Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

28 November 2024*

(Reference for a preliminary ruling – Internal market for electricity – Directive (EU) 2019/944 – Points 28 and 29 of Article 2 – Concept of 'distribution' – Concept of 'distribution system operator' – Concept of 'distribution system' – Articles 30 to 39 – Distribution system operation – Undertaking operating an energy facility comprising a combined heat and power plant and an electric wiring system, supplying heat, hot water and electricity to the tenants of a residential complex – Simultaneous sale of the electricity generated – National legislation exempting the operator of such a facility from the obligations of distribution system operators under that directive)

In Case C-293/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 13 December 2022, received at the Court on 9 May 2023, in the proceedings

ENGIE Deutschland GmbH

v

Landesregulierungsbehörde beim Sächsischen Staatsministerium für Wirtschaft, Arbeit und Verkehr,

other parties:

Zwickauer Energieversorgung GmbH,

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis (Rapporteur), President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Gratsias and E. Regan, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: German.

after considering the observations submitted on behalf of:

– ENGIE Deutschland GmbH, by D. Legler, Rechtsanwalt,

– the Landesregulierungsbehörde beim Sächsischen Staatsministerium für Wirtschaft, Arbeit und Verkehr, by A. Hennersdorf, J. Leuschke and K. Meißner, acting as Agents,

– Zwickauer Energieversorgung GmbH, by K.M. Schwabe, Rechtsanwalt,

– the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, by J. Kargel and C. Mögelin, acting as Agents,

– the European Commission, by O. Beynet and T. Scharf, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of points 28 and 29 of Article 2 and Article 30 et seq. of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2009 L 158, p. 125).

2 The request has been made in proceedings between ENGIE Deutschland GmbH ('ENGIE'), on the one hand, and the Landesregulierungsbehörde beim Sächsischen Staatsministerium für Wirtschaft, Arbeit und Verkehr (Regulatory Authority of the *Land* under the State Ministry of Economic Affairs, Labour and Transport of the *Land* of Saxony, Germany) ('the Regulatory Authority of the *Land* of Saxony'), on the other hand, concerning the refusal by Zwickauer Energieversorgung GmbH ('ZEV'), a distribution system operator, to connect two ENGIE energy facilities to its network as self-consumption facilities and to make available the necessary metering points.

Legal context

European Union law

Directive 2012/27/EU

3 Point 21 of Article 2 of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1), defines the concept of 'distribution system operator', for the purposes of that directive, as meaning a 'distribution system operator' as defined, inter alia, in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

Regulation (EU) 2019/943

4 Point 48 of Article 2 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54), defines the concept of 'distribution system operator' as meaning 'distribution system operator' as defined in point 29 of Article 2 of Directive 2019/944.

Directive 2019/944

5 Recitals 7, 8, 18, 65 and 68 of Directive 2019/944 state:

'(7) With a view to creating an internal market for electricity, Member States should foster the integration of their national markets and cooperation among system operators at [EU] and regional level, and incorporate isolated systems that form electricity islands that persist in the Union.

(8) … this Directive seeks to address the persisting obstacles to the completion of the internal market for electricity. The refined regulatory framework needs to contribute to overcoming the current problems of fragmented national markets …

…

(18) … The integration of electricity markets requires a high degree of cooperation among system operators, market participants and regulatory authorities, …

…

(65) Non-discriminatory access to the distribution network determines downstream access to customers at retail level. To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to household and small non-household customers.

…

(68) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. …'

6 Article 1 of that directive, entitled 'Subject matter', provides, in the first two paragraphs thereof:

'This Directive establishes common rules for the generation, transmission, distribution, energy storage and supply of electricity, together with consumer protection provisions, with a view to creating truly integrated competitive, consumer-centred, flexible, fair and transparent electricity markets in the Union.

Using the advantages of an integrated market, this Directive aims to ensure affordable, transparent energy prices and costs for consumers, a high degree of security of supply and a smooth transition towards a sustainable low-carbon energy system. It lays down key rules relating to the organisation and functioning of the Union electricity sector, in particular rules on consumer empowerment and protection, on open access to the integrated market, on third-party access to transmission and distribution infrastructure, unbundling requirements, and rules on the independence of regulatory authorities in the Member States.'

7 According to Article 2 of that directive, entitled 'Definitions':

'For the purposes of this Directive, the following definitions apply:

(1) "customer" means a wholesale or final customer of electricity;

…

(7) "small enterprise" means an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million;

…

(11) "citizen energy community" means a legal entity that:
(a) is based on voluntary and open participation and is effectively controlled by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises;
(b) has for its primary purpose to provide environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits; and
(c) may engage in generation, including from renewable sources, distribution, supply, consumption, aggregation, energy storage, energy efficiency services or charging services for electric vehicles or provide other energy services to its members or shareholders;

(12) "supply" means the sale, including the resale, of electricity to customers;

…

(28) "distribution" means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply;

(29) "distribution system operator" means a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;

…

(42) “small isolated system” means any system that had consumption of less than 3 000 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems;

(43) “small connected system” means any system that had consumption of less than 3 000 GWh in the year 1996, where more than 5% of annual consumption is obtained through interconnection with other systems;

…’

8 Article 4 of that directive, entitled ‘Free choice of supplier’, states:

‘Member States shall ensure that all customers are free to purchase electricity from the supplier of their choice and shall ensure that all customers are free to have more than one electricity supply contract at the same time, provided that the required connection and metering points are established.’

