OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 20 October 2009 [1]

I – Introduction

1. In the early days of the welfare state, certain areas of the economy were set apart from the free market philosophy with the aim of reducing the distance between the 'dominated *lebensraum* (living space)' and the 'effective *lebensraum*'. [2] Inspired by ideals which went beyond the strictly economic – enshrined in the time-honoured continental legal concept of *service public* – state intervention in some sectors was intensified, monopolies were created and regulation was increased.

2. Since the Single European Act, when competition was installed as the new deity on 'the altar of political ideas', public service has become an obstacle to be overcome in the name of a liberalisation on which all hopes were pinned. [3]

3. The creation of an open market is the first step of this policy, but once barriers have been removed there remain certain requirements which the market alone is not able to meet. Hence the origins of public intervention, in the form of 'services of general interest' and 'public service obligations', imposed by the authorities on undertakings in liberalised sectors in order to safeguard public interests which, because they are inalienable, cannot be left to market forces to take care of.

4. It is the great challenge of economic law today to define the limits of this state activity. So far, the question has only arisen in connection with the existence of exclusive rights or the financing of these services and rarely in relation to public service obligations. It is precisely this aspect with which the present reference for a preliminary ruling is concerned.

5. Since the 19th century gas has had a special importance in the development of modern

1 — Original language: Spanish.

2 — Using the terminology coined by Forsthoff, in his theory of *Daseinsvorsorge* or 'provision of subsistence' (Forsthoff, E., *Sociedad Industrial y Administración Pública,* Escuela Nacional de Administración Pública, Madrid 1967 (1958)).

3 — As Fernández, T.R. so expertly points out in 'Del servicio público a la liberalización desde 1950 hasta hoy', *Revista de Administración Pública,* no 150, September-December 1999, pp. 57 to 73.

societies. Literature reflects the suspicion initially aroused by gas [4] and the impact that it later had, [5] until it became part of everyday life, as shown by Pérez Galdós. [6] Directive 2003/55/EC [7] provides that the gas market shall be entirely opened up from 1 July 2007 and the Tribunale Administrativo Regionale della Lombardia (Regional Administrative Court, Lombardy) is asking whether, after this date, the Italian authorities can intervene on an exceptional basis in the setting of gas prices in a situation where there is a de facto absence of competition.

6. If public service can be defined, as noted by the French Conseil d'État, [8] as 'the extension of the market by other means, where the market has failed, and not the other way around', then, in a situation of diminished competition, the state would have to intervene in order to mitigate the effects of this difficult situation. Yet state involvement in the market must be limited so as not to postpone true liberalisation indefinitely, and should focus on the protection of the rights of the consumer.

4 — In his novel *La femme au collier de velours*, written in 1846, Alexandre Dumas describes how 'Nodier had a horror … of all new inventions in general. Gas made him furious; steam exasperated him. He discovered an infallible sign of the speedy end of the world in the destruction of the forests and the exhaustion of the coal mines' (*Monsieur de Chauvelin's will, to which is added The woman with the velvet necklace*, J.M. Dent & Co., London, 1897, p. 166).

5 — One of the earliest applications of gas was discovered by the Frenchman Montgolfier with the ascent of his famous balloon using the 'levity' of hydrogen:
In 1833 Mariano José de Larra wrote three articles, all under the same title of 'Ascensión aerostática' (ascent in a balloon) (*Artículos completos*, RBA and Instituto Cervantes). In the first (pp. 482 et seq.) he describes the attempt by the Spaniard García Rozo to launch a balloon from the parterre of the Retiro in Madrid on 28 April 1833 before the king and queen, amidst great excitement. The experiment failed for various reasons, including rain. In the second article (pp. 546 et seq.) the account focuses on another attempt by García Rozo in the Plaza de Oriente a few days later in which he failed to fill the balloon, re-enacting the scene where Don Quixote and Sancho, mounted on Clavileño, think they are flying through the region of fire as the bellows from the Duke's house are gently blown. In the third, shorter, article, which is not included in the cited work, he again refers to the Plaza de Oriente debacle.
Later on, gas is seen as a modern development:
In *La Reliquia*, José Maria Eça de Queirós has the protagonist ask: 'Had I irrevocably lost my identity as Raposo, a Catholic Bachelor of Law, contemporary of gaslight and *The Times*, and become a man of classical antiquity, of the time of Tiberius?' (*The Relic,* translated by Aubrey F. G Bell, Max Reinhardt, London, 1954, p. 148).
Finally, gas becomes part of daily life, lighting streets and homes:
In *Le Bal* (translated by Sandra Smith, Vintage Books, London, 2007, p. 7), Irene Nemirovsky relates how the mother of the main character, Antoinette, would read novels, leaning over below a large, round, frosted glass lamp in which the gas burnt sputteringly; and on p. 28 she writes of Antoinette bumping into the lamplighter one nightfall in Paris as he touched the streetlamps one after the other with his long stick, making them burst into flame.
Recently, Ana María Matute, winner of the Planeta, Nadal and Café de Gijón prizes and candidate for the Nobel prize, has written in *Paraíso inhabitado* (Destino, Barcelona, 2008, p. 1) of the lamplighter who, at dusk during the years leading up to Spain's Second Republic, 'would go about using a long pole to light little, tremulous, bluish flames within the gas street lamps'.

6 — Simón Palmer, M. del C., 'El gas en la obra de Galdós', *Actas del IV Congreso internacional de estudios galdosianos de 1990,* Cabildo Insular de Gran Canaria (ed.), Las Palmas, 1993, vol. II, pp. 565 et seq., contains numerous passages from *Episodios Nacionales*, *Fortunata y Jacinta*, *Tormento*, *La Desheredada* and *Doña Perfecta*.

7 — 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).

8 — 'Rapport public du Conseil d'État, 1994, Considérations générales: Service public, services publics : déclin ou renouveau, *Études et Documents* No 46, Paris, 1995.

