (see, to that effect, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 100).

79 In the present case, it appears that the two installations referred to by Decision No 138/2013 using indigenous primary energy sources were able to operate continuously as a result of the guaranteed access to the electricity grids combined with the priority dispatching of those installations, which enabled them to participate in the creation of production capacity to ensure security of the electricity supply. Therefore, guaranteed access, combined with the other measures taken in Decision No 138/2013, appears to be suitable to ensure security of supply, this being a matter which it is for the referring court to determine.

80 That being so, the referring court will have to determine whether the grant of guaranteed access to the transmission systems, under the conditions provided for by Decision No 138/2013, did not exceed the limits of what was appropriate and whether it was a measure necessary to achieve the objective of ensuring security of supply. In that regard, the referring court will have to examine whether that objective could have been achieved by other means which would have caused less damage to the principle of free third-party access to the system provided for in Article 32(1) of Directive 2009/72.

81 In the light of all of the foregoing considerations, the answer to the second question is that Article 32(1) of Directive 2009/72 must be interpreted as not precluding the grant by a Member State of a right of guaranteed access to the transmission systems to certain electricity generators, the installations of which use indigenous primary energy fuels, in order to safeguard security of the electricity supply, provided that that right of guaranteed access is based on objective and reasonable criteria and is proportionate to the legitimate objective pursued, this being a matter for the referring court to determine.

The first question

82 By its first question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a series of measures established by a government decision and consisting of priority dispatching by the system operator of the electricity produced by certain electricity generators, of guaranteed access to the transmission systems for the electricity produced by the installations of those generators, and of the obligation for those generators to provide ancillary services for a certain quantity of megawatts to the system operator, is liable to be classified as 'State aid' within the meaning of that provision and, therefore, if so, whether such a series of measures is subject to notification under Article 108 TFEU.

83 As a preliminary point, it must be borne in mind that the Court does not have jurisdiction to rule upon the compatibility of a national measure with EU law. Nor does the Court have jurisdiction to rule on the compatibility of State aid or of an aid scheme with the internal market, since that

assessment falls within the exclusive competence of the Commission, subject to review by the Court (judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 19 and the case-law cited).

84 However, the Court does have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility of a national measure with that law for the purposes of deciding the case before it. In the area of State aid, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation in order to enable it to determine whether a national measure may be classified as 'State aid' under EU law (judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 20 and the case-law cited).

85 Proceedings may be brought before the national courts requiring them to interpret and apply the concept of 'aid' contained in Article 107(1) TFEU, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought to have been subject to this procedure and, if appropriate, to verify whether the Member State concerned has complied with that obligation (judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 31 and the case-law cited).

86 It should also be noted that, according to settled case-law, classification of a measure as 'State aid', for the purposes of Article 107(1) TFEU, requires all of the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, that intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 18 and the case-law cited).

87 As regards, in the first place, the first of those conditions, it should be borne in mind that, in order for it to be possible to categorise advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 19 and the case-law cited).

88 In order to assess whether a measure may be attributed to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 23 and the case-law cited).

89 In the present case, it is apparent from the request for a preliminary ruling that the series of measures at issue was established by provisions of a legislative and regulatory nature, that is to say, Law No 123/2012 on which Decision No 138/2013 is based. Therefore, those measures must be regarded as attributable to the State, within the meaning of the case-law cited in the previous paragraph.

90 Furthermore, in order to determine whether the advantage has been granted directly or indirectly through State resources, it should be borne in mind that, according to the Court's settled case-law, the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State and aid granted through a public or private body appointed or established by that State to administer it (judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 25 and the case-law cited).

91 The distinction established in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not mean that all advantages granted by the State constitute aid, whether they are financed with State resources or not, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see, to that effect, judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 26 and the case-law cited).

92 It is also apparent from the Court's case-law that a measure consisting, inter alia, of an obligation to purchase energy may come within the concept of 'aid', even though it does not involve a transfer of State resources (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 52 and the case-law cited).

93 Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if sums corresponding to the aid measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and are therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 53 and the case-law cited).

94 The Court has, more specifically, held that funds financed through compulsory charges imposed by State legislation, and administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separate from the public authorities. The decisive factor in this regard is that such undertakings are appointed by the State to administer a State resource and are not merely bound by an obligation to purchase by means of their own financial resources (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraphs 54 and 55 and the case-law cited).

95 In the present case, it is apparent from the request for a preliminary ruling that Transelectrica, the sole transmission system operator, is a public undertaking in which the State has the majority shareholding. That company is required at all times to ensure the balance of the national energy system, that is to say, the balance between the production and consumption of electricity. In that regard, Transelectrica purchases ancillary services on the basis of procurement procedures in accordance with the order of economic precedence. However, under Decision No 138/2013, Transelectrica is required to purchase ancillary services from two electricity generators at the price set by ANRE, without taking account of the order of economic precedence, which may result in the purchase of those ancillary services at prices higher than those on the market. That is liable to represent a financial burden imposed on Transelectrica which constitutes a strain on the resources of the State.

96 As regards, in the second place, the condition that the series of measures in question in the main proceedings must be regarded as conferring an advantage on its recipient, it follows from the Court's settled case-law that measures which, whatever their form, are likely directly or indirectly to benefit undertakings or which must be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are to be regarded as aid (judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo*, C-212/19, EU:C:2020:726, paragraph 39 and the case-law cited).