9 Article 12 of Directive 2019/944, entitled ‘Right to switch and rules on switching-related fees’, provides, in paragraphs 1 and 4 thereof:

‘1. Switching supplier … shall be carried out within the shortest possible time. Member States shall ensure that a customer wishing to switch suppliers …, while respecting contractual conditions, is entitled to such a switch within a maximum of three weeks from the date of the request. …

…

4. Member States shall ensure that the right to switch suppliers … is granted to customers in a non-discriminatory manner as regards cost, effort or time.

…’

10 According to Article 15 of that directive, entitled ‘Active customers’:

‘1. Member States shall ensure that final customers are entitled to act as active customers …

2. Member States shall ensure that active customers are:

…

(e) subject to cost-reflective, transparent and non-discriminatory network charges that account separately for the electricity fed into the grid and the electricity consumed from the grid, … ensuring that they contribute in an adequate and balanced way to the overall cost sharing of the system;

…’

11 Article 16 of that directive, entitled ‘Citizen energy communities’, provides:

‘1. Member States shall provide an enabling regulatory framework for citizen energy communities ensuring that:

…

(e) citizen energy communities are subject to … transparent, non-discriminatory and cost-reflective network charges …, ensuring that they contribute in an adequate and balanced way to the overall cost sharing of the system.

…

4. Member States may decide to grant citizen energy communities the right to manage distribution networks in their area of operation and establish the relevant procedures, without prejudice to Chapter IV or to other rules and regulations applying to distribution system operators. If such a right is granted, Member States shall ensure that citizen energy communities:

…

(b) are subject to appropriate network charges at the connection points between their network and the distribution network outside the citizen energy community and that such network charges account separately for the electricity fed into the distribution network and the electricity consumed from the distribution network outside the citizen energy community …;

…’

12 Article 18 of that directive sets out the rules applicable to bills and billing information.

13 Chapter IV of Directive 2019/944, entitled ‘Distribution system operation’, comprises Articles 30 to 39.

14 Article 30 of that directive, entitled ‘Designation of distribution system operators’, provides:

‘Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate one or more distribution system operators for a period of time to be determined by the Member States, having regard to considerations of efficiency and economic balance.’

15 Article 31 of that directive, entitled ‘Tasks of distribution system operators’, provides:

‘1. The distribution system operator shall be responsible for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity, for operating, maintaining and developing under economic conditions a secure, reliable and efficient electricity distribution system in its area with due regard for the environment and energy efficiency.

2. In any event, the distribution system operator shall not discriminate between system users or classes of system users, particularly in favour of its related undertakings.

3. The distribution system operator shall provide system users with the information they need for efficient access to, including use of, the system.

…

6. Where a distribution system operator is responsible for the procurement of products and services necessary for the efficient, reliable and secure operation of the distribution system, rules adopted by the distribution system operator for that purpose shall be objective, transparent and non-discriminatory, and shall be developed in coordination with transmission system operators and other relevant market participants. The terms and conditions, including rules and tariffs, where applicable, for the provision of such products and services to distribution system operators shall be established in accordance with Article 59(7) in a non-discriminatory and cost-reflective way and shall be published.

…

9. Distribution system operators shall cooperate with transmission system operators for the effective participation of market participants connected to their grid in retail, wholesale and balancing markets. …

10. Member States or their designated competent authorities may allow distribution system operators to perform activities other than those provided for in this Directive and in Regulation [2019/943], where such activities are necessary for the distribution system operators to fulfil their obligations under this Directive or Regulation [2019/943], provided that the regulatory authority has assessed the necessity of such a derogation. This paragraph shall be without prejudice to the right of the distribution system operators to own, develop, manage or operate networks other than electricity networks where the Member State or the designated competent authority has granted such a right.'

16 Articles 32 to 37 of Directive 2019/944 concern, respectively, incentives for the use of flexibility in distribution systems (Article 32), the integration of electromobility into the electricity network (Article 33), the tasks of distribution system operators in data management (Article 34), the unbundling of distribution system operators when they are part of a vertically integrated undertaking (Article 35), the rules on ownership of energy storage facilities by distribution system operators (Article 36) and the obligation of confidentiality imposed on the latter (Article 37).

17 Article 38 of that directive, entitled 'Closed distribution systems', states:

'1. Member States may provide for regulatory authorities or other competent authorities to classify a system which distributes electricity within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if:

(a) for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or

(b) that system distributes electricity primarily to the owner or operator of the system or their related undertakings.

2. Closed distribution systems shall be considered to be distribution systems for the purposes of this Directive. Member States may provide for regulatory authorities to exempt the operator of a closed distribution system [from the obligations listed in points (a) to (e) of that paragraph].

…

4. Incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system shall not preclude an exemption under paragraph 2 being granted.'

18 Article 39 of that directive clarifies the rules applicable to combined system operators.

19 Chapter VIII of that directive, entitled 'Final provisions', comprises Articles 65 to 74.

20 Article 66 of Directive 2019/944, headed 'Derogations', provides:

'1. Member States which can demonstrate that there are substantial problems for the operation of their small connected systems and small isolated systems, may apply to the [European] Commission for derogations from the relevant provisions of Articles 7 and 8 and of Chapters IV, V and VI.

Small isolated systems and France, for the purpose of Corsica, may also apply for a derogation from Articles 4, 5 and 6.

