

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 13 December 2007¹

1. The present reference is the first that concerns the interpretation 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 ('the directive').²

operated by the company running the airport for its own supply and that of 93 undertakings located at the airport.

2. The provision to be construed by the Court is Article 20(1) of that Directive, which concerns free access by third parties to electricity transmission and distribution systems.

I — Relevant legislation*A — Community legislation*

3. The question referred arose because, under German law, energy supply systems wholly situated on the premises of an undertaking (so-called 'operation networks' or 'Betriebsnetze') may under certain circumstances be exempted inter alia from the principle of third-party access to the network.

5. Article 2 of the Directive gives the following definitions:

4. The system at issue in the main proceedings is located at Leipzig/Halle Airport and is

'5. "distribution" means the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers, but not including supply;

1 — Original language: English.

2 — OJ 2003 L 176, p. 37.

6. “distribution system operator” means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution 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 distribution of electricity;

...

26. “small isolated system” means any system with consumption of less than 3 000 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems;

27. “micro isolated system” means any system with consumption less than 500 GWh in the year 1996, where there is no connection with other systems;

...’

6. Article 3(8) of the Directive states as follows:

‘Member States may decide not to apply the provisions of Articles 6, 7, 20 and 22 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 Community. The interests of the Community include, amongst others, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.’

7. Article 13 of the Directive provides:

‘Designation of Distribution System Operators

Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more distribution system operators. Member States shall ensure that distribution system operators act in accordance with Articles 14 to 16.’

8. Article 20 of the Directive provides as follows: able fee reflecting the cost of providing such information.'

'Third party access

B — National legislation

1. 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 these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 23 and that these tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

9. The 'Gesetz über die Elektrizitäts- und Gasversorgung' (Law on electricity and gas supply), also referred to as 'Energiewirtschaftsgesetz' ('EnWG'), is the main piece of legislation implementing Directive 2003/54 in Germany.

10. Point 17 of Paragraph 3 ('Definitions') of the EnWG provides as follows:

2. The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reason-

"General supply systems" shall mean energy supply systems, whose function is to distribute energy to third parties and which in terms of their size are not from the outset designed only to supply specific end consumers already existing or identifiable at the time of system construction, but which are in principle open to supply all end consumers.'

11. Paragraph 20 of the EnWG establishes the principle of access for third parties to ‘energy supply systems’, in the following terms:

‘(1) Conditions and charges for system access shall be appropriate, non-discriminatory, transparent and no less favourable than those which in practice or for costing purposes are applied and charged by system operators in comparable situations for service provision within their undertaking or to connected or associated undertakings. ...’

‘Access to energy supply systems

(1) Operators of energy supply systems shall in accordance with objectively justified criteria grant anyone access to their system without discrimination and shall publish on the Internet the conditions, including specimen contracts, and charges for such system access. To the extent necessary to ensure efficient system access, they shall have a duty to cooperate. ...

13. Paragraph 110(1) of the EnWG is a provision which concerns specifically ‘site networks’ (‘Objektnetze’). It provides as follows:

(2) To the extent that operators of energy supply systems demonstrate that, with due regard to the objectives provided for in Paragraph 1 of this Law, for operational or other reasons it is neither possible nor reasonable for them to allow system access, they shall be permitted to refuse the access provided for in subparagraph (1). ...’

‘Parts 2 and 3 and Paragraphs 4, 52 and 92 of this Law shall not apply to the operation of energy supply systems which

12. Paragraph 21 sets out the ‘System access conditions and charges’ and provides:

1. are located on a geographically connected operation zone and which predominantly serve to supply the

energy needs of the undertaking itself or of connected undertakings within the meaning of point 38 of Paragraph 3 of this Law,³

3. are located on a closely geographically connected zone and serve predominantly their own supply purposes,⁵

2. are located on a geographically connected private zone and which enable the system operator or his representative in pursuit of a common primary commercial purpose,

(a) going beyond mere leasing or letting arrangements, and

on condition that the energy supply system does not serve to provide general supply within the meaning of point 17 of Paragraph 3 of this Law and that the operator of the site network or his representative possess such staff, technical and economic resources as to ensure the long-term operation of the system in accordance with the provisions of this Law.'

