



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 16 May 2019¹

Case C-31/18

Elektrorazpredelenie Yug EAD

v

**Komisia za energiyno i vodno regulirane (KEVR),
intervener:
BMF Port Burgas EAD**

(Request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria))

(Reference for a preliminary ruling — Internal market in electricity — Directive 2009/72/EC — Article 2(3), (4), (5) and (6) — Concepts of transmission system and distribution system — Criteria for distinguishing between the systems — Voltage — Ownership of installations — Free third-party access — Access using medium-voltage plant — Interconnection points between systems)

1. The present case concerns a request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) in relation to the interpretation of Article 2(3) and (5) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.²
2. The questions referred for a preliminary ruling by the referring court have arisen in the context of a dispute between the exclusive electricity distributor in South-Eastern Bulgaria and a company operating a port under concession, which intends to connect its network directly to the transmission system and, therefore, to pay the fees for network services directly to the operator of that system.
3. The present case offers an opportunity for the Court to provide important clarifications in relation to the scope of certain fundamental concepts laid down in Directive 2009/72.

I. Legal framework

A. EU law

4. Article 2 of Directive 2009/72, entitled ‘Definitions’, states as follows:

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

...

¹ Original language: Italian.

² OJ 2009 L 211, p. 55.

- (3) “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 does not include supply;
- (4) “transmission system operator” means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission 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 transmission of electricity;
- (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 does not include supply;
- (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’.

B. Bulgarian law

5. Article 86(1) of the *Zakon za energetikata* (Law on Energy) (‘the ZE’) (DV No 107, 2003) provides that ‘the transport of electricity shall be undertaken by the electricity transport system operator to which a licence for the transport of electricity has been issued and that has been certified ...’.

6. Under Article 88(1) of the ZE, ‘electricity shall be distributed and electricity distribution systems shall be operated by distribution system operators that own those systems in a specific area and hold an electricity distribution licence for that area. ...’.

7. Article 1 of the supplementary rules to the ZE (DV No 54, 2012) contains the following definitions:

‘20. “electricity transmission system” means all the power lines and installations used for the transport, transformation from high to medium voltage and redistribution of electricity;

...

22. “electricity distribution system” means all high-, medium- and low-voltage power lines and installations used for the distribution of electricity;

...

44. “transmission of electricity ...” means the transport of electricity ... via the transmission network ...;

49. “distribution” means the transport of electricity ... via the distribution networks’.

II. The facts, the main proceedings and the questions referred

8. *Elektrozpredelenie Yug EAD* (‘ER Yug’) holds an exclusive licence granted by the *Komisia za energiyno i vodno regulirane* (the Bulgarian Energy and Water Regulator) (‘the EWR’), under which it distributes electricity via a distribution system within the geographical area stated in the licence, namely South-Eastern Bulgaria.

9. The zone covered by ER Yug's licence includes the area in which the installations of BMF Port Burgas EAD ('BMF') are located, specifically the Burgas West and Burgas East port terminals, for which a concession has been granted to BMF by a publicly owned undertaking. BMF operates the port in that area and provides associated services.

10. The BMF installations are connected to the electricity network by means of a medium-voltage (20 kV) line referred to as 'Novo pristanishte' ('New port'), which has a medium-voltage connection to the medium-voltage plant (also 20 kV) in the 'Ribari' ('Fishermen') electrical conversion substation.³ The 'Novo pristanishte' power line is owned by the State and assigned to BMF under the concession covering the abovementioned port terminals. The 'Ribari' electrical substation is owned by the Bulgarian transmission system operator, Elektroenergien sistemem operator ('ESO').

11. Electricity enters the ESO transmission system at a voltage of 110 kV (high voltage) and is transformed in transformers 1 and 2 into medium-voltage current (20 kV) before entering the medium-voltage plant (20 kV) of the 'Ribari' substation. The commercial metering systems for electricity delivered from ESO's transmission system to ER Yug's distribution system are installed immediately after transformers 1 and 2 at the connection points for cells 26 and 39 of the 'Ribari' substation medium-voltage plant. The 'Novo pristanishte' line is connected to the 'Ribari' substation's closed medium-voltage (20 kV) distribution plant at cell 44. This line is used to transmit and supply electricity exclusively to BMF.

12. ER Yug and BMF concluded a contract in 2013 covering network services under which the former would supply the latter with access to and the transmission of electricity via the distribution system, for the purpose of supplying electricity to the BMF installations in the Port Burgas port area.

13. However, considering that it was connected directly to the transmission network, BMF unilaterally withdrew from the contract with ER Yug in 2016 and concluded contracts with ESO covering access to the transmission network, the provision of network services and the transmission of energy for the purpose of supplying electricity to the abovementioned BMF installations.

14. Despite this, ER Yug, considering that the BMF installations were still connected to the distribution network, continued to charge BMF fees for access to and the transmission of electricity via the distribution system.

