JUDGMENT OF THE COURT (Grand Chamber)

22 October 2013 (*)

(Reference for a preliminary ruling – Free movement of capital – Article 63 TFEU – Rules governing the system of property ownership – Article 345 TFEU – Electricity and gas distribution system operators – Prohibition of privatisation – Prohibition of links with undertakings which generate/produce, supply or trade electricity or gas – Prohibition of activity which may adversely affect system operation)

In Joined Cases C-105/12 to C-107/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 24 February 2012, received at the Court on 29 February 2012, in the proceedings

Staat der Nederlanden

v

Essent NV (C-105/12),

Essent Nederland BV (C-105/12),

Eneco Holding NV (C-106/12),

Delta NV (C-107/12),

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, and M. Safjan, Presidents of Chambers, A. Rosas, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, A. Arabadjiev (Rapporteur), D. Šváby, M. Berger and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 January 2013,

after considering the observations submitted on behalf of:

– Essent NV and Essent Nederland BV, by W. Knibbeler and A. Pliego Selie, advocaten,

– Eneco Holding NV, by C. Kroes, advocaat,

– Delta NV, by T. Ottervanger and P. Glazener, advocaten,

– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

– the Czech Government, by M. Smolek and T. Müller, acting as Agents,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by E. Montaguti, S. Noë and T. van Rijn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 April 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 63 TFEU and Article 345 TFEU.

2 The request has been made in proceedings between the Staat der Nederlanden and Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV, companies which are active, in particular, in the generation/production, supply and trade of electricity and gas in the Netherlands (together 'Essent and Others'), concerning the compatibility with European Union law of national legislation which prohibits, first, the sale to private investors of shares held in the electricity and gas distribution system operators active in the Netherlands ('the prohibition of privatisation'), secondly, any ownership or control links between, on the one hand, companies which are members of the same group as an operator of such distribution systems and, on the other, companies which are members of the same group as an undertaking which generates/produces, supplies or trades in electricity or gas in the Netherlands ('the group prohibition') and, thirdly, engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the operation of the system concerned ('the prohibition of activity which may adversely affect the system operation').

Legal context

European Union law

Directive 2003/54/EC

3 Recitals 4 to 8, 10 and 23 in the preamble to Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37) read as follows:

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

(5) The main obstacles in arriving at a fully operational and competitive internal market relate amongst other things to issues of access to the network, tarification issues and different degrees of market opening between Member States.

(6) For competition to function, network access must be non-discriminatory, transparent and fairly priced.

(7) In order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance. A transmission or distribution system operator may comprise one or more undertakings.

(8) In order to ensure efficient and non-discriminatory network access it is appropriate that the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist. The [European] Commission should assess measures of equivalent effect, developed by Member States to achieve the aim of this requirement, and, where appropriate, submit proposals to amend this Directive. It is also appropriate that the transmission and distribution system operators have effective decision-making rights with respect to assets necessary to maintain, operate and develop networks when the assets in question are owned and operated by vertically integrated undertakings.

It is necessary that the independence of the distribution system operators and the transmission system operators be guaranteed especially with regard to generation and supply interests. Independent management structures must therefore be put in place between the distribution system

operators and the transmission system operators and any generation/supply companies.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation does not imply a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertakings. However, a non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible.

...

(10) While this Directive is not addressing ownership issues it is recalled that in case of an undertaking performing transmission or distribution and which is separated in its legal form from those undertakings performing generation and/or supply activities, the designated system operators may be the same undertaking owning the infrastructure.

…

(23) In the interest of security of supply, the supply/demand balance in individual Member States should be monitored, and monitoring should be followed by a report on the situation at Community level, taking account of interconnection capacity between areas. … 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 15 of that directive, headed 'Unbundling of distribution system operators', provided, inter alia:

'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 of 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:

(a) those persons responsible for the management of the distribution system operator may not participate in company structures of the

integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the distribution system operator shall have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 23(2), in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the transmission system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument;

(d) the distribution system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. ...

