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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

30 March 2023 (\*)

(Reference for a preliminary ruling – Internal market in electricity – Directive 2009/72/EC – Article 37 – Annex I – Duties and powers of the national regulatory authority – Consumer protection – Administrative management costs – Power of the national regulatory authority to order the repayment of sums paid by final customers pursuant to contractual terms that have been penalised by that authority)

In Case C-5/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 31 December 2021, received at the Court on 3 January 2022, in the proceedings

**Green Network SpA**

v

**SF,**

**YB,**

**Autorità di Regolazione per Energia Reti e Ambiente (ARERA),**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič, I. Jarukaitis (Rapporteur) and Z. Csehi, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having considered the observations submitted on behalf of:

- Green Network SpA, by V. Cerulli Irelli and A. Fratini, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello and F. Fedeli, avvocati dello Stato,
- the European Commission, by O. Beynet, G. Gattinara and T. Scharf, acting as Agents,

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

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 37(1) and (4) of and Annex I to 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 the context of proceedings between Green Network SpA and the Autorità di Regolazione per Energia Reti e Ambiente (Regulatory Authority for Energy, Networks and the Environment, Italy) (ARERA) concerning the latter's decision imposing an administrative fine of EUR 655 000 on Green Network and ordering it to repay its final customers the sum of EUR 13 987 495.22 corresponding to certain administrative management costs that it had charged to them.

## **Legal context**

### ***European Union law***

3 Recitals 37, 42, 51 and 54 of Directive 2009/72 were worded as follows:

‘(37) Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity. ...

...

(42) All [European Union] industry and commerce, including small and medium-sized enterprises, and all citizens of the Union that enjoy the economic benefits of the internal market should also be able to enjoy high levels of consumer protection, and in particular household customers and, where Member States deem it appropriate, small enterprises should also be able to

enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs, for reasons of fairness, competitiveness and, indirectly, to create employment. Those customers should also have access to choice, fairness, representation and dispute settlement mechanisms.

...

(51) Consumer interests should be at the heart of this Directive and quality of service should be a central responsibility of electricity undertakings. Existing rights of consumers need to be strengthened and guaranteed, and should include greater transparency. Consumer protection should ensure that all consumers in the wider remit of the [European Union] benefit from a competitive market. Consumer rights should be enforced by Member States or, where a Member State has so provided, the regulatory authorities.

...

(54) Greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all consumers. Member States should introduce speedy and effective complaint handling procedures.'

4 Article 1 of that directive, headed '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]. ... It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.'

5 Under Article 2 of that directive, headed 'Definitions':

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

...

7. "customer" means a wholesale or final customer of electricity;

8. "wholesale customer" means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he is established;

9. "final customer" means a customer purchasing electricity for his own use;

...'

6 Article 3 of that directive, headed 'Public service obligations and customer protection', provided:

'...

7. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. ... They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. ...

...

9. ...

The regulatory authority or another competent national authority shall take the necessary steps to ensure that the information provided by suppliers to their customers pursuant to this Article is reliable and is provided, at a national level, in a clearly comparable manner.

...'

7 Article 36 of Directive 2009/72, headed 'General objectives of the regulatory authority', was worded as follows:

'In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies:

...

(g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;

...'

8 Article 37 of that directive, headed 'Duties and powers of the regulatory authority', provided, in paragraphs 1 and 4:

'1. The regulatory authority shall have the following duties:

...

(i) monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations;

(j) monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services, and complaints by household customers, ...

...

(n) helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced;

...

4. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

...

(d) to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10% of the annual turnover of the transmission system operator on the transmission system operator or of up to 10% of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive; ...

...’

9 Annex I to that directive, headed ‘Measures on consumer protection’, provided, in paragraph 1:

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

(a) have a right to a contract with their electricity service provider that specifies:

...

– any compensation and the refund arrangements which apply if contracted service quality levels are not met, including inaccurate and delayed billing,

...

...

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

...

(f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. In particular, all consumers shall have the right to a good standard of service and complaint handling by their electricity service provider. Such out-of-court dispute [settlement] procedures shall enable disputes to be settled fairly and promptly, preferably within three months, with provision, where warranted, for a system of reimbursement and/or compensation. ...

...’

### ***Italian law***

10 Article 2(12)(g) of Legge n. 481 – Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità (Law No 481 on the rules relating to competition and the regulation of public utility services – Establishment of regulatory authorities for public utility services) of 14 November 1995 (Ordinary Supplement No 136 to GURI No 270 of 18 November 1995) entrusts ARERA with the task of ‘[monitoring] the performance of services with powers of inspection, access, acquisition of documentation and

relevant information, also determining the cases where compensation is automatically payable by the entity providing the service to the user where that entity fails to observe the contractual terms or provides the service at levels of quality below those laid down in the service regulations’.

