

Principle of the primacy of EU law: the judge must not apply a rule that is recognized as being in conformity with constitutional principles but contrary to EU law (ruling 20-16.257)

16/03/2022



Ruling No. 197 FS-B
Appeal No. J 20-16.257

Partial quashing without referral before another *cour d'appel* (Court of Appeal)

Public hearing of 16 March 2022

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Ms MOUILLARD, President

Ruling No. 197 FS-B

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FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE COUR DE CASSATION (COURT OF CASSATION), COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER, OF 16 MARCH 2022

The company Joul, a simplified joint-stock company with registered office at [Address 3], trading as ek Wateur, filed the appeal No. J 20-16.257 against the ruling delivered on 27 February 2020 by the *cour d'appel* (Court of Appeal) of Paris (Division 5, Chamber 7) in the dispute between:

(1) the Commission for the Regulation of Energy, with registered office at [Address 1],

(2) the company Enedis, a public limited-liability company with registered office at [Address 2],

(3) the Prosecutor-General for the *cour d'appel* (Court of Appeal) of Paris, domiciled at [Address 4], respondents before the *Cour de cassation* (Court of cassation).

In support of its appeal, the claimant asserted the two grounds before the *Cour de cassation* (Court of cassation), attached hereto.

The case file has been sent to the Prosecutor General.

On the report by Ms Poillot-Peruzzetto, judge, the observations of SCP Spinosi (lawyer of the company Joul), SCP Duhamel-Rameix-Gury-Maitre (lawyers of the Commission for the Regulation of Energy), SCP Thouvenin, Coudray and Grévy (lawyers of Enedis) and the advisory opinion by Mr Douvreur, advocate-general, following which the President asked the lawyers whether they wished to make further comments; after discussions in the public hearing of 25 January 2022, attended by Ms Mouillard, President, Ms Poillot-Peruzzetto, judge referee, Ms Darbois, Champalaune and Ms Michel-Amsellem, judges, Mr Blanc, Ms Comte, Bessaud, Bellino, Ms Maigret and Ms Régis, referee judges, Mr Douvreur, advocate-general, and Ms Labat, Chamber Registrar,

the Commercial, Finance and Economic Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after deliberation thereof in accordance with the law, has delivered this ruling.

Facts and procedure

1. According to the ruling under appeal (Paris, 27 February 2020), on 24 February 2016, Joul, a retail electricity supplier, entered into an agreement with Enedis, distribution grid manager (GRD), to access the distribution grid,

where said agreement did not provide for any financial consideration for the customer management services provided by the former on behalf of the latter. On 7 September 2016, Joul asked Enedis to draft a contract for the provision of customer relationship management services (SLA).

2. On 4 April 2017, accusing Enedis of not complying with its request, Joul filed a complaint with the Committee for the Settlement of Disputes and Sanctions of the Commission for the Regulation of Energy (the Cordis) requesting it to acknowledge an infringement of the principle of non-discrimination and reinstate its rights by ordering Enedis to transfer the requested SLA.
3. *On 30 December 2017, Law No. 2017-1839 was passed, which created, Article L. 341-43 of the Energy Code, which provides that customer management services performed by electricity suppliers on behalf of distribution system operators in the context of the performance of contracts relating to access to grids and the supply of electricity may give rise to remuneration, the components and amount of which were to be set by the Commission for the Regulation of Energy (CRE), and Article L. 452 2-3-1.II, which provides that, "subject to court decisions having the force of res judicata, the agreements relating to access to grids by and between system operators [...] and electricity suppliers shall be validated insofar as they are contested by the plea alleging that they impose on suppliers customer management on behalf of system operators or award suppliers all or part of the costs incurred for the customer management carried out on behalf of system operators prior to the entry-into-force of this Law. This validation is not susceptible to compensation."*
4. By Decision No. 08-38-17 of 13 July 2018, the Cordis stated:

"- Article 1: *Enedis disregarded its obligation to proceed in a non-discriminatory manner, as provided in Article L. 322-8 of the Energy Code, by refusing to grant Joul's application of 7 September 2016 for remuneration for services provided on its behalf, while other suppliers benefited from such provision of services pursuant to Article L. 224-8 of the Consumer Protection Code.* - Article 2: *The other applications by Joul were rejected.*"

5. Enedis appealed against said decision, seeking annulment and, in the alternative, the reversal of Article 1 thereof.
6. As observations, the company Joul requested the *cour d'appel* (Court of Appeal) to put an end to the discriminatory situation to which it was subject by requiring Enedis to communicate, subject to penalty, with a SLA with the same remuneration conditions and duration as those offered to other suppliers, as from 1 June 2016.

Review of the pleas

[...]

On the third part of the first plea

Statement of plea

10. *13 The company Joul objects to the ruling that it renders Article 1 of Cordis Decision No. 08-38-17 null and void and, again ruling, rejects the plea filed by Joul seeking a ruling stating that Enedis had failed to meet its obligation to non-discriminatory treatment, whereas, "by depriving electricity suppliers of the possibility of confirming the existence of a discriminatory practice owing to the fact that some of them have been forced to assume costs in respect of services provided on behalf of the system operator, with no remedial measure such as financial compensation being granted to them, Article L. 452-3-1 of the Energy Code is contrary to Directive 2009/72/EC on common rules for the internal electricity*

market, which requires the regulatory authorities to put an end to discriminatory situations; by not rendering said provisions of national law null and void, the cour d'appel (Court of Appeal) infringed Directive 2009/72/EC, Article 20 of the Charter of Fundamental Rights, together with the principle of the primacy of EU law."

