JUDGMENT OF THE COURT (Third Chamber)

14 April 2005 *

In Joined Cases C-128/03 and C-129/03,

REFERENCES for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decisions of 14 January 2003, received at the Court on 24 March 2003, in the proceedings

AEM SpA (C-128/03),

AEM Torino SpA (C-129/03)

v

Autorità per l'energia elettrica e per il gas and Others,

third party:

ENEL Produzione SpA,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, S. von Bahr (Rapporteur), J. Malenovský and U. Lõhmus, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 September 2004,

after considering the observations submitted on behalf of:

— AEM SpA and AEM Torino SpA, by O. Brouwer, advocaat, and T. Salonico, avvocato,

— the Italian Government, by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,

— the Commission of the European Communties, by V. Di Bucci et H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Article 87 EC and Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20), in particular Articles 7 and 8 thereof.

2 Those questions were raised in proceedings brought by AEM SpA ('AEM') and AEM Torino SpA ('AEM Torino') by which those companies contested two decisions of the Autorità per l'energia elettrica e per il gas (Electricity and Gas Authority; 'the AEEG') and a ministerial decree increasing the charge on certain hydroelectric and geothermal power stations for access to and use of the national electricity transmission system.

Relevant provisions

Community legislation

3 Article 1 of Directive 96/92 states that the directive 'establishes common rules for the generation, transmission and distribution of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorisations and the operation of systems'.

4 Article 7(1) and (5) of Directive 96/92 provide:

'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.

...

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

5 Article 8(1) to (3) of the same directive provide:

'1. The transmission system operator shall be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the dispatching of generating installations and the use of interconnectors shall be

determined on the basis of criteria which may be approved by the Member State and which must be objective, published and applied in a non-discriminatory manner which ensures the proper functioning of the internal market in electricity. They shall take into account the economic precedence of electricity from available generating installations of interconnector transfers and the technical constraints on the system.

3. A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.'

6 Article 24(1) of the directive states:

'1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This decision shall be published in the *Official Journal of the European Communities*.'

7 Article 24(2) of Directive 96/92 states that applications for a transitional regime are to be notified to the Commission no later than one year after the entry into force of that directive.

National legislation

8 Legislative Decree No 79 of 16 March 1999 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity (*Gazzetta ufficiale della Repubblica italiana* No 75 of 31 March 1999, p. 8) ('Legislative Decree No 79/99') states in Article 3(10) that a charge is payable to the system operator for access to and use of the national transmission system. That charge is determined independently of the geographical location of the production sites and final customers and, in any event, on the basis of non-discriminatory criteria. The amount of the charge is determined by the AEEG which also adjusts its rate.

9 Article 3(11) of Legislative Decree No 79/99 provides that the general revenue charges relating to the electricity system include different expenditure: research expenditure, expenditure incurred in the dismantling of decommissioned nuclear power stations, those related to closure of the nuclear fuel cycle and those of related and consequent activities. Those general revenue charges are specified by one or more decrees of the Ministro dell'industria, commercio e dell'artigianato (Minister for Industry, Commerce and Craft Industries), in consultation with the Ministro del tesoro, bilancio e della programmazione economica (Minister for the Treasury, the Budget and Economic Planning), on a proposal of the AEEG.

10 Under Article 2(1) of the Decree of the Ministro dell'industria, del commercio e dell'artigianato of 26 January 2000 on the determination of the general revenue charges of the electricity system, adopted in cooperation with the Ministro del tesoro, del bilancio e della programmazione economica on a proposal of the AEEG (*Gazzetta ufficiale della Repubblica italiana* No 27 of 3 February 2000, p. 12) ('the Decree of 26 January 2000'), general revenue charges relating to the electricity system are defined as:

'(a) restitution to the generation and distribution undertakings, under the criteria defined in this decree, of the non-recoverable portion, following implementation of [Directive 96/92], of the costs incurred in connection with electricity generation;

(b) financial offset for the overvaluation, stemming from implementation of [Directive 96/92], of electricity generated by hydroelectric and geothermal installations which, as at 19 February 1997, were the property of or were available to generation and distribution undertakings;

(c) costs related to the dismantling of decommissioned nuclear power stations and to the closure of the nuclear fuel cycle and related activities resulting therefrom;

(d) costs of research and development for the purpose of technological innovation of general interest for the electricity system;

(e) application of favourable rates for the supply of electricity provided for in Article 2(2)(4) of Decision No 70/97 of [the AEEG] and by the Decree of the Ministro dell'industria, del commercio e dell'artigianato of 19 December 1995.'