97 Thus, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 66).

98 In the present case, it is apparent from the request for a preliminary ruling that the series of measures established by Decision No 138/2013 constitutes a comprehensive package of measures for the benefit of two electricity generators, CE Hunedoara and CE Oltenia. Those three measures are linked and form a mechanism that enables the continuous operation of the generating installations. The referring court states that the two installations referred to by Decision No 138/2013 have high production costs, with the result that they do not normally operate continuously. When those installations are shut down, this reduces their chances of providing ancillary services due to the slow starting times of the installations, and it also results in the high starting and restarting costs of those installations. By allowing those installations to operate on a continuous basis, the series of measures at issue in the main proceedings thus guarantees them the supply of a certain quantity of electricity and enables them to provide ancillary services, to save on the starting and restarting costs of the installations and thus, as a result of the elimination of those costs, to produce electricity at a better price.

99 Therefore, measures such as those provided for by Decision No 138/2013 appear to confer an economic advantage on the recipient electricity generators in comparison with their competitors, an advantage which they would not have obtained under normal market conditions. As a result, it must be held that, in the present case, the condition concerning the existence of a selective economic advantage is likely to be satisfied.

100 As regards, in the third place, the condition that the intervention must be liable to affect trade between Member States and distort or threaten to distort competition, it should be borne in mind that, for the purpose of categorising a national measure as 'State aid', it is necessary, not to establish that the aid has a real effect on trade between the Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 29 and the case-law cited).

101 In particular, when aid granted by a Member State strengthens the position of an undertaking in comparison with other undertakings competing in EU trade, those latter undertakings must be regarded as being affected by that aid. In that connection, it is not necessary that the beneficiary undertakings themselves be involved in that trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are correspondingly reduced (see, to that effect, judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraphs 31 and 32 and the case-law cited).

102 Furthermore, is should be borne in mind that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (see, to that effect, judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 52 and the case-law cited).

103 In the present case, as observed by the referring court, electricity generators operate on a market which is open to competition and trade between Member States, since electricity is the subject of cross-border trade.

104 In addition, as has been pointed out in paragraph 98 of the present judgment, the measures at issue in the main proceedings appear to have enabled the recipient installations to operate on a continuous basis, thus saving the costs associated with the starting and restarting of the installations, which would have also enabled them to reduce the final price of the electricity they offer.

105 Therefore, measures such as those established by Decision No 138/2013 are liable, in principle, to affect trade between Member States and to distort competition.

106 It follows that, in the light of the foregoing points of interpretation, the measures at issue in the main proceedings must, subject to the checks which it is for the referring court to carry out, be classified as 'State aid' within the meaning of Article 107(1) TFEU.

107 The referring court also asks the Court whether, if they are to be classified as State aid, those measures should or should not have been subject to the preliminary examination procedure provided for in Article 108(3) TFEU.

108 In accordance with that provision, new aid must be notified in advance to the Commission and may not be put into effect until the procedure has resulted in a final decision.

109 According to settled case-law of the Court, an aid measure which is put into effect in infringement of the obligations arising from Article 108(3) TFEU is unlawful (judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 66 and the case-law cited).

110 It follows from the foregoing that, if the referring court classifies the series of measures at issue in the main proceedings as 'State aid' within the meaning of Article 107(1) TFEU, that series of measures should be regarded as new aid and should, on that ground, have been subject to the obligation of prior notification to the Commission in accordance with Article 108(3) TFEU. It is for the referring court to determine whether the Member State concerned has complied with that obligation.

111 In the present case, it is apparent from the written observations of the Commission that it did not receive any notification under Article 108(3) TFEU relating to State aid granted to CE Hunedoara and CE Oltenia pursuant to Decision No 138/2013. In addition, it must be noted that those measures do not appear to come within the scope of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107] and [108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3) and of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] (OJ 2014 L 187, p. 1), applicable during the period covered by Decision No 138/2013, this being a matter which it is for the referring court to determine.

112 In the light of all the foregoing considerations, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that a series of measures established by a government decision and consisting of priority dispatching by the system operator, in which the State has the majority shareholding, of the electricity produced by certain electricity generators,

the installations of which use indigenous primary energy fuel sources; of guaranteed access to the transmission systems for the electricity produced by those installations of those generators; and of an obligation for those generators to provide ancillary services for a certain quantity of megawatts to the system operator, which reserves for them a right to supply that quantity at the prices fixed in advance and deemed to exceed the prices on the market, is liable to be classified as 'State aid' within the meaning of Article 107(1) TFEU. If so, such a series of measures must be regarded as new aid and is, on that ground, subject to the obligation of prior notification to the Commission, in accordance with Article 108(3) TFEU.

Costs

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

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

1. **Article 32(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as not precluding the grant by a Member State of a right of guaranteed access to the transmission systems to certain electricity generators, the installations of which use indigenous primary energy fuel sources, in order to safeguard security of electricity supply, provided that that right of guaranteed access is based on objective and reasonable criteria and is proportionate to the legitimate objective pursued, this being a matter for the referring court to determine.**

2. **Article 107(1) TFEU must be interpreted as meaning that a series of measures established by a government decision and consisting of priority dispatching by the system operator, in which the State has the majority shareholding, of the electricity produced by certain electricity generators, the installations of which use indigenous primary energy fuel sources; of guaranteed access to the transmission systems for the electricity produced by those installations of those generators; and of an obligation for those generators to provide ancillary services for a certain quantity of megawatts to the system operator, which reserves for them a right to supply that quantity at the prices fixed in advance and deemed to exceed the prices on the market, is liable to be classified as 'State aid' within the meaning of Article 107(1) TFEU. If so, such a series of measures must be regarded as new aid and is, on that ground, subject to the obligation of prior notification to the European Commission, in accordance with Article 108(3) TFEU.**

[Signatures]