JUDGMENT OF THE COURT (Third Chamber)

17 July 2008 *

In Case C-206/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank Groningen (Netherlands), made by decision of 19 April 2006, received at the Court on 2 May 2006, in the proceedings

Essent Netwerk Noord BV,

supported by

Nederlands Elektriciteit Administratiekantoor BV

v

Aluminium Delfzijl BV,

and in the indemnification proceedings

* Language of the case: Dutch.

Aluminium Delfzijl BV

v

Staat der Nederlanden

and in the indemnification proceedings

Essent Netwerk Noord BV

v

Nederlands Elektriciteit Administratiekantoor BV,

Saranne BV,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 May 2007,

after considering the observations submitted on behalf of:

— Essent Netwerk BV, as universal successor in title as of 1 January 2005 to Essent Netwerk Noord BV, by P.E. Mazel and E. Hamminga, advocaten,

— Aluminium Delfzijl BV, by A.J. van den Berg and M.Van Leeuwen, advocaten,

— Nederlands Elektriciteit Administratiekantoor BV, by J.K. de Pree and Y. de Vries, advocaten,

— the Netherlands Government, by H.G. Sevenster, P.P.J. van Ginneken and D.J.M. de Grave, acting as Agents,

— the Commission of the European Communities, by R. Lyal and H. van Vliet, acting as Agents.

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 25 EC, 87(1) EC and 90 EC.

2 The reference was made in the course of proceedings between Essent Netwerk Noord BV ('Essent Netwerk'), an electricity net operator, and Aluminium Delfzijl BV ('Aldel'), a purchaser of electricity and transport services, regarding a price surcharge for the transmission of electricity in the period from 1 August 2000 to 31 December 2000.

3 In connection with an intervention and with indemnification proceedings, the dispute also involves Nederlands Elektriciteit Administratiekantoor BV, formerly Samenwerkende ElektriciteitsProduktiebedrijven NV ('SEP'), a statutorily-designated company, the State of the Netherlands and Saranne BV, a subsidiary of SEP and a high-voltage net operator.

Legal context

Community law

4 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) ('the Directive') sets out common rules relating to the generation, transmission and distribution of electricity.

5 Chapters IV, VI and VII of the Directive deal respectively with transmission system operation, the accounts of electricity undertakings and the organisation of access to the system.

6 Article 24(1) and (2) of the Directive provides:

'1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This decision shall be published in the *Official Journal of the European Communities*.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapter IV, VI and VII of this Directive. Applications

for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.'

National legislation

7 Before the liberalisation of the electricity sector in the Netherlands, electricity was generated by four regional undertakings.

8 Under Article 2 of the Law on the regulation of the production, importation, transmission and sale of electricity (Elektriciteitswet) of 16 November 1989 (*Staatsblad* 1989, No 535) ('the EW 1989'), those generating undertakings, together with a designated company (SEP, their jointly-owned subsidiary), were responsible for ensuring that the public transmission of electricity functioned reliably and effectively at a cost which was as low as possible and was justified in the light of the public interest. To accomplish that task, SEP and its shareholders had concluded a cooperation agreement in 1986. The EW 1989 provided a legal basis for that agreement in respect of the period from 1990 onwards.

9 All generated and imported electricity was managed by SEP. The costs were pooled by SEP and paid by it to the four generating undertakings. SEP's total costs made it possible to establish the price of the electricity invoiced to the distribution sector, taking account of a maximum set by the Minister for Economic Affairs.

10 During the period of the closed energy market, SEP or SEP and the generating undertakings had, under the cooperation agreement, made certain investments, in part at the instigation of the State, the reasons for those investments being considerations in respect of security of supply and provision and the sustainable use of sources of energy. The investments in question related in particular to (i) long-term contracts for the importation of electricity and gas which SEP had concluded with foreign

electricity and gas producers, (ii) agreements concluded, it seems, by the generating undertakings in connection with urban heating projects, and (iii) the construction of an experimental and ecological coal gas plant called 'Demkolec'. The costs related to those projects were not expected to be recoverable after liberalisation. What were involved were non-market-compatible costs, or 'stranded costs', according to the terminology used by the Commission.

11 On 21 January 1997, SEP, the four generating undertakings and the 23 distribution companies concluded an agreement ('the protocol agreement') relating to the supply of electricity to the distribution companies for the period from 1997 to 2000.

12 That protocol agreement provided inter alia that the distribution companies would, until 2000, jointly pay an amount of NLG 400 million per year to SEP (that is to say, a total of NLG 1.6 thousand million) to cover the non-market-compatible costs.

