



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 October 2019*

(Reference for a preliminary ruling — Directive 2009/72/EC — Internal market in electricity — Article 2(3) to (6) — Concepts of electricity transmission system and electricity distribution system — Distinguishing criteria — Voltage — Ownership of installations — Article 17(1)(a) — Independent transmission operator — Articles 24 and 26 — Distribution system operator — Article 32(1) — Free third-party access — Access to medium-voltage electricity — Interconnection points between transmission and distribution systems — Discretion of the Member States)

In Case C-31/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria), made by decision of 4 January 2018, received at the Court on 17 January 2018, in the proceedings

‘Elektrozpredelenie Yug’ EAD

v

Komisija za energijno i vodno regulirane (KEVR)

other parties:

‘BMF Port Burgas’ EAD

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, I. Jarukaitis, E. Juhász and C. Lycourgos, Judges,

Advocate General: G. Pitruzzella,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 6 February 2019,

after considering the observations submitted on behalf of:

- ‘Elektrozpredelenie Yug’ EAD, by H. Nihrizov, P. Stanchev, A. Todorov, B. Petrov, M. Baykushev and G. Dimitrov, advokati, and by S. Radev, Legal Adviser,
- the Komisija za energijno i vodno regulirane (the KEVR), by I. Ivanov,

* Language of the case: Bulgarian.

- ‘BMF Port Burgas’ EAD, by T. Dimitrova, M. Derelieva, M. Peneva and I. Todorov, advokati,
 - the French Government, by C. Mosser, acting as Agent,
 - the European Commission, by O. Beynet and Y.G. Marinova, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 16 May 2019,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 2(3) and (5) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).
- 2 The reference was made in the proceedings between ‘Elektrozpredelenie Yug’ EAD (‘ER Yug’), electricity distribution system operator on part of the Bulgarian territory, and the Komisia za energiyno i vodno regulirane (the Energy and Water Regulator, Bulgaria) (‘the KEVR’), concerning the rates ‘BMF Port Burgas’ EAD (‘BMF’) was charged for access to that system and for the transport of electricity via that system.

Legal context

European Union law

- 3 Recitals 1 to 3, 9, 11, 16, 17, 19 and 44 of Directive 2009/72 are worded as follows:
 - ‘(1) The internal market in electricity, which has been progressively implemented throughout the [European Union] since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.
 - (2) 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 [OJ 2003 L 176, p. 37] has made a significant contribution towards the creation of such an internal market in electricity.
 - (3) The freedoms which the [TFEU] guarantees the citizens of the Union — inter alia, the free movement of goods, the freedom of establishment and the freedom to provide services — are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.
 - ...
 - (9) Without effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.
 - ...

(11) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market [OJ 2008 C 175 E, p. 206] referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a generation or supply undertaking. ...

...

(16) The setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.

(17) Where, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and generation interests.

...

(19) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. ...

...

(44) ... The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity supply. The maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable electricity supply.'

4 Article 1 of Directive 2009/72, entitled ‘Subject matter and scope’, provides:

‘This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the [European Union]. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.’

5 Under Article 2 of that directive, entitled ‘Definitions’:

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

...

3. “transmission” means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply;

4. “transmission system operator” means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;

5. “distribution” means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply;

6. “distribution system operator” means a natural or legal person who is 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. “customer” means a wholesale or final customer of electricity;

8. “wholesale customer” means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he is established;

9. “final customer” means a customer purchasing electricity for his own use;

...

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

...’

6 Chapters IV and V of Directive 2009/72, which comprise Articles 9 to 23 thereof, stipulate the provisions applicable, respectively, to the operation of transmission systems and to independent transmission operators, while Chapter VI of the directive, which comprises Articles 24 to 29 thereof, relates to the operation of distribution systems.

7 Article 9 of Directive 2009/72, entitled ‘Unbundling of transmission systems and transmission system operators’, which is in Chapter IV thereof, relating to the operation of transmission systems, provides:

‘1. Member States shall ensure that from 3 March 2012:

- (a) each undertaking which owns a transmission system acts as a transmission system operator;
- (b) the same person or the persons are entitled neither:
 - (i) directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
 - (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply;
- (c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply; and
- (d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.

...

8. Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

- (a) designate an independent system operator in accordance with Article 13; or
- (b) comply with the provisions of Chapter V.

...’

