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1 — Original language: German.

I - 4986
I — Introduction

1. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity² (hereinafter, 'the Directive' or 'Directive 96/92') introduced a second phase in the liberalisation of the electricity market within the Community. An internal market in electricity was to be created by the progressive introduction of competition in the Member States and the opening-up of national markets. It was apparent that very different circumstances prevailed within the Member States at the outset: whilst in some of the Member States the generation, transmission and distribution of electricity was the responsibility of a — usually State-owned — vertically integrated undertaking having exclusive rights, other Member States had a large number of private producers and system operators either with or without territorially restricted monopolies, so that the degree of openness in the markets differed between the individual States.³

2. The progressive liberalisation of the national electricity markets was effected for the most part by the authorisation of a certain degree of competition, involving the splitting-up of production, transportation and distribution activities. The integration of the national markets for the purposes of creating an internal market in electricity within the Community raises specific issues in itself, particularly in relation to the interoperability of systems and transport and interconnection capacity. The creation

³ For a review see Per Conradl Andersen, 'Free movement of electricity: third party access and quantitative restrictions', Legal issues of European integration, No. 2 (1994) p. 51 et seq.
of an internal market requires an exchange of electricity between the Member States within the scope of existing technical options. However, capacity congestion on the interconnection of systems can itself prevent the cross-border transmission of electricity.

3. In addition to these fundamental issues, the aim of liberalisation of electricity markets pursued by the Directive raises various complex transitional issues in general. The Directive itself contains a transitional provision in Article 24 covering the treatment of commitments and guarantees of operation in the Member States which might not be honoured following liberalisation and affords wide-ranging powers to the Commission in that respect.

4. In this case the Court of Justice is required to resolve a material transitional issue relating to trade in electricity between Member States and to clarify Community principles in relation to the post market liberalisation treatment of long-term electricity supply contracts concluded prior to the opening-up of the market.

5. Until the market was opened up an undertaking formed by four regional electricity producers — and known as ‘SEP’ — dominated the electricity market in the Netherlands. This undertaking was entrusted with services of general economic interest, which also included ensuring security of supply. As national production did not satisfy national demand and as expansion of national generating capacity was not politically feasible SEP concluded long-term electricity supply contracts with foreign suppliers. The duration of those contracts extended beyond the time that the market was opened up. As interconnection capacity in the Netherlands is limited — as in other Member States — the Netherlands legislature afforded SEP preferential status in relation to the allocation of importation capacity after the market had been opened up. It is this preferential allocation after the market was opened up that forms the subject of the main proceedings. The new distribution companies considered that the national provision concerned distorted competition to their detriment and constituted an infringement of the principle of equal treatment contained in the Directive.

4 — Reference is made here to just the discussion on the funding of so-called ‘stranded costs’ — that is to say, costs resulting from unprofitable investment made in the past in reliance upon long-term use. Since those costs can no longer be recovered as a result of the opening up of the market, one question that arises is the extent to which they are eligible for aid.

6. It will therefore essentially be for the Court of Justice to decide whether and to what extent the opening-up of the market intended by the Directive — accompanied by the formation of an internal market in electricity within the Community — can be deferred in reliance upon existing commitments which, at least on the date that they arose, served to perform tasks of general
economic interest. This question has not yet been specifically clarified in case-law or in the context of the Commission’s decisions; it should also be emphasised that this is a question that is ultimately of relevance to all network services.

II — Legal framework

A — Community law

7. Article 28 EC provides:

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

8. Article 86 EC provides (excerpts only):

'(1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

9. Article 7 of Directive 96/92 is to be found in Chapter IV 'Transmission system operation' and reads as follows (excerpts only):

'(1) Member States shall designate or shall require undertakings which own transmission systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, a system operator to be responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and its interconnectors with other systems, in order to guarantee security of supply.

2. Member States shall ensure that technical rules establishing the minimum technical
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3. The system operator shall be responsible for managing energy flows on the system, taking into account exchanges with other interconnected systems. ...

4. The system operator shall provide to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system.

5. The system operator shall not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

...'

B — National law

10. Article 8 of the Elektriciteitswet (Law on Electricity) of 16 November 1989 (hereinafter, 'the 1989 Law') provided that a public limited company or a private limited company was to be designated which, together with the licensees, was to be responsible under Article 2 of the Law for ensuring the reliable and efficient operation of the public electricity supply at costs which were as low as possible and in a socially responsible fashion.

11. Article 34 of the 1989 Law also provided that only the company designated for that purpose was authorised to import electricity intended for public distribution.


13. Article 24 of the 1998 Law requires the system operator to refrain from any form of discrimination between system users.

14. Under the 1998 Law control of the operation of systems and system operators...
was assigned to the Director of the Dienst uitvoering en toezicht energie (service for implementation and control of energy supply, hereinafter: 'DTE'). Article 36 of the 1998 Law makes that Director responsible inter alia for laying down the conditions for access to the systems.

15. In accordance with that provision the DTE laid down the conditions relating to the operation of the system (hereinafter, 'the System Code') on 12 November 1999.

16. Articles 5.6.4 and 5.6.7. of the System Code made a preferential allocation of transport capacity for imports, as regards cross-border transport of electricity for the year 2000, to the company designated under Article 34 of the 1989 Law on the basis of import commitments under long-term agreements.

17. Article 13(1) of the Overgangswet elektriciteitsproductiesector (Transitional law on the electricity generating sector, hereinafter: 'the 2001 Transitional Law') of 21 December 2001 provides as follows (excerpts only): "The system operator of the national high-voltage grid shall, on request, allocate to the designated company a maximum of 900 MW until 31 March 2005 and a maximum of 750 MW from 1 April 2005 to 31 March 2009 for the transport of electricity where such transport serves to implement the agreements concluded in 1989 and 1990 between the designated company, of the one part, and Electricité de France, PreussenElektra AG and Vereinigte Elektrizitätswerke Westfalen AG, of the other part, in the version thereof in force on 1 August 1998 and in so far as these agreements are still in force.

III — The main proceedings and questions referred for a preliminary ruling

18. NV Samenwerkende Elektriciteitsproductiediensten (hereinafter: 'SEP') is controlled by the four regional Netherlands electricity producers. In pursuance of Article 34 of the 1989 Law a ministerial decree of 20 March 1990 made SEP the only company authorised to import electricity for public distribution.