15. BMF then filed a complaint with the EWR, which issued Decision No Zh-37 of 28 February 2017 concluding that, because the period for withdrawing from the contract had expired, ER Yug was no longer entitled to charge BMF fees for access to and the transmission of electricity via the distribution system. Based on a majority decision by its members, the EWR found that the BMF installations were connected directly to the ESO electricity transmission system and that BMF could therefore access that system directly. The EWR therefore ordered ER Yug to stop charging BMF fees for access to and the transmission of electricity via the distribution system and to review the fees charged following expiry of the period of notice of termination of the contract concluded with BMF.

16. ER Yug lodged an appeal against the EWR's decision before the referring court.

17. In the proceedings pending before that court, ER Yug is asserting that, as long as BMF is connected to the electricity distribution system, it cannot withdraw from the contract covering access to and the transmission of electricity via that system. Under the scheme of Directive 2009/72, the key factor in establishing a distinction between a transmission system and an electricity distribution system is the voltage: very high and high voltage for a transmission system, and high, medium and low voltage

³ According to the decision to refer, the BMF installations in the port of Burgas are connected to the electricity network also via two other lines: the 'Komi' line and the 'Parova tsentrala' ('Steam power plant') power line. The dispute pending before the referring court does not, however, concern these two power lines.

for a distribution system. According to ER Yug, the definition of electricity transmission laid down in Article 1(20) and (44) of the ZE is not compatible with the definition provided in Article 2(3) of Directive 2009/72, which should be applied directly because of its direct effect and the principle of primacy of EU law. On the basis of that definition, the provision of medium-voltage network services would constitute electricity distribution. Yug ER argues that the transmission network operator ESO is not entitled to connect its own customers to the medium-voltage transmission system or to supply medium-voltage network services because these activities fall within the remit of electricity distribution services, for which ER Yug holds an exclusive licence within the area where the BMF installations are located.

18. Conversely, BMF contends that its installations are directly connected to the electricity transmission system via the ‘Ribari’ substation. Thus, to the extent that neither that substation nor the ‘Novo pristanishte’ line connected to it is owned by ER Yug, they are not components of the electricity distribution system. BMF therefore maintains that the licence held by ER Yug does not meet the necessary conditions for providing services covering access to and the transmission of electricity via the distribution system or for charging for those services.

19. The referring court notes that it is necessary in the present case to establish which electricity network — distribution or transmission — the BMF installations are connected to and, therefore, to which operator BMF should pay the fees for network services. The referring court therefore holds that it is crucial to identify the criterion used to distinguish between electricity transmission and distribution activities and between the concepts of ‘transmission system’ and ‘distribution system’. Indeed, if the court were to find that the voltage is the sole criterion to be used to distinguish between these activities, then, because the ‘Novo pristanishte’ line is connected to the ‘Ribari’ substation at medium voltage, BMF would be required to pay the fees for network services to ER Yug, which would have the exclusive right to supply network services to all customers connected at medium voltage within the geographical area covered by its licence, irrespective of whether or not it owns the corresponding installations.

20. The referring court also notes that the domestic legislature has established a distinction between the transmission system and the distribution system on the basis of whether or not the power installations are owned by the transmission system operator or the distribution system operator. In terms of voltage, however, the position taken by the domestic legislature is not so clear. However, according to the referring court, it follows from the definitions provided in Article 2(3) and (5) of Directive 2009/72 that for the EU legislature the sole relevant criterion is the voltage of the electricity transported. This has been confirmed by the Court of Justice in its judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298).

21. In those circumstances, the referring court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

- (1) Are the provisions of Article 2(3) and (5) of Directive 2009/72 to be interpreted as meaning that the voltage is the sole criterion by which the distribution system is distinguished from the transmission system and, by extension, electricity “distribution” activities are distinguished from electricity “transmission” activities and that, despite their freedom of action to allocate system users to either the transmission or the distribution system, Member States are not allowed to introduce ownership of the assets used to exercise those activities as an additional criterion for the purpose of distinguishing transmission activities from distribution activities?
- (2) If the first question is answered in the affirmative: should electricity [consumers] connected to the medium-voltage network always be treated as customers of the distribution system operator which holds a licence for the area concerned, irrespective of who owns the equipment to which the customer’s electrical installations are directly connected and irrespective of the contracts concluded directly between the customer and the transmission system operator?

- (3) If the first question is answered in the negative: are national rules in keeping with the spirit and purpose of Directive 2009/72 permissible, such as those laid down in [Article] 1(44), read in combination with [Article] 1(20), of the [supplementary rules to the ZE], which state that “transmission of electricity” means the transport of electricity via the transmission network and that “electricity transmission system” means all the power lines and installations used for the trans[port], transformation from high to medium voltage and redistribution of electricity? All other things being equal, are national regulations permissible, such as those laid down in [Article] 88(1) of the [ZE], which states that electricity is to be distributed and electricity distribution systems are to be operated by distribution [system] operators which own those [systems] in a specific area and hold an electricity distribution licence for that area?’