8 Article 17 of Directive 2009/72, entitled ‘Assets, equipment, staff and identity’, which is in Chapter V thereof, relating to independent transmission operators, states:

‘1. Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this directive and carrying out the activity of electricity transmission, in particular:

- (a) assets that are necessary for the activity of electricity transmission, including the transmission system, shall be owned by the transmission system operator;

...’

- 9 Article 24 of Directive 2009/72, entitled ‘Designation of distribution system operators’, which is in Chapter VI thereof, relating to the operation of distribution systems, provides:

‘Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more distribution system operators. Member States shall ensure that distribution system operators act in accordance with Articles 25, 26 and 27.’

- 10 Under that chapter, Article 26 of the directive, entitled ‘Unbundling of distribution system operators’ states:

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

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

...

(c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, physical and financial resources. ...’

- 11 Article 32(1) of Directive 2009/72, that article being entitled ‘Third-party access’ and in Chapter VIII thereof, itself entitled ‘Organisation of access to the system’, provides:

‘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. ...’

Bulgarian law

- 12 Article 86(1) of the *Zakon za energetikata* (Law on Energy) (DV No 107, 2003) (‘the ZE’), provides:

‘The transport of electricity shall be undertaken by the electricity transport system operator to which a licence for the transport of electricity has been issued ...’

- 13 Under Article 88(1) of the ZE:

‘Electricity shall be distributed and electricity distribution systems shall be operated by the electricity distribution system operators that own those systems in a specific area and hold a licence for the distribution of electricity for that area. ...’

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

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

...

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

...

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

...

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

- 15 Articles 124 and 125 of the Naredba n° 6 za prisaedynavane na proizvoditeli i klienti na elektricheska energiya kam prenosnata ili kam razpredelitelnite elektricheski mrezhi (Regulation No 6 concerning the connection of electricity producers and customers to electricity transmission or distribution systems) of 24 February 2014 draw the line in terms of ownership between the installations of the transmission system operator and those of the distribution system operator.

The dispute in the main proceedings and the questions referred

- 16 ER Yug holds an exclusive licence for the distribution of electricity, granted on 13 August 2014 by the KEVR, under which it distributes electricity, via a distribution system which it operates, in the area defined in that licence, namely South-Eastern Bulgaria.
- 17 That area includes the areas in which the ‘Burgas West’ and ‘Burgas East 2’ port terminals are located, which BMF operates under a concession and supplies with related services.
- 18 The BMF installations relating to the ‘Burgas East 2’ port terminal are connected to the electricity network by means of a medium-voltage (20 kV) line referred to as ‘Novo pristanishte’ (‘New port’), which is connected to the medium-voltage plant (also 20 kV) of the ‘Ribari’ (‘Fishermen’) electrical transformer substation. The ‘Novo pristanishte’ power line, which is owned by the State, was entrusted to BMF as an asset component that is necessary for the port terminals under concession to function. The ‘Ribari’ electrical substation is owned by the Bulgarian transmission system operator, ‘Elektroenergien sistemen operator’ EAD (‘ESO’).
- 19 Electricity transported on the high-voltage transmission system operated by ESO is transformed at the interconnection points between the transmission and the distribution systems, in transformers 1 and 2, to enable a transition from a voltage of 110 kV (high voltage) into a voltage of 20 kV (medium voltage), for operation in the medium-voltage (20 kV) plant of the ‘Ribari’ substation. The commercial metering devices for electricity brought from ESO’s transmission system to ER Yug’s distribution system, which are owned by the latter, are installed immediately after transformers 1 and 2 at the connection points for cells 26 and 39 of the medium-voltage (20 kV) plant of the ‘Ribari’ substation. The ‘Novo pristanishte’ power line is connected to that plant at cell 44. That line is used to transport and supply electricity exclusively to BMF.
- 20 ER Yug and BMF concluded a contract on 30 September 2013 covering network services under which the former would supply the latter with access to the electricity distribution system and transport electricity via that system, for the purpose of supplying electricity to the BMF installations in the Burgas port area.