The Commission shall inform the Member States of such applications before taking a decision, taking into account respect for confidentiality.

2. Derogations granted by the Commission as referred to in paragraph 1 shall be limited in time and subject to conditions that aim to increase competition in and the integration of the internal market and to ensure that the derogations do not hamper the transition towards renewable energy, increased flexibility, energy storage, electromobility and demand response.

For outermost regions within the meaning of Article 349 TFEU, that cannot be interconnected with the Union electricity markets, the derogation shall not be limited in time and shall be subject to conditions aimed to ensure that the derogation does not hamper the transition towards renewable energy.

Decisions to grant derogations shall be published in the *Official Journal of the European Union*.

3. Article 43 shall not apply to Cyprus, Luxembourg and Malta. In addition, Articles 6 and 35 shall not apply to Malta and Articles 44, 45, 46, 47, 48, 49, 50 and 52 shall not apply to Cyprus.

…

4. Until 1 January 2025, or until a later date set out in a decision pursuant to paragraph 1 of this Article, Article 5 shall not apply to Cyprus and Corsica.

5. Article 4 shall not apply to Malta until 5 July 2027. …'

21 Article 72 of that directive, entitled 'Repeal', provides:

'Directive [2009/72] is repealed with effect from 1 January 2021, without prejudice to the obligations of Member States relating to the time limit for the transposition into national law and the date of application of the Directive set out in Annex III.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex IV.'

22 Article 73 of Directive 2019/944, entitled 'Entry into force', states, in the second paragraph thereof:

'Article 6(1), Article 7(2) to (5), Article 8(1), points (a) to (i) and (k) of Article 8(2) and Article 8(3) and (4), Article 9(1), (3), (4) and (5), Article 10(2) to (10), Articles 25, 27, 30, 35 and 37, Article 38(1), (3) and (4), Articles 39, 41, 43, 44 and 45, Article 46(1), points (a), (b) and (c) and (e) to (h) of Article 46(2), Article 46(3) to (6), Article 47 to 50, Articles 52, 53, 55, 56, 60, 64 and 65 shall apply from 1 January 2021.'

German law

23 Paragraph 3 of the Energiewirtschaftsgesetz (Law on energy management) of 7 July 2005 (BGBl. I, pp. 1970 and 3621), in the version applicable to the dispute in the main proceedings ('the EnWG'), provides:

'For the purposes of this law, the following definitions apply:

…

3. "electricity distribution system operator" means

a natural or legal person, or a legally dependent organisational unit of an energy supply undertaking that performs the task of distributing electricity and is responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems;

…

15. "energy facility" means

a facility for the generation, storage, transmission or supply of energy, unless it is used solely for the transmission of signals; this includes facilities for distribution to end consumers …

16. "energy supply network" means

an electricity and gas supply network over one or more voltage levels or pressure stages with the exception of self-consumption facilities within the meaning of [point 24a] …

…

18. "energy supply undertaking" means

a natural or legal person who supplies energy to others, operates an energy supply network or has power of disposal over an energy supply network as its owner; the fact that it operates a self-consumption facility or a self-consumption facility for the undertaking's own supply does not make the operator an energy supply undertaking;

…

24a. "self-consumption facility" means

an energy facility for the supply of energy
(a) which is located in an adjacent geographical area,
(b) which is connected to an energy supply network or to a generating installation,
(c) the role of which is insignificant with regard to guaranteeing effective and undistorted competition in the supply of electricity and gas, and
(d) which is made available to all in order to allow connected consumers to be supplied by means of transmission, irrespective of their choice of energy supplier, on a non-discriminatory basis and free of charge;

…'

24 Paragraph 20(1d) of the EnWG provides:

'The operator of the energy distribution system to which a self-consumption facility is connected shall provide the metering point through which it is possible to measure the amount of electricity drawn from and fed into the general supply network by the self-consumption facility (summation meter), as well as all the metering points required for the sub-meters located within the self-consumption facility in order to ensure access to the system by means of transmission (sub-meters relevant for invoicing). Where end consumers are supplied by third parties, the meter readings shall be adjusted, where necessary, through the use of sub-meters. …'

The dispute in the main proceedings and the question referred for a preliminary ruling

25 ENGIE is an undertaking that supplies energy. Among other things, it operates combined heat and power plants, local heating networks and energy supply facilities at several locations to supply heat and electricity to end consumers. ZEV operates the electricity distribution system in Zwickau (Germany).

26 ENGIE supplied heat and hot water on the basis of a heating supply contract with a housing association, Zwickauer Wohnungsbaugenossenschaft ('ZWG'), the owner of the land concerned, to four residential buildings with 96 dwellings on a site measuring 9 000 m^2 ('zone 1') and six residential buildings with 160 dwellings on a site measuring 25 500 m^2 ('zone 2'), via an energy plant and a connected local heating network located in each of those areas. Areas 1 and 2 are adjacent to each other, but the local heating networks are not interconnected. The residential buildings situated in those two areas were all connected to the distribution system operated by ZEV.