…’

Directive 2003/55/EC

5 The wording of recitals 4, 6 and 7 in the preamble to Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57) corresponded to that of recitals 4, 5 and 6 in the preamble to Directive 2003/54. The drafting of recitals 8 and 23 in the preamble to Directive 2003/55 corresponded, *mutatis mutandis*, to that of recitals 7 and 23 in the preamble to Directive 2003/54.

6 Recitals 9 and 10 in the preamble to Directive 2003/55 read as follows:

‘(9) In case of a gas undertaking performing transmission, distribution, storage or liquefied natural gas (LNG) activities and which is separate in

its legal form from those undertakings performing production and/or supply activities, the designated system operators may be the same undertaking owning the infrastructure.

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

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

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation [does not imply] a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertakings. However, a non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible.'

7 Article 13 of that directive, headed 'Unbundling of distribution system operators', was, *mutatis mutandis*, identical to Article 15 of Directive 2003/54.

Directive 2009/72/EC

8 Recitals 3, 4, 7, 9 to 12, 15, 16, 21, 25, 26 and 44 in the preamble to 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) read as follows:

'(3) The freedoms which the Treaty 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.

(4) However, at present, there are obstacles to the sale of electricity on equal terms and without discrimination or disadvantages in the [European Union]. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.

...

(7) The Communication of the Commission of 10 January 2007 entitled "An Energy Policy for Europe" highlighted the importance of completing the internal market in electricity and of creating a level playing field for all electricity undertakings established in the [European Union]. The Communications of the Commission of 10 January 2007 entitled "Prospects for the internal gas and electricity market" and "Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)" showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well-functioning internal market.

...

(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.

(10) The rules on legal and functional unbundling as provided for in Directive 2003/54/EC have not, however, led to effective unbundling of the transmission system operators. At its meeting on 8 and 9 March 2007, the European Council therefore invited the Commission to develop legislative proposals for the "effective separation of supply and generation activities from network operations".

(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. Within those limits, a generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

(12) Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.

...

(15) Under ownership unbundling, to ensure full independence of network operation from supply and generation interests and to prevent exchanges of any confidential information, the same person should not be a member of the managing boards of both a transmission system operator or a transmission system and an undertaking performing any of the functions of generation or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator or a transmission system and to exercise 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.

...

(21) A Member State has the right to opt for full ownership unbundling in its territory. Where a Member State has exercised that right, an undertaking does not have the right to set up an independent system operator or an independent transmission operator. Furthermore, an undertaking performing any of the functions of generation or supply cannot directly or indirectly exercise control or any right over a transmission system operator from a Member State that has opted for full ownership unbundling.

...

(25) The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States. ...

(26) Non-discriminatory access to the distribution network determines downstream access to customers at retail level. The scope for discrimination as regards third-party access and investment, however, is less significant at distribution level than at transmission level where congestion and the influence of generation or supply interests are generally greater than at distribution level. Moreover, legal and functional unbundling of distribution system operators was required, pursuant to Directive 2003/54/EC, only from 1 July 2007 and its effects on the internal market in electricity still need to be evaluated. The rules on legal and functional unbundling currently in place can lead to effective unbundling provided they are more clearly defined, properly implemented and closely monitored. To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to household and small non-household customers.

...

(44) In the interests of security of supply, the balance between supply and demand in individual Member States should be monitored, and such monitoring should be followed by a report on the situation at Community level, taking account of interconnection capacity between areas. … 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.'

9 Article 9 of Directive 2009/72 deals with 'Unbundling of transmission systems and transmission system operators' and Article 14 thereof with 'Unbundling of transmission system owners'. The headings of Articles 18 and 19 of that directive indicate that their respective aims are to ensure the 'Independence of the transmission system operator' and the 'Independence of the staff and the management of the transmission system operator'.

10 Article 26(1) to (3) of that directive, headed 'Unbundling of distribution system operators' provides:

'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:

(a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(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. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 37(6), in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. ...

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.'

11 In accordance with the first subparagraph of Article 49(1) of Directive 2009/72, the period for its transposition expired on 3 March 2011.