19. Within the framework of services of general economic interest that SEP was required to perform under Article 2 of the

20. In pursuance of the 1998 Law SEP transferred the operation of most of the national high-voltage grid to a subsidiary, TenneT BV, and transferred ownership of that high-voltage grid to another of its subsidiaries, Sarrane BV. SEP then sold its shares in both of these subsidiaries to the Netherlands State.

21. The preferential allocation of electricity transport capacity via cross-border systems afforded to SEP under the System Code of 12 November 1999 was the subject of administrative objections lodged with the DTE by Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV and NV Eneco (hereinafter: 'the claimants').

22. The DTE dismissed those objections as unfounded in a decision dated 17 July 2000.

23. The claimants lodged an appeal against that decision with the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry, hereinafter: 'the College') claiming inter alia that the reservation of import capacity for the electricity purchase contracts concluded by SEP, which was no longer providing services of general economic interest after the opening-up of the market as a result of the 1998 Law, was in breach of the prohibition of discrimination laid down in both the Directive and the 1998 Law. It also constituted an unlawful restriction on the free movement of electricity contrary to Articles 28, 81, 82 and 86 EC. The allocation method set out in the System Code should also be regarded as a technical rule and should therefore have been notified to the Commission under Directive 83/189/EEC.5

24. It is against this background that the College has referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

I. (a) Can Article 86(2) EC be invoked to justify continuing to grant a company which was formerly entrusted with the operation of services of general economic interest and which entered into certain commitments in connection with such operation a special right to

enable it to honour those commitments after the particular task assigned to it has been completed?

If so, is an allocation method relating to the cross-border transport capacity of electricity to be regarded as a technical rule within the meaning of the abovementioned provision?

(b) If this question is answered in the affirmative, is a rule which provides for the preferential allocation for a period of ten years of half to a quarter (declining over time) of the cross-border transport capacity for electricity to the undertaking concerned nevertheless invalid because it

1. is not proportionate in relation to the — public — interest served thereby;

2. affects trade to such an extent as would be contrary to the interests of the Community?

(b) In the event that the allocation method must be regarded as a technical rule or in the event that Article 7(5) of the Electricity Directive is not limited to technical rules, is a rule under which preferential cross-border transport capacity is made available for contracts concluded in connection with a particular public task compatible with the prohibition of discrimination contained in that article?

IV — Legal appraisal

A — Introductory observations

1. The questions referred for a preliminary ruling

II. (a) Is Article 7(5) of the Electricity Directive to be interpreted as meaning that the prohibition of discrimination contained therein is restricted to the requirement that the system operator must not draw any distinction in granting access to the system by means of technical rules?

25. By its first question the referring court essentially seeks to establish in what circumstances Article 86(2) EC can be invoked where an undertaking is afforded special rights and Community law might possibly stand in the way of those rights. This question is therefore based on the assump-
tion that Community law is fundamentally opposed to the preferential allocation of electricity importation capacity. In its reasoning referring these questions for a preliminary ruling the court making the reference refers to Article 28 EC, Article 81 EC and Article 82 EC.

26. Although the national court making the reference is not requesting an interpretation of those provisions the French Government, in its written observations, and some of the other interested parties, in the oral procedure, went into the assumptions made by the national court in this context.

27. It is settled case-law that it is for the national court making the reference to determine the relevance of the questions which it submits for a preliminary ruling. In the event of any doubt as to whether questions have been correctly put to the Court for the purposes of an assessment under Community law the Court may rephrase those questions. That power should not, however, be taken so far as to allow the Court to include 'points of law which have not been raised at all in the order for reference and which, as far as can be seen from the file before the Court, have not been debated in the main proceedings'.

28. In this case it is a matter of record that both Article 28 EC and Articles 81 EC and 82 EC were mentioned by the national court. It is indeed apparent from the order for reference that it was not — even — seriously argued that the said provisions are not incompatible with the national rule concerned. In my opinion, however, the present case is concerned not so much with questioning or upholding the assumptions made by the court of reference as with the issue of the extent to which the Court is obliged to rely upon the relevant Treaty provisions in order to provide the national court with a useful answer. In the light of this consideration it is also necessary here to go into Articles 28 EC, 81 EC and 82 EC.

29. The second question referred for a preliminary ruling essentially relates to the substance and scope of the prohibition of discrimination in Article 7(5) of the Directive. This question is initially intended to clarify whether the prohibition of discrimi-


7 — Under its settled case-law the Court of Justice always tries to provide the national court with clarification to guide it in its decision on the case pending before it. See in this context, for example, the judgments in Case C-424/97 Haim [2000] ECR I-5123, paragraph 58, and in Case C-366/98 Geffroy [2000] ECR I-6579, paragraph 20.


9 — See page 16 of the order for reference: 'The parties do not dispute that these provisions [the preferential allocation of transport capacity] constitute a quantitative restriction on imports within the meaning of Article 28 EC. Furthermore, the appellants' contention that the abovementioned provisions are also incompatible with a number of other articles of the Treaty is not expressly contested.'
nation is confined to technical rules; if this should not be the case — or if the contested provisions of the System Code on the preferential allocation of importation capacity are to be classified as technical rules — it would then be necessary to examine the extent to which the grant of special rights in order to honour long-term electricity purchase contracts is to be considered discrimination against other market participants.

2. Directive 96/92

30. Since the Court has not yet had an opportunity to interpret Directive 96/92 it is now necessary to go into its essential content and scope with all due brevity.

(a) Essential substance of the Directive

31. According to Directives 90/547/EEC and 90/377/EEC Directive 96/92 represents a second step towards the liberalisation of national electricity markets and the creation of an internal market in electricity.12

32. These aims are pursued, firstly, by separating generation, transportation and marketing activities — so-called 'unbundling' — and, secondly, by affording a regulated degree of access to corresponding activities.

33. For the construction of new generating capacity, Member States may choose between an authorisation procedure and/or a tendering procedure, with both procedures being 'conducted in accordance with objective, transparent and non-discriminatory criteria'.13

34. In relation to system use the Directive contains provisions on the operation of the transmission system, the operation of the distribution system and on market organisation in connection with access to the system.