(b) which would be unreasonably hindered by application of the provisions mentioned in the introductory part of this sentence,

to supply identifiable end consumers with energy,⁴ or

14. If a site network fulfils the criteria set out in Paragraph 110(1), (1) or (2) or (3) of the EnWG various provisions of the EnWG are not applied, including those relating to third party access to the network.

3 — These are called 'operation networks' (Betriebsnetze).

4 — These are called 'service networks' (Dienstleistungsnetze).

5 — These are called 'own supply networks' (Eigenversorgungsnetze).

II — Factual background, procedure before the national court and the question referred

15. Flughafen Leipzig/Halle GmbH ('FLH') operates Leipzig/Halle Airport. In this capacity it manages an energy supply system through which it and 93 other undertakings located at the airport are supplied with electricity. In 2004 the volume of energy consumed via this system amounted to approximately 22 200 MWh, of which, over and above FLH's own consumption of 85.4%, around 3 800 MWh, or 14.6%, was supplied to other undertakings situated at the airport.

16. Since the beginning of 2004 citiworks AG ('citiworks'), an electricity supply undertaking, has supplied DFS Deutsche Flugsicherung GmbH, located at Leipzig/Halle Airport, with electricity.

17. On 12 July 2006, following an application by FLH, the Saxon Ministry of the Economy and Employment, as regulatory authority for the *Land*, issued a decision declaring that the energy supply system managed by FLH at Leipzig/Halle Airport constituted a 'site

network' which fulfilled the requirements of Paragraph 110(1)(1) and (2) of the EnWG.

18. Since this decision would allegedly have the effect of preventing third parties such as citiworks from accessing the system operated by FLH at Leipzig/Halle Airport in order to supply customers located there, citiworks challenged that decision before the Oberlandesgericht Dresden.

19. The Oberlandesgericht considered that since compliance with the relevant provisions of the EnWG would not impose an unreasonable burden on FLH, the system at issue could not be regarded as a 'service network' in accordance with Paragraph 110(1)(2) of the EnWG. However, the system fulfils the conditions laid down in Paragraph 110(1)(1) of the EnWG and could thus be qualified as an 'operation network' and be exempted *inter alia* from the provisions of the EnWG on third party access. The action brought by citiworks is therefore, in principle, unfounded under national law. However, the Oberlandesgericht expressed doubts as to whether Paragraph 110(1)(1) of the EnWG is consistent with the requirements of Article 20(1) of Directive 2003/54.

20. Therefore, by order of 17 October 2006, received at the Court's Registry on 24 October 2006, the Kartellsenat of the Oberlandesgericht Dresden (Germany) decided to stay the proceedings and to make a reference to the Court of Justice of the European Communities for a preliminary ruling on the following question:

22. A hearing was held on 20 September 2007.

IV — Main arguments of the parties

'Is the first point of Paragraph 110(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Law on electricity and gas supply, or "EnWG") compatible with Article 20(1) of Directive 2003/54/EC of the European Parliament and the Council inasmuch as in accordance with the conditions laid down in the first point of Paragraph 110(1) of the EnWG a so-called "operation network" is exempted from the general provisions on system access (Paragraphs 20 to 28a of the EnWG) even where such system access would not impose an unreasonable burden?'

A — Citiworks

23. Citiworks submits that Paragraph 110(1)(1) of the EnWG is not compatible with Article 20 of the Directive.

III — Procedure before the Court

21. The Court has received observations from citiworks, the Saxon Ministry of the Economy and Employment as regulatory authority for the Land, FLH, the Commission, and the German, Polish and United Kingdom Governments.

24. Citiworks observes that one of the main objectives of the directive is to guarantee to energy providers the right to access the entire energy network so as to ensure that customers can freely choose their provider. However, Paragraph 110(1)(1) of the EnWG violates the obligation to guarantee access to the network.

25. Citiworks indicates that the exemption pursuant to Paragraph 110(1)(1) of the EnWG is in practice automatic. According to a majority of competent regulators at Federal

and *Land* level, Paragraph 110(1)(1) of the EnWG is directly applicable when the conditions it lays down are fulfilled. While many system operators have submitted applications for the provision to be declared applicable to their system, others presume that they fulfil the requirements of that provision and do not even seek a declaration to that effect.

cannot justify a general and automatic exemption such as that contained in Paragraph 110(1)(1) of the EnWG.

