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Case No: CO/2625/2014

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/11/2014

**Before :**

**MR JUSTICE GREEN**

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**Between :**

<b>The Queen on the application of UK Power Networks Services (Contracting) Limited</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>The Gas and Electricity Markets Authority</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>Heathrow Airport Limited</b>	<b><u>Interested Party</u></b>

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**Richard Gordon QC and Sarah Abram** (instructed by **UK Power Networks Services  
(Contracting) Ltd**) for the **Claimant**  
**Javan Herberg QC and Tom Mountford** (instructed by **Ofgem**) for the **Defendant**  
**Daniel Beard QC, Gerry Facenna and Ligia Osepciu** (instructed by **Heathrow Airport Ltd**)  
for the **Interested Party**

Hearing dates: 13<sup>th</sup> & 14<sup>th</sup> October 2014

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**Approved Judgment**

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**Mr Justice Green :**

**A. Introduction, issue and conclusion**

*(i) The Issue*

1. The Claimant is UK Power Networks Services (Contracting) Limited (“UKPNS”). It “runs”, for want of a more neutral verb, the high voltage part of the electricity supply network at London Heathrow Airport. It does so under a very long term agreement (the “Distribution Agreement”) between itself and Heathrow Airport Limited (“HAL”), the Interested Party in this litigation. The part of the overall Heathrow network that is subject to this agreement is termed “the Leased Network”. The Gas and Electricity Markets Authority (the “Defendant” or the “Authority”) is the Defendant to the proceedings.
2. Under the Distribution Agreement, UKPNS is paid a substantial annual fee. But UKPNS does not sell electricity. It simply operates the Leased Network. HAL, on the other hand, does sell electricity to the many customers who are situated on the Heathrow site and whose businesses are connected to the electricity network at Heathrow. This includes hotels, airlines and numerous shops, restaurants and other businesses.
3. Until recently, these customers had been forced to acquire their electricity from HAL who (not being a generator itself) acquired its electricity from a third party electricity supplier. However, under the terms of an EU Directive of 2009, which had to be implemented in the Member States by 3<sup>rd</sup> March 2011, operators of networks (such as exists at Heathrow) are now required to open these networks to competition. The relevant measure is Directive 2009/72 of the European Parliament and of the Council of 13<sup>th</sup> July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 (hereafter “Directive 2009/72” or “the Directive”). Under the Directive any customer can switch electricity supplier to favour a new (and presumably cheaper) option. But for this competition to occur the network operator must open its network and give access to rival electricity suppliers. This is known as “third party access”. It enables competition for the supply of electricity to occur freely.
4. The obligation to give practical effect to third party access must be imposed upon someone. It entails a range of technical and physical actions which have to be performed by a person who is able to operate the network. Under the Directive that obligation or task is imposed upon persons who are “responsible” for such matters as: operating the system; ensuring its maintenance; developing the system in a given area; ensuring its interconnections with other systems; and, ensuring the long term ability of the system to meet reasonable demands for the distribution of electricity.
5. If, in a given case, a dispute arises as to who has this “responsibility” the national regulatory authorities are required, under the Directive, to resolve the dispute.
6. In the UK, in order to implement this scheme of third party access, Parliament has introduced a schedule to the Electricity Act 1989 (“EA 1989”). This is Schedule 2ZA. It is a lengthy and complex measure which, as this case has demonstrated, is bedevilled by a dearth of any, or any sensible, definitions. What was a simple and

rather elegant proposition of third party access articulated in the relevant Directive became entangled in the thickets of domestic implementation. Regrettably, the wood was, in transposition, lost sight of amongst the trees.

7. Schedule 2ZA recognises that if competition is truly to thrive the switching process must be highly expeditious: days not even months. Super-tight timetables are therefore set out in the Schedule for third party access to occur. However, in this case in March 2012 a hotel at Heathrow sought to avail itself of this new third party access right. This triggered months of wrangling between UKPNS and HAL and then a regulatory procedure which culminated in a decision (“the Decision”) in March 2014 and now a judicial review. Not surprisingly the hotel has gone away. That decision, however, has laid down the principles which govern, in the view of the Authority, the exercise of the duty to secure third party access. In the Decision the Authority finds UKPNS to be subject to the duty to secure that access. It is therefore the “distribution exemption holder” or “DEH”. Indeed it found that, in law, there could only ever be one DEH per network who could be made subject to that duty; the duty could never be shared. However, because of the complexity of the arrangements in the agreements between HAL and UKPNS the Authority has been forced to accept that the performance of the obligation imposed upon UKPNS was outside of its ability to perform. Certain actions now required of it could only be performed with the consent of HAL or following modification of the contractual arrangements with HAL because (for instance) they were otherwise prohibited by contract, or required supplementary matters to be agreed. Notwithstanding, the Authority proceeded to impose upon UKPNS an obligation the performance of which was conditional upon the conduct and cooperation of a third party (HAL) over whom, on the Authority’s analysis, it had no regulatory or supervisory jurisdiction. The matter is made more complex because, in principle, non-observance by UKPNS of the obligation is subject to enforcement proceedings and substantial financial penalties under the EA 1989. The Authority however does not consider this to be a problem because it says UKPNS and HAL will renegotiate their agreements. No timetable is however set out in the Decision for the renegotiations to occur. And, of course, the Authority has no power to ensure that consensus is ultimately arrived at. Accordingly, over 30 months following a customer’s request for third party access the issue of who is responsible remains unresolved.
8. One is left with the paradoxical situation whereby in law the Authority does not consider that it can impose obligations on two operators even where they must cooperate to enable third party access to occur; *yet* it is content to impose the full obligation on one operator knowing that it is unable to comply with the obligation unless it also agrees with the other party satisfactory contractual arrangements to cover the outstanding matters.

***(ii) The task of the High Court in this judicial review***

9. UKPNS has sought judicial review of the Decision. Mr Richard Gordon QC, for the Claimant, has candidly accepted that a number of the points of law that he now raises were not advanced to the Authority below (when he did not act for the Claimant). His client has also advanced new evidence which Mr Gordon has relied upon; although he recognised the substantial difficulties confronting him in seeking to place before this Court evidence which was not placed before the Authority. Mr Javan Herberg QC, for the Authority, urged me strongly to respect the margin of discretion which the

Authority was, he submitted, entitled to exercise over complex economic and factual matters. Further, he objected to the adducing of fresh evidence by the Claimant and invited me to resist the temptation to resolve any of the new factual issues which had arisen. Nonetheless, he accepted that in so far as issues of law arose I should decide them, recognising the intrinsic importance of clarifying points of law about the scope of this new regime at its outset.

10. In my view I must distinguish between arguments based upon issues of law and those based upon facts (whether new ones or ones which were before the Authority) unless they fall within the accepted (and narrow) circumstances in which the High Court, in judicial review proceedings, will interfere with factual findings. I am clear that I should address the issues of law arising because they essentially go to the jurisdiction of the Authority and they are matters which, irrespective of whether the parties raised them in the procedure below, the Authority must address itself to in any event: See by way of example *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB) paragraphs [99] and [100(5)]. The decision maker must ask itself the “right question”: *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. In the event I have therefore focused upon the issues of law going to the proper approach to be adopted by the Authority to enforcement under the Directive and under the Schedule 2ZA EA 1989. I listened to extensive argument on factual matters. I have not decided any factual issue against the Authority or resolved any new factual matter said to be outstanding following the Decision. I did, however, find that an understanding of the factual disputes was important both in providing context to the legal analysis and in enabling me to assess the materiality of the errors of law that I have concluded exist.
11. I have come to the conclusion that the Authority erred in law in a number of important respects in the manner in which it approached the issues before it. I have considerable sympathy for the Authority. It well understood that its task was to seek to achieve the objective set out in the Directive. It adopted a procedure which has not been, and which could not in my view be, criticised. And it had to grapple with the convoluted provisions of Schedule 2ZA. Moreover, it proceeded upon an analytical framework as to the correct network to focus upon which was agreed (at that point at least) by the parties. However, it erred in framing the relevant questions which it had to answer. It never stood back to ask the elementary question required to be asked: Which system or systems are used in carrying current from a third party supplier to a customer and who has any responsibility for ensuring the carriage or transport of that current?
12. The legal issues that have arisen in the course of written and oral submissions may be summarised as follows:
  - a) What is the relevant “system” for the purpose of applying the duty to secure third party access?
  - b) Can there be more than one person with responsibility for securing third party access per system?
  - c) What is meant by “supply” in Paragraph 1(1) of Schedule 2ZA?
  - d) What is meant by “operation or control” in Paragraph 1(1) of Schedule 2ZA?

- e) Is the “workability” test applied by the Authority in the Decision a relevant test to apply?

I have set out the relevant parts of the Decision which relate to these questions at paragraphs [42] – [54] below; and I have set out my conclusions at Sections I – M below.

*(iii) The parties*

13. The Claimant – UKPNS – is wholly owned by UK Power Networks Services Holdings Limited which in turn is wholly owned by UK Power Networks Holdings Limited. UKPNS was part of the EDF Energy Group until 2010 at which time part of that group was acquired by the Cheung Kong group of companies based in Hong Kong. Although its ultimate UK parent company owns a number of licensed electricity distributors, neither UKPNS nor any of its affiliates is engaged in the business of supplying electricity to customers in the sense of selling electricity to them. Neither does it hold any form of licence for the distribution of electricity.
14. Heathrow Airport Limited (“HAL”) owns and operates Heathrow Airport. It is wholly owned by Heathrow Airport Holdings Limited (“HAHL”) which also owns and operates Southampton, Aberdeen and Glasgow Airports. Some of the correspondence relevant to this case refers to “BAA”, which was the former corporate name of HAL.
15. The Gas and Electricity Markets Authority (the “Defendant” or the “Authority”) is the national regulatory authority responsible for implementing the requirements laid down in the Directive and it is responsible, *inter alia*, for determining disputes between undertakings in relation to matters within its jurisdiction. The Authority took the decision which is the subject matter of this judicial review and in which it held that UKPNS, and only UKPNS, was responsible for securing third party access over the network leased to it under the agreements with HAL.

*(iv) Conclusion and remedy.*

16. Having concluded that there are errors of law in the approach adopted by the Defendant I have to consider whether they are material to the outcome of the Decision. In the circumstances it seems to me that in the interests of the Authority being able to articulate in a fresh decision the corrected legal position I should remit the matter for the Authority to reconsider.

**B. The electricity distribution network at Heathrow**

17. In order to understand the facts it is necessary to describe, albeit in broad terms, how the electricity distribution network at Heathrow operates. Evidence was given on this by Mr Stewart Dawson, who is the Director of, in effect, the Claimant’s operating division with responsibility for the Leased Network at Heathrow. There has been no material challenge to the accuracy of his description of the network.
18. The electricity network at Heathrow is owned by HAL. It comprises all the cables, ducts and other infrastructure, equipment and kit necessary for the conveyance of electricity. It serves the multiplicity of functions that go on at the airport. The capacity of the network exceeds by a significant “headroom” the immediate needs of HAL.

19. A distribution network operator or “DNO” is an operator of the public network for electricity distribution. At Heathrow the local DNO is Scottish and Southern Electricity (“SSE”). The Heathrow electricity distribution network has three bulk supply points (“BSPs”) which may also be known as “host DNO entry points”. These are the points at which the electricity enters the Heathrow distribution network from SSE’s local public network.
20. A contractual arrangement exists (a “connection agreement”) between HAL and SSE regarding the connection between the Heathrow network and the local public network operated by SSE. HAL does not, however, purchase electricity from SSE; instead it acquires electricity from EoN pursuant to a supply contract between HAL and EoN. Meters which are placed at the incoming BSP measure the amount of electricity taken out of the SSE local public network on to the Heathrow network and acquired by HAL from EoN.
21. UKPNS has no contractual arrangement with either SSE or EoN or with any DNO or other electricity supplier.
22. The supply of electricity going from SSE’s local public network that has been acquired by HAL from EoN is provided at the high voltage of 33 kilovolts (“kV”) onto the Heathrow network high voltage switchgear, from which the supply transfers via cables at the Heathrow electricity distribution network. The electricity is then transformed down to 11 kV.
23. The majority of the electricity transported on the Leased Network (which is between 60-70%) is consumed by HAL, some at low voltage (for instance, for powered street lighting, traffic bollards, telecommunications cabinets, etc). This electricity is not metered. The remainder of the electricity transported through the Leased Network leaves it at a number of “exit points”. Electricity leaving the network at an exit point in this way is metered by an electricity meter owned and operated by HAL.
24. UKPNS does not sell electricity. End users of electricity at the airport, whether at low or high voltage, have contracts with HAL for the purchase of electricity that is supplied to them by HAL. There are two types of exit point. First, exit points from the Leased Network on to HAL’s low voltage network. This supplies the vast majority of HAL’s customers amounting to approximately 3,000 airport occupants such as shops, restaurants and other outlets. In practical terms the electricity is transported from the Leased Network on to a low voltage switchboard; these are leased by UKPNS from HAL as part of the Leased Network. However the switchboard and the outgoing switches are owned and operated by HAL and are not part of the Leased Network. The electricity enters the network owned and operated by HAL by passing through HAL’s switchboard. Secondly, exit points directly from the high voltage Leased Network to approximately 45 customers of HAL acquiring high voltage supplies. Until recently, these included Hilton who, as I have already explained above, now acquires its electricity from a third party source. Other high voltage customers include the likes of BA WorldCargo.
25. The Leased Network is one part of the overall network at Heathrow comprising the entirety of the high voltage network and a small part of the low voltage network. UKPNS has specified contractual responsibilities as a result of its agreements with HAL to maintain, operate, repair, replace and reinstate the Leased Network. Unless

HAL requires otherwise, UKPNS does not have the power to change or develop the Leased Network but is expected to maintain the existing network in good condition.