13 — Article 4 of Directive 96/92.
35. With regard to access to the system, Articles 17 and 18 of the Directive make provision for two equivalent systems which are to operate 'in accordance with objective, transparent and non-discriminatory criteria'. As a result of a political compromise the Member States can choose between a procedure of negotiated access to the system (Article 17) and a single buyer procedure (Article 18). Under the first procedure the electricity producers and, where appropriate, the electricity supply undertakings and eligible customers can negotiate access to the system so as to conclude supply contracts, whereas the second system is based on the premiss of an arrangement with a single buyer. Article 19 sets staggered binding targets with regard to the degree of opening-up of the market that is to be achieved.

36. Operation of the transmission system is entrusted to one of the system operators designated by the Member State in question. It is to be responsible 'for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and its interconnectors with other systems', thereby guaranteeing security of supply. The Directive also establishes principles governing the relationship between system operators and users — including the distributors concerned here.

37. In the context of the operation of the distribution system the option of imposing on distribution companies an obligation to supply customers located in a given area at pre-determined prices — in the sense of a service of general economic interest — merits special mention. A responsible system operator is also to be designated here.

38. Article 3, subparagraphs 2 and 3 of which essentially adapt the substance of Article 86(2) EC to the electricity sector, is one of the core provisions of the Directive. Under that provision the Member States — notwithstanding their obligations under the EC Treaty — may 'impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and to environmental protection'. This provision also states that such obligations must be 'clearly defined, transparent, non-discriminatory and verifiable'.

39. Article 3(3) makes it clear that some of the provisions of the Directive need not be applied in so far as 'the application of these provisions would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general

14 — Second sentence of Article 16 of Directive 96/92.
15 — Article 7(1) of Directive 96/92.
16 — Articles 10 to 12 of Directive 96/92.
17 — Article 10(1) of Directive 96/92.
economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community.'

(b) Scope of the Directive

40. The liberalisation achieved by the Directive is deficient in several respects. 18

41. First, it should be noted that the opening-up of the market was reserved to just certain participants in the market. It is indeed apparent from Article 19 of the Directive that the Member States are only obliged to open up their markets in relation to certain customers. 19 Only those eligible customers are entitled to conclude electricity supply contracts under the provisions of the Directive.

42. The general public service reservation in Article 3 of the Directive also provides the Member States with far-reaching opportunities not to apply the core provisions of the Directive. Article 3(3) enables them, subject to the conditions stated, not to apply the provisions of Articles 5, 6, 17, 18 and 21. These are central liberalisation provisions in the Directive on, firstly, the generation of electricity and, secondly, access to the system. 20

43. The provisions in the Directive on the operation of transmission systems — particularly Article 7 of the Directive — are nevertheless not open to negotiation having regard to Article 3, so that it would appear doubtful whether exceptions to those provisions could be permitted in reliance upon the existence of public interest commitments.

44. In view of all this it is only logical that the 39th recital in the preamble to the Directive should state that 'this Directive constitutes a further phase of liberalisation' whereby '... once it has been put into effect, some obstacles to trade in electricity between Member States will nevertheless remain in place'. 21


19 — As regards final customers, Article 19(3) of the Directive states that all final customers consuming more than 100 GWh per year must be included in the eligible customer category.

20 — Article 21 contains rules on authorisation to construct direct lines.

21 — See also in this respect the judgment in Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 78.
3. Investigatory approach

45. The Commission’s approach favouring a prior examination of the provisions of secondary law would appear to be methodologically correct as Directive 96/92 is a liberalisation directive. It is therefore necessary to look, first of all, at the second question referred to the Court relating to the interpretation of Directive 96/92. Primary law remains relevant, however, inasmuch as a directive cannot overturn primary-law principles. Regard should also be had to primary law as an examination criterion where no harmonisation under the Directive has taken place.

46. In relation to the first question referred to the Court, the question of the applicability of Article 86(2) EC is inseparably linked to the preliminary question as to the existence of infringements of Community law resulting from the national provision at issue.

47. As far as Article 28 EC is concerned, the need for a separate examination essentially depends upon the scope of the particular prohibition of discrimination under secondary law.

48. With regard to the provisions of Community competition law — Articles 81 EC and 82 EC — cited by the national court in its order referring the questions to the Court, it is also initially necessary, in any event, to examine what significance should be attributed to the fact that the preferential treatment for access to the system afforded to long-term ‘old contracts’ has a legislative basis.

B — The second question referred to the Court relating to the prohibition of discrimination under Article 7(5) of Directive 96/92

49. The question of whether any infringement of the prohibition of discrimination under Article 7(5) of Directive 96/92 results from the national provision at issue can be split into two subsidiary questions. Firstly, the Court is asked to clarify whether that prohibition is restricted to the field of technical rules. If so, it is then asked to examine whether the preferential allocation of transport capacity is to be regarded as a technical rule. If that should not be the case, or if the prohibition of discrimination should have general application, it is then necessary to examine the extent to which the national provision at issue is in breach of the prohibition of discrimination.

22 — See also in this respect the third recital in the preamble to the Directive, according to which 'the provisions of this Directive should not affect the full application of the Treaty, in particular the provisions concerning the internal market and competition'.

I - 4998
1. Scope of the prohibition of discrimination under Article 7(5) of Directive 96/92

50. Under Article 7(5) of Directive 96/92 the system operator is to refrain from any discrimination between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

51. Neither the wording, the systematic arrangement, nor the meaning or objective of this provision support the view that the prohibition of discrimination expressed in that provision is restricted to technical rules.

52. The prohibition of discrimination in Article 7(5) is, from its very wording, not restricted to technical rules. It should be noted in this context — going briefly into the subsidiary question asked by the national court making the reference — that the preferential allocation of importation capacity can hardly be considered a technical rule. It is really an operational decision by the system operator that has nothing to do with technical matters. Such an allocation constitutes a method of distributing the capacity available — which is limited for technical reasons associated with the system; the preferential allocation of a part of that capacity is not caused by technical factors, however, but by economic or legal ones — in this case, by the existence of long-term electricity purchase contracts. The main proceedings make this background clear: the problem is not the restricted capacity, but the criteria applied to the distribution of that capacity.

