

JUDGMENT OF THE COURT (Second Chamber)

17 July 2008^{*}

In Case C-347/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 23 May 2006, received at the Court on 17 August 2006, in the proceedings

ASM Brescia SpA

v

Comune di Rodengo Saiano,

intervener:

Anigas — Associazione Nazionale Industriali del Gas,

^{*} Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, P. Küris, J.-C. Bonichot (Rapporteur) and C. Toader, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2008,

after considering the observations submitted on behalf of:

— ASM Brescia SpA, by V. Salvadori, A. Salvadori, G. Caia and N. Aicardi, avvocati,

— Anigas — Associazione Nazionale Industriali del Gas, by M. Zoppolato and D. Gazzola, avvocati,

— the Commission of the European Communities, by X. Lewis, B. Schima and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 April 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 10 EC, 43 EC, 49 EC and 86(1) EC, of the principles of equal treatment, non-discrimination, transparency and proportionality, and of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).
- ² The reference was made in the course of proceedings between ASM Brescia SpA ('ASM Brescia') and the Comune di Rodengo Saiano (Municipality of Rodengo Saiano) regarding Decision No 19 of 19 July 2005 of the municipal council of that municipality confirming the expiry on 31 December 2005 of the concession which it had granted to ASM Brescia for the natural gas distribution service in its territory.

Legal context

Community law

- ³ Recital 4 in the preamble to Directive 2003/55 provides:

‘The freedoms which the Treaty guarantees European citizens — free movement of goods, freedom to provide services and freedom of establishment — are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.’

4 Recital 8 in the preamble to that directive states:

‘In order to complete the internal gas market, non-discriminatory access to the network of the transmission and distribution system operators is of paramount importance. A transmission or distribution system operator may consist of one or more undertakings.’

5 Recital 10 in the preamble to that directive specifies:

‘In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are operated through legally separate entities where vertically integrated undertakings exist. The Commission should assess measures of equivalent effect, developed by Member States to achieve the aim of this requirement, and, where appropriate, submit proposals to amend this Directive.

It is also appropriate that the transmission and distribution system operators have effective decision making rights with respect to assets necessary to maintain and operate and develop networks when the assets in question are owned and operated by vertically integrated undertakings.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation implies neither 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.’

6 Recital 18 in the preamble to Directive 2003/55 provides:

‘Gas customers should be able to choose their supplier freely. None the less a phased approach should be taken to completing the internal market for gas, coupled with a specific deadline, to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose their supplier.’

7 Article 1(1) of that directive states:

‘This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.’

8 Article 2 of that directive provides:

‘For the purposes of this Directive:

...

5. “distribution” means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;

...

7. “supply” means the sale, including resale, of natural gas, including [liquefied natural gas], to customers;

...

28. “eligible customers” means customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 23 of this Directive;

....’

9 Article 23(1) of Directive 2003/55 provides:

‘Member States shall ensure that the eligible customers are:

- (a) until 1 July 2004, the eligible customers as specified in Article 18 of Directive 98/30/EC [of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1)]. Member States shall publish by 31 January each year the criteria for the definition of these eligible customers;
- (b) from 1 July 2004, at the latest, all non-household customers;
- (c) from 1 July 2007, all customers.’

National law

- 10 Legislative Decree No 164 of 23 May 2000 implementing, in accordance with Article 41 of Law No 144 of 17 May 1999, Directive 98/30/EC concerning common rules for the internal market in natural gas (Decreto legislativo n. 164, attuazione della direttiva n. 98/30/CE recante norme comuni per il mercato interno del gas naturale, a norma dell’articolo 41 della legge 17 maggio 1999, n. 144) (GURI No 142 of 20 June 2000, p. 4; hereinafter ‘Legislative Decree 164/2000’) provides that natural gas distribution activities are, in principle, to be a municipal public service delegated by the municipalities to concession-holders selected exclusively by tendering procedure for periods of no more than 12 years.

