Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 April 2013 [1]

Joined Cases C-105/12 to C-107/12

De Staat der Nederlanden
v
Essent NV and Essent Nederland BV (C-105/12),
Eneco Holding NV (C-106/12),
Delta NV (C-107/12)

(Requests for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Energy distribution system operators — Absolute prohibition of privatisation — Rules governing the system of property ownership — Prohibition of formation of groups including both energy distribution system operators and companies marketing, supplying or producing energy — Prohibition of unrelated activities imposed on energy distribution system operators — Free movement of capital — Restrictions — Justification — Proportionality — 'Purely economic' justification — Competition not distorted)

I – Introduction

1. The Hoge Raad der Nederlanden (Netherlands Supreme Court) requests the Court to interpret Articles 63 TFEU and 345 TFEU in the context of disputes between the Staat der Nederlanden and Essent NV and Essent Nederland BV (Case C-105/12), Eneco Holding NV (Case C-106/12) and Delta NV (Case C-107/12) (hereinafter referred to together as 'the companies'), which are various companies active in the distribution of electricity and gas in the Netherlands, concerning several provisions of Netherlands legislation applicable to those sectors.

2. In the context of those three cases, which were joined by the Court, the Hoge Raad der Nederlanden referred three questions for a preliminary ruling:

— the first question concerns the 'prohibition of privatisation' imposed by Netherlands legislation, which precludes electricity and gas distribution system operators [2] from becoming the property of private individuals, in the light of Article 345 TFEU;

— the second question concerns the appraisal, in relation to the free movement of capital, of two other prohibitions established by the Netherlands legislation precluding such distribution system operators from maintaining links with undertakings generating/producing, supplying or marketing

1 — Original language: French.

2 — In this Opinion, the terms 'system' and 'system operator' refer always to the electricity or gas distribution systems in the Netherlands. Where energy transmission systems are being referred to, that will be expressly mentioned.

electricity or gas in the Netherlands (hereinafter 'energy companies') (hereinafter the 'group prohibition') or from engaging in other activities foreign to system operation (hereinafter the 'prohibition of unrelated activities'); and

— the third question concerns whether there are 'overriding reasons in the public interest' which constitute a justification on a restriction on the free movement of capital to the extent that the group prohibition and the prohibition of unrelated activities mentioned in the second question constitute a restriction of that freedom.

3. The present cases therefore invite the Court to rule again on the interpretation of the FEU Treaty and more specifically on the interrelationship between Articles 345 TFEU and 63 TFEU concerning measures liberalising a strategic economic sector. However, the present cases display certain specific characteristics as compared with those giving rise to the 'golden shares' case-law. First, the issue is not partial privatisation, but a prohibition of privatisation which takes the form of a clear separation between the rules governing ownership of the distribution system operators, functioning in a 'closed circuit' amongst public persons, and ownership of the undertakings generating/producing, supplying or marketing electricity or gas, which may be transferred to private individuals. Secondly, the prohibitions at issue do not rest on a mechanism derogating from private law and conferring a privilege on public persons. Finally, the provisions of Netherlands law at issue do not stem only from spontaneous action at national level but also form part of a policy of liberalisation initiated by the European Union, resulting in the adoption of directives requiring an unbundling between the operators and the users of energy distribution and transmission systems.

4. In that regard, it should be pointed out at the outset that the two directives of the second energy package of 2003, namely Directives 2003/54/EC[3] and 2003/55/EC,[4] and of the third energy package of 2009 (see below), namely Directives 2009/72/EC[5] and 2009/73/EC,[6] which do not form the subject-matter of the request for a preliminary ruling, are none the less important. In fact, they define the degree of liberalisation sought by the Community legislature between 2003 and 2009 which the companies maintain the Member States cannot exceed without infringing the rules of European Union law on the fundamental freedoms. Moreover, they contain definitions that are relevant to the present cases.

II – Legal framework

A – *European Union law*

1. The FEU Treaty

5. Article 63(1) EC prohibits all restrictions on the movement of capital between Member States and between Member States and third countries.

6. Article 345 of the Treaty provides that the Treaty is in no way to prejudice the rules in Member States governing the system of property ownership.

3 — Directive of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

4 — Directive of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

5 — Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

6 — Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

2. Directives 2003/54 and 2003/55

7. Directives 2003/54 on electricity and 2003/55 on gas form part of the second energy package adopted in order to liberalise the energy sector. The rules concerning electricity are essentially identical to those concerning gas. In order to avoid duplication, only the provisions on electricity are reproduced here.

8. Recitals 6 to 8 and 10 in the preamble to Directive 2003/54 read as follows:

'(6) For competition to function, network access must be non-discriminatory, transparent and fairly priced.

(7) In order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance. A transmission or distribution system operator may comprise one or more undertakings.

(8) In order to ensure efficient and non-discriminatory network access it is appropriate that the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist. …

It is necessary that the independence of the distribution system operators and the transmission system operators be guaranteed especially with regard to generation and supply interests. Independent management structures must therefore be put in place between the distribution system operators and the transmission system operators and any generation/supply companies.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation does not imply a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertakings. However, a non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible.

…

(10) While this Directive is not addressing ownership issues it is recalled that in case of an undertaking performing transmission or distribution and which is separated in its legal form from those undertakings performing generation and/or supply activities, the designated system operators may be the same undertaking owning the infrastructure.'

9. Under Article 2(3) and (5) of Directive 2003/54, '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, while '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.

10. Article 15(1) of Directive 2003/54, entitled 'Unbundling of Distribution System Operators', provides as follows:

'Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. These rules shall not create an obligation to separate the ownership of assets of the distribution network operator from the vertically-integrated undertaking.'

11. Article 15(2) of that directive lays down additional obligations concerning vertically integrated undertakings. In particular, it must be guaranteed that the persons responsible for the management of the distribution system operator are independent of the structures in charge of the management of generation/production, transmission and supply, the system operator must have decision making powers and adopt a compliance programme to ensure the absence of discriminatory practices.

3. Directives 2009/72 and 2009/73

12. Taking note of the inadequacies of the unbundling achieved under the earlier directives and in order to pursue liberalisation of this sector, the European Union legislature, under the third energy package, adopted Directives 2009/72 and 2009/73, concerning common rules for the internal market in electricity and natural gas, respectively. *Ratione temporis*, they are not relevant to the cases in the main proceedings but the parties refer to them in their observations.

