Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 13 September 2018[1]

Joined Cases C-262/17, C-263/17 and C-273/17

Solvay Chimica Italia SpA
Solvay Specialty Polymers Italy SpA
Solvay Chimica Bussi SpA
Fenice — Qualità per l'ambiente SpA
Ferrari F.lli Lunelli SpA
Erg Power Srl
Erg Power Generation SpA
Eni SpA
Enipower SpA (C-262/17)
Whirlpool Europe Srl
Fenice — Qualità Per L'ambiente SpA
FCA Italy SpA
FCA Group Purchasing Srl
FCA Melfi SpA
Barilla G. e R. Fratelli SpA
Versalis SpA (C-263/17)
Sol Gas Primari Srl (C-273/17)
v
Autorità per l'energia elettrica, il gas e il sistema idrico
joined parties:
Terna SpA,
Nuova Solmine SpA,
American Husky III,
Inovyn Produzione Italia SpA,
Sasol,
Radici Chimica SpA,
La Vecchia Soc. cons. a r.l.,
Santa Margherita e Kettmeir e Cantine Torresella SpA,
Zignago Vetro SpA,
Chemisol Italia Srl,
Vinavil SpA,
Italgen SpA,
Arkema Srl,
Yara Italia SpA,
Ineos Manufacturing Italia SpA,
ENEL Distribuzione SpA,
CSEA — Cassa per i servizi energetici e ambientali,
Ministero dello Sviluppo Economico,
Terna SpA,
CSEA — Cassa per i servizi energetici e ambientali,

1 Original language: English.

Ministero dello Sviluppo Economico,
ENEL Distribuzione SpA,
Terna SpA,
Ministero dello Sviluppo Economico

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy))

(Internal market in electricity — Directive 2009/72/EC — Closed distribution systems — Concept of distribution system — Power conferred on Member States to exempt operators of closed distribution systems from certain requirements — Third-party access — Dispatching charges)

1. In the present case, the Court is called upon to interpret the concept of electricity 'closed distribution systems' within the meaning of Article 28 of Directive 2009/72/EC.[2] That concept was introduced into EU secondary law following the Court's judgment in *citiworks*.[3]

2. In *citiworks*, the Court was asked whether the obligation imposed on Member States by Article 20(1) of Directive 2003/54/EC,[4] now Article 32(1) of Directive 2009/72, to ensure that open access is provided to transmission and distribution systems[5] applies to a system which supplies electricity *only* to its operator, the managing body of the airport of Leipzig/Halle, and to 93 other undertakings established on that airport's site. The Court found, first, that such a system was to be regarded as a distribution system since Directive 2003/54 did not set conditions pertaining to the system's size or consumption of electricity. Second, the Court held that Article 20(1) of Directive 2003/54 applied to the system at issue since open third-party access to distribution systems is one of the essential measures which Member States are required to implement in order to bring about the internal market in electricity, and that system did not fall within the scope of any exception or derogation from the obligation to provide open access set forth by Directive 2003/54.[6]

3. Following the Court's judgment in *citiworks*, concern grew that the requirements of Directive 2003/54 were too heavy on operators of distribution systems such as the one at issue in that judgment.[7]

4. Accordingly, Directive 2009/72 introduced the concept of 'closed distribution systems', whose operators are eligible for exemption from certain obligations provided for by that directive. Pursuant to Article 28 of Directive 2009/72, a closed distribution system is a system which, first, distributes electricity within a geographically confined industrial, commercial or shared services site, and, second, either serves users with integrated operations or an integrated production process, or distributes electricity primarily to the owner or operator of the system or their related undertakings. Pursuant to the same provision, Member States may exempt such systems from, first, the requirement under

2 Directive 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).

3 Judgment of 22 May 2008, *citiworks*, (C-439/06, EU:C:2008:298).

4 Directive 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).

5 I should specify that, while 'transmission' is 'the transport of electricity on the extra high-voltage and high-voltage interconnected system', 'distribution' is 'the transport of electricity on high-voltage, medium-voltage and low-voltage' systems, (see Article 2(3) and (5) of Directive 2009/72).

6 Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraphs 44, 49, 55 and 64).

7 Section 5.1 of the Commission's Interpretative note, of 22 January 2010, on the retail markets in Directive 2009/72 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) ('the Commission's Interpretative note on retail markets'). That note is available on the website of the Commission's Directorate-General for Energy at the following address: https://ec.europa.eu/energy/en/home.

Article 25(5) of that directive to procure energy to cover energy losses and reserve capacity according to transparent, non-discriminatory and market based procedures and, second, the requirement under Article 32(1) of the same directive that tariffs or their methodologies be approved by the competent national regulatory authority prior to their entry into force.[8]

5. In the present instance, the Court is called upon to interpret for the first time Article 28 of Directive 2009/72 by way of reference from the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy). It is asked to specify the scope of that provision. It is also asked whether operators of closed distribution systems are required to provide open access to third parties, and whether they may be exempted from obligations other than those referred to in Article 28 of Directive 2009/72. Finally, it is asked whether users of closed distribution systems may be subject to the rules applicable to users of the public network[9] in respect of dispatching charges.

I. Legal context

A. EU law

6. Article 28 of Directive 2009/72, entitled 'Closed distribution systems', reads:

'1. Member States may provide for national 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. Member States may provide for national regulatory authorities to exempt the operator of a closed distribution system from:

(a) the requirement under Article 25(5) to procure the energy it uses to cover energy losses and reserve capacity in its system according to transparent, non-discriminatory and market based procedures;

(b) the requirement under Article 32(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37.

3. Where an exemption is granted under paragraph 2, the applicable tariffs, or the methodologies underlying their calculation, shall be reviewed and approved in accordance with Article 37 upon request by a user of the closed distribution system.

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.'

8 A similar provision was introduced into Directive 2009/73. See Article 28 of Directive 2009/73.

9 See point 35 below.

7. Pursuant to Article 32 of Directive 2009/72, entitled 'Third-party access':

'1. Member States shall ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. …'

8. Article 37 of Directive 2009/72, entitled 'Duties and powers of the regulatory authority', provides:

'…

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;

(b) the provision of balancing services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and

(c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

7. The methodologies or the terms and conditions referred to in paragraph 6 shall be published.

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

…'

B. Italian law

1. Law No 99/2009

9. Article 30(27) of Law No 99/2009[10] provides that:

'In order to guarantee and improve the quality of electricity supply to final consumers connected to the national electricity system through private networks which may have generation capacity, …, the Ministry for Economic Development shall lay down, within 120 days of this Law entering into force, new criteria for defining the relations between the network operator, the concessionaire distribution companies, the owner of the private networks and the final consumer connected to those networks. The Regulatory Authority for electricity and gas shall implement those criteria for the purpose of balancing and safeguarding acquired rights and shall, in that regard, take account also of the need for rational use of existing resources.'