- 21 Taking the view that that it was connected directly to the transmission system, on 6 October 2016 BMF unilaterally terminated the contract concluded with ER Yug and concluded with ESO various contracts covering access to the transmission system, the provision of network services and the transport of electricity for the purpose of supplying electricity to the abovementioned BMF installations. On the basis of those contracts, ESO installed its own commercial metering devices for electricity transported by the ‘Novo pristanishte’ power line.
- 22 Being of the opinion, however, that those installations were still connected to the distribution system, ER Yug continued to charge BMF the rate for access to the distribution system and for the transport of electricity via that system.
- 23 In response to a complaint filed by BMF, the KEVR, by Decision No Zh-37 of 28 February 2017, found that, because the notice period for terminating the contract with BMF had expired, ER Yug was no longer entitled to charge the latter for access to the electricity distribution system and for transport via that system. The KEVR found that the BMF installations at issue were connected directly to the ESO electricity transmission system and that, therefore, BMF had direct access to that system. Consequently, the KEVR ordered ER Yug, first, to stop charging BMF the rate for access to the distribution system and for the transport of electricity via that system and, secondly, to review the rates charged following expiry of the notice period for terminating the contract concluded with BMF.
- 24 ER Yug challenged that decision before the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria).
- 25 In the proceedings pending before that court, ER Yug is asserting that, as long as BMF is connected to the electricity distribution system, it cannot terminate the contract covering access to and the transport of electricity via that system. Under the scheme of Directive 2009/72, in its view, the key factor for distinguishing between an electricity transmission system and an electricity distribution system is the voltage of the electricity it transports, namely, on the one hand, extra high and high voltage for a transmission system, and, on the other hand, high, medium and low voltage for a distribution system. According to ER Yug, the definition of electricity transmission in Article 1(20) and (44) of the supplementary provisions to the ZE is incompatible with the definition in Article 2(3) of Directive 2009/72, which should apply directly because of its direct effect and the principle of primacy of EU law. It would follow that the provision of medium-voltage network services would constitute electricity distribution. ER Yug argues that the transmission system operator ESO is not entitled to connect its customers to the medium-voltage plant or to supply medium-voltage network services because these activities fall within the remit of electricity distribution services, for which ER Yug holds an exclusive licence for the area where the BMF installations at issue are located.
- 26 Conversely, BMF contends that its installations are directly connected to the electricity transmission system via the ‘Ribari’ substation, which is owned by ESO. Thus, since neither that substation nor the ‘Novo pristanishte’ power line connected to it is owned by ER Yug, BMF argues that they do not form part of the electricity distribution system. BMF therefore maintains that the licence held by ER Yug does not meet the necessary conditions for providing services covering access to and the transport of electricity via the electricity distribution system or, consequently, for charging for those services. In addition, according to BMF, the ZE includes no provisions precluding the customer from being connected directly to the electricity transmission system.
- 27 The referring court notes that it is necessary in the present case to establish to which electricity network — distribution or transmission — the BMF installations at issue are connected and, therefore, to which operator BMF should pay the rate for network services. It would be appropriate to determine the relevant criterion for distinguishing between electricity ‘transmission’ activities and electricity ‘distribution’ activities and between the concepts of ‘transmission system’ and ‘distribution system’. Indeed, if voltage were to be considered the sole distinguishing criterion, since the ‘Novo pristanishte’ power line is connected to the medium-voltage plant of the ‘Ribari’ substation, BMF

would be required to pay the rate for network services to ER Yug, which would have the exclusive right to supply network services to all customers connected at medium voltage within the area covered by its licence, whether or not it owns the corresponding installations.

28 The referring court, like the majority of the Bulgarian courts, is of the opinion that it follows from Article 88(1) of the ZE, Articles 124 and 125 of Regulation No 6 concerning the connection of electricity producers and customers to transmission or distribution systems as well as from ER Yug's own licence that the domestic legislature has used the criterion relating to the ownership of the electrical installations by the transmission system operator or the distribution system operator as the criterion for distinguishing between transmission system and distribution system. In terms of voltage, the position taken by the domestic legislature is not so clear. However, according to the referring court, it follows from the definitions in Article 2(3) and (5) of Directive 2009/72 that for the EU legislature the sole relevant criterion is the voltage of the electricity transported, which has been confirmed by the Court of Justice in paragraph 48 of its judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298).