### **C. The Facts**

#### ***(i) The agreements between UKPNS and HAL in relation to the system at Heathrow: The Distribution Agreement***

26. In this section I set out the facts which have given rise to this dispute. In March 1993 UKPNS concluded a series of agreements with HAL and the operators of Heathrow, Gatwick and Stansted Airports relating to the electricity distribution networks at those airports. These agreements were referred to by the parties as the “Raglan Agreements”.
27. Under these agreements UKPNS took long leases of the high voltage and a small part of the low voltage electricity distribution networks at the three airports. The lease itself is for 140 years. The Distribution Agreement however refers to a lease of 90 years. The distinction, which is not material for present purposes, is covered by the Master Agreement, which again it is not necessary to refer to further. That part of the Heathrow network covered by these agreements is the Leased Network.
28. UKPNS agreed to use and operate the Leased Network in return for substantial annual payments from HAL and their airport operators. In advance of the divestiture of Gatwick Airport by HAL the Raglan Agreements were amended to provide separate suites of agreements for each of the three airports. The present case concerns the agreement relating to Heathrow Airport only. There are three agreements, dating from 2009, which apply to Heathrow: the Master Agreement, the Distribution Agreement, and the Umbrella Agreement. The most important agreement for present purposes is the Distribution Agreement.
29. The recitals to the Distribution Agreement record that UKPNS wishes to use and operate the “*Distribution System*” for the purpose of carrying on its trade of distributing electricity. To this end, “*Distribution System*” is defined as: “...*the Plant and Apparatus comprising (or treated as comprising) the system for the distribution of electricity from Entry Points to Exit Points at the Airport from time to time in accordance with the provisions of this Agreement... but excluding, for the avoidance of doubt, all Telemetry Pits and Ducts and the Metering Equipment but including all control cables between the telemetry cubicles and the Distribution System and pilot cables associated with the unit protection of HV circuits*”.
30. The Distribution Agreement reflects the fact that the system being operated by UKPNS is connected to a wider system operated and run by HAL. To that end, pursuant to Clause 3.1, HAL preserves the right to be, and remain, connected and energised. More generally, the agreement covers such matters as: the distribution of electricity; rights of de-energisation; maintenance; performance indicators, repair and replacement; faults and emergencies; safety; control of the network; insurance; interfaces; metering; limitations upon demand; pits and ducts and telemetry; customer service standards; compliance with distribution codes; power factor and phase balance; generation equipment; customers’ installations and equipment; fees; the making of modifications, extensions and relocations; etc.

31. I should refer to Clause 4.2 which addresses the question of third party access and which prohibits such access unless “*required*” by law:

“4.2 [UKPNS shall neither itself nor permit any third party] to, make or receive supplies of electricity through the Distribution System without the prior written consent of HAL, unless it is required to do so by law and further so that this restriction shall not have the effect of preventing [UKPNS] from undertaking any activity in relation to the Distribution System which any other distributor or supplier of electricity could lawfully require that such other distributor or supplier undertake in relation to that Distribution System under the then current electricity regulatory regime. Where [UKPNS], or a third party, wishes to make or receive supplies of electricity through the Distribution System, HAL shall be responsible for negotiating appropriate terms with [UKPNS] or the third party for the distribution of electricity through the Distribution System; HAL shall allocate to [UKPNS] or such third party, as the case may be, an appropriate proportion of the distribution charges payable by HAL under this Agreement. Neither [UKPNS] nor such third party shall enter into a direct contractual relationship with [UKPNS] in relation to the distribution of electricity through the Distribution System”.

**(ii) The expression of interest by Hilton Hotels to take a supply of electricity from a new third party supplier**

32. On 26<sup>th</sup> March 2012 the General Manager of the Hilton London Heathrow Airport (“Hilton”) wrote to HAL purporting to give notice pursuant to Schedule 2ZA of the Electricity Act 1989 formally expressing the interest of Hilton in taking a supply of electricity from a third party supplier through HAL’s electricity network at Heathrow. In particular, Hilton enclosed written confirmation from its chosen third party supplier (SSE) that they would be willing to supply the Hilton via HAL’s electricity network.
33. On 10<sup>th</sup> April 2012 HAL responded making it clear that in its view, in principle, it had no obligation to secure third party access, an obligation falling upon UKPNS:

“We continue to be in discussions with UK Power Networks Services (Contracting) Limited (“UKPNS”) regarding the identity of the distribution exemption holder in the context of the Heathrow electricity distribution system. From our interpretation of the new legislation, your notice should have been directed to UKPNS since that company operates and has control of the electricity distribution system from which Hilton currently takes a supply. We hope to be able to reach a conclusion on this point with UKPNS shortly, but in the meantime please note that this response is without prejudice to our position that UKPNS is the distribution exemption holder and as such is under an obligation to comply with the provisions of Schedule 2ZA of the Electricity Act 1989 (as

inserted by the Electricity and Gas (Internal Markets) Regulations 2011).

We will be working with UKPNS over the coming days to provide further information in connection with Hilton's expression of interest, including (i) any metering arrangements which will be required to enable access to be given and (ii) whether access will be possible through contractual arrangements without making or modifying a connection. Irrespective of the final analysis regarding the identity of the Distribution Exemption Holder, the conditions in paragraph 1(4)(b)(i) or (ii) of Schedule 2ZA to the Electricity Act 1989 will not apply in respect of Hilton's expression of interest".

34. On 18<sup>th</sup> April 2012 Hilton sent two letters to UKPNS giving it notice that it wished to take a supply of electricity from a third party explaining that "...we understand from [HAL] that the Heathrow Network is operated and controlled by you". They enclosed written confirmation from the selected third party supplier (SSE) that it would be willing to supply Hilton with electricity via the Heathrow network.
35. On 25<sup>th</sup> April 2012 HAL sought guidance or a determination from the Authority as to whether or not it, or UKPNS, was the relevant distribution exemption holder for the purpose of Hilton's notice. This stimulated a response to the Authority from UKPNS rejecting the assertion that UKPNS operated, or had control of, the electricity distribution system at Heathrow. It was submitted that notwithstanding the existence of longstanding contractual relations with HAL responsibility for operation and control of the entire network remained with HAL who was the only person from whom Hilton was currently taking its supply of electricity and it followed that HAL was the only party which could satisfy the test in Schedule 2ZA. The letter stated:

"In summary, under the agreement UKPNS bought some of the electricity distribution assets at the airport and took a long lease of the land on which they stand. For simplicity we'll refer to this as the "leased network". UKPNS also carries out modifications to the leased network (at BAA's request) which includes design (agreed with BAA), procurement (agreed with BAA), construction and maintenance of the leased network for the duration of the agreement. The maintenance programme for each year is agreed with HAL. HAL then makes the necessary arrangements with its tenants for the maintenance to proceed (UKPNS is expressly prohibited from having any relationship with the tenants). The day to day control of the entire distribution system (both the leased network and the remainder of the network which remains in the ownership of HAL) is the responsibility of HAL's control staff, and UKPNS staff are required to comply with all relevant operational instructions issued by such control staff".

The letter continued to reject the suggestion that the Hilton notification was properly directed to it, as opposed to BAA/HAL.

36. On 4<sup>th</sup> May 2012 UKPNS responded to Hilton stating that it should address its access request to HAL. It explained that UKPNS was nominally prohibited by the Distribution Agreement from communicating directly with HAL's tenants but that UKPNS had sought and obtained specific permission to reply to Hilton. UKPNS further explained that HAL was the correct recipient of the third party access request although it explained that the network which Hilton would need to use to receive electricity from SSE comprised parts covered by the Distribution Agreement and parts operated by HAL. The reasons given were as follows:

“Your premises at the Hilton London Heathrow Airport are connected at High Voltage to the airport electricity distribution network. That network comprises some parts which fall under the Distribution Agreement (referred to in this letter as the “Outsourced Network”), and some parts which are operated, maintained and owned by HAL (the “HAL Network”). Although your premises are connected to part of the Outsourced Network, HAL has retained operational control of the whole of the airport electricity distribution network – including the part to which you are connected.

Schedule 2ZA places certain duties on “distribution exemption holders” and our view is that HAL is such a distribution exemption holder in relation to the whole of the airport electricity network.

We understand that you are currently taking a supply of electricity through the airport distribution system from HAL and your letter of 18 April indicates that you now wish to be supplied by a third party supplier. We understand that you have previously served an expression of interest under Schedule 2ZA on HAL.

**Basis upon which HAL is the correct recipient of your Expression of Interest**

On the basis that:

- i) HAL is the distribution exemption holder which has control of the entire airport electricity network;
- ii) You are currently taking your supply of electricity from HAL; and
- iii) UKPNS has no knowledge of your current electricity supply, billing or metering arrangements – only HAL has this information.

It is clear to UKPNS that HAL is the correct recipient of the expression of interest under Schedule 2ZA, and that your second expression of interest (to UKPNS, received on 20 April) was misdirected.

For the reasons set out above, UKPNS is not in the position to give your third party electricity supplier the information it needs in order to start supplying you with electricity in place of HAL – only HAL can do this”.

***(iii) The Complaint by HAL to the Authority***

37. Between April and December 2012 unsuccessful discussions and negotiations occurred between HAL, UKPNS and the Authority. On 21<sup>st</sup> December 2012 the Authority wrote to HAL inviting it to make a complaint in order to initiate an “Article 37 dispute”. This refers to the requirement in Article 37 of the Directive addressed to Member States requiring them to confer upon the relevant Authorities the power to resolve disputes and complaints (cf Article 37(11) and (12)). This requirement has been implemented in the UK by virtue of section 44B EA 1989. Any complaint made by HAL would, accordingly, require the Authority to determine the dispute.
38. HAL accepted the suggestion. HAL’s terms of reference for the dispute were accepted by the Authority and by UKPNS. I have recited the terms of reference at paragraph [44] below. They posed the question in terms of the Leased Network only. The agreed terms of reference did not therefore put into issue that the relevant network or system which was to be the subject of the determination *might* be both the HAL and UKPNS parts of the overall Heathrow network. The Claimant’s principal concern at that time was to ensure that the final decision of the Authority was binary, i.e. a decision as to which of UKPNS and/or HAL was responsible. UKPNS wished to avoid the result whereby the Authority found that UKPNS was not the DEH but made no determination as to whether HAL was.
39. Between January and September 2013 the Authority received detailed written submissions from the parties. An oral hearing of the dispute occurred on 6<sup>th</sup> September 2013. Subsequently, the Authority requested further submissions on a variety of matters.
40. A draft decision (known as the “Minded To” letter) was provided to the parties on 19<sup>th</sup> December 2013. In that draft the Authority provisionally concluded that UKPNS and not HAL was the distribution exemption holder under Schedule 2ZA in relation to the Leased Network. Paragraph 87 of the draft was in a form which was identical to paragraph 95 of the final determination, i.e. the Authority made clear its provisional view that even though it accepted that it was outside of the Claimant’s powers to observe the obligation without reaching an accommodation with HAL nonetheless it was likely that such an accommodation would in fact be reached and hence there was, in the view of the Authority, no problem of workability of its proposed decision.

***(iv) The position of HAL in relation to the system***

41. The Decision does not address the position of HAL in any general way. There are 3 possible scenarios here. First, as to the power of the Authority to compel HAL to co-operate with UKPNS in relation to any part of the HAL network (i.e. the non-leased network) which is required to be used to enable third party access to be secured. Secondly, as to the power of the Authority to compel HAL to co-operate with UKPNS in relation to any power which HAL has in respect of the Leased Network. Thirdly, as to the power of the Authority over HAL in relation to matters unrelated to the

network(s) but which could impact upon the ability of UKPNS to secure third party access. I will address each possible scenario separately. First, in relation to the non-leased parts of the overall Heathrow network the Authority is of the view that HAL is the DEH. There is, however, no formal determination to this effect and the conclusion played no part in the reasoning of the Authority in the Decision which examined only the Leased Network and nothing else. In the course of the hearing Mr Beard QC, for HAL, accepted, on instructions, that HAL was the DEH for the non-leased part of the Heathrow system. He also accepted that as such HAL was subject to the regulatory powers of the Authority under the EA 1989. In response to a question from me, Mr Beard QC confirmed on behalf of HAL, that it accepted that insofar as any kit or equipment or other infrastructure on its system was needed to be used in order to enable UKPNS to comply with its obligation *qua* DEH on the Leased Network then HAL was subject to the regulatory powers of the Authority. Put another way the Authority would be empowered under the EA 1989 to use regulatory force to require HAL to cooperate in respect of its own network with UKPNS so as to enable UKPNS to perform its obligation *qua* DEH on the Leased Network. Secondly, in relation to the power of the Authority to compel HAL to co-operate with UKPNS in relation to any power which HAL held in respect of the Leased Network the Authority, in the Decision, held that because there could only be one DEH per network, HAL could not be compelled to co-operate with UKPNS in this respect. Thirdly, in relation to matters unrelated to the networks which could, nonetheless, impact upon the ability of UKPNS to secure third party access the Authority has expressed no view. Mr Beard QC was at pains to distinguish between the power of the Authority in relation to the use of HAL's own system (which he conceded was a regulated activity) and the situation where HAL was (hypothetically) unable to agree with UKPNS over a purely commercial matter such as the need to renegotiate the basic financial terms of the Distribution Agreement which might arise as a result of UKPNS performing its responsibilities in providing access to the system. As to this he submitted that this was not a regulatory matter. I will return to these scenarios later.