27 In 2018, ENGIE launched a project for the construction and operation of two combined heat and power plants with an electrical power capacity of 20 kW (zone 1) and 40 kW (zone 2), respectively, and of two electrical wiring systems separated by galvanic isolation, to which the end consumers, namely the tenants, would be connected. In addition to heat and hot water, ENGIE wanted to sell to the tenants the electricity generated in those combined heat and power plants, with an

estimated annual energy transfer of 288 MWh (zone 1) and 480 MWh (zone 2). It therefore notified ZEV of grid connections for two separate self-consumption facilities with main electrical connections in zones 1 and 2 and requested that those facilities be connected to its grid and that the necessary metering points be provided pursuant to Paragraph 20(1d) of the EnWG. ZEV refused those requests on the ground that they were not self-consumption facilities within the meaning of point 24a of Paragraph 3 of the EnWG.

28 ENGIE then applied to the Regulatory Authority of the *Land* of Saxony for an order requiring ZEV to connect those facilities to its grid as self-consumption facilities and to allow energy flows to be accounted for and invoiced in accordance with Paragraph 20(1d) of the EnWG. Those requests were refused by a decision of 19 July 2019. Since ENGIE's action for annulment of that decision before the Oberlandesgericht Dresden (Higher Regional Court, Dresden, Germany), was in turn dismissed by order of 16 September 2020, that undertaking brought an appeal before the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court.

29 The referring court states, as a preliminary point, that, on 21 and 27 April 2020, that is to say, during the proceedings before the Oberlandesgericht Dresden (Higher Regional Court, Dresden), ENGIE and ZWG concluded a new heating supply contract, providing that the two combined heat and power plants were, in principle, to be completed by December 2020.

30 The referring court states that the appeal before it must be upheld if it transpires that the facilities at issue before it are self-consumption facilities within the meaning of point 24a of Paragraph 3 of the EnWG. It takes the view that that is the case, since all the conditions laid down in that provision have been met. That court states, in particular, that all of the electricity suppliers, including ENGIE, are treated in the same way since they use the facility free of charge, and it emphasises, in that regard, that ENGIE does not charge a consumption-based fee for the use of these facilities, but a single monthly basic fee irrespective of consumption.

31 However, the application of point 24a of Paragraph 3 of the EnWG to the facilities at issue in the main proceedings is incompatible with points 28 and 29 of Article 2 and with Article 30 et seq. of Directive 2019/944 if it appears that those facilities form an integral part of the distribution system, within the meaning of points 28 and 29. In that regard, the referring court states that, under point 16 of Paragraph 3 of the EnWG, self-consumption facilities are not part of an energy distribution system and their operators are not distribution system operators within the meaning of point 3 of Paragraph 3 of that law, with the result that they are not subject to the rules laid down in Paragraph 11 et seq. of that law since the point where the self-consumption facility is connected to the energy distribution system marks the end of the regulated system and the beginning of the unregulated self-consumption facility.

32 However, the Court has not yet ruled on whether the concept of 'distribution system', within the meaning of Directive 2019/944, also includes self-consumption facilities such as those referred to in point 24a of Paragraph 3 of the EnWG and there is no obvious solution to that issue. Although it follows from the case-law of the Court that the EU legislature did not intend to exclude particular transmission or distribution systems from the scope of that directive on account of their size or electricity consumption, it has not yet been decided which structures should be considered as distribution systems and what the criteria should be.

33 In that regard, the referring court considers that there can be no doubt that in-house distribution facilities operated by a lessor within a building, irrespective of its size, or energy facilities belonging to an association of homeowners which supplies energy to 20 single-family houses on

a single plot of land, do not constitute distribution systems. However, in the present case, given the size of the facilities at issue in the dispute before it and the fact that ENGIE is both the operator of those facilities and the electricity supplier, it is not certain that those facilities are not part of the distribution system, within the meaning of Directive 2019/944.

34 Furthermore, the connection of such facilities to the distribution system as self-consumption facilities has effects on the objectives of the first and second paragraphs of Article 1 of Directive 2019/944. It is true that those effects, both positive and negative, are negligible for a facility considered in isolation. However, if an increasing number of similar facilities were connected to the distribution system as self-consumption facilities, those effects would be magnified.

35 First of all, the interconnection of facilities for the supply of energy to such decentralised generating installations could facilitate the transition to a sustainable low CO_2 energy system. However, when a large number of similar facilities are connected to a distribution system, it generally becomes more costly and less efficient to operate that system. The operator of the distribution system to which such facilities are connected is still required to maintain sufficient system capacity to ensure supply in the event of a failure of the decentralised generating installations. At the same time, increasingly fewer end consumers bear the total cost of that network, since electricity generated by a decentralised generating installation and consumed in the self-consumption facility connected to it is not subject to network fees pursuant to Paragraph 20 et seq. of the EnWG. It follows from Article 15(2)(e) and Article 16(1)(e) of Directive 2019/944 that even active customers and energy communities must contribute in an adequate and balanced way to the overall cost sharing of the system.

36 Next, since the costs for constructing, operating and ensuring the maintenance of those facilities are borne by ZWG and, ultimately, by the tenant end consumers, under the heating supply contract, competition between ENGIE and the other electricity suppliers is distorted since ENGIE does not have to bear the costs of the energy facilities intended for the supply of energy or to pay network charges. As a consequence, the more facilities of a comparable type and size are operated by ENGIE, the greater the impact on competition is likely to be.

37 Finally, there is a conflict of interest inherent in that system in relation to the end consumers since ENGIE is both the owner and operator of the self-consumption facility and their electricity supplier. As an electricity supplier, it has an interest in charging the highest possible prices for electricity, but it would be contrary to that interest if the fees which it charges for constructing, operating and ensuring the maintenance of the facilities at issue were disclosed in a transparent manner. In the present case, the agreements concluded in the context of the heating supply contract do not display the usage fee separately. The tenants are therefore not in a position to calculate the total cost of the electricity they consume.

