Case C-293/23

Request for a preliminary ruling

Date lodged:

10 May 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

13 December 2022

Appellant in the appeal on a point of law:

ENGIE Deutschland GmbH

Respondent to the appeal on a point of law:

Landesregulierungsbehörde beim Sächsischen Staatsministerium für Wirtschaft, Arbeit und Verkehr

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BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

DECISION

[…]

Made on:
13 December 2022
[…]

in the administrative case on energy law

ENGE Deutschland GmbH, […] Essen,

applicant and
appellant in the appeal on a point of law:

[…] […]

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v

Landesregulierungsbehörde beim Sächsischen Staatsministerium für Wirtschaft, Arbeit und Verkehr, […] Dresden,

respondent to the appeal on a point of law:

Other parties:

1. Zwickauer Energieversorgung GmbH, […] Zwickau,

defendant

[…] […]

2. Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, […] Bonn

Following the hearing held on 11 October 2022, the antitrust division of the Bundesgerichtshof (Federal Court of Justice, Germany)

ordered:

I. The proceedings are stayed.

II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 2(28) and (29) and Article 30 et seq. of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU:

Do Article 2(28) and (29) and Article 30 et seq. of Directive 2019/944 preclude a provision such as Paragraph 3(24a) in conjunction with Paragraph 3(16) of the Gesetz über die Elektrizitäts- und Gasversorgung (Law on electricity and gas supply (; 'the EnWG'), according to which the operator of an energy facility for the supply of energy is not subject to the obligations of a distribution system operator if it constructs and operates the energy facility instead of the existing distribution system in order to supply, by means of electricity generated in a combined heat and power plant, several blocks of flats with up to 200 rented residential units and with an annual quantity of transmitted energy of up to 1 000 MWh, with the costs of the construction and operation of the energy facility being borne by the end consumers (tenants) as part of a standard monthly basic fee payable for the heat supplied and the operator sells the electricity generated to the tenants?

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Grounds:

1 I. The applicant is an energy supply company. Among other things, it operates combined heat and power plants, local heating networks and energy facilities at several locations, used to supply end consumers with heat and electricity, generating a turnover of more than EUR 1 billion in 2019. The defendant ('the Distribution System Operator') operates the electricity distribution system in Zwickau. The parties disagree as to whether the defendant is obliged to connect two of the applicant's energy facilities to its network as customer systems pursuant to Paragraph 3(24a) of the EnWG.

2 The applicant supplied heat and hot water on the basis of a heat supply contract with the property owner, Zwickau Wohnungsbaugenossenschaft eG ('the Housing Association') to four apartment blocks with 96 residential units, located on a site measuring 9 000 m^2 ('Area 1'), as well as six residential blocks with 160 residential units, located on a site measuring 25 500 m^2 ('Area 2'), each through an energy centre and a local heating network connected to this. Areas 1 and 2 are adjacent to each other; however, the local heating networks are not connected to each other. The apartment blocks located in the two areas were all connected to the distribution system of the Distribution System Operator.

3 In 2018, the applicant planned to construct and operate two combined heat and power plants with 20 kW (Area 1) and 40 kW (Area 2) of electrical capacity and two galvanically isolated electrical wiring systems […] to which the end consumers (tenants) were then to be connected. The applicant wanted to sell the electricity generated in the combined heat and power plants, in addition to heat and hot water, to the tenants living in the blocks of flats, whereby an annual amount of energy passed through is expected to be 288 MWh in Area 1 and 480 MWh in Area 2. It therefore applied to the defendant for network connections for two separate customer systems with main electrical connections in Areas 1 and 2 and applied for connection to its network as well as the provision of the necessary metering points pursuant to Paragraph 20(1d) of the EnWG. The defendant rejected the applications on the grounds that they were not customer systems.

4 The respondent to the appeal on a point of law, which is the regulatory authority of the *Land* ('the *Land* Regulatory Authority'), rejected the applicant's requests for a review of this conduct and for the defendant to be ordered to connect the systems to its network as customer systems and to allow for usage to be invoiced in accordance with Paragraph 20(1d) of the EnWG. During the appeal proceedings before the Oberlandesgericht (Higher Regional Court) the applicant and the Housing Association concluded a new heat supply contract on 21/27 April 2020. After that, the two combined heat and power plants were expected to be built by December 2020.