III. Legal analysis

22. The questions referred to the Court by the referring court raise important issues concerning the interpretation of various fundamental concepts of Directive 2009/72, and in particular the concepts of ‘transmission system’ and ‘distribution system’.

23. Before we address these questions, I think it would be appropriate, as a preliminary step, to recall the objectives pursued by that directive, in the light of the relevant case-law of the Court.

A. The objectives of Directive 2009/72 in the light of the Court’s case-law

24. Directive 2009/72 was adopted as part of the ‘third energy package’ and lays down, in Article 1 thereof, common rules for the transmission and distribution of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Union.⁴

25. It appears from recitals 3 and 8 of Directive 2009/72 that the text aims to achieve a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers⁵ and in which competition and the supply of electricity can be secured at the most competitive price.

26. To that end Directive 2009/72 also aims to facilitate cross-border access for new electricity suppliers, which also contributes, as stated in recital 5 of the directive, to guaranteeing a secure supply of electricity, which is of vital importance for the development of European society. To that end, Directive 2009/72 seeks to develop further cross-border interconnections.

27. In that context, guaranteeing non-discriminatory, transparent and fairly priced network access is a necessary factor for competition to function and is of paramount importance in completing the internal electricity market.⁶

28. To achieve these objectives, Directive 2009/72 lays down provisions guaranteeing an effective legal and functional separation of networks from activities of generation and supply, so as to avoid, as stated in recital 9, discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.

⁴ See, in that regard, judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 27). On 30 November 2016, the Commission published a proposal to recast the directive (see COM(2016) 864 final (corrigendum to the English version of 23 February 2017, COM(2016) 864 final/2)).

⁵ See, in that regard, judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 55).

⁶ In that regard, see, with reference to the previous Directive 2003/54, judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraphs 40 to 44), and of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 31).

29. On that basis, Article 2 of Directive 2009/72 contains a series of definitions of the fundamental concepts used in the directive.

30. Directive 2009/72 does not define the concepts of ‘transmission system’ and ‘distribution system’ as such, but does provide definitions in Article 2(3) and (5) of electricity ‘transmission’ and ‘distribution’. Electricity transmission is defined as 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 does not include supply’. Electricity distribution, by contrast, is defined as the ‘transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply’. The concept of ‘supply’ is defined in Article 2(19) of the directive as the sale of electricity to customers.⁷

31. The Court has inferred the definitions of the concepts of ‘transmission system’ and ‘distribution system’ from the above definitions of the concepts of ‘transmission’ and ‘distribution’. Thus, the Court has defined, first, a transmission system as an interconnected system used to transport electricity at extra-high and high voltage for delivery to final customers or to distributors and, second, a distribution system as a system used to transport electricity at high, medium or low voltage for sale to wholesale or final customers.⁸

32. Consequently, the Court has held that, with regard to the nature of transmission and distribution systems and the quantity of electricity transported on those systems, the sole criterion for distinguishing between transmission and distribution is the voltage of that electricity. That voltage is also the relevant criterion for establishing whether a network constitutes a transmission or distribution system under that Directive.⁹

33. On the basis of these definitions, the Court has established, by contrast, that other criteria are not relevant in determining whether a system is caught by Directive 2009/72, such as the date on which the system was created or the fact that it is intended for self-consumption and operated by a private entity, to which a limited number of production and consumption units are connected, or the size of the system.¹⁰

34. On the basis of these considerations, systems performing the function of transporting electricity, on the one hand, at extra-high and high voltage for delivery to final customers or to distributors or, on the other hand, at high, medium or low voltage for sale to final customers, must be considered as ‘transmission systems’ or ‘distribution systems’ respectively and thus caught by Directive 2009/72.¹¹

35. In that regard, the Court has made it clear that, although Directive 2009/72 gives some discretion to Member States for its implementation, and therefore as to the methods they use to achieve the objectives set, Member States are nonetheless required, in any case, to guarantee compliance with the principles and scheme of that directive within its scope of application. In other words, where Directive 2009/72 applies, Member States may not exclude, from the regulatory provisions laid down in that directive, elements or aspects falling within its scope and relating to the organisation and functioning of the electricity sector.¹²

⁷ Judgments of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 28), and, by analogy, of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 45).

⁸ See, with respect to Directive 2003/54, judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 46). See also judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 29).

⁹ *Ibidem* (paragraphs 48 and 30 respectively).

¹⁰ Judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 31 and 35).

¹¹ See, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 37).

¹² This principle is clear from the judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraphs 44, 49 and 55), and of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 48 and 51) on third-party access and the categorising of electrical networks under the directive. In this regard, see also footnote 25 below.

