AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2024:000111

[2025] IESC 1

O'Donnell C.J.

Dunne J.

Charleton J.

Woulfe J.

Hogan J.

Collins J.

Donnelly J.

BETWEEN

GR WIND FARMS 1 LIMITED AND OTHERS

Applicants/Respondents

AND

THE COMMISSION FOR REGULATION OF UTILITIES

Respondent/Appellant

AND

EIRGRID PLC

Notice Party

AND

(BY ORDER) THE ATTORNEY GENERAL

Notice Party

S:AP:IE:2024:000110

BETWEEN

ENERGIA GROUP HOLDINGS (ROI) DAC AND OTHERS

Applicants/Respondents

AND

THE COMMISSION FOR REGULATION OF UTILITIES

Respondent/Appellant

AND

EIRGRID PLC

Notice Party

AND

(BY ORDER) THE ATTORNEY GENERAL

Notice Party

TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

REQUEST FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 267(3) OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Order for Reference delivered by the Supreme Court on 21 January 2025

The Referring Court

1. This reference is made by the Supreme Court of Ireland (Mr Justice Donal O' Donnell (Chief Justice), Ms Justice Elizabeth Dunne, Mr Justice Peter Charleton, Mr Justice Seamus Woulfe, Mr Justice Gerard Hogan, Mr Justice Maurice Collins and Ms Justice Aileen Donnelly) in two appeals presenting similar issues concerning the meaning and

effect of Article 13(7) of Regulation (EU) 2019/943 of the European Parliament and the Council of 5 June 2019 on the internal market for electricity ("*the Regulation*"). The Applicants are all participants in the electricity market in the island of Ireland. The Appellant, the Commission for the Regulation of Utilities (CRU), is the statutory body responsible for the regulation of the electricity market in Ireland. The Attorney General is a party to the appeals at the invitation of the Court, reflecting the importance of the issues raised.

Subject Matter of the Dispute in the Main Proceedings

Preliminary

2. Some of the Applicants own and operate wind farms in Ireland and Northern Ireland. Others operate as intermediaries for renewable generators.

3. There is a single electricity market (SEM) on the island of Ireland. The CRU is the statutory regulator and the National Regulatory Authority (NRA) for that sector in this jurisdiction. The Northern Ireland Authority for Utility Regulation (NIAUR) is the regulator in Northern Ireland. As regards the SEM, the relevant functions of the CRU and NIAR are exercised by the Single Electricity Market Committee (SEMC), which is the collective description of committees with common membership appointed for that purpose by the CRU and the NIAUR. The SEMC is not a legal person, which explains why these proceedings were brought against the CRU.

4. The Notice Party, Eirgrid plc ("*Eirgrid*") is the transmission system operator (TSO) in Ireland. The TSO in Northern Ireland is the System Operator for Northern Ireland Ltd (SONI). Eirgrid and SONI jointly act as the single energy market operator (SEMO).

Relevant Provisions of the Regulation

5. Article 12 of the Regulation deals with the dispatching of generation and demand response. Article 12(1) provides that the dispatching of power-generating and demand response shall be non-discriminatory, transparent and, save to the extent otherwise provided for in Article 12, market-based. Article 12(2) requires Member States to ensure that priority is given in dispatching to generating installations using renewable energy and having an installed electricity capacity of less than 400 kW (to be reduced to 200kW as from 1 January 2026). The generators operated by the Applicants exceed those thresholds but Article 12(6) provides that generators commissioned before 4 July 2019 (which, when commissioned, were subject to priority dispatch under Article 15(5) of Directive 2012/27/EC or Article 16(2) of Directive 2009/28/EC) shall continue to benefit from priority dispatch (though that priority may cease to apply in certain circumstances). Priority dispatch may be surrendered voluntarily and Member States may provide incentives to installations eligible for priority dispatch to give it up: Article 12(3).