11 As to financial offset for the overvaluation referred to in Article 2(1)(b) of the Decree of 26 January 2000, Article 3(3) of that decree, under the heading 'Charges resulting from implementation of [Directive 96/92]', provides:

'... in order to offset, if only in part, the general revenue charges relating to the electricity system only the amount of overvaluation of electricity generated by hydroelectric and geothermal installations not benefiting from a contribution [in favour of new installations using renewable energy sources] under the decisions of the Comitato interministeriale dei prezzi [Inter-ministerial committee on prices] of

12 July 1989 (No 15), 14 November 1990 (No 34) and 29 April 1992 (No 6), as amended, shall be recovered for a period of seven years with effect from 1 January 2000 and subject to the detailed rules laid down in Article 5. The provisions hereof shall not apply to installations with a nominal power not greater than 3 MW or to hydroelectric pumping installations.'

12 Under Article 5(9) of the Decree of 26 January 2000:

'The amount of the overvaluation to be recovered in respect of the period stated in Article 3(3) shall be equal for the year 2000 to the approved variable unit cost of electricity generated by thermal power stations using commercial fossil fuels, as provided for in Article 6(5) of Decision No 70/1997 of [the AEEG]. In subsequent years for each power station and in each two-month period, it shall be equal to a proportion of the difference between the average weighted value of wholesale prices of electricity sold on the national market from time to time during that two-month period, using as weightings the quantities of electricity generated by the station from time to time during the two-month period, and the average fixed unit costs of the station as determined by [the AEEG] on an annual basis up to 31 December of the preceding year. For the years 2001 and 2002 such proportion shall be equal to 75%; for the years 2003 and 2004 50% and for the years 2005 and 2006 25%. After that date the proportion shall be equal to zero.'

13 Under Article 2(1) and (2) of Decision No 231/00 of the AEEG of 20 December 2000 and Article 2(1), (2) and (8) of Decision No 232/00 of the AEEG of 20 December 2000 concerning determination of the increased charge in respect of electricity generated by hydroelectric and geothermal installations for access to and use of the national transmission system for 2000 to 2006 (Ordinary Supplement to *Gazzetta ufficiale della Repubblica italiana* No 4 of 5 January 2001, p. 13) ('Decision No 231/00' and 'Decision No 232/00'), the electricity stated in Article 3(3) of the Decree

of 26 January 2000 which is generated and supplied to the system by installations which, as at 19 February 1997, were the property of or were available to generation and distribution undertakings, attracts an increased charge for use of the system covering the power services, to offset the overvaluation within the meaning of Article 2(1)(b) of the Decree of 26 January 2000.

14 Under Article 3(1) of both Decision No 231/00 and Decision No 232/00 the revenue from the increased charge referred to in Article 2 of those decisions ('the increased charge') is to be paid into the 'Cassa conguaglio per il settore elettrico' (Equalisation fund for the electricity sector, hereinafter 'equalisation fund') by the system operator. Article 3(2) of those decisions provides that those payments are to be credited to the 'Conto per la gestione della compensazione della maggiore valorizzazione dell'energia elettrica nella transizione' (Account for offsetting the overvaluation of electricity during the transitional period). Under Article 3(3) of the said decisions any surplus on the latter account is to be transferred to the 'Conto per nuovi impianti da fonti rinnovabili e assimilate' (Account for new installations using renewable and assimilated energy sources).

The main proceedings

15 According to the orders for reference, AEM and AEM Torino brought proceedings before the Tribunale amministrativo regionale per la Lombardia challenging Decision No 231/00 and Decision No 232/00 and their preparatory, basic and related measures, including the Decree of 26 January 2000.

16 When those proceedings were dismissed, AEM and AEM Torino lodged appeals before the Consiglio di Stato for annulment of the decisions of dismissal.

17 In the orders for reference, the Consiglio di Stato states in particular that AEM and AEM Torino claim that the increased charge comes entirely within the regime of aid for the functioning of certain undertakings or generation financed by levies on supplies by undertakings in the sector, which amounts to State aid within the meaning of Article 87(1) EC, granted in the present case in disregard of the procedure laid down in the EC Treaty. AEM and AEM Torino also submit that dissimilar charges for access to the transmission system, with a heavier burden on certain undertakings, constitutes an infringement of one of the fundamental principles of Directive 96/92 as regards universal access without discrimination to that system.