B — FLH

26. Moreover, there is nothing in the directive to allow Member States to determine freely those situations in which they may derogate from the principle of freedom of access to the network.

27. The exception provided for under Article 26 of the Directive for small isolated systems does not justify a provision such as Paragraph 110(1)(1) EnWG, because no request for derogation has been submitted by Germany to the Commission and the systems covered by the national provision are not micro or small isolated systems as defined at Article 2(26) and (27) of the Directive.

28. A general exemption of systems from third party access obligations for structural reasons cannot be inferred from the directive. While it may be true that third party access obligations impose a disproportionately heavy burden on small systems, this

29. First of all, FLH submits that the reference for a preliminary ruling is inadmissible because the question referred to the Court is hypothetical. Indeed, the referring court refers in its question to a wording of Paragraph 110(1)(1) of the EnWG which does not actually exist. Moreover, the answer to that question is not relevant for the solution of the dispute before the referring court.

30. On the substance, FLH submits that Paragraph 110(1)(1) of the EnWG is compatible with Community law. The systems falling within that provision are internal systems created by companies for the purposes of their own consumption and they do not affect competition. Therefore they do not fall within the scope of the directive.

31. This is illustrated by the fact that the consumption of the system in question is far below that of a 'micro isolated system' as defined in Article 2, point 27 of the Directive.⁶ The exclusion of such a system is therefore unlikely to imply a significant distortion of competition on the internal market for energy.

34. For these reasons Paragraph 110(1)(1) of the EnWG is compatible with Article 20(1) of the Directive.

C — Sächsisches Staatsministerium für Wirtschaft und Arbeit

32. Paragraph 110(1)(1) of the EnWG is merely the expression of the discretion which the German legislature had when implementing the directive. Articles 3(8), 13, 15(2)(d), 15(2), last sentence, and 20(1) of the Directive provide indeed for a number of possibilities to derogate from the provisions on unbundling, connection and access to the network.

35. This party submits that the system at issue in the present proceedings, which may be exempted under Paragraph 110(1) of the EnWG, is neither a transmission system nor a distribution system within the meaning of the directive but a system which serves predominantly for to supply FLH's own consumption. Therefore the system does not fall within the scope of the directive and there is no obligation to give third parties access to that system pursuant to the provisions of the directive.

33. FLH emphasises that it is a company which provides services in the general economic interest within the meaning of Article 3(8) of the Directive and is not just a simple energy distributor. It bears the obligation of running an airport. Therefore the private supply system that it operates is not a distribution system within the meaning of the directive.

36. Furthermore, FLH cannot be regarded as an operator of a distribution system within the meaning of Article 2(6) of the Directive, because its main objective is to operate an airport and, as a result, it cannot fully comply with the obligations imposed on a distribution system operator.

⁶ — A 'micro isolated system' is a system which had a consumption of less than 500 GWh in the year 1996. The consumption of the network in question is not known for 1996 but it appears from the file that it varied between 19 GWh and 23 GWh between 2000 and 2007.

37. Therefore Paragraph 110(1)(1) EnWG only concerns systems which do not fall within the scope of the directive and it

is compatible with Article 20(1) of the Directive.

Therefore the rules on energy market liberalisation apply only to systems with third party participation.

D — *The German Government*

38. The German Government submits that on a systemic and teleological interpretation of the directive ‘customer installations’ do not fall within its scope. A customer installation is the electricity installation of a final consumer which also includes systems set up by such consumers and which distribute energy within a closed installation.

39. As is apparent from the definition of a ‘distribution system operator’ contained in Article 2(6) of the Directive and the obligations of such operators set out in Article 14 of the Directive, the directive concerns only companies operating distribution systems which are aimed at the supply of energy to the public, which excludes customer installations.

40. Moreover the legal rules on energy market liberalisation aim at giving third parties the right freely to choose their provider. In the case of a customer installation, there are however no such third parties.