5 II. The decision on the appeal depends on provisions of the German Law on electricity and gas supply (EnWG), which read as follows:

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Paragraph 3 EnWG

For the purposes of this law, the following definitions apply

3. Electricity distribution system operators

Natural or legal persons or legally dependent organisational units of an energy supply company that perform the task of distributing electricity and are responsible for the operation, maintenance and, if necessary, expansion of the distribution system in a given area and, where applicable, the interconnectors to other networks,

15. Energy facilities

Facilities for the generation, storage, transmission or distribution of energy, unless they are used solely for the transmission of signals; this includes the distribution systems of the end consumers (…),

16. Energy supply networks,

Electricity supply networks and gas supply networks over one or more voltage levels or pressure stages with the exception of customer systems as defined in Nos 24a (…),

18. Energy supply company

Natural or legal persons who supply energy to others, operate an energy supply network or have power of disposal over an energy supply network as the owner; the operation of a customer system or a customer system for its own operational energy supplies does not make the operator an energy supply company,

24a. Customer systems

Energy plants for the supply of energy,

(a) that are located in an area that is spatially connected,

(b) are connected to an energy supply network or to a generation facility,

(c) are insignificant for ensuring effective and undistorted competition in the supply of electricity and gas, and

(d) are made available to anybody free of charge and on a non-discriminatory basis for the purpose of supplying the connected end consumers by way of transmission, irrespective of the choice of energy supplier,

Paragraph 20(1d) of the EnWG (…)

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> The operator of the energy supply network to which a customer system (…) is connected shall provide the metering point for recording the quantity of electricity withdrawn by the customer system from the general supply network and fed into the general supply network (summation meter) as well as all metering points required for granting network access for sub-meters within the customer system by way of transmission (sub-meters required for end-consumer invoicing). When third parties supply end consumers, metered values shall be invoiced in accordance with the total quantities registered as consumed by the sub-meters (…)

6 III. The success of the appeal on points of law depends on the question referred. For that reason, prior to a decision, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to Article 267(1)(b) and Article 267(3) of the TFEU.

7 1. The court hearing the appeal found that there were no customer systems because systems 1 and 2 were not insignificant for ensuring effective undistorted competition in the supply of electricity and gas within the meaning of Paragraph 3(24a)(c) of the EnWG. The heat supply contract acted as a common framework linking Areas 1 and 2 to form a common entity with 10 apartment blocks, comprising an area of almost 30 000 m^2 and more than 300 connected residential units; the applicant was the operator of systems 1 and 2 and at the same time the electricity supplier for the tenants.

8 2. The appeal on points of law against this decision will be successful if systems 1 and 2 are to be classified as customer systems pursuant to Paragraph 3(24a) of the EnWG. In the opinion of the court division, this must be answered in the affirmative on the basis of the established facts.

9 a) The requirements of Paragraph 3(24a)(a) and (b) of the EnWG are met. Systems 1 and 2 are each located in an area that is spatially connected (cf. Federal Court of Justice, decision of 12 November 2019 – EnVR 66/18, WM 2020, 901 paragraph 22 – Netze BW) and are connected to an energy supply network and a generation plant. Despite its wording (‘or’), Paragraph 3(24a)(b) of the EnWG does not require a connection only with the energy supply network or only with a generation plant. The provision merely clarifies that the connection with a generation plant that does not have a connection with an energy supply network (‘stand-alone solutions’) is sufficient (cf. draft of a Law on the reorganisation of provisions in the energy sector of 6 June 2011, BT-Drucks. 17/6072 p. 51.

10 b) Pursuant to Paragraph 3(24a)(d) of the EnWG, the facilities are also made available to anybody on a non-discriminatory basis and free of charge and for the purpose of supplying the connected end consumers by way of transmission, irrespective of the choice of energy supplier.

11 aa) If consumption-related fees are levied for the use of the customer system, they are not free of charge. This includes any form of remuneration based on the

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amount of energy transmitted (Higher Regional Court Frankfurt, EnWZ 2018, 182 paragraph 40 […] [references]). With this provision, the law pursues the goal of refraining from regulating customer systems – which, in the case of natural monopolies, would also include pricing – only if there is no risk from the outset that the costs of the customer system will be charged on the basis of use. This risk also exists if the operator of the customer system acts as an energy supplier itself (Federal Court of Justice, order of 25 January 2022 – EnVR 20/18, ZNER 2022, 258 paragraph 20 with further references).

12 bb) The applicant does not charge consumption-based fees. It receives a standard monthly basic fee, which is not based on consumption, for all services to be provided under the heat supply contract, including all costs not dependent on consumption, such as, inter alia, for the construction and operation of the combined heat and power plants and the energy facilities from the point of transfer from the public distribution system to the point of transfer to the tenants and for ensuring the data exchange process with, inter alia, the distribution system operator under the heat supply contract (clause 2(1), clause 5, Annex 7 – tenant electricity). The Housing Association will charge the basic fee to the end consumers on a pro-rata basis according to the size of the occupied floor space.