The questions referred for a preliminary ruling

18 In the view of the Consiglio di Stato, an examination of the provisions challenged, taken together, shows that the increased charge is based on the need to offset the undue advantages and to counter the competitive imbalances which arose in the first period of liberalisation of the electricity market, set from 2000 to 2006, following implementation of Directive 96/92.

19 In that regard it notes that in fact prior to liberalisation the generation and distribution undertakings of electricity coming from hydroelectric and geothermal installations applied a tariff of which one element, B, related to the cost of the fuel. However, the portion representing that element of the tariff was paid by the undertakings to the equalisation fund which, in turn, transferred it to the thermal installations which were the only ones to bear a fuel cost.

20 That change has produced a twofold advantage for those undertakings. First, following elimination of the B element of the tariff for customers on the captive market and which was previously intended for the equalisation fund, those undertakings are able to receive a charge of an equal amount across national territory for the captive market still subject to the tariff system on the basis of criteria which still take account of a fuel cost, although they do not bear that cost. Secondly, that advantage is intended to be applied also on the open market in the case of eligible customers, inasmuch as wholesale prices on the captive market constitute a reference for bilateral bargaining on the open market. Both advantages are attributable solely to the altered legal framework following liberalisation of the sector and not to an alteration in terms of efficiency and competitiveness.

21 The Consiglio di Stato states in an explanatory memorandum on the regulation of tariffs of 4 August 1999 ('the explanatory memorandum') that the AEEG maintained that, were the generation and distribution undertakings permitted to retain the benefit of that overvaluation of hydroelectric and geothermal generation, revenue would be created for those undertakings and a charge would arise for the electricity system as a direct consequence of liberalisation, thus entailing higher tariffs for consumers not founded on higher costs.

22 The explanatory memorandum goes on to state that 'in the case of electricity generated by hydroelectric and geothermal installations, that consequence must be avoided by imposing on that electricity an increased charge for access to and use of the transmission system within the meaning of Article 3(10) of Legislative Decree No 79/99, pending expiry of existing concessions for the extraction of water for hydroelectric uses and for utilisation of geothermal resources for the purposes of thermal electricity generation. The yield from those increases may be used to offset "stranded costs" which might arise and could not be met in any other way or may be used for financing general revenue charges relating to the electricity system including those concerning the promotion of electricity generated by installations using renewable energy sources.'

23 Annex 2 to the explanatory memorandum states, first, that the tariff regulation based on the system in force prior to implementation of Directive 96/92 provided for the grant of contributions paid by the equalisation fund in favour of electricity generation differentiated according to the type of installation and producer.

24 It is stated in that annex that such differentiation in the system of contributions to electricity generation is incompatible with a liberalised framework of generation. Under a liberalised framework it is inevitable that, for each period, a single market price is formed for wholesale electricity which all producers fix and charge, irrespective of the type of installation utilised.

25 Finally, it is stated in that annex that the profit which results for electricity generated by hydroelectric and geothermal installations depends on the availability of scarce resources, namely water and geothermal resources for use in electricity generation, which are not valued in a proper manner under the current system.

26 The Consiglio di Stato adds that, so far as concerns electricity on the free market, the increased charge for access to and use of the national transmission system was introduced from the year 2000 by Decision No 231/00, whereas for electricity on the captive market the increase was only introduced from 2001 by Decision No 232/00. That is attributable to the fact that, on the captive market, elimination of the B element of the tariff and of the contributions to the fuel costs related to it was deferred until 2001.

27 The Consiglio di Stato also states that recovery of the overvaluation is determined by reducing it progressively until the end of 2006 in such a way as to allow the market to attain an equilibrium which is actually competitive.

28 It further states that it has taken note of the fact that the increased charge is not based on Article 24 of Directive 96/92.

29 On the basis of those considerations, the Consiglio di Stato believes it necessary to clarify, first, whether a regime such as the one in question in the main proceedings constitutes State aid within the meaning of the rules laid down in Article 87 EC et seq.