53. The national court making the reference quite rightly notes that Article 7(2) imposes an obligation on the Member States to ensure that technical rules are developed establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines, whereby — under the second sentence of Article 7(2) — those requirements must ensure the interoperability of systems and be objective and non-discriminatory. However, since the second sentence of Article 7(2) already contains a prohibition of discrimination directed at such technical rules it is impossible to see why the prohibition in subparagraph 5 of the same provision should again be restricted solely to technical rules, as that would constitute unnecessary repetition of the prohibition.

54. Admittedly, Article 7(5) is to be found in Chapter IV of the Directive relating to 'Transmission system operation' but Directive 96/92 is essentially concerned with avoiding all discrimination between market
participants. Article 3 of the Directive, as a general rule for the organisation of the sector, has already made it clear that the Member States are to ensure inter alia that they do not discriminate between these undertakings as regards either rights or obligations.\(^\text{23}\) It is therefore clear that the prohibition of discrimination finds expression in numerous different places in the Directive, so that it is to be afforded general application. It should also be noted that the opening-up of the market can only ultimately succeed if market participants are not prevented from gaining access to the market due to discriminatory practices.

2. The existence of discrimination

55. The prohibition of discrimination in Article 7(5) of Directive 96/92 is merely a more specific expression of the general principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified.\(^\text{24}\)

56. B.V. Nederlands Elektriciteit Administratiekantoor (hereinafter, ‘NEA’), as successor in title to SEP, supported in this respect by the Netherlands and French Governments, is essentially claiming that the differing treatment of the market participants with regard to the allocation of transport capacity does not constitute unequal treatment inasmuch as SEP, on the one hand, and the other market participants, on the other, are not in the same or a comparable situation. NEA, as SEP’s successor, refers in this context to the long-term electricity purchase contracts concluded prior to liberalisation and the acceptance commitments contained therein, which were ultimately the result of a political decision by the government at the time.\(^\text{25}\) The different situation is also apparent from the fact that, when the contracts were concluded, SEP had been entrusted with services of general economic interest and that the conclusion of the contracts had been essential specifically in order for it to perform those special duties. SEP’s situation is therefore contrasted with that of its

\(^{23}\) — The absence of discriminatory criteria is required by the Directive in relation to the choice of undertakings for the construction of new generating capacity (Article 4), in relation to the dispatching of generating installations (Article 8(2)), in relation to the grant of access to the system (Article 16) and in relation to authorisation for the construction of direct lines (Article 21(2)). It is not only the operator of the transmission system that has to refrain from all discrimination (Article 7(5)), but also the operator of the distribution system (Article 11(2)). The separate accounts required by the Directive in the context of the unbundling provisions are stipulated, according to Article 14(3), ‘with a view to avoiding discrimination, cross-subsidisation and distortion of competition’.


\(^{25}\) — It is claimed in this connection that long-term electricity purchase contracts are to be treated in law as compensation for the creation of additional electricity generating capacity.
competitors as they had not been entrusted with such special duties. Finally, SEP’s shareholders had been landed with stranded costs when the market was opened up.

57. These arguments, albeit factually correct, are unconvincing having regard to fundamental methodological considerations. The comparability of the situations of SEP or of its successor NEA, on the one hand, and of the claimants, on the other, has to be appreciated in the light of the opening-up of the market that was the purpose of the Directive — and which was also achieved. The question is therefore not whether both categories of market participants were starting from different positions because of their particular pasts, but whether differentiation by virtue of legislation is ever permissible under the liberalisation directive — namely, Directive 96/92.

58. In the context of the liberalisation of network industries, such as the electricity sector, non-discriminatory access — that is to say, the grant of access according to objective and transparent criteria — is absolutely essential. Any differentiation between market participants is liable to seriously jeopardise access to the market on the part of certain participants, or even to completely prevent it, which would again appear detrimental to the liberalisation objective. The case in the main proceedings makes this problem clear: the preferential allocation of transport capacity in order to honour long-term electricity purchase contracts would seem liable to at least make it much more difficult for other distribution undertakings to gain access to the transnational transmission system. If the pattern of business of the latter undertakings is based on importing and selling electricity from abroad that is cheaper in comparison with the national market, the scope for competition in costs on the distribution market in question is considerably reduced.

59. In so far as the competition sought by the Directive is here actually being curbed, the reasons for this must therefore be examined to ascertain the extent to which they provide objective justification for established dissimilar treatment of market participants as a result of that curb. The

26 — See point 2 in the Annex to Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ 2003 L 176, p. 1, hereinafter 'Regulation No 1228/2003'). The TSOs, or, where appropriate, Member States shall provide non-discriminatory and transparent standards, which describe which congestion management methods they will apply under which circumstances' (emphasis inserted).

27 — See too, in the natural gas sector, the 13th recital in the preamble to Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1) (no longer in force): 'Long-term planning may be one means of carrying out those public service obligations, taking into account the possibility of third parties seeking access to the system.'
circumstances described by NEA could provide material reasons to objectively justify differentiation.

60. It should be stated first of all, however, that none of the said circumstances per se are to be considered objective grounds for differentiation. In a liberalised market the grant of a preferential allocation of import capacity cannot be justified per se by the continued existence of long-term electricity purchase contracts any more than can reliance simply be placed on the rendering of services of general economic interest, as these were, in any event, no longer in existence on the date that the right to preferential allocation of import capacity was granted.

(a) Community-law assessment of long-term electricity supply contracts

61. However, objective justification for the preferential treatment afforded to SEP and its successor in title could be construed from a combination of two factors: having regard to the requirement of equal treatment in Article 7(5) of the Directive the preferential treatment could be justified by the fact that it was afforded with a view to honouring the long-term electricity purchase contracts in question, which were themselves concluded to fulfil public interest commitments. However, such justification presupposes that Community law does not preclude the continuation of the long-term contracts in question after Directive 96/92 came into force and that the preferential treatment does not exceed the degree required in order to achieve its intended objective.28

62. The Transitional Law of 2001 itself creates a link between its proposed preferential allocation of importation capacity in favour of SEP and the long-term electricity purchase contracts between SEP and foreign electricity producers in that, in Article 13(1), it makes the preferential allocation conditional on the existence of such contracts and expressly provides for the grant of a preferential allocation in order to honour those contracts.