41. Although they supply several physical or legal persons as customers, some systems must be regarded as customer installations, when such customers cannot be regarded as true third parties. This is the case for parties which are associated with the operator of the customer installation in a ‘supply community’, which may be the result of factual or legal circumstances. Since such customers are not true third parties vis-à-vis the system operator, it is not necessary to ensure their right to choose freely their electricity supplier and the rules on energy market liberalisation do not apply to them.

42. Paragraph 110(1)(1) EnWG is aimed at excluding precisely such systems, by reference to which there are no true third parties, from the obligations relating to third party access. It is therefore compatible with Article 20(1) of the Directive.

E — *The Polish Government*

43. The Polish Government takes the view that Paragraph 110(1)(1) of the EnWG is not compatible with the directive.

44. The Polish Government recalls that it appears especially from the 11th recital to and Article 3(8) of the Directive that Member States can provide for exemptions from the principle of third party access to the network, but there is no scope for general exemptions.

45. The 11th recital to the Directive clearly implies that an exemption of small system operators from the obligations to provide third party access requires the existence of a disproportionate financial and administrative burden. It is likely that for small operators compliance with administrative requirements laid out by the directive is more burdensome and related costs will be more difficult to offset given the relatively limited amount of electricity which they sell. Moreover, in the present case, the operator of the transmission system is also required to contribute to the security of electricity supply.

46. However, before the operator of a small system can be exempted from obligations

relating to third party access, it is necessary to examine whether the fulfilment of these obligations would entail disproportionate costs. For this purpose the competent national authorities must undertake a comprehensive economic evaluation of the situation of the system operator, bearing in mind the need to ensure the security of supply to the system operator's final customers.

47. A provision of national legislation, such as Paragraph 110(1)(1) of the EnWG, which allows for the exemption of small distribution system operators from third party access obligations, even where this does not entail excessive difficulties for the operator in question, is therefore incompatible with Article 20(1) of the Directive.

F — *United Kingdom*

48. The United Kingdom Government is of the view that the national provision in question is compatible with Article 20(1) of the Directive.

49. It recalls that one of the main objectives of the directive was to establish free competition and that it targeted especially

companies in a position of monopoly or quasi-monopoly, which prevent competition from functioning efficiently. However, small electricity companies and undertakings not supplying electricity to domestic customers were not a main focus of the Community legislature. Moreover the obligations which Articles 14 to 20 of the Directive impose on the operators of distribution systems are costly to fulfil. As a result, Article 20 of the Directive must be interpreted in such a way as to permit Member States to exclude carefully and narrowly defined categories of entities from network access obligations.

G — *The Commission*

52. The Commission is of the view that Paragraph 110(1)(1) of the EnWG is incompatible with Article 20(1) of the Directive.

50. The application of the provisions of the directive to even the smallest systems would be absurd and unreasonable. Compliance with third party access obligations would make it too burdensome to run small and new systems and thus harder for them to compete effectively with larger-scale electricity undertakings. In contrast, their exclusion from third party access requirements would have a negligible impact on the liberalisation of the electricity market given their very limited sphere of operation.

53. It submits that Article 20 of the Directive, which requires that third parties are granted access to transmission and distribution systems, is applicable to the factual situation which gave rise to the dispute before the referring court. The system in question is a distribution system within the meaning of Article 2(6) of the Directive because it serves to distribute electricity to FLH and further 93 companies located at the airport. Therefore the freedom to access such a system must be ensured in accordance with Article 20(1) of the Directive.

51. Lastly, according to the wording of the definition of 'distribution' in Article 2(5) of the Directive, it is made 'with a view to its delivery to customers'. Therefore, delivery to customers must be the main objective of a distribution system, but this is obviously not the case of FLH which itself consumes 85.4% of the electricity transported through its system. FLH's main objective is the operation of an airport.

54. As is apparent from the 6th and 7th recitals to the Directive, the principle of third party access is essential in order to ensure the full achievement of the internal energy market. Limitations to that principle may therefore be admitted only in clearly defined

circumstances. Thus, the directive provides for only one general exception to third party access obligations. That exception is set out in Article 20(2) and is linked to the lack of necessary capacity of the system operator. However, this provision of the directive cannot justify a general exception defined by law because operation networks within the meaning of Paragraph 110(1)(1) of the EnWG are neither necessarily nor permanently subject to such a lack of capacity.