Directive 2009/73/EC

12 The wording of recitals 3, 5, 6, 8, 9, 12, 13 and 18 in the preamble to Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) corresponds to that of recitals 3, 7, 9, 11, 12, 15, 16 and 21 in the preamble to Directive 2009/72. Recitals 4, 7, 22, 25 and 40 in the preamble to Directive 2009/73 correspond, *mutatis mutandis*, to recitals 4, 10, 25, 26 and 44 in the preamble to Directive 2003/72.

13 Article 9 of Directive 2009/73 governs the '[u]nbundling of transmission systems and transmission system operators' and Article 15 thereof governs the '[u]nbundling of transmission systems owners and storage system operators'. The aim of Articles 18 and 19 respectively of that directive is to ensure, according to their headings, the '[i]ndependence of the transmission system operator' and the '[i]ndependence of the staff and the management of the transmission system operator'.

14 Article 26(1) to (3) of that directive, headed 'Unbundling of distribution system operators', is, *mutatis mutandis*, identical to Article 26(1) to (3) of Directive 2009/72.

15 In accordance with the first subparagraph of Article 54(1) of Directive 2009/73, the period for the transposition of that directive expired on 3 March 2011.

Netherlands law

The prohibition of privatisation

16 It is apparent from the requests for a preliminary ruling that, at the time material to the main proceedings, the source of the prohibition of privatisation was a combined reading of, on the one hand, Article 93(2) of the Law

regulating the production, supply and transmission of electricity (the 1998 Law on electricity) (Wet houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit (Elektriciteitswet 1998) of 2 July 1998, *Staatsblad* 1998 No 427: 'the Law on electricity'), and/or Article 85(2) of the Law regulating the transmission and supply of gas (the Law on gas) (Wet houdende regels omtrent het transport en de levering van gas (Gaswet)) of 22 June 2000 (*Staatsblad* 2000 No 305; 'the Law on gas') and, on the other, Article 1 of the Decree establishing the rules relating to permitting changes in rights attaching to shareholdings in a system operator subject to the 1998 Law on electricity and to the Law on Gas (the decree on shareholdings in system operators) (Besluit, houdende regels omtrent het verlenen van instemming met wijzigingen ten aanzien van rechten op aandelen in een netbeheerder als bedoeld in de Elektriciteitswet 1998 en in de Gaswet (Besluit aandelen netbeheerders)) of 9 February 2008 (*Staatsblad* 2008 No 62; 'the 2008 Decree'), which was adopted pursuant to Article 93(4) of the Law on electricity and Article 85(4) of the Law on gas.

17 Under Article 93(2) of the Law on electricity and Article 85(2) of the Law on gas, the transfer of shares held in a system operator required the consent of the Minister for Economic Affairs. Pursuant to Articles 1 and 3 of the 2008 Decree, that consent had to be refused where the result of such a transfer was that the shares became the property of persons other than the State of the Netherlands, the provinces of the Netherlands or its municipalities (together 'the authorities'), or other specified legal persons, including Essent and Others, all of whose shares were owned, directly or indirectly, by those authorities.

The group prohibition

18 Like the prohibition of privatisation, the group prohibition was introduced into Netherlands law by the Law amending the Law on electricity and the Law on gas in respect of the rules concerning independent system operation (the Law on independent system operation) (Wet tot wijziging van de Elektriciteitswet 1998 en van de Gaswet in verband met nadere regels omtrent een onafhankelijk netbeheer (Wet onafhankelijk netbeheer) of 23 November 2006, *Staatsblad* 2006 No 614;'the Law on independent system operation'), namely, Article 10b(1) of the Law on electricity and Article 2c(1) of the Law on gas. The Law on independent system operation, inter alia, amended the provisions of national law which had been adopted in order to implement Directives 2003/54 and 2003/55 ('the 2003 Directives').

19 Article 10b(1) to (3) of the Law on electricity provides:

'1. A system operator shall not be a member of a group, within the meaning of Article 24b of Book 2 of the Civil Code, of which a legal

person or company which generates, supplies or trades in electricity in the Netherlands is also a member.