II – Legal framework

A – *Community law: Directive 2003/55*

7. Directive 2003/55 seeks to complete the internal market in natural gas.

8. As noted in Recital 2 in the preamble to that directive, experience in respect of Directive 98/30/EC, [9] which is repealed by the 2003 directive, has shown the benefits that would result from the creation of such a market, while highlighting the significant shortcomings that remain and the possibilities for improvement in the functioning of the market, notably through 'concrete provisions … to ensure a level playing field and to reduce the risks of market dominance and predatory behaviour, …, and ensuring that the rights of small and vulnerable customers are protected'.

9. Recital 18 in the preamble to Directive 2003/55 concerns one of the key aspects of the liberalisation process: the ability of gas customers to choose their supplier freely. The directive adopts a phased approach to achieving this objective, coupled with a deadline, in order to enable undertakings to adjust and to ensure the protection of the interests of customers and their real and effective right to choose a supplier.

10. Recital 26 concerns measures taken by Member States to achieve high levels of 'public service in the Community', specifying that they should be regularly notified to the Commission and that they differ 'according to households and small and medium sized enterprises'. Recital 27 refers to public service, stating that it is a 'fundamental requirement' of the directive, which should specify 'common minimum standards, … which take into account … consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States'. It also emphasises that such requirements must be interpreted taking into account national circumstances and subject to the observance of Community law.

11. Pursuant to Article 2(25), the directive defines 'household customers' as meaning those customers purchasing natural gas for

9 — 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).

their own household consumption and, pursuant to Article 2(28), it defines 'eligible customers' as meaning those customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 23 of the directive. Article 23(1)(c) requires Member States to ensure that, from 1 July 2007, all customers are eligible customers.

12. Article 3 of the directive relates to public service obligations and customer protection. Article 3(1) requires Member States to ensure that 'natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas' and states that they must not 'discriminate between these undertakings as regards either rights or obligations'.

13. However, the foregoing is 'without prejudice to paragraph 2' of Article 3, which provides that 'having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to … price of supplies …'. Such obligations must be clearly explained, transparent, non discriminatory, verifiable and must guarantee equality of access for EU gas companies to national consumers.

14. Article 3(3) introduces a requirement to protect consumers, and to pay particular attention to the most needy: Member States must protect final customers and ensure adequate levels of consumer protection, particularly of vulnerable customers, including helping them to avoid disconnection, in particular with respect to transparency regarding general contractual terms and conditions, information and dispute settlement mechanisms. Member States should ensure that eligible customers are able to switch to a new supplier. As regards at least household customers, these measures should include those set out in Annex A. [10]

15. Pursuant to Article 3(6), Member States shall, 'upon implementation of this Directive, inform the Commission of all measures adopted to fulfil public service obligations, including consumer and environmental protection,

10 — Paragraph g of Annex A refers to measures 'to ensure that customers … connected to the gas system are informed about their rights to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices'.

and their possible effect on national and international competition', irrespective of whether such measures represent a derogation from the provisions of the directive.

B – *The relevant Italian law*

16. Just a few days before 1 July 2007, which was the deadline for completing the liberalisation of the gas market under Article 23 of Directive 2003/55, Italian Decree-Law No 73 of 18 June 2007 was adopted, giving the Autorità per l'energia elettrica e il gas (Regulatory Authority for Electricity and Gas) the power to set 'reference prices' for the sale of gas to certain customers, even after the market had been fully opened up.

17. The Decree-Law was converted into Law No 125 of 3 August 2007, Article 1(3) of which provides that:

'To comply with the Community law provisions on universal service, the Autorità per l'energia elettrica e il gas shall impose standard terms for the supply of the service and establish, on a transitional basis and based on the actual costs of the service, reference prices … for supplies of gas to domestic customers, which distributors or suppliers shall, within the scope of their public service obligations, incorporate into their commercial offers (providing also the possibility of a choice between different tariff and time-band packages). … without affecting the powers of supervision and intervention of the Autorità per l'energia elettrica e il gas to protect the rights of consumers, particularly in cases of verified and unjustified price increases and variations in the terms of service to customers who have not yet exercised the right of choice.' [11]

18. The Italian court making the reference takes the view that this provision provides 'a legislative basis for the exercise beyond 1 July 2007 of the regulatory power of the Authority in relation to the price of gas'.

11 — The drafting of Article 1(3) of the Decree-Law differed slightly from that of the same article in the converting Law, which further specified that the power of the Autorità is transitional.

III – The main proceedings and the question referred for a preliminary ruling

19. On 29 March 2007 the Autorità per l'energia elettrica e il gas adopted Decision No 79/07 revising the economic terms for the supply of gas for the period between 1 January 2005 and 31 March 2007 and establishing criteria for future revisions of such terms. Paragraph 1.3.1 of the decision provides that the calculation formulae approved for the revision of the variable wholesale cost would apply until 30 June 2008; paragraph 1.3.2 allows the Autorità to determine whether the conditions are met for this power to be extended until 30 June 2009.

20. Federutility, Assogas, Libarna Gas SpA., Collino Commercio SpA, Sadori Gas SpA., Egea Commerciale, E.On Vendita srl and Sorgenia SpA (which are undertakings and associations of undertakings operating in the Italian natural gas market) have brought five actions challenging Decision No 79/07 and other subsequent decisions of the Autorità (Decision Nos 80/07, 158/07, 242/07 and 346/07). [12]

21. The main argument put forward by them concerns a supposed breach of Directive 2003/55, pursuant to which the gas sector was to have been entirely liberalised from 1 July 2007. The applicants maintain that in order to ensure that, as from that date, all customers can freely choose their supplier, gas prices must be determined exclusively by supply and demand, without interference from the authorities. They therefore claim that, after the second quarter of 2007, the 'reference prices' (which were introduced under Decision No 79/07) contravene Community law.