13. Recital 11 in the preamble to Directive 2009/72 states: '[o]nly the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling'. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production structures, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market [7] referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a generation or supply undertaking. Within those limits, a generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

B – *Netherlands law*

14. The provisions of national law relevant to the cases in the main proceedings are to be found in the Law regulating the production, transmission, and supply of electricity (Wet houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit) of 2 July 1998 [8] and the Law on the rules relating to the transmission and supply of gas (Wet houdende regels omtrent het transport en de levering van gas) of 22 June 2000, [9] as amended in 2004 and 2006 (hereinafter the 'Electricity Law 1998' and the 'Gas Law').

15. Those laws were amended, first, by the Law on intervention and implementation (Intervention and Implementation Law) of 1 July 2004, [10] in particular to transpose the directives of the second energy package.

7 — OJ 2008 C 175 E, p. 206.

8 — Staatsblad 1998, No. 427.

9 — Staatsblad 2000, No. 305.

10 — Staatsblad 2004, No. 328.

16. They were subsequently amended by the Law on the independent operation of networks (Independent Network Operation Law of 23 November 2006[11]: hereinafter the 'WON law'). That law imposed stricter requirements for the system operator including the prohibition of privatisation, the group prohibition and the abovementioned prohibition of unrelated activities. The amendments made by the WON Law to the Electricity Law 1998 and the Gas Law form the subject-matter of the dispute between the parties before the national court.

17. On the basis of those measures, the following prohibitions that are relevant in this case are applicable in the Netherlands:

1. The prohibition of privatisation

18. The Decree on shares in system operators (Besluit aandelen netbeheerders) of 9 February 2008,[12] read in conjunction with Article 93 of the Electricity Law 1998 and Article 85 of the Gas Law, lays down the rules governing the system of property applicable to system operators.

19. The shares in the companies designated as system operators and control of the systems must be entirely in the hands of shareholders belonging to the 'circle of authorities'. According to the Decree on shares in system operators, only public bodies, such as municipalities, provinces or the State, or legal persons ownership of which is, indirectly or indirectly, wholly in the hands of the authorities, including Essent NV,[13] Eneco Holding NV and Delta NV, may be, or may become, owners of shares in a system operator.

20. Consequently, according to the decree on the shares in system operators, the Minister for Economic Affairs must refuse authorisation of any alteration in the ownership of a system or of the shares in a system operator if the result of the transfer is likely to be that the shares pass into the ownership of persons outside the circle of authorities.

2. The group prohibition

21. The group prohibition is imposed by Article 10b(1) of the Electricity Law 1998 and Article 2c(1) of the Gas Law.

22. On the basis of those provisions, system operators cannot be members of a group, as defined in Article 2:24b of the Netherlands Civil Code (Burgerlijk Wetboek), to which an energy company also belongs, namely a legal person which generates/produces, supplies or markets electricity or gas in the Netherlands. As an extension of that, the group prohibition also precludes a system operator from holding a share or interest in an energy company or in any entity of a group of which an energy company is a member. Conversely, an energy company may not hold any share or interest in a system operator or in an entity forming part of a group of which a system operator is a member.

23. Under that prohibition, vertically integrated undertakings active in the energy sector must be split into a part responsible for the operation of the system and a part responsible for the generation/production, supply and trade in energy, in other words into one or more system operators and energy companies. A system operator and the group companies connected with it may not in fact belong to a group of which energy companies are also members. The obligation to split is referred to by the national court as 'the splitting obligation'.

11 — Staatsblad 2006, No. 614.

12 — Staatsblad 2008, No 62.

13 — See point 27 above.

3. The prohibition of unrelated activities

24. The prohibition of unrelated activities is laid down in Article 17(2) to (4) of the Electricity Law 1998 and Article 10b(2) to (4) of the Gas Law.[14] It comprises three elements.

25. First, it is not permissible for a distribution system operator, and group companies connected to it, to engage in transactions or activities which may conflict with the interests of a system operation. Secondly, under that prohibition, a group company is not permitted to carry on activities which do not have a close link to basic infrastructure tasks. Finally, the prohibition of unrelated activities also prevents the system operator from supplying, for the benefit of the activities of the system undertaking, financial guarantees or standing as guarantor of debts incurred by other component parts of the distribution system operator.

III – The main proceedings, the questions referred and the proceedings before the Court

A – *Facts*

26. It is apparent from the observations of the Netherlands Government that, on the entry into force of the WON Law, three types of undertaking were active on the Netherlands energy market. The first type were undertakings that were active only in the generation/production, supply or trade in electricity or gas. The second type were vertically integrated undertakings active both in the generation/production, supply or trade in electricity or gas and in the operation and use of electricity and gas distribution systems. The third type related to undertakings which were principally active in the operation and use of electricity and gas systems and carried on no activity in regard to generation/production, supply or trade in electricity or gas. The companies which were the applicants in the main proceedings were the major vertically integrated energy undertakings on the Netherlands market. They thus belonged to the second type of undertaking.

27. Essent is active on the energy markets of Netherlands, Belgium and of other States. For Essent the group prohibition means that Essent NV split itself into two in order to form, first, the system undertaking, Enexis Holding NV, which, in accordance with the prohibition of privatisation, is wholly owned by public shareholders, and, secondly, the undertaking for marketing, supply and generation/production of electricity and gas, Essent NV. The splitting requirement entailed considerable costs for Essent, so much so that the national court held, in the main proceedings, that it had standing to seek a ruling. Following its acquisition by the specialist German energy group RWE, Essent NV is wholly owned by RWE Benelux Holding BV, a subsidiary of the RWE AG group.

28. Eneco Holding NV is an undertaking carrying on the business, by means of its subsidiaries, of generating/producing, buying, selling, transmitting and supplying electricity and gas, specifically to energy users. The capital in Eneco Holding NV is owned by 60 municipalities. Its supply business covers the whole of the country whereas its system business covers a zone encompassing six Dutch provinces.

29. Delta NV is also active on the markets for the generation/production, trade in and supply of electricity. It also distributes and supplies gas. Delta NV is, moreover, active on other markets. The energy systems play an important role in the context of its multi-utility strategy which includes a majority shareholding in a Belgian undertaking specialising in waste processing. The value represented by these systems strengthens Delta NV's financial base. The province of Zeeland is its main shareholder, the remaining shares being held by Dutch municipalities.

