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Press and Information

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Judgment of the Court of Justice in Case C-17/03

Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie

**THE GRANT OF PREFERENTIAL ACCESS TO THE CROSS-BORDER
ELECTRICITY TRANSMISSION NETWORK TO AN UNDERTAKING WHICH
PREVIOUSLY HELD A MONOPOLY, BECAUSE OF CONTRACTS CONCLUDED
PRIOR TO THE LIBERALISATION OF THE MARKET, AMOUNTS TO
DISCRIMINATION PROHIBITED BY THE SECOND ELECTRICITY DIRECTIVE**

The directive provided the Netherlands with the opportunity to apply to the Commission for a derogation; the Netherlands did not, however, make use of that opportunity

Prior to the liberalisation of the electricity market, the Samenwerkende Elektriciteits Productiebedrijven NV (SEP)¹ was the only undertaking in the Netherlands authorised to import electricity and was entrusted with the task of general economic interest which consisted in ensuring the reliable and efficient operation of the public distribution of electricity at costs that were as low as possible and justified in the light of the general interest. In order to perform that task, the SEP had entered into long-term contracts with Électricité de France, Preussen Elektra AG and Vereinigte Elektrizitätswerke Westfalen AG for the importation of electricity.

Subsequently, by reason of the liberalisation of the market as a result of the transposition of the second European directive on the internal market in electricity,² the SEP lost its import monopoly and that market was opened up to other competing operators. The directive requires that there be no discrimination in regard to operators' access to the network for the transmission of electricity.

That notwithstanding, the competent administrative authority, namely the Directeur van de Dienst uitvoering en toezicht energie (the Director of the Service for Implementation and

¹ The Netherlands Elektriciteit Administratiekantoor BV (NEA) assumed the rights of the SEP with effect from 1 January 2001.

² 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).

Control of Energy Supply) (DTE), reserved for the SEP, on a preferential basis, a significant portion of the capacity of the cross-border network for the importation of electricity into the Netherlands in order that the SEP could continue to honour the long-term contracts referred to above.

Three of the competing companies – Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV and Eneco NV – challenged the decision of the DTE.

The College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), before which the dispute was brought, has referred questions to the Court of Justice of the European Communities in that connection.

The Court takes the view that **the priority access to the cross-border transmission network conferred on the SEP constitutes discriminatory treatment which is not justified** by the fact that the undertaking formerly holding the monopoly in the Netherlands had concluded long-term contracts pursuant to its task of general economic interest.

The Court points out in this regard that, in order to tone down some of the consequences of liberalisation, the directive provided for the possibility of applying a transitional regime allowing Member States to seek derogations in cases where contracts concluded before the directive entered into force might not be capable of being honoured on account of the directive's provisions.

Applications for a derogation of this kind had to be submitted by Member States no later than one year after the directive entered into force. The decision was a matter for the Commission.

The Kingdom of the Netherlands did not, however, apply in good time for a derogation in respect of those long-term contracts of the SEP. The derogation procedure under the directive would be rendered meaningless if it were to be accepted that a Member State may unilaterally apply differing treatment to electricity importers with regard to network access. Were that the case, the access of new operators to the market would be frustrated and the position of the undertaking previously holding the monopoly in the Netherlands could be protected against competition from other operators in a manner going beyond the possibilities which the Community legislature had envisaged, contrary to the liberalising objective pursued by the directive.

Furthermore, the system of derogations provided for in the directive is designed, *inter alia*, to ensure equal treatment for undertakings previously holding a national monopoly. Equal treatment of this kind could be compromised if it were accepted that each Member State could, outwith the procedure and conditions laid down in the directive, confer an advantage on the undertaking previously holding its monopoly in order to safeguard performance of the long-term contracts which that undertaking had concluded prior to the liberalisation of the electricity market.

Accordingly, **the Court concludes that preferential access to a portion of the network capacity for the cross-border transmission of electricity conferred on an operator by reason of contracts concluded before the directive entered into force, but without compliance with the derogation procedure set out therein, must be regarded as being discriminatory and for that reason contrary to the second electricity directive.**

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

Languages available: DE, FR, EN, NL

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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