10. Article 33 of Law No 99/2009 provides for a particular type of private networks, known as 'internal user networks' ('the IUNs'). Article 33(1) of Law No 99/2009 states:

'… an internal user network (IUN) is defined as an electricity network which satisfies all the following conditions:

(a) it is a network in existence on the date on which this Law enters into force, or a network on which, on that date, construction has commenced, or for which all the authorisations required under the rules in force have been obtained;

(b) it connects units of industrial consumption, or units of industrial consumption and units of electricity generation which are functionally essential for the industrial production process, provided that they are in areas located in the territory of not more than three adjacent municipalities, or not more than three adjacent provinces, only where generation units are powered by renewable sources;

(c) it is a network not subject to the obligation to connect third parties, without prejudice to the right of each person included in that network to be connected, as an alternative, to the network under an obligation to connect third parties;

(d) it is connected via one or more connection points to a network with an obligation to connect third parties with a nominal voltage of not less than 120 kV;

(e) it has a responsible person who acts as a sole operator of that network. That person may be different from the persons who own the units of consumption or generation, but cannot be the holder of concessions for transmission and dispatching or distribution of electricity.'

2. Ministerial Decree of 10 December 2010

11. Article 30(27) of Law No 99/2009 was implemented by Ministerial Decree of 10 December 2010.[11]

10 Legge 23 luglio 2009, n. 99 — Disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia (Law of 23 July 2009, No 99, concerning measures for the development and internationalisation of undertakings, also as regards energy) ('Law No 99/2009').

11 Decreto ministeriale 10 dicembre 2010 — Attuazione dell'articolo 30, comma 27, della legge 23 luglio 2009, n. 99, in materia di rapporti intercorrenti fra i gestori delle reti elettriche, le società di distribuzione in concessione, i proprietari di reti private ed i clienti finali collegati a tali reti (Ministerial Decree of 10 December 2010 implementing Article 30(27) of Law No 99 of 23 July 2009 on relations between the network operator, the concessionaire distribution companies, the owner of private networks and the final consumer connected to those networks) ('the Ministerial Decree of 10 December 2010').

12. The Ministerial Decree of 10 December 2010 laid down, in particular, the following obligations: (i) the obligation, on the operators of private networks, to allow final consumers who are connected thereto to request and obtain physical or virtual connection to the public network; and (ii) the obligation, on the operators of private networks, to allow use thereof by the operators of the public network to ensure the right of end-users to obtain connection to the public network.

13. According to the order for reference, there is no definition, under Italian law, of the networks referred to by Article 30(27) of Law No 99/2009.[12] Those networks therefore constitute a residual category, distinct from IUNs and from simple generation and consumption systems.[13] They will be referred to as 'the other private networks'.

3. Legislative Decree No 93/2011

14. Pursuant to Article 38(5) of Legislative Decree No 93/2011:[14]

'Without prejudice to the provisions concerning efficient user systems within the meaning of Article 2(1)(t) of Legislative Decree No 115/2008, internal user networks within the meaning of Article 33 of Law No 99/2009 and the other private networks within the meaning of Article 30(27) of Law No 99/2009 are closed distribution systems …'.

15. According to the order for reference, the term 'closed distribution systems' in Article 38(5) of Legislative Decree No 93/2011 is a reference to Article 28 of Directive 2009/72.

16. Only IUNs[15] and the other private networks[16] are regarded, under Italian law, as closed distribution systems.

17. According to the order for reference, systems within the meaning of Article 2(1)(t) of Legislative Decree No 115/2008[17] ('the efficient user systems') and systems within the meaning of Article 10(2)(b) of the same legislative decree ('the existing systems equivalent to efficient user systems') are not regarded, under Italian law, as closed distribution systems.

18. An efficient user system is, according to Article 2(1)(t) of Legislative Decree No 115/2008, in the version applicable at the material time, 'a system that connects directly, via a private connection not subject to the obligation to provide access to third parties, an electricity generation unit … to a consumption unit which belongs to a single final customer, provided that that system is situated in an area owned by, or fully available to that customer.'Existing systems equivalent to efficient user system are, according to Article 10(2)(b) of Legislative Decree No 115/2008, in the version applicable at the material time, systems 'whose configuration is consistent with the definition laid out in Article 2(1)(t),

12 Although Article 30(27) of Law No 99/2009 called for the adoption by the Ministry for Economic Development of criteria for the definition of those networks.

13 See point 18 below.

14 Decreto legislative 1 giugno 2011, n. 93 — Attuazione delle direttive 2009/72/CE, 2009/73/CE e 2008/92/CE relative a norme comuni per il mercato interno dell'energia elettrica, del gas naturale ed ad una procedura comunitaria sulla trasparenza dei prezzi al consumatore finale industriale di gas e di energia elettrica, nonchè abrogazione delle direttive 2003/54/CE e 2003/55/CE (Legislative Decree of 1 June 2011, No 93, implementing Directives 2009/72/EC, 2009/73/EC and 2008/92/EC concerning common rules for the internal market in electricity and natural gas, a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, and repealing Directive 2003/54/EC and Directive 2003/55/EC) ('Legislative Decree No 93/2011').

15 See point 10 above.

16 See point 13 above.

17 Decreto legislative 30 maggio 2008, n. 115 — Attuazione della direttiva 2006/32/CE relative all'efficienza degli usi finali dell'energia e i servizi energetici e abrogazione della direttiva 93/76/CEE (Legislative Decree of 30 May 2008, No 115, transposing Directive 2006/32/EC on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC) ('Legislative Decree No 115/2008').

or that connect, via a private connection not subject to the obligation to provide access to third parties, exclusively electricity production and consumption units owned by the same legal entity'. Efficient user systems are regarded, together with existing systems equivalent to efficient user systems, as 'simple generation and consumption systems'.

4. Decree-Law No 91/2014

19. Article 24(2) of Decree-Law No 91/2014[18] provides that:

'As regards the internal user networks within the meaning of Article 33 of Law No 99/2009, as subsequently amended, the systems referred to by Article 10(2) of Legislative Decree No 115/2008, as subsequently amended, and the efficient user systems within the meaning of Article 10(1) of the same legislative decree, which were in operation by 31 December 2014, charges compensating for general system costs within the meaning of paragraph 1 shall, as regards their variable part, apply to electricity consumed but not taken from the network, at a rate of 5% of the corresponding unitary charges payable on electricity taken from the network.'

5. Decision of the Regulatory Authority for Electricity, Gas and Water No 539/2015

20. Annex A to Decision of the Autorità per l'energia elettrica il gas e il sistema idrico (Regulatory Authority for Electricity, Gas and Water) ('the AEEGSI') No 539/2015[19] lays down the rules applicable to closed distribution systems.

21. Article 8 of Annex A to Decision No 539/2015 states that 'a closed distribution system is a network with an obligation to connect only users which, for the purposes of Article 6 of this Decision, form part of the category of users that may be connected to that closed distribution system'.

22. According to Article 10(6) of Annex A to Decision No 539/2015, 'the operator of the closed distribution system, in relation to the obligations concerning the separation of accounts referred to in the Consolidated Text on the Unbundling of Accounts and the functional unbundling referred to in the Consolidated Text on the Unbundling of Functions, shall be regarded as the operator of an electricity distribution service with fewer than 5 000 off-take points'.[20]

23. Pursuant to Article 22(1) of Annex A to Decision No 539/2015, 'dispatching rules apply in relation to electricity fed into, and taken from the closed distribution system by each user through his connection point to that system.'