V — Admissibility

58. FLH challenged the admissibility of the question referred essentially on the ground that it envisages a hypothesis which is not the one formulated by the national law in question and it is therefore hypothetical.

55. The small size of some systems and their limited economic importance do not justify their exclusion, as a matter of principle, from the principle of the freedom of access. The size of a system only plays a role for issues relating to the legal separation of distribution system operators, as it appears from Article 15(2) of the Directive.

56. Article 13 of the Directive does not offer any justification for an exemption of certain systems from third party access obligations.

57. Neither can the exception provided for under Article 26(1) of the Directive for ‘micro isolated systems’ serve as a basis for Paragraph 110(1)(1) EnWG because, *inter alia*, no request has been submitted to the Commission for that purpose.

59. According to consistent case-law, it is solely for the national court to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court can refuse a request submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is general or hypothetical.⁷

60. This, however, is not the case here. It is clear from the order for reference that the referring court has doubts as to whether Paragraph 110(1)(1) of the EnWG, as it

7 — See, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61; Case C-369/95 *Somafruit and Camar* [1997] ECR I-6619, paragraphs 40 and 41; and Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20.

stands, is compatible with Article 20(1) of the Directive.

serve to supply the energy needs of the undertaking itself or of connected undertakings.

61. It is true that the question referred to the Court not only refers to the actual formulation of Paragraph 110(1)(1) of the EnWG, but adds the phrase ‘even where such system access would not impose an unreasonable burden’. By such a statement the referring court merely identifies where in its view the problem of compatibility of the implementing national law with the directive arises, namely in the fact that the derogation from third party access obligations is granted without further consideration of the actual burden that compliance with such obligations may actually impose on the system operator, whereas, in the referring court’s view, a requirement to take that burden into account follows from the directive. However, this does not make the question hypothetical.

62. Thus, the reference for a preliminary ruling is admissible and the question to be answered by the Court is, in essence, whether Article 20(1) of the Directive precludes national legislation, such as Paragraph 110(1)(1) EnWG, which excludes, as a rule, the application of the provisions on third party access to so called ‘operation networks’ which are located on a geographically connected operation zone and which predominantly

VI — Substance

63. Directive 2003/54 marks the second phase of the liberalisation of the market in electricity within the European Community. Its objective is to complete the internal market in electricity launched by Directive 96/92/EC⁸ (the ‘first electricity directive’).⁹

64. One of the key elements of the liberalisation of the internal market for electricity is third party access to the network. In the directive the principle of third party access is reflected in Article 20(1), which requires Member States to ensure the implementation of third party access to transmission

8 — Directive of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

9 — A third legislative package has been presented by the Commission on 19 September 2007 (see Commission press release IP/07/1361 and Explanatory Memorandum of the third energy package, available at http://ec.europa.eu/energy/electricity/package_2007/doc/2007_09_19_explanatory_memorandum_en.pdf). It appears that the changes proposed do not concern the provision at issue in the present proceedings.

and distribution systems. It follows from Article 20(1) of the Directive that only so called 'transmission systems' or 'distribution systems' within the meaning of the directive are subject to third party access obligations pursuant to the directive.

65. It is undisputed that a system such as that operated by FLH is not a transmission¹⁰ system. In order to ascertain whether it is nevertheless required to give access to third parties in accordance with Article 20(1) of the Directive it remains to be determined whether the system in question could be a distribution system.

66. In this connection, it may be briefly pointed out that it is debatable whether FLH may, for example, also be regarded as a 'supplier' and/or a 'wholesaler' of electricity within the meaning of the directive. These possible additional qualifications are irrelevant for the present case, however, since it cannot be inferred from the directive that they would prevent FLH from being at the same time a distribution system operator and, as such, in principle obliged to give third parties access to the distribution system it operates.

67. Therefore the relevant issue in the present case is whether a system, such as that operated by FLH and which may be exempted in application of contested German legislation, is in fact a 'distribution system' within the meaning of the directive.

68. The directive does not define the term 'distribution system' but it defines 'distribution' as the 'transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers, but not including supply'.¹¹

69. In these circumstances it is necessary, in order to determine the scope of the concept of 'distribution system' as used in the directive, to consider not only the wording of the relevant provision of the directive but also the context in which it occurs and the objects of the rules of which it forms part.¹²

70. The directive aims at the completion of the internal market for energy, by liber-

10 — According to Article 2(3) of the Directive '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 not including supply.