#### **D. The Decision: 31<sup>st</sup> March 2014**

##### ***(i) The Decision***

42. The Decision was issued on 31<sup>st</sup> March 2014 and it was made public on 12<sup>th</sup> May 2014.
43. There are five aspects of the Decision which are at the heart of this case (listed at paragraph [12] above). In the text below I set out the legal issue arising and recite the principal parts of the Decision in which the legal conclusion is reflected. I have analysed these conclusions at Sections I – M below.

##### ***(ii) The identification of the Leased Network as the “system”***

44. The identification of the system or systems over which current must pass, or which must otherwise be used, in order to connect a third party electricity supplier and a customer is a critical first question that any responsible Authority must ask itself. However, there is no *analysis* in the Decision of what the “system” in this case is. This is because it was, as I have explained above (see paragraph [38]), common ground between the parties that the subject matter of the dispute was the Leased Network. Mr Gordon QC, for the Claimant, candidly accepted that his client did not challenge this

most elementary of propositions in the administrative proceedings. He submits that in this respect all parties fell into an error of law in failing to identify as a relevant question whether the real network was the entire network or system operated at Heathrow. Mr Herberg QC submits that since it was common ground below I should not address the issue. I have set out at Section I below (paragraphs [115] – [120]) why I have concluded that I must address the point of law arising but not any issue on this topic relating to the facts. The limited nature of the exercise conducted by the Authority can be seen from paragraphs [1] to [4] of the Decision:

“1. On 14 May 2012 HAL formally requested the Gas and Electricity Markets Authority” make a determination on the identity of the distribution exemption holder for the Heathrow Leased Network.

2. By reference to the documentation submitted by the parties the dispute was defined as:

*“Whether the duties imposed by Schedule 2ZA of the Electricity Act 1989 on distribution exemption holders apply to UKPNS in the context of requests to take a supply of electricity from third party supplier by customers of HAL that are connected to the portion of the distribution network at Heathrow Airport that has been leased to UKPNS.”*

3. The dispute was framed in this way, asking whether the duties imposed by Schedule 2ZA of the Electricity Act 1989 fall on UK Power Network Services (Contracting) Limited (“UKPNS”) because the dispute was submitted by HAL. But it could equally well have been framed the other way round had the request for dispute resolution been made by UKPNS, asking whether the duties imposed by the Schedule apply to HAL. The nature of the dispute and our approach was explained in the course of the oral hearing. In this decision we answer the dispute as defined, but in reaching that decision we have considered the position of both UKPNS and HAL, and nothing turns on the way in which the question was put.

4. For ease of reference, in this decision we refer to the portion of the distribution network at Heathrow Airport that has been leased to UKPNS as the “Leased Network”.

***(iii) The conclusion that there cannot be more than one DEH per network***

45. A second question of law that an Authority must address is as to the person or persons who have responsibility for securing third party access. Under the domestic regime implementing the Directive the relevant person is the “*distribution exemption holder*” or “*DEH*”. Here, the Authority considered that a “*key question*” was whether there could be more than one DEH per network as a matter of law (Decision paragraph [76]). It arrived at a negative answer to this question. There were three components to its reasoning based on EU law, domestic law and practicality. Its reasoning as a matter of EU law was set out in paragraph [76(c)], as follows:

“c. We also consider that the EU legislation supports the view that there can only be one relevant DEH in respect of the same distribution system. There is force in HAL's argument (as set out at paragraphs 28, 31 and 32 above) that the EU legislation essentially contemplates a single DSO for a particular area and that the obligation to provide a charging methodology falls on the DSO. UKPNS seeks to rely on paragraph 52 of Citiworks and the observation of the ECJ that "Article 13 of Directive 2003/54 requires undertakings that own or are responsible for distribution systems to designate distribution system operators. It is not apparent either from that provision or from any other provision of that directive that only undertakings acting principally as distribution system operators are subject to the obligation to allow open access to the systems." UKPNS' point is that this suggests that identification of the DSO does not necessarily determine the identity of the correct person to give third party access. However, we do not read paragraph 52 of Citiworks, in the context of the surrounding provisions, to mean that the obligations of third party access do not necessarily fall on the DSO. We consider that the reference to "undertakings acting principally as distribution system operators" is referring to the argument that in respect of a system which is operated as an ancillary activity by an entity such as an airport owner, that entity's primary function is not one of a DSO, i.e. that is not its core business. This can be seen from paragraph 53 of the judgment where the ECJ continues, "It is appropriate to observe in that regard that the first point of Paragraph 110(1) of the EnWG does not stipulate whether the activity of operating the energy supply system must, for the operator, be a principal or ancillary activity for the purpose of defining the systems which come within its scope." Read together with the other parts of the decision and the Directives, we accept HAL's submission that the European legislation contemplates a single DSO for a particular area and envisages the obligations of third party access falling upon that singular relevant DSO. We do not accept that in circumstances where most DSOs will be licensed distributors subject to standard licence conditions requiring third party access, that the obligations on DSOs do not apply to DEHs because that is a concept created by the domestic statutory provisions. It seems to us that at a simple level both licensed distributors and DEHs are DSOs within the meaning of the European legislation”.

46. Its reasoning in relation to domestic law was in paragraph [76(b)]:

“b. We do not agree with UKPNS that the definition of exempt distribution system leads to the conclusion that there may be more than one DEH in respect of a single system. The wording of the statutory definition of a DEH is consistent with there being a single relevant DEH who is either the operator or,

alternatively, the controller of the system. Whilst we agree with UKPNS' point that, at least on the facts of this case, the possibility of there being more than one DEH for the purpose of sections 64 and 4 of the Act does not present the same problem of conformity with the European legislation as the possibility of there being more than one DEH for the purpose of Schedule 2ZA, that does not compel the conclusion that there can be more than one DEH for the purposes of sections 64 and 4 of the Act. We are not attracted to UKPNS' suggestion that the defined concept of a DEH should have different meanings in different parts of the Act, and we note that DEH connotes a status. The word is used in both sections 64 and 4 and in schedule 2ZA and we do not see any good reason why a party should be considered to have the status of a DEH for the purpose of one part of the Act but not for another. If the same meaning should be accorded to the term throughout the Act, then conformity with the European legislation strongly favours there being only one DEH”.

47. The Authority also considered whether practical considerations militated against there being more than one DEH (paragraph [76(d)]):

“Practical considerations also militate against the conclusion that there may be more than one DEH. We accept that those practical conclusions do not arise in this case (on UKPNS' argument) because it says that it (as one of the two DEHs) does not meet the "supply" definition, leaving HAL as the only relevant DEH. But that will not always be the case. If there can be two DEHs in respect of a particular network it may be the case that both could satisfy the supply condition. That would seem to give rise to the possibility, if both satisfy the test of supply and the operation or control obligations are read disjunctively (see further discussion on this below at paragraph 86), so that (for example) the lessee is said to operate the network but the owner to control it, that the regulatory obligations in Schedule 2ZA would fall on both parties. That is in our view impracticable and inconsistent with legal certainty because it would mean that both have the obligation to allow access/to submit charging methodologies if they wish to charge for third party access. We note that the obligation to formulate and submit a charging methodology is not an insignificant obligation. Thus, the requirement to produce and submit one is only triggered when an end user serves a qualifying expression of interest. Equally, the charging methodology produced should be cost reflective. In all those circumstances it seems not to be a sensible conclusion that the legislative requirements, properly construed, envisage or require the provision of charging methodologies by two separate parties in respect of the same exempt network, or that if there is only one relevant DEH (for the purpose of the obligations in Schedule 2ZA) of multiple

DEHs, the relevant DEH is ascertainable only upon reference to Ofgem for resolution of the question in each case.”

48. There was something of a belt and braces rider to this, set out in paragraph [76(f)]:

“f. If (contrary to the above) there can be more than one DEH (because of the reference to operation or control in the definition of an exempt distribution system) we consider that, for the reasons given below, there would not be two DEHs in the present case as we consider that on the evidence of the arrangements between the parties, UKPNS is properly described both as the operator and the controller of the Leased Network”.

*(iv) The meaning of “supply”*

49. The next legal issue concerns the meaning of “supply” in Paragraph 1(1) of Schedule 2ZA. UKPNS advanced, as one of its central submissions, that it was not a “supplier” of electricity so it could not satisfy the condition precedent for being a DEH within Paragraph 1(1)(b) of Schedule 2ZA, which refers to a customer “...taking a supply of electricity through that system”. UKPNS referred to the fact that in the Directive a supplier was unequivocally defined as a seller of electricity and UKPNS submitted that since it did not sell electricity it could not therefore fall within Paragraph 1(1)(b) which implemented the Directive. The Authority rejected this submission:

“79. We are persuaded, by reference to the recitals and operative provisions of the Directive, that the purpose of the Directive and the third package is broader than simply unbundling monopoly distribution and supply, and is concerned more broadly with facilitating third party access and consumer choice as part of the proper functioning of a competitive market. We therefore conclude that a construction of "supply" which could lead to particular classes of customer being deprived of third party access rights risks putting the UK in breach of its primary European legal obligations and is a factor which would strongly militate in favour of a construction which avoided such a result”.

50. Later in paragraph [85]:

“85. In conclusion, we determine that UKPNS is supplying and the other HV tenants connected directly to the Leased Network for the purposes of Schedule 2ZA of the Act”.

*(iv) The test to be applied: “Operation or control”.*

51. This issue is linked to the question of whether there can be more than one DEH. Because the Authority decided that, in law, there could only be one DEH with the duty to secure third party access it had to decide which, out of UKPNS and HAL, bore that duty. To answer that question the Authority applied the test of who “operates or

*has control of the system*” in a relative way comparing and contrasting the respective positions of UKPNS and HAL. In paragraph [86] of the Decision the Authority stated:

“The question which then arises is whether UKPNS can be said to be operating or controlling the system in addition to supplying in the physical sense in which we have determined above that expression must be construed in Schedule 2ZA.”

52. As to this the Authority held:

“87. Paragraph 1(1)(b)(i) refers to "the distribution exemption holder that operates or has control of the system". We make the following observations on this:

a. Operation and control are, linguistically, disjunctive conditions.

b. If there can only be one DEH, the disjunctive nature of the condition is less significant as the test, although focusing on the two separate elements of operation and control, is a single one. The two limbs may have been designed with the intention of ensuring, from an abundance of caution, that the DEH is not able to evade the third party access obligation on the basis of a delegation of operational roles to (potentially a number of different) subcontractors.”

And:

“88. In any event, for the purpose of the present question it is not necessary to reach a definite conclusion on whether control as referenced in Schedule 2ZA is superfluous by reference to the European legislation. This is because it is clear that UKPNS both operates and controls the Leased Network: ...”

***(v) The conclusion on the ability of UKPNS and HAL to reach voluntary agreement: The “workability” test***

53. The “workability” question also results from the prior legal conclusion of the Authority that there could only ever be one person duty bound to secure third party access. It was this conclusion that led the Authority to conclude that it had to impose a duty upon UKPNS even though it knew that UKPNS had no power fully to perform that duty. This regulatory gap was then plugged by the Authority applying a “workability” test, i.e. was it likely that UKPNS would reach agreement with HAL and thereby become (following renegotiation of the Distribution Agreement) able fully to comply with the DEH duty? The Authority considered that it was indeed likely that UKPNS would reach agreement with HAL in relation to those matters relevant to UKPNS’ obligation which were technically issues outwith its control under the Distribution Agreement:

“95. By reference to the parties' submissions on the workability of the DA, the strongest point in favour of UKPNS is that the

consequences flowing from the fact that UKPNS being recognised as having the relevant obligations as DEH under Schedule 2ZA may allow HAL to terminate the agreement early (see clause 28 of the DA). However, we also note that, as HAL has pointed out, there is a strong obligation on both parties using its best endeavours to seek to agree any necessary amendments to accommodate a material regulatory intervention. It should therefore be possible for the DA to continue to be operated in circumstances where, as a result of this decision, UKPNS is recognised as having the obligations of the relevant DEH under Schedule 2ZA of the Act in respect of the high voltage network tenants. We consider it unlikely that there would be some problem in the operation of the DA (including the need for one party to provide certain data to the other) that is not capable of resolution by amendment upon both parties' best endeavours. We therefore do not consider that this is a sufficiently weighty consideration to overcome the clear conclusions we have otherwise reached on the questions set out above”.

#### **E. The challenge to the Decision and the proffering of undertakings by HAL**

##### ***(i) The application for judicial review***

54. The Decision was adopted on 31<sup>st</sup> March 2014 and application for permission to apply for judicial review was lodged on 5<sup>th</sup> June 2014.
55. On 19<sup>th</sup> June 2014 Hayden J adjourned the application for a rolled up hearing to permit investigation to occur as to whether secure legally binding undertakings could be drafted to enable the Claimant properly to fulfil its obligation under Schedule 2ZA EA 1989 pending the determination of the claim.

##### ***(ii) Undertakings offered by HAL***

56. On 25<sup>th</sup> June 2014, shortly after the commencement of the proceedings, HAL wrote to UKPNS offering substantial interim relief pending the outcome of the judicial review. The letter is in the following terms:

“Heathrow Airport Ltd (HAL) hereby provides these undertakings to UK Power Network Service (Contracting) Ltd (UKPNS).

With a view to protecting the interests of third party electricity access applicants who are connected to the private electricity network located at Heathrow Airport and wish to make formal applications under Schedule 2ZA of the Electricity Act 1989, HAL undertakes to not do anything that would prevent or impede a person connected (or who becomes connected) to the private electricity network located at Heathrow Airport and eligible to take a supply of electricity from a third party

supplier under Schedule 2ZA of the Electricity Act 1989 to take such a supply.