- 11 As regards current concessions for the distribution of natural gas granted without a public procedure, Article 15(5) of Legislative Decree 164/2000 states:

‘With regard to gas distribution activities, concessions in existence on the date of entry into force of this decree, and also those entrusted to companies created by the transformation of current operators, shall continue until the date of expiry provided for, if that date falls before the time-limits fixed by paragraph 7 for the transitional period. Concessions in existence for which no expiry date has been set, or for which an expiry date has been set after the end of the transitional period, shall continue until the end of the transitional period. ...’

- 12 Article 15(7) of Legislative Decree 164/2000 specifies:

‘The transitional period referred to in paragraph 5 shall be of five years running from 31 December 2000. That period may be extended, on the conditions set out below, for no more than:

- (a) one year if, at least a year before the end of the five years, a merger of companies takes place which makes it possible to serve a total number of customers at least twice as great as the number of customers originally served by the larger of the merged companies;
- (b) two years if, before the time-limit mentioned in subparagraph (a), the number of final customers served is greater than 100 000, or more than 100 million cubic metres of natural gas are distributed in a year, or the undertaking’s field of operations is at least as great as the whole territory of the province;

(c) two years if, before the time-limit mentioned in subparagraph (a), private capital forms at least 40% of the share capital.'

¹³ Article 15(8) of Legislative Decree 164/2000 provides that, where several of those conditions are met, the years of deferment of the end of that transitional period may be aggregated.

¹⁴ Article 1(69) of Law No 239 of 23 August 2004 reorganising the energy sector and delegating to the Government the reform of the provisions in force in respect of energy (*Legge n. 239, riordino del settore energetico, nonché delega al Governo per il riassetto delle disposizioni vigenti in materia di energia*) (GURI No 215 of 13 September 2004, p. 3) provides:

'... The transitional period referred to in Article 15(5) [of Legislative Decree 164/2000] shall come to an end by 31 December 2007, without prejudice to the right of the local concession-granting authority to extend for one year, within six months of the date of entry into force of this decree, the term of the transitional period where grounds of general public interest have been established. ... Article 15(8) of Legislative Decree [164/2000] is hereby repealed.'

¹⁵ Article 23(1) of Decree-Law No 273 of 30 December 2005 defining and extending the time-limits and on the emergency provisions resulting therefrom (*Decreto-legge n. 273, definizione e proroga dei termini, nonché conseguenti disposizioni urgenti*) (GURI No 303 of 30 December 2005, p. 8), converted, after amendment, into a law by Law No 51 of 23 February 2006 (General Supplement to the GURI No 49 of 28 February 2006; hereinafter 'Decree-Law 273/2005'), provides that the final date for expiry of the transitional period, provided for by Article 15(5) of Legislative Decree 164/2000, first, is to be deferred until 31 December 2007 and, second, is to be postponed until 31 December 2009, if at least one of the conditions laid down by Article 15(7) of Legislative Decree 164/2000 is satisfied.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- ¹⁶ ASM Brescia holds the concession for the public service of natural gas distribution in the territory of the Comune di Rodengo Saiano by virtue of an agreement concluded on 27 February 1984, which was initially due to expire on 31 December 2014. By a variation, the concession's expiry was postponed to 31 December 2029.
- ¹⁷ By its Municipal Council Decision No 19 of 19 July 2005, the Comune di Rodengo Saiano fixed 31 December 2005 for the early expiry of the concession granted to ASM Brescia, so as to be able to set in motion a call for tenders and designate a new operator of that service. ASM Brescia was, on the other hand, recognised as being entitled to reimbursement of the written-down value of its investment, which was estimated, on the basis of an expert report, at EUR 926 000.
- ¹⁸ ASM Brescia brought an action against that decision before the referring court.
- ¹⁹ Subsequently, Decree-Law 273/2005, Article 23 of which provides for the deferment of the end of the transitional period provided for by Article 15(5) of Legislative Decree 164/2000 from 31 December 2005 to 31 December 2007, and, under certain conditions, the automatic postponement of that period from 31 December 2007 to 31 December 2009, entered into force.