14 — [Footnote concerning French terminology, not relevant to the English version].

30. Taking into account the electricity or gas system, the companies had to be wholly owned, directly or indirectly, by (public) shareholders belonging to the circle of authorities. Those undertakings and their shareholders were prohibited from selling the system or the system operator, wholly or in part, to private investors. As I have already pointed out, Essent NV has since been split into a system operator and an energy undertaking, the two other companies remaining vertically integrated companies.

B – *National proceedings*

31. The companies brought three separate actions before the Rechtbank Den Haag, seeking a declaration that the group prohibition and the prohibition of unrelated activities run counter to the fundamental freedoms enshrined in Articles 49 TFEU and 63 TFEU and, are, consequently, of no effect. The Rechtbank Den Haag dismissed those actions.

32. The companies appealed against those decisions to the Gerechtshof Den Haag. The Gerechtshof Den Haag set aside the decisions of the Rechtbank Den Haag on the grounds that the contested provisions ran counter to Article 63 TFEU and, consequently, were of no effect.

33. The Staat der Nederlanden subsequently appealed on a point of law against the judgments of the Gerechtshof Den Haag, submitting that European Union law did not preclude the contested provisions.

34. In the context of those proceedings the Hoge Raad der Nederlanden, by three decisions of 24 February 2012, decided to stay the proceedings and refer to the Court, in the three cases concerned, the following questions for a preliminary ruling:

‘(1) Must Article 345 TFEU be interpreted as meaning that the ‘rules in Member States governing the system of property ownership’ also include the rule in respect of the absolute prohibition of privatisation which is at issue in the present case, as set out in the Besluit aandelen netbeheerders (Decree on shares in system operators), in conjunction with Article 93 of the [Elektriciteitswet 1998] and Article 85 of the [Gaswet], under which shares in a system operator can be transferred only within the circle of public authorities?

(2) If Question 1 is answered in the affirmative, does this then have the effect that the rules relating to the free movement of capital are not applicable to the group prohibition and to the prohibition of [unrelated activities],[15] or at least that an assessment of the group prohibition and of the prohibition of [unrelated activities] in the light of the rules relating to the free movement of capital is not required?

(3) Are the objectives which also form the basis of the WON (Wet onafhankelijk netbeheer) (Law on independent network operation), that is to say, to achieve transparency in the energy market and to prevent distortions of competition by opposing cross-subsidisation in the broad sense (including strategic information exchange), purely economic interests, or can they also be regarded as interests of a non-economic nature, in the sense that in certain circumstances, as overriding reasons in the public interest, they may constitute a justification for a restriction of the free movement of capital?’

15 — [Footnote referring to footnote 14 on French terminology, not relevant to the English version].

C – *Procedure before the Court*

35. By order of 26 March 2012 the President of the Court ordered the joinder of Cases C-105/12, C-106/12 and C-107/12.

36. Written observations were submitted to the Court by the companies concerned, the Netherlands, Czech and Polish Governments and by the European Commission which, with the exception of the Czech Republic and the Republic of Poland, were also represented at the hearing on 14 January 2013.

IV – Analysis

A – *The first question referred for a preliminary ruling, concerning the prohibition of privatisation in the light of Article 345 TFEU*

37. By the first question referred for a preliminary ruling, the referring court seeks to ascertain whether Article 345 TFEU must be interpreted as meaning that the 'rules in Member States governing the system of property ownership' cover the rule in respect of the absolute prohibition of privatisation at issue in the present case which entails that the shares in a system operator cannot be transferred other than exclusively within the circle of authorities.

38. I note at the outset that the prohibition of privatisation under the Netherlands legislation means, in regard to systems, that only 'authorities', within the meaning of the abovementioned decree on the shares in system operators,[16] may be owners of them, whether directly or indirectly.

39. None the less, the assets involved in the use of the system, in the same way as the shares or direct or indirect holdings in the systems, are not *res extra commercium*, since they involve perfectly ordinary property rights under private law which may be sold, bought and used, for example, by way of surety for a debt. None the less, the shareholdings may be transferred only within a specific category of owners, namely the 'authorities'.

40. The Hoge Raad der Nederlanden considers, with regard to the national legislation applicable *ratione temporis*, that this is an absolute prohibition of privatisation. I agree. The fact that that limitation is realised only in an act of a regulatory nature does not affect that conclusion, contrary to what is claimed by the companies.

41. As Advocate General Ruiz-Jarabo Colomer pointed out, Article 345 TFEU is the only provision of the Treaties to be directly inspired by the Schuman declaration of 9 May 1950 and it was initially provided for in Article 83 of the ECSC Treaty.[17] Its original objective was to ensure that the establishment of the new community would not impinge upon a delicate political issue of the time relating to the legal and social nature of ownership of 'decartelised' German mines and undertakings active in the steel sector.[18] Thus, Article 345 TFEU enshrines the principle of neutrality in regard to ownership, public or private, of the 'means of production' and of undertakings.[19]

16 — It should be stated that the definition of authority encompasses also legal persons who are wholly owned subsidiary companies of an energy company referred to by the decree on the shares of system operators, including Essent NV (before its splitting), Eneco Holding NV and Delta NV. Those subsidiary companies may be foreign legal persons.

17 — See point 45 of the Opinion of Advocate General Ruiz-Jarabo Colomer delivered in the cases giving rise to the judgments in Joined Cases C-367/98 *Commission* v *Portugal* [2001] ECR I-4731; C-483/99 *Commission* v *France* [2001] ECR I-4781, and C-503/99 *Commission* v *Belgium* [2001] ECR I-4809.

18 — Delta NV refers in its observations to the description of the genesis of the aforesaid provision by Professor Reuter, P., in his book *La Communaute europeenne du charbon et de l'acier*, Paris 1953.

19 — According to Advocate General Ruiz Jarabo Colomer, Article 345 TFEU does not concern systems of property ownership in the sense of the civil rules concerning property relationships (see point 54 of his Opinion in the cases cited above of *Commission* v *Portugal* (C-367/98), *Commission* v *France* (C-483/99) and *Commission* v *Belgium* (C-503/99)).

