Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

24 February 2022 *

(Reference for a preliminary ruling – Internal market in natural gas – Directive 2009/73/EC – Article 2(3) – Concept of 'transmission' – Article 23 – Decision-making powers regarding the connection of storage facilities, liquid natural gas regasification facilities and industrial customers to the transmission system – Article 32(1) – Access to the network for third parties – Possibility of direct connection for final customers to the natural gas transmission system)

In Case C-290/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia), made by decision of 11 June 2020, received at the Court on 30 June 2020, in the proceedings

Latvijas Gāze AS,

intervening parties:

Latvijas Republikas Saeima,

Sabiedrisko pakalpojumu regulēšanas komisija,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer (Rapporteur), F. Biltgen, L.S. Rossi and N. Wahl, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Latvijas Gāze AS, by L. Liepa, advokāts,

– Sabiedrisko pakalpojumu regulēšanas komisija, initially by R. Irklis, and subsequently by I. Birziņš,

* Language of the case: Latvian.

– the Latvian Government, initially by K. Pommere and V. Soņeca, and subsequently by K. Pommere, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finish Government, by H. Leppo, acting as Agent,

– the European Commission, by O. Beynet and A. Sauka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(3), Article 23 and Article 32(1) of 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).

2 The request has been made in proceedings in which Latvijas Gāze AS brought an action for a declaration of unconstitutionality against a decision of the Sabiedrisko pakalpojumu regulēšanas komisija (Public Services Regulatory Commission, Latvia) ('the Regulatory Commission') pursuant to which any user of natural gas may, under certain conditions, connect to the natural gas transmission network without the intervention of a distribution network operator.

Legal framework

European Union law

Directive 2009/73

3 Recitals 3, 4, 8, 14, 16, 23 to 26 and 61 of Directive 2009/73 state:

'(3) The freedoms which the Treaty guarantees the citizens of the Union – *inter alia*, the free movement of goods, the freedom of establishment and the freedom to provide services – are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

(4) However, at present, there are obstacles to the sale of gas on equal terms and without discrimination or disadvantages in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.

…

(8) 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. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market [(OJ 2008 C 175 E, p. 206),] referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. …

…

(14) Where, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and production interests.

…

(16) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of gas markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, *inter alia*, be ensured through certain "cooling-off" periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking. The independent transmission operator model of effective unbundling is in line with the requirements laid down by the European Council at its meeting on 8 and 9 March 2007.

…

(23) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to transport. Those tariffs should be applicable to all users on a non-discriminatory basis. Where a storage facility, linepack or ancillary service operates in a sufficiently competitive market, access could be allowed on the basis of transparent and non-discriminatory market-based mechanisms.

(24) It is necessary to ensure the independence of storage system operators in order to improve third-party access to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers. …

(25) 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.

(26) Member States should take concrete measures to assist the wider use of biogas and gas from biomass, the producers of which should be granted non-discriminatory access to the gas system, provided that such access is compatible with the relevant technical rules and safety standards on an ongoing basis.

…

(61) Under Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks [and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36)], the [European] Commission may adopt Guidelines to achieve the necessary degree of harmonisation. Such Guidelines, which constitute binding implementing measures, are, also with regard to certain provisions of this Directive, a useful tool which can be adapted quickly where necessary.'

4 Under Article 2 of that directive:

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

(1) "natural gas undertaking" means a natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including [liquid natural gas (LNG)], which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers;

…

(3) "transmission" means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply;

…

(5) "distribution" means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;

…

(7) "supply" means the sale, including resale, of natural gas, including LNG, to customers;

…

(9) “storage facility” means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;

…

(11) “LNG facility” means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage;

…

(24) “customer” means a wholesale or final customer of natural gas or a natural gas undertaking which purchases natural gas;

(25) “household customer” means a customer purchasing natural gas for his own household consumption;

(26) “non-household customer” means a customer purchasing natural gas which is not for his own household use;

(27) “final customer” means a customer purchasing natural gas for his own use;