11 — See Article 2(5) of the Directive.

12 — See, to this effect, inter alia, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St. Nikolaus Brenner* [1984] ECR 1051, paragraph 10; and Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23.

alising and harmonising the conditions in which the electricity market operates so as to fully integrate the national markets in one true and fully operational single market for energy.¹³

71. The objective of achieving a level playing field between Member States in term of market opening¹⁴ requires a uniform interpretation of the material scope to which the directive applies. This requires that restrictions to the general principle of third party access be interpreted narrowly and be limited to those provided for under the directive. This also precludes the possibility that a provision such as Article 13 of the Directive, which provides that Member States are to designate, or to require undertakings that own or are responsible for distribution systems to designate, one or more distribution system operators, could give Member States total freedom in the definition of a 'distribution system'.

72. Furthermore, it appears from the directive that one of the essential elements of the liberalisation of energy markets is to ensure that electricity customers have the right to choose freely their suppliers and all suppliers the right to freely deliver their

customers.¹⁵ These two rights are necessarily linked because, if customers are to choose freely their supplier, it is necessary that suppliers have the right to access, for an adequate and non-discriminatory remuneration, the different transmission and distribution systems which carry electricity to the customer.

73. The importance of the principle of third party access is also apparent from the legislative history of the directive. The provision requiring Member States to ensure third party access was an essential element of the Commission's proposal to amend the first electricity directive¹⁶ and was adopted, essentially unchanged, in Article 20 of the Directive.

74. Moreover, in its case-law on the first electricity directive the Court has already highlighted the importance of non-discriminatory third party access to the network.¹⁷

75. It is in the light of these considerations that the scope of the concept of 'distribution system', which is essential for the effec-

13 — See Explanatory memorandum presented by the Commission with the Proposal for a Directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas (COM/2001/0125 final).

14 — See Explanatory memorandum, cited in footnote 13.

15 — See 4th recital to the Directive. The full implementation of that freedom of choice should be available to non-domestic customers by 1 January 2003 and all categories of customers at the latest by 1 January 2005.

16 — COM/2001/125final (OJ 2001 C 240E, p. 60).

17 — See Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others* [2005] ECR I-4983, paragraphs 42 to 46.

tive scope of third party access as laid out in Article 20(1) of the Directive, must be construed. As a first step, I shall analyse the extent to which some criteria, such as the size or the purpose of the system, are essential for the qualification of a 'distribution system'.

76. It may first be pointed out that the directive does not specify a size threshold in order for an electricity system to be regarded as a 'distribution system'. Nevertheless, within the framework of the directive the size of a system is relevant for the application of certain essential obligations, most importantly for the unbundling of distribution system operators.¹⁸

77. In relation to the obligation to provide third party access it would appear to be relevant only in exceptional circumstances,¹⁹ namely in relation to the definition of micro and small isolated systems, for which Member States can provide for exemptions *inter alia* from third party access obliga-

tions. However, the possibility of exempting isolated systems is not justified primarily by their small size but by the fact that such systems are either not connected to a bigger system or receive very little amounts of electricity from a bigger system, which makes them subject to very specific technical constraints, especially with regard to security of electricity supply to end users.²⁰ The threshold regarding micro isolated systems was thus established for a very specific purpose and cannot be regarded as an overall indicator of the size of systems the Community legislature intended to regulate or not.

78. In my view this indicates that, as a matter of principle, the directive is intended to apply to a wide range of systems regardless of their size. This does not preclude the possibility that the application of certain essential obligations laid down in the directive, as is the case for unbundling, may be adapted depending on the size of the system in question.

79. Moreover, while the exclusion of one 'small' system from the scope of the directive may not necessarily have a significant impact

18 — Article 15 of the Directive, which concerns the 'unbundling of distribution system operators', provides in the last sentence of the second paragraph that 'Member States may decide not to apply paragraphs 1 and 2 to integrated electricity undertakings serving less than 100 000 connected customers, or serving small isolated systems'. See also the 11th recital to the Directive, which states that '[t]o avoid imposing a disproportionate financial and administrative burden on small distribution companies, Member States should be able, where necessary, to exempt such companies from the legal distribution unbundling requirements'.