6. Article 13 of the Regulation deals with redispatching, defined in Article 2(26) as meaning "*a measure, including curtailment, that is activated by one or more transmission system operators or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity*

system and relieve a physical congestion or otherwise ensure system security". Redispatch differs from dispatch instructions intended to balance supply and demand. Redispatch arises when there is a "*physical congestion*" or "*constraint*" operative in the system or where, for system-wide reasons, a "*curtailment*" is necessary. A curtailment may arise where the applicable System Non-Synchronous Penetration (SNSP) limit is exceeded. Renewable generation is non-synchronous and where the level of renewable generation is such that the SNSP limit is or is likely to be exceeded, it may be necessary to reduce the level of renewable energy in the system (by the downward dispatch of renewable generators), with a corresponding increase in non-renewable generation (by the upward dispatch of non-renewable generators).

7. Article 13(1) of the Regulation provides that the dispatching of generation and demand response "*shall be based on objective, transparent and non-discriminatory criteria*". Article 13(2) provides that the resources to be redispatched shall be selected "*using market-based mechanisms and shall be financially compensated*". However, Article 13(3) permits the use of non-marketing based redispatching in (and only in) certain specified circumstances. Article 13(4) requires system operators to report at least annually to the regulatory authority, including as to the measures they have taken to reduce downward redispatching of renewable generators. Article 13(5) obliges system operators to (a) guarantee the capability of transmission and distribution networks to transmit electricity produced from renewable energy sources or high-efficiency cogeneration with minimum possible redispatching; (b) take appropriate grid-related and market-related operational measures in order to minimise the downward redispatching of electricity produced from renewable energy sources or from high-

efficiency co-generation and (c) ensure that their networks are sufficiently flexible so that they are able to manage them.

8. Notwithstanding Article 13(5), it is apparent from the evidence in these proceedings that renewable generators, including those with the benefit of priority dispatch, are frequently redispatched downwards and that the rate at which such redispatching occurs has increased in recent years. The issue of the proper calculation of the compensation payable where such redispatching occurs is therefore one of huge commercial significance.

9. Article 13(6) of the Regulation sets out a number of principles which apply where non-market based downward redispatching is used, the first of which is that "*power-generating facilities using renewable energy sources shall only be subject to downward redispatching if no other alternative exists or if other solutions would result in significantly disproportionate costs or severe risks to network security*".

10. Article 13(7) then provides:

> *"Where non-market based redispatching is used, it shall be subject to financial compensation by the system operator requesting the redispatching to the operator of the redispatched generation, energy storage or demand response facility except in the case of producers that have accepted a connection agreement under which there is no guarantee of firm delivery of energy. Such financial compensation shall be at least equal to the higher of the following*

elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation:

(a) additional operating cost caused by the redispatching, such as additional fuel costs in the case of upward re-dispatching, or backup heat provision in the case of downward redispatching of power-generating facilities using high-efficiency cogeneration;

(b) net revenues from the sale of electricity on the day-ahead market that the power-generating, energy storage or demand response facility would have generated without the redispatching request; where financial support is granted to power-generating, energy storage or demand response facilities based on the electricity volume generated or consumed, financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues."

11. While Article 64 of the Regulation provides for a power to derogate, it does not apply to Article 13, at least so far as Ireland is concerned. Article 71(2) provides that, subject to exceptions that are not material, the Regulation "*shall apply from 1 January 2020*." Article 71 provides that the Regulation "*shall be binding in its entirety and directly applicable in all Member States*".

The SEMC Decision of March 2022

12. Following a consultation process, the SEMC adopted a *Decision Paper on Dispatch, Redispatch and Compensation Pursuant to Regulation (EU) 2019/943* on 22 March 2022 (SEM-22-009) ("*the Decision*"). The CRU has identified Article 59 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU as the legal basis for the Decision.

13. The decisions set out in the Decision are said to be "*the first step*" in the implementation of the requirements of the Regulation. The SEMC decided that in order to implement the requirements of Article 13(7), it was necessary to separate the compensation mechanisms in terms of costs associated with lost revenues in the market and revenues "*associated with foregone government support associated with the jurisdictional renewable support schemes*" (page 2). As regards market revenue, all units would initially receive compensation in the SEM for non-market based redispatch (in relation to both constraints and curtailment) at the better of their complex bid/offer price or imbalance settlement price up to the level of their firm access quantity. Compensation payable for curtailment should begin in tariff year 2024/25.