…’

5 Article 8 of that directive, which is entitled ‘Technical rules’, provides:

‘The regulatory authorities where Member States have so provided or Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of LNG facilities, storage facilities, other transmission or distribution systems, and direct lines, are developed and made public. Those technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. The Agency may make appropriate recommendations towards achieving compatibility of those rules, where appropriate. …’

6 Article 9 of that directive, which is entitled ‘Unbundling of transmission systems and transmission system operators’, is worded as follows:

‘1. Member States shall ensure that from 3 March 2012:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or persons are entitled neither:
(i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor

(ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;

(c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

…

8. Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

(a) designate an independent system operator in accordance with Article 14, or

(b) comply with the provisions of Chapter IV.

9. Where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Member State may decide not to apply paragraph 1.

…’

7 Under Article 23 of Directive 2009/73, which is entitled ‘Decision-making powers regarding the connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system’:

‘1. The transmission system operator shall establish and publish transparent and efficient procedures and tariffs for non-discriminatory connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system. Those procedures shall be subject to approval by the regulatory authority.

2. The transmission system operator shall not be entitled to refuse the connection of a new storage facility, LNG regasification facility or industrial customer on the grounds of possible future limitations to available network capacities or additional costs linked with necessary capacity increase. The transmission system operator shall ensure sufficient entry and exit capacity for the new connection.’

8 Article 32 of that directive, which is entitled 'Third-party access', provides in paragraph 1 thereof:

'Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, 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 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.'

9 Article 41 of that directive, which is entitled 'Duties and powers of the regulatory authority', provides, in paragraph 1 thereof:

'The regulatory authority shall have the following duties:

…

(m) monitoring the time taken by transmission and distribution system operators to make connections and repairs;

…'

Regulation No 715/2009

10 Under Article 1, first paragraph, point (a) of Regulation No 715/2009, as amended by Commission Decision 2010/685/EU of 10 November 2010 (OJ 2010 L 293, p. 67) ('Regulation No 715/2009'), that regulation sets non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas.

11 In accordance with Article 23(2) of that regulation, the guidelines concerning, inter alia, the definition of the technical information necessary for network users to gain effective access to the system and the definition of all relevant points for transparency requirements, including the information to be published at all relevant points and the time schedule for the publication of that information, are laid down in Annex I with respect to transmission system operators.

12 Paragraph 3.2 of Annex 1 to that regulation, which is entitled 'Definition of all relevant points for transparency requirements', is worded as follows:

'(1) Relevant points shall include at least:
(a) all entry and exit points to and from a transmission network operated by a transmission system operator, with the exception of exit points connected to a single final customer, and with the exception of entry points linked directly to a production facility of a single producer that is located within the EU;

…

(2) Information for single final customers and for production facilities, that is excluded from the definition of relevant points as described under 3.2(1)(a), shall be published in aggregate format, at least per balancing zone. The aggregation of single final customers and of production facilities, excluded from the definition of relevant points as described under 3.2(1)(a), shall for the application of this Annex be considered as one relevant point.'

Latvian Law

13 Article 84[1](1) of the Enerģētikas likums (Law on Energy) of 3 September 1998 (*Latvijas Vēstnesis*, 1998, No 273/275), in the version applicable to the dispute in the main proceedings ('the Law on Energy'), provides:

'The Public Services Regulatory Commission shall approve the rules on connection to the natural gas transmission network that are laid down by the operator of the natural gas transmission network for producers of biomethane, operators of liquefied natural gas networks and users of natural gas, and the rules on connection to the natural gas distribution network that are laid down by the operator of the natural gas distribution network for users of natural gas. Those rules must be objectively and financially justified, fair, equitable and transparent. The Public Services Regulatory Commission may propose amendments to the rules on connection and request that the operator of the natural gas network concerned submits draft legislation in that regard within a specified period.'