19 — See Article 26, which allows in certain circumstances for the exclusion of micro and small isolated systems from third party access obligations.

20 — 'Operation networks' within the meaning of the EnWG are in principle closed but this does not make them isolated, as they may well receive electricity from a bigger network to which they are connected.

on competition and thus on the liberalisation of the electricity sector, this has no bearing on how the exclusion of a whole category of small systems may affect competition.

the definition of ‘distribution’ in Article 2(5) of the Directive.

80. In any event, besides the obvious difficulties of defining when a system is to be regarded as ‘small’, there is no evidence that only relatively ‘small’ systems will be exempted pursuant to Paragraph 110(1)(1) of the EnWG. So long as they fulfil the conditions laid down in that provision, systems are exempted regardless of the amount of electricity they deliver. This means, for example, that far bigger airports than Leipzig/Halle Airport may be exempted from third party access obligations in application of Paragraph 110(1)(1) EnWG.

81. I am therefore of the view that the small size of a system is not an essential criterion on which to refuse to qualify a system such as that operated by FLH as a ‘distribution system’ and to exclude it, as a matter of principle, from the application of the principle of third party access.

82. Second, it must be determined to what extent the purpose for which a system is operated is essential for the qualification of the system as ‘distribution system’. This question stems from the use of the phrase ‘with a view to its delivery to customers’ in

83. The exemption of certain systems from third party access obligations on the sole basis of the purpose for which they are operated bears the risk that the same system, depending on whether it is run as part of another business or as a business on its own, will or will not be eligible for exemption from third party access obligations. For example, if FLH had outsourced the operation of its electricity system to another company having as its sole purpose the operation of the system with a view to delivering electricity to the airport and other end-users located at the airport, the distribution of electricity would certainly be made ‘with a view to its delivery to customers’, as stated in Article 2(5) of the Directive. Thus, the exclusion of so called ‘operation networks’ from third party access obligations could result in a different treatment of the same system solely on the basis of the business purpose of the system operator.

84. If this approach were to be followed, this would also mean that the same customer, for example a shop or a restaurant, would or would not have the right to choose freely among electricity suppliers depending on the business purpose of the system operator running the electricity system to which it is

connected for the purpose of receiving electricity. Thus, the exclusion of systems from third party access obligations on the basis of the purpose for which they are operated would result in a different treatment of final customers.

obligations imposed on distribution system operators by the directive.

85. These considerations suggest that a situation where the qualification of a system as a 'distribution system' would depend on the condition that it pursues the main objective of delivering electricity to the general public would lead to substantial discrimination between system operators as well as between customers. Such an outcome seems difficult to reconcile with the objective of non-discriminatory third party access and the end-user's right to freely choose the energy supplier that the directive seeks to achieve.

87. This approach should not be followed. Member States enjoy a wide margin of discretion in how they implement in practice the third party access obligations provided for in the directive. Member States might possibly provide for a lighter administrative regime for smaller or newly-created systems or systems which pursue a main objective that is different from that of the supply of energy to customers. Thus, the actual burden which the fulfilment of such obligations constitutes for an individual operator is to a certain extent the result of regulatory choices made by each Member State.²¹ Therefore, such a ground would not in itself allow for the total exclusion of such systems from the obligations imposed by the directive on distribution system operators and especially third party access obligations.

86. Moreover, I do not think that certain small or closed systems should be denied, as a matter of principle, the qualification as 'distribution systems' on structural grounds. It has indeed been argued that the obligations imposed by the directive on distribution system operators, and in particular third party access obligations, are per se overly burdensome for certain system operators, particularly when they are small, new entrants and/or pursue a main objective that is different from that of the supply of energy to customers. For that reason, such operators cannot be intended to be subject to the

88. It follows that none of the above reasons justifies as such the exclusion of a system such as that operated by Leipzig/Halle Airport from the scope of the concept of

21 — For example the German legislature has opted for an ex-ante control of tariffs for network access, 'an intrusive and cumbersome instrument of regulation not required by Community law, instead of confining itself to control methods to calculate these tariffs'. See Thomas von Danwitz, 'Regulation and Liberalisation of the European Electricity Market — A German View', 2006 *Energy Law Journal*, Vol. 27:423, p. 448.