14. In relation to foregone financial support, the SEMC decided that the decision in relation to compensation needed to be made jurisdictionally and in coordination with the respective Departments of Government. It expressed the view that, where there was a difference between market revenue compensation and a renewable unit's foregone support payment where non-market redispatch had occurred, in order to prevent

potential distortions of competition within the SEM resulting from divergent jurisdictional approaches, the following principles should apply:

(a) For renewable units commissioned *after* 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should not be considered "*unjustifiably high*" unless there is good cause to find otherwise;

(b) For renewable units commissioned *prior to* 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should be considered "*unjustifiably high*" unless there is good cause to find otherwise.

The effect of these principles would be that units commissioned *prior to* 4 July 2019 (units which generally benefit from priority dispatch) will generally be compensated at a lower level than units commissioned *after* 4 July 2019 (which do not benefit from priority dispatch).

15. The Decision excludes compensation for generators that do not operate on the *ex ante* (day ahead) market. These include *de minimis* generators (generators below the threshold for mandatory participation in the SEM, currently set at 10MW maximum export capacity) that have not chosen to participate in the market voluntarily. The Decision proposes that compensation be paid within the SEM which, it is said, means that compensation will be payable to electricity suppliers (who may not be the affected generator). Finally, the Decision's interpretation of "*financial support*" in Article 13(7)(b) – as limited to financial support provided under Government incentive

schemes or support mechanisms – has implications for generators who supply electricity pursuant to certain Power Purchase Agreements (PPAs), which is explained below.

The Judicial Review Proceedings

16. Each group of Applicants brought judicial review proceedings challenging the lawfulness of the Decision, contending that Article 13(7) required that compensation for non-market-based redispatching should fully compensate the affected generators for any loss arising from the redispatching, such that they would be "*indifferent*" to the prospect of being redispatched. The Applicants maintain that the Decision restricts their entitlement to compensation, particularly for downward redispatching, in a manner inconsistent with Article 13(7). In particular, the Applicants object to (i) the postponement of any compensation for curtailment until 2024; (ii) the separation of compensation for market revenue foregone and compensation for foregone market support and the deferral of any compensation for foregone market support; (iii) the proposed methodology for calculating compensation involving foregone financial support, including the proposed differential treatment of generators depending on the date they were commissioned and whether they had the benefit of priority dispatch; (iv) the exclusion of generators who do not participate in the *ex ante* market, such as *de minimis* generators, from compensation; (v) the failure to provide for compensation to be paid to the affected generators and (vi) the limitation of the compensation payable to generators who supply electricity pursuant to certain PPAs.

17. The High Court (Sanfey J) upheld the Applicants' challenges and made an order quashing the Decision: [2023] IEHC 620.

18. This Court granted the CRU leave to appeal based on the general importance of the issues raised.

The Arguments on Appeal and the Grounds for a Reference

19. While there is a significant dispute between the parties as to the proper interpretation of Article 13(7) of the Regulation, their dispute is even more fundamental, extending to the legal status and effect of Article 13(7) in the Irish legal order and whether and to what extent it is justiciable in these proceedings and whether it may properly be relied on by the Applicants as a basis for challenging the legality of the Decision before the Irish courts at all.

20. While the CRU accepts that the entirety of the Regulation is binding and *directly applicable* in the State, in accordance with Article 288 TFEU, it says that Article 13(7) lacks *direct effect*. It says that the reference to "*unjustifiably low or unjustifiably high compensation*" in Article 13(7) leaves such a broad discretion to Member States in implementing that provision that it cannot be said to be sufficiently "*clear, precise and unconditional*" to have direct effect. On that basis, the CRU says that it follows from the Grand Chamber's judgment in Case C-573/17 *Popławski* ECLI: EU:C:2019:530 (*Popławski II*) that Article 13(7) cannot be relied upon to disapply a provision of a national law measure (which, according to the CRU, includes a measure of implementation, such as the Decision here) and it cannot be enforced before a national

court: its enforcement is a matter for the European Commission in an action under Article 258 TFEU. The CRU accepts that, as a matter of principle, any conflicting provision of national law must, so far as possible, be interpreted so as to conform with Article 13(7), but considers that no such issue arises on the facts here.