Since the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) is uncertain about the conformity of that law with Community law, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Is an automatic and generalised extension till 31 December 2007 of current concessions for the distribution of natural gas, originally granted without any previous tender procedure, compatible with Articles 43 EC, 49 EC and 86(1) EC and the principles of equal treatment, non-discrimination and transparency?

2. Are subsequent automatic extensions till 31 December 2009 of current concessions for the distribution of natural gas, originally granted without any previous tender procedure, compatible with Articles 43 EC, 49 EC and 86(1) EC and the principles of equal treatment, non-discrimination and transparency in the following cases:
 - (a) when the holder of the concession has carried out a merger enabling it to serve a number of customers twice as great as the larger of the merged companies was able to;

 - (b) when the holder of the concession has acquired more than 100 000 final users, or it distributes more than 100 million cubic metres of gas a year or its field of operations is at least as great as the whole territory of the province;

 - (c) when at least 40% of the concession-holder’s share capital has been transferred to private shareholders?

3. Is the extension of current concessions for the distribution of natural gas, both in the case described in the first question and in the cases described in the second, compatible with the fourth, eighth, 10th and 18th recitals in the preamble to Directive 2003/55/EC ..., and with Article 23(1) thereof, Article 10 EC and the principles of reasonableness and proportionality, having particular regard to:
 - (a) the fact that the [Member] States are obliged to attain the objective of liberalising the market in natural gas before the dead-line of 1 July 2007;
 - (b) the fact that the [Member] States are prohibited from adopting or maintaining in force domestic legislation incompatible with the liberalisation of the market in natural gas;
 - (c) the fact that the [Member] States are obliged to set a reasonable term for the duration of the transitional period and subject it to objective requirements?’

The questions referred for a preliminary ruling

Admissibility

Observations submitted to the Court

- ²¹ ASM Brescia submits that the questions referred by the national court are inadmissible because they are based on an analysis, which is incorrect, but according to which Italian law effects the extension of the duration of the relevant gas-distribution concessions.
- ²² ASM Brescia maintains that the national law applicable to the main proceedings does not provide for the statutory extension of those concessions but, on the contrary, prescribes their early cessation where they are not for a fixed term or where they will expire contractually after the transitional period provided for by Article 15(5) of Legislative Decree 164/2000.
- ²³ Anigas — Associazione Nazionale Industriali del Gas — also maintains that the first question raised by the referring court is based on a false premiss since the legislation at issue in the main proceedings does not provide for an automatic and generalised extension of the concessions concerned but is limited to deferring the date of their early expiry.

The Court's reply

- 24 The referring court has asked the Court to rule on the compatibility with Community law of the extension, by Article 23 of Decree-Law 273/2005, of the transitional period provided for by Article 15(5) of Legislative Decree 164/2000.
- 25 In the context of proceedings brought under Article 234 EC, the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law (see, in particular, Case 14/86 *X* [1987] ECR 2545, paragraph 15). The Court may, however, extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of Community law for the purpose of enabling that court to resolve the legal problems before it (*X*, cited above, paragraph 16).
- 26 The order for reference contains sufficient information to meet those requirements, since the referring court has stated that the interpretation of Articles 43 EC, 49 EC and 86(1) EC and of Article 23(1) of Directive 2003/55 is necessary for it to rule on the conformity with Community law of Articles 23 of Decree-Law 273/2005 and 15(5) and (7) of Legislative Decree 164/2000.
- 27 Moreover, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, particularly, Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 18).