28 — See, in general, regarding the connection between objective justification for different treatment and the principle of proportionality: Tridimas, The General Principles of EC Law, Oxford 2000, particularly p. 351: 'A test of proportionality is inherent in the concept of objective justification'. In case-law see, for example, the judgment in Case C-274/96 Bickel [1998] ECR I-7637, paragraph 27: 'a ... requirement of that kind can be justified only if it based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions' (emphasis inserted).
No duty of termination under Directive 96/92

63. It should be noted, first, that the Directive does not contain express rules with regard to existing long-term electricity supply contracts even though, according to uncontested assertions made by SEP, such electricity supply contracts are customary in the industry. The Directive states only that 'long-term planning may be one means of carrying out those public service obligations'.

The later Regulation No 1228/2003 apparently proceeds on the basis that such contracts are valid in principle: in the guidelines on the management and allocation of available transfer capacity of interconnections between national systems contained in the Annex to the Regulation it is expressly stated with regard to long-term contracts that 'priority access rights to an interconnection capacity shall not be assigned to those contracts which breach Articles 81 and 82 of the EC Treaty'. It is also made clear that 'existing long-term contracts shall have no pre-emption rights when they come up for renewal' (emphasis inserted in both cases). It must be concluded, in any event, that, subject to any rules of primary law, secondary legislation does not in principle preclude long-term contracts.

64. The Commission also argues in this context that Directive 96/92 should, in any event, be construed in the light of the principles of legal certainty and protection of legitimate expectations. It is to be inferred from case-law, in particular, that 'substantive rules of Community law must be interpreted ... as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives, or general scheme that such an effect must be given to them.' Directive 96/92 does not satisfy the appropriate clarity and certainty requirements in relation to the continued existence of long-term electricity purchase contracts concluded before that Directive came into force.

65. In order to assess the long-term contracts under Community law, therefore, it is necessary to look into the competition rules contained in Articles 81 EC and 82 EC; mention might also be made of Article 86(2) EC in so far as the contracts in question were concluded in the performance of services of general economic interest.

29 — 14th recital in the preamble. See also the last sentence of Article 3(2) of Directive 96/92: 'As a means of carrying out the abovementioned public service obligations, Member States which so wish may introduce the implementation of long-term planning.'

66. It would appear to be of particular significance to note in this context — without wishing at this stage to pre-empt the question of the applicability of Articles 81 EC and 82 EC to the provisions of national law at issue — that SEP — supported in this respect by the Netherlands, French and Norwegian Governments — is laying emphasis on the cost intensity of the investment required in this particular sector. The existence of investment in order to honour long-term electricity purchase contracts could prove a critical point with regard to both Article 81 EC and Article 82 EC.

67. Under Article 81(1) EC all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market. However, Article 81(3) EC contains a possible exemption if the agreement concerned contains objective advantages that compensate for the competitive disadvantages. Assuming that long-term contracts have adverse effects on competition, there might possibly be room for an exemption in so far as the performance of such contracts is accompanied by investment by the contracting parties — whether quite general investment in new generating installations on the part of the electricity exporter, for example, or in the expansion of the capacity of system interconnections on the part of the electricity importer — since such investment, in so far as the contracting parties also actually bear the cost of that investment, ultimately benefits all the market participants.  

68. It should be noted with regard to Article 82 EC and the resultant prohibition on abuse of a dominant position in the market that public debate centres less on the electricity purchase contracts themselves than on the preferential allocation of importation capacity that might be granted, where appropriate (such as here), for the performance thereof. A relevant abuse might exist where the system operator applies dissimilar conditions to equivalent transactions with customers (Article 82(c)), thereby placing other market participants at a competitive disadvantage. The preferential allocation of importation capacity would have to be considered justifiable preferential treatment of certain customers. Objective justification for such unequal treatment might again be sought in

31 — See the suggested Discussion Paper prepared by DG Competition for the 6th Regulatory Forum for Electricity in Florence (November 2000), 'Compatibility of long-term electricity transmission capacity reservations with EC competition law'. 
the making of investment in connection with
the performance of long-term electricity
purchase contracts, when the burden of such
investment would have to remain with the
party preferred for as long as it enjoyed the
preferential allocation.

69. This means that the unobjectionability
under competition law of long-term electric­
city purchase contracts of the kind at issue
depends, in any event, on investment having
been made in connection with their perfor­
mance and on the burden of that investment
definitively lying with the party who enjoys
the preferential allocation of transport capac­
ity in order to honour such contracts. The
essential element here is that the competitive
disadvantages to competitors as a result of a
long-term contractual commitment are
counterbalanced by that investment on the
part of the market participants preferred.

70. Inasmuch as SEP — and the Netherlands
Government — refer to the cost of making
available the purchased quantities provided
under the long-term contracts, it is never­
theless doubtful whether those costs should
be recognisable as investment that promotes
competition. Admittedly, both SEP and the
Netherlands Government argue that those
costs are comparable with the cost of
constructing new generating installations
since it makes no difference, financially
speaking, whether in order to guarantee
energy supplies in the long term the electricity importer invests in new generating
installations or in long-term contracts. Con­
versely, however, expansion of the capacity of
system interconnections would appear to
promote competition in that the additional
capacity also benefits the new market
participants, whilst the quantity-unrelated
cost of making available definite quantities of
electricity under long-term electricity pur­
chase contracts principally enables electricity
to be obtained on more favourable (quantity­
related) terms. However, this strengthens the
competitive position of the already preferred
electricity importer and does not therefore
appear to generally promote competition in
any way. SEP's position of supremacy there­
fore becomes even more established in that it
makes it possible for it to guarantee a
comparatively cheap source of electricity
abroad in the medium term, which in turn
correspondingly reduces the attractiveness of
its new competitors' business patterns.

71. In the present case it is not absolutely
clear whether, and to what extent, SEP — or
its electricity suppliers — made investment
in connection with the performance of the
long-term electricity purchase contracts at
issue. It is therefore for the national court to
definitively appraise the relevant facts in this
particular case. To cover the eventuality of it
not then being possible to bring the long-
term contracts in question into conformity with Articles 81 EC and 82 EC, it is now appropriate to consider the extent to which consideration should be given to justification for the long-term contracts under Article 86 (2) EC.