42. In my view, that means, first, that, in so far as this system is not discriminatory or disproportionate, an intrinsic consequence of the system of ownership adopted cannot be regarded as an obstacle subject to the prohibitions laid down by the Treaty. Secondly, the restrictive consequences other than those directly and inevitably stemming from the public or private system of ownership are on the contrary subject to the fundamental freedoms of the Treaty. [20]

43. For example, it follows from the fact that the steel industry sector is nationalised in one Member State that the establishments of other Member States, and even direct investments by investors from those States, are excluded. As the Commission notes, the Court has upheld the compatibility of nationalisations with European Union law since the *Costa* judgment. [21]

44. Moreover, it is appropriate, in my view, to refer to the judgment delivered by the Court of the European Free Trade Association (EFTA) [22] in the case between the EFTA Surveillance Authority and the Kingdom of Norway concerning concessions for the acquisition of waterfalls. The EFTA Court interpreted Article 125 of the European Economic Area Agreement [23] of 2 May 1992, which corresponds to Article 345 TFEU, as meaning that the right of an European Economic Area (EEA) State to decide whether the ownership of hydro-electric resources and installations relating thereto should be in the hands of public authorities or private persons is not in itself affected by the European Economic Area agreement. According to that court, the Kingdom of Norway was therefore legitimately entitled to pursue the objective of establishing a system of public ownership for those assets, provided it did so in a proportionate and non-discriminatory manner.

45. Following that reasoning, the fact that no private investor may buy shares or interests in a company reserved for public shareholders cannot be regarded as a restriction prohibited by the Treaty, inasmuch as it is precisely an element of the system of property ownership that the Treaty does not seek to change.

46. Conversely, as the case-law on 'golden shares' illustrates, the privileged treatment of public interests within an essentially private property system, such as that established in the case of companies limited by shares, as provided for by company law, is not exempted from the Treaty provisions on the fundamental freedoms. [24]

47. The Netherlands system at issue is founded on a fundamental choice under which ownership of the energy distribution system has been reserved to a circle of public shareholders (*res publica*), but not to a single shareholder. In accordance with that objective, property rights in the system are held by various entities meeting the definition of 'authority' within the meaning of the decree on the shares in system operators. Flowing ineluctably from that is the need to prohibit indirect private ownership.

48. Therefore, restrictions on the transfer of shares in the company are necessary so that interests in the assets can be bought and sold by and to the various entities authorised to do so, without such assets losing their public character. The prohibition of privatisation is therefore an inevitable consequence of the choice of public ownership and of the idea of preserving ownership in the hands of the public authorities. I conclude that, in the cases in the main proceedings, what is involved is indeed a system of property ownership, as referred to in Article 345 TFEU.

20 — The Court recently stated in its judgment of 8 November 2012 in Case C-244/11 *Commission* v *Greece* [2012] ECR, paragraphs 15 and 16, that 'Article 295 does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty […]. More specifically, the Court has ruled that, although Article 295 EC does not call into question the Member States' right to establish a system for the acquisition of immoveable property, such a system remains subject to the fundamental rules of Union law, including those of non-discrimination, freedom of establishment and freedom of movement of capital (Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24 and the case-law cited).

21 — Case 6/64 *Costa* [1964] ECR 585, 593.

22 — E-2/06 *ESA* v *Norway* ('Waterfalls in Norway') [2007] EFTA Ct. Rep. 164, paragraph 72.

23 — OJ 1994, L. 1, p. 3.

24 — See, inter alia, Case C-367/98 *Commission* v *Portugal*, (C-483/99) *Commission* v *France* and (C-503/99) *Commission* v *Belgium*.

49. I therefore propose that the Court's reply to the first question should be that a body of rules in a Member State, such as that at issue in the main proceedings, under which the shares in a distribution system operator can be transferred only to public bodies and to certain companies wholly owned by the public authorities (the prohibition of privatisation), constitutes a body of rules governing a system of property ownership for the purposes of Article 345 TFEU and is, in that regard, compatible with European Union law.

B – *The second question referred for a preliminary ruling, concerning the 'group prohibition' and the 'prohibition of unrelated activities' in the light of the free movement of capital*

50. The second question referred for a preliminary ruling concerns the free movement of capital. The Hoge Raad der Nederlanden seeks to ascertain whether a positive reply to the first question would entail the consequence that the rules relating to the free movement of capital would not be applicable to the group prohibition and the prohibition of unrelated activities [25] or whether, at least, those prohibitions would not need to be assessed in the light of the rules relating to that freedom.

51. First of all, in accordance with the distinction I proposed earlier, [26] it is necessary to determine whether those two prohibitions are consequences which inherent in the choice of principle made by the Staat der Nederlanden, discussed in the context of the first question, to reserve ownership of the system operators to the public authorities, which are not capable of constituting restrictions. I do not think they are.

52. The group prohibition and the prohibition of unrelated activities are not direct and inevitable consequences of the prohibition of privatisation which, for its part, comes under the rules governing the system of ownership for the purposes of Article 345 TFEU, but rather are legislative measures which seek to prevent the distribution system operation from being used in order to promote interests unrelated to the needs of those systems, in particular interests linked to the supply or production of energy. In reality, this is a way of preventing circumvention of the unbundling of the ownership structures of systems from those of the supply and production services using the systems, irrespective of the public or private nature of either of those two structures. Further, the prohibition of unrelated activities isolates system operation from the risks linked to unconnected activities and, conversely, prevents the system operation from being used a basis for the funding of unconnected activities.

53. In other words, these are not measures seeking to control intermediary chains of ownership, and thereby to reserve ownership of the systems to the public authorities; rather they are measures seeking to keep the system 'pure' by aiming at the unbundling of ownership structures, in such a way that the interests of the system and those of the sale of energy are not confused. In my view, comparable legislation would also be necessary where unbundling of ownership were implemented without a prohibition of privatisation. Even if national legislation allowed a system operator to be owned by private persons, it would also be necessary to introduce comparable prohibitions to ensure that unbundling of ownership is respected [27], in order to prevent conflicts of interest.

54. Since the group prohibition and the prohibition of unrelated activities may be detached from the prohibition of privatisation, it must be considered whether they constitute a restriction on the free movement of capital.

25 — Points 21 to 25 above.

26 — At point 42 of this Opinion.

27 — According to the Commission, at the time of the adoption of these two prohibitions, the Dutch government had not yet excluded the possibility of a privatisation of the system operators. I would point out that, in fact, rules limiting the formation of groups and/or the carrying on of unrelated activities are not uncommon in the regulations applicable to the sectors subject to enhanced State control, such as those applicable to the financial sector or that of health.