21. The Attorney General, whose participation was requested by the Court in light of the significance of the issues in the appeals, broadly supports the position of the CRU. He submits that, if Article 13(7) lacks direct effect, and if indirect effect cannot be given to it by way of a conforming interpretation of national law, no remedy is available to the Applicants in an Irish court and any non-compliance with Article 13(7) can only be remedied by legislative or executive action or by way of infringement proceedings.

22. The Applicants make a number of arguments in response. Firstly, they say that Article 13(7) does have direct effect. In that context, the Applicants say that a provision of EU law may be sufficiently precise to have direct effect even if it contains undefined or indeterminate concepts and even if a preliminary reference is required to clarify the meaning of those concepts. They further say that, even if a provision of EU law requires or permits measures of implementation or application and confers a degree of latitude on Member States when adopting such measures, it will be regarded as sufficiently precise and unconditional where it imposes a precise obligation as to the result to be achieved and/or where the margin of discretion is sufficiently delimited so as to permit judicial review of whether the implementing measure exceeds that margin of discretion (citing, *inter alia*, Case C-205/20 *NE* ECLI:EU:C:2022:168). Secondly, they say that the direct applicability of a regulation means that it may be relied on independently of any measure of reception into national law, including, if necessary, in order to disapply

conflicting provisions of national law. That position is, they say, unaffected by *Popławski II*, which was concerned with a measure – a framework decision – that did not have direct applicability, not with a regulation (citing *inter alia* Case C-34/21 *Hauptpersonalrat* ECLI:EU:C:2023:270). Thirdly, the Applicants say that it is a well-established principle of EU law that, where Member States adopt measures of implementation or application to facilitate the implementation of a regulation, they must not exceed the parameters of the margin of discretion conferred by the regulation and national courts may review such measures of implementation and, where appropriate, annul such measures. They point to a line of authority to that effect, going back at least to Case C-230/78 *Eridania* ECLI:EU:C:1979:216, which had been reiterated without qualification since *Popławski II* (citing, inter alia, Case C-319/20 *Meta Platforms Ireland* ECLI:EU:C:2022:322, Case C-372/20 *QY* ECLI:EU:C:2021:962, and Case C-390/22 *Obshtina Pomorie* ECLI:EU:C:2024:75). Finally, the Applicants argue that the need for a remedy before the national courts is reinforced by the obligation of Member States to ensure that an effective remedy is available when there is a breach of EU law, referring to Article 19(1) TEU, Article 47 of the Charter and cases such as Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 and Case C-107/23 *PPU Lin* ECLI:EU:C:2023:606. The Applicants also say that they have a right to a remedy as a matter of national law.

23. It appears to this Court that the question of whether Article 13(7) has direct effect may depend on its proper interpretation, which is a matter of significant dispute. As to whether, in the absence of direct effect, Article 13(7) may be relied on by the Applicants as a basis for challenging the legality of the Decision, the jurisprudence cited by the

Applicants appears to indicate that, as a measure having direct application in the Irish legal order, Article 13(7) may be relied on for that purpose. However, having regard to the decision of the Grand Chamber in *Popławski II*, the position is not so obvious as to leave no scope for reasonable doubt.

24. There is also significant dispute between the parties as to the proper interpretation of Article 13(7). According to the Applicants, the fundamental principle of Article 13(7) is that generators who are redispatched (and particularly generators who are redispatched downward) should be "*made whole*" by the system operator i.e. that they should be fully compensated for all loss sustained by them as a result of being redispatched, such that generators should be "*indifferent*" to the prospect of being redispatched. That, the Applicants say, is reflected in Article 13(7)(b) (which is the limb of Article 13(7) relevant to downward dispatching of renewable generators, given that renewable generators will not generally incur additional operating costs if dispatched downwards). The reference to "*unjustifiably low or unjustifiably high compensation*" in Article 13(7) is simply a "*safety valve*" which reflects the possibility that, in particular circumstances, compensation calculated in accordance with subparagraph (b) may be unduly low *or* unduly high and would thus undercompensate or overcompensate generators for the loss arising from being redispatched. In such circumstances, the application of the default compensation rule in Article 13(7) (which in the case of renewables dispatched downwards will be compensation in accordance with subparagraph (b)) may need to be adjusted.