72. Article 86(2) EC contains an exception to the provisions of the Treaty for inter alia undertakings entrusted with the operation of services of general economic interest. This provision allows the Member States to afford such undertakings exclusive rights incompatible with the Treaty. In its judgments on import and export monopolies for electricity and gas the Court has made it clear that Article 86(2) EC can also be invoked to justify infringements of Treaty provisions that are directed at the Member States — in those cases Article 31 EC. 33

73. The prerequisite here is nevertheless that these exceptions to the Treaty provisions are necessary in order to perform the special service of general economic interest entrusted to an undertaking.

74. However, the applicability of Article 86 (2) EC depends upon the undertaking concerned having been entrusted with such a special service in the first place. In the present case SEP was indisputably entrusted with such services before the market was opened up by Directive 96/92. 35

75. It is equally indisputable that the said long-term electricity purchase contracts had been concluded prior to liberalisation in order to fulfil public interest commitments associated with those services. When considered in this light there can be hardly any doubt of a sufficient probability of the contracts in question having passed the test of necessity under Article 86(2) EC — at least when they were concluded.

76. If long-term electricity purchase contracts should therefore be considered in conformity with Community law on the date of their conclusion, it will also be necessary to consider the extent to which their performance can be guaranteed by the preferential allocation of electricity importation capacity in question. It is necessary to examine in this context whether the national legislation concerned is reasonably proportionate to the aim pursued — namely, the performance of such long-term electricity purchase contracts.

34 — See with regard to Article 49 EC the judgment in Joined Cases C-147/97 and C-148/97 Deutsche Post [2000] ECR I-825, paragraph 55.
35 — In its judgment in Commission v Netherlands (see footnote 33) the Court expressly acknowledged the fact that SEP had been entrusted with services of general economic interest under the old law.
(b) The preferential allocation of importation capacity in question and its proportionality

77. Preferential allocation of importation capacity along the lines of the national provision in question would, in any event, seem appropriate in order to guarantee performance of the existing long-term electricity purchase contracts.

78. Apart from the conformity with Community law by long-term electricity purchase contracts described above, it is necessary at this juncture to record the fact that, according to uncontested assertions, the contracts the performance of which was to be guaranteed by the preferential allocation of importation capacity were customary in the industry and should not be considered unlawful.

79. It has not been asserted that there was any such illegality, for example, as a result of the conclusion of long-term contracts at a time when the opening-up of the market — abolishing national general economic commitments — was already foreseeable. 36 Other illegal acts, as mentioned by Vereniging voor Energie, Milieu en Water in its written observations, 37 such as the contraction of national electricity production in order to take full advantage of preferential importation capacity and maintain high prices at home, can only be termed hypothesis.

80. The essential nature of the preferential allocation of importation capacity would be acceptable if no other rules less detrimental to the claimants' access to the system were conceivable. The question is therefore whether the absence of such a rule would ultimately impede the continuation of the contracts.

81. Discussion has been controversial in this context in relation to the question of the extent to which the termination of long-term electricity purchase contracts is legally possible or to be economically expected of SEP, so that ultimately the grant of preferential allocation of importation capacity with a view to the performance of existing long-term electricity purchase contracts might not appear necessary. The absence of Community law rules — both with regard to any kind of obligation to effect termination and with regard to the energy-policy option available to the Member States of either continuing the contracts concerned or, where appropriate, funding the costs associated with

36 - The question whether it is still possible to conclude long-term electricity purchase contracts under Directive 96/92 can be left undecided in this context. The illegality addressed — which might be relevant in the context of Article 82 EC — relates to conduct designed to frustrate — or, in any event, delay — the opening up of the market.

37 - Paragraph 33.
termination — would appear to be critical here. *Vereniging voor Energie, Milieu en Water* has argued in this context\(^\text{38}\) that termination of the contracts and funding the associated costs as *stranded costs* was considered but ultimately deemed inexpedient.\(^\text{39}\) However, this is a decision to be taken by the Member State concerned at its own discretion and not one that is in breach of secondary law, in any event.\(^\text{40}\)

82. It is also for the national court, in any event, to ascertain whether and to what extent the contracts the performance of which was intended to be guaranteed by the option of the preferential allocation of importation capacity in question included any right of termination and whether and to what extent use could have been made of that right on economically feasible terms.

83. Subject to the outcome of such an examination, there would be good reason to also conclude that the national rule in question is necessary. Nor does this conflict with the public interest.

84. Admittedly, Article 3(3) of the Directive recalls that 'the interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article \([86]\) of the Treaty'. Free market access in the form of free access to the system does not come without any restrictions, however: indeed, Article 17(5) of the Directive makes it clear that the right of access to the system can be subject to restrictions.\(^\text{41}\)

85. It should also be noted in relation to the Community interest that the national legislative provision in question does not adversely affect the intensity of trade in electricity between the Member States.\(^\text{42}\) Furthermore, it only extends to a limited part of the capacity of system interconnections between the Netherlands and other Member States.\(^\text{43}\) The French Government

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\(^\text{38}\) — Written observations, paragraph 28 et seq.

\(^\text{39}\) — The fact that the grant of preferential access to the system does not lead to the transfer of State funds within the meaning of Community law on aid certainly explains why the national court making the reference did not rely on the Treaty provisions relating to the law governing aid. The funding of cancellation of contracts as funding *stranded costs* would probably have raised such issues however.

\(^\text{40}\) — For rules under primary legislation with regard to the preferential allocation of importation capacity, see below in relation to the first question referred to the Court.

\(^\text{41}\) — 'The operator of the transmission or distribution system concerned may refuse access where he lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3.'

\(^\text{42}\) — What is affected is the position of the market participants inter se. The total capacity of system interconnections between the Netherlands and other Member States is not affected.