29 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Are the provisions of Article 2(3) and 2(5) of Directive [2009/72] to be interpreted as meaning that the voltage is the sole criterion by which the distribution system is distinguished from the transmission system and, by extension, electricity "distribution" activities are distinguished from electricity "transmission" activities and that, despite their freedom of action to allocate system users to either the transmission or the distribution system, Member States are not allowed to introduce ownership of the assets used to exercise those activities as an additional criterion for the purpose of distinguishing transmission activities from distribution activities?
- (2) If the first question is answered in the affirmative: should electricity [consumers] connected to the medium-voltage network always be treated as customers of the distribution system operator which holds a licence for the area concerned, irrespective of who owns the equipment to which the customer's electrical installations are directly connected and irrespective of the contracts concluded directly between the customer[s] and the transmission system operator?
- (3) If the first question is answered in the negative: are national rules in keeping with the spirit and purpose of Directive [2009/72] permissible, such as those laid down in [Article] 1(44), read in combination with [Article] 1(20), of the [supplementary provisions to the ZE], which state that "transmission of electricity" means the transport of electricity via the transmission network and that "electricity transmission system" means all the power lines and installations used for the transmission, transformation from high to medium voltage and redistribution of electricity? All other things being equal, are national regulations permissible, such as those laid down in [Article] 88(1) of the [ZE], which states that electricity is to be distributed and electricity distribution systems are to be operated by distribution network operators which own those networks in a specific area and hold an electricity distribution licence for that area?'

Consideration of the questions referred

Admissibility

30 BMF claims that the questions referred are irrelevant to the resolution of the dispute in the main proceedings and are, therefore, inadmissible. According to BMF the dispute relates solely to a user's right to terminate an electricity connection agreement concluded, without basis, with a company, ER

Yug, that does not own the system supplying electricity and is not responsible for the operation and functioning of the installations of that system. In that context, BMF argues that the primary question is whether the user is entitled to connect to an installation owned by an independent electricity transmission operator. According to BMF, the referring court's questions concerning the concepts of electricity 'transmission' and 'distribution' are irrelevant. In addition, it claims that the interpretation of the provisions of EU law applicable to the present case is not open to doubt and, furthermore, those provisions have been transposed into Bulgarian law.

- 31 It is appropriate to note in that regard that, according to consistent case-law of the Court, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a 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 to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, *inter alia*, judgment of 26 October 2017, *Balgarska energiyana bursa*, C-347/16, EU:C:2017:816, paragraph 30).
- 32 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. The purpose of a request for a preliminary ruling is not to enable advisory opinions on general or hypothetical questions to be delivered, but rather to meet the need for the effective resolution of a dispute concerning EU law (see, *inter alia*, judgment of 26 October 2017, *Balgarska energiyana bursa*, C-347/16, EU:C:2017:816, paragraph 31).
- 33 In the present case, it is appropriate to note that the questions referred by the referring court, arising in the context of a dispute between an electricity distribution system operator and a user claiming to connect directly to the transmission system for access to medium-voltage electricity, concern, *inter alia*, the interpretation of the concepts of electricity 'distribution' and 'transmission' set out in Article 2(3) and (5) of Directive 2009/72 with a view to determining, first, if a national rule such as that at issue in the main proceedings, which defines the concepts of electricity transmission and distribution systems, is consistent with those provisions, and, secondly, to which one of those systems the user must be considered to be connected in the circumstances of the main proceedings and, therefore, to which one of those operators it must pay the rates for access to and transport of the electricity supplied.
- 34 In those circumstances, it is not apparent that the questions referred for a preliminary ruling, which concern the interpretation of EU law provisions in the context of a dispute pending before the referring court, are manifestly irrelevant.
- 35 The argument that the interpretation of those provisions is not open to doubt and that those provisions have been implemented into national law has no bearing in that regard since those considerations concern the substance of the answers to be given to the questions referred rather than their admissibility.
- 36 Consequently, the questions referred must be found to be admissible.