13 The payment of that amount by the distribution companies was to be financed by an increase in the price of electricity charged to small, medium and (ordinary) large consumers. Pursuant to Article 32 of the EW 1989, which provided for the possibility of concluding agreements with them, special large consumers contributed only partially or not at all to the non-market-compatible costs.

14 The Directive was transposed in the Netherlands by the Law on the regulation of the generation, transmission and sale of electricity (Elektriciteitswet) of 2 July 1998 (*Staatsblad* 1998, No 427) ('the EW 1998'), which repealed the EW 1989 with effect from 1 July 1999. Under that law, the operating activities in respect of the distribution network and the distribution of electricity were unbundled.

15 The protocol agreement was given a legal basis by the new Article 97(2) of the EW 1998 (added by the Law of 1 July 1999, *Staatsblad* 1999, No 260), under which the protocol was to be observed until 1 January 2001.

16 Under the Law, a committee of three experts presided over by Mr Herkströter ('the Herkströter Committee') was entrusted with giving an opinion on the need for compensatory measures in respect of the non-market-compatible costs. That committee submitted its opinion to the Minister for Economic Affairs on 18 November 1999. It concluded that the government should grant compensation only in respect of the non-market-compatible costs for which it was itself responsible, namely those for the urban heating projects and the Demkolec plant. The other non-market-compatible costs and, in particular, those relating to the import contracts, were to be borne by the generating undertakings, in accordance with a formula suggested by the Herkströter Committee.

17 On 21 December 2000, the Transitional Law on the electricity generating sector (Overgangswet Elektriciteitsproductiesector, *Staatsblad* 2000, No 607) ('the OEPS'), which governed, inter alia, the issue of the non-market-compatible costs, was adopted.

18 Both the Explanatory Memorandum for that law and the first recital in the preamble thereto describe the protocol agreement as having lapsed on account of the liberalisation of electricity generation. It is apparent in that regard, from the explanations submitted before the Court that, although the protocol agreement expired only on 1 January 2001, it could no longer be implemented as initially envisaged, in particular in respect of the year 2000, on account of the new rules applicable to special large consumers.

19 Article 9 of the OEPS, which entered into force on 29 December 2000 and applied with retroactive effect to 1 August 2000, as provided for in Article 25 of that Law, set out a mechanism for the financing of the non-market-compatible costs for 2000. It is worded as follows:

'1. Every customer, not being a protected customer, shall, in addition to what he contractually owes to the net operator for the area in which he is established, pay to that net operator an amount of NLG 0.0117 per kWh, calculated on the basis of the total amount of electricity which the net operator distributed to the customer's connection over the period from 1 August 2000 to 31 December 2000.

2. Every protected customer shall, in addition to what he contractually owes to the licence holder for the area in which he is established, pay to that licence holder an amount of NLG 0.0117 per kWh, calculated on the basis of the total amount of electricity which that licence holder supplied to the customer over the period from 1 August 2000 to 31 December 2000.

3. If a customer has already paid to a net operator or licence holder over the course of 2000 or part thereof an advance in order to meet the amount referred to in the first or second paragraphs, the net operator or licence holder shall set off that advance against the total amount due in the final accounts for 2000.

4. The proceeds from the amounts payable by customers pursuant to the first or second paragraphs shall be paid by the net operators or licence holders, before 1 July 2001, to the designated company.

5. The designated company shall inform the Minister of the amount of the proceeds referred to in the fourth paragraph, and shall include therewith a declaration by an auditor, as defined in Article 393, first paragraph, of Book 2 of the Civil Code, concerning the veracity of the statement. If the total of the proceeds amounts to more than NLG 400 000 000, the designated company shall pay the excess to the Minister, who shall set that amount aside for the purpose of defraying the costs referred to in Article 7.'

20 The protocol agreement expired on 1 January 2001. Under Article 2(1) of the OEPS, the four generating undertakings became jointly liable for the non-market-compatible costs listed in Article 2(2) of the OEPS.

21 Articles 6 to 8 of the OEPS related to the financing by the State of the payment of the non-market-compatible costs relating to the urban heating projects and the Demkolec plant for the period after 1 January 2001. They were worded as follows:

'*Article 6*

1. Every year, for a maximum period of 10 years, the Minister shall set a surcharge which shall be paid by every customer except net operators.

2. The amount of the surcharge shall be determined for the first time within a period of four weeks from the date of entry into force of this article. The surcharge applicable to the nine remaining years shall be set before 1 October of the year preceding that to which the new tariff relates.

3. The surcharge shall be expressed as a percentage of the total amount owed by a customer for the transmission of electricity to his place of connection and for the provision of services provided by the system.

