



Press and Information

Court of Justice of the European Union

**PRESS RELEASE No 137/13**

Luxembourg, 22 October 2013

Judgment in Joined Cases C-105/12, C-106/12 and C-107/12  
Staat der Nederlanden / Essent NV, Essent Nederland BV, Eneco Holding  
NV, Delta NV

## **Restrictions on the free movement of capital affecting undertakings active in the electricity and natural gas markets may be compatible with EU law**

*In that context, the objectives of maintaining undistorted competition in order to protect consumers and ensuring security of energy supply constitute overriding reasons in the public interest*

In accordance with the 2003 Directives, the aim of EU law on the internal market in electricity and natural gas is, 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<sup>1</sup>.

Under recent Netherlands legislation, a private investor may not acquire or own shares or interests in the capital of an electricity or gas distribution system operator in the Netherlands ('the privatisation prohibition'). Also prohibited are 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'). Last, the national legislation also prohibits 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.

When that legislation was adopted, Essent, Eneco and Delta 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.

Following the adoption of the national legislation which introduced the privatisation prohibition, the group prohibition and the prohibition of activities which may adversely affect system operation, 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 market 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.

Against that background, Essent, Eneco and Delta brought actions before the national courts, arguing that the national legislation was incompatible with the free movement of capital. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), hearing the case on appeal, decided to refer questions to the Court of Justice on that issue.

The Court holds, first, that the privatisation prohibition – which means, inter alia, that no private investor may acquire shares or interests in the capital of an electricity or gas distribution system

<sup>1</sup> 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) and 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).

operator active in the Netherlands – falls within the scope of Article 345 TFEU, which 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 and under which, in particular, Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.

Nonetheless, 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. Consequently, the Court holds that, having regard to its effects, the privatisation prohibition constitutes a restriction on the free movement of capital.

However, the reasons underlying the choice of the rules of property ownership adopted by the national legislation are factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital. It is for the referring court to conduct such an examination.

As regards the group prohibition and the prohibition of activities which may adversely affect system operation, the Court holds that those also constitute restrictions on the free movement of capital which must be justified. In that regard, the Court states 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, mentioned by the referring court, serve to ensure undistorted competition on the markets for the generation/production, supply and trade of electricity and gas. The objective of combating cross-subsidisation seeks, further, to guarantee adequate investment in the electricity and gas distribution systems.

The Court states that the national measures at issue thereby pursue overriding objectives in the public interest. The objective of undistorted competition is also pursued by the FEU Treaty, the ultimate aim being to protect consumers. Further, according to the Court's settled case law, consumer protection constitutes an overriding reason in the public interest.

Next, the Court states 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 it has also recognised as being an overriding reason in the public interest.

Last, the group prohibition and the prohibition of activities which may adversely affect system operation were introduced by Netherlands legislation which itself, inter alia, amended provisions of national law adopted in order to transpose the 2003 Directives. Even if those prohibitions were not imposed by those directives, the Kingdom of the Netherlands pursued, by introducing those measures, objectives sought by those directives.

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

The Court states however that the restrictions at issue must be appropriate to the objectives pursued, and must not go beyond what is necessary to attain those objectives, which it is for the referring court to determine.

---

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

---

*Unofficial document for media use, not binding on the Court of Justice.*

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355

Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106