14 By Decision No 1/7 of 18 April 2019, the Regulatory Commission approved the 'Rules on connection to the natural gas transmission network for producers of biomethane, operators of liquefied natural gas networks and users of natural gas'. According to those rules, any user of natural gas may connect to the natural gas transmission network without the intervention of a distribution network operator, in accordance with the procedure and conditions provided for.

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

15 Up until 3 April 2017, Latvijas Gāze, the applicant in the main proceedings, as a vertically integrated undertaking, alone ensured the purchase, storage, transmission, distribution and marketing of natural gas on the Latvian market in natural gas.

16 After that date, in the process of the liberalisation of the market in natural gas in Latvia, the company Conexus Baltic Grid AS was created, as an entity separate from the applicant. The applicant is not a shareholder in that public limited liability company to which the national infrastructure for the transmission of natural gas and the single network for the transmission of natural gas was transferred.

17 In the context of that same process, the company Gaso AS was created, as a subsidiary separate from the applicant. Gaso provides, under licence, a natural gas distribution service in the territory of Latvia. The applicant is the only shareholder in that public limited liability company and, pursuant to its licence, Gaso is the sole operator of the natural gas distribution network in Latvia.

18 On 18 April 2019, pursuant to Article 84[1](1) of the Law on Energy, the Regulatory Commission adopted Decision No 1/7.

19 The applicant in the main proceedings brought an action for a declaration of unconstitutionality in respect of that decision before the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia).

20 The applicant in the main proceedings submits, in particular, that, in accordance with Article 23 of Directive 2009/73, legislation enacted by a Member State may allow users of natural gas to connect directly to the natural gas transmission network only if the operator of the natural gas distribution network refuses to connect them to the network on account of technical or operational limitations or if there are other objective reasons making it necessary for a user of natural gas to connect directly to the natural gas transmission network.

21 By contrast, the Regulatory Commission considers that neither the national legislation nor Article 23(1) of Directive 2009/73 attaches restrictions to the connection of facilities of users of natural gas to the natural gas transmission network.

22 According to the referring court, it follows at first sight from Article 2(3) of Directive 2009/73 that the transmission of natural gas as an activity involving the supply of natural gas does not include the transmission of natural gas through a section of the network that forms part of the high-pressure pipelines used primarily to distribute natural gas locally for the purposes of supply to final customers.

23 It nonetheless follows from Article 23 of Directive 2009/73 that industrial customers, or at least new industrial customers, can connect to the natural gas transmission network. It is apparent from the drafting history of that directive that the concept of 'industrial customer', which is not defined by that directive, could refer to a final 'non-household customer' within the meaning of Article 2(26) of that directive.

24 Moreover, the referring court asks whether the principle of third-party access to the internal market in natural gas recognised in Article 32(1) of Directive 2009/73 must, given the objective of that directive to protect the interests of consumers, apply indirectly to final customers. That being so, it would appear, by analogy, from the judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551), that that provision of Directive 2009/73 must be interpreted as defining the Member States' obligations only in respect of the access and not the connection of third parties to the natural gas transmission and distribution systems.

25 In those circumstances, the Latvijas Republikas Satversmes tiesa (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 23 and Article 32(1) of Directive 2009/73/EC be interpreted as meaning that Member States are required to adopt legislation permitting any final customer to choose which type of network – transmission or distribution – he or she wishes to connect to and imposing on the network operator an obligation to allow him or her to connect to the network in question?'

(2) Must Article 23 of Directive 2009/73/EC be interpreted as requiring Member States to adopt legislation under which only a non-household final customer (that is to say, only an industrial customer) may connect to the natural gas transmission system?

(3) Must Article 23 of Directive 2009/73/EC, in particular the concept of "new industrial customer", be interpreted as requiring Member States to adopt legislation under which only a non-household final customer (that is to say, only an industrial customer) who has not previously been connected to the distribution system may connect to the natural gas transmission system?