The first and third questions

- 37 By its first and third questions, which should be examined together, the referring court asks, in essence, whether Article 2(3) and (5) of Directive 2009/72 must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, first, defines the concepts of electricity transmission system and electricity distribution system based on criteria relating not only to the voltage of the electricity but also to the ownership of the assets used to exercise transmission and distribution activities, respectively, and, secondly, provides that the transformation of electricity to enable the transition from high to medium voltage falls within the remit of the activities of an electricity transmission system.
- 38 It must be recalled that the subject matter of Directive 2009/72, as set out in Article 1 thereof, is to establish common rules for, inter alia, the transmission and distribution of electricity with a view to improving and integrating competitive electricity markets in the European Union.
- 39 It is apparent from recital 3 of Directive 2009/72 that the text aims, in particular, to achieve a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers in order to bring about completion of the internal market in electricity (judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 36 and 55).
- 40 In that context, non-discriminatory, transparent and fairly priced access to the distribution and the transmission systems is necessary for competition to function and is of paramount importance (see, by analogy, judgments of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 40, and of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 31).
- 41 In particular, free access to the distribution and transmission systems for third parties, guaranteed by the first and second sentences of Article 32(1) of Directive 2009/72 constitutes, as the Court has repeatedly acknowledged, one of the essential measures that Member States are required to implement for bringing about the completion of the internal market in electricity (judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 54 and the case-law cited).
- 42 To achieve these objectives, Directive 2009/72 requires, as stated in recital 9 thereof, an effective legal and functional separation of networks from activities of generation and supply, so as to avoid discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.
- 43 The concepts of distribution system and transmission system are not defined as such in Directive 2009/72. However, Article 2(3) of the directive defines the concept of ‘transmission’ as the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but excludes ‘supply’ itself. Article 2(5) of the directive, for its part, defines the concept of ‘distribution’ as the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but excludes ‘supply’ itself. The concept of ‘supply’ must be understood, according to Article 2(19) of the directive, as meaning the sale of electricity to customers (see, by analogy, judgment of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 45, and, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 28).
- 44 Since those definitions make no express reference to the law of the Member States, the need for a uniform application of EU law and the principle of equality require that the terms of those definitions must be given an autonomous and uniform interpretation throughout the European Union (see, inter alia, judgment of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309, paragraph 36).

- 45 It is clear 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, secondly, a distribution system is a system used to transport electricity at high, medium or low voltage for sale to wholesale or final customers (see, by analogy, judgment of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 46, and judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 29).
- 46 It follows, first of all, that, with regard to the nature of transmission and distribution systems within the meaning of Directive 2009/72 and the quantity of electricity transported on those systems, the sole relevant distinguishing criterion for determining whether a system is a transmission system or a distribution system within the meaning of that directive is the voltage of the electricity transported on those systems (see, by analogy, judgment of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 48, and of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 30).
- 47 The Court has already made it clear that neither the date on which the system was put in place nor the fact that it is intended for self-consumption and operated by a private entity, to which a limited number of generation and consumption units are connected, nor its size or consumption of electricity constitute relevant criteria in that regard, since the EU legislature did not intend to exclude particular transmission or distribution systems from the scope of the directive by reason of those criteria (see, by analogy, judgment of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 49, and, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 31 and 35).
- 48 In the second place, it follows from the definitions in Article 2(3) and (5) of Directive 2009/72 that, with regard to the purpose of the electricity transmission and distribution systems within the meaning of the directive, the relevant distinguishing criterion, as noted by the Advocate General in points 51 and 53 of his Opinion, is the category of customers for which the electricity transported is intended, since a transmission system serves to sell electricity to final customers or to distributors whereas a distribution system serves to sell electricity to wholesale or final customers.
- 49 It follows that systems whose function is to transport electricity at extra-high and high voltage for sale to final customers or to distributors, on the one hand, and at high, medium or low voltage for sale to wholesale or final customers, on the other hand, must be considered to be transmission systems or distribution systems, respectively, and thus caught by Directive 2009/72 (see, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 37).
- 50 It is true that, since its objective is to establish gradually a fully operational internal market in electricity, Directive 2009/72 has not brought about exhaustive harmonisation of the rules relating to, inter alia, the transmission and distribution of electricity (see, to that effect, judgments of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 86, and of 6 December 2018, *FENS*, C-305/17, EU:C:2018:986, paragraphs 23 to 25).
- 51 In addition, Article 2(3) and (5) of Directive 2009/72, while setting out criteria for distinguishing between the concepts of electricity transmission system and electricity distribution system, nevertheless confers on Member States a certain discretion to implement those criteria, as is apparent, inter alia, from the overlapping definitions contained therein with regard to high voltage and the customers concerned.
- 52 Thus, in the absence of any provision on that point in the directive, the Member States, in so far as they observe the distinction drawn in Article 2(3) and (5) thereof between extra-high, high, medium and low voltage retain the power, as observed by the Advocate General in point 64 of his Opinion, to determine the exact thresholds for distinguishing between the various voltage levels.