55. Failing any definition of capital movements in the Treaty, the Court has recognised that the nomenclature of capital movements set out in Annex I to Directive 88/361/EEC [28] has indicative value, notably in its judgment in *Commission* v *Portugal*. [29] That nomenclature includes, in particular, 'direct' investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking. [30] That nomenclature also includes sureties, other guarantees and rights of pledge.

56. The Court has stated that national measures must be regarded as 'restrictions' within the meaning of Article 63(1) TFEU if they are likely to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other Member States from investing in their capital. [31]

57. It seems to me that the group prohibition and the prohibition of unrelated activities clearly come within the scope of capital movements for the purposes of Article 63(1) TFEU and constitute restrictions on such movements. Moreover, since they are absolute prohibitions preventing by definition all transactions coming within their scope, it is not necessary to establish separately whether they are in the nature of obstacles to the free movement of capital.

58. By impeding any strategy of financial or operational diversification of the entities concerned, based on complementarity between the two sectors, the prohibitions in question prevent both direct investments and portfolio investments. Indeed they restrict investments by foreign undertakings in traders active in the energy sector in the Netherlands as well as investments by the latter in foreign traders holding shares in the other energy groups in the Netherlands. The prohibition of unrelated activities is also likely adversely to affect the terms on which the companies concerned are financed. Consequently, the group prohibition and the prohibition of unrelated activities constitute restrictions on movements of capital for the purposes of Article 63(1) TFEU which, unless they can be justified, are prohibited.

59. It is worth pointing out that these two prohibitions can also be analysed from the perspective of freedom of establishment. In fact, the group prohibition precludes the taking of both minority and majority shareholdings in system operators and energy companies and in entities that are members of groups to which such companies belong. For its part, the prohibition of unrelated activities limits the business activity of system operators and companies connected with them within a group, which is a potential restriction on freedom of establishment from the point of view of the undertaking concerned. In that regard, it is sufficient to note that, in accordance with settled case-law, in so far as the national measures at issue entail restrictions on freedom of establishment, such restrictions are the direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Accordingly, it will not be necessary to examine the measures at issue from the perspective of freedom of establishment. [32]

60. Consequently, I propose that the Court's answer to the second question should be that, even though the prohibition of privatisation of distribution system operators, such as that at issue in the main proceedings, constitutes a body of rules governing a system of property ownership within the meaning of Article 345 TFEU which is compatible with European Union law, other national rules,

28 — Council Directive of 24 June 1998 implementing Article [67 EC] (OJ 2009 L 178, p. 5).

29 — Case C-171/08 [2010] ECR I-6817, paragraph 49. See also Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 179.

30 — See, for example, judgments in Cases C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 19, and C-171/08 *Commission* v *Portugal*, cited above, paragraphs 49 to 50.

31 — Case C-171/08 *Commission* v *Portugal*, cited above, paragraph 50.

32 — Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 43, and Case C-171/08 *Commission* v *Portugal*, cited above, paragraph 80.

such as the prohibition of groups including both energy distribution system operators and legal persons marketing, supplying or generating/producing electricity or gas in the Netherlands, and the prohibition of unrelated activities applicable to distribution system operators, come within the scope of the free movement of capital, with which their compatibility must be determined.

C – *The third question referred for a preliminary ruling, concerning 'overriding reasons in the public interest' constituting a justification of a restriction on the free movement of capital*

61. By its third question, the national court seeks to ascertain whether the objectives of the WON Law, that is to say to ensure transparency on the energy market and prevent distortions of competition by combating cross-subsidies in the broad sense (including the exchange of strategic information), are pure economic interests, or whether they may also be deemed to be interests of a non-economic nature in the sense that, depending on the circumstances, they may constitute overriding reasons in the public interest justifying a restriction on the free movement of capital.

1. Characteristics of electricity and gas distribution systems

62. Before analysing whether there is any justification and whether it is proportional, it appears to me necessary to rehearse the characteristics of the electricity and gas distribution systems from the perspective of competition and strategy.

63. These systems connect the national energy transmission system to the consumer at regional and local level. They are 'natural' monopolies since they cannot reasonably be duplicated owing to the very large economies of scale associated with them. From the point of view of competition, the owner of the distribution system therefore controls an 'essential facility' between supply and consumption which confers on it market power both upstream and downstream.

64. Electricity and gas distribution systems are important to consumers in two respects. First, it is essential that the system owner does not use its monopoly position to demand disproportionate remuneration for its service, that is to say for access to the supply of energy by the distribution system. That is why the delivery charge for the distribution of energy is likely to be controlled by the national authorities, which seems to be the case in the Netherlands.[33] Secondly, the quality of the operation of the system must be satisfactory in terms, specifically, of the repair of faults affecting energy provision and reliable invoicing of consumption.

65. From the point of view of the security of energy supplies, distribution systems are essential since it is of no use having adequate energy supplies available if they cannot be distributed to consumers. That is why system operators are also important from the point of view of national security, because the person controlling the distribution of electricity also controls modern society in all its functions. The same reasoning also applies to gas in the Member States where it is a major source of energy.

66. Owing to the specific characteristics of the sectors using 'not capable of duplication' systems for the supply of services or of energy, it is very plainly important to ensure that there is a suitable competitive structure. In that perspective, third parties must be able to access those systems on a non-discriminatory basis in order to complete the process of liberalisation, that is the creation of a competitive market where freedom to supply services is guaranteed, in respect of the use of systems such as, inter alia, distribution systems for electricity, gas, or rail transport. To achieve this, the European Union legislature, in common with the legislatures of several Member States, adopted the

33 — According to information provided by the Netherlands Government at the hearing.

strategy of unbundling, in other words, detaching the operation of the system from its use for the supply of services. The degree of unbundling desired or achieved has varied according to sector and Member State concerned, ranging from unbundling for accounting or functional purposes to legal separation and even to unbundling of property ownership structures.

2. Effect of secondary European Union law on the assessment of national legislation in light of the freedoms of movement

67. The cases in the main proceedings raise the problem of the effect of measures of secondary European Union law on the assessment of the justification of a national transposition measure which constitutes a restriction of one of the freedoms of movement and which goes beyond the requirements of the directive which it transposes.

68. In my view, it is important, in light of the Court's earlier case-law, to determine whether review of the transposition measure at issue in the main proceedings necessitates a review of whether the directive transposed is compatible with primary European Union law.