‘distribution system’ within the meaning of the directive.

89. Quite to the contrary, some elements suggest that a system such as that operated by FLH should in fact be regarded as a distribution system within the meaning of the directive.

90. While it appears that the system in question is predominantly used for FLH’s own supply,²² it must not be forgotten that approximately 15% of the total volume of electricity it consumed in 2004 was distributed to third parties, which, according to the order for reference, is equivalent to the consumption of approximately 1 000 3-person households, and the figure tends to increase steadily.²³ Thus, the supply to third parties, while perhaps not predominant, is far from irrelevant.

91. Nor do I see why the 93 undertakings located at Leipzig/Halle Airport should not be regarded as ‘true’ third parties. They

happen to be located at the airport but they pursue their own commercial purpose. The contractual relationship they have with FLH is, as was confirmed at the hearing, primarily a lease contract. The situation of the 93 undertakings in question therefore does not differ fundamentally from that of businesses renting city centre premises or premises in a retail centre. These undertakings should therefore, in principle, be able to choose freely their supplier of electricity. For that purpose, the system which delivers electricity to the connection point of these customers’ private installations should in principle be accessible to third parties.

92. For these reasons, I believe that a system, such as that operated by FLH, must be regarded as a ‘distribution system’ within the meaning of the directive.

93. However, this does not mean that such a system may not be exempted, in compliance with the directive, from third party access obligations. The directive provides indeed for a number of provisions which exempt systems from certain obligations, in an attempt to strike a balance between the need to grant third party access to the network while safeguarding overriding general inter-

22 — As already mentioned at point 15 of the present Opinion, for 2004, the volume of energy consumed via this system amounted to approximately 22 200 MWh, of which around 3 800 MWh, or 14.6%, was supplied to other undertakings situated at the airport.

23 — According to the order for a reference, it was forecast that for 2007 the volume of energy supplied to other undertakings situated on the airport site would be of approx. 8 000 MWh, which is said to be the equivalent of the consumption of 2 000 3-person-households and represents a doubling of the volume of energy provided by the network in question to third parties within only three years.

ests such as security of supply and the fulfilment of services in the general economic interest.

exemption based on lack of capacity could be unlimited in time.

94. Under Article 3(8) of the Directive, Member States may decide not to apply the provisions of Article 20 'insofar 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 insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community'. While it cannot be excluded that some 'operation networks' eligible for exemption pursuant to Paragraph 110(1)(1) of the EnWG fulfil these conditions, there is no basis for the conclusion that this is necessarily the case, without further evaluation of the circumstances in which a given system operates.

96. As mentioned above, Article 26 of the Directive provides for an exception for micro and small isolated systems from inter alia third party access obligations. However, there is no evidence that either the system operated by FLH or all 'operation networks' eligible for exemption pursuant to Paragraph 110(1)(1) of the EnWG are isolated within the meaning of the directive. Moreover, the application of this exception requires a Member State to submit an application to the Commission, whereas Germany has never submitted such a request. Each of these two reasons precludes that an exemption of 'operation networks' in application of Paragraph 110(1)(1) EnWG could as a rule be based on Article 26 of the Directive.

95. A distribution system may also be exempted from third party access obligations in accordance with Article 20(2) of the Directive, 'where it lacks the necessary capacity'. Again, it cannot be excluded that this provision allows for the exemption of certain 'operation networks', but this is certainly not the case if there is no circumstantiated evidence of a lack of capacity to allow access. Furthermore, it is difficult to accept that an

97. It follows from the foregoing that the exclusion of the application of the provisions on third party access obligations to 'operation networks' within the meaning of the EnWG cannot be justified by the wording, context and purpose of the directive.

VII — Conclusion

98. In the light of the foregoing, I am of the view that the answer to the question referred should be that:

‘Article 20(1) 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 must be construed so as to preclude national legislation which excludes, as a general rule, the application of the provisions on third party access to distribution systems which are located on a geographically connected operation zone and which predominantly serve to supply the energy needs of the undertaking itself or of connected undertakings.’