- 28 It is also to be remembered that it is not for the Court of Justice to rule on the interpretation and applicability of provisions of national law or to establish the facts relevant to the decision in the main proceedings. The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set (see, particularly, Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35).
- 29 The argument that since the questions referred for a preliminary ruling are based on an erroneous interpretation of Italian law they are inadmissible cannot, therefore, be accepted.
- 30 It follows that the reference for a preliminary ruling is admissible.

Substance

The third question

- 31 By its third question, which it is appropriate to consider first, the referring court is, in essence, asking the Court to state whether Article 10 EC, the principle of proportionality, Article 23(1) of Directive 2003/55 and recitals 4, 8, 10 and 18 in the preamble to that directive preclude legislation such as that at issue in the main proceedings which automatically extends the length of the transitional period at the end of which occurs the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings, granted without a competitive tendering procedure.

— Observations submitted to the Court

- ³² ASM Brescia maintains that neither Directive 98/30, implemented by Legislative Decree 164/2000, nor Directive 2003/55 imposes an obligation to abridge the duration of concessions for the distribution of natural gas which were granted without competitive tendering. It submits, therefore, that it was in the exercise of its discretion that the national legislature decided that those concessions would cease before their contractual expiry and fixed, for that purpose, a transitional period and the detailed rules for its application.
- ³³ It adds that the early end of the concessions concerned and the consequent issue of invitations to tender for the award of new concessions are no guarantee of a higher degree of competition in the distribution of natural gas since any newly appointed distributor may, in some circumstances, favour the sales undertaking with which it is connected. It submits that that difficulty can be resolved only by compliance with the distribution system operators' duties of impartiality and neutrality laid down by Directive 2003/55 and, in particular, the right of access of third parties to the distribution system, as well as by the legal, administrative, operational and accounting separation as regards vendors of natural gas which are part of the same vertically integrated undertaking.
- ³⁴ The Commission also submits that Directive 2003/55 does not require the early cessation of concessions for the distribution of natural gas granted in breach of Community requirements.
- ³⁵ It adds that, even if the combined provisions of Articles 13(1) and 33(2) of Directive 2003/55 permitted the natural gas distribution system operator also to carry on the activity of supplying gas until 1 July 2007, that operator was none the less bound, under Article 12(2) of that directive, to treat with impartiality all the different operators on the natural gas market.

36 Anigas points out that the deadline for the liberalisation of the natural gas market, fixed at 1 July 2007 by Article 23(1) of Directive 2003/55, simply imposes on the Member States the requirement that all purchasers of natural gas be eligible customers and Anigas submits that that directive does not require the termination of concessions for the distribution of natural gas which were granted without prior advertisement.

— The Court's reply

37 It is clear both from the terms and from the scheme of Directive 2003/55 that its purpose is the completion of the internal market in the natural gas sector. To that end, as the first sentence of Article 1(1) of that directive provides, it establishes common rules for the transmission, distribution, supply and the storage of natural gas.

38 Article 23(1) of Directive 2003/55 sets out the calendar for the opening of the market for the supply of natural gas and provides, in particular, that the Member States must ensure that the eligible customers, that is to say those who are entitled to approach a supplier of their choice, are, from 1 July 2007, all customers.

39 That provision concerns the supply of natural gas and not its distribution. Therefore, no obligation can be inferred from it for the Member States to put an end to distribution contracts granted without any competitive tendering procedure.

40 Directive 2003/55 contains, moreover, no provision on current concessions for the distribution of natural gas.

- 41 The reply to the third question referred must therefore be that Directive 2003/55 does not preclude legislation of a Member State, such as that at issue in the main proceedings, from providing for the extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur. In those circumstances, it must also be held that neither Article 10 EC nor the principle of proportionality precludes such legislation.

The first and second questions

- 42 By its first and second questions, which it is appropriate to consider together, the referring court is asking, in essence, whether Articles 43 EC, 49 EC and 86(1) EC and the principles of equal treatment, non-discrimination and transparency preclude legislation, such as that at issue in the main proceedings, which provides for the extension, on the conditions which it lays down, of the length of the transitional period at the end of which occurs the early cessation of a concession for the distribution of natural gas, such as that in question in the main proceedings.