69. In the cases in the main proceedings, the group prohibition and the prohibition of unrelated activities stem from the WON law, which was specifically adopted in order to transpose Directives 2003/54 and 2003/55 of the second energy package; those directives do not require the unbundling of ownership of shares in a transmission or distribution system operator and ownership of shares in other traders and do not make this an express means of transposition.[34] Like other national legislatures which opted for the unbundling of ownership structures as between transmission system operators, on the one hand, and energy production and supply undertakings, on the other hand,[35] the Netherlands legislature, it seems to me, on its own initiative went further in 2006 with the WON law than was required under the secondary European Union law in force by choosing to unbundle the ownership structures of the distribution system operators, on the one hand, and the energy production and supply undertakings, on the other hand. I would emphasize that the directives in question provide for a minimum level of harmonisation.

70. In the legal context applicable *ratione temporis* to the cases in the main proceedings, although the WON law was adopted in order to transpose the 2003 directives, it thus appears as a national measure which can be detached from them. It is therefore amenable to independent review in the light of the freedoms of movement.

71. However, although Directives 2009/72 and 2009/73 are not applicable *ratione temporis* to the present cases, their subsequent adoption cannot be disregarded; for their part, they make unbundling of ownership structures an express means of transposition. Recital 11 in the preamble to directive 2009/72 describes such unbundling as an effective and stable means of resolving the inherent conflict of interests and recital 21 thereof enshrines a right to opt for full ownership unbundling.[36]

34 — See the abovementioned recital 8 of the preamble to, and Article 15 of, Directive 2003/54.

35 — Prior to adoption of the third energy package, thirteen Member States had opted for the unbundling of ownership of electricity transmission system operators, and six for gas transmission system operators, according to Hunt, M., 'Ownership Unbundling: The Main Legal Issues in a Controversial Debate', *EU Energy Law and Policy Issues*, Ed. Delvaux, B., et.al., Rixensart: Euroconfidentiel, 2008.

36 — None the less, it is not an obligation. In that regard, Article 26 of Directive 2009/72, entitled 'Unbundling of Distribution System Operators', provides, like Article 15 of Directive 2003/54, that 'Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking'.

72. Admittedly, a literal and restrictive interpretation of those recitals might suggest that they concern only energy transmission system operators. None the less, like the Netherlands Government and the Commission, I consider that those recitals are also relevant as regards distribution systems, in the light of their characteristics as above described, and the need to eliminate conflicts of interest between system operators and users; that need seems to me to be just as acute with regard to distribution as to transmission even if only the latter systems are decisive from the point of view of freedom to provide services at cross-border level.

73. Consequently, as the law currently stands, the group prohibition and the prohibition of unrelated activities can, it seems to me, no longer be challenged, at least as to their principle, without directly entailing a review of the compatibility of the 2009 directives with the free movement of capital. I note, however, that the ownership unbundling contemplated in recital 11 of the preamble to those directives is not as far reaching as that resulting from the group prohibition in Netherlands law, since that recital expressly reserves the possibility of reciprocal minority investments between the system operator and a production or supply undertaking.

74. The Commission in its observations says that the compatibility of the group prohibition with the free movement of capital must be assessed under the relevant rules of secondary European Union law; it seems to be claiming that, if the group prohibition is compatible with the objectives of the directives, that may be enough to justify that measure.

75. In my view, the real question is rather this: is the unbundling of ownership structures subsequently provided for by the 2009 directives compatible with the Treaty and in particular with the freedoms of movement which such unbundling is likely to restrict?

76. According to settled case-law, the European Union legislature is as a matter of principle bound to observe the freedoms of movement established by the Treaty, as must the national legislature.[37] An academic debate[38] has been engaged in order to determine whether secondary legislation is subject to review of the same nature and intensity in the context of the assessment of its conformity with primary European Union law, in particular the freedoms of movement,[39] or whether that review must be adapted to the specific features and objectives of European Union law.

77. In *Bauhuis*, the Court held that measures enacted by the Council in the general interest of the Community, and not unilaterally by the Member States in order to protect their own interests, cannot be regarded as measures impeding trade.[40] In other words, secondary European Union legislation seems to benefit from a presumption of conformity with the freedoms of movement guaranteed by the Treaty. A more recent illustration of the specific nature of the review of measures of secondary law with regard to freedoms of movement is to be found in the judgment in *Germany* v *Parliament and Council*[41] in which it was held that the objective of combating any market disturbance could justify a restriction on freedom of establishment stemming from the directive on deposit-guarantee schemes. Such an objective would doubtless not have been held to justify a similar national measure which would have been adjudged to be purely economic in nature.

37 — See, in regard to the free movement of goods, (Joined Cases 80/77 and 81/77 *Les Commissionnaires Réunis et Les Fils de Henri Ramel* [1978] ECR 927), which states that 'the prohibition of quantitative restrictions on exports and of all measures having equivalent effect applies, as the court has repeatedly held, not only to national measures but also to measures adopted by the community institutions'. See also Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15. There is no ground, it seems to me, for adopting a different reasoning in regard to the free movement of capital.

38 — See in this regard Mortelmans, K., 'The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market', vol. 39 CMLRev 2002, p. 1303.

39 — In support of this argument, see Petersmann, E.-U., *Constitutional Functions and Constitutional Problems of International Economic Law*, Freiburg 1991.

40 — See Case 46/76 [1977] ECR 5, paragraphs 27 to 30.

41 — Case C-233/94 [1997] ECR I-2405, paragraph 57.

78. Thus, it has been accepted in the Court's case-law that the economic aims of the Treaty may justify restrictions on fundamental freedoms stemming from European Union legislation. The question therefore, in relation to the main proceedings, is whether objectives of national legislation pursuing Treaty aims may also do so and, if so, to what extent. This problem may present itself in the same terms outside the liberalisation of the electricity and gas distribution system sectors, in particular, in an analysis of national competition legislation which, in its own sphere, might prove stricter than that of the Union and thus be likely to constitute a restriction on freedom of establishment.

3. 'Purely economic' justifications

79. I established, in the context of the second question referred, that both the group prohibition and the prohibition of unrelated activities applicable to distribution system operators come within the scope of the free movement of capital and that those prohibitions restrict that freedom.