(4) Must Article 2(3) and Article 23 of Directive 2009/73/EC be interpreted as precluding legislation of a Member State under which the transmission of natural gas includes the transmission of natural gas directly to the final customer's natural gas supply system'

Consideration of the questions referred

The first question

26 By its first question, the referring court asks whether Article 23 and Article 32(1) of Directive 2009/73 must be interpreted as meaning that Member States are obliged to adopt legislation under which, first, any final customer may choose to be connected either to the transmission system or to the distribution system for natural gas, and, second, the system operator concerned is required to allow him or her to connect to that system.

27 In the first place, with regard to Article 32(1) of Directive 2009/73, it should be noted at the outset that the wording of that provision is similar to that of Article 20(1) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37), and, moreover, to that of Article 32(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 (OJ 2009 L 211, p. 55).

28 In that regard, the Court has held that Article 20 of Directive 2003/54 should be interpreted as imposing obligations on Member States only in respect of consumer access to electricity systems and not in respect of connection thereto (see, to that effect, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 42).

29 On the one hand, as the Advocate General stated in points 24, 25 and 62 of his Opinion, it is apparent from EU rules that the internal market in natural gas is organised in a similar way to the internal market in electricity.

30 On the other, the terms 'access' and 'connection' to the network appear in Directive 2009/73 with the same meanings as those set out by the Court in its judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551, paragraphs 40 to 42), with regard to Directive 2003/54.

31 It is apparent in particular from recitals 4, 8 and 23 to 26 of Directive 2009/73 that, like in Directive 2003/54, the term 'access' to the network is linked, in Directive 2009/73, to the supply of natural gas, including inter alia the quality, regularity and cost of the service, and is often used in the context of guaranteeing non-discriminatory tariffs. Thus, access to the system includes the right to use natural gas systems. By contrast, it follows in particular from Articles 8 and 23 and Article 41(1)(m) of Directive 2009/73 that, like the term used in Directive 2003/54, the term 'connection' relates to physical connection to the natural gas system (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraphs 40 to 42).

32 Furthermore, as in Directive 2003/54 and Directive 2009/72 with regard to electricity, the transmission and distribution of natural gas, as defined in Article 2(3) and (5) of Directive 2009/73, do not include the supply of natural gas. Thus, for eligible customers, the right to access the systems is exercised through a supplier whom customers must be able freely to choose, as stated in recital 3 of Directive 2009/73, since that freedom of choice is guaranteed whether the supplier connects them to a transmission system or to a distribution system (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 43).

33 It follows that, like Article 20(1) of Directive 2003/54, Article 32(1) of Directive 2009/73 must be interpreted as imposing obligations on Member States only in respect of access to the system and not in respect of connection thereto (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 42). Consequently, that provision cannot be interpreted as laying down an obligation for Member States to include in their respective legislation the right of any final customer to connect to the natural gas transmission network.

34 In the second place, such an obligation cannot be inferred from Article 23 of that directive either.

35 In that regard, it should be borne in mind that, in accordance with Article 9 of Directive 2009/73, read in the light of recital 14 thereof, the Member States must provide for the unbundling of transmission systems and transmission system operators in relation to production and supply interests according to one of the following systems for unbundling: ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests ('the first system for unbundling'); the setting up of an independent system operator ('the second system for unbundling'); or the setting up of an independent transmission operator ('the third system for unbundling').

36 It is only when the Member State concerned decides not to install the first system for unbundling that the Member State must, as provided for in Article 9(8)(a) of Directive 2009/73, designate an independent system operator in accordance with Article 14 (the second system for unbundling) or that it must, pursuant to Article 9(8)(b) of the directive, comply with the provisions of Chapter IV (the third system for unbundling) (see, to that effect, judgment of 3 December 2020, *Commission* v *Belgium (Markets in electricity and natural gas)*, C-767/19, EU:C:2020:984, paragraph 48).

37 As stated in recital 16 of Directive 2009/73, it is in the event that the Member State concerned chooses to install the second or third system for unbundling that the full effectiveness of the solutions should be ensured by way of specific additional rules, that is to say rules other than those set out in Article 9(1) to (7) of that directive. Those 'specific additional rules' are, respectively, the provisions of Article 14 of Directive 2009/73 and Chapter IV of that directive, within which Article 23 falls.