38 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do [points 28 and 29 of Article 2] and Article 30 et seq. of Directive 2019/944 preclude a provision such as [point 24a of Paragraph 3] in conjunction with [point 16 of Paragraph 3 of the EnWG], according to which the operator of an energy facility for the supply of energy is not subject to the obligations of a distribution system operator if it constructs and operates the energy facility instead of the existing distribution system in order to supply, by means of electricity generated in a combined heat and power plant, several blocks of flats with up to 200 rented residential units and with an annual quantity of transmitted energy of up to 1 000 MWh, with the costs of the con-

struction and operation of the energy facility being borne by the end consumers (tenants) as part of a standard monthly basic fee payable for the heat supplied and the operator sells the electricity generated to the tenants?'

Admissibility of the request for a preliminary ruling

39 ENGIE disputes the admissibility of the request for a preliminary ruling, claiming, in essence, that the referring court has not sufficiently explained either the facts or the applicable law, with the result that the Court is not in a position to provide an answer that will be of use for resolving the dispute in the main proceedings. Furthermore, the factual and legal explanations which are missing from the order for reference, detailed by ENGIE, establish that the question referred is irrelevant to the subject matter of the main proceedings and that the referring court's doubts as to the possible effects which the facilities at issue in the main proceedings, or an increasing number of such facilities, could have on the objectives of Directive 2019/944, on an increase in the network charges paid by end consumers connected exclusively to the public grid or on competition are unfounded.

40 According to the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgments of 10 December 2002, *der Weduwe*, C-153/00, EU:C:2002:735, paragraph 31 and the case-law cited, and of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano*, C-178/22, EU:C:2024:371, paragraph 26 and the case-law cited).

41 It follows that the questions referred by a national court concerning the interpretation or assessment of the validity of EU law are presumed to be relevant in the factual and legislative context established by that court, the accuracy of which does not fall within the jurisdiction of the Court of Justice. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation or the determination of the validity of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 25 and the case-law cited, and of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano*, C-178/22, EU:C:2024:371, paragraph 27 and the case-law cited).

42 In the present case, as is apparent from the information set out in paragraphs 25 to 38 above, the referring court has referred a question to the Court concerning the interpretation of the provisions of Directive 2019/944 in proceedings between an energy supply undertaking operating two energy facilities and the regulatory authority of a *Land* concerning, in substance, whether those provisions preclude national legislation under which the operation of facilities such as those at issue in the main proceedings, in circumstances such as those in the main proceedings, is not regarded as falling within the concept of 'operation of a distribution system' for the purposes of that directive. As is also apparent from those paragraphs, the referring court has, in that regard, clearly set out, first, the matters of fact and of law characterising that dispute, the

reality of which, moreover, is not in doubt, and, secondly, the reasons which prompted it to inquire about the interpretation of those provisions in the light of the applicable national legislation.

43 In those circumstances, it is not obvious that the question referred is irrelevant or that it falls within any of the situations listed in paragraph 41 of this judgment which allow the Court to refuse to rule on the request submitted to it.

44 Furthermore, in proceedings under Article 267 TFEU, the Court is empowered to give rulings on the interpretation of EU law only on the basis of the facts which the national court puts before it (judgments of 5 December 2013, *Nordecon and Ramboll Eesti*, C-561/12, EU:C:2013:793, paragraph 28 and the case-law cited, and of 16 March 2023, *Colt Technology Services and Others*, C-339/21, EU:C:2023:214, paragraph 30 and the case-law cited). Therefore, whatever considerations ENGIE may have set out with regard to the factual assessments made by the referring court, the question referred for a preliminary ruling must be examined on the basis of those assessments (see, by analogy, judgment of 12 October 2023, *INTER Consulting*, C-726/21, EU:C:2023:764, paragraph 34 and the case-law cited).

45 Furthermore, ENGIE's criticisms of the doubts expressed by the national court concerning the possible effects of facilities such as those at issue in the main proceedings, or the increasing number of such facilities, relate to the content of the answer to be given to the question referred and are, therefore, not capable of establishing that the reference for a preliminary ruling is inadmissible.

46 In the light of the foregoing, it must be held that the reference for a preliminary ruling is admissible.

Consideration of the question referred

47 By its question, the referring court asks, in essence, whether points 28 and 29 of Article 2 and Articles 30 to 39 of Directive 2019/944 are to be interpreted as precluding national legislation under which an undertaking which, by replacing the existing distribution system, constructs and operates an energy facility for the supply of electricity, generated by a combined heat and power plant, to several residential buildings with up to 200 dwellings and with an annual energy transfer of up to 1 000 MWh, is not subject to the obligations of a distribution system operator, since the costs of constructing and operating the energy facility are borne by the end consumers, who are the tenants of those dwellings, and the electricity generated is sold by that undertaking to those consumers.