80. The Court has repeatedly held that the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 58 EC or on overriding grounds in the public interest as defined in the Court's case-law. Moreover, such restrictions must be appropriate to the objective pursued and not exceed what is necessary to attain the objective sought. [42]

81. The national court observes that the objectives of transparency on the energy market and preventing distortions of competition in order to create a level playing field, relied on by the State in order to justify the group prohibition and the prohibition of unrelated activities, were also used by the Parliament and by the Council as the basis for Directives 2009/72 and 2009/73. According to their preambles, those directives specifically seek to ensure fair access to the system and market transparency with a view to the application of transparent and non-discriminatory tariffs. [43] Even though these directives do not impose an ownership unbundling requirement as between distribution system operator and marketing activities, the national court observes that the measures prescribed, in particular unbundling and functional separation, were adopted in order to attain the objectives that have just been mentioned.

82. On the other hand, the companies consider that the main purpose of transparency and prevention of cross-subsidies is to strengthen the competitive structure of the Netherlands energy market. Relying on the Court's settled case law, they maintain that those objectives are of a purely economic nature and cannot, as such, constitute an overriding reason in the public interest. [44]

83. For its part, the Commission considers that the group prohibition and the prohibition of unrelated activities lead to a separation of distribution system operators going beyond that prescribed by Directives 2003/54 and 2003/55, but in conformity with the general structure and objectives of those directives.

42 — Case C-271/09 *Commission* v *Poland* [2011] ECR I-13613, paragraphs 55 to 58.

43 — See, in particular, recitals 4, 7, 26 and 32 in the preamble to Directive 2009/72 and recitals 4, 5, 25 and 31 in the preamble to Directive 2009/73.

44 — Cases 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 35 and 36; C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34 and C-96/08 *CIBA* [2010] ECR I-2911, paragraph 48.

84. In my view, both the preambles to the 2009 directives and the parliamentary debates in the Netherlands clearly show that the principal objectives of ownership unbundling and of the group prohibition are, in the European Union, increased investment and competition on the energy market and lower prices at European level,[45] and in the Netherlands, the objective is to counter anti-competitive conduct by means of greater transparency.[46] It is sufficient to note that those objectives constitute prima facie grounds of an economic nature, as defined by the Court's case-law.

85. Specifically, in spite of the economic grounds under consideration in the present case, the group prohibition and the prohibition of unrelated activities are, it seems to me, justifiable in three ways. The first is to consider that the economic objectives are not 'pure', but rather means at the service of non-economic ends. The second is to define the concept of economic objective so as to include in it an element relating to the protectionist, or even 'self-interested', aim of the measure under review. The third way would be to justify, irrespective of the economic nature or otherwise of the ground advanced, the prohibitions at issue by reference to one of the objectives of the Treaty.

86. The first line of reasoning reflects the nuanced reading now permitted by the Court of the prohibition of economic grounds.[47] In particular, the Netherlands Government is relying on a line of case-law which accepts the legitimacy of measures which, at the same time as having an economic ground, pursue another purpose of a non-economic nature.[48]

87. To follow that reasoning would none the less raise two difficulties in the present cases. One is in the formulation of the third question referred by the Hoge Raad der Nederlanden relating only to the objectives of transparency on the energy market and on distortions of competition, which do not allow the Court to take into consideration the non-economic objectives put forward by the Netherlands Government, in particular consumer protection, guaranteeing security of supply, and the interest in having system operators focussed on that task.

88. The other difficulty is this: there is no clear connection between the group prohibition and the prohibition of unrelated activities, on the one hand, and public security and consumer protection, on the other, as regards either the adequacy of those measures or their proportionality to those objectives,[49] as rightly emphasised by the companies. In fact, the prohibition of privatisation seems to me already sufficiently to meet the requirements based on the concern to protect public security because it excludes, inter alia, the operation of electricity distribution systems by companies controlled by third States. Conversely, the requirements stemming from the concern to protect consumers should receive specific attention even if the legislature had permitted vertically integrated companies to continue to exist.

89. The second line of reasoning rests on the idea that the reason why measures enacted under European Union law are not subject to as strict a review with regard to the freedoms of movement as the review undergone by purely national measures is that what the Court is concerned with when distinguishing grounds which justify a restrictive measure from other grounds is not so much the economic nature in itself of the objective pursued as the protectionist aim implicit in that explicit justification.[50] Thus, the static classification of the legislative expression of a public policy is less important than its dynamic aim, regard being had to the system and objectives of the Treaty.

45 — See, on this, the Explanatory Memorandum to the proposal for this directive (COM(2007) 5 final.

46 — The observations formulated by Essent NV and Essent Nedreland BV reproduce the grounds advanced by the Netherlands legislature at various stages of the process.

47 — For an attempted rationale of these nuances, see Snell, J., 'Economic Aims as Justification for Restrictions on Free Movement', in *Rule of reason: rethinking another classic of European legal doctrine*, ed. Schrauwen, A., Groningen, Europa Law Publishing, 2005.

48 — *Campus Oil and Others.*

49 — All the more so as the Court considers that the public security derogation now in Article 65(1) TFEU must be strictly construed and can only cover cases in which there is a genuine and sufficiently serious threat to the public interest, see judgments in Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 72, and Case C-171/08 *Commission* v *Portugal*, cited above, paragraph 73.

50 — As the Commission asserted at the hearing.

90. That analysis is confirmed by the study of the measures at issue in certain cases in which the Court held that the justification of a restriction on freedom of establishment or free movement of capital was of a purely economic nature and therefore rejected it.

91. For example, in *Commission* v *Portugal*,[51] the Court did not accept that the national scheme at issue, which sought to limit the number of investors who are nationals of another State and to submit for the prior approval of the Portuguese Republic the acquisition of shares above a certain threshold, was justified by the improvement to the competitive structure of the market at issue and by the modernisation and improved efficiency of the means of production, on the basis of their economic nature. It seems to me that the implicit rationale of that judgment is a suspicion of protectionist motives in the exercise of the power of appraisal reserved to the national authority responsible for issuing such an authorisation.

92. Moreover, the pre-eminence of the risk of protectionist abuse in connection with the nature of the ground relied on is even more apparent in the Court's case-law that does not concern economic justifications. Thus, in the recent case of *Commission* v *Greece*,[52] the Court rejected the justification of a measure providing for authorisation prior to the acquisition of shares in strategic companies owing to the national authorities' discretionary power of appraisal in the exercise of that option, notwithstanding the existence of a public security ground justifying such provision based on the security of the energy supply. In other words, the aim of the national provisions under review prevails over their being described as economic.