38 By contrast, the Member State concerned is not subject to compliance with the specific additional rules if it chooses to install the first system for unbundling (see, by analogy, judgment of 26 October 2017, *Balgarska energiyna borsa*, C-347/16, EU:C:2017:816, paragraphs 33 to 35).

39 In the present case, as the Advocate General noted in points 38 to 40 of his Opinion, it is apparent from the information before the Court that, in the context of implementation of Directive 2009/73, the Republic of Latvia chose to install the first system for unbundling.

40 It follows that, subject to the verifications to be made by the referring court, Article 23 of Directive 2009/73 appears not to assist in resolving the dispute in the main proceedings.

41 In any event, if Article 23 were to apply in the present case, that provision cannot be interpreted as requiring Member States to provide for the right of any final customer to connect, in all circumstances, to the natural gas transmission network.

42 Pursuant to Article 23(2) of that directive, the transmission system operator is not entitled to refuse the connection of a new storage facility, LNG regasification facility or industrial customer on the grounds of possible future limitations to available network capacities or additional costs linked with necessary capacity increase.

43 First, the term 'storage facility' is defined in Article 2(9) of that directive as meaning a facility owned and/or operated by a 'natural gas undertaking', a term defined in Article 2(1) 'but [as] not includ[ing] final customers'.

44 Second, the term 'LNG facility' is defined in Article 2(11) of that directive as meaning a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and 'includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system'. It is therefore an entity which, unlike 'final customers', within the meaning of Article 2(27) of that directive, carries out the function of supply for the transmission network.

45 The exclusion of final customers from the two concepts referred to in paragraphs 43 and 44 above also corresponds to the statement made in recital 16 of Directive 2009/73. According to that recital, effective unbundling through the independent transmission operator provisions, according to the third system for unbundling, should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. Those measures are implemented by the provisions of Chapter IV of that directive, and measures relating to connecting new 'production' capacities to the network are specifically implemented by Article 23 of that directive.

46 Third, while, having regard to the definitions of the terms 'customer' and 'final customer' set out in Article 2(24) and (27) of Directive 2009/73 respectively, it cannot be ruled out that the term 'industrial customer', which also appears, without being defined, in Article 23(2) of that directive, applies to certain categories of final customer, the fact remains that, as noted, in essence, by the Advocate General in point 78 of his Opinion, that term does not include all final customers. In particular, it does not include 'household customers', within the meaning of Article 2(25) of that directive, namely, therefore, customers purchasing natural gas for their own household consumption.

47 In the light of the foregoing considerations, the answer to the first question referred is that Article 23 and Article 32(1) of Directive 2009/73 must be interpreted as meaning that it does not follow from those provisions that Member States are obliged to adopt legislation under which, first, any final customer may choose to be connected either to the transmission system or to the distribution system for natural gas, and, second, the system operator concerned is required to allow him or her to connect to that system.

The second and third questions

48 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 23 of Directive 2009/73 must be interpreted as requiring Member States to adopt legislation under which only an industrial customer or, as the case may be, an industrial customer who has not previously been connected to the distribution system may connect to the natural gas transmission system.

49 In that regard, it should be borne in mind that it is apparent from paragraphs 35 to 40 above that Article 23 of Directive 2009/73 appears, subject to the verifications to be made by the referring court, not to assist in resolving the dispute in the main proceedings.

50 In any event, even if that provision were to apply in the present case, the prohibition, which it imposes on transmission system operators, on refusing certain entities the right to connect to the network in no way includes, as such, an obligation to refuse the connection to all other types of customers.

51 If the Member State concerned were to choose the third system for unbundling, Article 23 of Directive 2009/73 merely limits the flexibility retained by that Member State in steering system users towards one or another type of system (see, by analogy, judgment of 9 October 2008, *Sabatauskas and Others*, C-239/07, EU:C:2008:551, paragraph 47).