30 In that regard, it notes that the yield from the increased charge is not used to cross-subsidise certain undertakings or categories of undertakings operating in the market but seeks to offset the general revenue charges of the electricity system for the benefit of users. It is therefore a general measure of economic policy which does not aim to benefit certain undertakings or the production of certain goods but, on the contrary, pursues an interest of a general nature. In fact, according to the Consiglio di Stato, contrary to what is indicated in places in the preparatory documents, the provisions at issue do not seek to allocate the revenue raised to a specific category of undertakings with a view to covering the stranded costs. Decisions Nos 231/00 and 232/00 further provide — merely as a possibility — that any surplus on the account for offsetting the overvaluation of electricity during the transitional period may be transferred to the account for new installations using renewable and assimilated energy sources. In the final analysis, it is not the provisions in question of the Decree of 26 January 2000 providing for the relevant sums to be paid into an account intended to meet the general revenue charges of the system which may be classed as State aid. Rather, it may be the distinct and subsequent determination to use those

sums, henceforth publicly available, in favour of certain undertakings or the production of certain goods within the meaning of Article 87(1) EC which may amount to State aid.

31 Secondly, the Consiglio di Stato believes it necessary to check the compatibility of such a regime with the principles and provisions of Directive 96/92, in particular Article 7 thereof and the 25th recital in the preamble thereto, as regards ensuring universal network access without discrimination, and Article 8 of the same directive as regards laying down the criteria for dispatching the generating installations.

32 It is in those circumstances that the Consiglio di Stato decided to stay the proceedings and refer to the Court for a preliminary ruling two questions which are identical in Cases C-128/03 and C-129/03:

'(1) Can an administrative measure which, on the terms and for the purposes stated in the reasoning, imposes on certain undertakings using the electricity transmission system an increased charge for access to and use of that system intended to finance general revenue charges of the electricity system be regarded as a State aid for the purposes of Article 87 et seq of the [EC] Treaty?

(b) Must the principles established in Directive 96/92 concerning the liberalisation of the internal market in electricity, and in particular Articles 7 and 8 thereof concerning operation of the electricity transmission system, be interpreted as precluding the possibility for a Member State to adopt a measure imposing on certain undertakings, for a transitional period, an increased charge in order to offset the overvaluation of hydroelectric and geothermal energy occasioned, on

the terms and for the purposes stated in the reasoning, by the altered legislative framework and to finance general revenue charges of the electricity system?'

33 By order of 6 May 2003 the President of the Court ordered that Cases C-128/03 and C-129/03 be joined.

Substance

The first question

34 By its first question, the national court asks essentially whether a measure such as the one at issue in the main proceedings, under which a Member State imposes only on certain users of the electricity transmission system an increased charge for access to and use of that system, constitutes State aid within the meaning of Article 87 EC.

Observations submitted to the Court

35 AEM and AEM Torino note that the Decree of 26 January 2000 and Decisions Nos 231/00 and 232/00, and also Decision No 228/01 of the AEEG of 18 October 2001 approving a consolidated version of provisions of the AEEG for the provision of

services in the transmission, measurement and sale of electricity (Ordinary Supplement to *Gazzetta ufficiale della Repubblica italiana* No 277 of 22 December 2001, p. 5), impose on certain undertakings generating and distributing hydroelectricity and electricity from geothermal sources an increased charge for access to the national transmission system, with a view to offsetting the general revenue charges of the electricity system and the costs of generation of the power stations admitted to the system of contributions in favour of new installations using renewable energy sources. AEM and AEM Torino maintain that those provisions are an integral part of the schemes of State aid provided for by the Decree of 26 January 2000 to finance the general revenue charges of the Italian electricity system (stranded costs) and by Article 22(3) of Law No 9/91 of 9 January 1991 on rules for the implementation of the new national plan on energy: institutional aspects, hydroelectric power stations and electric, hydrocarbon and geothermal lines, autoproduction and fiscal provisions (Ordinary Supplementto *Gazzetta ufficiale della Repubblica italiana* No 13 of 16 January 1991, p. 3), to grant incentives to generate electricity obtained from renewable and assimilated sources.

36 The Italian Government submits that an administrative measure which, in the context of lowering generation costs, imposes on certain undertakings generating and distributing hydroelectricity and geothermal electricity which use the national transmission system an increased charge which is temporary and degressive for access and use designed to finance the general revenue charges of the electricity system cannot be classed as State aid.

37 The Commission of the European Communities, for its part, maintains that a measure such as the one which is the subject of the main proceedings and which, on the terms and for the purposes stated in the reasoning, provides for certain undertakings which use the electricity grid to pay an increased charge for access to and use of the system, intended to finance general revenue charges of the electricity system, does not constitute State aid within the meaning of Article 87 EC et seq.