13 cc) Based on these facts, the applicant does not have to demonstrate and prove that the electricity price it offers to end consumers does not include a usage fee for the system. The purpose of the requirement that the service be free of charge is fulfilled. According to the clear wording, the provision (only) aims to ensure that the supply of end consumers is free of charge and non-discriminatory. That is the case. All electricity suppliers, including the applicant, are treated equally as they use the plant free of charge. All end consumers connected to the energy facilities are made to bear the costs equally and irrespective of their choice of electricity supplier and the amount of electricity they consume. There are no indications of prohibitively high usage fees dependent on network use. Whether the fact that the costs for the construction and operation of the system are charged to the tenants is permissible according to the legal rules applicable in Germany for the allocation of operating costs is immaterial […]. It is irrelevant for the question whether the supply is free of charge pursuant to Paragraph 3(24a)(d) of the EnWG. According to the aforementioned principles, any inadmissibility under the law regarding operating costs, which the end consumers and tenants would have to assert against the Housing Association, would not mean that the criterion that the supply be free of charge pursuant to Paragraph 3(24a)(d) of the EnWG is not fulfilled.

14 c) Systems 1 and 2 are also insignificant for ensuring effective and undistorted competition in the supply of electricity and gas pursuant to Paragraph 3(24a)(c) of the EnWG.

15 aa) An energy facility is insignificant for competition if it does not reach a scale, either in technical or economic terms or in terms of supply law, that can have an influence on supply competition and the position of the network operator as determined by the regulation. The key factor in that regard is the size of the

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system (Federal Court of Justice, decision of 12 November 2019 – EnVR 65/18, WM 2020, 897 paragraph 31 et seq. – Gewoba). A customer system is usually no longer deemed to exist if several hundred end consumers are connected, an area of significantly more than 10 000 m^2 is being supplied, several buildings are connected and the annual quantity of energy transmitted is expected to significantly exceed 1 000 MWh. If, in contrast, the size of the energy facility falls short of the listed values with regard to several of these points, it usually constitutes a customer system. However, in this case the trial judge must also decide whether the system is not to be regarded as competitively insignificant in the light of an overall assessment, in particular when other circumstances are taken into account (Federal Court of Justice, loc. cit. paragraph 32 – Gewoba).

16 bb) According to these principles, systems 1 and 2 are insignificant for competition. System 1 falls short of the listed values on three points and system 2 falls short on two.

17 (1) The court hearing the appeal wrongly considered both systems together in the overall assessment. Since they are galvanically isolated, they constitute two different systems for which the requirements of Paragraph 3(24a) of the EnWG must be checked separately in every case. The explanatory memorandum to the law, according to which, for example, the existence of a larger number of additional connected customer services must be taken into account (BT-Drucks. 17/6072 page 51; cf. BGH, loc. cit. paragraph 28 – Gewoba), refers only to additional customer systems connected to the energy facility in question (and not: additional customer systems connected to the upstream distribution system [references] […]).

18 (2) If the overall assessment required for the competition criterion is carried out only with regard to the respective system under consideration, the result is that systems 1 and 2 are insignificant from a competition point of view. It is true that the court has not yet decided whether a system that – as in this case, system 2 – falls short of the stated values in two points must generally be regarded to constitute a customer system. However, this must be answered in the affirmative. In that case, there is usually no value that is of significant size in terms of competition […]. In view of the small number of end consumers connected to each of the systems, one can expect no more than insignificant effects on the competitive situation of the defendant and on supply competition, even taking into account the fact that, vis-à-vis the end consumers, the applicant acts as operator of the customer system and at the same time as electricity supplier.

19 (3) Paragraph 3(24a) of the EnWG, as interpreted above, which the court has to use in view of the wording, meaning and purpose as well as the legislative history of the provision, and which the Bundesnetzagentur (Federal Network Agency) as the national regulatory authority also considers to be correct according to its statements at the hearing, does not comply with Article 2(28) and (29) as well as with Article 30 et seq. of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 (‘the Electricity Directive’) if systems 1 and 2 are

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part of the distribution system within the meaning of Article 2(28) and (29) of the Electricity Directive. This is because, according to Paragraph 3(16) of the EnWG, customer systems are not part of an energy supply network. Their operators are not distribution system operators pursuant to Paragraph 3(3) of the EnWG and are therefore not subject to regulation pursuant to Paragraph 11 et seq. of the EnWG. At the network connection point of the customer system to the energy supply network, the regulated network ends and the non-regulated customer system starts (cf. BT-Drucks. 17/6072 . p. 51). The Court of Justice of the European Union has not yet addressed the question of whether the concept 'distribution system' also includes customer systems within the meaning of Paragraph 3(24a) of the EnWG. That question cannot be answered readily.