48 In that regard, it is apparent from the grounds set out by the referring court in its request for a preliminary ruling that such an undertaking is not subject to those obligations since such an energy facility does not constitute an 'energy supply network' within the meaning of point 16 of Paragraph 3 of the EnWG; consequently, in accordance with point 18 of Paragraph 3 of that law, the entity which operates such a facility is not regarded as an 'energy supply undertaking' and that, consequently, it is not covered by the concept of 'electricity distribution system operator', as defined in point 3 of Paragraph 3 of that law. It should also be noted that the latter provision reproduces, in essence, the definition of the concept of 'distribution system operator' in point 29

of Article 2 of Directive 2019/944, with the tasks and obligations of 'distribution system operators' set out, inter alia, in Articles 30 to 39 of that directive, which comprise Chapter IV thereof, which relates to the operation of electricity distribution systems.

49 In order to answer the question referred, it is therefore necessary, in the first place, to determine whether an energy facility such as that described in paragraph 47 above is capable of being covered by the concept of 'distribution system' within the meaning of Directive 2019/944.

50 Although no definition of that concept appears as such in Directive 2019/944, the concept of 'distribution' is, by contrast, defined in point 28 of Article 2 of that directive as 'the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply.' As regards the concept of 'supply', it refers, according to point 12 of Article 2 of that directive, to the sale of electricity to 'customers', the term 'customer' referring, according to point 1 of Article 2 of that directive, to wholesale or final customers of electricity.

51 Since those definitions make no express reference to the law of the Member States, the need for a uniform application of EU law and the principle of equality require that the terms of those definitions must be given an autonomous and uniform interpretation throughout the European Union (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraphs 43 and 44 and the case-law cited).

52 It is clear from the definitions set out in paragraph 50 above that a distribution system is a system used to transport electricity at high, medium or low-voltage for sale to wholesale or final customers (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 45 and the case-law cited).

53 Accordingly, the only relevant criteria for determining whether a system constitutes a distribution system within the meaning of Directive 2019/944 are the voltage of the electricity transported, which must be at least low voltage, and the category of customers for which the electricity transported is intended (see, by analogy, judgments of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 30 and 37, and of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraphs 46, 48 and 49).

54 By contrast, neither the date on which such a system was put in place, nor the fact that the transported electricity was generated by a self-consumption facility within the specific meaning given to that concept by the national legislation, nor the fact that such a system is operated by a private entity, to which a limited number of generation and consumption units are connected, nor its size or consumption of electricity constitute relevant criteria in that regard, since the EU legislature did not intend to exclude particular distribution systems from the scope of that directive on the basis of such criteria (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 47 and the case-law cited).

55 Similarly, the fact that the transported electricity is generated by a combined heat and power plant or the fact that the facilities used for that transport are available to each of them free of charge are also not relevant criteria in that regard, since the EU legislature did not adopt the method of generation of the electricity transported or the tariff charged for the use of the relevant infrastructure as criteria for identifying a distribution system.

56 It is true that Directive 2019/944, in so far as it seeks, in accordance with recital 8 thereof, to address the persisting obstacles to the completion of the internal market for electricity, has not introduced an exhaustive harmonisation of the rules relating to, inter alia, the distribution of electricity. Furthermore, although point 28 of Article 2 of that directive sets out the criteria for identifying a distribution system, that provision confers on Member States a certain discretion to define the network thus identified (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 50 and the 51).

57 Accordingly, in the absence of any provision on that point in Directive 2019/944, the Member States, in so far as they comply with the criteria set out in point 28 of Article 2 thereof, remain competent, inter alia, to determine, in accordance with the definitions in that directive, whether the interconnection points with other networks belong to the distribution system (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 52 and 53).

58 By contrast, at the risk of undermining the autonomous and uniform interpretation of point 28 of Article 2 of Directive 2019/944, Member States are not permitted to introduce additional criteria other than those relating to the voltage and the category of customers to which electricity is brought to define the concept of 'distribution system' (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 55).

59 Although Directive 2019/944 has not introduced an exhaustive harmonisation of the areas governed by it, the concept of 'distribution system', within the meaning of that directive, plays a fundamental role in the scheme thereof in so far as, in order to address the persistent obstacles to the completion of the internal market for electricity, that directive, as follows, inter alia, from the provisions in Chapter IV thereof, prescribes specific rules for the operators of those systems (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 56).

60 In those circumstances, the Member States, in order to ensure a uniform application of Directive 2019/944 capable of achieving the competitive market provided for therein, must define the concept of 'distribution system' for the purposes of the directive by reference solely to the only two criteria laid down in point 28 of Article 2 thereof, relating, respectively, to the voltage and to the category of customers to which electricity is brought (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 57).

61 It follows that Member States may not regard a particular type of network as being excluded from the concept of 'distribution system', for the purposes of Directive 2019/944, on the basis of a criterion in addition to those laid down in point 28 of Article 2 thereof (see, by analogy, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 58).

62 Since that concept must be applied and interpreted uniformly throughout the European Union, the Member States are not entitled to exclude facilities from the scope of Directive 2019/944, even on the basis of proportionality, if it is common ground that they are used to transport electricity at high, medium or low voltage for the purpose of selling it to customers (see, by analogy, judgment of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 34 to 37).

63 In the second place, as regards whether an undertaking operating a distribution system, within the meaning of Directive 2019/944, may be excluded from the concept of 'distribution system operator' within the meaning of that directive, it should be noted that point 29 of Article 2 thereof defines the concept of 'distribution system operator' as a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity.

64 Since that definition also makes no express reference to the law of the Member States, it must also, in accordance with the case-law cited in paragraph 51 above, be given an autonomous and uniform interpretation throughout the European Union.