4. The surcharge may not be greater than 10% of the amount referred to in paragraph 3 above.

5. The Minister shall set that surcharge in a manner consistent with the provisions adopted by a Ministerial Order which shall provide, in each case, that no subsidy shall be granted to finance costs in respect of which a sum has been allocated in the form of a grant or by virtue of a tax provision. If it proves to be necessary in order to comply with the interpretation suggested by the Commission …, the Minister may amend the basis referred to in the third paragraph, in accordance with which the surcharge in question is payable.

Article 7

The income from the surcharge shall serve to subsidise:

a. the costs arising under the agreements relating to urban heating concluded between the generating undertakings and suppliers prior to the date when the [EW] 1989 was repealed, in so far as the projects to which those agreements relate had already been undertaken before that date.

b. the costs connected with the sale and transfer of the shares in n.v. Demkolec or of the Demkolec experimental coal gas plant, and

c. the costs connected with the collection of that surcharge by the network operators.

Article 8

1. In accordance with the provisions to be made by the Minister, the subsidy referred to in Article 7 above shall be granted to the following persons:

a. legal persons who defray the costs referred to in Article 7(a), it being declared that each legal person shall receive each year that amount which represents the costs incurred in the year in question. Those costs shall be calculated by using the price of fuel risk method, which takes account of the generation of heat per project.

b. persons who defray the costs referred to in Article 7(b).

2. The Minister shall grant the subsidy to the legal persons referred to in subparagraph 1(a) only after having carried out with them an estimation of the costs, referred to in Article 7(a), which shall be defrayed by them in the year in question; to that end, the legal persons concerned shall state the total quantity of heat generated, expressed as an annual total.

3. The Minister shall grant the subsidy to the legal persons referred to in paragraph 1(b) only after the sale or the transfer by the legal persons concerned of the shares in n.v. Demkolec or of the Demkolec experimental coal gas plant and only after having carried out with them an estimation of the costs which they will have to bear in connection with the sale or the transfer of those shares or of the plant.

4. The Ministerial Order referred to in paragraph 1 of this article shall provide, in each case, that no subsidy shall be granted to finance costs in respect of which a sum has been allocated in the form of a grant or by virtue of a tax provision.

5. The period referred to at the beginning of Article 7 may, subject to the agreement of the Commission … under Article 88 EC, be extended by Ministerial Order by a period which takes into account the length of time for which the agreements referred to in Article 7(a) will continue to run.'

22 The Royal Decree providing for the entry into force of those articles was, however, never adopted. Article 6 of the OEPS was repealed by the Law of 3 July 2003 (*Staatsblad* 2003, No 316). Articles 7 and 8 were replaced by provisions providing for the grant of subsidies intended to cover the costs of the urban heating projects and the Demkolec plant, in accordance with what had been approved by the Commission in its decision (SG (2001) D/290565) of 25 July 2001 in 'State aid' file N 597/1998.

Contact between the Netherlands Government and the Commission

23 By letter of 20 February 1998, the Netherlands Government informed the Commission of the proposed compensation payments to the four electricity generating undertakings and asked it to approve them in accordance with Article 24 of the Directive.

24 By letter of 16 October 1998, the Netherlands Government communicated additional information to the Commission and notified to it the transitional regimes, in particular the draft versions of Articles 6 to 8 of the future OEPS, intended to reflect Article 24 of the Directive and, in so far as was necessary, Articles 92 of the EC Treaty (now, after amendment, Article 87 EC) and 93 of the EC Treaty (now Article 88 EC).

25 By Decision 1999/796/EC of 8 July 1999 concerning the application of the Netherlands for a transitional regime under Article 24 of Directive 96/92 (OJ 1999 L 319, p. 34), the Commission took the view that the system of levies and the transfer of compensation payments provided for did not require a derogation from Chapters IV, VI or VII of the Directive and could not therefore be regarded as a transitional regime within the meaning of Article 24 of the Directive.

26 Point 42 of the grounds for Decision 1999/796 provides:

'…The transfer of a compensation payment to certain electricity producers, financed through a levy or charge on the consumers is, therefore, a measure which is not directly addressed by the Directive but one which needs to be examined pursuant to the rules on competition, and in particular Article 87(3)(c) [EC] …'

27 The 'State aid' issue gave rise to various communications, exchanges of letters and postponements to the time for examining the file in the period between the above-mentioned notification of 16 October 1998 and the Commission's decision of 25 July 2001.

28 According to the national court, while the Netherlands State did not formally notify Article 9 of the OEPS to the Commission, it did provide the Commission, by letter of 30 August 2000, with the entire draft version of the OEPS, including Article 9.

29 The Netherlands Government states that it sent the Commission the full text of that draft law together with the Explanatory Memorandum in respect of it. The letter setting out that text dealt with a large number of subjects. As regards the protocol agreement which expired on 31 December 2000, the Netherlands Government stated that its legal basis might be withdrawn, that is to say that Article 97 of the EW 1998 might be repealed.