22. The fourth Chamber of the Tribunale Administrativo Regionale della Lombardia, before which these actions have come, has taken the view that the resolution of the case depends on the interpretation of Directive 2003/55 and has referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 234 EC:

'On a proper interpretation, in accordance with the principles enshrined in the EU Treaty, of Article 23 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003, which regulates the opening up of the gas market, is it contrary to that provision and to the principles of Community law for a national provision (and measures adopted in pursuance thereof) to maintain in effect after 1 July 2007 the power of the national regulatory authority to set reference prices for the supply of natural gas to domestic customers (an open-ended category not defined in the legislation and

12 — Cases 1276/07, 1279/07, 1285/07, 1359/07 and 1490/07.

which does not of itself entail particular circumstances of socio-economic disadvantage such as might justify the setting of such reference prices), which distributors or suppliers, within the scope of their public service obligations, are bound to include in their commercial offers?

Or is the provision in question (Article 23) to be read in conjunction with Article 3 of Directive 2003/55/EC (which provides that Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which … relate … to the price of supplies) as meaning that it is not contrary to those provisions of Community law for a national provision which, having regard to the particular circumstances of the market, still characterised by an absence of conditions of "effective competition", at least in the wholesale sector, to allow a public authority to set a reference price for natural gas which has to be quoted by every supplier in its commercial offers to its domestic customers within the scope of the universal service concept, despite the fact that all customers [are] treated as "free"?'

IV – The procedure before the Court of Justice

23. The request for a preliminary ruling was lodged at the Registry of the Court of Justice on 20 June 2008.

24. Federutility, Libarna Gas SpA, Sorgenia SpA and Assogas have submitted written observations, as have the Commission and the Polish, Estonian and Italian Governments.

25. In a document appended to the notice to attend the hearing, the parties to the main proceedings and the Italian Republic were asked whether the requirement to state 'reference prices' for supplies of natural gas to domestic customers in commercial offers means that undertakings are obliged to offer and apply these prices to their customers and that, consequently, they are prohibited from entering into contracts on the basis of different tariffs, or whether those prices are purely indicative. They were also asked about the scope of

this requirement and requested to give information on whether the customers involved are private individuals only, to the exclusion of legal persons. Federutility, Libarna Gas SpA, Sorgenia SpA, Assogas and the Italian Government have each replied to the Court of Justice in documents dated July 2009.

26. At the hearing held on 8 September 2009, the representatives of Federutility, Assogas, Libarna Gas SpA, Sorgenia SpA, the Commission, the Italian Government and the Estonian Government presented oral submissions.

V – Preliminary remarks: price intervention in a context of formal competition

A – *The absence of genuine competition in the gas market*

27. The process of liberalising the energy sector which started with Directives 96/92/EC [13] and 98/30/EC was considerably hastened by the adoption of Directives 2003/54/EC [14] and 2003/55/EC, which opened up the electricity and gas markets for all non-domestic customers from 1 July 2004 and for all consumers, without distinction, from 1 July 2007. [15]

28. It was for the Member States to make this ambitious agenda a reality. Progress has, however, been very uneven. So stated the Commission in its Communication to the Council and the European Parliament of 10 January 2007, [16] which recognises that, although 'the basic concepts of the internal energy market have become embedded in terms of the legal framework, institutional arrangements and the physical infrastructure …, meaningful competition does not exist in many Member States. Often customers do not have any real possibility of opting for an alternative supplier' and, in general, a high degree of confidence in the internal market does not yet exist. [17]

13 — 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).

14 — 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).

15 — Article 21 of Directive 2003/54 and Article 23 of Directive 2003/55.

16 — Communication on the prospects for the internal gas and electricity market (COM(2006) 841 final).

17 — In fact, as pointed out by Peter Cameron, '[t]he benefits of liberalization of energy markets have so far been less obvious than had been anticipated: lower prices are not necessarily an effect of liberalization, nor is a decline in state interference; the market power of incumbents has increased and the entry of new players into the electricity and gas markets has taken on a "waiting for Godot" aspect' (Cameron, P., *Legal aspects of EU energy regulation. Implementing the New Directives on Electricity and Gas Across Europe,* Oxford University Press, 2005, p. 36).

29. Mindful that the liberalisation process is incomplete, the Commission has adopted a 'third energy package' with a view to addressing the shortcomings of the current provisions. This includes a proposal for amending Directive 2003/55 which suggests, for example, the effective separation of supply and production activities from network operation. [18]

30. The Commission sees intervention in gas (and electricity) pricing as simultaneously one of the causes and one of the effects of the current lack of competition in the energy sector. On the one hand, the Commission puts 'regulated prices preventing entry from new market players' among the main deficiencies observed in the transposition of the recent directives. [19] On the other, it goes on to say that such shortcomings mean that 'incumbent electricity and gas companies largely maintain their dominant positions", which has "led many Member States to retain tight control on the electricity and gas prices charged to end-users. Unfortunately this is often a serious constraint on competition.' [20]

31. Coexistence of open energy markets and regulated prices is quite common among EU Member States; according to the Commission report of 15 April 2008, [21] it exists 'in one third of the gas markets … and more than half of the electricity markets. For most Member States with price regulation, regulation is not limited to small customers – all customer segments can be supplied at regulated prices'.

32. This situation matches that of the Italian gas sector. As the Italian Government has expressed in its statement of written observations, the national gas market is characterised by the pre-eminent role of Eni, an undertaking which simultaneously has a monopoly on gas imports, owns most of the transport network, has a totally dominant position with regard to production and is the main wholesaler. This absence of competition in the wholesale market has allowed the continued existence of local retail monopolies, which are frequently vertically integrated with the operators of the distribution network. In this

18 — Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC (COM(2007) 529 final).

19 — Communication of 10 January 2007, paragraph 1.3.

20 — Communication of 10 January 2007, paragraph 1.4.

21 — Report from the Commission to the Council and the European Parliament on progress in creating the internal gas and electricity market (COM(2008) 192 final).

situation, it is very difficult for other suppliers to enter the market: firstly because they would be obliged to purchase gas from Eni, which would impose its own terms, thus reducing to a minimum any profit margins; and secondly because of the difficulty of competing locally with vertically integrated operators.

B – *Regulation of the price of supplies in conditions of absence of competition*

33. It was these circumstances, together with rising oil prices on the international markets, which led the Italian authorities to take the action now in dispute. To prevent the increased cost of the raw material having a negative impact on consumers, it took the decision to extend the power of the Autorità per l'energia elettrica e il gas to set 'reference prices' for the supply of natural gas to domestic customers even after 1 July 2007, the date on which the Italian gas market was liberalised under the legislation transposing Directive 2003/55.