25. The CRU disputes that interpretation of Article 13(7). It says that the reference to "*unjustifiably low or unjustifiably high compensation*" gives a broad discretion to

Member States to determine the basis for compensation, which is not required to be full compensation. According to the CRU, Article 13(7) allows Member States to have regard to broad issues of market policy and organisation, including the investment expectations of generators and the interests of consumers, in determining how compensation is to be calculated.

26. Many of the specific disputes between the parties follow from their different understandings of the meaning and effect of Article 13(7). The CRU says that it was entitled to defer payment of compensation for curtailment to 2024/2025. That is disputed by the Applicants. The CRU says that it was entitled to limit compensation to generators who participate in the *ex ante* (day ahead) market. Again, that is disputed by the Applicants. The Applicants also say that the Decision is flawed in that it fails to provide for payment of compensation to generators (compensation is to be paid within the SEM and thus payments will be made to *suppliers* of electricity, who may be intermediaries who have purchased from the generators). The Applicants say that the Decision fails to give effect to Article 13(7) in that it does not provide for recovery of foregone financial support and instead improperly defers consideration of that issue. They also say that the suggested methodology for calculating compensation set out in the Decision does not comply with Article 13(7), *inter alia* because it treats generators differently depending on whether they were installed prior to or after 4 July 2019 i.e. whether or not they enjoy priority dispatch. The Applicants contend that, for the purpose of assessing compensation under Article 13(7), whether a generator has the benefit of priority dispatch or not is an irrelevant consideration.

27. There are a number of schemes of financial support for renewable generators. The treatment of financial support for the purposes of compensation is therefore of great commercial significance for generators. A related issue is the treatment of PPAs. Article 19a of the Regulation requires Member States to promote PPAs. Certain renewable generators operated by the Applicants have entered into PPAs with private companies by which the companies agree to purchase electricity at an agreed price ("*the strike price*"), which may be higher or lower than the market price from time to time. Such PPAs (referred to as Corporate Power Purchase Agreements or CPPAs) generally take the form of contracts for difference, whereby if the market price is higher than the strike price, the generator pays the difference to the purchaser, and where the market reference price is lower, the purchaser makes good the difference to the generator.

28. The Decision limits the recovery of "*financial support*" under Article 13(7)(b) to financial support provided under Government incentive schemes or support mechanisms. The CRU maintains that where a generator under a CPPA is entitled to be paid more than the relevant market price (i.e. where the strike price exceeds that market price) that is a form of financial support which is outside the scope of Article 13(7)(b) and which therefore does not have to be the subject of compensation by the system operator in the event that the generator is redispatched downward. In such cases (according to the CRU), Article 13(7)(b) requires only that the generator be compensated on the basis of the net revenues it would have received from the sale of electricity on the day ahead *ex ante* market that it would have generated if it had not been redispatched, without any regard being had to any additional payment it would have received under the CPPA if it had in fact generated as dispatched.

29. The Applicants contend that such a limitation of the compensation payable by the system operator is not consistent with Article 13(7)(b) and would result in under-compensation of generators who have entered into CPPAs, contrary to the fundamental principle in Article 13(7) that generators should be fully compensated for all loss arising from redispatch, such that they should be commercially indifferent to being redispatched. The Applicants say that there is no basis in the Regulation for treating CPPAs differently from State support schemes (some of which also take the form of contracts for difference). According to the CRU, the reference in Article 13(7)(b) to "*financial support … granted to*" generators is properly understood as referring only to State support, having regard to both the text of Article 13(7)(b) and the intent of the Regulation generally, which (the CRU says) is to encourage CPPAs so as to avoid the need for State support. It also points to the practical difficulties of assessing compensation by reference to CPPAs, given that they are private contracts of which it has limited or no visibility. It also refers to concern about the possibility of contracting parties "*gaming the system*".