52 In the light of the foregoing considerations, the answer to the second and third questions referred is that Article 23 of Directive 2009/73 must be interpreted as not requiring Member States to adopt legislation under which only an industrial customer may connect to the natural gas transmission system.

The fourth question

53 By its fourth question, the referring court asks whether Article 2(3) and Article 23 of Directive 2009/73 must be interpreted as precluding legislation of a Member State under which the transmission of natural gas includes the transmission of natural gas directly to the natural gas supply system of a final customer.

54 With regard, in the first place, to Article 23 of Directive 2009/73, it should be noted that, for reasons similar to those set out in paragraphs 49 to 51 above, if that provision were to apply in the present case, it would not preclude such national legislation.

55 So far as concerns, in the second place, Article 2(3) of that directive, it must be observed that that provision defines 'transmission', for the purposes of that directive, as 'the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply'.

56 While it is true that that definition excludes 'the transport of natural gas through … the part of high-pressure pipelines primarily used in the context of local distribution of natural gas', it nevertheless covers 'the transport of natural gas … with a view to its delivery to customers'. In addition, it follows, on the one hand, from Article 2(24) of Directive 2009/73 that the term 'customers' means, in particular, final customers and, on the other, from Article 2(7) that the term

'supply' covers 'the sale, including resale, of natural gas, including LNG, to customers'. Consequently, it cannot be inferred only from the wording of Article 2(3), which defines the term 'transmission', that a final customer is not permitted to connect to the transmission network.

57 Second, it should be noted that the term 'transmission' was defined in similar terms in Article 2(3) of Directive 2003/54, namely as meaning 'the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but not including supply'. In the judgment of 9 October 2008, *Sabatauskas and Others* (C-239/07, EU:C:2008:551), the Court acknowledged the possibility of direct connection for final consumers to the electricity transmission system.

58 That definition was reproduced without amendment in Article 2(3) of Directive 2009/72.

59 Third, the interpretation according to which the term 'transmission' includes the possibility of direct connection for final consumers to the transmission network is also supported by Regulation No 715/2009.

60 That regulation, which aims, in accordance with Article 1 thereof, at setting non-discriminatory rules for access conditions to natural gas transmission systems, includes, in Annex I thereto, binding guidelines, must also be taken into account in the context of Directive 2009/73, as is apparent from recital 61 thereto.

61 Point 3.2.1 of those guidelines, relating to the definition of all relevant points for transparency requirements, provides, in particular, that that definition must include at least all entry and exit points to and from a transmission network operated by a transmission system, with the exception of exit points 'connected to a single final customer', with the exception of entry points linked directly to a production facility of a single producer that is located within the EU.

62 Point 3.2.2 of those guidelines provides, on the one hand, that information for 'single final customers' and for production facilities, that is excluded from the definition of relevant points as described under point 3.2.1(a), is to be published in aggregate format, at least per balancing zone and, on the other, that the aggregation of single final customers and of production facilities are for the application of that annex to be considered as one relevant point.

63 In the light of the foregoing considerations, the answer to the fourth question is that Article 2(3) and Article 23 of Directive 2009/73 must be interpreted as not precluding legislation of a Member State under which the transmission of natural gas includes the transmission of natural gas directly to the natural gas supply system of a final customer.

Costs

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

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

1. **Article 23 and Article 32(1) of 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 must be interpreted as meaning that it does not follow from those provisions that Member States are obliged to adopt legislation under which, first, any final customer may choose to be connected either to the transmission system or to the distribution system for natural gas, and, second, the system operator concerned is required to allow him or her to connect to that system.**

2. **Article 23 of Directive 2009/73 must be interpreted as not requiring Member States to adopt legislation under which only an industrial customer may connect to the natural gas transmission system.**

3. **Article 2(3) and Article 23 of Directive 2009/73 must be interpreted as not precluding legislation of a Member State under which the transmission of natural gas includes the transmission of natural gas directly to the natural gas supply system of a final customer.**

[Signatures]