18 Decreto legge 24 giugno 2014, n. 91 — Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica a universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti della normativa europea (Decree-Law of 24 June 2014, No 91, on urgent measures for the agricultural sector, environmental protection and energy efficiency in school and university buildings, the relaunch and development of undertakings, the reduction of costs which affect electricity tariffs, and for the immediate implementation of EU rules) ('Decree-Law No 91/2014'). Decree-Law No 91/2014 was later converted into law, with amendments.

19 Deliberazione 12 novembre 2015, n. 539/2015/R/eel dell'Autorità per l'energia elettrica, il gas e il sistema idrico — Regolazione dei servizi di connessione, misura, trasmissione, distribuzione, dispacciamento e vendita nel caso di sistemi di distribuzione chiusi (Decision of 12 November 2015; No 539/2015, of the Authority for electricity, gas and water on the regulation of services for connecting, metering, transmitting, distributing, dispatching and selling in relation to closed distribution systems) ('Decision No 539/2015'). Decision No 539/2015 is available on the website of the AEEGSI, now the Autorità di Regolazione per Energia Reti e Ambiente (Regulatory Authority for Energy, Networks and Environment), at the following address: https://www.arera.it/it/index.htm.

20 See Article 1(r) and (s) of Annex A to Decision No 539/2015. The Consolidated Text on the Unbundling of Accounts is laid down in Annex A to the deliberazione 22 maggio 2014, n. 231/2014/R/com dell'AEEGSI - Disposizioni in materia di obblighi di separazione contabile (unbundling) per i settori dell'energia elettrica e del gas (Decision of 22 May 2014, No 231/2014/R/com, of the AEEGSI on the obligation to hold separate accounts (unbundling) in the sectors of electricity and gas). The Consolidated Text on the Unbundling of Functions is laid down in Annex A to deliberazione 22 giugno 2015, n. 296/2015/R/com dell'AEEGSI - Disposizioni in merito agli obblighi di separazione funzionale (unbundling) per i settori dell'energia elettrica e del gas (Decision of 22 June 2015, No 296/2015/R/com, of the AEEGSI on the obligation concerning functional unbundling in the sectors of electricity and gas). Both decisions are available on the website of AEEGSI.

II. The facts, the main proceedings and the questions referred for a preliminary ruling

24. Solvay Chimica Italia S.p.A. ('Solvay'), Erg Power S.r.l. and Erg Power Generation S.p.A. (collectively 'Erg Power'), Eni S.p.A., Enipower S.p.A. and Versalis S.p.A. (collectively 'Eni'), Sol Gas Primari S.r.l and Whirlpool Europe S.r.l. own or operate private networks for the distribution of electricity which are considered, under Article 38(5) of Legislative Decree No 93/2011, to be closed distribution systems. For instance, Erg Power S.r.l. owns, and Erg Power Generation S.p.A. operates, the IUN of the petrochemical hub situated in the municipalities of Priolo Gargallo and Melilli (both in the province of Syracuse). That IUN connects eleven undertakings to a thermoelectric power plant operated by Erg Power S.r.l..

25. Following the classification as closed distribution systems, by Article 38(5) of Legislative Decree No 93/2011, of the networks owned or operated by the undertakings mentioned in the preceding point, the AEEGSI adopted Decision No 539/2015, whereby it imposed new obligations on the operators of those networks.

26. Therefore, those undertakings, among others, brought an action before the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy) seeking the annulment of Decision No 539/2015.

27. The applicants in the main proceedings contended that Decision No 539/2015 makes closed distribution systems within the meaning of Article 38(5) of Legislative Decree No 93/2011 subject to the rules applicable to the public network,[21] without taking account of the specific features of those systems. According to the applicants in the main proceedings, equating such systems with the public network is inconsistent with Article 28 of Directive 2009/72.

28. Before the referring court, the applicants in the main proceedings criticised the following aspects of Decision No 539/2015: (i) the obligation imposed on operators of closed distribution systems within the meaning of Article 38(5) of Legislative Decree No 93/2011 to connect third parties; (ii) the obligation to unbundle accounts and functions imposed on those operators; (iii) the application of dispatching charges to every user connected to the closed distribution system without, however, treating that entire system as a whole, as the sole user of dispatching, as was previously the case; and (iv) the application of general electricity charges to the consumption of electricity by each user connected to the closed distribution system, even where the electricity is generated within that system.

29. The Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy) considered that it was unable to resolve the dispute and referred the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of [Directive 2009/72], in particular Article 3(5) and (6) and Article 28, be interpreted as meaning that a system created and operated by a private person, to which a limited number of generation and consumption units are connected, and which in turn is connected to the public network, necessarily constitutes an electricity network, and thus a "distribution system" for the purposes of that directive, without it being possible to exclude from that classification private systems with those characteristics created before the entry into force of that directive and set up originally for the purpose of self-generation?

(2) If the preceding question is answered in the affirmative, is the only possibility offered by [Directive 2009/72] of taking advantage of the particular features of a private electricity network that of including it in the category of closed distribution systems referred to in Article 28 of [Directive

21 See point 35 below.

2009/72], or is the national legislature permitted to identify another category of distribution systems subject to a simplified set of rules which are different from those laid down in respect of closed distribution systems?

(3) Independently of the previous questions, must the directive be interpreted as meaning that the obligation to connect third parties is applicable in all cases to the closed distribution systems referred to in Article 28 [of Directive 2009/72]?

(4) Independently of the previous questions, does the classification of a private electricity network as a closed distribution system within the meaning of Article 28 of [Directive 2009/72] permit the national legislature to allow, in favour of such a system, only the derogations from the general scheme for distribution systems expressly referred to in Articles 28 and 26(4) of the directive, or is the Member State — in the light of what is stated in recitals 29 and 30 of that directive — permitted or required to provide for other exceptions to the application of the general rules governing distribution systems in such a way as to ensure attainment of the objectives set out in those recitals?

(5) In the event that the Court of Justice considers that the Member State may or must lay down rules which take account of the specific nature of closed distribution systems, do the provisions of [Directive 2009/72] — in particular recitals 29 and 30 and Articles 15(7), 37(6)(b) and 26(4) — preclude national legislation, such as that under consideration in the present case, which subjects closed distribution systems to rules on dispatching and unbundling that are very similar to those imposed in respect of the public network and which, as regards general electricity charges, provides that payment of those charges should in part also be commensurate with the energy consumed within the closed system?'

30. Written observations were submitted by Solvay, Erg Power, Eni, the Hellenic Republic, the Italian Republic, the Kingdom of the Netherlands and the European Commission.