- 53 Similarly, to the extent that, as follows from Article 2(4) and (6) of Directive 2009/72, both a transmission system operator and a distribution system operator may be responsible for the corresponding interconnections with other systems, Member States are free to determine, in accordance with the definitions in Article 2(3) and (5) of the directive, if the interconnection points belong to the transmission system or to the distribution system.
- 54 Therefore, national legislation such as that at issue in the main proceedings, which provides that the transformation, in an electrical substation, of the voltage to enable the transition from high to medium voltage falls within the remit of the activities of a transmission system, does not go beyond the scope of the Member States' discretion to implement Article 2(3) and (5) of Directive 2009/72, since that choice, provided by the EU legislature, depends on the voltage.
- 55 By contrast, at the risk of undermining the autonomous and uniform interpretation of Article 2(3) and (5) of Directive 2009/72, Member States may not introduce additional distinguishing criteria other than those relating to the voltage and the category of customers to which electricity is brought, to define the concepts of distribution and transmission systems.
- 56 As noted by the Advocate General in points 60 and 61 of his Opinion, although Directive 2009/72 has not introduced an exhaustive harmonisation of the areas governed by it, the concepts of transmission system and distribution system, within the meaning of that directive, play a fundamental role in the scheme thereof in so far as, in order to bring about completion of the internal market in electricity, the directive, as follows from the provisions in Chapters IV to VI thereof and as already pointed out in paragraph 42 above, (i) requires an effective legal and functional separation of those systems and (ii) prescribes distinct rules for the latter and their operators.
- 57 In those circumstances, the Member States, in order to ensure a uniform application of Directive 2009/72 capable of achieving the competitive market provided for therein, must define the concepts of electricity distribution and transmission systems for the purposes of the directive by reference solely to the only two criteria laid down in Article 2(3) and (5) thereof, relating, respectively, to the voltage and to the category of customers to which electricity is brought.
- 58 It follows that Member States may not distinguish between the concepts of electricity distribution and transmission systems, for the purposes of Directive 2009/72, on the basis of a criterion in addition to those laid down in Article 2(3) and (5) thereof.
- 59 Consequently, it must be held that those provisions preclude national legislation such as that at issue in the main proceedings, which uses as a criterion for distinguishing between transmission system and distribution system, in addition to that relating to the voltage, that of the ownership of the electrical installations concerned.
- 60 Moreover, if, as pointed out by the referring court, such a distinguishing criterion stemmed, *inter alia*, from the interpretation of that legislation by a majority of the national courts, it is important to recall that, according to the Court's settled case-law, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 68 and the case-law cited).
- 61 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and

the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 69 and the case-law cited).

- 62 The requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 70 and the case-law cited).
- 63 It is also appropriate to note that, when a Member State decides, as the Republic of Bulgaria did, for the purpose of separating the operation of the electricity transmission system from the generation and supply of electricity, to make use of the right to choose laid down in Article 9(8)(b) of Directive 2009/72, which allows a Member State to decide not to apply Article 9(1) of the directive, on ownership unbundling, in order to designate an independent transmission operator, that choice entails an obligation for the Member State concerned to comply with the requirements of Chapter V of the directive, which comprises Articles 17(1)(a) thereof (see, to that effect, judgment of 26 October 2017, *Balgarska energiyna borsa*, C-347/16, EU:C:2017:816, paragraphs 32, 33 and 41).
- 64 That last provision requires explicitly that independent transmission operators must own the assets that are necessary for the electricity transmission activities, including the transmission system, in particular in order to ensure, as follows from recitals 16, 17 and 19 of Directive 2009/72, the complete and effective independence of those operators from activities of generation and supply (see, to that effect, judgment of 26 October 2017, *Balgarska energiyna borsa*, C-347/16, EU:C:2017:816, paragraph 34).
- 65 By contrast, the provisions of Directive 2009/72 that apply to distribution system operators, which are in Chapter VI of the directive, comprising Articles 24 to 29 thereof, do not impose that requirement in respect of distribution system operators.
- 66 Indeed, first, Article 26(1) of Directive 2009/72, the article being on the unbundling of distribution system operators, merely provides that the distribution system operator, where it is part of a vertically integrated undertaking, must be independent at least in terms of its legal form, organisation and decision-making from other activities not relating to distribution, without however being required to separate the ownership of its assets from those of that undertaking
- 67 Secondly, under Article 26(2)(c) of the directive, the distribution system operator must, at most, ‘have effective decision-making rights’, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network.
- 68 However, as observed by the Advocate General in point 74 of his Opinion, the requirement under national law that the distribution system operator be the owner of that system, although not imposed by Directive 2009/72, may, as the requirement for transmission system operators laid down in Article 9(1)(a) and Article 17(1)(a) of the directive, be capable of reinforcing the effective separation of the various activities in the electricity market.
- 69 That requirement may also serve as an incentive for distribution system operators to invest in their networks and thus contribute to achieving one of the objectives sought by Directive 2009/72 consisting, as follows from recitals 9, 11, 19 and 44 thereof, in promoting investments in infrastructure in order to ensure a stable electricity supply.
- 70 However, that requirement may not jeopardise the achievement of the objective sought by the directive consisting, as follows from paragraphs 38 to 40 above, in establishing an open internal market in electricity on which the proper functioning of competition is ensured.