34. Under Article 1(3) of the Italian Law of 3 August 2007, the power at issue has the following characteristics:

— (1) It sets 'reference prices' for the supply of natural gas which distributors or suppliers are required to incorporate 'into their commercial offers (providing also the possibility of a choice between different tariff and time-band packages)'.

In response to enquiries made of the parties to the main proceedings and the Italian Government regarding the scope of this obligation, the former reply denying that such 'reference prices' are merely indicative. They argue that, in practice, gas undertakings cannot offer their customers different and more attractive prices than those indicated by the Autorità, whose 'reference prices' are already below the European average. Taking into account the fact that, in addition, suppliers have to offer and apply such protected prices to a large number of consumers, the conclusion must be, according to the applicants in the main proceedings, that the option of other pricing is purely theoretical. [22]

— (2) The 'reference prices' are calculated on the basis of 'the actual costs of the

22 — Statement submitted by Federutility dated 31 July 2009, points 7 to 9; and that submitted by Sorgenia dated 31 July 2009, paragraph 1.

service'. According to the information on the file, the economic terms set by the Autorità derive from the aggregate of four elements: the cost of distribution, the cost of transport and storage, a variable amount relating to retail sale and a further variable amount relating to the cost of acquiring the raw material, including the cost associated with the wholesale purchase of gas. The dispute in this case revolves around the calculation of the last component, since, unlike in the wholesale market, where gas prices follow the trajectory of oil prices, retail gas prices are protected by a 'safeguard clause', used by the Autorità to prevent the full cost of the raw material being recouped when it is very high. Thus, gas suppliers are obliged to charge their customers a price which does not fully reflect the amount paid for the raw material. To prevent the economic burden of the transaction falling exclusively on these undertakings, the Autorità has required wholesalers to renegotiate their gas sales contracts. [23]

— (3) As far as the scope of such 'reference prices' is concerned, Article 1(3) of the Decree-Law requires only that these should be offered to 'domestic customers'. The order for reference calls this category of consumers 'open-ended'; the Commission suggests, to the contrary, that 'reference prices apply to families and to homes in centrally heated buildings which use less than 200 000 cubic metres per year'.

More specifically, the replies given by the parties to the main proceedings and the Italian Government at the end of July 2009 and the oral statements made at the hearing indicate that the requirement to maintain 'reference prices' affects two classes of consumers:

(a) final customers who were already eligible customers prior to 1 January 2003 (because their annual gas consumption was in excess of 200 000 cubic metres or for other reasons) and who had not yet entered into a new gas supply contract;

(b) final customers whose annual gas consumption was less than 200 000 cubic metres.

23 — In this regard, see pp. 5 and 6 of the statement of written observations submitted by Sorgenia SpA.

The applicants in the main proceedings alleged at the hearing and in the documents of July 2009 that both categories of final customers are made up of both private individuals and undertakings, including legal persons. [24] They cite Article 4 of Decision No 64/09 of the Autorità, which extended the application of protected prices to property owners' associations, even where the owner of the point of distribution is a management company. Nevertheless, Article 5 of Decision No 64/09 emphasises that final customers who have not entered into new contracts and who are not private individuals continue to fall within the protection until 30 September 2009 or until 30 September 2010 if their annual consumption does not exceed 200 000 cubic metres.

The Italian Government argues, to the contrary, that the system of 'reference prices' applies only to private individuals.

— (4) The Decree-Law, as converted into law by the Italian parliament, states that the power of the Autorità to set prices is of a transitional nature, thus amending the original wording of the Decree-Law, which did not mention this aspect.

At the hearing, the applicants argued that the power to set prices is insufficiently transitional in nature, since a cut-off point for exercising it was never laid down. In this regard they refer to the recent Law No 99 of 23 July 2009, which, in their view, grants the Autorità a general regulatory power without any limitation in time whatsoever.

— (5) Finally, the Italian legislature adds that 'reference prices' are established 'within the scope of their public service obligations' and in order to 'comply with the Community law provisions on universal service'.

35. The Tribunale Administrativo Regionale della Lombardia is asking the Court of Justice whether, in a market which is liberalised, as in the case of gas, but where there is a lack of effective competition, state intervention of this nature is contrary to Article 23 of Directive 2003/55 or whether it falls within Article 3. Both provisions should therefore be analysed.

24 — Statements submitted by Federutility dated 31 July 2009, points 12 and 13; and by Sorgenia SpA dated 31 July 2009, point 2.

VI – Analysis of the question referred

A – *Article 23 and price liberalisation*

36. The creation of an internal market in natural gas, which is the prime objective of Directive 2003/55, requires complete liberalisation.

37. The Community legislature soon realised that the opening up of the market would have to be undertaken gradually. The starting point was markets which were highly regulated, wholly national and often subject to monopolies. [25] The challenge was to turn them into a single, entirely free European market in which all consumers would be able to buy gas from the supplier of their choice. Directive 98/30 was a tentative first step, followed by Article 23 of Directive 2003/55, which set out a step-by-step timetable towards ensuring that all customers, including domestic customers, were eligible. [26]

38. The time-limit for attaining this goal was 1 July 2007. To achieve it required the removal of barriers which might hinder competition in the gas market, including price intervention to the extent that it constitutes a disincentive to investment. Article 3(1) of the directive obliges Member States to 'ensure … that … natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas'.

39. In view of the terms of the directive, and of its obvious liberalising motive, it would seem difficult to argue, as the Polish Government does in its statement of written observations, that the setting of prices purely by supply and demand is not a prerequisite for ensuring the right to a free choice of supplier. In fact, neither Article 23 nor any other provision in the directive expressly requires the Member States to allow prices for supplies to be established by the free operation of the market, and, in theory, it remains open to debate whether such a measure would always be beneficial for the consumer.

40. It is significant, however, that the Community legislature contemplates the regulatory authorities approving gas transmission and distribution tariffs (Article 25(2) of the directive), and, when it comes to establishing the price of supplies, sees this merely as an

25 — Frequently, state-owned monopolies.