2. Legal persons and companies which are members of a group, within the meaning of Article 24b of Book 2 of the Civil Code, of which a legal person or company which generates, supplies or trades in electricity in the Netherlands is also a member shall not own any shares in a system operator or in a legal person which is a member of the same group as that of which a system operator is a member and shall not have any interest in a company which is a member of the same group as a system operator.

3. A system operator and group companies within the meaning of Article 24b of Book 2 of the Civil Code linked to the system operator:

a. shall not own any shares in a legal person which generates, supplies or trades in electricity in the Netherlands or in a legal person which is a member of the same group as a legal person which generates, supplies or trades in electricity in the Netherlands;

b. shall not have any interest in a company which generates, supplies or trades in electricity in the Netherlands or in a company which is a member of the same group as a legal person or a company which generates, supplies or trades in electricity in the Netherlands.'

The prohibition of activities which may adversely affect system operation

20 The prohibition of activities which may adversely affect system operation, also introduced into the Netherlands legal order by the Law on independent system operation, was laid down in Article 17(2) and (3) of the Law on electricity and Article 10b(2) and (3) of the Law on gas. Those provisions read as follows:

'2. If a system operator which is not the system operator of the national high-voltage grid is a member of a group within the meaning of Article 24b of Book 2 of the Civil Code, that group may not engage in transactions or activities which may adversely affect the operation of the system concerned.

3. Transactions or activities within the meaning of paragraph 2 shall extend to the following:

a. transactions or activities which are unrelated to infrastructure equipment or associated activities,

b. the grant by the system operator of guarantees in respect of the funding of activities of legal persons or companies belonging to the group, and

c. the offer by the system operator to stand guarantor of the debts of legal persons or companies belonging to the group,

unless the system operator grants guarantees or stands guarantor in respect of debts incurred:

1. in respect of requirements of operations or activities in which the system operator itself might engage,

2. for other reasons linked to operation of the system, or

3. to satisfy conditions linked to the application of legal provisions.'

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

21 At the time of adoption of the Law on independent system operation, which introduced, into the Law on electricity and the Law on gas, the group prohibition and the prohibition of activities which may adversely affect system operation, Essent and Others were vertically integrated undertakings, active both in the generation/production, supply and/or trade in electricity and/or gas in the Netherlands and in the operation and use of electricity or gas distribution systems in the Netherlands.

22 Following the adoption of the Law on independent system operation, which, inter alia, introduced the group prohibition, Essent NV was split, on 1 July 2009, into two separate companies, namely, (i) Enexis Holding NV, whose object as a company is the operation of a gas and electricity distribution system in the Netherlands and all of whose shares are owned by the authorities and (ii) Essent NV, whose object as a company is to generate/produce, supply and trade electricity and gas. The latter company was purchased by the subsidiary of a German group which specialises in the energy sector, RWE AG. Eneco Holding NV and Delta NV were not split, but identified their subsidiaries Stedin Netbeheer BV and Delta Netwerkbedrijf BV as the respective operators of their distribution systems in the Netherlands.

23 By three separate actions, Essent and Others sought from the Rechtbank Den Haag (The Hague District Court) a declaration that the provisions of national law which contain the group prohibition and the prohibition of activities which may adversely affect system operation are incompatible with, inter alia, Article 63 TFEU and that they must therefore be disapplied.

24 The State of the Netherlands, the defendant in each of those cases, pleaded against those actions, first, the general rule, contained in the national

legislation, on the prohibition of privatisation, which, in its opinion, constitutes a body of rules governing the system of property ownership, within the meaning of Article 345 TFEU. The effect of that prohibition is, first, that shares held in a system operator active in the Netherlands cannot be the subject of private investment and, secondly, that the rules of the FEU Treaty relating to free movement of capital and freedom of establishment are not applicable. Alternatively, the State of the Netherlands maintained that the group prohibition and the prohibition of activities which may adversely affect system operation do not impede either the free movement of capital or freedom of establishment or, at the least, that a restriction on those freedoms is justified by overriding reasons in the public interest.