65 It is clear from the definition in point 29 of Article 2 of Directive 2019/944, read in conjunction with the explanations set out in paragraphs 52 to 62 above, that an undertaking which operates an energy facility which is used to transport electricity at high, medium or low voltage with a view to its delivery to wholesale customers or to final customers falls within the concept of 'distribution system operator' within the meaning of point 29 of Article 2.

66 In that regard, it is true that Article 30 of Directive 2019/944 provides that Member States are to designate or require undertakings that own or are responsible for distribution systems to designate one or more distribution system operators for a period of time to be determined by the Member States, having regard to considerations of efficiency and economic balance.

67 It cannot, however, be inferred from that article that Member States may exclude from the scope of that directive an entity satisfying the definition of 'distribution system operator' within the meaning of point 29 of Article 2 of Directive 2019/944. Although, in accordance with what has been stated in paragraph 62 above, Member States are not entitled to exclude facilities from the scope of that directive if it is common ground that they are used to transport electricity at high, medium or low voltage for sale to customers, they are also not entitled to exclude from the definition of 'distribution system operator', within the meaning of point 29 of Article 2, an entity which is responsible, inter alia, for operating and ensuring the maintenance of such a facility, except where they allow circumvention of the scope of the scope of Directive 2019/944 and prejudice both the practical effect of the concepts of 'distribution' and 'distribution system', within the meaning of that directive, and the uniform application of EU law.

68 Therefore, Member States cannot exclude from the concept of 'distribution system operator', within the meaning of point 29 of Article 2 of Directive 2019/944, an undertaking which operates an energy facility for the supply of electricity to residential buildings if that facility is used to transport electricity at high, medium or low voltage with a view to its supply to final customers who reside in those buildings.

69 In the third place, with regard to whether it is open to the Member States not to subject distribution system operators, within the meaning of point 29 of Article 2 of Directive 2019/944, to the obligations of those operators under that directive, it should be noted that, under that directive, Member States may, first, in accordance with Article 16 thereof, establish an enabling regulatory framework for citizen energy communities and provide that those communities, even where they own or have established a distribution system and manage them autonomously, benefit from the exemptions provided for in Article 38(2) of that directive in favour of closed distribution systems.

70 The concept of 'citizen energy community', within the meaning of Directive 2019/944, merely refers, however, according to point 11 of Article 2 thereof, to a legal entity which, inter alia, is effectively controlled by members or shareholders who are natural persons, local authorities or small enterprises, with the concept of 'small enterprise' being defined in point 7 of Article 2 of that directive as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

71 Secondly, Article 38 of Directive 2019/944 states that Member States may, subject to compliance with the conditions set out in that article, provide for the competent national authorities to classify a system which distributes electricity within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4 of that article, supply household customers, as a 'closed distribution system' and for those authorities to exempt the operator of such a closed distribution system from some of the obligations which must be imposed on distribution system operators under that directive, from which exemption is possible in the situations set out in paragraph 2(a) to (e) of that article. However, it is apparent from paragraph 4 that mere incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system is not to preclude an exemption under paragraph 2 of that article being granted.

72 Thirdly, Article 66 of Directive 2019/944 provides, in the first subparagraph of paragraph 1 thereof, that Member States which can demonstrate that there are substantial problems for the operation of their small connected systems and small isolated systems may apply to the Commission for derogations from the provisions, inter alia, of Chapter IV thereof. However, Article 66(2) states, in essence, that the Commission must decide on such an application by means of a decision which is published in the *Official Journal of the European Union*. Moreover, under point 43 of Article 2 of that directive, the concept of 'small connected system' refers to any system that had consumption of less than 3 000 GWh in the year 1996, where more than 5% of annual consumption may be obtained through interconnection with other systems, whereas, according to point 42 of Article 2 of that directive, the concept of 'small isolated system' refers to any system that had consumption of less than 3 000 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems.

73 Fourthly, Article 66(3) to (5) of Directive 2019/944 sets out certain derogations in favour of Cyprus, Luxembourg, Malta and the French region of Corsica.

74 Fifthly, certain provisions in Chapter IV of Directive 2019/944, entitled 'Distribution system operation', provide, in essence, on an ad hoc basis, that Member States may decide not to apply certain obligations referred to in those provisions to certain undertakings or in certain circumstances. That is the case, inter alia, for Article 32(5), Article 33(3), Article 35(4) and Article 36(2) of that directive.

75 In the present case, subject to the matters to be verified by the referring court, it does not appear that a facility such as those at issue in the main proceedings or that the operator of a facility such as that at issue in the main proceedings would satisfy the conditions allowing it to benefit from one of the derogations or exemptions referred to in paragraphs 69 to 74 above. In particular, it does not appear, first of all, that such a facility can be covered by the concept of 'citizen energy community' within the meaning of point 11 of Article 2 of Directive 2019/944, given, inter alia, that the controlling operator does not appear to be a 'small enterprise' within the meaning of point 7 of Article 2 of that directive. Next, in so far as a facility such as that at issue in the main

proceedings supplies electricity to household customers not as an accessory service to the supply of an industrial, commercial or service-sharing site, but as its main or exclusive service, the operator of such a facility also cannot, in any event, benefit from the derogations which Article 38 of the Directive allows Member States to grant to operators of closed distribution systems. Lastly, aside from the fact that the facilities at issue in the main proceedings are not located in one of the Member States or in the region referred to in paragraph 73 above, it does not appear that a facility such as those at issue in the main proceedings, if, in accordance with the criteria referenced in paragraph 62 above, it were to be classified as a distribution system within the meaning of Directive 2019/944, could be covered by the concept of 'small connected system' or 'small isolated system' within the meaning of that directive. Moreover, it is not apparent from the file before the Court that the Federal Republic of Germany was granted, in respect of facilities such as those at issue in the main proceedings, a derogation pursuant to Article 66(1) of that directive, or even that that Member State applied to the Commission for such a derogation in favour of such facilities.