- 71 In particular, as noted by the Advocate General in points 78 to 81 of his Opinion, where, on the basis of its voltage and the category of customers to which it brings electricity, a system can be classified, under Article 2(3) and (5) of Directive 2009/72, as a distribution system, the requirement that that system is owned by its operator may not have the effect of making that system fall outside the scope of the obligation to comply with the provisions of that directive applicable to it.
- 72 In that regard, it is appropriate to recall that the Court has already recognised that the Member States may not include systems that are caught by Directive 2009/72 in a category of systems different from that expressly provided for in the directive, in particular in order to grant them exemptions not available under that text (see, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 48).
- 73 Consequently, a Member State cannot exclude from the concept of distribution system a system which serves to bring high, medium or low-voltage electricity for sale to wholesale or final customers, on the sole ground that the operator of that system does not own the system.
- 74 Moreover, as stated by the Advocate General in points 82 and 83 of his Opinion, the requirement that the distribution system be owned by the operator cannot lead to that operator being granted a monopoly for an unlimited period of time on electricity distribution in a given area, on account of the barrier to entry that such a requirement would represent for third parties. It is a matter for the referring court, however, to determine whether the requirement at issue is likely to have that effect.
- 75 In the light of all the foregoing, the answer to the first and third questions referred is that Article 2(3) and (5) of Directive 2009/72 must be interpreted as:
- not precluding national legislation such as that at issue in the main proceedings, which provides that the transformation of the voltage to enable the transition from high to medium voltage falls within the remit of the activities of an electricity transmission system;
 - precluding, by contrast, such a legislation that defines the concepts of electricity transmission system and electricity distribution system based on criteria relating not only to the voltage but also to the ownership of the assets used to exercise transmission and distribution activities, respectively.
- 76 That interpretation is without prejudice, however, first, to the application of Article 17(1)(a) of the directive, according to which the transmission system must be owned by an independent transmission operator and, secondly, to the Member States' freedom to require that the distribution system be owned by the operator of that system, in so far as that requirement does not jeopardise the achievement of the objectives sought by the directive, in particular by making such a system fall outside the scope of the obligation to comply with the rules applicable to it under the directive — which is a matter for the referring court to determine.

The second question

- 77 By its second question the referring court asks, in essence, whether Directive 2009/72 must be interpreted as meaning that a user connected to the medium-voltage plant of the electricity system must necessarily be considered to be a customer of the electricity distribution system operator holding an exclusive licence for the distribution of electricity for the area concerned, even if the latter does not own that installation and regardless of the contractual relations between that user and the electricity transmission system operator.

- 78 In that regard, it is appropriate to recall that free access to the distribution and transmission systems for third parties, guaranteed by the first and second sentences of Article 32(1) of Directive 2009/72 constitutes, as already mentioned in paragraph 41 above, one of the essential measures that Member States are required to implement for bringing about the completion of the internal market in electricity.
- 79 That freedom of access is closely linked to the consumers' freedom to choose their suppliers and to the suppliers' right to supply their goods freely to their customers, meaning that, 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 bring electricity to the customers (see, by analogy, judgments of 22 May 2008, *citiworks*, C-439/06, EU:C:2008:298, paragraph 43, and of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraphs 33 and 43).
- 80 According to Article 32(1) of Directive 2009/72, network access should be based on objective, non-discriminatory and transparent criteria and on tariffs published prior to their entry into force, and it should not be discretionary (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 46).
- 81 It follows that that provision leaves the Member States free to take the necessary measures in that regard, since they have authority, under Article 288 TFEU, over the form and the methods to be used to implement a system of third-party access to transmission or distribution systems, provided that they comply with the principle of free access to those systems, except where the directive lays down exceptions or derogations (see, to that effect, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 56 and the case-law cited).
- 82 Moreover, it must be recalled that the Member States' obligations set out in Article 32(1) of Directive 2009/72 are only in respect of the access to the systems and not the connection thereto, meaning the physical connection to the systems (see, to that effect, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 42).
- 83 The customers' freedom to choose their suppliers, enshrined in that provision, is guaranteed whether the supplier connects them to a transmission system or whether that connection connects them to a distribution system (judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 43).
- 84 It follows that Member States retain a certain flexibility in steering system users towards one or another type of system and, therefore, in determining the type of system on which the connection is to be made, provided, however, that they do so in accordance with non-discriminatory and objective considerations. Users are thus not free to choose, at their discretion, the type of system to which they wish to connect (see, to that effect, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraphs 46 to 49).
- 85 In the present case, it follows from the order for reference that the user at issue in the main proceedings seeks connection to the electricity transmission system on the ground that it is linked to a medium-voltage plant integrated in an installation that transforms the voltage to enable the transition from high- to medium-voltage electricity, since, under national law, such a transformation falls within the remit of the activities of that transmission system.
- 86 In that respect, it has already been noted in paragraphs 53 and 54 above that it follows from Article 2(4) and (6) of Directive 2009/72 that the Member States are free to determine, in the exercise of the discretion conferred on them by the directive, whether the interconnection points between an electricity transmission system and an electricity distribution system form part of the former or the