30. This issue of whether renewable generators who have entered into CPPAs are entitled to recover the revenue that would have been payable to them had they not been redispatched, including any payment in excess of the day ahead market rate where the contract strike price exceeds that rate, is commercially very significant and may have significant implications for the use of CPPAs.

31. The proper interpretation of Article 13(7) is an issue of significance in its own right and may also have a significant bearing on the issue of whether it is of direct effect and/or whether it may be relied on by the Applicants to challenge the Decision. The Court

considers that the interpretation of Article 13(7) is not so obvious as to leave no scope for reasonable doubt.

Questions Referred for Preliminary Ruling

32. Accordingly, following an oral hearing which took place on 12 and 13 December 2024, the Supreme Court of Ireland has decided to refer the following questions to the Court of Justice of the European Union pursuant to Article 267(3) TFEU:

1 (a) Does Article 13(7) of Regulation (EU) 2019/943 require that generators with firm access who are dispatched downwards by the system operator be fully compensated for the revenue lost as a result of being redispatched (including any foregone financial support) such that the generator is put in the same financial position as it would have been in had it not been redispatched and is accordingly indifferent to the prospect of being redispatched?

(b) In this context, what is meant by the words "*unjustifiably low or unjustifiably high compensation*" and by reference to what criteria or benchmark is the assessment of whether compensation is "*unjustifiably low or unjustifiably high*" to be made?

(c) In particular, does Article 13(7) permit the adoption of a measure of application that distinguishes between electricity generators in relation to their entitlement to compensation depending on whether the generators enjoy the benefit of priority dispatch or not?

2 (a) Is Article 13(7) of Regulation (EU) 2019/943 sufficiently clear, precise and unconditional, whether in its terms or with the assistance of a reference under Article 267, such that it is directly effective in national law?

(b) To what extent does Article 13(7) require or permit the adoption of national measures of implementation or application?

3 (a) If Article 13(7) of Regulation (EU) 2019/943 is not directly effective, may it nonetheless be invoked before a national court for the purposes of challenging the legality of a provision of national law (including any purported national implementing measure) allegedly inconsistent with it and as a basis for annulling or setting aside such a provision or measure if found to be inconsistent with it or is the exercise of such a jurisdiction by a national court excluded by *Popławski II*?

(b) If Article 13(7) is not directly effective, and if it cannot be invoked before a national court for the purpose set out in (a) above, what remedies are available to an undertaking who claims that a purported national implementing measure wrongly restricts its entitlement to compensation under Article 13(7), whether pursuant to Article 19(1) TEU, Article 47 of the Charter or otherwise ?

4 As regards the correct meaning and effect of Article 13(7):

(a) Having regard to the provisions of Article 71 of Regulation (EU) 2019/343, was it open to the National Regulatory Authority (NRA) to adopt a measure of application deferring payment of compensation under Article 13(7) to 2024?

(b) Was it open to the NRA to adopt a measure of application that deferred the decision as to whether (and if so to what extent) compensation should be payable under Article 13(7) in respect of foregone financial support?

(c) Does Article 13(7) permit the adoption of a measure of application that (i) restricts compensation to generators participating in the *ex ante* (day ahead) market, thus excluding *de minimis* generators from being compensated in the event of being redispatched and/or (ii) provides for payment of compensation to suppliers of electricity, who may be intermediaries rather than the generators who have been redispatched?

(d) In the event that a renewable generator that is a party to a Corporate Power Purchase Agreement (CPPA) is redispatched downwards, must the compensation payable under Article 13(7) include compensation for the loss of any payments that would have been payable under the CPPA (in the event that the generator had not been redispatched) due to the contract strike price exceeding the relevant market price or do such payments constitute a form of financial support falling outside the scope of Article 13(7)(b)?

Priority

33. This reference raises issues of systematic importance for the functioning of the electricity market in the island of Ireland and therefore the Court of Justice is respectfully requested to give the reference as much priority as possible.

Dated: 21 January 2025

Signed: