

JUDGMENT OF THE COURT (Third Chamber)

22 May 2008*

In Case C-439/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Dresden (Germany), made by decision of 17 October 2006, received at the Court on 24 October 2006, in the energy management proceedings

citiworks AG

intervening party:

Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde,

v

Flughafen Leipzig/Halle GmbH,

Bundesnetzagentur,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Mazák,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2007,

after considering the observations submitted on behalf of:

— citiworks AG, by C. Haellmigk, Rechtsanwalt,

— Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde, by R. Huber, acting as Agent,

— Flughafen Leipzig/Halle GmbH, by R. Wagner and J. Kloos, Rechtsanwälte,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

- the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

- the United Kingdom Government, by V. Jackson, acting as Agent, assisted by A. Henshaw, Barrister,

- the Commission of the European Communities, by B. Schima, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling relates to the interpretation of Article 20(1) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

- ² The reference has been made in proceedings brought by citiworks AG ('citiworks') against the decision by which the Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde (Ministry of the Economy and Employment of the *Land* of Saxony, acting as regulatory authority for the *Land*; 'the regulatory

authority’) classified the energy supply network managed by Flughafen Leipzig/Halle GmbH (‘FLH’) as a ‘site network’ within the meaning of the first point of Paragraph 110(1) of the Law on electricity and gas supply (Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz)) of 7 July 2005 (BGBl. 2005 I, p. 1970; ‘EnWG’).

Legal context

Community legislation

3 Pursuant to Article 1 of Directive 2003/54:

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

4 Recitals (4) to (7) and (26) in the preamble to Directive 2003/54 are worded as follows:

‘(4) The freedoms which the Treaty guarantees European citizens — free movement of goods, freedom to provide services and freedom of establishment — are only

protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.’

5 Article 2 of Directive 2003/54, entitled ‘Definitions’, states:

‘For the purposes of this Directive:

...

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 not including 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 not including 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;

- 7 “customers” means wholesale and final customers of electricity;

8. “wholesale customers” means any natural or legal persons who purchase electricity for the purpose of resale inside or outside the system where they are established;

9. “final customers” means customers purchasing electricity for their own use;

...

19. “supply” means the sale, including resale, of electricity to customers;

...

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

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

...’

6 Paragraph (8) of Article 3 of Directive 2003/54, entitled ‘Public service obligations and customer protection’, states:

‘Member States may decide not to apply the provisions of Articles 6, 7, 20 and 22 insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and

insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, amongst others, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.’

7 Article 20 of the Directive, entitled ‘Third party access’, is worded as follows:

‘1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 23 and that these tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

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

8 Article 26 of Directive 2003/54, entitled ‘Derogations’, provides:

‘1. Member States which can demonstrate, after the Directive has been brought into force, that there are substantial problems for the operation of their small isolated

systems, may apply for derogations from the relevant provisions of Chapters IV, V, VI, VII, ..., as far as refurbishing, upgrading and expansion of existing capacity are concerned, which may be granted to them by the Commission. The latter shall inform the Member States of those applications prior to taking a decision, taking into account respect for confidentiality. This decision shall be published in the *Official Journal of the European Union*. ...

...'

National legislation

- 9 The EnWG was adopted for the purpose of transposing Directive 2003/54.
- 10 Points 16 and 17 of Paragraph 3 of the EnWG define energy supply systems as 'electricity and gas supply systems passing through one or more voltage levels or pressure levels' and general supply systems as 'energy supply systems whose function is to distribute energy to third parties and which in terms of their size are not from the outset designed only to supply specific end consumers already existing or identifiable at the time of system construction, but which are in principle open to supply all end consumers'.

11 Point 18 of Paragraph 3 of that Law defines the distribution system operator as any natural or legal person responsible for operating energy supply systems.

12 Part 3 of the EnWG includes Paragraphs 20 and 21. The first sentence of Paragraph 20(1) provides that operators of energy supply systems ‘shall in accordance with objectively justified criteria grant anyone access to their system without discrimination and shall publish on the Internet the conditions, including specimen contracts, and charges for such system access’.

13 Paragraph 21(1) of the EnWG provides:

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

14 Paragraph 110(1) of the EnWG lays down the conditions under which the status of site network may be obtained and states the legal consequences of that status as follows:

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

1. are located on a geographically connected operation zone and which predominantly serve to supply the energy needs of the undertaking itself or of connected undertakings within the meaning of point 38 of Paragraph 3 of this Law,

2. are located on a geographically connected private zone and which enable the system operator or his representative in pursuit of a common primary commercial purpose,
 - (a) going beyond mere leasing or letting arrangements, and

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

to supply identifiable end consumers with energy, or

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

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

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

- 15 Citiworks is an electricity supply undertaking incorporated under German law. Since the beginning of 2004 it has supplied electricity to the branch of DFS Deutsche Flugsicherung GmbH located on the site of Leipzig/Halle Airport. The latter undertaking is wholly owned by the German State and is responsible for air traffic control in Germany.
- 16 FLH is the undertaking which operates Leipzig/Halle Airport. In that capacity, it maintains an energy supply system by which it meets its own electricity requirements and those of 93 other undertakings established on the airport site ('the system at issue in the main proceedings'). During 2004, that system supplied in total approximately 22 200 MWh, of which 85.4% was used by FLH itself.
- 17 FLH applied for the system at issue in the main proceedings to be classified as a site network within the meaning of Paragraph 110 of the EnWG. During the inquiry into that application, on 20 January 2006, the regulatory authority invited citiworks to intervene.
- 18 By decision of 12 July 2006, the regulatory authority granted FLH's application. Citiworks appealed against that finding to the Oberlandesgericht Dresden (Higher Regional Court, Dresden) (Germany).
- 19 Before that court, citiworks submitted that Paragraph 110 of the EnWG is incompatible with Article 20 of Directive 2003/54.

20 In those circumstances, the Oberlandesgericht Dresden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is the first point of Paragraph 110(1) of the [EnWG] compatible with Article 20(1) of Directive 2003/54/EC ... inasmuch as, in accordance with the conditions laid down in the first point of Paragraph 110(1) of the EnWG, a so-called “operation network” is exempted from the general provisions on system access (Paragraphs 20 to 28a of the EnWG) even where such system access would not impose an unreasonable burden?’

The question referred

21 As a preliminary point, it must be borne in mind that, although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with Community law, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, *inter alia*, Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 17; Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 18; and Case C-257/06 *Roby Profumi* [2008] ECR I-189, paragraph 11).

22 By its question, the national court is asking, in essence, whether Article 20(1) of Directive 2003/54 is to be interpreted as precluding a provision, such as the first point of Paragraph 110(1) of the EnWG, which exempts certain operators of energy

supply systems from the obligation to provide third parties with open access to those systems on the ground that they are located on a geographically connected operation zone and predominantly serve to supply the energy needs of the undertaking itself or of connected undertakings, where it is not established that open third-party access to those systems would impose an unreasonable burden.

Observations submitted to the Court

23 Citiworks takes the view that Article 20(1) of Directive 2003/54 precludes the first point of Paragraph 110(1) of the EnWG. One of the main objectives of that directive, it submits, is to allow energy suppliers to have open access to energy supply systems in order that consumers may freely choose their supplier.

24 It argues that the national provision which derogates from the principle of open third-party access to energy supply systems runs contrary to that objective. There is no provision in Directive 2003/54 which authorises Member States freely to determine in what situations they may derogate from that principle.

25 Furthermore, citiworks submits that the first point of Paragraph 110(1) of the EnWG is automatically applicable once the conditions which it lays down have been met.

26 As a preliminary point, FLH contends that the question referred is inadmissible on the ground that it is hypothetical. That question, it argues, is based on wording of the first point of Paragraph 110(1) of the EnWG which does not exist, since that provision does not refer to a notion of 'unreasonable burden'. In addition, the question is not relevant to the outcome of the main proceedings.

27 On the substance, FLH, the regulatory authority and the German and United Kingdom Governments take the view that the system at issue in the main proceedings is neither a transmission system nor a distribution system and, accordingly, does not come within the scope of Directive 2003/54. Such a system, they argue, is an internal system created by undertakings for their own energy supplies, which has a low consumption and does not affect competition. The first point of Paragraph 110(1) of the EnWG is merely the expression of the discretion available to the German legislature when it implemented Directive 2003/54. Moreover, the supply of electricity is ancillary to FLH's main activity, which is the operation of an airport.

28 The German Government submits that the system at issue in the main proceedings is a 'customer installation' which distributes energy within a closed installation. The undertaking which operates it is, it argues, not subject to the obligations imposed by Directive 2003/54 on operators of distribution systems.

29 The Polish Government takes the view that the first point of Paragraph 110(1) of the EnWG is incompatible with Directive 2003/54. The Directive, it submits, contains a system of derogations linked to specific circumstances, which excludes derogations of a general nature.

30 The Commission takes the view that Article 20(1) of Directive 2003/54 precludes the first point of Paragraph 110(1) of the EnWG. The system at issue in the main proceedings is, in its view, a distribution system within the meaning of that directive and open access to that system must therefore be guaranteed. The Commission points out that the principle of open access of third parties to energy supply systems is essential and that derogations from that principle must be allowed only in clearly defined circumstances. In that regard, the size of the system is taken into account only in respect of questions concerning legal separation of the operators of distribution systems, as follows from the final part of Article 15(2) of Directive 2003/54.

Answer of the Court

Admissibility

- 31 In accordance with established case-law, 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 (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47).
- 32 The Court can refuse to give a preliminary ruling on a question submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical (see *Bosman*, paragraph 61, and *Acereda Herrera*, paragraph 48).
- 33 In the case in the main proceedings, the national court is dealing with a challenge made by an electricity supplier which submits that Article 20(1) of Directive 2003/54 precludes a provision of national law which exempts certain operators of energy supply systems from having to allow open access to their systems.
- 34 According to that court, the provision of national law at issue provides that that exemption applies to energy supply systems without there being a requirement as to the existence of an unreasonable burden, whereas that requirement applies to the service systems referred to in the second point of Paragraph 110(1) of the EnWG.

35 Accordingly, the national court asks whether Article 20(1) of Directive 2003/54 precludes that derogating system, which removes the obligation to allow third parties open access to certain energy supply systems without the technical capacities of those systems having to be taken into account.

36 It follows that the question referred is relevant, not hypothetical, and is for that reason admissible.

Substance

37 With a view to answering the question referred, it is necessary to interpret Article 20 of Directive 2003/54 in the light of the objectives of that directive and of its provisions in order to determine whether the system at issue in the main proceedings comes within the scope of that directive and whether Article 20 thereof precludes a provision such as the first point of Paragraph 110(1) of the EnWG, which dispenses with the obligation to provide third parties with open access to certain energy supply systems.

38 It is appropriate to recall that Directive 2003/54 repealed and replaced Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). It follows from recitals (1) and (2) in the preamble to Directive 2003/54 that it was adopted because of existing shortcomings in achieving the creation of an internal market in electricity after implementation of Directive 96/92. The objective of Directive 2003/54 is therefore to improve the operation of that market.

39 According to recital (5) in the preamble to Directive 2003/54, one of the main obstacles in arriving at a fully operational and competitive internal market relates to issues of access to the network, tariffication issues and different degrees of market opening between Member States.

40 Recitals (6) and (7) in the preamble to that directive state that, for competition to function, non-discriminatory, transparent and fairly priced network access is of paramount importance in bringing about the internal electricity market.

41 Articles 16 to 20 of Directive 96/92 provided for a negotiated system of access to electricity transmission and distribution systems. The Community legislature decided to bring an end to that system in order to create more openness in the internal electricity market, as is apparent from the proposal for a directive submitted by the Commission on 13 March 2001 (COM (2001) 125 final, OJ 2001 C 240 E, p. 60).

42 In that regard, it is appropriate to bear in mind that, in the context of the interpretation of Articles 7(5) and 16 of Directive 96/92, the Court has emphasised the general nature of the principle of non-discrimination between users of systems (see, to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraphs 42 to 46).

43 Recital (4) in the preamble to Directive 2003/54 states that a fully open market must enable all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers. As the Advocate General rightly observed in point 72 of his Opinion, these two rights are necessarily linked. In order for customers to be able

to choose freely their suppliers, it is necessary that suppliers should have the right to access the different transmission and distribution systems which carry electricity to the customers.

44 It follows that open third-party access to transmission and distribution systems constitutes one of the essential measures which the Member States are required to implement in order to bring about the internal market in electricity.

45 The principle of open access applies, according to Article 20(1) of Directive 2003/54, to electricity transmission and distribution systems. Points 3 and 5 of Article 2 of that directive define the notions of 'transmission' and 'distribution'. 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. Distribution is the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers. Transmission and distribution do not include supply. The notion of 'supply' is defined in point 19 of Article 2 of Directive 2003/54 as the sale of electricity to customers.

46 It follows from those definitions that, first, a transmission system is an interconnected system used to transport electricity at extra-high and high voltage for sale to final customers or to distributors and, second, a distribution system is a system used to transport electricity at high, medium or low voltage for sale to wholesale or final customers.

47 According to certain observations submitted to the Court, the system at issue in the main proceedings is neither a transmission system nor a distribution system and for that reason does not come within the scope of Directive 2003/54. First, it is submitted, it constitutes a site network and does not affect competition because of its low consumption and, second, the operation of that system is merely an activity ancillary to the main activity of operating the airport.

48 With regard, first of all, to the nature of transmission and distribution systems within the meaning of Directive 2003/54 and the quantity of electricity transported on those systems, it is appropriate to note that the sole distinguishing criterion between transmission and distribution is the voltage of that electricity.

49 Within the meaning of points 3 and 5 of Article 2 of that directive, a transmission system concerns electricity at extra-high and high voltage and a distribution system ensures transmission of electricity at high, medium or low voltage. Directive 2003/54 refers to electricity consumption only in order to define the notions of 'small isolated system' and 'micro isolated system', which give rise to the grant of derogations from certain obligations laid down by the Directive. The Community legislature did not therefore intend to exclude particular transmission or distribution systems from the scope of Directive 2003/54 by reason of their size or consumption of electricity.

50 It should be noted that the first point of Paragraph 110(1) of the EnWG does not define the systems which come within its scope on the basis of their consumption of electricity. That provision refers to systems 'located on a geographically connected operation zone and which predominantly serve to supply the energy needs of the undertaking itself or of connected undertakings'.

51 With regard, secondly, to the operation and purpose of transmission and distribution systems, Directive 2003/54 states, for both types of system, that the electricity is transported with a view to delivery, without there being actual supply, and that the operator is responsible for operating, ensuring the maintenance of and, if necessary, developing the system in a given area and for guaranteeing its long-term capacity.

52 Furthermore, Article 13 of Directive 2003/54 requires undertakings that own or are responsible for distribution systems to designate distribution system operators. It is not apparent either from that provision or from any other provision of that directive that only undertakings acting principally as distribution system operators are subject to the obligation to allow open access to the systems.

53 It is appropriate to observe in that regard that the first point of Paragraph 110(1) of the EnWG does not stipulate whether the activity of operating the energy supply system must, for the operator, be a principal or ancillary activity for the purpose of defining the systems which come within its scope.

54 It is apparent from the decision for reference and the observations submitted to the Court that the system at issue in the main proceedings supplies electricity to FLH itself and to 93 other undertakings, all of which are located on the site of Leipzig/Halle airport. That system's consumption was 22 200 MWh in 2004, of which 3 800 MWh were consumed by undertakings other than FLH. According to the decision for reference, it was forecast that those undertakings' share of the consumption would reach 8 000 MWh in 2007. It follows that FLH does not operate a transmission system, as the electricity transported is not at extra-high or high voltage, but rather that it operates a system which transports electricity with a view to its supply to customers and which can be classified as an electricity distribution system within the meaning of point 5 of Article 2 of Directive 2003/54.

55 Article 20(1) of that directive leaves the Member States free to take the measures necessary to establish a system of third-party access to transmission or distribution systems. It follows that, in accordance with Article 249 EC, the Member States have authority over the form and the methods to be used to implement such a system. Having regard to the importance of the principle of open access to transmission or distribution systems, that margin of discretion does not, however, authorise them to depart from that principle except in those cases where Directive 2003/54 lays down exceptions or derogations.

56 It is therefore only where a provision such as the first point of Paragraph 110(1) of the EnWG comes within the scope of those exceptions or derogations that it will be compatible with Directive 2003/54.

57 Firstly, Article 20(2) of Directive 2003/54 provides that the operator of a distribution system may refuse access where it lacks the necessary capacity, on condition that duly substantiated reasons are given for such refusal. This possibility of refusing access to the system is, however, to be assessed on a case-by-case basis and does not authorise the Member States to lay down those derogations in a general manner without, in respect of each operator, a concrete assessment of the technical incapacity of the system to meet the demand for access from third parties.

58 Secondly, Article 3(8) of Directive 2003/54 allows the Member States not to apply the provisions of Article 20 thereof where the application of those provisions would obstruct the performance of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community.

59 It is appropriate to note that Article 3(2) and (3) of Directive 2003/54 applies to the public-service obligations which Member States may impose on electricity undertakings in the general economic interest. It follows from recital (26) in the preamble to that directive that public-service requirements are to be interpreted on a national basis.

60 It follows from Article 3(8) of Directive 2003/54 that the Member States may decide to restrict third-party rights of access to transmission and distribution systems in order to ensure the supply of a public electricity service. However, in order to do so, the Member States must, on the one hand, ascertain whether an unrestricted right of access to the systems would obstruct the performance by the system operators of their public-service obligations and, on the other, determine whether that performance cannot be achieved by other means which do not impact adversely on the right of access to the systems, which is one of the rights enshrined in Directive 2003/54.

61 It is appropriate to observe that the derogation from the principle of open access to energy supply systems contained in the first point of Paragraph 110(1) of the EnWG is not justified by the risk that the operators of systems coming within the scope of that provision would be prevented from performing their public-service obligations by the fact of that open access. That derogation can be justified only by the geographical or legal configuration of the area in which those systems are operated. Nor is it alleged by the German Government that the Federal Republic of Germany adopted the first point of Paragraph 110(1) of the EnWG for the purpose of implementing Article 3(8) of Directive 2003/54.

62 Thirdly, Article 26(1) of Directive 2003/54 provides that Member States which can demonstrate that there are substantial problems for the operation of small isolated systems may apply for derogations from certain provisions of Directive 2003/54, including Article 20 thereof.

63 Such derogations, however, require the agreement of the Commission, which takes the form of a decision published in the *Official Journal of the European Union*. Derogations of this kind have been granted to the Republic of Cyprus, by decision of 25 September 2006 (OJ 2006 L 270, p. 72), and to the Republic of Malta, by decision of 28 November 2006 (OJ 2006 L 332, p. 32). It must be stated that the Federal Republic of Germany has neither sought nor obtained from the Commission a decision on derogation under Article 26(1) of Directive 2003/54.

64 It follows that a provision such as the first point of Paragraph 110(1) of the EnWG does not come within the scope of any of the exceptions or derogations from the principle of open access to electricity transmission or distribution systems laid down by Directive 2003/54.

65 It follows from all the foregoing that Article 20(1) of Directive 2003/54 must be interpreted as precluding a provision such as the first point of Paragraph 110(1) of the EnWG, which exempts certain operators of energy supply systems from the obligation to provide third parties with open access to those systems on the grounds that they are located on a geographically connected operation zone and that they predominantly serve to supply the energy needs of the undertaking itself and of connected undertakings.

Costs

66 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 (Third Chamber) hereby rules:

‘Article 20(1) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC must be interpreted as precluding a provision such as the first point of Paragraph 110(1) of the Law on electricity and gas supply, referred to as ‘the Law on energy management’ (Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz)) of 7 July 2005, which exempts certain operators of energy supply systems from the obligation to provide third parties with open access to those systems on the grounds that they are located on a geographically connected operation zone and that they predominantly serve to supply the energy needs of the undertaking itself and of connected undertakings.’

[Signatures]