31. In response to a request for clarification from the Court pursuant to Article 101 of the Rules of Procedure, the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy) stated, by order of 12 April 2018, that, first, the obligation to unbundle functions does not apply any more to operators of closed distribution systems within the meaning of Article 38(5) of Legislative Decree No 93/2011 [22] and, second, Article 24(2) of Decree-Law No 91/2014 was repealed, so that general electricity charges now apply to electricity taken by the closed distribution system, as a whole, from the public network. [23]

32. Consequently, the referring court withdrew the fifth question referred as far as it concerns unbundling obligations and general electricity charges. However, it maintained that question as far as it concerns dispatching charges.

33. Solvay, Eni, the Italian Republic and the European Commission presented oral argument at the hearing on 31 May 2018.

22 This is because the legge 4 agosto 2017, n. 124 — legge annuale per il mercato e la concorrenza (Law of 4 August 2017, No 124 — Annual law on the market and competition) added paragraphs 5 bis and 5 ter to Article 38(5) of Legislative Decree No 93/2011, to the effect that the obligation to unbundle functions imposed on operators of distribution systems does not apply to operators of closed distribution systems, which are only required to keep separate accounts if they are part of a vertically integrated undertaking. Consequently, the Regulatory Authority for Energy, Networks and Environment adopted the deliberazione 18 gennaio 2018, n. 15/2018/R/com — Esclusione dagli obblighi di separazione funzionale per le imprese di distribuzione elettrica con meno di 25 000 punti di prelievo e per i sistemi di distribuzione chiusi, ai sensi della legge 124/2017 (Decision of 18 January 2018, No 15/2018/R/com, on the exemption from the requirements of functional unbundling for distributors of electricity with less than 25 000 connection points and for closed distribution systems within the meaning of Law No 124/2017).

23 See the decreto legge 30 dicembre 2016, n. 244 — Proroga e definizione di termini (Decree-Law of 30 December 2016, No 244, on the extension and definition of time limits), later converted into law.

III. Analysis

A. Preliminary remarks

34. For the sake of clarity, I would like to point out that the reference, in the preliminary questions referred to the Court, to the term 'the public network' should be understood as a reference to distribution or transmission systems that are operated under a concession contract. Indeed, according to Article 1(1)(u) of Annex A to Decision No 539/2015, a 'public network' is 'any electricity network operated under a concession contract for the transmission or the distribution of electricity', whose operator is 'required to provide access to third parties upon request' because it provides a public service.

35. Therefore, transmission or distribution systems that are operated, under Italian law, under a concession contract will be referred to in this Opinion as 'the public network'. IUNs,[24] the other private networks,[25] and simple generation and consumption systems[26] are not part of the public network.

36. I will consider, first of all, whether a system created and operated by a private entity, to which a limited number of production and consumption units are connected, and which in turn is connected to the public network, must be regarded as a 'distribution system' within the meaning of Directive 2009/72 (first question referred). Since that is, in my view, the case, I will then examine whether Member States may exempt a distribution system from obligations provided for by Directive 2009/72 only if that system may be classified as a closed distribution system within the meaning of Article 28(1) thereof, or whether Member States are permitted to identify another category of distribution systems to which other exemptions may apply (second question referred). I will then turn to assess whether the obligation to provide access to third parties, provided for by Article 32 of Directive 2009/72, applies to operators of closed distribution systems (third question referred) and whether the requirements listed under Article 26(4) and Article 28(2) of that directive are the only requirements from which Member States may exempt operators of closed distribution systems (fourth question referred). Finally, I will examine whether Directive 2009/72 precludes national legislation which applies to the users of closed distribution systems the rules applicable to the users of the public network in respect of dispatching charges (fifth question referred).

B. The first question referred

37. By the first question, the referring court asks the Court of Justice whether a system created and operated by a private entity, to which a limited number of production and consumption units are connected, and which in turn is connected to the public network, must be regarded as a 'distribution system' within the meaning of Directive 2009/72, in particular, of Article 2(5) and (6) and Article 28 thereof. The referring court also asks whether account must be taken, in that regard, of the fact that such system was created before Directive 2009/72 entered into force, or that it was set up originally as a self-generation system.

38. I should specify that, in my opinion, the reference, in the first preliminary question, to Article 3(5) and (6) of Directive 2009/72 is to be read as a reference to Article 2(5) and (6) of that directive. Indeed, Article 3(5) and (6) of Directive 2009/72 pertains to public service obligations (more specifically, to the right of consumers to change supplier and to receive all relevant consumption data, and to the obligation of Member States to grant compensation and exclusive rights for the performance of public

24 See point 10 above.
25 See point 13 above.
26 See point 18 above.

service obligations in a non-discriminatory manner). That provision is hardly relevant to the classification of IUNs and the other private networks as distribution systems. Moreover, Article 3(5) and (6) of Directive 2009/72 is not mentioned in the grounds of the request for a preliminary ruling. By contrast, Article 2(5) and (6) of that directive is mentioned in the grounds of that request. Furthermore, it is relevant to the first question referred, since it defines the notions of 'distribution' and 'distribution system operator'.

39. Solvay and Erg Power submit that systems created and operated by a private entity, to which a limited number of generation and consumption units are connected, and which in turn are connected to the public network, do not necessarily qualify as distribution systems within the meaning of Article 2(5) and (6) and Article 28 of Directive 2009/72. It is, in their view, possible to exclude from such classification systems which possess those features, were created before Directive 2009/72 entered into force and were set up originally for the purpose of self-generation. Eni contends that IUNs cannot qualify as distribution systems within the meaning of Directive 2009/72.

40. The Italian Government claims that IUNs qualify as distribution systems within the meaning of Directive 2009/72. The Greek Government, the Netherlands Government and the Commission consider that a system created and operated by a private entity, to which a limited number of production and consumption units are connected, and which in turn is connected to the public network, must be regarded as a distribution system.

41. As the referring court points out, Directive 2009/72 does not define the concept of 'distribution system'. However, according to Article 2(5) of that directive, '"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'.[27] Therefore, as the Court held in *citiworks*, a distribution system is a system used to transport electricity at high, medium or low-voltage for sale to wholesale or final customers.[28]

42. It does not matter, in order to determine whether a network qualifies as a distribution system within the meaning of Directive 2009/72, that it connects only a limited number of generation and consumption units.

43. Indeed, distribution is defined as the transport of electricity on certain systems with a view to its delivery to 'customers'. There is no indication in Article 2(5) of Directive 2009/72 that the transport of electricity with a view to its delivery to a few customers only should not be regarded as distribution within the meaning of that provision. Consequently, there is no reason why a system that connects only a few consumption and generation units should not be regarded as a distribution system within the meaning of Directive 2009/72. In that regard, I note that the system at issue in *citiworks*, which the Court found to be a distribution system within the meaning of Directive 2009/72, served *a limited number* of customers.[29] In the Court's words, 'the [Union] legislature did not … intend to exclude particular … distribution systems from the scope of Directive 2003/54 by reason of their size or consumption of electricity.'[30]

27 Article 2(19) of Directive 2009/72 defines 'supply' as 'the sale, including resale, of electricity to customers'.

28 Judgment of 22 May 2008, *citiworks*, (C-439/06, EU:C:2008:298, paragraph 46).

29 See point 2 above.

30 Judgment of 22 May 2008, *citiworks*, (C-439/06, EU:C:2008:298, paragraph 49). The Court's finding at paragraph 49 of its judgment in *citiworks* that distribution systems fall within the scope of Directive 2003/54 irrespective of their size may apply to Directive 2009/72. This is because the wording of Article 2(5) of Directive 2003/54, which led the Court to the abovementioned finding at paragraph 49 of its judgment in *citiworks*, is almost identical to the wording of Article 2(5) of Directive 2009/72. Indeed, Article 2(5) of Directive 2003/54 defines distribution as 'the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers, but not including supply'.