25 By judgment of 11 March 2009 the Rechtbank Den Haag dismissed the actions of Essent and Others. On appeal, the Gerechtshof Den Haag (Regional Court of Appeal, The Hague) set aside that judgment by a decision of 22 June 2010 and ruled that the above provisions of national law are incompatible with Article 63 TFEU and must therefore be disapplied. The State of the Netherlands brought an appeal on a point of law before the referring court.

26 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer to the Court of Justice the following questions for a preliminary ruling, which are identically worded in each of the joined cases:

‘1. Must Article 345 TFEU be interpreted as meaning that the “rules in Member States governing the system of property ownership” also include the rules entailing the absolute prohibition of privatisation which is at issue in [the main proceedings], as set out in [the 2008 Decree], in conjunction with Article 93 of [the Law on electricity] and Article 85 of [the Law on gas], under which shares in a system operator can be transferred only within the circle of public authorities?

2. If Question 1 is answered in the affirmative, does this then have the effect that the rules relating to the free movement of capital are not applicable to the group prohibition and the prohibition of activities which may adversely affect system operation, or at least that an assessment of the group prohibition and of the prohibition of activities which may adversely affect system operation in the light of the rules relating to the free movement of capital is not required?

3. Are the objectives which also underlie [the Law on independent network operation], that is to say, to achieve transparency in the energy market and to prevent distortions of competition by combating cross-subsidisation in the broad sense (including strategic information exchange), purely economic interests, or can they also be regarded as

interests of a non-economic nature, in the sense that in certain circumstances, as overriding reasons in the public interest, they may constitute a justification for a restriction on the free movement of capital?'

Procedure before the Court

27 By order of 26 March 2012, the President of the Court of Justice decided to join Cases C-105/12, C-106/12 and C-107/12 for the purposes of the oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first and second questions

28 By its first and second questions, which may be examined together, the referring court seeks, in essence, to ascertain whether Article 345 TFEU must be interpreted as covering rules entailing the prohibition of privatisation, such as those at issue in the main proceedings, which have the effect that shares held in an electricity or gas distribution system operator active in the Netherlands must be held, directly or indirectly, by the public authorities identified by the national legislation. If the answer is that it does, the referring court asks whether the consequence of that interpretation is that Article 63 TFEU ceases to apply to national provisions, such as those at issue in the main proceedings, which prohibit, first, any ownership or control links between companies which are members of the same group as an electricity or gas distribution system operator active in the Netherlands and companies which are members of the same group as an undertaking which generates/produces, supplies or trades in electricity or gas in the Netherlands and, secondly, the engagement by such an operator and by the group of which it is a member in transactions or activities which 'may adversely affect the operation of the system' concerned.

29 Article 345 TFEU is an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership.

30 In that regard, it is apparent from the Court's case-law that the Treaties do not preclude, as a general rule, either the nationalisation of undertakings (see, to that effect, Case 6/64 *Costa* [1964] ECR 585, at 598) or their privatisation (see, to that effect, Case C-244/11 *Commission* v *Greece* [2012] ECR, paragraph 17).

31 It follows that Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.

32 In the main proceedings, it can be seen from Article 93(2) of the Law on electricity, Article 85(2) of the Law on gas and Article 1 of the 2008 Decree, the effect of which was summarised in paragraph 17 of this judgment, that the prohibition of privatisation, within the meaning of the national legislation at issue in the main proceedings, allows, in essence, the transfer of shares held in a distribution system operator only to the authorities and to legal persons owned, directly or indirectly, by those authorities, since any transfer which has the result that the shares become the property of persons other than such authorities and legal persons is prohibited.

33 It follows that the prohibition of privatisation precludes ownership by any private individual of shares in an electricity or gas distribution system operator active in the Netherlands. Its objective is therefore to maintain a body of rules relating to public ownership in respect of those operators.