36. The Court has stated this principle with specific regard to determining the existence of a distribution system under Directive 2009/72, highlighting the fact that the Member States may not include systems that are caught by Directive 2009/72 in a category of distribution systems different from that expressly provided for in the directive,¹³ in order to grant them exemptions not available under that text. This reasoning applies *mutatis mutandi* to transmission systems.¹⁴

37. On the basis of this case-law, therefore, for electrical networks that can be classified as transmission or distribution systems under Directive 2009/72, despite the discretion given to Member States by that directive, there cannot be any ‘grey areas’, namely networks classifiable as transmission or distribution systems under Directive 2009/72 but not subject to the regulatory provisions laid down in that directive as a result of the choice made by Member States.

38. With specific reference to access to transport and distribution systems, the Court has repeatedly emphasised that free access to these systems for third parties, guaranteed by the first and second sentences of Article 32(1) of Directive 2009/72,¹⁵ is one of the fundamental objectives of that directive,¹⁶ and constitutes one of the essential measures that Member States are required to implement for bringing about the completion of the internal market in electricity.¹⁷

39. Given the importance of the principle of free access to transmission or distribution systems, the discretion given to Member States by Article 32(1) of Directive 2009/72, in accordance with Article 288 TFEU, to adopt the measures necessary for implementation of a system for third-party access to transmission or distribution systems does not in any way authorise Member States to refrain from applying that principle, except in those cases where the directive lays down exceptions or derogations.¹⁸

40. In any case, third-party access to transmission and distribution systems must be based on objective, non-discriminatory and transparent criteria and on tariffs published prior to their entry into force, and must not be at the customer’s discretion.¹⁹

41. The Court has also pointed out, first, the close link between the right of access and the freedom for consumers to choose their suppliers and, second, the corresponding freedom for all suppliers to deliver electricity to their customers, a specific characteristic of a fully open market. Indeed, in order for eligible customers to be able to choose their suppliers freely, it is necessary that suppliers should have the right to access the different transmission and distribution networks which carry electricity to the customer.²⁰

42. However, the free choice of supplier undertaking is not directly dependent on the type of system to which the customer is connected. The Court has thus held that this freedom of choice is guaranteed whether the supplier connects customers to a transmission system or to a distribution system.²¹

13 Judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 48).

14 See, in that regard, with reference to Directive 2003/54, judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 49 *in fine*).

15 Article 32(1) of Directive 2009/72, entitled ‘Third-party access’, states that ‘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.’

16 Judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 46).

17 See, most recently, judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 54 and the case-law cited).

18 Judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 56).

19 Judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 46).

20 See judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 43); of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 33); and of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 55).

21 See judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 43), and point 41 of the Opinion delivered by Advocate General Kokott on that case (EU:C:2008:344).

43. The Court has specified that Member States, however, retain a certain flexibility in steering system users towards one or another type of system, provided that they do so for non-discriminatory reasons and in accordance with objective considerations.²² In that respect, the Court has, however, recognised the importance of the wish to prevent large customers from connecting directly to transmission systems, which would result in the costs related to the distribution systems falling on small customers alone and thus in an increase in the price of electricity, which could justify the obligation to connect primarily to a distribution system.²³

44. Lastly, we should also note that in the judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961), the Court has clarified that a closed distribution system within the meaning of Article 28 of Directive 2009/72 is not, and cannot be, exempted from the obligation to provide free third-party access in accordance with Article 32(1) of that directive.²⁴

45. In the light of all the above I now turn to the analysis of the three questions referred for a preliminary ruling by the referring court.

B. Consideration of the questions referred

1. The first question referred for a preliminary ruling

46. The first question is divided into two parts.

47. In the first part, the referring court is essentially asking whether the provisions of Article 2(3) and (5) of Directive 2009/72 should be interpreted as meaning that the sole criterion for distinguishing between transmission and distribution systems and, therefore, between electricity distribution and transmission activities, is the voltage.

48. In the second part of the first question referred, the referring court is essentially asking whether or not Member States can introduce ownership of the assets used to exercise those activities as an additional criterion for the purpose of distinguishing transmission activities (and system) from distribution activities (and system).

(a) The possibility of Member States introducing criteria in addition to voltage to distinguish between a transmission system and a distribution system

49. It is apparent from the considerations set out in points 30 to 32 above, that, with regard to the legal regime to which electrical networks are subject under Directive 2009/72, the latter makes a fundamental distinction between transmission system and distribution system.

50. As noted in those points, Directive 2009/72 does not actually define the concepts of transmission system and distribution system. However, the Court has inferred the definition of these concepts from the definitions of ‘transmission’ and ‘distribution’ activities provided in Article 2(3) and (5) of that directive, the interpretation of which is sought by the referring court.

²² Judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 47).

²³ Judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 48).

²⁴ Paragraph 59.

51. According to the definitions provided in point 31 above, the concepts of transmission system and distribution system are both objective, in that they refer to the network as such and not to the body operating it, and are both based on two criteria. One of these is properly objective, namely the voltage — extra-high and high voltage, for the transmission system, and high, medium and low voltage, for the distribution system — and the other is functional, tied to the function performed by each of the two types of system in the organisation and functioning of the electrical system, namely the transport of electricity for delivery to final customers or distributors, for the transmission system, and for sale to wholesale or final customers, for the distribution system, respectively.

52. With regard to the first criterion, namely the voltage, as noted in point 32 above, the Court has recently confirmed that, with regard to the *nature* of transmission and distribution systems under Directive 2009/72 and the *quantity of electricity* transported on those systems, the sole criterion for distinguishing between transmission and distribution is the voltage of that electricity and that voltage is therefore the relevant criterion for establishing whether a network constitutes a transmission or distribution system under that directive.

53. However, with regard to the second criterion, the functional criterion, we should note that the two types of systems perform different functions in the organisation and functioning of the electricity sector.

54. In effect, transmission systems are used to transport electricity over long distances, from production power plants to the locations where the electricity is used. These are necessarily large-scale systems, generally interconnected between various Member States, on which electricity is transported at extra-high or high voltage so as to reduce losses as much as possible during transport.

55. Conversely, distribution systems perform a different function. They are used to bring electricity to customers in general for their own consumption. These systems are generally smaller, typically developed locally and on a widespread basis so as to reach users and final customers. They are also characterised by a lower voltage compared to transmission systems, a factor necessary for safety reasons, namely the need to reduce the risk of electrocution near populated areas and to be able to provide a network connection for final domestic and industrial uses which generally have connections at low and medium voltage respectively.

56. Transmission and distribution systems are interconnected at electrical substations, in which the electricity entering at extra-high or high voltage from the transmission system is converted into medium voltage so that it can be distributed via the distribution system. These electrical substations represent interconnection points between the systems and generally contain high-voltage components, called the primary system, and medium- and low-voltage components, called the secondary system.

57. It is against this background that we must respond to the question posed by the referring court, essentially asking whether or not Directive 2009/72 permits Member States to introduce additional criteria in their national legislation transposing that directive to distinguish between a transmission system and a distribution system.

58. On that basis, we must first note that the concepts of transmission system and distribution system inferred by the Court from the definitions provided in Directive 2009/72 do not contain any reference to the national law of the Member States and must be understood as independent concepts of EU law. As such, they must be interpreted uniformly within the territory of the EU in order to ensure that the aims of the directive can be achieved, as noted in points 24 to 28 above.

59. Second, I note that it is particularly important to make a precise distinction between electricity transmission activity (and system) and distribution activity (and system) because Directive 2009/72 establishes different legal regimes for transmission and distribution and different responsibilities for the operators of the corresponding systems. This also means that it is necessary to ensure that this distinction is applied uniformly in all Member States.

60. Although, as rightly noted by the Commission, Directive 2009/72 does not introduce a complete and exhaustive harmonisation of all aspects governed by that directive²⁵ and therefore gives some discretion to the Member States in terms of the most appropriate methods to achieve the objectives set by that text, I do believe that this directive establishes certain fundamental concepts which must necessarily be applied uniformly to ensure that these objectives can be achieved.

61. These concepts certainly include those of electricity ‘transmission’ and ‘distribution’ for the purposes of Article 2(3) and (5) of the abovementioned directive, from which the Court has inferred the concepts of transmission and distribution systems. These concepts do, in fact, play a fundamental role in the scheme of the Directive.

62. In this regard, we should note that Directive 2009/72 lays down a coherent system underpinned by concepts that are interlinked so as to make it possible to achieve the objectives that EU legislature intended to pursue by adopting the directive. In that context, I believe that permitting Member States to make changes to basic concepts, such as those of ‘transmission’ and ‘distribution’, on which the scheme of the directive is based, would result in those concepts being applied in a non-uniform manner, with a resulting regulatory fragmentation that would jeopardise the achievement of those objectives and, in particular, the fundamental objective of creating an internal market in electricity.

63. In the light of these considerations, I believe that Article 2(3) and (5) of Directive 2009/72 should be interpreted as meaning that that voltage represents the criterion for distinguishing between electricity transmission and distribution and the relevant criterion, along with the function performed by the network concerned, for establishing whether a network constitutes a transmission or distribution system under that directive.

64. Member States may not, therefore, introduce additional criteria in their national legislation to distinguish a transmission system from a distribution system. Nevertheless, Directive 2009/72 leaves Member States a certain amount of leeway in how these concepts are implemented, for example by setting the limits corresponding to the various voltage levels (extra-high, high, medium and low), provided that the objectives sought by the directive are not compromised.