26 — Within the meaning of Article 2 of the directive.

exceptional power within the framework of public service obligations (Article 3(2)).

B – *Article 3 and public service obligations*

41. The fact that the market has been liberalised does not necessarily mean that any intervention in gas pricing is ruled out. Article 3 of the directive provides various routes for legitimising the actions of Member States in this regard.

42. Firstly, Article 3(2) allows them to 'impose on undertakings operating in the gas sector, in the general economic interest, public service obligations' relating to the price of supplies. Secondly, Article 3(3) charges the Member States with adopting appropriate measures to protect final customers, particularly vulnerable customers, and to ensure a high level of consumer protection.

43. Both paragraphs of Article 3 reflect the multiple objectives of Directive 2003/55: to establish an internal market in gas as a way of protecting the interests of undertakings and consumers at the same time. Liberalisation, if it is not to be at any cost to individuals, makes a certain amount of regulation necessary when the market does not function adequately. Public service obligations constitute a method of structuring that exceptional state intervention, even after the deadline of 1 July 2007.

44. By the time the second energy package was adopted the formula was already well tried and tested. Once the state-owned monopolies [27] in the sector had been eliminated and it was subject to the laws of the market, certain requirements of general interest still remained. With this aim, the Community legislature considered the possibility of imposing public service and universal service obligations, even in the first sectors to be liberalised, such as the postal, transport and telecommunications sectors. The Court of Justice has specifically addressed these derogations, particularly their funding, and has held that the subsidies paid by way of 'compensation' for public service obligations do not constitute State aid [28] if they meet certain conditions. [29]

27 — Which, as Jones, C.W. writes in *EU Energy Law, Volume I, The Internal Energy Market*, Second Edition, Claeys & Casteels, Leuven, 2006, p. 223, 'it was always assumed … would act in the public interest'.

28 — Within the meaning of Article 87(1) EC.

29 — Case C-280/00 *Altmark* [2003] ECR I-7747, paragraphs 84 to 95. Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243 applied the conditions laid down in the previous decision to a case where the issue was the nature of port charges which were partially paid to a public undertaking. Prior to *Altmark*, Case C-53/00 *Ferring* [2001] ECR I-9067 had already identified the key factors which must be present for a tax exemption enjoyed by undertakings with public service functions to be considered compatible with the Treaty.

45. Article 3(2) of Directive 2003/55 incorporates the concept into the list of measures for the organisation of the gas sector and permits Member States to impose certain burdens on gas undertakings provided that these are essential to protect a 'general economic interest' whose precise scope remains undefined. [30]

46. The directive's lack of precision shows that the Community legislature has allowed the Member States wide discretion. This is confirmed by Recital 27, which refers to establishing 'common minimum standards' concerning the respect of the public service requirements, forming a nucleus which balances up 'the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States', and is interpreted in the light of the particular characteristics of each country, 'taking into account national circumstances and subject to the observance of Community law'.

47. However, the Member States do not have absolute freedom in this area, since Article 3(6) of the directive envisages a monitoring procedure for 'all measures adopted to fulfil public service obligations, including consumer and environmental protection, and their possible effect on national and international competition', which must be notified to the Commission upon implementation of the directive. Thereafter, the Member States are required to notify any changes every two years. [31]

30 — The directive indicates only that public service obligations are created in the general economic interest and that they 'may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency and climate protection'. There are those who regard this list as a closed category of reasons of 'general economic interest' capable of constituting grounds for state involvement (Geldhof, W., and Vanden Driessche, F., 'Chapter 1: European Electricity and Gas Market Liberalisation. Background, Status, Developments', in Delvaux, B., Hunt, M. and Talus, K. (eds.) *EU Energy Law and Policy Issues*, Euroconfidentiel, p. 48, citing, in turn, Jones, C.W., op. cit. p. 230). In my opinion, however, the provision describes the types of action in which the aforementioned public service obligations should result, rather than a list of circumstances which justify them, although the two aspects are closely linked. It follows from Article 3(2) of the directive that Member States can create public service obligations relating to gas prices, but simply stating that is not enough. In each case it is necessary to examine whether there exists a task of general economic interest.

31 — The Commission has attempted to define the requirements of the directive in more detail by issuing a non-binding note which applies in part to the *ex ante* monitoring of public service obligations notified by the Member States (see 'Note of DG Energy and Transport on Directives 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas. This document is not binding on the Commission', available at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/public_service_obligations_en.pdf). In an attempt to strengthen its position with regard to this monitoring function, the third energy package advocates the Commission adopting guidelines for the implementation of Article 3 of the directive (Article 3(4) of the Proposal for a Directive amending Directive 2003/55, inserting a new paragraph 7 into Article 3 of Directive 2003/55).

48. Furthermore, the directive itself sets out some fairly strict parameters for imposing public service obligations, which must:

— be in the 'general economic interest';

— be developed 'having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof';

— be clearly defined, transparent and verifiable;

— not give rise to discrimination; and

— guarantee equality of access for EU gas companies to national consumers.

49. Whether or not the power of the Autorità per l'energia elettrica e il gas to set prices is legally viable, which is the question at stake in this case, depends on whether or not these parameters have been respected and this must be established by the national court, following the interpretation of the directive given by the Court of Justice. [32]

50. It is necessary, then, to examine both the requirement for a 'general economic interest' (C), having regard to the Treaty and, in particular, Article 86 (D), and the absence of discrimination (E).

C – *The need for reasonable prices as grounds for 'general economic interest'*

51. Whether or not there exists a 'general economic interest' justifying public service obligations is the first matter at issue in this case.

52. As the Commission correctly argues in its statement of written observations, [33] the double reference in Article 3(2) of the

32 — Pursuant to Article 3(6) of the directive, such measures must be notified to the Commission, and this the Italian Government did, upon request (statement of written observations of the Commission at point 42).