34 Such a prohibition falls within the scope of Article 345 TFEU.

35 In this case, it is moreover apparent that the prohibition of privatisation encompasses the prohibition contained in Article 10b(2) of the Law on electricity and Article 2c(2) of the Law on gas, which provide that an undertaking established in another Member State and active in the generation/production, supply or trade in electricity or gas in the Netherlands and companies of another Member State which are members of the same group as such an undertaking may not acquire shares in an electricity or gas distribution system operator active in the Netherlands.

36 However, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital (see, to that effect, Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7; Case C-302/97*Konle* [1999] ECR I-3099, paragraph 38; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24; Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 64; Case C-271/09 *Commission* v *Poland* [2011] ECR I-13613, paragraph 44; and *Commission* v *Greece*, paragraph 16).

37 Consequently, the fact that the Kingdom of the Netherlands has established, in the sector of electricity or gas distribution system operators active in its territory, a body of rules relating to public ownership covered by Article 345 TFEU does not mean that that Member State is free to disregard, in that

sector, the rules relating to the free movement of capital (see, by analogy, *Commission* v*Poland*, paragraph 44 and the case-law cited).

38 Accordingly, the prohibition of privatisation falls within the scope of Article 63 TFEU and must be examined in the light of that article, as must the group prohibition and indeed the prohibition of activities which may adversely affect system operation.

39 In that regard, it should be noted that, according to settled case-law, Article 63(1) TFEU generally prohibits restrictions on movements of capital between Member States (Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 18 and the case-law cited, and Case C-171/08 *Commission* v *Portugal*, paragraph 48).

40 In the absence, in the FEU Treaty, of a definition of the concept of 'movement of capital' within the meaning of Article 63(1) TFEU, the Court has previously recognised as having indicative value the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the [EC] Treaty (OJ 1988 L 178, p. 5). The Court has therefore held that movements of capital within the meaning of Article 63(1) TFEU include in particular 'direct' investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (see *Commission* v *Netherlands*, paragraph 19, and Case C-171/08 *Commission* v *Portugal*, paragraph 49).

41 Concerning those two forms of investment, the Court has stated that national measures must be regarded as 'impediments' for the purposes of Article 63(1) TFEU if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital (see Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraphs 45 and 46; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 40; Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 61 and 62; Case C-98/01*Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 47 and 49; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31; and *Commission* v *Netherlands*, paragraph 20).

42 It is also apparent from the Court's case-law that a provision of national law which imposes quantitative or qualitative restrictions on investments made in other Member States has a restrictive effect in relation to companies

established in other Member States in that such a provision constitutes an obstacle to the raising, by such companies, of capital, since the acquisition of, inter alia, shares is restricted (see, to that effect, *Commission* v *Poland*, paragraphs 51 and 52 and the case-law cited).

43 In the main proceedings, the prohibition of privatisation means that no private investor can acquire shares or interests in the capital of an electricity or gas distribution system operator active in the Netherlands.

44 Further, as regards the group prohibition and the prohibition of activities which may adversely affect system operation, it must be observed that those prohibitions have several aspects. First, it follows from the group prohibition that a company of another Member State which is a member of the same group as an undertaking active in generation/production, supply or trade of electricity or gas in the Netherlands may not acquire shares in a company which is a member of the same group as an electricity or gas distribution system operator active in the Netherlands.

45 Secondly, the group prohibition also means that a company which is a member of the same group as an electricity or gas distribution system operator active in the Netherlands may not invest in an undertaking established in another Member State which is active in the sector of generation/production, supply or trade of electricity or gas in the Netherlands, or in a company which is a member of the same group as such an undertaking.

46 Thirdly, the prohibition of activities which may adversely affect system operation is also such as to impose qualitative restrictions on investments in other Member States, since it prevents, directly or indirectly, companies in the same group as an electricity or gas distribution system operator active in the Netherlands from investing in undertakings active in sectors other than system operation.

47 Accordingly, those prohibitions constitute restrictions on the free movement of capital, within the meaning of Article 63 TFEU.