\(^\text{43}\) — See, for example, the figures in Appendix 3 to the written observations lodged by the French Government: in 2000 the Netherlands importation capacity was 3 200 MW and in 2001 and 2002 3 350 MW. The Netherlands Government gives a figure for this of 3 900 MW and holds out the prospect of an increase in capacity.
entertains doubts as to whether intra-Community competition is adversely affected in this respect. 44

86. With regard to the reasonableness of the preferential national rule in question, it is a requirement that the quantities of electricity affected by the preferential allocation of importation capacity should not exceed the quantities that are the subject of the long-term contracts. 45 This requirement also seems to be satisfied in the present case as the preferential allocation of import capacity is granted only on an application being made by SEP.

87. It is also a requirement that unused capacity that is made available to the undertaking concerned by the system operator should once again be made available to the other market participants. 46 According to the uncontested assertions made by the Netherlands Government the principle of 'use it or lose it' was applied to the rule in question.

88. It would finally appear to be significant, in relation to the reasonableness of the preferential allocation of importation capacity, that the proposed preferential allocation of transport capacity on the transmission system is subject to a time-limit — and graduated — according to the duration of the long-term contracts to be performed, which supports the conclusion that the rule in question is reasonably proportionate to the aims pursued — namely, to guarantee the performance of contracts which were themselves concluded to fulfil public interest commitments.

89. It would also appear significant that the preferential allocation of importation capacity is not effected without a charge. The revenue from that charge is to be used for a specified purpose and, under Article 31(5) of the 1998 Law, serves to improve improvements in system interconnection capacity.

90. In any event, it is for the national court to undertake a conclusive evaluation of the proportionality of the national measures in question, having regard to all of the circumstances of the particular case.
91. The answer to the second question referred to the Court must therefore be that Article 7(5) of Directive 96/92 does apply to the preferential allocation of electricity transport capacity. The prohibition of discrimination in Article 7(5) of Directive 96/92 does not preclude such a preferential allocation of electricity transport capacity based on a legislative provision in so far as that preferential treatment does not exceed the bounds necessary in order to perform long-term electricity purchase contracts and in so far as those contracts are not contrary to Community law, particularly Articles 81 EC, 82 EC and 86(2) EC.

92. The first question referred to the Court essentially relates to the justification under Article 86(2) EC for any infringements of primary law on the part of the provisions of national legislation in question.

93. The conditions governing the application of Article 86(2) EC have already been discussed and reference is made thereto. It is undisputedly the case that SEP, or its successor NEA, is no longer entrusted with services of general economic interest so that the direct application of Article 86(2) EC to the national provision in question is ruled out. According to the proposed answer to the second question referred to the Court, however, it is to be assumed that any allocation of commitments of general economic interest has to be taken into consideration when assessing the presence of objectively unjustified dissimilar treatment of the market participants concerned.

C — The first question referred to the Court

94. The extent to which the provisions of primary law referred to by the national court making the reference might conflict with a rule of the type in question now remains to be examined.

1. Article 28 EC as criterion?

95. The question of the extent to which reference should be made to Article 28 EC as the criterion for examination purposes was the subject of much controversial discussion.

47 — See above, paragraph 72 et seq.

48 — The same consideration must also lead to the non-applicability of Article 3(3) of Directive 96/92.
in the course of both the written and oral procedures.

96. The French Government refers in this respect to the judgment in Case C-324/99 according to which 'where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles 30, 34 and 36 of the Treaty'.

97. NEA, as SEP's successor, argues that, even if the national rule concerned did have to be examined in the light of Article 28 EC, a restriction on the free movement of goods would be ruled out in so far as any capacity congestion amongst transmission systems, particularly system interconnections, was caused by technical factors; the national rule in question just draws the obvious conclusions from congestion already in existence.

98. The view expressed by the French Government, namely that primary law does not have to be invoked where the provisions in the Directive regarding access to the transmission system are to be considered conclusive, must be accepted. In my opinion it appears doubtful whether, in the context of Article 28 EC, legal argument can be put forward that has not already been expressed in connection with the interpretation of Article 7(5) of the Directive, so that it therefore seems pointless to seek to definitively establish the degree of harmonisation achieved under Directive 96/92.

99. It should in any event be noted with regard to the degree of harmonisation achieved by Directive 96/92 that — as already stated — it fails to address a number of specific questions relating to access to transmission systems. It is therefore also particularly significant that the recent Regulation No 1228/2003 should have attempted to resolve some of the problems in this connection. Because of the significance of the prohibition of discrimination in Directive 96/92 this prohibition would appear, to a certain extent, to be more authoritative than the specific rules on access.

100. If, in the light of the foregoing, the Court should nevertheless seek to look into Article 28 EC, it should, with regard to its scope of application, recall the judgment in

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50 — See above, paragraph 40 et seq.
51 — Cited in footnote 26.
52 — Such as the compensating mechanism between system operators, the fees for system access, congestion management etc. Regulation No 1228/2003 essentially draws on the work done by the European Electricity Regulatory Forum in Florence.
53 — See above, paragraph 54.
Dassonville, according to which Article 28 EC conflicts with any rule or measure enacted by Member States which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade.\footnote{54}{Judgment in Case 8/74 Dassonville [1974] ECR 837, paragraph 5.}

The capacity of transmission systems and system interconnections is indisputably subject to technical constraints; however, if demand exceeds available capacity regard must be had to the method used to distribute the available capacity in the context of access to the electricity transmission system protected under Article 28 EC, as is made absolutely clear by the main proceedings, for example.\footnote{55}{See above, paragraph 58.}

Preferential treatment in relation to access to the system is therefore capable of hindering (or even preventing) access by other participants. When considered in this light, the preferential allocation of transport capacity in intra-Community trade in electricity does not just extend to the distribution of a commodity in short supply — namely, the capacity of the system interconnections — between market participants according to objective principles.\footnote{56}{NEA is not ultimately intimating anything different when it claims that the preferential allocation of importation capacity does not constitute a measure having equivalent effect within the meaning of Article 28 EC 'provided that the corresponding legal provisions do not produce discrimination'. However, discrimination exists precisely when dissimilar treatment of market participants does not appear to be objectively justified, which is the actual substance of the legal dispute here.}

101. The Commission's working documents\footnote{57}{See, in particular, Congestion management in the EU electricity transmission network — Status report, September 2002.} make it clear that various capacity allocation methods can be used in congestion management.\footnote{58}{Congestion management should be understood to mean a decision on the allocation of limited transmission capacity.}

A distinction is to be drawn between market based methods\footnote{59}{Such as express or implied (market splitting) capacity auctions.} and other methods,\footnote{60}{Particularly 'retention' (reservation of capacity in favour of vertically integrated undertakings); 'first come, first served'; 'pro rata'.} with the 6th Florence Forum having come down in favour of market based solutions. Article 6(1) of Regulation No 1228/2003 supports this view when it provides that 'network congestion problems shall be addressed with non-discriminatory market based solutions'.