In addition, HAL undertakes to provide such information and assistance to UKPNS as is reasonably required to enable UKPNS to properly fulfil their obligations under Schedule 2ZA of the Electricity Act 1989.

These undertakings are provided for the purpose of interim relief and are without prejudice to (i) the question of to whom the duties imposed by Schedule 2ZA of the Electricity Act 1989 apply at Heathrow Airport; and (ii) HAL's right in respect of material regulatory intervention and any associated rights (including rights of termination) set out in the 25 March 1993 Distribution Agreement.

This deed constitutes and will constitute the legal, valid, binding and enforceable obligations of the undertaker and is, and will continue to be, effective until the conclusion of the Judicial Review proceedings (Case CO/2625/2014).

HAL have executed and delivered this undertaking as a deed on the date above".

57. It is necessary to set out precisely what this means. Under the Distribution Agreement the parties may terminate the agreement in certain specified events (cf Clause 28). One such event is where "...*there occurs any Material Regulatory Intervention*" (Clause 28(2)(1)(i)). A "*Material Regulatory Intervention*" is defined in Clause 28.4(b) and includes: "...*the exercise of any power or right by any Competent Authority which relates to the regulation of the Parties or any of them and/or the Distribution System*". Under Clause 28(2)(1)(ii) the power to terminate arises where there occurs a Material Regulatory Intervention:

"if ... the Parties shall have used best endeavours in an effort to prevent, reduce or mitigate the effects of any such material Regulatory Intervention and to establish whether any practicable course of action is available to avoid the result referred to in paragraph (iii) below and shall have been unable, having used best endeavours, to agree appropriate amendments to the Agreements ... or to agree to take other action to achieve such effect; Provided that notice of termination is served by the Terminating party within six months after the occurrence of the Material Regulatory Intervention".

58. It is common ground that the Decision is a Material Regulatory Intervention. It will be seen that HAL presently reserves the right to terminate upon the basis of the Intervention. In the event time has been extended for HAL to terminate otherwise the right would elapse six months from the date of the Decision.

*(iii) The practical implications of HAL's reservations of the right to terminate*

59. In the course of the hearing it was explained to me on behalf of HAL that the logic behind HAL reserving its right to terminate yet simultaneously undertaking (and generally expressing willingness) to take necessary technical steps to ensure that UKPNS could perform its DEH obligation, was to protect itself against the possibility or probability that the financial arrangements under the Distribution Agreement would need to be revisited in the light of the new ways in which revenues would be earned and received with UKPNS playing the role of DEH. *Prima facie*, this seems to me be commercially logical and there is hence no necessary inconsistency between HAL wishing to reserve its right to terminate under Clause 28 whilst at the same time offering the necessary technical assistance to enable UKPNS to perform its obligations *qua* DEH. I address the implications of this further at paragraph [158] below.
60. If HAL did terminate the Distribution Agreement then HAL accepted that it would become the default DEH for the Leased Network.

**F. The extent to which UKPNS is unable to perform its obligations as DEH without an agreement with HAL**

*(i) General warnings*

61. Before me UKPNS made detailed submissions upon the extent to which it needed the cooperation and assistance of HAL in order to comply with its obligation to provide third party access. It did this to support the argument that the imposition of a DEH duty upon it and not HAL was illogical and unlawful and that the Defendant had misunderstood the “operation or control” test in Paragraph 1(1)(b) of Schedule 2ZA. I start this section of the judgment with two general warnings. First, I do not see it as a legitimate part of my task, upon a judicial review, to make findings of fact about the correctness of the analysis of either side on this issue. I am aware that the material that was placed before me was not before the Authority when it adopted the Decision and Mr Herberg QC, for the Authority, submitted (in my view correctly) that I should stoutly resist the temptation to become embroiled in this dispute (which was between UKPNS and HAL). Secondly, in recording the arguments of (in particular) UKPNS in some detail I am not therefore to be taken as necessarily accepting them.
62. In my view the relevance of the dispute, for this judicial review, is that it provides guidance or context as to the nature of the regulatory void that arises from the conclusion in the Decision that there can only be one DEH and the implications for the other related issues of law arising. It provides a useful indicator as to the sorts of practical problems that arise in this case and which might arise in future cases if the Authority is correct in that it has no regulatory power to compel HAL to enter into any sort of an agreement with UKPNS.

*(ii) UKPNS' claims*

63. In a letter dated 23<sup>rd</sup> June 2014 UKPNS listed 13 different ways in which it argued that it could not observe the DEH obligation imposed upon it by the Authority without new agreement(s) with HAL. In this letter the Claimant sought to show:

- That the ability to comply with key requirements relating to such matters as negotiation with third party suppliers, being responsible for interfaces between the network and the customer, and the conclusion of interconnection agreements with Customers, lay with HAL not UKPNS.
  - That the Distribution Agreement actually prohibited UKPNS from carrying out actions which it was otherwise required to do by the Decision, such as entering into direct contractual relations with third parties in relation to the distribution of electricity through the leased lines.
  - That for the Claimant to comply with the Decision HAL would have to: (i) appoint UKPNS to act as its agent for capacity allocation and reserved capacity allocation to HAL customers; (ii) agree to the replacement of its meters; (iii) provide detailed technical and commercial information to the third party supplier to enable it to put supply arrangements in place; (iv) make modifications to the distribution system (under Clause 23) where required by third party customers for additional capacity; (v) grant new land rights and/or consents and if necessary provide supporting infrastructure such as pits and ducts required for new electricity lines of electrical plant in order to enable new or modified connection by a third party supplier; and (vi) direct its control staff to take steps to enable outages to facilitate connection of third party meters and any maintenance subsequently required on third party connections.
  - That to enable UKPNS to observe its obligation it also required HAL to provide undertakings not to operate or switch the Leased Network or otherwise perform its obligation under the connection agreement in a way which placed UKPNS in breach of any of its contractual obligations with third parties, or Schedule 2ZA.
64. In addition to the above UKPNS sought an indemnity from HAL in relation to any additional costs it incurred in performing its obligations under the Decision which it was unable to recover from third parties but which resulted from HAL's breach of the requirements that UKPNS sought of HAL. The letter was designed to demonstrate that not only would the Distribution Agreement have to be fundamentally revised but that new and different agreements (e.g. agency agreement, indemnities etc) would have to be concluded.
65. The letter was in the following terms:
- “1. HAL undertakes not to treat the Ofgem determination as a Material Regulatory Intervention for the purposes of a termination right under Clause 28.2(I) of the Distribution Agreement, and to withdraw any previous correspondence purporting to do so;
  2. UKPNS gives a binding waiver of HAL's responsibility under Clause 4.2 to negotiate terms with third party suppliers

(TPS) for the distribution of electricity through the leased network at Heathrow (the Leased Network), of HAL's obligation under Clause 13.3 to retain responsibility for the interface between the Distribution System and Customers (including in relation to changed capacity and new supplies) and of HAL's obligation under Clause 19.2 to enter into connection agreements with Customers;

3. HAL gives a binding waiver of the restriction in Clause 4.2 prohibiting UKPNS from entering into a direct contractual relationship with any third party in relation to the distribution of electricity through the leased network and authorises UKPNS to enter into use of system agreements with TPS and connection agreements with customers. UKPNS intends to provide copies of any such agreements to HAL, subject to customer consent;

4. HAL appoints UKPNS as its agent to allocate connection capacity and reserved capacity on the Leased Network to customers on HAL's behalf and undertakes to honour any commitments made by UKPNS in connection agreements with customers;

5. HAL gives a binding undertaking to provide all required access and consents for TPS' meter operator to install a settlement compliant half-hourly meter in place of HAL's existing meter;

6. HAL gives a binding undertaking to provide directly to TPS (with a copy to UKPNS) all meter operator, data collector and data aggregator details in order to enable TPS to put necessary agreements in place;

7. HAL undertakes to instruct modifications or extensions to the Distribution System under Clause 23 where required by a third party customer for additional capacity (unless Schedule 2ZA exclusions apply);

8. HAL undertakes to grant any land rights or consents (and, if relevant, provide supporting infrastructure (e.g. pits and ducts etc)) required for new electric lines or electrical plant in order to enable new or modified connection by a third party customer;

9. HAL undertakes to direct its control staff to take such steps (consistent with good industry practice, the safety rules and all relevant legislation) as are required to enable outages to facilitate connection of third party meters and any maintenance subsequently required on third party connections in accordance with Schedule 2ZA;

10. HAL undertakes not to operate or switch the Leased Network in a way which puts UKPNS in breach of:

(a) the terms of any connection agreement between UKPNS and a third party;

(b) the terms of any use of system agreement between UKPNS and TPS; and

(c) Schedule 2ZA.

11. HAL undertakes to perform its obligations under the connection agreement with the Licensed DNO in a way which avoids putting UKPNS in breach of:

(a) the terms of any connection agreement between UKPNS and third party;

(b) the terms of any use of system agreement between UKPNS and TPS; or

(c) Schedule 2ZA.

12. HAL indemnifies UKPNS for any additional costs it incurs in performing the duties under Schedule 2ZA which it is unable to recover from a third party customer or TPS, and against any claims from a third party customer or TPS as a result of HAL's breach of the above undertakings;

13. HAL (or in the alternative Ofgem) indemnifies third party customers and TPS for wasted costs in the event that agreements are put in place with UKPNS which then need to be cancelled if HAL is held to be DEH following the determination of UKPNS' Judicial Review application".

***(iii) HAL's response***

66. As I have observed none of this was before the Authority when it took its decision and, indeed, UKPNS was far more ambivalent in its response to the "Minded To" letter on the question of workability than is reflected in the letter of 23<sup>rd</sup> June 2014. This led Mr Beard QC to suggest that this letter was a concoction designed to pick a fight for the purposes of strengthening its case in this litigation. He accordingly devoted considerable energy to taking me through the Distribution Agreement and the underlying arrangements to show that the Claimant's case was, in his submission, overblown and exaggerated or artificial or otherwise covered by the generous undertakings offered on multiple occasions by HAL.
67. I do not propose to make any findings on this, for the reason that I have already given. However, the debate does highlight how in any particular case a range of complex technical and commercial matters could arise which would impact upon the workability of a DEH obligation imposed on one person where multiple persons share responsibility for running a network or system.

## **G. The Legislative regime**

### ***(i) Introduction***

68. The outcome of this case turns ultimately upon questions of law. The answers to these questions are found in a close analysis of the relevant EU law, as well as the domestic implementing measures.
69. It is necessary to address this in stages. First, the relevant EU legislation. Secondly, the domestic implementing legislation.

### ***(ii) Directive 2009/72: The policy as set out in the recitals***

70. I start with the EU legislation. The source of the obligation in dispute is Directive 2009/72. The purpose of the Directive – which is colloquially known as the “Third liberalisation package” – was to take further steps to introduce competition into the markets for the supply of electricity. It is clear from the recitals to the Directive that steps taken to promote competition were proving inadequate because of a number of identified deficiencies. The rights of consumers to choose their suppliers remained constrained and when granted was done often on only discriminatory and unequal terms (recital [4]). Further, an “*equally effective level of regulatory supervision*” across the Member States did not exist (recital [4]). A Commission report (dated 10<sup>th</sup> January 2007) had identified that the then existing rules did not “*...provide the necessary framework for achieving the object of a well-functioning internal market*” (recital [7]). To achieve the objective of enhanced competition and consumer choice the Directive therefore addressed, *inter alia*, the unbundling of “network” “generation” and “supply” activities; the strengthening of consumer choice of supplier; and, the strengthening of the powers of national regulatory authorities.
71. The recitals provide important guidance as to how to construe the powers of national regulators. Recital [33] points out that the prior legislative framework (*viz* Directive 2003/54) had required Member State to set up regulators but that experience had shown that their “effectiveness” had been hampered through, *inter alia*, a lack of independence from the State. Recital 34 stated, in broad terms, that regulators needed to have power to deal with “*all*” regulatory issues:
- “(34) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests.”
72. Recital 37 emphasises that regulators needed adequate powers in order to ensure that the objective of improving consumer welfare through increased competition was achieved:
- “(37) Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. Energy regulators should also be granted the power to decide,

irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity”.

73. Recital 38 is to similar effect and emphasises that regulators must also have the power to collect relevant information from electricity undertakings and “*settle disputes*”.
74. Recital 51 is explicit in creating a link between what is perceived to be the quintessential consumer protection object of the Directive and effective regulation. It speaks in terms of the “*rights*” of consumers and the enforcement of those rights by regulators:

“51. Consumer interests should be at the heart of this Directive and quality of service should be a central responsibility of electricity undertakings. Existing rights of consumers need to be strengthened and guaranteed, and should include greater transparency. Consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market. Consumer rights should be enforced by Member States or, where a Member State has so provided, the regulatory authorities”.

75. Recital 57 emphasises the centrality (“*utmost importance*”) of “easy access” to suppliers to compete for business from customers:

“Promoting fair competition and easy access for different suppliers and fostering capacity for new electricity generation should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity”.

76. Recital 62 explains that, *inter alia*, subsidiarity and proportionality, have governed the manner in which the Directive has been framed:

“62. Since the objective of this Directive, namely the creation of a fully operational internal electricity market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective”.

Parliament and Council, in adopting this measure, had well in mind the extent to which the duty to supervise would create “*an overly onerous regulatory regime for national regulatory authorities*”. But of course the notion that any obligation imposed by the Directive would have such an effect was not accepted: See recital [12].

77. Recital 20 underpins Article 32 of the Directive and reinforces the centrality of commercial customers being able to choose their supplier of choice. It is in the following terms:

“20. In order to develop competition in the internal market in electricity, large non-household customers should be able to choose their supplier and enter into contracts with several suppliers to secure their electricity requirements. Such customers should be protected against exclusivity clauses the effect of which is to exclude competing or complementary offers”.