48 Consequently, the answer to the first and second questions is that Article 345 TFEU must be interpreted as covering rules entailing the prohibition of privatisation, such as those at issue in the main proceedings, which have the effect that shares held in an electricity or gas distribution system operator active in the Netherlands must be held, directly or indirectly, by the public authorities identified by the national legislation. However, that interpretation does not mean that Article 63 TFEU does not apply to provisions of national law, such as those at issue in the main proceedings, which prohibit the privatisation of electricity or gas distribution system operators or, further, which prohibit, first, ownership or control links between companies which are

members of the same group as an electricity or gas distribution system operator active in the Netherlands and companies which are members of the same group as an undertaking which generates/produces, supplies, or trades in electricity or gas in the Netherlands and, secondly, engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the interests of the system operation.

The third question

49 By its third question, the referring court seeks to ascertain, in essence, whether objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition, constitute purely economic interests or, on the contrary, overriding reasons in the public interest capable of justifying restrictions on the free movement of capital.

50 The Court of Justice has repeatedly held that the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest within the meaning of the Court's case-law (see the judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 35, and *Commission* v*Poland*, paragraph 55).

51 Moreover, according to settled case-law, grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaties (Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 22, and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34).

52 However, the Court has accepted that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest (see, to that effect, Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 60 and the case-law cited).

53 Accordingly, as regards the prohibition of privatisation, which falls within the scope of Article 345 TFEU, it has indeed been held that that provision cannot justify a restriction on the rules relating to the free movement of capital (see Case C-171/08 *Commission* v *Portugal*, paragraph 64 and the case-law cited, and *Commission* v *Poland*, paragraph 44). That does not however mean that the interest underlying the choice of the legislature in relation to the rules on the public or private ownership of the electricity or gas distribution system operator may not be taken into consideration as an overriding reason in the public interest.

54 In that regard, it must be observed that the situations in, on the one hand, the cases in the main proceedings and, on the other, the cases which gave rise to those judgments are not comparable. What is at issue in the cases in the main proceedings is an absolute prohibition of privatisation, whereas the case which gave rise to the judgment in Case C-171/08 *Commission* v *Portugal* concerned restrictions created by privileges which the Member States attached to their position as a shareholder in a privatised undertaking, and the case which gave rise to the judgment in *Commission* v *Poland* concerned restrictions on investments abroad by open pension funds which, however, in no way affected the rules relating to ownership of those funds.

55 Consequently, the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital. Accordingly, in the main proceedings, it is for the referring court to conduct such an examination.

56 As regards the other prohibitions, it is clear, first, that the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition serve to ensure undistorted competition on the markets for the generation/production, supply and trade of electricity and gas in the Netherlands and, secondly, that the objective of combating cross-subsidisation seeks, further, to guarantee adequate investment in the electricity and gas distribution systems.

57 Consequently, it must be determined whether the national measures at issue in the main proceedings ultimately pursue, by means of those objectives, overriding objectives in the public interest.

58 The objective of undistorted competition on those markets is also pursued by the FEU Treaty, the preamble to which underlines the need for concerted action in order to guarantee, inter alia, fair competition, the ultimate aim of that action being to protect consumers. According to the Court's settled case-law, consumer protection constitutes an overriding reason in the public interest (Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083, paragraph 27; Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 52; and Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraph 89).

59 It must also be observed that the objective of guaranteeing adequate investment in the electricity and gas distribution systems is designed to ensure, inter alia, security of energy supply, an objective which the Court has also recognised as being an overriding reason in the public interest (Case

72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34 and 35; Case C-503/99 *Commission* v*Belgium* [2002] ECR I-4809, paragraph 46; and Case C-174/04 *Commission* v *Italy*, paragraph 40).

60 Last, as stated in paragraphs 18 and 20 of this judgment, the group prohibition and the prohibition of activities which may adversely affect system operation were introduced by the Law on independent system operation, which itself, inter alia amended the provisions of national law adopted in order to transpose the 2003 Directives into the Netherlands legal system. In particular, those prohibitions amended the provisions which were introduced in order to transpose Article 15 of Directive 2003/54 and Article 13 of Directive 2003/55.