— Observations submitted to the Court

- 43 ASM Brescia submits that the termination of concessions for the distribution of natural gas such as that in question in the main proceedings is a measure which may be decided, in the exercise of its independent discretion, by the national legislature. It adds that the measure enables the Italian Republic to comply early with Directive 2003/55 by designating new concession-holders of the public service of natural gas distribution.
- 44 ASM Brescia argues that the fixing of the transitional period, at the end of which the early cessation of the concessions concerned occurs, is intended to reconcile the achievement of that objective of opening the market in the natural gas sector

to competition with the necessary safeguarding of the legitimate expectations of the holders of current concessions.

45 That company notes that the Member States must, in the exercise of the powers which they implement in order to apply Community directives, comply with the principle of the protection of legitimate expectations (see, particularly, Case 316/86 *Krücken* [1988] ECR 2213, paragraph 22) and that, in the legislative reform of certain institutions or legal regimes, the protection of the legitimate expectations of economic operators makes the introduction of transitional measures or transitional adaptation periods necessary, if there are no overriding public interests which preclude them (see, particularly, Case 74/74 *CNTA v Commission* [1975] ECR 533, paragraph 44).

46 ASM Brescia points out that, until the entry into force of Legislative Decree 164/2000, Italian law did not make the grant of concessions for the distribution of natural gas subject to advertisement and permitted, moreover, the adoption of concessions of very long duration.

47 It adds that, until the publication of Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2) and the judgment in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, Community law gave no indications that duties of transparency and publicity would be imposed on public authorities, by virtue of Community law, in the award of public service concessions.

48 ASM Brescia notes, next, that Decree-Law 273/2005 actually only deferred for two years the end of the transitional period provided for by Article 15(5) of Legislative Decree 164/2000 from 31 December 2005 to 31 December 2007 and, under certain conditions, from 31 December 2007 to 31 December 2009. It submits that such a deferment is, inherently and by its effects, of a limited extent, having regard, in particular, to the residual contractual durations, frequently very long, of the concessions concerned, and that it does not affect the balance of the interests of the parties

disproportionately. It submits that such extension is also, in any event, a discretionary measure.

49 ASM Brescia notes, finally, that concessions for the distribution of natural gas, the expiry of which precedes the end of that transitional period, are not extended, that, under Legislative Decree 164/2000, the end of the transitional period provided for by Article 15(5) of that decree could be later than that which results from the application of Decree-Law 273/2005 and that the latter's adoption enhanced legal certainty by clarifying the legal scheme of that transitional period.

50 The Commission argues, for its part, that the main proceedings concern public service concessions and that such concessions are subject to the fundamental rules of the EC Treaty, in particular to Articles 43 EC and 49 EC, and to the principles of non-discrimination on grounds of nationality and equal treatment between tenderers which imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with (Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21).

51 It points out that the Court considered that such duty of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the concession of services to be opened up to competition and the impartiality of procurement procedures to be reviewed (*ANAV*, cited above, paragraph 21).

52 The Commission submits that failure to terminate a public service concession granted without prior advertisement is also contrary to Articles 43 EC and 49 EC, and to the principles of non-discrimination, equal treatment and transparency.

53 It adds that Article 86(1) EC precludes legislation, such as that at issue in the main proceedings, which provides for public service concessions granted in breach of the advertising requirements imposed by Community law to be kept in force.

54 Anigas submits, for its part, that Articles 43 EC, 49 EC and 86(1) EC and the principles of equal treatment, non-discrimination and transparency do not preclude a deferment of the transitional period such as that provided for by the legislation at issue in the main proceedings.

55 It points out that the conditions laid down in Article 15(7) of Legislative Decree 164/2000, which permit the extension of the transitional period provided for by Article 15(5) of that decree, are set in a body of measures the purpose of which is the creation of a competitive market in natural gas.