44. It does not matter, either, in order to determine whether a network qualifies as a distribution system within the meaning of Directive 2009/72, that it was created before that directive entered into force. Directive 2009/72 does not state that it does not apply to systems created before it entered into force.

45. Finally, it does not matter, in order to determine whether a network qualifies as a distribution system within the meaning of Directive 2009/72, that it was set up originally for the purpose of self-generation.

46. I note that, pursuant to Article 28(1)(b) of Directive 2009/72, a system which 'distributes electricity primarily to the owner or operator of the system or their related undertaking' may qualify as a closed distribution system (hence as a distribution system, as will be explained below).[31] According to the Commission's Interpretative note on retail markets, Article 28(1)(b) of Directive 2009/72 applies 'where an undertaking has allowed users to connect to a system which was developed for the undertaking's own use'.[32] I consider that that provision covers distribution systems which, like IUNs, were set up originally for the purpose of self-generation.[33]

47. Therefore, the answer to the first question referred should be that Article 2(5) and Article 28(1) of Directive 2009/72 must be interpreted as meaning that a system created and operated by a private person, to which a limited number of generation and consumption units are connected, and which in turn is connected to the main grid, is a distribution system. It is irrelevant in that regard that that system was set up originally as a self-generation system and that it was created before Directive 2009/72 entered into force.

C. The second question referred

48. By the second question, the referring court essentially asks the Court of Justice whether Member States may exempt a distribution system from obligations provided for by Directive 2009/72 only if that system qualifies as a closed distribution system within the meaning of Article 28(1) thereof, or whether Member States are permitted to identify another category of distribution systems and exempt systems belonging to that category from obligations other than those from which closed distribution systems may be exempted.

49. Solvay, Erg Power and Eni submit that the national legislature is permitted to identify a category of distribution systems other than closed distribution systems and to lay down for that category a simplified set of rules other than that applicable to closed distribution systems.

50. The Italian Government, the Greek Government, the Netherlands Government and the Commission contend that Directive 2009/72 does not allow Member States to provide for a category of distribution systems other than closed distribution systems and to apply to that category another set of simplified rules.

31 See point 69 below.

32 See point 5.2, p. 11 of the Commission's Interpretative note on retail markets.

33 In that regard, the referring court indicates that when electricity networks were nationalised in 1962, networks that connected one generation unit to one consumption unit were not included. Indeed, they were not regarded as genuine distribution networks because they connected two units owned by the same person. Rather, they were regarded as self-generation networks. Over time, however, some of those self-generation networks evolved, for instance, when the consumption unit was sold to a third party, so that the network could no longer be regarded as a self-generation network.

51. I note that Directive 2009/72 imposes certain obligations on operators of distribution systems. In particular, those operators are required to unbundle functions [34] and accounts. [35] They are also required to provide access to third parties based on objective and non-discriminatory tariffs. [36] Moreover, the energy used to cover energy losses and reserve capacity must be procured by the distribution system operator (where it has such a function) according to transparent, non-discriminatory and market based procedures. [37]

52. Directive 2009/72 provides for four categories of distribution systems which Member States may exempt from obligations provided for by that directive, namely, closed distribution systems, small isolated systems, micro isolated systems and systems serving less than 100 000 connected customers.

53. First, a distribution system qualifies as a closed distribution system within the meaning of Article 28(1) of Directive 2009/72 if two conditions are met. In the first place, that system must 'distribut[e] electricity within a geographically confined industrial, commercial or shared services site'. [38] In the second place, it must either distribute electricity to users whose operations or production process are integrated, or distribute electricity primarily to its owner or operator. According to Article 28(2) of that directive, Member States have the power to exempt the operator of a closed distribution system from (i) the requirement under Article 25(5) thereof to procure the energy it uses to cover energy losses and reserve capacity according to transparent, non-discriminatory and market based procedures and (ii) the requirement under Article 32(1) of Directive 2009/72 that tariffs are approved prior to their entry into force in accordance with Article 37 thereof. Moreover, pursuant to Article 26(4) of Directive 2009/72, Member States may exempt distribution systems serving less than 100 000 connected customers from unbundling obligations, which is likely the case of closed distribution systems. [39]

54. Second, small isolated systems are, according to Article 2(26) of Directive 2009/72, systems 'with 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'. Member States are permitted, under Article 44(1) of that directive, to apply derogations from the obligations laid down in Chapters IV, VI, VII and VIII thereof (subject, however, to Commission authorisation). They are also permitted, under Article 26(4) of Directive 2009/72, to exempt small isolated systems from unbundling obligations. [40]

55. Third, micro isolated systems are, according to Article 2(27) of Directive 2009/72, systems 'with consumption less than 500 GWh in the year 1996, where there is no connection with other systems'. Member States may, under Article 44(1) of Directive 2009/72, exempt micro isolated systems from the provisions of Chapters III, IV, VI, VII and VIII thereof (subject, again, to Commission authorisation). Member States may also, under Article 26(4) of that directive, exempt systems serving less than 100 000 connected customers from unbundling obligations, which is likely the case of micro isolated systems.

34 See Article 26 of Directive 2009/72.

35 See Article 31 of Directive 2009/72.

36 See Article 32 of Directive 2009/72.

37 See Article 25(5) of Directive 2009/72.

38 A closed distribution system cannot serve household customers, except for incidental use by a small number of households. See Article 28(4) of Directive 2009/72.

39 According to Section 5.3 of the Commission's Interpretative note on retail markets, 'due to the fact that they operate on confined geographic sites serving only non-household customers, closed [distribution system operators] will not have more than 100 000 customers. It will therefore be open to Member States to apply the provisions of Article 26(4) of [Directive 2009/72], which allow Member States not to require that such [distribution system operators] be unbundled.'

40 No Commission decision is necessary for a Member State to exercise the option provided for by Article 26(4) of Directive 2009/72.

56. Fourth, systems serving less than 100 000 connected customers may, pursuant to Article 26(4) of Directive 2009/72, be exempted from the unbundling obligations provided for by paragraphs 1, 2 and 3 of that provision. As mentioned above, closed distribution systems, small isolated systems and micro isolated systems may fall under that category.

57. There are, to my mind, no other categories of distribution systems which Member States may exempt from obligations provided for by Directive 2009/72. Had the Union legislature intended to confer on Member States the power to identify another category of distribution systems and to apply exemptions to systems belonging to that category, it would have done so expressly, as it did in Articles 26(4), 28(2) and 44(1) of that directive.

58. Consequently, Member States may only exempt a distribution system from obligations provided for by Directive 2009/72 if that system is a closed distribution system, a small isolated system, a micro isolated system or a system serving less than 100 000 connected customers.