61 It can be seen from recitals 4 to 8 and 10 in the preamble to Directive 2003/54 and recitals 4 and 6 to 10 in the preamble to Directive 2003/55 that those directives sought, inter alia, to establish an open and transparent market, non-discriminatory and transparent access to the network of the distribution system operator, and a level playing field.

62 In particular, it is apparent from recital 8 of Directive 2003/54 and recital 10 of Directive 2003/55, first, that the Member States are to develop measures to achieve those objectives. Further, those recitals underline the wish of the European Union legislature that distribution system operators should have available to them effective decision-making rights with respect to assets necessary to maintain, operate, and develop networks.

63 Moreover, recital 23 of Directive 2003/54 and recital 23 of Directive 2003/55 state that the construction and maintenance of the necessary network infrastructure are important elements in ensuring a stable and secure supply of electricity of electricity and gas.

64 It follows that, even if the group prohibition and the prohibition of activities which may adversely affect system operation were not imposed by those directives, the Kingdom of the Netherlands pursued, by introducing those measures, objectives sought by the 2003 Directives.

65 That finding is supported by Directives 2009/72 and 2009/73 which are designed, inter alia, to achieve the same objectives, as can be seen both from recitals 3, 4, 9 to 12, 15, 25 and 44 in the preamble to Directive 2009/72 and from recitals 3, 4, 6 to 13, 22 and 40 of Directive 2009/73. In particular, recitals 4, 9, 11, 15, 25, 26 and 44 of Directive 2009/72 and recitals 4, 6, 8, 12, 22, 25 and 40 in the preamble to Directive 2009/73 disclose the wish of the European Union legislature to ensure non-discriminatory access to electricity or gas distribution systems and transparency in the markets, to prevent cross-subsidisation, to ensure adequate investment in the networks in order to

guarantee the stable security of supply of electricity and gas and to prevent exchanges of confidential information between the system operators and the generation/production and supply undertakings.

66 Consequently, the objectives referred to by the referring court may, in principle, as overriding reasons in the public interest, justify the identified restrictions on fundamental freedoms.

67 However, it is also necessary that the restrictions at issue are appropriate to the objectives pursued and do not go beyond what is necessary to attain those objectives (Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 82, and *Commission* v *Poland*, paragraph 58), which it is for the referring court to determine.

68 It follows from the foregoing that the answer to the third question is as follows:

– as regards the rules entailing the prohibition of privatisation at issue in the main proceedings, which falls within the scope of Article 345 TFEU, the objectives which underlie the choice of the legislature in relation to the adopted rules governing the system of property ownership may be taken into consideration as overriding reasons in the public interest to justify the restriction on the free movement of capital;

– as regards the other prohibitions, the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition may, as overriding reasons in the public interest, justify restrictions on the free movement of capital caused by provisions of national law, such as those at issue in the main proceedings.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Grand Chamber) hereby rules:

1. Article 345 TFEU must be interpreted as covering rules entailing the prohibition of privatisation, such as those at issue in the main proceedings, which have the effect that shares held in an electricity

or gas distribution system operator active in the Netherlands must be held, directly or indirectly, by the public authorities identified by the national legislation. However, that interpretation does not mean that Article 63 TFEU does not apply to provisions of national law, such as those at issue in the main proceedings, which prohibit the privatisation of electricity or gas distribution system operators, or, further, which prohibit, first, ownership or control links between companies which are members of the same group as an electricity or gas distribution system operator active in the Netherlands and companies which are members of the same group as an undertaking which produces, supplies, or trades in electricity or gas in the Netherlands and, secondly, engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the operation of the system concerned.

2. **As regards the rules entailing the prohibition of privatisation at issue in the main proceedings, which falls within the scope of Article 345 TFEU, the objectives which underlie the choice of the legislature in relation to the adopted rules governing the system of property ownership may be taken into consideration as overriding reasons in the public interest to justify the restriction on the free movement of capital. As regards the other prohibitions, the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition may, as overriding reasons in the public interest, justify restrictions on the free movement of capital caused by provisions of national law, such as those at issue in the main proceedings.**

[Signatures]

---

* Language of the case: Dutch.