11 Under Article 2(20)(d) of that law, ARERA has the power to order the entity providing the service to cease any conduct prejudicial to the rights of users and to require that entity, pursuant to Article 2(12)(g) of that law, to pay compensation.

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

12 Following receipt of a report from the Sportello per il consumatore Energia e Ambiente (Consumer advice centre for Energy and the Environment, Italy), which revealed that Green Network, an electricity and natural gas distribution undertaking, had mentioned a fee on its invoices to its customers which those customers disputed on the ground that it was unclear, ARERA initiated proceedings against that undertaking.

13 Subsequent to that report, ARERA carried out other checks by which it found that that fee was provided for by a term in the general conditions applicable to energy supply contracts offered by Green Network, for both electricity and natural gas. According to that term, administrative management costs were not included in the tariffs for the supply of energy, and the supplier could charge the customer, in that respect, a fee not exceeding EUR 5 or, for certain customers, EUR 10 per month.

14 Having found that Green Network’s definition of that fee in those general conditions was unlawful in so far as that fee was not stated in the comparison table, which makes it possible to compare the different commercial offers available on the market, or on the platform on which consumers may search for offers, ARERA imposed, by decision of 20 June 2019, an administrative fine of EUR 655 000 on Green Network for having communicated to its final customers contractual information that did not comply with the regulatory provisions laid down by ARERA. In that decision, ARERA ordered Green Network to reimburse those customers the sum of EUR 13 987 495.22 collected from them by way of administrative management costs.

15 Green Network brought an action against that decision before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), which was dismissed.

16 Green Network brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy), the referring court, claiming, inter alia, that ARERA’s power to require repayment of a fee to customers was contrary to Directive 2009/72, since that fee had been determined in the context of private contractual relations.

17 The referring court states that the dispute before it concerns the question whether ARERA’s power to order the repayment of sums invoiced to customers can be inferred from Directive 2009/72. The relevant provisions of that directive, relied on by Green Network, the correct interpretation of which is not clear, do not appear to have already been interpreted by the Court.

18 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are the provisions of EU law contained in [Directive 2009/72] – and in particular in Article 37(1) and (4), governing the powers of the regulatory authorities, and in Annex I – to be

interpreted as including a prescriptive power exercised by [ARERA], in relation to companies operating in the electricity sector, whereunder [ARERA] may order such a company to reimburse customers, including former customers and customers in arrears, sums of money paid by such customers to cover administrative management costs, pursuant to a contractual term that has been penalised by [ARERA]?

(2) Are the provisions of EU law contained in [Directive 2009/72] – and in particular in Article 37(1) and (4), governing the powers of the regulatory authorities, and in Annex I – to be interpreted as including, within the scope of any compensation and the refund arrangements which apply to customers in the electricity market if contracted service quality levels are not met by the market operator, the reimbursement of moneys paid by such customers that are expressly governed by a contractual term in an agreement that has been signed and accepted and bear no relationship to service quality itself but are stipulated as covering the economic operator's own administrative management costs?'

### **Consideration of the questions referred**

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 37(1)(i) and (n) and Article 37(4)(d) of Directive 2009/72 and Annex I thereto must be interpreted as precluding a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for sums paid by those customers to cover 'administrative management costs' pursuant to a contractual term considered to be unlawful by that authority, including in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency.

20 In that regard, as the Court has already held, it follows from Article 1 of Directive 2009/72, and from recitals 37, 42, 51 and 54 thereof, that that directive aims to grant energy regulators the power to ensure the full effectiveness of consumer protection measures, to ensure that all EU industry and commerce and all EU citizens enjoy high levels of consumer protection and have access to dispute settlement mechanisms, to put consumer interests at the heart of the directive, to have the national regulatory authority, where the Member State confers on it that competence, enforce the consumer rights of electricity consumers as well as to implement effective means of dispute settlement for all consumers (judgment of 8 October 2020, *Crown Van Gelder*, C-360/19, EU:C:2020:805, paragraph 26).

21 Under Article 3(7) of Directive 2009/72, Member States are to take appropriate measures to protect final customers and are to ensure, inter alia, high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. According to that provision, as regards at least household customers, those measures are to include those set out in Annex I to that directive, which include the measures to ensure that customers receive transparent information on applicable prices and tariffs, and on standard terms and conditions.