33 — At point 38.

directive to Article 86 EC and to 'the general economic interest' means that the obligations contemplated therein correspond to those of undertakings entrusted with 'services of general economic interest' within the meaning of that article of the Treaty. [34]

53. The Court of Justice has held a large and varied group of services to be of general economic interest, including water, [35] gas [36] and electricity, [37] distribution, countrywide collection and delivery of mail, [38] the operation of unprofitable airlines, [39] ambulance transport [40] and the pharmaceuticals wholesale business, [41] to name but few. It is difficult to extrapolate a clear and precise rule from these decisions. [42] The directive, the Treaty and the case-law are all inspired by the same idea of finding a balance between the free market and regulation, between competition and the implications of the general interest, and, in my view, they also concur that it is for the Member States to determine which services of general economic interest they wish to preserve, without prejudice to the powers of the Community institutions (particularly the Court of Justice) to oversee such decisions and to prevent excesses. [43]

54. In the search for a common thread, one might look to Rolland's famous laws, to which the judgments in *Corbeau* [44] and *Almelo and Others* [45] indirectly refer in setting out the

34 — The term 'services of general economic interest' refers to services of an economic nature which the Member State subjects to obligations by virtue of a general interest criterion (Szyszczak, E., *The Regulation of the State in Competitive Markets in the EU*, Hart, 2007, p. 211). The origin of the formulation of Article 3(2) of the directive is, according to Laget-Annamayer, the meeting point 'between the French concept of *service public* and the Community notion of "service of general economic interest"' (Laget-Annamayer, A., *La régulation des services publics en réseaux. Télécommunications et électricité,* Bruylant, Brussels, 2002, p. 98).

35 — Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *NV IAZ International Belgium and Others* v *Commission* [1983] ECR 3369.

36 — Case C-159/94 *Commission* v *France* [1997] ECR I-5815.

37 — Case C-393/92 *Municipality of Almelo and Others* [1994] ECR I-1477.

38 — Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-147/97 *Deutsche Post* [2000] ECR I-825 and Case C-340/99 *TNT Traco* [2001] ECR I-4109.

39 — Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803.

40 — Case C-475/99 *Firma Ambulanz Glöckner* [2001] ECR I-8089.

41 — *Ferring*.

42 — Which otherwise concern undertakings with exclusive and special rights and do not relate to bodies which operate in liberalised sectors or those which are subject to public service obligations. The application of these decisions to this case must therefore depend on its particular factual context, which has yet to appear in the case-law.

43 — This idea also underlies Article 16 EC, which provides that 'without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.' The provision was incorporated by the Treaty of Amsterdam, at a time when the process of liberalising strategic sectors was in full swing, as the result of 'a deep concern in some sectors of society over the liberal tendencies being shown at the European level' (Sarmiento, D., 'La recepción en el derecho de la Unión Europea y en su jurisprudencia de las técnicas de regulación económica', *Derecho de la regulación económica. I. Fundamentos e instituciones de la regulación,* Muñoz Machado, S. and Esteve Pardo, J. (eds.), Iustel, Fundación Ortega y Gasset, 2009, p. 259).

44 — Paragraph 15.

45 — Paragraph 48. Along the same lines is Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 57.

conditions for the provision of services of general economic interest: the service should be uninterrupted (continuity); for the benefit of all consumers throughout the relevant territory (universality); at uniform tariff rates and of similar quality, irrespective of specific situations or of the degree of economic profitability of each separate transaction (equality).

55. Continuity, universality and equality; and today we would usually add transparency and affordability of the service to these time-honoured rules. Thus, Directive 2003/55 seeks continuity, universality and non-discrimination in the supply of gas, [46] but it also seeks to protect the right of customers 'to be supplied with natural gas of a specified quality at reasonable prices' (Recital 26). Hence the possibility of intervention in the price of supplies contemplated in Article 3(2) of the directive.

56. Against this background, it follows that the objective of preventing undesirable and disproportionate price rises which would be detrimental to consumers constitutes grounds for 'general economic interest' which, provided the directive's other conditions are met, would justify public intervention in respect of prices for the supply of natural gas.

D – *The proportionality test and regard for Community interests*

57. The second parameter focuses on the need to have full regard to the Treaty and, in particular, Article 86.

58. Of great importance here is Article 86(2) EC, which seeks, in the words of the case-law, 'to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market'. [47]

59. According to the Treaty provision, 'undertakings entrusted with the operation of services of general economic interest' are

46 — The list of possible obligations set out in Article 3(2) and the option of appointing a 'supplier of last resort' (Article 3(3)) demonstrate this.

47 — Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12.

subject to the Treaty and to its rules on competition, provided that their application does not obstruct the performance, in law or in fact, of the tasks assigned to them; and, in any event, the development of trade must not be affected contrary to the interests of the Community.

60. In the situation now to be resolved, the following aspects need to be examined: firstly, whether intervention in the price of gas supplies constitutes a necessary measure to ensure 'reasonable prices' (the so-called proportionality test); and, secondly, whether this route is contrary to 'the interests of the Community'.

1. The proportionality test

61. The part of the article which provides that the exception to the rules of the market must not obstruct the performance, in law or in fact, of the tasks in the general economic interest, brings the so-called proportionality test into play, and this is really the key to Article 86(2) EC, because it introduces the possibility of modulating its use.

(a) Case-law

62. Growing expectation over this article was triggered by the *Sacchi* judgment, which held that it was for the Member States to prove that free competition would seriously hinder the task assigned to the body in question. [48] Later on, the *Höfner* judgment clarified that the Treaty cannot be said to hinder the performance of the task assigned to a public employment agency 'in so far as [it] is not in a position to satisfy demand in that area of the market' and allows other companies to encroach on its exclusive rights. [49]

63. However, it was not until *Corbeau* that the principle of proportionality appeared in the Court's reasoning. In *Corbeau*, and later in *Almelo and Others,* the Court held that it was permissible to make exceptions to the rules of the market where these were necessary to ensure the 'economic stability' of the service, taking into account the balance of profitable and unprofitable operations.

64. Subsequently, three decisions concerning exclusive rights in the Netherlands, Italy

48 — Case 155/73 *Sacchi* [1974] ECR 409. Along the same lines, see *Ahmed Saeed Flugreisen and Silver Line Reisebüro.*

49 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 25.

and France to import and export energy [50] added further details. On the one hand, they referred to proportionality in the context of Article 86, allowing paragraph 2 to be relied upon 'to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights …, [provided that the] performance of the … tasks assigned to it [is guaranteed by] the grant of such rights and provided that the development of trade is not affected … contrary to the interests of the Community'. [51] On the other hand, the decisions went on to say that for the Treaty rules to be inapplicable, it is sufficient that they prevent 'the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not [essential] that the survival of the undertaking … be threatened' [52] and, although the burden of proof falls on the Member State in question, that Member State cannot be required to demonstrate 'that no other conceivable measure, which by definition would be hypothetical, [would guarantee] those tasks … under the same conditions'. [53]

65. It follows from the case-law that a derogation from competition rules on the basis of Article 86 is permissible only when absolutely necessary for the performance of the task of general interest in question and it is for the Member States to evaluate such circumstances in accordance with national policy and having full regard to the Treaty.

(b) Application to the case at issue

66. By means of a Decree-Law, the Italian Government chose to grant the national regulatory authority the power to intervene in the price of gas supplies, citing the absence of effective competition in the national gas market and rising oil prices in the international markets.

67. In my view, it is possible that circumstances such as those described could constitute a hindrance to attaining the 'general economic interest' aim of ensuring gas supplies at reasonable prices, thereby justifying state involvement in the free operation of the rules of the market.

68. In its Communication of 10 January 2007, referred to above, the Commission

50 — Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789; and Case C-159/94 *Commission* v *France* [1997] ECR I-5815. A fourth action for failure to fulfil obligations against Spain was dismissed (Case C-160/94 *Commission* v *Spain* [1997] ECR I-5851).

51 — *Commission* v *Netherlands*, paragraph 32; *Commission* v *Italy*, paragraph 43; and *Commission* v *France*, paragraph 49.

52 — *Commission* v *Netherlands*, paragraph 43; and *Commission* v *France*, paragraph 59. See also *TNT Traco*, paragraph 54; and Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 35.

53 — *Commission* v *Netherlands*, paragraph 58; *Commission* v *Italy*, paragraph 54; and *Commission* v *France*, paragraph 101.

recognises that '[e]xperience to date has demonstrated that wholesale energy prices exhibit considerable volatility. This raises the question of whether and how end-user customers, including vulnerable customers, should be exposed to such fluctuations'. With this concern in mind, it adds that, '[a]lthough price controls prevent suitable … signals being given to customers about future costs, targeted … regulations may be [unavoidable] to protect consumers in certain specific circumstances, for instance in the transition period towards effective competition'. Furthermore, '[such controls] must be balanced so as not to prevent market opening, create discriminations among EU energy suppliers, reinforce distortions of competition or restrict [sale]'. [54]

69. Thus, intervention must be proportional to the objective sought, which means, according to the case-law, that it must not go beyond what is absolutely necessary to achieve the relevant purpose 'of general economic interest': here, curbing prices. In applying this proportionality test, the following criteria, derived from the case-law already mentioned, can act as a guide:

54 — Paragraph 2.6.2.

(i) Transitional nature and adaptability

70. The temporary nature of the measure is, in my view, the first and main consequence of the proportionality principle, since the exception to the rules of the internal market loses its justification if the situation changes: for example, if competitors join the wholesale market or if prices stabilise. Any power to set prices for an unspecified period would therefore contravene the rule, [55] but would not require a date for the expiry of the power of intervention to be set. Moreover, the fact that it is adaptable to changing situations and is regularly revised [56] are aspects which should be regarded positively.

(ii) Content

71. Secondly, the content of the measure under consideration should be taken into account. So, if the aim is to prevent excessive rises in the amount paid by the final consumer of natural gas as a result of increases in oil prices, the public intervention must be

55 — This is probably the reason why, during the parliamentary process of conversion into law, the transitional nature of the power was emphasised.

56 — According to the Italian Government, this is done on a quarterly basis (see point 60 of its statement of written observations).

limited to that component of the sale price which relates to the raw material. [57]

(iii) Beneficiaries

72. Thirdly, in order to be proportional, the beneficiaries of the state measure must be limited. Mandatory pricing for commercial users (which are not families or 'domestic customers') would go beyond the objective of consumer protection which, ultimately, is the basis for state involvement in the market. In the present case, this would mean investigating whether the category of 'domestic customers' referred to in the Decree-Law fits this description. The applicants in the main proceedings and the Italian Government expressed their differing views on this point at the hearing. It is for the national court to determine whether, under Italian law, and in particular Autorità Decision No 64/09, the pricing protection applies to undertakings; if the answer is in the affirmative, the implication would be that the intervention is disproportionate and, as such, contrary to Community law.

73. Federutility, Assogas and Libarna Gas SpA also criticise the fact that the 'reference prices' extend beyond the category of 'vulnerable customers' referred to in Article 3(3) of the directive. There is particular concern shown for this group in the provision (it later mentions those living in outlying areas), but this is part of a general commitment to consumer protection. Consequently, it does not follow either from Article 3(3) or from Article 3(2) that public service obligations must always be based on social considerations.

(iv) Comparison with other instruments

74. Fourthly, of all the possible solutions, the least harmful to competition should be chosen. The case-law has given the Member States wide discretion in this regard, establishing that they cannot be required to provide the *probatio diabolica* or impossible proof that 'no other conceivable measure,…[would guarantee that] those tasks [were] performed under the same conditions'. [58] Consequently, the judgment in *Albany* [59] rejected the idea that the authorities should opt for the solution which least restricts competition.

57 — The Commission argues (see point 56), that this is the case in Italy; a matter which, again, is for the national court to verify.

58 — *Commission* v *Netherlands*, paragraph 58; *Commission* v *Italy*, paragraph 54; and *Commission* v *France*, paragraph 101.

59 — Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 99 and 104.

75. Federutility takes the view that the Italian state protects the quality and price of supplies (as well as their security and continuity) through the appointment of a supplier of last resort. It is for the Italian court to ascertain whether the price intervention and the universal service (referred to in Article 3(3) of the directive) have the same objective or whether they seek different and complementary aims.