59. In the present case, it has not been alleged that IUNs or the other private networks should be considered small isolated systems or micro isolated systems. IUNs and the other private networks are, however, classified as closed distribution systems by Article 38(5) of Legislative Decree No 93/2011.[41]

60. It is for the referring judge to determine whether IUNs and the other private networks should be regarded as closed distribution systems within the meaning of Article 28(1) of Directive 2009/72.

61. However, I note that, pursuant to Article 33(1)(b) of Law No 99/2009, IUNs must connect either 'units of *industrial* consumption' or 'units of *industrial* consumption and units of electricity generation',[42] and they must be 'located in the territory of not more than three adjacent municipalities, or not more than three adjacent provinces, only where generation units are powered by renewable sources'. Therefore, I consider that the first requirement under Article 28(1) of Directive 2009/72 that the system distributes electricity 'within a geographically confined industrial … site' is met. I also note that at least where IUNs connect units of industrial consumption and units of electricity generation 'which are functionally essential for the industrial production process', the second requirement under Article 28(1)(a) of Directive 2009/72 that the production process of users be integrated is, in my opinion, met.[43]

62. Therefore, the answer to the second question referred should be that Member States may only exempt distribution systems from obligations provided for by Directive 2009/72 where such systems qualify as closed distribution systems within the meaning of Article 28(1) thereof, as small isolated systems within the meaning of Article 2(26) thereof, as micro isolated systems within the meaning of Article 2(27) thereof or where they serve less than 100 000 customers. Member States are not permitted to identify another category of distribution systems and exempt systems belonging to that category from obligations other than those from which closed distribution systems, small isolated systems, micro isolated systems or systems serving less than 100 000 connected customers may be exempted.

41 According to the request for a preliminary ruling, the term 'closed distribution system' has the same meaning under Article 38(5) of Legislative Decree No 93/2011 and Article 28(1) of Directive 2009/72. See point 15 above.

42 Emphasis added.

43 The issue cannot be addressed as regards the other private networks since, the referring court states, there is no definition of those networks under Italian law. See point 13 above.

D. The third question referred

63. By the third question, the referring court asks the Court of Justice whether operators of closed distribution systems within the meaning of Article 28(1) of Directive 2009/72 are obliged to provide access to third parties in all cases.

64. Solvay, Erg Power, Eni, the Italian Government and the Greek Government contend that operators of closed distribution systems are not obliged to provide access to third parties in all cases. [44]

65. The Commission considers that Directive 2009/72 does not allow Member States to exempt operators of closed distribution systems from the obligation to provide access to third parties.

66. Article 32 of Directive 2009/72 states that 'Member States shall ensure the implementation of a system of third-party access to the … distribution systems' based on objective and non-discriminatory tariffs. Member States must also ensure that such tariffs are approved by the national regulatory authority and published prior to their entry into force, in accordance with Article 37 of that directive.

67. According to case-law, open third-party access to transmission and distribution systems constitutes one of the essential measures which the Member States are required to implement in order to bring about completion of the internal market in electricity. [45] In that regard, recital 4 of Directive 2009/72 stresses that non-discriminatory network access in each Member State does not yet exist.

68. In my opinion, Article 32 of Directive 2009/72 requires operators of closed distribution systems to provide third-party access.

69. First, I stress that closed distribution systems within the meaning of Article 28(1) of Directive 2009/72 are distribution systems. [46] Consequently, all obligations imposed on operators of distribution systems are imposed on operators of closed distribution systems, unless otherwise provided for by that directive.

70. This is consistent with the Commission's Interpretative note on retail markets. According to Section 5.3 thereof, 'closed distribution systems are distribution systems and do not constitute a new and separate category of systems'.

71. This is also consistent with the Commission's proposal for a recast electricity directive of 23 February 2017. [47] That proposal adds a fifth paragraph to Article 28 of Directive 2009/72 (Article 38 in the Commission's proposal for a recast electricity directive), which provides that 'closed distribution systems shall be considered as distribution systems for the purpose of [this] [d]irective'.

72. Second, it is true that Article 32(1) of Directive 2009/72 leaves the Member States free to take the measures necessary to establish a system of third-party access to transmission or distribution systems. However, having regard to the importance of the principle of open access to transmission or distribution systems, [48] that margin of discretion does not authorise Member States to depart from that principle except in those cases where Directive 2009/72 lays down exceptions or derogations. [49]

44 The Netherlands Government did not submit observations on the third question referred.

45 Judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 44); of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraph 33); and of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 76).

46 As defined by the Court in the judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 46). See point 41 above.

47 Commission's proposal for a directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast), of 23 February 2017 ('the Commission's proposal for a recast electricity directive') (COM(2016) 864 final/2).

48 See point 67 above.

49 Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 55).

73. In that regard, I note that Article 28(2)(b) of Directive 2009/72 does not allow Member States to exempt operators of closed distribution systems from the obligation to provide non-discriminatory access to third parties.

74. Indeed, Article 28(2)(b) of Directive 2009/72 states that Member States may exempt operators of closed distribution systems from 'the requirement under Article 32(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37'. Therefore, under Article 28(2)(b) of Directive 2009/72, Member States may exempt operators of closed distribution systems *from the obligation of prior approval of their tariffs*. This means that operators of closed distribution systems may be permitted to apply negotiated tariffs, as mentioned in the Commission's Interpretative note on retail markets.[50] Where that option is exercised, users of the closed distribution system may, pursuant to Article 28(3) of that directive, request the national regulatory authority to review those tariffs. However, Article 28(2)(b) of Directive 2009/72 does not allow Member States to exempt operators of closed distribution systems *from their obligation to provide access to third parties*.[51]

75. I also note that the Commission's Interpretative note on retail markets provides, under Section 5.3, that 'the obligation to grant third-party access to the system also applies to closed [distribution system operators]'.

76. By contrast, Article 3(14) of Directive 2009/72 states that 'Member States may decide not to apply the provisions of Articl[e] … 32 … insofar as [its] application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest …'.[52] According to case-law, Member States are thus permitted not to apply the provisions of Article 32 of Directive 2009/72 providing for third-party access, subject to the conditions set out in Article 3(8) thereof.[53]

77. Therefore, Article 32 of Directive 2009/72 requires operators of closed distribution systems to provide third-party access, provided that, as stated by the second paragraph of that provision, they do not lack the necessary capacity.

78. In the present case, I note that, according to Article 8 of Annex A to Decision No 539/2015,[54] IUNs and the other private networks are not subject to the obligation to connect third parties, whereas users of those networks have a right to be connected to the public network.[55]

79. Therefore, should IUNs and the other private networks be regarded as closed distribution systems within the meaning of Article 28(1) of Directive 2009/72, the provisions referred to in the preceding point would be inconsistent with Article 28(2)(b) and Article 32 of that directive.

80. Consequently, the answer to the third question referred should be that Article 28(2)(b) and Article 32 of Directive 2009/72 should be interpreted as meaning that operators of closed distribution systems are required to provide third-party access, unless they lack the necessary capacity.