30 As the Commission had expressed doubts concerning the compatibility of Articles 6 to 8 of the draft OEPS with the Treaty, the Netherlands Government decided not to bring those articles into force and to provide for some non-market-compatible costs to be financed out of general resources.

31 That Government had, in the letter of 30 August 2000 expressly informed the Commission of the fact that a price surcharge would be introduced by Article 9 of the draft OEPS. That communication was worded in the following terms:

'In connection with the introduction, in 2000, of a new price structure under the [EW] 98, a structure under which prices will be divided into a price for distribution and a price for transmission, the draft law incorporates a provision under which the net operators and the generating undertakings may temporarily raise their prices. The purpose of this is to ensure that the former distribution undertakings which are parties to the protocol agreement can, even in respect of 2000, continue to meet their

obligations under that protocol. That measure is a logical consequence of the provision of the [EW 1998] which gave the protocol agreement a legal basis. For further details on that point, please see Article 9 of the draft [OEPS] and the passages in the Explanatory Memorandum which relate to that point.'

32 According to the Commission, by its letter of 30 August 2000, the Netherlands Government asked the Commission to review Articles 6 to 8 of the draft OEPS in the light of Articles 87 EC and 88 EC, but not Article 9 of that draft law.

33 It is apparent from the Commission's decision of 25 July 2001 that a meeting between the Netherlands authorities and the Commission's services took place on 15 September 2000 and that there was an exchange of letters in October, November and December 2000. According to that decision, the Netherlands authorities withdrew the financial mechanism in respect of the notified measures by letter of 27 June 2001.

34 In its decision of 25 July 2001, the Commission concluded that the notified aid relating to the grant of subsidies to cover the costs of the urban heating projects and the Demkolec plant was covered by Article 87(1) EC and that the measure complied with the Communication relating to the methodology for analysing State aid linked to stranded costs, which was also adopted on 25 July 2001.

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

35 On 19 December 1996 Aldel a 'special large consumer', acting pursuant to Article 32 of the EW 1989, concluded a contract for the provision of electrical capacity and the supply of electrical energy and 'load management' with SEP, Elektriciteits-Productiemaatschappij Oost- en Noord-Nederland NV (a generating undertaking)

and Energie Distributiemaatschappij voor Oost- en Noord-Nederland (a distribution undertaking).

36 Essent Netwerk is an autonomous legal person, a net operator and a subsidiary of Essent NV, which is wholly controlled by provincial and local authorities. It delivered 717 413 761 kWh to Aldel's connection between 1 August 2000 and 31 December 2000.

37 Pursuant to Article 9 of the OEPS, Essent Netwerk sent an invoice to Aldel on 4 April 2001 requesting payment of a sum of NLG 9 862 646.25(EUR 4 475 473.75), inclusive of turnover tax. Notwithstanding Essent Netwerk's formal demand for payment, Aldel did not pay the amount claimed.

38 In the main proceedings, Essent Netwerk is seeking payment, under Article 9 of the OEPS, of the amounts which it invoiced to Aldel, together with interest and costs. Aldel refuses to pay those amounts on the ground that Article 9 of the OEPS is contrary to Articles 25 EC, 87 EC and 90 EC. Aldel has brought an action for indemnification against the State. Essent Netwerk has, in turn, brought an action for indemnification against Nederlands Elektriciteit Administratiekantoor BV and Saranne BV.

39 In those circumstances, the Rechtbank Groningen (Groningen District Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Articles 25 EC and 90 EC be construed as precluding a statutory rule under which domestic purchasers of electricity are required during a transitional period (31 August 2000 to 31 December 2000) to pay to their net operator a price surcharge on the amounts of electricity transmitted to them, where that surcharge is to be paid by the net operator to a company designated by the legislature for the purpose of defraying non-market-compatible costs which have

arisen as a result of obligations incurred, or investments made, by that company prior to the liberalisation of the electricity market, and that company:

— is the joint subsidiary of four domestic generating undertakings;

— was solely responsible, in the period in question (2000), for the non-market-compatible costs which arose during that year;

— requires, by general agreement, an amount of NLG 400 million (EUR 181 512 086.40) in order to cover those costs incurred in that year; and

— so far as the income generated by the price surcharge exceeds the aforementioned amount, is required to forward such surplus to the Minister?