The combined effect of recitals 20 and 51 (*supra*) makes clear that it is a prime responsibility or duty of regulators to enforce those rights conferred upon consumers by the Directive. Recital 20 is, moreover, an elaborated version of its predecessor in Directive 2003/54. There, recital 4 stated:

“The freedoms which the Treaty guarantees European Citizens – free movement of goods, freedom to provide services and freedom of establishment – are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers”.

That particular recital was relied upon by the Court in *Citiworks* in guiding the interpretation of Article 20 of the Directive which, as explained above, was in, *mutatis mutandis*, identical terms to Article 32 of the Directive.

78. Finally, in relation to the recitals, it is clear that the legislature had no preconceived ideas as to how the market in the different Member States would evolve. Recital [22] recognises that under the Directive “...*different types of market organisation will exist in the internal market in electricity*”.

***(iii) The relevant substantive provisions of the Directive***

79. Turning to the substantive terms of the Directive I examine below the meaning given to key terms, the designation of distribution system operators, unbundling, and then (and most importantly) the provisions relating to third party access.
80. **Definitions:** A significant part of the argument in this case has turned upon issues of definition both within the Directive and in the provisions of the EA 1989 which implement the Directive. In the Directive key terms are provided for in Article 2, from which I selectively cite below:

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

1. ‘generation’ means the production of electricity;
2. ‘producer’ means a natural or legal person generating electricity;

3. 'transmission' means 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 does not include supply;
4. 'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;
5. '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;
6. 'distribution system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;
7. 'customer' means a wholesale or final customer of electricity;
8. 'wholesale customer' means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he is established;
9. 'final customer' means a customer purchasing electricity for his own use;
10. 'household customer' means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;
11. 'non-household customer' means a [sic] natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers;
12. 'eligible customer' means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33;
13. 'interconnector' means equipment used to link electricity systems;

14. ‘interconnected system’ means a number of transmission and distribution systems linked together by means of one or more interconnectors;

15. ...

16. ...

17. ‘ancillary service’ means a service necessary for the operation of a transmission or distribution system;

18. ‘system user’ means a natural or legal person supplying to, or being supplied by, a transmission or distribution system;

19. ‘supply’ means the sale, including resale, of electricity to customers...”.

81. **The designation of Distribution System Operators:** Article 24 has some relevance. It provides rules for the designation of “distribution system operators” (“DSO”) who will then be subject to the tasks and duties set out in Article 25. A DSO has this basic duty set out in Article 25(1):

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

82. **Unbundling:** Chapter IV of the Directive addresses the unbundling of transmission systems and transmission system operators. It sets the date of 3<sup>rd</sup> March 2012 as that from which the unbundling requirements had to be in place (cf Article 9(1)). I mention this only to make clear that one of the plainly recognised consequences of the Directive was that the markets of Member States would evolve in the future with a wide variety of new commercial structures arising out of the mandated fragmentation of systems.

83. **Third party access rights and obligations:** The Directive addressed third party access in Article 32. The purpose behind this was to introduce competition into the supply of electricity. In practical terms there will not *normally* be more than one electricity supplier per geographical area or region. Competition therefore occurs between operators who are geographically disparate. This is because in most markets, where liberalisation has occurred, the State has not permitted two operators to lay parallel infrastructure in the same region in order to compete (unlike for instance in relation to telecommunications or television where multiple parallel under-road networks may be laid thereby fostering intensive local operator competition). Instead in the electricity market competition occurs because more distant or remote suppliers can offer to supply electricity to distant customers by reason of the obligation on *all* intermediary operators to provide connectivity to the distant supplier so that this current can be carried to wherever the customer is located. In this way electricity

might pass and be carried across a number of different systems as it moves from supplier to customer and competition can occur even though there is no more than one incumbent operator in a particular region. However, as this case demonstrates and, indeed, as was recognised by the Advocate General in the leading case of *Citiworks* (see paragraph [109(g)] below) it is possible for there to be multiple undertakings with co-terminous interests in the carriage of electricity in a single location. The growing use of subcontracting or outsourcing illustrates the point.

84. Article 32 provides:

“ORGANISATION OF ACCESS TO THE SYSTEM

*Article 32*

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. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information”.

85. The gravamen of Article 32 is the imposition of an obligation of “*implementation*” upon Member States to “*ensure*” a specific result, namely that third parties can access “*systems*” with a view to obtaining competitive supplies from competing vendors of electricity. The converse is also true, namely that competing vendors of electricity can have access to all of those “*systems*” which the electricity must pass over in order for it to be conveyed to the customer. It necessarily follows that in between a supplier and customers there may be one or multiple “*systems*”. As is explained below in paragraph [110] this was also the conclusion of the Court of Justice in *Citiworks*.

86. In my judgment, read purposively by reference to the recitals and other provisions of the Directive, five consequences flow from Article 32:
- a) Distribution is not sale: First, the Article is concerned only with distribution not sale. There is no reference to “*supply*” in Article 32. This is logical because, following unbundling, there is no reason why sellers should have any responsibility for distribution related activities.
  - b) Distribution means “*transport*” or “*delivery*”: Secondly, it is evident from the definitions of “*distribution*” and “*distribution system operator*” in Articles 2(5) and 2(6) that Article 32 is concerned with “*transport*” or “*delivery*” which functions are (obviously) different from sale or resale (cf Articles 2(5) and 2(19)). This conclusion is made clear by the judgment of the Court of Justice in *Citiworks* at paragraphs [43] – [46] and [51].
  - c) “*Systems*” connect sellers and buyers: Thirdly, the subject matter of the Article 32 obligations is the system or systems which connect a supplier and a customer. “*Systems*” is not a defined term but it is apparent (cf Article 2(6)) that it connotes all that infrastructure which must be used to ensure the “*transport*” or “*delivery*” of current between a third party supplier and a customer. Article 32 is neutral and silent as to the number of systems operators who may be subject to the duty to provide third party access. The precise number of persons subject to the duty is simply a function of the number of operators whose “*systems*” may need to be used to ensure the carriage of the current from the supplier to the customer.
  - d) “*Responsibility*”: Fourthly, Article 32 coupled to Article 2(5) and (6) establish that the person(s) subject to the duty to secure third party access are those who have “*responsibility*” for carrying or delivering current or for performing the activities referred to in Article 2(6). The Directive is, as observed, silent and neutral as to the number of such persons who may be responsible, this being a question of fact. It may on the facts be a single “*monopoly*” carrier but nothing precludes the possibility that the duty will also fall upon other persons who have responsibility for a part or parts of the system. Nothing precludes the possibility of joint responsibility.
  - e) The scope of regulator’s powers: Fifthly, it follows also that if third party access is to be “*ensured*” regulatory authorities must be empowered to regulate every person who in any way has responsibility for the carriage or delivery of electricity from a supplier to a customer. There can be no regulatory *lacuna* or black holes.
87. The present case illustrates how contractual arrangements can arise in which two undertakings may, to a greater or lesser degree, share responsibility for the carriage of electricity between the vendor and the customer. It is possible to take the present facts and to modulate them to imagine a situation where the responsibility was far more evenly spread than the Authority found to be the case in the Distribution Agreement between UKPNS and HAL. Mr Herberg QC for the Defendant accepted

that it was the substance of the contractual relationship that arose between the parties that really counted. If one imagines a hypothetical agreement between HAL and UKPNS of relatively short duration, with HAL having substantial veto rights over important decisions relating to the Leased Network, and UKPNS having extensive obligations to consult with HAL on operational and technical matters and HAL reserving the right to take all decisions about network development, then the logical conclusion would be that both clearly have “*responsibility*” for distribution. And as such they would both be *capable of* being held responsible for the obligation to secure third party access.

88. **National Regulatory Authorities:** Chapter IX concerns “*National Regulatory Authorities*”. It sets out a very long list of functions which Authorities are to perform. These are cast in broad terms and leave it to national implementing legislation to take forward. Throughout it is emphasised that the Authorities must “*take all reasonable measures*” in pursuit of objectives and must act transparently, effectively and proportionately. For instance Article 36 which sets out the “*General Objectives*” of regulators starts with these words:

“In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies”.

89. Article 37(1) states that it is a duty of the regulators to “ensure” that operators of transmission and distribution systems comply with their duties under the Directive. Article 37(4) makes clear that Member States “*shall ensure*” that regulators have all the powers “*necessary*” to perform their functions in a proportionate and effective manner:

“4. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(a) to issue binding decisions on electricity undertakings;

(b) to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market

...”.

**(iv) *Implementing measures adopted in the United Kingdom***

90. I turn now to the domestic implementing measures. The UK has implemented the relevant provisions of the Directive, and in particular Article 32, by a combination of

Section 4 and Schedule 2ZA EA 1989 thereof. The latter deals specifically with obligations imposed in order to ensure third party access to “*systems*”.

91. Section 4 is a basic provision which makes the provision of the supply of electricity a criminal offence if unlicensed and then provides relevant definitions:

“4. Prohibition on unlicensed supply etc.

(1)A person who—

(a) generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;

(b) transmits electricity for that purpose; or

(bb) distributes electricity for that purpose;

(c) supplies electricity to any premises...

shall be guilty of an offence unless he is authorised to do so by a licence”.

92. Section 4(4) sets out definitions. For present purposes the following are to be noted: (i) “*supply*” is not limited to sale or re-sale as it is in the Directive; (ii) “*distribute*” is not defined to exclude sale in the same way as the term “*distribution*” is in Article 2(5) of the Directive:

“(4) In this Part, unless the context otherwise requires -

“distribute”, in relation to electricity, means distribute by means of a distribution system, that is to say, a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system;

“supply”, in relation to electricity, means supply of electricity conveyed by a distribution system to premises other than premises occupied by a licence holder for the purpose of carrying on the activities which he is authorised by his licence to carry on;

“transmit”, in relation to electricity, means transmit by means of a transmission system, that is to say, a system which consists (wholly or mainly) of high voltage lines and electrical plant and is used for conveying electricity from a generating station to a substation, from one generating station to another or from one substation to another”.

93. The definitions are most unsatisfactory. This criticism is especially focused upon the lack of definition of key terms, such as “*supply*” and the circularity of other terms.

94. As to “supply” there is no definition so that, at least at first blush, one would suppose that the phrase would bear the same meaning as the Directive, which is its *locus classicus* and which, as explained above, makes clear that it means only sale and resale. Mr Herberg QC for the Authority accepted that the phrase “supply” is used in a number of relevant places in Schedule 2ZA to connote sale and hence the phrase was used there consistently with the definition in the Directive. But he submitted in the pivotal (for this case) Paragraph 1(1)(b) of Schedule 2ZA it did not, and indeed simply could not, mean sale. It had to mean only physical provision even though this was (i) nowhere set out and (ii) was inconsistent with the Directive. For the reasons that I set out elsewhere (see paragraphs [134ff]) I share Mr Herberg’s analysis. It is nonetheless most unsatisfactory that essential terms are undefined especially where they are being used to indicate a meaning which both differs from that in the source EU legislation where they are in fact defined, and, where they have different meanings even within the same domestic implementing legislation.
95. “Distribute” in Section 4(4) fares little better. It is a circular definition: “*Distribute ... means distribute by means of a distribution system*” So distribute means distribute means distribute. A hint as to the meaning is given by the explanation that distribution is through a “system” which is something used for “conveying electricity”, which can be taken to suggest that distribute connotes a purely physical transport or conveyance function. In the Directive “*Distribution*” is pithily defined as “*transport*” and the unequivocal qualification is added “*but does not include supply*” (see paragraph [80] above). However, the domestic equivalent does not make this clear.
96. Section 64 (Interpretation provision for Part I within the Act) is no more helpful. It defines “distribute” and “distribution exemption holder” as follows:
- “‘distribute’, in relation to electricity, has the meaning given by section 4(4), and cognate expressions shall be construed accordingly;
- ‘distribution exemption holder’ means a person who - (a) is distributing electricity for the purpose mentioned in section 4(1)(bb); and (b) is authorised to do so by an exemption.”.
97. Section 5 EA 1989 empowers the Secretary of State by order to grant exemptions either to a person or to a class of person. Under Article 3(1)(b) of the Electricity (Class Exemptions from the Requirement of a Licence) Order 2001 an exemption is granted to the persons or the classes specified in Schedule 3. Paragraph 3 of Schedule 3 covers: “*Persons (other than licensed distributors) who do not at any time distribute electrical power for the purpose of giving a supply to domestic consumers or enabling a supply to be so given with that electrical power.*” This power has been exercised in a way which includes UKPNS and HAL.
98. I turn now to Paragraph 1 of Schedule 2ZA. The Explanatory Memorandum to the Regulations creating the new Schedule 2ZA makes clear that this was intended to implement Article 32 of the Directive in relation to operators of licence exempt networks and this was common ground between all of the parties in the case. Broadly speaking the new schedule requires a DEH that satisfies the relevant criteria to provide to third party suppliers access to its distribution system upon request by a

customer. Paragraph 1 of Schedule 2ZA identifies the steps that must be taken by the relevant DEH and a short timetable within which the steps must be complied with. Paragraph 1 of Schedule 2ZA provides:

“1.—(1) This paragraph applies where—

(a) a customer owns or occupies premises which are connected to an exempt distribution system;

(b) the customer is taking a supply of electricity through that system from—

(i) the distribution exemption holder that operates or has control of the system, or

(ii) a person related to the distribution exemption holder;  
and

(c) the customer—

(i) has served on the distribution exemption holder a notice expressing the customer’s interest in taking a supply of electricity from a third party supplier through that system; and

(ii) has provided with the notice evidence that at least one third party supplier would be willing to supply the customer with electricity through that system, and has identified any such third party supplier in the notice.