latter type of system, with the result that the Member States may provide that the transformation of the voltage to enable the transition from high to medium voltage falls within the remit of the activities of an electricity transmission system.

- 87 In those circumstances, it is apparent that a user's connection, such as that at issue in the main proceedings, to the electricity transmission system may be considered to be based on objective and non-discriminatory considerations since that user is connected to a medium-voltage plant that, in accordance with Directive 2009/72 and national law, falls within the remit of the activities of that transmission system.
- 88 It follows that the directive does not preclude, in a case such as that at issue in the main proceedings, such a user from being considered to connect to the electricity transmission system.
- 89 It is for the referring court, however, to ascertain that the plant in question actually forms part, as is apparent from the documents before the Court and the oral exchanges at the hearing, of the electrical substation belonging to the electricity transmission system and that, accordingly, it is not an external component of that substation that would form part of the electricity distribution system.
- 90 In any event, it is irrelevant in that regard, as follows from the answer to the first and third questions, in particular paragraph 71 above, whether or not the respective operators of the distribution system and the transmission system own the system concerned, since such a circumstance is not capable of depriving the nature of that system as a distribution or a transmission system within the meaning of Directive 2009/72.
- 91 Consequently, the answer to the second question is that Directive 2009/72, in particular Article 2(3) to (6) and Article 32(1) thereof, must be interpreted as meaning that a user connected to the electricity network at a medium-voltage plant must not necessarily be considered to be a customer of the electricity distribution system operator holding an exclusive licence for electricity distribution for the area concerned, irrespective of the contractual relations between that user and the electricity transmission system operator, since such a user may be considered to be a customer of the electricity transmission system when it is connected to a medium-voltage plant forming part of an electrical substation whose activity of transforming the voltage to enable the transition from high to medium voltage falls within the remit of the activities of that system, which is a matter for the referring court to determine.

Costs

- 92 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 (Fifth Chamber) hereby rules:

- 1. Article 2(3) and (5) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as:**
 - not precluding national legislation such as that at issue in the main proceedings, which provides that the transformation of the voltage to enable the transition from high to medium voltage falls within the remit of the activities of an electricity transmission system;**

- **precluding, by contrast, such a legislation which defines the concepts of electricity transmission system and electricity distribution system based on criteria relating not only to the voltage but also to the ownership of the assets used to exercise transmission and distribution activities, respectively.**

That interpretation is without prejudice, however, first, to the application of Article 17(1)(a) of the directive, according to which the transmission system must be owned by an independent transmission operator and, secondly, to the Member States' right to require that the distribution system operator own that system, in so far as that requirement does not jeopardise the achievement of the objectives sought by the directive, in particular by making such a system fall outside the scope of the obligation to comply with the rules applicable to it under the directive — which is a matter for the referring court to determine.

- 2. Directive 2009/72, in particular Article 2(3) to (6) and Article 32(1) thereof, must be interpreted as meaning that a user connected to the electricity network at a medium-voltage plant must not necessarily be considered to be a customer of the electricity distribution system operator holding an exclusive licence for electricity distribution for the area concerned, irrespective of the contractual relations between that user and the electricity transmission system operator, since such a user may be considered to be a customer of the electricity transmission system when it is connected to a medium-voltage plant forming part of an electrical substation whose activity of transforming the voltage to enable the transition from high to medium voltage falls within the remit of the activities of that system — which is a matter for the referring court to determine.**

[Signatures]