20 a) Distribution according to Article 2(28) means the transmission of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to delivering it to customers, but does not include supply. Supply is the sale, including resale, of electricity to customers (Article 2(12) of the Electricity Directive). It is not intended for particular transmission or distribution systems to be excluded from the scope of the Directive by reason of their size or consumption of electricity (judgment of 22 May 2008, citiworks, C-439/06, EU:C:2008:298, paragraph 49, as regards Directive 2003/54/EC). Which structures form distribution systems, and according to which criteria this is to be determined, is unclear. There appears to be no doubt that in-house distribution systems operated by the landlord inside a building do not constitute distribution systems, irrespective of their size [references] […]. This also applies to an energy facility owned by a homeowners' association for the supply of energy which supplies – in the legal sense – 20 single-family houses on one property (see Federal Court of Justice, WM 2020, 901 paragraph 22 – Netze BW). However, in view of the size of systems 1 and 2 to be assessed here and the fact that the applicant deals with the tenants both as owner and operator of the systems and as electricity supplier [references] […], it cannot be assumed beyond any doubt that the systems are not part of the distribution system within the meaning of Article 2(28) and (29) and Article 30 et seq. of the Electricity Directive.

21 b) The connection of systems 1 and 2 as customer systems to the distribution system affects the objectives of Article 1(1) and (2) of the Electricity Directive to create integrated, competitive, fair and transparent electricity markets, and to ensure affordable and transparent energy prices and costs for consumers, a high level of security of supply and a smooth transition to a sustainable energy facility with low CO_2 emissions. Admittedly, this is insignificant with regard to the individual system, which, as explained above, must be considered separately. However, the more energy facilities for the supply of energy of a comparable type and size are connected to the distribution system by way of customer systems, the more significant are the possible, partly adverse and – as the applicant rightly points out – partly beneficial effects on the aforementioned objectives.

22 aa) While it is true that energy facilities for the delivery of energy connected to decentralised generation plants, such as systems 1 and 2, can facilitate a transition

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to a sustainable energy system with low CO_2 emissions [reference] […]; however, when a large number of comparable customer systems are connected to the distribution system, network operation generally becomes more expensive and less efficient. Increasingly fewer end consumers bear the total costs of the network. That is because electricity generated by a decentralised generation plant and consumed in the customer system connected to it is not subject to network fees pursuant to Paragraph 20 et seq. of the EnWG, whereas the distribution system operator must nevertheless maintain sufficient network capacity to maintain supplies in the event of a failure of the decentralised generation plants (cf. Federal Court of Justice, decision of 28 June 2005 – KVR 27/04, BGHZ 163, 296 [juris, paragraph 48]; [references] […]). In view of Articles 15(2)(e) and 16(1)(e) of the Electricity Directive, according to which it must be ensured that (even) active customers and citizen energy communities contribute in an appropriate and balanced way to the overall system costs, there are therefore also doubts as to whether systems 1 and 2 can be excluded from the distribution system.

23 bb) The fact that the costs for the construction, operation and maintenance of systems 1 and 2 are borne by the Housing Association (and ultimately by the end consumers and tenants) on the basis of the heat supply contract leads to a distortion of competition in the relationship between the applicant and other electricity suppliers. The applicant does not have to bear the costs of the energy facilities for the delivery of energy, nor does it have to pay network fees ([…]. The more systems of a comparable type and size the applicant operates, the greater the impact on competition that can therefore be expected.

cc) Furthermore, there is also a conflict of interest inherent in the system in relation to the end consumers because the applicant deals with them both as, on the one hand, owner and operator of the customer system and, on the other, as electricity supplier. As an electricity supplier, the applicant has an interest in imposing the highest possible electricity prices. This interest would be impaired if the charges it levies for the construction, operation and maintenance of systems 1 and 2 were shown in a transparent manner. The agreements entered into in the heat supply contract in question accordingly do not show the usage fee separately. It is therefore not possible for the tenants to calculate the total fees incurred by them for the electricity which they use.

Previous court:

OLG Dresden (Higher Regional Court Dresden), decision of 16 September 2020 – Kart 9/19 –

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