2. Does the rule mentioned in the first question satisfy the requirements of Article 87(1) EC?'

The questions referred for a preliminary ruling

The first question, relating to the interpretation of Articles 25 EC and 90 EC

40 As the Advocate General noted at point 29 of his Opinion, Articles 25 EC and 90 EC, which lay down respectively a prohibition on customs duties and charges having equivalent effect and on discriminatory internal taxation, complement each other in pursuing the objective of prohibiting any national fiscal measure that is liable to discriminate against products coming from or destined for other Member States by constituting a restriction on their free movement within the Community in normal conditions of competition (see, to that effect, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 55, and Case C-221/06 *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* [2007] ECR I-9643, paragraph 30).

41 Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect. By contrast, pecuniary charges resulting from a general system of internal taxation applied systematically, in accordance with the same objective criteria, to categories of products irrespective of their origin or destination fall within Article 90 EC (See *Air Liquide Industries Belgium*, paragraphs 51 and 56).

42 A charge which is imposed on domestic and imported products according to the same criteria may nevertheless be prohibited by the Treaty if the revenue from such a charge is intended to support activities which specifically benefit the taxed domestic products. If the advantages which those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 90, the collection of which is prohibited as regards the proportion used to

offset the burden borne by the domestic products (see, to that effect, Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 27).

43 In the case in the main proceedings, the price surcharge is imposed on transmitted electricity. In that regard, it must be borne in mind that electricity constitutes a product for the purposes of the provisions of the Treaty (Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 28, and Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 17).

44 Furthermore, as the chargeable event is the transmission of electricity, the Court has already held that a charge which is imposed not on a product as such, but on a necessary activity in connection with the product may fall within the scope of Articles 25 EC and 90 EC (see, to that effect, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten*, paragraph 43). In any event, it must be pointed out that the price surcharge is calculated on the basis of the number of kWh transmitted and not on the basis of the distance for which the electricity has to be transmitted or according to any other criterion directly connected with transmission and it is therefore imposed on the product itself.

45 That price surcharge on electricity which is transmitted was imposed by Article 9 of the OEPS. In this respect, it is of little importance that that provision facilitates the implementation of an agreement which had been previously concluded by various economic operators, since it is that legislation which provides that electricity consumers are required to pay that surcharge. The surcharge is a unilaterally imposed charge.

46 Likewise, for the purposes of the application of Articles 25 EC and 90 EC, it is of little account that the financial charge is not levied by the State (Case 132/82 *Commission* v *Belgium* [1983] ECR 1649, paragraph 8). The fact that the price surcharge is levied by the net operators is, therefore, irrelevant.

47 It is apparent from those considerations that the surcharge in question is a charge which is imposed on electricity, whether imported or domestic, according to an

objective criterion which is the number of kWh transmitted. It is therefore with regard to the use to which the revenue from the charge is put that it must be ascertained whether that charge constitutes a charge having equivalent effect or discriminatory internal taxation.

48 Essent Netwerk submits that neither Article 25 EC nor Article 90 EC is applicable in the case in main proceedings, given that it is consumers who pay the charge. There can therefore be no question of offsetting any burden borne by the domestic electricity generating undertakings.

49 However, it must be pointed out that, for the purposes of the application of Articles 25 EC and 90 EC, the identity of the person liable for payment of the charge is of little account in so far as the charge relates to the product or to a necessary activity in connection with the product. As was stated in paragraph 44 of this judgment, that is true of the case in the main proceedings.

50 As regards the identity of the recipients of the revenue from the charge, the possibility cannot be excluded that these are domestic electricity generating undertakings. Although a sum of NLG 400 million was, in respect of 2000, paid to the designated authority, namely SEP, for the purpose of payment of the non-market-compatible costs, SEP was the subsidiary of those generating undertakings and was bound to them by various agreements.

51 It is therefore for the national court to ascertain whether the generating undertakings were required to ensure that SEP defrayed those non-market-compatible costs or whether they could have enjoyed an advantage as a result of the charge, for example, because of a selling price incorporating the revenue from that advantage, by the grant of dividends or by any other means.

52 As regards the amount in excess of NLG 400 million, since the use to which it was to be put was governed by Article 7 of the OEPS and that article did not enter into force, it appears that that sum was not used to defray non-market-compatible costs and could not, therefore, have constituted an advantage benefiting the domestic product. It is however for the national court to ascertain whether that is indeed the case.

53 On the basis of the outcome of the checks carried out, in particular as regards the relationship between SEP and the generating undertakings, it will be possible for the national court to ascertain whether there is no offsetting to the advantage of the domestic generating undertakings, in which case the charge would constitute non-discriminatory internal taxation for the purposes of Article 90 EC. If the revenue from the charge were partially to offset the burden borne by the domestic product, that would constitute discriminatory internal taxation for the purposes of Article 90 EC, while if it were wholly to offset it, that would be a charge having equivalent effect prohibited by Article 25 EC.