Findings of the Court

38 It should be noted that Article 87(1) EC defines State aid which is governed by the Treaty as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. The concept of State aid within the meaning of that provision is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the normal burdens on the budget of an undertaking (see, in particular, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, p. 19, Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19, and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 24).

39 However, the concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question (see, in particular, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42, and Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 42).

40 In the case in the main proceedings, according to the orders for reference the increased charge for access to and use of the national electricity transmission system demanded only from undertakings generating and distributing electricity from hydroelectric or geothermal installations is intended to offset the advantage created for those undertakings by the liberalisation of the market in electricity following the implementation of Directive 96/92. The transitional regime for the initial period of that liberalisation enables those undertakings to charge, first, a price on the captive market set on the basis of criteria which take account of a fuel cost which they do

not bear and which is no longer offset by an element of the tariff paid by them to the equalisation fund, and secondly, a price on the open market for which the wholesale price on the captive market constitutes a reference, whilst, as Annex 2 to the explanatory note in particular shows, under concessions for the extraction of water for hydroelectric uses and for utilisation of geothermal resources for the purposes of thermal electricity generation, those resources are not yet properly valued.

41 As the national court observed, that advantage does not result from altered criteria for efficiency and competition, but from the altered legal framework following liberalisation of the electricity sector.

42 Further, according to the explanatory memorandum the electricity generated by those undertakings will not be subject to the increased charge until expiry of existing concessions for the extraction of water for hydroelectric uses and for utilisation of geothermal resources for the purposes of thermal electricity generation. Also according to the order for reference, the increased charge is to be degressive until the end of 2006.

43 Consequently, a measure such as the one at issue in the main proceedings, which imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydroelectric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the liberalisation of the market in electricity following the implementation of Directive 96/92, constitutes different treatment of undertakings in relation to charges which is attributable to the nature and general scheme of the system of charges in question. That difference is not therefore per se State aid within the meaning of Article 87 EC.

44 However, AEM and AEM Torino have claimed that the increased charge is an integral part of the schemes of State aid provided for by the Decree of 26 January 2000 to finance the general revenue charges of the Italian electricity system (stranded costs) and by Article 22(3) of Law No 9/91 to promote the generation of electricity from renewable and assimilated sources.

45 According to the case-law of the Court, the method by which an aid is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing. On the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid where that method forms an integral part of the measure (see Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 49).

46 However, for a special tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the special tax is necessarily allocated for the financing of the aid. It is only in the event of such hypothecation that the revenue from the special tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the common market (see, to that effect, Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 26, and Case C-175/02 *Pape* [2005] ECR I-127, paragraph 15).

47 It follows that if, as in a situation such as that in the main proceedings, there is hypothecation of the increased charge for access to and use of the national electricity transmission system to a national scheme of aid, in the sense that the revenue from the increase is necessarily allocated for the financing of the aid, that increase is an integral part of that scheme and must therefore be considered together with the latter.

48 The case-file does not contain sufficiently specific information in that regard to enable the Court to rule on that question.

49 In that connection, it should also be noted that the Commission stated that on 25 July 2000 the Italian authorities notified to it the Decree of 26 January 2000 as an aid measure as provided for in Article 88(3) EC, and that that decree referred to financial offset for the overvaluation and therefore indirectly to the increased charge. At the hearing, the Commission stated that the investigation procedure in respect of that decree is still pending.

50 The answer to the first question referred for a preliminary ruling must therefore be that a measure such as the one at issue in the main proceedings, which imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydroelectric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the liberalisation of the market in electricity following the implementation of Directive 96/92, constitutes different treatment of undertakings in relation to charges which is attributable to the nature and general scheme of the system of charges in question. That different treatment is not therefore per se State aid within the meaning of Article 87 EC.

51 However, aid cannot be considered separately from the effects of its method of financing. If, in a situation such as that in the main proceedings, there is hypothecation of the increased charge for access to and use of the national electricity transmission system to a national scheme of aid, in the sense that the revenue from the increase is necessarily allocated for the financing of the aid, that increase is an integral part of that scheme and must therefore be considered together with the latter.

The second question

52 By its second question, the national court asks essentially if Article 7(5) and Article 8 (2) of Directive 96/92, inasmuch as they prohibit all discrimination between users of the national electricity transmission system, preclude a Member State from adopting a measure, such as the one at issue in the main proceedings, imposing an increased charge for a transitional period only on certain electricity generation and distribution undertakings for access to and use of that system.

Observations submitted to the Court

53 AEM and AEM Torino submit that an increased charge for access to and use of the national transmission system which is imposed, if only for a transitional period, on certain undertakings only, in particular having regard to the fact that that period of increase coincides with the phase of introducing competition on the Italian electricity market after it has been opened to such competition, is incompatible with the basic principle of access to the system on the basis of objective, transparent and non-discriminatory criteria provided for in Directive 96/92.

54 The Italian Government is of the opinion that the fact that a Member State imposes on certain electricity generation and distribution undertakings an increased charge which is for a transitional period and degressive for access to and use of the national electricity transmission system in order to balance an advantage which results from the overvaluation of hydroelectricity and electricity from geothermal sources attributable to the new legislative framework owing to the liberalisation of the

internal market in electricity is not incompatible with the principles laid down by Directive 96/92.

55 The Commission considers that the principles laid down by Directive 96/92 concerning liberalisation of the internal market in electricity, and in particular Articles 7 and 8 on operation of the national transmission system, do not preclude the possibility for a Member State to adopt a measure imposing for a transitional period on certain undertakings an increased charge intended to offset the overvaluation of hydroelectricity and geothermal electricity occasioned by the altered legislative framework and to finance general revenue charges of the electricity system.

Findings of the Court

56 It should first be noted that Article 7(5) of Directive 96/92 refers to the system operator of the national electricity transmission system, and Article 8(2) of that directive refers to the order of dispatching of electricity generating installations. However, first, the measures at issue in the main proceedings are a ministerial decree and decisions adopted by a public authority, not by the system operator. Secondly, the national provisions referred to in the actions lodged by AEM and AEM Torino relate to the conditions for access to the system and not the order of dispatching of electricity generating installations.

57 However, it follows from Article 16 of Directive 96/92 that although, for the organisation of access to the system, Member States may choose between the

negotiated access procedure and the single buyer procedure, both sets of procedure must be operated in accordance with objective, transparent and non-discriminatory criteria.

58 In any event, those provisions, like the general principle of non-discrimination of which they are specific applications, preclude different treatment of comparable situations and like treatment of different situations (see, as to the principle of non-discrimination, in particular Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32).

59 As the Court has stated in paragraphs 42 and 43 of this judgment, the national measure at issue in the main proceedings imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydro-electric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the altered legal framework following the liberalisation of the market in electricity as a result of the implementation of Directive 96/92. Whilst such a measure treats differently situations which are not comparable, it is nevertheless a matter for the national court to satisfy itself that the increased charge does not go beyond what is necessary to offset that advantage.

60 Therefore, the answer to the second question referred for a preliminary ruling must be that the rule of non-discriminatory access to the national electricity transmission system laid down in Directive 96/92 does not preclude a Member State from adopting a measure, such as the one at issue in the main proceedings, which imposes an increased charge for a transitional period for access to and use of that system only on certain electricity generation and distribution undertakings to offset the advantage created for those undertakings, during the transitional period, by the

altered legal framework following the liberalisation of the market in electricity as a result of the implementation of that directive. However, it is a matter for the national court to satisfy itself that the increased charge does not go beyond what is necessary to offset that advantage.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **A measure such as the one at issue in the main proceedings, which imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydroelectric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the liberalisation of the market in electricity following the implementation of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common**

rules for the internal market in electricity, constitutes different treatment of undertakings in relation to charges which is attributable to the nature and general scheme of the system of charges in question. That different treatment is not therefore per se State aid within the meaning of Article 87 EC.

However, aid cannot be considered separately from the effects of its method of financing. If, in a situation such as that in the main proceedings, there is hypothecation of the increased charge for access to and use of the national electricity transmission system to a national scheme of aid, in the sense that the revenue from the increase is necessarily allocated for the financing of the aid, that increase is an integral part of that scheme and must therefore be considered together with the latter.

2. **The rule of non-discriminatory access to the national electricity transmission system laid down in Directive 96/92 does not preclude a Member State from adopting a measure, such as the one at issue in the main proceedings, which imposes an increased charge for a transitional period for access to and use of that system only on certain electricity generation and distribution undertakings to offset the advantage created for those undertakings, during the transitional period, by the altered legal framework following the liberalisation of the market in electricity as a result of the implementation of that directive. However, it is a matter for the national court to satisfy itself that the increased charge does not go beyond what is necessary to offset that advantage.**

[Signatures]