\footnote{58}{Congestion management should be understood to mean a decision on the allocation of limited transmission capacity.}

\footnote{59}{Such as express or implied (market splitting) capacity auctions.}

\footnote{60}{Particularly 'retention' (reservation of capacity in favour of vertically integrated undertakings); 'first come, first served'; 'pro rata'.}

\footnote{61}{Alternatively, it might be necessary to examine the extent to which an infringement of the rules on free movement of goods might be justified under Article 30 EC. In so far as NEA relies on security of supply recognised in case-law as grounds for justification (see the judgment in Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraph 34) it might be worth mentioning that although the long-term electricity purchase contracts in question were concluded in the pursuit of that aim the preferential allocation to be assessed here was facilitated at a time when SEP was no longer entrusted with those services.}

102. Therefore, as long as the preferential allocation of transmission capacity ultimately just intensifies existing congestion and also narrows down the scope for market based solutions, it should be measured against the criterion of Article 28 EC. That provision would be infringed, in particular, if the preferential allocation of transport capacity were discriminatory by nature, which brings us back to the prohibition of discrimination contained in Article 7(5) of Directive 96/92.\footnote{61}{Alternatively, it might be necessary to examine the extent to which an infringement of the rules on free movement of goods might be justified under Article 30 EC. In so far as NEA relies on security of supply recognised in case-law as grounds for justification (see the judgment in Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraph 34) it might be worth mentioning that although the long-term electricity purchase contracts in question were concluded in the pursuit of that aim the preferential allocation to be assessed here was facilitated at a time when SEP was no longer entrusted with those services.
2. Community competition law

(a) Scope of application of Articles 81 EC and 82 EC

103. It is necessary to start from the premiss that the subject-matter of the present procedure for a preliminary ruling is the preferential allocation of importation capacity in order to honour long-term purchase commitments — not the underlying long-term electricity purchase contracts themselves.

104. It must be stated, first of all, that according to settled case-law 'Articles 81 and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 and 82 do not apply. In such a situation the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings'.

(b) Scope of application of Article 86(1) EC

105. In this case it must therefore be established that the preferential allocation of transport capacity is attributable to national legislation. Accordingly — notwithstanding the applicability of Articles 81 EC and 82 EC to the long-term electricity purchase contracts themselves — these provisions are not in any event directly applicable to an assessment of the national legislation at issue here.

106. However, it should be recalled that under Article 86(1) EC, in the case of undertakings to which they grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in that Treaty, in particular those rules provided for in Article 12 and Articles 81 to 89. It is therefore questionable to what extent Articles 81 EC and 82 EC in conjunction with Article 86(1) EC preclude a statutory rule of the type in question.

107. The application of Article 86(1) EC to undertakings is conditional on special or exclusive rights having been granted to them.

62 — Judgment in Case C-207/01 (Opinion cited in footnote 8), paragraph 30.

63 — See above, paragraph 65 et seq.
108. Under the Netherlands Transitional Law of 2001 the preferential allocation of importation capacity in the electricity transmission system was reserved to an undertaking in order to perform long-term electricity purchase contracts concluded between it and foreign electricity producers. This is therefore a right that a Member State grants to a limited number of undertakings within its territory by virtue of legislative or administrative provisions — and is therefore a special right within the meaning of Article 86(1) EC.

3. Preferential allocation of importation capacity as a competition issue

109. The preferential allocation of importation capacity was directly effected by way of national legislation without an agreement in restraint of trade coming into effect in this connection between undertakings — that is to say, between SEP and the system operator. Hence there is no need to consider Article 81 EC.

110. In so far as the system operator is to be considered an undertaking, Article 82 EC could nevertheless apply in as much as the national legislation in question ultimately encourages the system operator to apply dissimilar conditions to equivalent transactions with its trading parties, thereby placing them at a competitive disadvantage. 65

111. Hence, Article 82(c) EC in conjunction with Article 86(1) EC raises the issue of discrimination between market participants in relation to the preferential allocation of importation capacity in order to perform long-term electricity purchase contracts. However, there is no discrimination within the meaning of Article 82(c) EC if it is justified on objective grounds. Reference can therefore be made in this respect to discussion of the topic of prohibition of discrimination in Article 7(5) EC 66 so that Article 82(c) EC does not raise any further points in the context of a legal appraisal of the national legislation in question and no separate examination is therefore required.

112. In so far as Article 82 EC is invoked by way of Article 86(1) EC in determining the conduct of SEP, or its successor, in connection with the grant of an option of preferential allocation of importation capacity, the issue that arises is the extent to which the company favoured by the allocation, inas-

64 — This does not affect the question of the extent to which long-term electricity supply contracts, as agreements between electricity producers and distributors and therefore between undertakings, are compatible with Article 81 EC. See above, paragraph 65 et seq.

65 — Article 82(c) EC.

66 — See above, paragraph 55 et seq.
much as it enjoys a dominant position in the relevant market, exploits the advantage accruing to it as a result of that allocation so as to expand its dominant position, reduce the intensity of the competition, or make it more difficult for new market participants to gain access to the market. It would first be necessary to establish in this context whether SEP, or its successor, enjoys a dominant position. However, that notwithstanding, it would be inconsistent to conclude that there is objective justification for dissimilar treatment of the market participants whilst at the same time considering the same rule to be the cause of an offence within the meaning of Article 82 EC.

V — Conclusion

113. In the light of the foregoing it is recommended that the questions referred to the Court should be answered as follows:


(2) The prohibition of discrimination in Article 7(5) of Directive 96/92 does not preclude such a preferential allocation of electricity transport capacity based on a legislative provision in so far as that preferred treatment does not exceed the degree required in order to honour long-term electricity purchase contracts and provided that those contracts are not in breach of Community law, particularly Articles 81 EC, 82 EC and 86(2) EC.