54 According to SEP and the Netherlands Government, the revenue from the price surcharge does not, in any event, favour the domestic generation of electricity since it serves to cover non-market-compatible costs, namely investments made in the past, and has no effect on the price of domestic electricity.

55 However, that argument cannot be upheld. In so far as the domestic electricity generating undertakings are required to bear those non-market-compatible costs, those costs are part of the expenses taken into consideration in establishing the overall purchase price of electricity and, depending on the selling price established by the generating undertakings, the profit which those undertakings make. It follows that the use of the revenue from the charge to pay costs which, even in relation to past investments, must be borne by domestic producers improves their competitive situation to the detriment of producers from other Member States.

56 As the Advocate General correctly pointed out at points 24 and 25 of his Opinion, the surcharge levied on the electricity transmitted can be declared to be contrary to Articles 25 EC and 90 EC only in so far as it was levied on imported electricity. It is therefore important, in accordance with the rules relating to the burden of proof applicable in a dispute such as that in the main proceedings, that it be determined to what extent the charge levied on Aldel relates to the transmission of electricity from other Member States.

57 Having regard to all of those considerations, the answer to the first question must be that Article 25 EC is to be construed as precluding a statutory rule under which

domestic purchasers of electricity are required to pay to their net operator a price surcharge on the amounts of domestic and imported electricity which are transmitted to them, where that surcharge is to be paid by that net operator to a company designated by the legislature, with that company being the joint subsidiary of the four domestic generating undertakings and having previously managed the costs of all the electricity generated and imported, and where that surcharge is to be used in its entirety to pay non-market-compatible costs for which that company is personally responsible, with the result that the sums received by that company wholly offset the burden borne by the domestic electricity transmitted.

The same applies where the national electricity generating undertakings are required to bear those costs and where, by reason of existing agreements, by the payment of a purchase price for electricity produced in the Member State, by the payment of dividends to the various domestic electricity generating undertakings of which the designated company is the subsidiary or by any other means, the advantage which that price surcharge constitutes could be passed on in its entirety by the designated company to the domestic electricity generating undertakings.

Article 90 EC is to be construed as meaning that it precludes such a statutory rule where the revenue from the charge levied on the electricity transmitted is used only in part to pay non-market-compatible costs, that is to say, where the amount levied by the designated company only partly offsets the burden borne by the national electricity transmitted.

The second question, relating to the interpretation of Article 87 EC

58 It should be noted at the outset that a charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products alone, so that the advantages accruing from it offset the burden borne by those products, may constitute, having regard to the use to which the revenue from that charge is put, State aid incompatible

with the common market, if the conditions for the application of Article 87 EC are met (see, to that effect, Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 32, and Case C-72/92 *Scharbatke* [1993] ECR I-5509, paragraph 18).

59 A measure carried out by means of a discriminatory taxation and which is liable at the same time to be considered as forming part of an aid within the meaning of Article 87 EC, is governed both by the provisions of Articles 25 EC or 90 EC and by those applicable to State aid (see, to that effect, Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 9, and Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 22).

60 While Articles 25 EC and 90 EC seek to preserve the free movement of goods and competition between domestic products and imported products, Article 87 EC has the objective, more generally, of preserving competition between undertakings by prohibiting any aid granted by a Member State which satisfies the conditions of the latter article.

61 According to that provision, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

62 It must be ascertained whether the sums paid to SEP under Article 9 of the OEPS comply with that definition.

63 According to settled case-law, the classification as 'aid' within the meaning of Article 87(1) of the Treaty requires that all the conditions set out in that provision are fulfilled (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, *'Tubemeuse'*, paragraph 25; Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*

[2003] ECR I-7747, paragraph 74; and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *Ufex and Others* [2008] ECR I-4777, paragraph 125).

64 First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 56, and *Chronopost and La Poste* v *Ufex and Others*, paragraph 126).

65 As regards the first condition, it is necessary to ascertain whether the amounts paid to SEP constitute intervention by the State or through State resources.

66 Article 9 of the OEPS provides for the payment to the designated company, namely SEP, of NLG 400 million and for the payment of the excess of the charge received to the Minister, who must set that amount aside for the purpose of defraying the costs referred to in Article 7 of the OEPS — which will not, however, enter into force — namely the non-market-compatible costs associated with urban heating and the Demkolec coal gas plant. In that regard, it must be borne in mind that those amounts have their origin in the price surcharge imposed by the State on purchasers of electricity under Article 9 of the OEPS, a surcharge with regard to which it has been established, in paragraph 47 of this judgment, that it constitutes a charge. Those amounts thus have their origin in a State resource.