50 Indeed, Section 5.5 of the Commission's Interpretative note on retail markets is entitled 'review procedure for *negotiated tariffs*' (emphasis added). Section 5.5 of that note belongs to Section 5, which pertains to closed distribution systems.

51 See Johnston, A., and Block, G., *EU Energy Law*, Oxford University Press, 2012, para. 4.131.

52 By contrast, Article 28(2)(b) of Directive 2009/72 states that Member States may exempt operators of closed distribution systems from a certain 'requirement' provided for by Article 32 of that directive, not from Article 32 itself.

53 Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 91).

54 See point 21 above.

55 See also, as regards IUNs, Article 33(1)(c) of Law No 99/2009 (cited at point 10 above) and, as regards the other private networks, the Ministerial Decree of 10 December 2010 (cited at point 12 above).

E. The fourth question referred

81. By the fourth question, the referring court asks the Court of Justice whether Member States are permitted to exempt operators of closed distribution systems within the meaning of Article 28(1) of Directive 2009/72 only from the requirements listed under Article 26(4) and Article 28(2) thereof, or whether Member States are either permitted or required to exempt those operators from other requirements set forth by that directive.

82. Solvay submits that Member States are allowed to exempt closed distribution systems not only from the requirements referred to in Article 26(4) and Article 28(2) of Directive 2009/72, but also from other requirements provided for by the same directive in order to avoid, as stated by recitals 29 and 30 of that directive, that a disproportionate or unnecessary burden is imposed on those systems' operators. Erg Power shares Solvay's view. Eni claims that Member States are required to exempt closed distribution systems from other requirements. The Italian Government considers that closed distribution systems may be exempted from requirements other than those listed under Article 26(4) and Article 28(2) of Directive 2009/72 as long as this results in a simplified regime. The Greek Government states that the power of Member States to exempt operators of closed distributions systems from requirements provided for by that directive is probably not confined to those listed under Article 26(4) and Article 28(2) thereof.

83. The Netherlands Government contends that Member States may only exempt closed distribution systems from the requirements listed under Article 26(4) and Article 28(2) of Directive 2009/72. The Commission submits that closed distribution systems may only be exempted from the requirements provided for by Article 25(5) and Article 32(1) of that directive.

84. In my opinion, Member States are not allowed to exempt operators of closed distribution systems from requirements other than those referred to in Article 26(4) and Article 28(2) of Directive 2009/72, that is, (i) the unbundling obligations provided for by Article 26(1), (2) and (3) of that directive, (ii) the requirement under Article 25(5) of the same directive to procure the energy used to cover losses and reserve capacity according to transparent, non-discriminatory and market based procedures, and (iii) the obligation of prior approval of tariffs by the national regulatory authority examined at points 63 to 80 of this Opinion.

85. First, as I have stated above,[56] closed distribution systems are distribution systems. Consequently, all obligations imposed on operators of distribution systems are imposed on operators of closed distribution systems, unless otherwise provided for by Directive 2009/72.

86. Second, I note that, during the preparatory work for Directive 2009/72, the European Parliament proposed to add a paragraph to Article 26 of Directive 2003/54,[57] which stated that 'Member States may exempt industrial sites from the provisions of Chapters III, IV, V, VI and VII'.[58] 'Industrial sites' were defined by the Parliament as 'privately owned geographical area[s] with a power grid which is primarily designed to supply industrial consumers in [those] area[s]'.[59] In my view, 'industrial sites' resemble the closed distribution systems discussed in this Opinion (which were only introduced at a later stage in Directive 2009/72). The Parliament's amendment conferred on Member States the power to exempt 'industrial sites' from a large number of provisions, in particular, those pertaining to the operation of distribution systems (provided for by Chapter V of Directive 2003/54).

56 See points 69 to 71 above.

57 Article 26 of Directive 2003/54 corresponds to Article 44 of Directive 2009/72.

58 European Parliament legislative resolution of 18 June 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (OJ 2009 C 286 E, p. 106).

59 See Article 1(2)(c) of the legislative resolution mentioned at footnote 58 above.

87. However, Directive 2009/72 was adopted without the Parliament's amendment. This suggests that the intention of the Union legislator was to allow Member States to grant operators of closed distribution systems only limited exemptions from the obligations imposed on operators of distribution systems.

88. Third, it is true that, according to Section 5.3 of the Commission's Interpretative note on retail markets, '[Member States] may design targeted and proportionate rules for closed [distribution system operators] that take into account their particular circumstances. This is particularly important as the precise nature of many obligations on system operators is set by Member States and not directly laid down in [Directive 2009/72]'.

89. However, in my opinion, Member States are allowed discretion in order to implement the obligations provided for by Directive 2009/72 (that is, to define the 'precise nature' of such obligations). Since, as recital 30 of that directive states, 'an unnecessary administrative burden' should not be imposed on closed distribution systems, those obligations may be *adjusted* by Member States to take account of the particular features of those systems. This does not mean that Member States are allowed to *exempt* closed distribution systems from obligations imposed by Directive 2009/72.

90. For instance, according to the Commission's Interpretative note on retail markets, Member States may take account of the particular features of closed distribution systems in setting rules for the designation of distribution system operators. That note does not, however, state that Member States may exempt undertakings that own or are responsible for closed distribution systems from the obligation to designate an operator, provided for by Article 24 of Directive 2009/72.

91. I also note that the sentences cited at point 88 above form part of Section 5.3 of the Commission's Interpretative note on retail markets, entitled 'Not a separate category of systems',[60] not of Section 5.4 of that note, entitled 'Specific exemptions' and which refers to Article 28(2) of Directive 2009/72. This confirms that the power of Member States to define the 'precise nature' of the obligations imposed on operators of closed distribution systems, referred to in those sentences, is not a power to exempt, but rather a power to adjust the rules set for operators of distribution systems that are not closed.

92. In the present case, operators of IUNs and of the other private networks are exempted from certain obligations imposed on operators of distribution systems, namely, (i) the obligation to provide third-party access, and (ii) the obligation to unbundle functions.[61]

93. The exemption from the obligation to provide third-party access has been examined above. As regards the exemption from the obligation to unbundle functions, it is consistent with the power conferred on Member States by Article 26(4) of Directive 2009/72 to exempt from that obligation systems serving less than 100 000 connected customers.

94. Consequently, the answer to the fourth question referred should be that Article 26(4) and Article 28(2) of Directive 2009/72 must be interpreted as precluding Member States from exempting operators of closed distribution systems from requirements not listed under those provisions.

F. The fifth question referred

95. By the fifth question, the referring court asks the Court of Justice whether Directive 2009/72, in particular Article 15(7), Article 37(6)(b) and recitals 29 and 30 thereof, precludes national legislation which makes users of closed distribution systems subject to the rules applicable to users of the public network in respect of dispatching charges.