65. In that regard, we should also note, as follows from the definitions of ‘transmission system operator’ and ‘distribution system operator’, provided in Article 2(4) and (6) of Directive 2009/72, that both the transmission system operator and the distribution system operator may be responsible for the necessary interconnections between systems. We can infer from this definition that Directive 2009/72 gives Member States the choice of determining whether the interconnection points between the transmission and distribution systems, such as the electrical conversion substations described in point 56 above, form part of the transmission system or the distribution system.

²⁵ For an assessment of the exhaustive nature of the harmonisation introduced by Directive 2009/72, see, by analogy, the considerations of Advocate General Sharpston in points 28 et seq. of her Opinion in *FENS* (C-305/17, EU:C:2018:536). In this regard, see also paragraphs 23 et seq. of the corresponding judgment of 6 December 2018, *FENS* (C-305/17, EU:C:2018:986), and point 50 of the Opinion of Advocate General Szpunar in *Renega* (C-238/17, EU:C:2018:571).

2. The requirement that the distribution system operator be the owner of the assets used to exercise distribution activities

66. On the basis of the response to the first part of the first question referred, which I have provided in the preceding points, it follows that, because Member States may not introduce any additional criteria other than voltage and function to distinguish between transmission and distribution systems, we must answer the second part of that question in the sense that a Member State may not introduce the ownership by the operator of the assets used to exercise the corresponding activity into its national legislation as an additional criterion for distinguishing between these systems.

67. That said, I believe that the second part of the first question referred merits a more detailed analysis.

68. In the scheme of Directive 2009/72, the requirement that the operator of a network be the owner of the assets used to exercise the corresponding activities, and thus essentially the owner of the network, is not considered to be a criterion for distinguishing between transmission and distribution activities and, therefore, between the two types of network. Rather, this constitutes a subjective requirement concerning the legal regime governing the bodies that may be regarded or designated as operators of the two types of systems. In effect, this relates to the legal position of the system operator in respect of the assets used for the activity, and specifically in respect of the network.

69. On this point, we should note that Article 17(1)(a) of Directive 2009/72 itself provides that it is necessary that the transmission system and the other assets required for electricity transmission activities be owned by an independent transmission system operator.

70. This requirement falls within the provisions of Directive 2009/72 that aim to ensure that an effective separation exists between supply and generation activities and network operations.²⁶

71. Directive 2009/72 does not impose such a requirement for the operator of the distribution network.²⁷

72. It merely states, in Article 26(1) thereof, that, where the distribution system operator is part of a vertically integrated undertaking, there is no ‘obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking’. Rather, according to the terms of Article 26(2)(c) of the directive, it is only necessary for ‘the distribution system operator [to] have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network’.

73. In that context, because the Bulgarian legislation, and in particular Article 88(1) of the ZE, imposes a requirement that the distribution system be owned by the operator of that network, the question we need to ask is whether that requirement complies with Directive 2009/72.

74. In that regard, I believe that, in principle, a provision of national law requiring that the distribution system operator be the owner of that system is not contrary per se to the spirit and purpose of Directive 2009/72. In the abstract, it appears to comply with the objectives sought by the directive, because it contributes to reinforcing the separation between the various levels of activity in the electricity sector. In that context, a provision of national law of this kind extends a requirement already imposed by the directive itself on the transmission system operator to cover the distribution system operator.

²⁶ In this regard, see recital 11 of Directive 2009/72.

²⁷ This choice by the legislature is due to the fact that, as we can infer from recital 26 of Directive 2009/72, for the distribution network, the scope for discrimination as regards third-party access and investments is less significant than for the transmission network.

75. I therefore believe that, in principle, the introduction of a requirement into national law whereby the assets used to exercise distribution activities must be owned by the distribution system operator falls within the margin of discretion that Directive 2009/72 gives to Member States for its implementation.

76. That said, it is necessary, however, to ensure that by imposing this subjective requirement on the distribution system operator, this provision of national law does not actually jeopardise the achievement of the objectives sought by Directive 2009/72, which is a matter for the national courts to verify on a case-by-case basis.

77. A number of pertinent observations should be made on this point.

78. First, as we can see from points 35 to 37 above, transmission and distribution systems are required to be subject in their entirety to the legal regime imposed by the directive. There cannot therefore be any 'grey areas', namely components of the electrical network that can be classified as transmission system or distribution system under Directive 2009/72 but are not covered by the legal regime imposed by the Directive. Directive 2009/72 does not permit a *'tertium genus'* outside the transmission system and distribution system and assumes that the entire electrical network is subject to its provisions.

79. It therefore follows that, in the case that an electrical network can be classified as a distribution system on the basis of the criteria of voltage and function provided in points 31 and 51 et seq. above, it must be subject to the legal regime imposed by Directive 2009/72 concerning distribution, irrespective of whether an additional ownership requirement applies, where such a requirement is possibly imposed by the national legislation.