22 The Court has, moreover, already held that, in order to pursue the abovementioned objectives, Directive 2009/72 requires Member States to confer wide powers on their national regulatory authorities to regulate and monitor the market in electricity (judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraph 23). As is apparent from Article 36(g) of that directive, the general objectives that Member States must assign to their national regulatory authorities in the exercise of their duties and powers include helping to ensure consumer protection (see, to that effect, judgments of 23 January 2020, *Energiavirasto*, C-578/18, EU:C:2020:35,

paragraph 35, and of 8 October 2020, *Crown Van Gelder*, C-360/19, EU:C:2020:805, paragraph 27).

23 In particular, Article 37(1)(i) and (n) of Directive 2009/72 provides that the national regulatory authority is to have the duties of monitoring compliance of electricity undertakings with transparency obligations and helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I to that directive, are effective and enforced. In that regard, Article 37(4) of that directive provides that Member States are to ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in Article 37(1), (3) and (6) of that directive in an efficient and expeditious manner, and are to have, for that purpose, at least the powers listed in that provision. Although those powers include the power, provided for in Article 37(4)(d) of Directive 2009/72, to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under that directive or any relevant legally binding decisions of the national regulatory authority, that provision does not mention the power to require those undertakings to repay any sums received as consideration under a contractual term considered to be unlawful.

24 However, the use, in Article 37(4) of Directive 2009/72, of the words ‘the regulatory authority shall have at least the following powers’ indicates that powers others than those expressly mentioned in Article 37(4) may be conferred on such an authority to enable it to carry out the tasks referred to in Article 37(1), (3) and (6) of that directive (see, to that effect, judgment of 23 January 2020, *Energiavirasto*, C-578/18, EU:C:2020:35, paragraphs 37, 38 and 40).

25 Given that ensuring compliance with the transparency obligations incumbent on electricity undertakings and protecting consumers fall within the scope of the tasks referred to in Article 37(1), (3) and (6) of that directive, it should be noted that a Member State may grant such an authority the power to require those operators to repay sums received by them in breach of consumer protection requirements, in particular those concerning the obligation of transparency and the accuracy of invoicing.

26 Such an interpretation is not called into question by the fact that Article 36 of Directive 2009/72 provides, in essence, that the national regulatory authority is to take the necessary measures ‘in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies’, or that Article 37 of that directive contains, in paragraph 1(n), the words ‘together with other relevant authorities’. It is not apparent from those provisions that, in a case such as that in the main proceedings, only one of those other national authorities may order the repayment of sums unduly received from final customers by electricity undertakings. On the contrary, the use of the words ‘as appropriate’ implies that such consultation is only necessary where the measure whose adoption is envisaged is likely to have implications for other relevant authorities.

27 Moreover, the referring court asks, in essence, whether Article 37(1)(i) and (n) and Article 37(4)(d) of Directive 2009/72 and Annex I thereto must be interpreted as allowing the national regulatory authority, on the basis of a national provision relating to the automatic payment of compensation to customers for sums received by an electricity undertaking where the contracted service quality levels are not attained, to require that electricity undertaking to repay its final customers the amounts invoiced to them, where that order for repayment is based not on considerations of the quality of the relevant service, but on the unlawfulness of a contractual term providing for the payment of ‘administrative costs’.



28 In that regard, as is apparent, in essence, from paragraph 25 above, although Directive 2009/72 does not require Member States to provide that the national regulatory authority has the power to order the repayment, by an electricity undertaking, of sums unduly received from its customers, that directive does not preclude a Member State from granting such a power to that authority. In so far as consumer protection and compliance with transparency obligations fall within the scope of the duties to be entrusted to the regulatory authorities under Article 37(1)(i) and (n) of that directive, the exact reason why, in order to accomplish one of those duties, such an undertaking is ordered to reimburse its customers is irrelevant.

29 That being so, it is for the national court to assess whether national law actually confers on the national regulatory authority the power to order the repayment of sums unduly received in cases such as that at issue in the main proceedings, or even whether that authority has applied that national law correctly.

30 In the light of all the foregoing, the answer to the questions referred is that Article 37(1)(i) and (n) and Article 37(4)(d) of Directive 2009/72 and Annex I thereto must be interpreted as not precluding a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for the sums paid by those customers to cover ‘administrative management costs’ pursuant to a contractual term considered to be unlawful by that authority, including in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency.

### **Costs**

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

**Article 37(1)(i) and (n) and Article 37(4)(d) 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, and Annex I to Directive 2009/72,**

**must be interpreted as not precluding a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for the sums paid by those customers to cover ‘administrative management costs’ pursuant to a contractual term considered to be unlawful by that authority, including in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency.**

[Signatures]

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\* Language of the case: Italian.