(2) In this Schedule “expression of interest” means a notice served under sub-paragraph (1).

(3) Within 5 working days beginning with the day on which it receives the expression of interest, the distribution exemption holder must provide any person related to it that is currently supplying the customer with electricity with a copy of the expression of interest.

(4) Within 10 working days beginning with the day on which it receives the expression of interest, the distribution exemption holder must serve on the customer—

(a) a notice informing the customer that it will take the steps in sub-paragraph (6) with a view to giving a third party supplier access to its distribution system; or

(b) a notice informing the customer that the distribution exemption holder considers—

(i) that it would need to increase the capacity of its distribution system in order to give a third party supplier access to that distribution system; and

(ii) that one of the conditions in sub-paragraph (5) is met.

(5) Those conditions are—

(a) that it is not technically feasible to provide the increase in capacity in question;

(b) that providing that increase in capacity would have a significant and adverse economic impact on the distribution exemption holder or any other person.

(6) Where the distribution exemption holder has served on the customer a notice under sub-paragraph (4)(a), the distribution exemption holder must—

(a) serve on any third party supplier identified in the expression of interest a notice specifying—

(i) any metering arrangements that the distribution exemption holder considers would be required to enable access to be given; and

(ii) whether it would be willing to give access through contractual arrangements which would not require a connection to be made or modified; and

(b) provide each such third party supplier with any other documents or information that it may reasonably request.

(7) The distribution exemption holder must serve the notice required by sub-paragraph (6)(a) within 20 working days beginning with the day on which it receives the expression of interest.

(8) The distribution exemption holder must provide any documents or information requested by a third party supplier under sub-paragraph (6)(b)—

(a) within 20 working days beginning with the day of the distribution exemption holder's receipt of the expression of interest; or

(b) if the request is made at a time when there are fewer than 10 working days remaining in the 20 working day period mentioned in paragraph (a) above, within 10 working days beginning with the day of the distribution exemption holder's receipt of the request".

99. In the light of the above, the Schedule must be interpreted to be consistent with Article 32 of the Directive. In my judgment it is perfectly capable of a compatible construction:
- a) First, the focus in Paragraph 1(1) is upon the rights of the customer to obtain a competitive source of supply. It is this particular competitive dynamic which characterises the conditions in Paragraph 1(1) and it provides the relevant important optic through which to interpret the remainder of the Schedule; one is concerned here with consumers' rights.
  - b) Secondly, the paragraph does not refer to “*networks*” but, upon five occasions, to “*system*”. That term is not defined but, as with the Directive, in context it means all of the infrastructure and equipment that is required to be used for electricity to be transported or delivered or conveyed from the third party supplier to the customer.
  - c) Thirdly, the person who has the duty to secure third party access is the “*distribution exemption holder*”, the “*DEH*”. A combination of sections 64(4) and 4(1)(bb) and (b) EA 1989 make clear that a DEH is someone who “*distributes*”, or “*conveys*”, electricity. In context this is, manifestly, a carriage or transport function.
  - d) Fourthly, nothing in the Schedule states that there can only be one DEH per system or part thereof. The Schedule is silent as to this. Read consistently with the Directive the answer to the question: Who is a DEH? – must be, all those whose system or systems in any way are used to connect the current from the third party supplier to the customer.

**(v) Enforcement**

100. I have set out above (see paragraphs [37ff]) the procedure whereby the Authority came to take its decision pursuant to the so called “Article 37” procedure set out in section 44B EA 1989. Under section 44C(8) sections 25-28 of the Act “...*have effect in relation to a person against whom a complaint is made ... and on whom a duty or other requirement is imposed by an order under this section*”.
101. The Decision was adopted under section 44B so that, in principle, it would be capable of being subject to an order to secure compliance and, absent compliance, the imposition of substantial financial penalties upon the Claimant.
102. Sections 25-28 set out the enforcement mechanism. They empower the adoption of orders to secure compliance and, *in extremis*, penalties for contravention: See section 27A.

**(vi) Principles of interpretation to be applied to the domestic implementing legislation**

103. In the Decision the Authority accepted that the Schedule was introduced to implement the Directive and that the two had to be construed together and consistently. In a

variety of places the Authority has paid careful regard to the express terms of the Directive and, equally importantly, to its essential purpose. I can detect no fundamental error in the articulation of the broad purposive approach adopted by the Authority. I have though – for reasons set out elsewhere – come to a different conclusion about the correct meaning of certain provisions. In the final analysis all parties accepted that the implementing measures had to be construed purposively and with a view – if at all possible – to ensuring that effect was given to the purpose in the Directive.

104. The law can be summarised shortly. All EU law instruments must be construed teleologically or purposively and the purpose behind a measure is identifiable, in the first, instance, from the recitals to the measure in issue. In Case 14/82 *Von Colson* [1984] ECR 1891 at paragraph [26] the Court held that the Member States were under a duty to achieve the “*result envisaged by the directive*” and that this obligation extended to all organs of the State including its judicial emanations. In Case C106/89 *Marleasing* [1990] ECR I-4153 the Court held that in the light of this a “...*national court called upon to interpret [national law] is required to do so, as far as possible, in the light of the wording and the purpose of the directive*” (paragraph [8]). In that case the Court identified the purpose of the directive from the preamble (cf paragraph [12]).
105. Where there is ambiguity a Court may also look to the *travaux préparatoires*. In this case no one has suggested that the recitals do not provide an ample exposition of the purpose or that any further elucidation would be obtained from reviewing the pre-legislative *travaux*. I did conduct an informal review of the *travaux* but found nothing which added to that which was set out in the recitals.

## **H. The judgment of the European Court of Justice in Case C-439/06 Citiworks**

### ***(i) The significance of the judgment***

106. Guidance as to the proper construction of Article 32 has been given by the Court of Justice in Case C-439/06 *Citiworks* [2008] ECR I-3913 (“*Citiworks*”), which concerned the effect of Article 20 of Directive 2003/54 (the predecessor to Article 32 of Directive 2009/72). This judgment is of particular importance since it predated the third liberalisation package reflected in the Directive and is part of the legal reasoning of the Authority in the Decision (See e.g. Decision paragraphs [25], [30] and [31]).

### ***(ii) The facts of the case***

107. The question referred arose because, under applicable German law (the *Energiewirtschaftsgesetz* or “*EnWG*”), energy supply systems wholly situated on the premises of an undertaking (so-called ‘operation networks’ or ‘*Betriebsnetze*’) could under certain circumstances be exempted from the principle of third-party access to the network. The system at issue was located at Leipzig/Halle Airport and was operated by the company running the airport for its own supply and that of the 93 undertakings located at the airport. Flughafen Leipzig/Halle GmbH (‘FLH’) operated Leipzig/Halle Airport. In this capacity it managed an energy supply system through which it and 93 other undertakings located at the airport were supplied with electricity. In 2004 the volume of energy consumed via this system amounted to approximately 22 200 MWh, of which, over and above FLH’s own consumption of

85.4%, around 3 800 MWh, or 14.6%, was supplied to other undertakings situated at the airport.

108. Since 2004 Citiworks AG ('Citiworks'), an electricity supply undertaking, had supplied DFS Deutsche Flugsicherung GmbH, located at Leipzig/Halle Airport, with electricity. On 12 July 2006, following an application by FLH, the Saxon Ministry of the Economy and Employment, as regulatory authority for the *Land*, issued a decision declaring that the energy supply system managed by FLH at the airport constituted a 'site network' which fulfilled the requirements for exemption under Paragraph 110(1)(1) and (2) EnWG. This had the effect of preventing third parties such as Citiworks from accessing the system operated by FLH at Leipzig/Halle Airport in order to supply customers located there. Citiworks challenged that decision before the Oberlandesgericht Dresden. The Court considered that since compliance with the relevant provisions of the EnWG would not impose an unreasonable burden on FLH, the system at issue could not be regarded as a 'service network' in accordance with Paragraph 110(1)(2) of the EnWG. However, the system fulfilled the exemption conditions laid down in the EnWG and was thus exempted from the provisions of the EnWG on third party access. The appeal Court queried whether the EnWG was consistent with the requirements of Article 20(1) of Directive 2003/54 and made a reference to the Court of Justice.

**(iii) The opinion of Advocate General Mazak**

109. Article 20 of Directive 2003/54 is, *mutatis mutandis*, identical in language to Article 32 of the Directive. The opinion of Advocate General Mazak was adopted, as to its key analysis of the purpose behind Article 32, by the Court (cf Judgment para [43]). His opinion guides the approach to be applied to the interpretation of the Directive and it applies, *a fortiori*, to Article 32 of Directive 2009/72. I summarise his Opinion below:
- a) The subject matter of the third party access obligation are the transmission systems and the distribution systems. It follows: "...*only so called 'transmission systems' or 'distribution systems' within the meaning of the directive are subject to third party access obligations pursuant to the directive.*" (para [64]).
  - b) It is irrelevant whether a person subject to an obligation to provide third party access has multiple functions in addition to being a distributor of electricity. Such a person might be a wholesaler or a supplier (seller) at the same time as being a "*distribution system operator*". The fact that such a person simultaneously served other functions was "*irrelevant*" (para [66])
  - c) Terms such as "*distribution system*" must be interpreted in the light of (i) the context in which it occurs and (ii) the object of the rules of which it forms a part (para [69]).
  - d) Given the importance of the principle of third party access exceptions or limitations to the principle had to be construed narrowly:

“71. The objective of achieving a level playing field between Member States in terms of market opening ... requires a uniform interpretation of the material scope to which the directive applies. This requires that restrictions to the general principle of third party access be interpreted narrowly and be limited to those provided for under the directive. This also precludes the possibility that a provision such as Article 13 of the Directive, which provides that Member States are to designate, or to require undertakings that own or are responsible for distribution systems to designate, one or more distribution system operators, could give Member States total freedom in the definition of a ‘distribution system’.”

- e) The essence of Article 20 was that suppliers had a right to choose their customers and customers a right to choose their suppliers:

“72. Furthermore, it appears from the directive that one of the essential elements of the liberalisation of energy markets is to ensure that electricity customers have the right to choose freely their suppliers and all suppliers the right to freely deliver their customers. These two rights are necessarily linked because, if customers are to choose freely their supplier, it is necessary that suppliers have the right to access, for an adequate and non-discriminatory remuneration, the different transmission and distribution systems which carry electricity to the customer.

73. The importance of the principle of third party access is also apparent from the legislative history of the directive. The provision requiring Member States to ensure third party access was an essential element of the Commission’s proposal to amend the first electricity directive ... and was adopted, essentially unchanged, in Article 20 of the Directive”.

- f) Applying the purpose behind the Directive it applied to a “*wide range of different systems regardless of their size*” (paragraphs [76] - [78]).
- g) The purpose for which a system is operated by a person is immaterial in determining whether a “*system*” was a distribution system. The Advocate General took by way of illustration the position of an airport that outsourced its supply obligation to a third party. He stated:

“83. The exemption of certain systems from third party access obligations on the sole basis of the purpose for which they are operated bears the risk that the same system, depending on whether it is run as part of another business or as a business on its own, will or will not be eligible for exemption from third party access obligations. For example, if FLH had outsourced the operation of its electricity system to another company having as its sole purpose the operation of the system with a view to delivering electricity to the airport and other end-users located at the airport, the distribution of electricity would certainly be made ‘with a view to its delivery to customers’, as stated in Article 2(5) of the Directive. Thus, the exclusion of so called

‘operation networks’ from third party access obligations could result in a different treatment of the same system solely on the basis of the business purpose of the system operator.

84. If this approach were to be followed, this would also mean that the same customer, for example a shop or a restaurant, would or would not have the right to choose freely among electricity suppliers depending on the business purpose of the system operator running the electricity system to which it is connected for the purpose of receiving electricity. Thus, the exclusion of systems from third party access obligations on the basis of the purpose for which they are operated would result in a different treatment of final customers”.

- h) Exceptions could not be created to the obligation upon the basis that the obligation was “*overly burdensome*” for very small or marginal systems (paragraph [86]). The answer to this lay in “*lighter*” (proportionate) regulation (paragraph [87]).

**(iv) *The judgment of the Court***

- 110. The Court held that the essence of Article 20 was the “*right*” that suppliers and customers had to contract for the sale of electricity. This is necessary to create a “*fully open market*”. The “*right*” to access is to the different “*systems*” (plural) which carry electricity:

“43. Recital (4) in the preamble to Directive 2003/54 states that a fully open market must enable all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers. As the Advocate General rightly observed in point 72 of his Opinion, these two rights are necessarily linked. In order for customers to be able to choose freely their suppliers, it is necessary that suppliers should have the right to access the different transmission and distribution systems which carry electricity to the customers.

44. It follows that 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 the internal market in electricity”.

- 111. The Court also made clear that Article 20 (and *a fortiori* Article 32) was concerned with transport or delivery, but not sale. In paragraph [45] the Court pointed out that the principle of open access applied to electricity transmission and distribution systems which were defined (in Article 2(3) and (5)) in terms of the “*transport*” of electricity with a view to its “*delivery*”. The Court then stated:

“Transmission and distribution do not include supply. The notion of “*supply*” is defined in Point 19 of Article 2 of Directive 2003/54 as the sale of electricity to customers”.

The same point was made in paragraph [51] where the Court stated that with regard to “*the operation and purpose*” of transmission and distribution systems these entailed “*...electricity [which] is transported with a view to delivery, without there being actual supply*”. The Court also stated (referring implicitly to the definition of “*distribution system operator*” in Article 2(6)) that the “*...operator is responsible for operating, ensuring the maintenance of, and, if necessary, developing the system in a given area and for guaranteeing its long-term capacity*”. This exposition excludes supply/sale.