80. Indeed, allowing network components to be removed from the scope of Directive 2009/72, on the basis of any additional requirements imposed by national legislation, would undermine the system imposed by Directive 2009/72 and could jeopardise the objectives sought by that Directive, such as the creation of a single market in electricity, free third-party access and security of supply.

81. In my opinion, therefore, an interpretation of national law whereby the concept of a distribution system excludes, *de jure*, all assets and all networks that are not owned by the distributor, irrespective of whether they are classified as a distribution system on the basis of the criteria imposed by Directive 2009/72, is not compatible with the provisions of that directive. It follows that a system used to transport electricity at high, medium and low voltage for sale to wholesale and final customers constitutes a distribution system under Directive 2009/72 and, therefore, is subject to the provisions laid down in that text, irrespective of whether or not it is owned by the operator of the distribution network.

82. Second, the legal imposition of a requirement that the distribution system be owned by the operator of that system must not jeopardise the essential objective of Directive 2009/72 of achieving a fully open market in which competition can be guaranteed. More specifically, the imposition of such a requirement could create a sort of regulatory barrier to entry into the electricity distribution sector, creating the risk that the owner of the distribution system could be granted a form of eternal *de jure* monopoly on distribution in a given geographical area.

83. In effect, if ownership of the distribution system is a necessary requirement imposed by law on the performance of distribution activities in a given area, then only the owner of that system can be designated as network operator and there could therefore be no competitive tenders for award of management. In the absence of any competition, this would create a risk that the incentives for the owner of the system to increase the efficiency of the network itself would be reduced.

84. It is the responsibility of the referring court to verify whether this is actually the case within the framework of the national legal system in question.

85. In my opinion, and in the light of all the above considerations, we must conclude that the provisions of Directive 2009/72 do not, in principle, preclude a national legal provision that imposes an additional subjective requirement that the distribution system operator must be the owner of the distribution system, provided that the application of that additional requirement under the national legislation does not jeopardise the achievement of the objectives sought by the directive, which is a matter for the national courts to determine on a case-by-case basis.

C. The third question referred

86. In the third question referred, which I believe should be analysed before the second one,²⁸ the referring court is essentially asking the Court whether national provisions such as, on the one hand, those laid down in Article 1(20) and (44) of the supplementary rules to the ZE, which define the concepts of ‘electricity transmission system’ and ‘electricity transmission’ and, on the other, those laid down in Article 88(1) of the ZE, according to which only the owner of the distribution system may perform distribution activities and operate the system itself, are compatible with Directive 2009/72.

87. The response to the third question referred can be inferred directly from the responses I have proposed to the first question.

88. With regard to the compatibility with Directive 2009/72 of national provisions such as Article 1(20) and (44) of the supplementary rules to the ZE, we can see from point 65 above that Article 2(4) and (6) of Directive 2009/72 allow Member States to choose whether the interconnection points between transmission and distribution systems — such as the electrical substations described in point 56 above, which convert extra-high or high-voltage electricity into medium voltage — form part of the transmission system or the distribution system. It follows that Directive 2009/72 does not preclude national provisions stating that the electricity transmission system comprises all the power lines and installations intended for the transport of electricity and its transformation from high to medium voltage.²⁹

89. In terms of the compatibility with Directive 2009/72 of a provision of national law such as Article 88(1) of the ZE, this can be inferred clearly from point 85 above.

D. The second question referred

90. In the second question referred, the referring court is essentially asking whether the provisions of Directive 2009/72 should be interpreted as meaning that electricity consumers connected to the medium-voltage network should always be regarded as customers of the distribution system operator which holds a licence for the area concerned, irrespective of who owns the equipment to which the customer is directly connected and irrespective of any contracts concluded directly between the customer and the transmission system operator.

²⁸ The referring court is asking for a response to the third question referred if the response to the first question referred is in the negative, and for a response to the second question referred if the response to that first question is in the affirmative. However, considering the responses that I have proposed for the first question, it is necessary, in my opinion, to answer all of the questions referred in order to respond adequately to the referring court’s questions.

²⁹ I do not believe that it is necessary to provide an opinion on the aspect, in Article 1(20) of the supplementary rules to the ZE, relating to the redistribution of electricity, which seems to fall outside the scope of the questions raised before the referring court.

91. This question arises in a factual situation in which a medium-voltage power line connecting the customer to the electricity network (the ‘Novo pristanishte’ line falling within the scope of the BMF concession) is connected to a medium-voltage plant in an electrical conversion substation owned by the transmission network operator (the ‘Ribari’ substation owned by ESO).

92. On the basis of the above considerations, in a situation of this kind, the fact that the connection occurs at medium voltage does not necessarily mean per se that the customer in question is connected to the distribution network.