56 Anigas submits that compliance with the principle of the protection of legitimate expectations requires, in any event, that the early cessation of concessions for the distribution of natural gas, such as that in question in the main proceedings, takes effect only at the end of a transitional period.

— The Court's reply

57 A public service concession, such as that in question in the main proceedings, is outside the scope of the directives on the different categories of public contracts (see, particularly, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16).

- 58 The Court has however held that public authorities are bound, when they envisage granting such a concession, to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular (see, particularly, to that effect, *Telaustria and Telefonadress*, cited above, paragraph 60; *Coname*, cited above, paragraph 16; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 46; and *ANAV*, paragraph 18).
- 59 More particularly, since such a concession is of a certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States (see, to that effect, Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraph 30).
- 60 Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (*Commission v Ireland*, cited above, paragraph 31).
- 61 In addition, Article 86(1) EC precludes Member States, in the case of public undertakings and undertakings to which they grant special or exclusive rights, from maintaining in force national legislation contrary to Articles 43 EC and 49 EC.
- 62 First, it is certainly possible that the concession in question in the main proceedings is, having regard to the criteria identified by the Court, particularly the place where the work is to be carried out and the economic interest at stake, of a certain cross-border interest (see, by analogy, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 31). That is all the more true as the national legislation is applicable without distinction to all concessions.

63 Second, legislation such as that at issue in the main proceedings, by the deferment which it involves of the award of a new concession by a public procedure, constitutes, at least during the period of that deferment, a difference in treatment to the detriment of the undertakings which might be interested in such a concession and are located in a Member State other than that to which the contracting authority belongs.

64 That difference in treatment can, however, be justified by objective circumstances, such as the necessity of complying with the principle of legal certainty.

65 That principle forms part of the Community legal order (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 30) and is binding on every national authority responsible for implementing Community law (see, to that effect, Case 230/78 *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri* [1979] ECR 2749, paragraph 31).

66 In that regard, in a scenario such as that of the main proceedings, three sets of factors must be taken into account.

67 First, Directive 2003/55 does not require existing concessions for the distribution of gas to be called in question.

68 Secondly, it is clear from the order for reference that the concession granted in 1984 was to have effect until 2029. Thus, its early termination pursuant to Decree-Law 273/2005, the effect of which will be that the Comune di Rodengo Saiano will have to make the award of a new concession subject to competitive tendering, could constitute enhanced compliance with Community law.

- 69 Thirdly, the principle of legal certainty requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings (see, to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80 and the case-law cited).
- 70 It must, from that point of view, be noted that the concession in question in the main proceedings was granted in 1984, at a time when the Court had not yet held that it followed from primary Community law that contracts with a cross-order interest might be subject to duties of transparency in the situations referred to in paragraphs 59 and 60 of the present judgment.
- 71 In those circumstances, and without it being necessary to consider the principle of the protection of legitimate expectations, the principle of legal certainty not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.
- 72 It is for the referring court to determine whether, in particular, the extension of the length of the transitional period, brought about by legislation such as that at issue in the main proceedings, can be regarded as being necessary to comply with the principle of legal certainty.
- 73 The reply to the first and second questions must therefore be that Articles 43 EC, 49 EC and 86(1) EC do not preclude legislation of a Member State, such as that at issue in the main proceedings, which provides for the extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

Costs

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Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, from providing for the extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur. In those circumstances, it must also be held that neither Article 10 EC nor the principle of proportionality precludes such legislation.**

2. **Articles 43 EC, 49 EC and 86(1) EC do not preclude legislation of a Member State, such as that at issue in the main proceedings, from providing for the extension, on conditions which it lays down, of the length of the transitional period at the end of which the early cessation of a concession for the distribution of natural gas such as that in question in those proceedings must occur, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.**

[Signatures]