112. The Court rejected the argument that the scheme of regulation which flowed from its interpretation of the Directive would be overly burdensome. It explained that Member States could properly impose less intensive access duties to reflect the status of, for instance, new or small systems:

“87. This approach should not be followed. Member States enjoy a wide margin of discretion in how they implement in practice the third party access obligations provided for in the directive. Member States might possibly provide for a lighter administrative regime for smaller or newly-created systems or systems which pursue a main objective that is different from that of the supply of energy to customers. Thus, the actual burden which the fulfilment of such obligations constitutes for an individual operator is to a certain extent the result of regulatory choices made by each Member State. Therefore, such a ground would not in itself allow for the total exclusion of such systems from the obligations imposed by the directive on distribution system operators and especially third party access obligations”.

113. However, earlier at paragraph 55 the Court made clear that Member States could not create any further exceptions or derogations:

“55. Article 20(1) of that directive leaves the Member States free to take the measures necessary to establish a system of third-party access to transmission or distribution systems. It follows that, in accordance with Article 249 EC, the Member States have authority over the form and the methods to be used to implement such a system. Having regard to the importance of the principle of open access to transmission or distribution systems, that margin of discretion does not, however, authorise them to depart from that principle except in those cases where Directive 2003/54 lays down exceptions or derogations”.

114. The combined effect of paragraphs [55] and [87] is that small or new operators may not be exempted but they might be subject to less intensive regulation. This does no more than reflect the operation of the principle of proportionality.

**I. Conclusion: What is the relevant “system” for the purpose of applying the duty to secure third party access?**

115. I turn now to consider the issues of law arising. The first issue concerns the identification of the relevant system for the purposes of Paragraph 1(1)(b) of Schedule 2ZA. As explained elsewhere (see paragraphs [44]) the Authority did not address the question: What is the relevant system? It follows from my analysis of the law that the relevant system is all that infrastructure and equipment which must be used to ensure the transport or delivery of current between a third party supplier and a customer (I should, for the avoidance of doubt, clarify that I am referring here only to exempt distribution systems and not infrastructure and equipment on upstream licensed distribution systems). In the present case the Authority asked only the question: Which out of UKPNS and HAL has greatest responsibility for operating or controlling the Leased Network? The Authority therefore assumed, without investigating the assumption, that transport or delivery of current between a supplier and a customer involved only the Leased Network. However, this is not a self-evident proposition on the facts of this case.

116. In adopting this approach the Authority imposed an artificial constraint upon itself. It was its duty, in law, to ask itself the correct questions of law. In *Secretary of State for Education & Science v Tameside MBC* [1977] AC 1014 at page [1065B] Lord Diplock stated:

“The question for the Court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”?

117. The “*Tameside*” principle requires any decision maker – as a free standing duty - to ask itself the “*right question*”. The duty is not extinguished simply because the commercial parties agree. They may have commercial motives of their own for so doing but the regulator must get the law right irrespective of the position adopted by the parties. Only if the question posed is correctly formulated will the decision maker, thereafter, conduct a proper evidential investigation. If the wrong question is asked it will, almost inevitably, be the case that an incorrect factual inquiry will follow. The nature and extent of this subsequent evidential inquiry and the limits of judicial scrutiny were summarised by the Divisional Court in *Plantagenet Alliance Ltd v Secretary of State for Justice & Others* [2014] EWHC 1662 (QB) in the following terms:

“100. The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(2) Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], *per* Laws LJ).

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in *R(Khatun) v Newham LBC (supra)* at paragraph [35]).

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in *R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (*R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)".

118. It is apparent from the above that the Court must examine the correctness of the question that the Authority posed to itself. If the question was correctly articulated the Court will interfere in the subsequent factual inquiry only in the limited circumstances described. I have sympathy with the Authority because HAL (cleverly) drafted the question for resolution in a manner which, very largely, dictated the outcome and UKPNS (not so cleverly) accepted that formulation without demur. Regrettably, the Authority simply assumed the formulation to be correct.
119. I have made no findings as to the relative responsibilities for connecting a supplier to a customer as between HAL and UKPNS and therefore as to whether HAL's network should also be treated as part of the relevant "system". The Authority might well be entitled to conclude that the primary or even predominant responsibility lies with UKPNS. However, there is sufficient evidence before me to suggest, at the least, that there might be *some* level of responsibility which falls also upon HAL. This might arise because HAL has responsibility for its own (non-leased) network and this needs to be used to secure third party access; but also because it has some degree of responsibility for the Leased Network. The analytical exercise conducted by the Authority in relation to operation or control did not answer the relevant question

because it was confined to the Leased Network and, even then, only to determine which out of HAL or UKPNS met the operation or control test. The Authority did not ask itself whether the conveyance or transport of current from a supplier to a customer involved only the Leased Network or, to some greater or lesser degree, also the residual network operated by HAL. In my view both the first and second scenarios identified in paragraph [41] above might be relevant.

120. In conclusion, the Authority erred in its unquestioning acceptance of the proposition that the relevant system for its analysis was the Leased Network.

### **J. Conclusion: Can there be more than one DEH per network?**

121. The second issue concerns the conclusion that, in law, there could only be one DEH per network. In my judgment the Authority erred in concluding that there can be only one DEH per network. A summary of the reasons why the Authority erred is as follows: First, the limitation is entirely invented. Nothing in the Directive or the Schedule says that there can only be one DEH per network. Secondly, the very idea is antithetical to the purpose of the Directive which is to promote competition in its many guises but not to ossify monopoly structures into the regulatory regime. Thirdly, the Directive is neutral as to the number of persons with the duty to secure effective third party access; rather it is a framework Directive which mandates a result and makes no assumptions about how markets will evolve when operating freely. Fourthly, the introduction of a “*one DEH only*” policy has in this case been the central reason why third party access has failed. It is, and has the potential to be, a real obstacle to achieving the result required by the Directive since it encourages disputes between operators and promotes delay. Fifthly, it leads to a most unsatisfactory legal outcome which is that (if it is correct) the Authority must, in any case of shared responsibility, impose the DEH duty upon a person who, by definition, cannot standing alone comply with that obligation but who is, in principle, nonetheless subject to enforcement proceedings and possible sanctions if it does not comply. Sixthly, I reject the suggestion that my conclusion results in practical problems. In the text below I develop some of these points.
122. The duty of implementation is as to the result: Article 32 of the Directive imposes upon Member States a duty of result viz to “*ensure...a system of third party access*”. For this reason, it leaves it to Member States to determine how the principle is to be implemented though, as the Court in *Citiworks* (ibid) held at paragraph [55], Member States do not have a margin of discretion to depart from the principle. Article 32 identifies both the scope of the duty to be implemented in national law and the persons upon whom the duty is to be imposed.
123. The scope of the duty is to secure “*access*” to “*transmission and distribution systems*”: The purpose of this is (as recital 20 to the Directive makes clear, and as was reiterated in *Citiworks*) to enable third party suppliers to sell to commercial customers without any obstacle being placed in their way by the operation of the network or networks which sit between the third party supplier and the customer. Since the obligation is one of result, the Directive is neutral as to the number of systems over which current will be conveyed or transported in its journey from supplier to customer or the number of persons who are responsible for ensuring that carriage. It is the result that matters. The optic through which Article 32 must be examined is the co-relative rights of the supplier and the customer to contract with each other. The law here is

concerned with a conveyance, carriage or transport function and problems arising across that carriage network may not be used to thwart the rights of vendors and purchasers of electricity. The message which Article 32 clearly conveys to Member States is to do whatever is necessary to ensure that the carriage of electricity between supplier and customer is guaranteed. There is no room in this conception for an artificial limitation that precludes joint responsibility for ensuring that third party access rights are secured.

124. There is no assumption that monopoly power is preserved: As I have explained (see paragraphs [45] – [47] above) the Authority accepted HAL’s submission that Article 32 was implicitly concerned with monopoly operators. But the Directive is a framework Directive. It does not purport to lay down how electricity markets will develop. As recital [22] recorded “*different types of market organisation will exist*” in the internal EU market. It would be antithetical to the notion of a framework directive for the Directive to impose artificial limits on market structures and upon the powers of regulators to do whatever is necessary to secure third party access. In my view, I can see no possible justification for implying into the Directive any silent assumption whereby national regulators may only enforce their regulatory powers against one operator per area.
125. Size is irrelevant: I turn now to the position under domestic law. I have set out above (at paragraphs [98]) the relevant statutory provisions and definitions. The EA 1989 does not assume that there can be only one DEH per area. Pursuant to section 64 EA 1989 the concept of a “*distribution exemption holder*” is a person who distributes electricity for the “*purpose*” mentioned in section 4(1)(bb), which provision identifies the relevant “*purpose*” as “*...giving a supply to any premises or enabling a supply to be so given*”. This is amply broad to encompass all those persons involved in ensuring supply and includes a person with a marginal role in supply whose network, nonetheless, is required to be used for the conveyance of electricity from the supplier to the customer. In this connection the law is clear. There is no exemption simply because a person operates a very small network or, it must follow, bears only a small degree of responsibility for carriage. In the course of oral submissions Mr Beard QC, for HAL, repeatedly emphasised that “*size did not matter*”. He submitted that the critical question was whether there was equipment which was needed for the distribution of electricity - “*that is what matters*”. He submitted that there is “*no magic threshold in EU law for these matters*”. In support he referred me to the Opinion of Advocate General Mazak in *Citiworks* and to paragraph [76] thereof where it was pointed out that there were no size thresholds for a system to be subject to regulation. He also drew my attention to the analysis of the Advocate General at paragraphs [86] and [87] (which he endorsed) which specifically rejected the argument that to impose the principle of open access on small operators was “*per se overly burdensome*”. The Advocate General concluded:

“87. This approach should not be followed. Member States enjoy a wide margin of discretion in how they implement in practice the third party access obligations provided for in the Directive. Member States might possibly provide for a lighter administrative regime for small or newly-created systems or systems which pursue a main objective that is different from that of the supply of energy to customers. Thus, the actual

burden which the fulfilment of such obligations constitutes for an individual operator is to a certain extent the result of regulatory choices made by each Member State. Therefore, such a ground would not in itself allow for the total exclusion of such systems from the obligations imposed by the Directive on distribution system operators and especially third party access obligations”.

I agree that even if it be the case that HAL’s involvement is relatively minor this is not a reason for concluding that it falls outside the scope of the obligation to secure third party access. Schedule 2ZA must be construed in this light.

126. Accordingly, no relevant policy warrants excluding from the concept of a “distribution exemption holder” a person who distributes electricity only to a small degree, i.e. a person who plays a peripheral role in the distribution of current as between the supplier and the customer. As such the definitions in the EA 1989 are consistent with the Directive. And for the reasons already given, applying a proportionate system of regulation will mean that a person who plays a marginal role as a DEH may be subjected only to proportionate obligations.
127. A finding of joint responsibility does not create practical problems: Finally, the Authority concluded that having more than one DEH per area would be unworkable (cf Decision paragraph [76(c)]). If more than one person may constitute a DEH then “...*the regulatory obligations in Schedule 2ZA would fall on both parties. That is in our view impracticable and inconsistent with legal certainty because it would mean both have the obligation to allow access/to submit charging methodologies if they wished to charge for third party access. We note that the obligation to formulate and submit a charging methodology is not an insignificant obligation. Thus, the requirement to produce and submit one is only triggered when an end-user serves a qualifying expression of interest*”.
128. I do not agree.
129. First, the obligations to be imposed upon affected undertakings, must be applied proportionately. It does not necessarily follow, therefore, that where one person is (relatively) marginal in relation to the system(s) operating between a supplier and customer that it should be subject to the same level of regulatory burden as someone who has principal responsibility for operating the system(s).
130. Secondly, the duty to secure third party access is self-certifying. In principle it only requires regulatory intervention if a problem arises. If the position is that more than one person is responsible then in a case such as the present, the Distribution Agreement already provides a contractual framework for third party access to occur. Under the legislative scheme it is the primary duty of those with joint responsibility to guarantee third party access. Provided the “*result*” is ensured precisely how it is ensured is secondary. It is essentially because the Authority has concluded that only one of HAL or UKPNS may amount to a DEH that the process of resolving which of the two companies is to acquire that status has taken over two years. It is the present interpretation of the Schedule that risks unworkability.

131. Thirdly, on the proper construction of the powers of the Authority, in the event that sensible co-operation between those bearing joint responsibility fails, the Authority has a portfolio of powers including: informal pressure; dispute resolution; or (in the face of recalcitrance), formal enforcement. It will be an important incentive for DEHs to resolve matters to know that they are all subject to regulation and cannot argue, as has been done in the present case, that one escapes such a burden.
132. Fourthly, Schedule 2ZA, interpreted purposively and proportionately, is not unworkable or impracticable. This can be seen from applying the provisions to the position of a (hypothetical) DEH with a minor role to play in the carriage or conveyance of electricity from a supplier to a customer. Interpreted thus the Schedule only imposes upon such a person an obligation to provide information which is limited to those matters which are within its power to perform. So, for example:
- i) In accordance with Paragraph 1(4), and, (6) the (hypothetical) operator would only have to serve upon the customer such information about metering that it was able to provide.
  - ii) In accordance with Paragraph 1(6)(b) the operator would only be required to provide the third party supplier with such documents or information which it could provide. This would in any event be because the obligation is subject to an assessment of the reasonableness of the request.
  - iii) In accordance with Paragraph 2(6) – pursuant to which the DEH must give a third party supplier such access to “its” distribution system as is necessary to enable the third party supplier to give a supply of electricity to the customer – the (hypothetical) DEH would only be required to give such access as it was capable, itself, of giving.
  - iv) In relation to the obligation to make available pre-approved charging methodologies the Authority has already stated that it will apply this obligation proportionately in its Guidance on third party access charges for licence exempt gas and electricity distribution networks (10<sup>th</sup> November 2011). The Authority stated this in relation to charging methodologies:  
  
“We will take a proportionate approach to approving the methodologies. For larger ENOs, depending on their circumstances, this means we would prefer a greater level of detail underpinning various items than is included in the example set out in this proforma, where they have the resources to provide this information. This includes the identification of network costs, how the costs have been allocated to customers and detail on factors that are likely to affect network charges in the future, particularly where the impact of the charging methodology is likely to affect a significant number of customers. For very small ENOs with one or two small customers we would not necessarily expect them to provide the level of detail contained in our proforma.