93. In fact, according to point 56 above, it is possible for a customer to be connected by means of a medium-voltage plant forming part of an electrical substation. Under the national legislation of the Member State concerned, which, as we have seen in points 65 and 88 above, has some discretion in this regard, that electrical substation could form part of the transmission system.

94. In such a case, the customer, despite being connected to the electricity network at medium voltage, would be connected directly to the transmission network to which, under Article 32 of Directive 2009/72, it would be entitled to have free access, in accordance with the criteria indicated by the Court and set out in points 38 to 43 above. In that case, network services would be provided to that customer by the transmission network operator.

95. Moreover, it is for the referring court to verify whether this is the case here. More specifically, it will be up to the referring court to determine whether the medium-voltage plant to which the ‘Novo pristanishte’ line is connected constitutes an internal medium-voltage component of the ‘Ribari’ substation (forming part of the secondary system of that substation), which seems to be the case, based on the description provided by the referring court in its request for a preliminary ruling, or whether that plant constitutes, instead, a component outside the ‘Ribari’ substation conversion system, structurally forming part of the distribution system.

96. In the former case, the customer will be connected, although at medium voltage, directly to the transmission system and network services will be supplied to it by the operator of that system, and, therefore, it will be a customer of that operator. In the second case, conversely, the user will be connected to the distribution system, in which case network services will be supplied to it by the distribution network operator. It must therefore be considered a customer of that operator, irrespective of who owns the plant to which the customer is connected.

97. Lastly, I think it appropriate also to note, in respect of the ‘Novo pristanishte’ medium-voltage power line, that the request for the preliminary ruling indicates that this line is used exclusively to supply electricity to BMF. Should this not be the case,³⁰ this would raise the issue of a potential classification of that line as a closed distribution system under Article 28 of Directive 2009/72, if the requirements for such a classification are met, or possibly a distribution system *tout court*. In any case, on the basis of the considerations set out above in points 35 to 37 and 78 to 81, if that medium-voltage line is used for the supply of customers other than BMF, and therefore classified as a distribution system, it could not under any circumstances be removed from the scope of Directive 2009/72.

98. In the light of the above, we must answer the second question referred to the effect that an interpretation of Article 2(3), (4), (5) and (6) of Directive 2009/72 indicates that an electricity consumer connected to the medium-voltage electricity network should not necessarily always be considered a customer of the distribution system operator which holds a licence for the area concerned, but that it is for the national court to assess, taking into account all of the relevant legal and factual circumstances, whether that customer is connected to an electrical substation that forms

³⁰ It is not clear, in fact, from the observations made by BMF before the Court whether another user (Pristanishte Burgas EAD) is supplied with electricity via that line.

part of the transmission system or to the distribution system, irrespective of who owns the plant to which the customer is connected. In the first case, that consumer should be considered a customer of the transmission system operator while in the second case it should be considered a customer of the distribution system operator.

IV. Conclusion

99. On the basis of all the above considerations, I propose that the Court respond to the questions raised by the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) as follows:

- (1) Article 2(3) and (5) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC should be interpreted as meaning that voltage represents the criterion for distinguishing between electricity transmission and distribution and the relevant criterion, along with the function performed by the network concerned, for establishing whether a network constitutes a transmission or distribution system under that directive. Member States may not, therefore, introduce additional criteria in their national legislation to distinguish a transmission system from a distribution system. Nevertheless, Member States have a certain amount of leeway in how these concepts are implemented, for example by setting the limits corresponding to the various voltage levels (extra-high, high, medium and low), provided that the objectives sought by the directive are not compromised. According to Article 2(4) and (6) of Directive 2009/72, Member States are also free to determine whether the interconnection points between transmission and distribution systems — such as electrical conversion substations — form part of the transmission system or the distribution system.
- (2) The provisions of Directive 2009/72 do not, in principle, preclude a national legal provision that imposes an additional subjective requirement that the distribution system operator must be the owner of the distribution system, provided that the application of that additional requirement under the national legislation does not jeopardise the achievement of the objectives sought by the directive, which is a matter for the national courts to determine on a case-by-case basis
- (3) The provisions of Directive 2009/72 do not preclude national provisions stating that the electricity transmission system comprises all the power lines and installations intended for the transport of electricity and its transformation from high to medium voltage.
- (4) Article 2(3), (4), (5) and (6) of Directive 2009/72 should be interpreted as meaning that an electricity consumer connected to the medium-voltage electricity network should not necessarily always be considered a customer of the distribution system operator which holds a licence for the area concerned, but that it is for the national court to assess, taking into account all of the relevant legal and factual circumstances, whether that customer is connected to an electrical substation that forms part of the transmission system or to the distribution system, irrespective of who owns the plant to which the customer is connected. In the first case, that consumer should be considered a customer of the transmission system operator while in the second case it should be considered a customer of the distribution system operator.