60 Section 5.3 of that note is itself part of Section 5, entitled 'Closed distribution systems'.

61 See point 31 above.

96. As the Commission stated in the 2007 Energy Sector Enquiry,[62] 'as electricity cannot be stored', and network stability requires generation and consumption to be in balance at all times, 'balancing and reserve regimes exist to settle market participants' real-time imbalances resulting from discrepancies between … electricity demand and production'.[63] Transmission system operators and distribution system operators are entrusted with the operation of those regimes.[64]

97. Article 2(10) of Legislative Decree No 79/1999[65] defines dispatching as 'the activity of issuing instructions for the coordinated use and operation of generation units, the transmission system and auxiliary services'. According to Article 1(1) of that legislative decree, dispatching is a public service performed by the State through the operator of the national transmission system, Terna SpA ('Terna').

98. System users are charged for the provision of dispatching services. According to Article 22(1) of Annex A to Decision No 539/2015, the rules applied to the users of closed distribution systems in respect of dispatching charges are those applicable to the users of the public network. The same provision specifies that, as regards the users of closed distribution systems, dispatching charges are applied 'in relation to electricity fed into, and taken from the closed distribution system by each user through his connection point to that system.'

99. Dispatching charges are paid to Terna, not to the operator of the closed distribution system.

100. Before Decision No 539/2015 entered into force, dispatching charges were applied solely in relation to electricity fed into, or taken from the public network by the closed distribution system, as a whole, through that system's connection point to that network. This means that dispatching charges were applied solely in relation to electricity fed into, or taken from the public network. They were not applied in relation to electricity generated within the closed distribution system.

101. Solvay, Erg Power, Eni and the Greek Government submit that Directive 2009/72 precludes the application to closed distribution systems of the dispatching rules applicable to the public network.

102. The Italian Government submits that the users of IUNs may decide to regroup into a single connection point to the public network, in which case dispatching charges are applied solely to electricity taken by the IUN, as a whole, from the public network.[66]

103. The Commission contends that Directive 2009/72 does not preclude the imposition on the users of IUNs of dispatching rules applicable to the users of the public network.

104. I note that, as argued by Eni, the users of IUNs normally feed electricity into, or take electricity from the IUN only, not from the public network, so that dispatching services are provided by the IUN operator, not by Terna. It is only rarely, when there are unexpected peaks in demand or disruption of production in the IUN, that the users of IUNs source electricity from the public network and that they are provided with dispatching services by Terna.

62 DG Competition Report on Energy Sector Enquiry, of 10 January 2007 ('the 2007 Energy Sector Enquiry') (SEC(2006) 1724). That report is available on the website of the Commission's Directorate-General for Competition at the following address: http://ec.europa.eu/competition/sectors/energy/overview_en.html.

63 See paragraph 327 of the 2007 Energy Sector Enquiry.

64 See Articles 15 and 25 of Directive 2009/72.

65 Decreto legislativo 16 marzo 1999, n. 79 — Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica (Legislative Decree of 16 March 1999, No 79, implementing Directive 96/92/EC concerning common rules for the internal market in electricity) ('Legislative Decree No 79/1999').

66 The Netherlands Government did not submit observations on the fifth question referred.

105. Therefore, the methodology whereby the amount of dispatching charges is calculated in relation to electricity fed into, or taken from the IUN, not solely in relation to electricity fed into, or taken from the public network, is inconsistent with the requirement under Article 15(7) and Article 37(6)(b) of Directive 2009/72 that imbalance charges be 'non-discriminatory'. Indeed, the users of IUNs, like the users of the public network, are charged for the provision of dispatching services by Terna although the former, unlike the latter, are only exceptionally provided with such services.

106. Moreover, that methodology is inconsistent with the requirement under Article 15(7) and recital 35 of Directive 2009/72 that imbalance charges be 'cost-reflective' and with the requirement under Article 37(6)(b) of that directive that balancing services be provided 'in the most economic manner possible'. This is because Terna incurred no costs, or incurred only limited costs, in respect of the users of IUNs.

107. Consequently, it seems to me that the same methodology cannot be applied to the calculation of the dispatching charges paid by the users of IUNs and to the calculation of the dispatching charges paid by the users of the public network. Dispatching charges paid by the users of IUNs must be calculated in relation to electricity fed into, or taken from the public network. Indeed, those charges must reflect the costs incurred by Terna for the provision of dispatching services to the users of IUNs.

108. I note that, at the oral hearing, the Italian Government argued that the users of IUNs may, under Italian legislation, regroup so that dispatching charges are calculated in relation to electricity fed into, or taken from, the public network by the IUN, as a whole. According to the Italian Government, should the users of IUNs take the decision to regroup, dispatching charges would be calculated as they were before Decision No 539/2015 entered into force. At the oral hearing, both Solvay's and Eni's representatives replied that, should the users of IUNs regroup, this would have no impact on the calculation of the dispatching charges. It will be for the referring court to clarify this issue.

109. As to the issue whether the option of sourcing from the public network should be compensated for in itself, that is, even if the option is not exercised and no electricity is sourced from the public network, the Court does not, in my view, have sufficient information on the Italian regulatory framework and market features to address that issue.

110. Therefore, the answer to the fifth question referred should be that Article 15(7) and Article 37(6)(b) of Directive 2009/72 preclude national legislation whereby dispatching charges paid by the users of closed distribution systems to the operator of the main grid are applied to electricity fed by each user into the closed distribution system, or to electricity taken by each user from the closed distribution system. Those charges should apply solely to electricity fed by each user of the closed distribution system into the main grid, or to electricity taken by each user of the closed distribution system from the main grid.

IV. Conclusion

111. In the light of the foregoing, I propose that the Court give the following reply to the question referred by the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy):

(1) Article 2(5) and Article 28(1) of 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 must be interpreted as meaning that a system created and operated by a private person, to which a limited number of generation and consumption units are

connected, and which in turn is connected to the main grid, is a distribution system. It is irrelevant in that regard, that that system was set up originally as a self-generation system and that it was created before Directive 2009/72 entered into force.

(2) Member States may only exempt distribution systems from obligations provided for by Directive 2009/72 where such systems qualify as closed distribution systems within the meaning of Article 28(1) thereof, as small isolated systems within the meaning of Article 2(26) thereof, as micro isolated systems within the meaning of Article 2(27) thereof or where they serve less than 100 000 customers. Member States are not permitted to identify another category of distribution systems and exempt systems belonging to that category from obligations other than those from which closed distribution systems, small isolated systems, micro isolated systems or systems serving less than 100 000 connected customers may be exempted.

(3) Article 28(2)(b) and Article 32 of Directive 2009/72 should be interpreted as meaning that operators of closed distribution systems are required to provide third-party access, unless they lack the necessary capacity.

(4) Article 26(4) and Article 28(2) of Directive 2009/72 must be interpreted as precluding Member States from exempting operators of closed distribution systems from requirements not listed under those provisions.

(5) Article 15(7) and Article 37(6)(b) of Directive 2009/72 preclude national legislation whereby dispatching charges paid by the users of closed distribution systems to the operator of the main grid are applied to electricity fed by each user into the closed distribution system, or to electricity taken by each user from the closed distribution system. Those charges should apply solely to electricity fed by each user of the closed distribution system into the main grid, or to electricity taken by each user of the closed distribution system from the main grid.