67 Under Article 9(1) and (2) of the OEPS, the charge has to be paid to the net operator or to the licence holder, who must, as provided by Article 9(4) of the OEPS, pay the proceeds from the amounts payable to SEP before 1 July 2001. Under Article 9(5) of the OEPS, SEP is to retain a sum amounting to not more than NLG 400 million and to pay the excess to the Minister.

68 In the case in the main proceedings, the company which is the net operator is Essent Netwerk. As is apparent from the answer given by that company to a question asked

by the Court, Essent Netwerk is a 100% a subsidiary of Essent NV, 74% of whose shareholders are Netherlands provinces and 26% of which are municipalities of that Member State. As for SEP, whose capital is held in its entirety by the electricity generating undertakings, it was at that time an undertaking which had been given the task by statute of operating an economic service of general interest.

69 It is apparent from the provisions of the OEPS that the designated company is not entitled to use the proceeds from the charge for purposes other than those provided for by the Law. Furthermore, it is strictly monitored in carrying out its task, since Article 9(5) of the OEPS requires it to have the detailed account of the sums received and transferred certified by an auditor.

70 It is of little account that that designated company was at one and the same time the centralising body for the tax received, the manager of the monies collected and the recipient of part of those monies. The mechanisms provided for by the Law and, more specifically, the detailed accounts certified by an auditor, make it possible to distinguish those different roles and to monitor the use of the monies. It follows that as long as that designated company did not appropriate to itself the amount of NLG 400 million, at the time when it was freely able to do so, that amount remained under public control and therefore available to the national authorities, which is sufficient for it to be categorised as State resources (see, to that effect, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 37).

71 The objective of Article 9 of the OEPS appears to be that of enabling the electricity generating undertakings, through their subsidiary SEP, to recover the non-market-compatible costs which they have incurred in the past. That provision relates to the costs for 2000, whereas certain costs in respect of subsequent years are to be offset by subsidies which are to be authorised by the Commission as State aid.

72 Those different circumstances distinguish the measure at issue in the main proceedings from that referred to in Case C-345/02 *Pearle and Others* [2004] ECR I-7139. The monies at issue in that case, which were used for an advertising campaign, had been collected by a professional body from its members who benefited from the

campaign, by means of compulsory levies earmarked for the organisation of that campaign (*Pearle and Others*, paragraph 36). They were, therefore, neither revenue for the State nor monies which remained under State control, by contrast to the amount received by SEP, which has its origin in a charge and can be used for no other purpose than that provided for by the Law.

73 Furthermore, in the case which gave rise to the judgment in *Pearle and Others*, although the monies were collected by a professional body, the advertising campaign was organised by a private association of opticians, had a purely commercial purpose and had nothing to do with a policy determined by the authorities (*Pearle and Others*, paragraphs 37 and 38). By contrast, in the case in the main proceedings, the payment of the amount of NLG 400 million to the designated company had been the subject of a decision by the legislature.

74 Likewise, the measure in question differs from that referred to in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, in which the Court held, at paragraph 59, that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity. In the latter case, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.

75 It follows from all of those points that the amounts paid to SEP constitute intervention by the State through State resources.

76 As regards the second condition, namely the possibility of affecting trade between Member States, it must be borne in mind that, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of an aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see *Tubemeuse*, paragraph 43, and *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 81).

77 In that regard, it must be stated that SEP and the domestic electricity generating undertakings are in competition with the electricity producers of other Member States. Furthermore, having regard to the context of the liberalisation of the market in electricity and the resulting intense competition, that factor is sufficient to establish that the aid is liable to affect trade.

78 Regarding the third and fourth conditions, it appears to follow from the Law, from its Explanatory Memorandum and from the explanations submitted before the Court, that the amount of NLG 400 million received by SEP was to enable it to pay the non-market-compatible costs for 2000 without analysis of the nature and the origin of those costs. By contrast, in respect of 2001 and the years following that, the Herkströter Committee regarded the Netherlands State as having been responsible for certain costs, such as the urban heating projects and the Demkolec plant, and subsidies from that State were provided for in order to offset those costs.

79 In that regard, it must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 84; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 30; and *Servizi Ausiliari Dottori Commercialisti*, paragraph 59).

80 By contrast, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) EC (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 87; *Enirisorse*, paragraph 31; and *Servizi Ausiliari Dottori Commercialisti*, point 60).

81 However, for such compensation to escape classification as State aid in a particular case, and there was, moreover, no submission to that effect in the case in the main proceedings, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88; *Enirisorse*, paragraph 31; and *Servizi Ausiliari Dottori Commercialisti*, paragraph 61).

82 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 89; *Enirisorse*, paragraph 32; and *Servizi Ausiliari Dottori Commercialisti*, paragraph 62).

83 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 90; *Enirisorse*, paragraph 35; and *Servizi Ausiliari Dottori Commercialisti*, paragraph 64).