Court's response

In view of the principle of the primacy of EU law and Articles 32(1) and 37(10) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 on common rules for the internal electricity market:

14 By ruling of 9 March 1978, the Court of Justice of the European Union (CJEU) ruled that, "*a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently* (CJEU, *Administration of State Finances / the public limited company Simmenthal*, 9 March 1978, 106/77).

15. The CJEU also held that, "*wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state*" (CJEU, 19 January 1982, *Becker*, 8/81).

16. Under the terms of Article 32(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 on common rules for the internal electricity market, 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, including supply companies, and applied objectively and without discrimination between system users.

17 Pursuant to Article 37(10) of said directive, regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs or methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner.

18. In a ruling of 29 September 2016, *Essent*, C-492/14, paragraph 78, the CJEU stated that, "*Article 16 [of Directive 96/92 of the European Parliament and of the Council of 19 December 1996 on common rules for the internal electricity market] thus prohibits Member States from organising access to the distribution system in a discriminatory manner, this prohibition relating generally to all discrimination, including, therefore, any discrimination in terms of the cost of using the distribution system.*"

19. Interpreted in the light of that ruling, the prohibition of tariff discrimination resulting from the abovementioned directive precludes a practice consisting, without objective justification, of granting remuneration to certain suppliers providing services to the distribution system operator while refusing remuneration to others providing the same services, thus discriminating against the user of that system in terms of the cost to be assumed.

20. Having held that Article L. 452-3-1 II of the Energy Code, resulting from Law No. 2017-1839 of 30 December 2017, was applicable to the dispute, the ruling renders Article 1 of *Cordis* Decision No. 08-38-17 null and void and, again ruling, rejects the plea filed by *Joul* seeking a ruling stating that *Enedis* had failed to meet its obligation to non-discriminatory treatment.

21. In so ruling, the *cour d'appel* (Court of Appeal), which was under a duty to refuse to apply Article L. 452-3-1, II of the Energy Code, which prohibits any action for compensation in respect of the abovementioned discriminatory practice and thereby maintains such a discriminatory practice and is contrary to the provisions of Directive 2009/72/EC, violated the abovementioned principle and texts. 22. And in the absence of reasonable doubt as to the interpretation of the European law provisions at issue it is not necessary to refer the questions suggested by the company *Joul* to the CJEU.

Scope and consequences of the referral before the *Cour de cassation* (Court of cassation).

23 After the advisory opinion given to the parties, supplemented by an email of 17 January 2022, in accordance with Article 1015 of the Civil Procedure Code, Articles L. 411-3, paragraph 2, of the Judicial Code and 627 of the Civil Procedure Code are applied.

24. The interest of the proper administration of justice justifies the *Cour de cassation* (Court of cassation) deciding on the merits.

25 According to the information provided to the Cordis by Enedis in relation to this dispute, as of 1 June 2016, six electricity suppliers had entered into a CPS with said party for the remuneration of customer management costs. Joul, which requested a similar contract on 7 September 2016 based on the services it was required to provide under the single contract with consumers, didn't obtain satisfaction.

26 As Enedis failed to assert any grounds justifying such a difference in treatment between the electricity suppliers other than that asserted before the *cour d'appel* (Court of Appeal) based on the date on which said suppliers had requested a CPS, irrelevant to the abovementioned discrimination, it must be held, as decided by the Cordis in Decision No. 08-38-17 of 13 July 2018, that by refusing to grant Joul's request to benefit from a contract providing for payment of consideration for customer management services performed for the benefit of Enedis, the latter has failed to meet its obligation regarding non-discriminatory treatment as provided in Article L. 322-8(4) of the Energy Code, and, accordingly, the action initiated by Enedis against that decision must be dismissed.

ON THESE GROUNDS, and without having to rule on the other objections, the Court:

QUASHES AND SETS ASIDE, but only insofar as it renders null and void Article 1 of Decision No. 08-38-17 of the Committee for the Settlement of Disputes and Sanctions of the Commission for the Regulation of Energy of 13 July 2018 and, ruling in a further hearing, rejects Joul's plea to uphold the fact that the company Enedis failed to meet its obligation to non-discriminatory treatment, and with regard to the award of costs, the ruling of 27 February 2020 delivered for the parties by before the *cour d'appel* (Court of Appeal) of Paris;

DECLARES that there is no need to refer back the case;

DISMISSES the action initiated by Enedis against the decision of the Committee for the Settlement of Disputes and Sanctions of the Commission for the Regulation of Energy No. 08-38-17 of 13 July 2018 on the dispute between said company and Joul;

ORDERS Enedis to pay the costs, including those incurred before the *cour d'appel* (Court of Appeal);

Pursuant to Article 700 of the Civil Procedure Code, dismissed the requests made by Enedis and the Commission for the Regulation of Energy and orders Enedis to pay Joul the amount of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of cassation), this ruling shall be transferred for transcription in the margin or further to the partially quashed ruling;

Thus carried out and decided by the *Cour de cassation* (Court of cassation), Commercial, Financial and Economic Chamber, and pronounced by the President at a public hearing on the sixteenth day of the month of March of the year two thousand and twenty-two.

President : Ms Mouillard

Reporting Judge : Ms Poillot-Peruzzetto

Judge referee : Ms Darbois

Advocate-general : Mr Douvreur

Lawyer(s) : SCP Spinosi – SCP Duhamel-Rameix-Gury-Maitre – SCP Thouvenin,

Gaudreau and Grévy

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