76 In the fourth and final place, allowing Member States to exclude from the category of distribution systems, within the meaning of Directive 2019/944, facilities used to transport electricity at high, medium or low voltage for sale to customers and, consequently, not to subject the entities which operate such facilities to the obligations which must, under that directive, be imposed on 'distribution system operators', within the meaning of that directive, in circumstances other than those in respect of which a derogation or exemption is expressly provided for by that directive, would undermine the objectives pursued by that directive, having regard to the fundamental role of those distribution systems and their operators in the scheme of that directive and, moreover, in the regulation of the EU internal market for electricity in general. In that context, it should also be noted that that concept of 'distribution system operator' is also used for the purposes of Directive 2012/27, in accordance with point 21 of Article 2 thereof, and for the purposes of Regulation 2019/943, in accordance with point 48 of Article 2 thereof.

77 In that regard, it is necessary, in particular, to point out the essential role assigned by Directive 2019/944 to system operators in completing the integration of national markets, which presupposes, in particular, as is apparent, in essence, from recitals 7 and 18 of that directive, a high degree of cooperation between system operators at EU level and at regional level. National legislation such as that described in paragraph 47 above may exclude a significant number of entities from the scope of the obligations of distribution system operators, even though they are system operators and it is common ground that those systems are used to transport electricity at high, medium or low voltage for sale to customers, thereby contributing to the maintenance of fragmented markets, in contrast to the truly integrated markets which Directive 2019/944 seeks to create, in accordance with Article 1 thereof.

78 Allowing such an exclusion would, moreover, run the risk of undermining the objective of creating electricity markets in the European Union which are not only truly integrated but also competitive, consumer-centred, flexible, fair and transparent, capable, in particular, of ensuring affordable energy prices and costs, in accordance with Article 1, since the obligations to which distribution system operators are subject are intended, inter alia, as is apparent, in essence, from recitals 65 and 68 of that directive, to ensure a level playing field at retail level, for the benefit of consumers.

79 In the light of all the foregoing considerations, the answer to the question referred is that points 28 and 29 of Article 2 and Articles 30 to 39 of Directive 2019/944 must be interpreted as precluding national legislation under which an undertaking which, by replacing the existing distribution

system, constructs and operates an energy facility for the supply of electricity, generated by a combined heat and power plant, to several residential buildings with up to 200 dwellings and with an annual energy transfer of up to 1 000 MWh, is not subject to the obligations of a distribution system operator, since the costs of constructing and operating the energy facility are borne by the end consumers, who are the tenants of those dwellings, and the electricity generated is sold by that undertaking to those consumers, if that facility is used to transport electricity at high, medium or low voltage for sale to customers and if none of the exemptions or derogations from those obligations which are expressly provided for in that directive are applicable.

80 It is nevertheless for the referring court to verify that Directive 2019/944 is applicable *ratione temporis* to the dispute in the main proceedings, bearing in mind that, should that court ultimately consider that Directive 2009/72 is applicable to that dispute, the answer to the question referred will be transposable *mutatis mutandis*. First, the definitions of 'distribution' and 'distribution system operator' in points 28 and 29 of Article 2 of Directive 2019/944 reproduce identically those of the same concepts which already appeared in Directive 2009/72. Secondly, it is true that the objectives of Directive 2019/944 are more precise and detailed than those of Directive 2009/72, and Directive 2019/944 imposes new tasks and obligations on distribution system operators. However, the fact remains that the concept of 'distribution system' already played a fundamental role in the scheme of Directive 2009/72 (see, to that effect, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 56) and that that directive was already intended to establish common rules concerning, inter alia, the distribution of electricity with a view to improving and integrating competitive electricity markets in the European Union and already aimed, in particular, to achieve a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers in order to bring about completion of the internal market in electricity (see, to that effect, judgment of 17 October 2019, *Elektrorazpredelenie Yug*, C-31/18, EU:C:2019:868, paragraphs 38 and 39), by providing, in that respect, in particular, for a series of tasks and obligations of the operators of such systems, without allowing derogation from them outside the cases expressly provided for by the same directive.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Points 28 and 29 of Article 2 and Article 30 to 39 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU

must be interpreted as precluding national legislation under which an undertaking which, by replacing the existing distribution system, constructs and operates an energy facility for the supply of electricity, generated by a combined heat and power plant, to several residential buildings with up to 200 dwellings and with an annual energy transfer of up to 1 000 MWh, is not subject to the obligations of a distribution system operator, since the costs of constructing and operating the energy facility are borne by the end consumers, who are the tenants of those dwellings, and the electricity generated is sold by that undertaking

to those consumers, if that facility is used to transport electricity at high, medium or low voltage for sale to customers and if none of the exemptions or derogations from those obligations which are expressly provided for in that directive are applicable.

[Signatures]