84 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 92, and *Servizi Ausiliari Dottori Commercialisti*, paragraph 66).

85 Fourth, the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the requisite means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 93, and *Servizi Ausiliari Dottori Commercialisti*, point 67).

86 With the aid of those criteria, which may be used, *mutatis mutandis*, to assess whether the compensation in respect of non-market-compatible costs for which the State is responsible constitutes aid, it is for the national court to ascertain whether, or to what extent, the amount of NLG 400 million may be regarded as compensation for the services provided by the designated company in order to discharge public service obligations or whether that amount was to be used for the purpose of paying non-market-compatible costs of another kind, in which case it would be an economic advantage corresponding to the definition of 'aid' within the meaning of Article 87 EC.

87 In so far as the measure in question gives an advantage to SEP and/or the electricity generating undertakings, such an advantage favours the electricity generating sector and is, therefore, selective in nature.

88 It follows from all of those factors that, in so far as they represent an economic advantage, the amounts paid to SEP up to a maximum of NLG 400 million constitute 'State aid' for the purposes of Article 87(1) EC.

89 As regards the charge on the electricity transmitted, settled case-law provides that taxes do not fall within the scope of the provisions of the EC Treaty concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure (Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 25, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 34).

90 For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of that aid (*Streekgewest*, paragraph 26, and *Distribution Casino France and Others*, paragraph 40).

91 That appears to be true of the case in the main proceedings, subject to the verification referred to in paragraph 86 of this judgment, as concerns the amount of NLG 400 million paid to SEP.

92 Under Article 88(3) EC, the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member State concerned may not put its proposed measures into effect until any possible review procedure has resulted in a final decision.

93 Where a tax is hypothecated to an aid measure, the notification of the aid must also cover the method of financing (Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 51, and *Streekgewest*, paragraph 26).

94 The Netherlands Government and the Commission are at variance as regards whether there was a notification for the purposes of Article 88(3) EC. It is common ground that, by letter of 30 August 2000, the Netherlands Government made the draft OEPS and the Explanatory Memorandum in respect of it known to the Commission. The Commission states, however, that that letter asked it to review the drafts of Articles 6 to 8 of the OEPS under Articles 87 EC and 88 EC, but not the draft of Article 9.

95 In that regard, and without its being necessary to consider whether the letter of 30 August 2000 was sufficiently specific as regards Article 9 of the OEPS to constitute a notification for the purposes of Article 88(3) EC, it need only be stated, as did the Advocate General at points 121 to 123 of his Opinion, that Article 9 of the OEPS entered into force on 29 December 2000, namely before the decision of 25 July 2001 relating to the measures notified on 30 August 2000. It follows that the obligation not to implement a notified project until a decision has been taken by the Commission was not complied with.

96 It is apparent from those considerations that Article 87 EC must be construed as meaning that the amounts paid to the designated company under Article 9 of the OEPS constitute 'State aid' for the purposes of that provision of the Treaty to the

extent that they represent an economic advantage and not compensation for the services provided by the designated company in order to discharge public service obligations.

Costs

97 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:

1. **Article 25 EC is to be construed as precluding a statutory rule under which domestic purchasers of electricity are required to pay to their net operator a price surcharge on the amounts of domestic and imported electricity which are transmitted to them, where that surcharge is to be paid by that net operator to a company designated by the legislature, with that company being the joint subsidiary of the four domestic generating undertakings and having previously managed the costs of all the electricity generated and imported, and where that surcharge is to be used in its entirety to pay non-market-compatible costs for which that company is personally responsible, with the result that the sums received by that company wholly offset the burden borne by the domestic electricity transmitted.**

The same applies where the national electricity generating undertakings are required to bear those costs and where, by reason of existing agreements, by the payment of a purchase price for electricity produced in the Member

State, by the payment of dividends to the various domestic electricity generating undertakings of which the designated company is the subsidiary or by any other means, the advantage which that price surcharge constitutes could be passed on in its entirety by the designated company to the domestic electricity generating undertakings.

Article 90 EC is to be construed as meaning that it precludes such a statutory rule where the revenue from the charge levied on the electricity transmitted is used only in part to pay non-market-compatible costs, that is to say where the amount levied by the designated company only partly offsets the burden borne by the national electricity transmitted.

2. Article 87 EC must be construed as meaning that the amounts paid to the designated company under Article 9 of the Transitional Law on the electricity generating sector (Overgangswet Elektriciteitsproductiesector) of 21 December 2000 constitute 'State aid' for the purposes of that provision of the EC Treaty in so far as they represent an economic advantage and not compensation for the services provided by the designated company in order to discharge public service obligations.

[Signatures]