93. The *Commission* v *Italy* case[53] also concerned privatisation legislation which, by way of a transitional measure with a view to the complete liberalisation of the energy sector, deprived of voting rights all shares above a consolidated 2% threshold. The Italian Republic sought to justify that measure on the ground of preserving sound and fair competition on the energy markets, which objective was rejected by the Court. There again, it seems to me that it was less the economic nature of the measure that precluded the Court from allowing it than the fact that that measure contributed to maintaining the *status quo*, that is to say, in that case, the control by the Italian public authorities of companies undergoing privatisation, which is an essentially protectionist objective.

94. Likewise, in regard to the 'golden shares' case-law, it was not so much the economic nature of the justification advanced as the excessive rights reserved to itself by a government, giving rise there also to public protectionism, which seems to me to have justified the Court in systematically considering such provisions to be incompatible with the free movement of capital and freedom of establishment.[54]

95. An objective which would a priori be incompatible with the Court's authoritative case-law might, on the other hand, be held to be compatible with the Treaty if there were first a test of aims within a new approach to economic grounds. That approach would, for example, distinguish between economic grounds protecting, in one way or another, the economic interests of the Member States and economic grounds for organising a sector in accordance with the economic objectives of the Treaty.

96. In this case, in the Netherlands situation, where system operators like the vertically integrated energy companies are owned by public entities, it does not seem to me that the group prohibition or the prohibition of unrelated activities directly or indirectly favour national traders. On the contrary, Essent NV, which was compelled to split itself before it could be privatised, and to sell interests in the distribution system operator, Enexis Holding NV, considers itself to have been placed at a competitive

51 — C-367/98, paragraph 52.

52 — Cited above, paragraph 79.

53 — Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraph 37.

54 — See, by way of example, *Commission* v *Portugal* (C-171/08), which involved shares with special rights attached (right of veto), a majority of which had compulsorily to be held by the State or other public shareholders.

disadvantage in relation to competitors from other Member States in which the vertically integrated model continues to be approved. Consequently, it would seem that the group prohibition does not pursue a protectionist aim, contrary to the measures judged incompatible with the freedoms of movement in the abovementioned cases.

97. Moreover, neither the group prohibition nor the prohibition of unrelated activities pursue a protectionist aim for the benefit of the public authorities. It is true that ownership of the system operators is reserved to them, but they are at the same time excluded from ownership of the energy companies, while they are system operators.

98. The third line of reasoning is to recognise a new basis of justification for a restriction on freedoms of movement, founded on the Treaty provision under which the internal market still includes a system ensuring that competition is not distorted. That provision, originally in Article 3(f) of the EEC Treaty, is now to be found in Protocol 27 of the FEU Treaty. [55]

99. Where national legislation is intended to replace, at regional or local level, the historical monopolies of vertically integrated energy companies with a structure under which ownership of the distribution system operation is unbundled from that of the services using it, that permits the establishment of a competitive market for the marketing, supply and production of energy, and it indeed constitutes a measure suitable for ensuring that competition is not distorted.

100. In my view, the restrictions on the freedom to act both of the distribution system operator and of the energy companies are likely to ensure non-discriminatory access to the energy market and to ensure that competition is not distorted with regard to the marketing, supply and production of energy. In my opinion, that objective must be regarded as an important justification in the public interest of national non-discriminatory restrictions that prove necessary in order to be able to liberalise a market characterised by a natural monopoly. It matters little if that justification is described as a justification that is not purely economic or non-protectionist.

101. More specifically, the group prohibition reinforces the separation between, on the one hand, supply and production and, on the other, distribution of energy; following recital 11 in the preambles of Directives 2009/72 and 2009/73, that is the most effective tool by which to promote investment in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market.

102. For its part, the prohibition of unrelated activities at the same time isolates the other sectors, such as for example waste management, from ‘spill over’ of resources accruing in an activity which is a natural monopoly whilst protecting the systems operation from the risks associated with unconnected activities. It follows that such a prohibition is likely to ensure that potential surpluses accruing in the course of system operation are invested in the maintenance and improvement of the system and not in external activities.

103. With regard to proportionality, under the decision of principle adopted by the national legislature in favour of the structural unbundling of distribution system operation and the marketing, supply and production of electricity and gas, the prohibition at issue goes no further than necessary in order to attain the objectives of transparency on the energy market and the prevention of distortions of competition.

55 — On the case-law on Article 3(f) of the EEC Treaty, see judgment in Case 229/83 *Association des Centres distributeurs Leclerc and Thouars Distribution* [1985] ECR 1, paragraph 20 et seq.

104. Accordingly, I propose that the Court's answer to the third question should be that the national systems at issue, such as the prohibition of groups including both energy distribution system operators and legal persons marketing, supplying or generating/producing electricity or gas in the Netherlands and the prohibition of unrelated activities applicable to distribution system operators, may be regarded as justified restrictions on the free movement of capital because they are liable to ensure that competition is not distorted by the exploitation by the distribution system operator of a monopoly position in marketing, supply or production or in other sectors unbundled from operation of the system.

V – Conclusion

105. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question submitted for a preliminary ruling by the Hoge Raad der Nederlanden:

(1) A body of rules within a Member State, such as that at issue in the main proceedings, under which the shares in a distribution system operator can be transferred only to public bodies and to certain companies wholly owned by the public authorities (the prohibition of privatisation), constitutes a body of rules governing the system of property ownership within the meaning of Article 345 TFEU and is, as such, compatible with the European Union law.

(2) Even though the prohibition of privatisation of distribution system operators, such as that at issue in the main proceedings, constitutes a body of rules governing a system of property ownership within the meaning of Article 345 TFEU which is compatible with European Union law, other national rules, such as the prohibition of groups including both energy distribution system operators and legal persons marketing, supplying or producing electricity or gas in the Netherlands, and the prohibition of unrelated activities applicable to distribution system operators, come within the scope of the free movement of capital, with which their compatibility must be determined.

(3) The national systems at issue, such as the prohibition of groups including both energy distribution system operators and legal persons marketing, supplying or generating/producing electricity or gas in the Netherlands and the prohibition of unrelated activities applicable to distribution system operators, may be regarded as justified restrictions on the free movement of capital because they are liable to ensure that competition is not distorted by the exploitation by the distribution system operator of a monopoly position in marketing, supply or production, or in other sectors unbundled from operation of the system.