76. The Commission 'benchmarking' carried out under Article 3(6) of the directive could be used for this type of monitoring, to compare measures implemented in the different Member States. However, this type of comparison requires great caution, as the directive itself demands 'that the public service requirements … be interpreted on a national basis, taking into account national circumstances and subject to the observance of Community law' (Recital 27).

2. Contrary to 'the interests of the Community'

77. Without prejudice to the proportionality test described above, Article 86(2) seeks to ensure that the measure adopted does not affect trade to such an extent 'as would be contrary to the interests of the Community'.

78. In the three judgments of 23 October 1997 referred to above, [60] the Court of Justice stated that it was incumbent on the Commission to define this interest. However, as Advocate General Léger warns in his Opinion in *Wouters and Others*, [61] these statements can be explained by the rules governing the burden of proof in infringement proceedings. I am in agreement with my former colleague that in order to find that there is a detrimental effect on intra-community trade within the meaning of Article 86(2), unlike the classic concept of measures having an effect equivalent to a quantitative restriction, proof would be required that the measure in issue has substantially disrupted the operation of the internal market.

79. In the present case, the Italian court must establish whether the price intervention of the Autorità has caused such a disruption. In its order for reference, the court hints that the 'continuation of a measure calculated to contain the cost of the raw material' has a negative impact on the right under the directive to choose a supplier. The court must

60 — *Commission* v *Netherlands*, paragraph 69; *Commission* v *Italy*, paragraph 65; and *Commission* v *France*, paragraph 113.

61 — Opinion delivered on 10 July 2001 in Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

also establish whether actual harm has been caused and whether, as has been claimed,[62] this hinders the opening up of the market.

Such a situation, coupled with the fact that the measure had an open-ended period of validity, led the French Conseil Constitutionnel to hold that a provision which subjected 'incumbent operators' to mandatory tariffs for the supply of electricity and natural gas were unconstitutional.[63]

E – *The non-discriminatory nature of public service obligations*

80. According to Article 3(2) of the directive, the public service obligations imposed on gas companies must not give rise to discrimination.

81. This requirement seeks to ensure that public service obligations bind all of the undertakings operating in the sector equally, so as to prevent the lack of competition becoming worse.

82. For example, it would be an infringement of the directive if 'reference prices' were introduced only for the dominant operator, giving rise to additional competitive advantages.

83. However, applying them in an indiscriminate, general way does not ensure equal treatment either. Assogas adds that the decisions of the Autorità give rise to a difference in treatment between gas suppliers who also act as wholesalers and those who do not, since although they are both obliged to respect the low 'reference prices', there is nothing to prevent the former from compensating themselves for the extra cost of the raw material out of sales to the latter. The case file indicates that the Autorità has attempted to minimise losses to retailers by pushing for a renegotiation of wholesale contracts.[64] Assogas suggests that this approach is inadequate, as the Autorità cannot involve itself in relationships governed by private law. The referring court must therefore investigate whether discrimination has taken place which resulted in actual losses for individual natural gas retailers.

62 — Statement of written observations submitted by Federutility, point 62.

63 — Decision No 2006-543 of 30 November 2006. The Conseil Constitutionnel found that such tariffs for incumbent operators were manifestly incompatible with the liberalising aims of the Community directives and had no public service justification whatsoever. On this decision, see Schoettl, E., 'Les problèmes constitutionnels soulevés par la loi relative au secteur de l'énergie', *Petites affiches*, 395th year (2006), No 244, pp. 3 to 23.

64 — Statement of written observations submitted by Sorgenia SpA at p. 6. This consisted of introducing economic incentives to renegotiate by virtue of Autorità Decision No 79/07, set out at points 22 and 23 of the statement of written observations submitted by the Italian Government.

F – *The role of Article 3(3) of the directive in the present case*

84. Whilst under Article 3(2) of the directive the introduction of public service obligations is simply seen as a Member State power 'in the general ... interest', under Article 3(3) the Member States have a general commitment to 'take appropriate measures to protect final customers and to ensure high levels of consumer protection'.

85. The possibility that this case could be considered under Article 3(3) has been raised and rejected, on more or less sound grounds, in some of the statements of written observations in these preliminary ruling proceedings.

86. Some of the applicants in the main proceedings argue that the disputed decisions are not justified under Article 3(3) because they apply to all types of user and not only to 'vulnerable' users. This argument is without foundation, as the provision is not limited to such persons, even if it expressly mentions them and accords them special protection.

87. I share the Commission's view that the measures to be taken by national governments under Article 3(3) of the directive 'do not relate directly to setting pricing requirements, since there is a more specific rule in Article 3(2)'.

88. Article 3(3) refers only indirectly to measures affecting the price of gas supplies, by way of reference to Annex A, which includes the requirement to inform consumers of their rights 'to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices' (paragraph g).

89. Intervention in the price of supplies is, therefore, simply something which is permissible and it falls within Article 3(2) rather than Article 3(3).

90. Article 3(3) reinforces the powers of the Member States by allowing them, and even requiring them, to intervene in a liberalised market, such as the gas market, when they become aware of a real threat to consumers which is not capable of being deflected by the tools provided in Article 3(2).

VII – Conclusion

91. In the light of the foregoing considerations, I propose that the Court of Justice should answer the questions referred for a preliminary ruling by the Tribunale Administrativo Regionale della Lombardia (Italy), by declaring that:

On a proper interpretation of Articles 3 and 23 of Directive 2003/55/EC, a national provision which, having regard to the particular circumstances of the market, still characterised by an absence of conditions of 'effective competition', allows a public authority to set a reference price for natural gas which it is compulsory to quote in commercial offers to domestic customers, does not infringe those articles, provided that the parameters laid down in Article 3(2) of Directive 2003/55 are respected and, in particular:

— it is directed towards a general economic interest such as the need to keep prices at a reasonable level;

— it meets the so-called proportionality test with regard to its period of validity, content and beneficiaries;

— it does not substantially disrupt the operation of the internal market; and

— it does not give rise to discrimination between operators in the sector.