...

Our guidance is not prescriptive and any other reasonable and proportionate methods of identifying network costs and allocating them to customers are likely to be acceptable for the purposes of approval”.

In the present case Mr Beard QC, for HAL, intimated that such was the minimal level of involvement which would be required by HAL to enable a supplier to convey electricity to a customer that it might levy a zero charge. Moreover, in the present case on 25<sup>th</sup> April 2012, HAL did submit to the Authority what it described as “...an application under Electricity Act 1989 Schedule 2ZA Charges for Use of System Methodology Approval in respect of Hilton Hotel Heathrow Terminal 4”. This incorporated information provided by UKPNS and HAL upon the basis that “...both entities own and control parts of the HV network at Heathrow”. It is apparent from the detailed Schedules which comprise the Charging Methodology that there was no obvious difficulty encountered in preparing this information. I thus reject the suggestion that the obligation to proffer charging methodologies to the Authority for prior approval will create real (as opposed to imagined) practical problems.

133. The jurisdiction of the Authority is broad and can be used flexibly and proportionately: In conclusion under the Directive and Schedule 2ZA any person with any degree of responsibility for the relevant functions becomes a DEH and there is no need for the Authority to act first for this to be so. Where there is joint responsibility the DEH must co-operate to ensure the “*result*” of quick and easy third party access. In the event of a dispute the Authority has jurisdiction over all those with any degree of responsibility for the conveyance of electricity between the supplier and the customer. The Authority may if called upon apply the obligation to secure access in a proportionate manner which reflects the level of responsibility of each person for the conveyance or carriage of that electricity. The Authority may exercise its (formal and informal) powers in any manner that it properly sees fit to secure the objective of timeous third party access. How it achieves the objective of securing timeous third party access would be a matter for it based upon the facts of each case before it. It seems to me consistent with the Directive that the Authority would have a good deal of flexibility in this respect.

#### **K. Conclusion: The meaning of “supply” in Paragraph 1(1)(b) of Schedule 2ZA**

134. I turn now to consider the third issue which concerns the meaning of “*supply*”. Mr Gordon QC, for the Claimant, submitted that UKPNS was not a vendor and that, properly interpreted, Paragraph 1(1)(b) of Schedule 2ZA entailed obligations applicable only to “*suppliers*” where that term meant a vendor of electricity. He pointed out that under the Directive a clear-cut distinction was drawn between “*supply*” which meant sale and resale; and “*distribution*” which meant transport but which excluded supply. He pointed out that Paragraph 1(1)(b) specifies as one of the conditions precedent for a person being designated a DEH that the customer in question is “*taking a supply of electricity through that system*”. Mr Gordon QC thus submitted that since Schedule 2ZA was intended to implement the Directive that the term “*supply*” in the Schedule must mean the same thing as “*supply*” in Article 2(19) of the Directive. In effect, he submitted that the relevant conditions in the Schedule assumed that a customer was taking a sale of electricity through the system. In the present case it is common ground that only HAL sells electricity through the system; and UKPNS does not. Mr Gordon QC pointed out, further, that there was no

definition of “supply” in the Schedule which, he submitted, created an overwhelming inference that the draftsman intended the expression in the Schedule to be the same as that in the Directive.

135. This is, at least on its face, an attractive argument. However, I have concluded that it is incorrect, and plainly so. The starting point must, *perforce*, be Article 32 of the Directive. The Schedule is intended to implement that provision. But Article 32 is explicitly not concerned with the sale of electricity; it is concerned only with the transport and conveyance of electricity. This has been confirmed by the Court of Justice in *Citiworks*: See paragraph [111] above. Indeed, it would be wholly contrary to the logic of Article 32 to limit it to those persons who simultaneously operated the system and sold electricity over it since if it were so pure (non-selling) distributors would not have to secure third party access in the context of a regulatory regime specifically designed to unbundle supply from distribution. This conclusion is buttressed by the definition of “distribution system operator” in Article 2(6) of the Directive which makes clear that the obligation to provide third party access applies to persons who operate, maintain, develop or ensure interconnection of systems for the transportation or delivery of electricity. Article 32 is about transportation, carriage and conveyance but not supply or sale. Any interpretation of Paragraph 1(1)(b) of Schedule 2ZA which is to be rendered consistent with the Directive simply must take this conclusion as its starting point, and indeed its end point.
136. The only place where “supply” is defined in EA 1989 is section 4(4) where it is defined in the following terms:
- “Supply in relation to electricity means its supply to premises in cases where –
- (a) it is conveyed to premises wholly or partly by means of a distribution system, or
- (b) (without being so conveyed) it is supplied to the premises from a substation to which it has been conveyed by means of a transmission system, but does not include its supply to premises occupied by a licence holder for the purposes of carrying on activities which he is authorised by his licence to carry on”.
137. Section 4(4) however opens with the following words: “*In this Part, unless the context otherwise requires—*”. Accordingly, the Schedule recognises that context is critical.
138. In my judgment the analysis of this phrase by the Authority is correct. The Authority started by addressing itself to the purpose behind the Directive. In paragraph 79 of the Decision it stated:

“79. We are persuaded, by reference to recitals and operative provisions of the Directive, that the purpose of the Directive and the third package is broader than simply unbundling monopoly distribution and supply, and is concerned more broadly with facilitating third party access and consumer choice

as part of the proper functioning of a competitive market. We therefore conclude that a construction of “supply” which would lead to particular classes of customers being deprived of third party access rights risks putting the UK in breach of its primary European legal obligations and is a factor which would strongly militate in favour of a construction which avoided such a result”.

139. In the light of this the Authority concluded correctly that “*supply*” in the Schedule could be construed so as to mean “...*supply in a physical sense without doing violence to the natural meaning of the word in context. Construing supply to mean the physical provision of electricity gives effect to the purpose of the Directive which it was introduced to implement*”. (cf Decision paragraph [81]).
140. The problem in the present case has arisen because of the failure by the draftsman of Schedule 2ZA to define the term “*supply*”. It was, however, a term crying out for a proper definition because the clear meaning of “*supply*” in Paragraph 1(1)(b) is (a) different to the definition of “*supply*” in the Directive and (b) inconsistent with the meaning of “*supply*” used elsewhere in relevant parts of the EA 1989 and Schedules 2ZA, and, 2ZB (which concerns suppliers as sellers). It was most unsatisfactory to leave the meaning of this key term to be worked out by reference only to whether “...*context otherwise requires*”. Nonetheless, context manifestly requires “*supply*” to mean physical distribution, and not sale.
141. Finally on this point, the Authority was not entirely correct to say (cf Decision paragraph [84]) that the definitions in the Directive were only of “*peripheral relevance*”. A careful analysis of the definitions in the Directive make perfectly plain that the pivot of Article 32 are the definitions of “*distribution*” and “*distribution system operators*” in Article 2(5) and (6). These make clear that Article 32 is concerned only with “*transport*” and “*delivery*”. These are the definitions which provide the “*context*” for the meaning of “*supply*”.
142. In conclusion, I have concluded that the Authority correctly determined the meaning of “*supply*”. I reject the interpretation placed upon this phrase by UKPNS.

#### **L. Conclusion: Application of the “operation or control” test**

143. The test in Paragraph 1(1) Schedule 2ZA to determine who is to be subject to the third party access obligation is by reference to who “*operates or controls*” the system. The Authority asked itself which out of HAL and UKPNS exercised greater operative powers or control because it concluded that in a multi-partite situation it was “*either/or*”. This followed from the Authority’s prior conclusion that there could only be one DEH on the Leased Network.
144. There are three issues to consider in this regard. First, whether the Authority was correct to use a test based upon operation or control. Secondly, whether the Authority was correct to conclude that the test was relative, i.e. which of UKPNS or HAL exercised the greater degree of operation or control. Thirdly, whether the Authority was correct to conclude that it was only the operation or control of the Leased Network that was relevant. The second and third questions are different ways of expressing the issue set out at sections [J] and [I] above and I will therefore deal with

them only summarily in this section. In this section I address only the issues of law arising. Mr Gordon QC made submissions about the manner in which the Authority applied the test. Mr Beard QC countered them. I am not making any findings of fact on these disputes.

145. Turning to the meaning of “*operation or control*”, the Authority correctly observed that “*control*” was not found in Article 32 and that its task in applying Paragraph 1(1) Schedule 2ZA was to act consistently with the Directive: Decision paragraph [87]. In the event the Authority decided that it did not need to determine whether HAL or UKPNS had the greater degree of “*control*” because on the facts the Authority was clear that the application of the control test indicated that UKPNS both operated and controlled the Leased Network. In my view, the Authority was correct to conclude that the phrase “*operation or control*” had to be construed consistently with the Directive and Article 32.
146. There, however, the test is formulated as “*responsibility*” for operation, maintenance, ensuring interconnection, development of the system, and, stability of demand. In my view, the concepts of “*operation*” and “*control*” may, with a purposive interpretation, be broad enough to encompass these matters. However, it is not apparent from the Decision that the Authority examined all of these relevant matters.
147. The notion of “*control*” was, in all likelihood, introduced to implement “*responsibility*” from the Directive and it can, in my view, take on board the content of that concept. A person who has control over such tasks as operation, maintenance, the securing of interconnections, development, and matching of supply and demand, can be said also to have “*responsibility*” for such matters. I do not therefore view the concept of “*control*” as irrelevant even though it is not specifically used as a term in the Directive provided it is linked to the concept of “*responsibility*”. The Authority in paragraph [87(b)] of the Decision speculated that “*control*” might have been introduced as an anti-avoidance measure to prevent a person escaping the DEH categorisation by delegating operational roles. In my view, understood purposively, “*control*” can be wide enough to cover avoidance techniques because a person who exercises upstream corporate control or delegated control can still be said to bear responsibility for the downstream or delegated actions.
148. “*Operation*” is the other part of the test. As a term it is referred to in Article 2(6) alongside maintenance, development, securing interconnections, and, stability of demand. If operation is given a meaning sufficient to encompass all of these things then Paragraph 1(1) Schedule 2ZA may be read consistently with the Directive. So, for example, operating the system in a wide sense might be said to include maintaining it, or securing interconnection of electricity between the different parts of the system. It can even be broad enough to embrace being responsible for developing the system in a given area and ensuring the long-term ability of the system to meet reasonable demand. I draw support for this conclusion from the judgment of the Court of Justice in *Citiworks* paragraph [51] which understands “*operation*” in precisely these terms.
149. The difficulty in the present case is that whilst the Authority recognised the need for purposive construction it did not follow that recognition through. It is not evident that the Authority actually examined all of the matters set out in the Directive in the context of the supply of electricity between a supplier and a customer. What did the

Authority do? In the Decision the Authority concentrated, in large measure, upon the submission of UKPNS that for a variety of reasons it did not “control” the system because HAL did: See Decision paragraphs [49] – [59] and [87] – [91]. The Authority did not equate the concept of “control” with “responsibility”. The Authority did not go so far as to say that control was “not relevant” (cf paragraph [88(c)]). However, it did not delve into the question which the Directive requires it to analyse *viz.*: Who was responsible for the matters identified in Article 2(6) and 32 of the Directive? The Authority concluded that UKPNS controlling the Leased Network did not exclude HAL from exerting a measure of control. For instance the Authority acknowledged that HAL did retain some degree of “control” which it stated was not a surprising conclusion: “...when considering the Leased Network is situated within and connected to critically important airport infrastructure”: cf Decision paragraph [90]. With regard to “operation” the Authority contented itself with noting that UKPNS did not, substantially, dispute the proposition that it operated the Leased Network. The Authority examined the Distribution Agreement and UKPNS’ acknowledgement therein that it was the distributor of the Leased Network. It conducted an analysis of such issues as: energisation and de-energisation; discretion as to how electricity was transmitted across the network and whether the right of UKPNS was fettered; whether pursuant to Clause 4.2 (see paragraph [31] above) HAL could control who gave or received supplies of electricity; the rights to de-energise entry and exit points; maintenance obligations; authorisation of personnel; insurance; and the metering of data. In paragraph [93] it stated:

“We therefore conclude that UKPNS clearly has the more significant, though not absolute, control, over the Leased Network. We have not found a case to be made by UKPNS to displace the *prima facie* inference of UKPNS’ control of the Leased Network by reference to Clause 6 of the DA. We are also satisfied that it is not necessary for UKPNS to be found to have absolute control in order to satisfy the test at Schedule 2ZA. The disjunctive statement of operation and control means that having concluded that it satisfies the test of supply and operation that is sufficient for it to be recognised as bearing the DH obligation that flow from Schedule 2ZA”.

Further it treated “operation” and “control” as alternative tests. This flows from the disjunctive language in Paragraph 1(1) Schedule 2ZA. However, there is no equivalent alternative test in the Directive. Indeed, if “control” is intended to implement “responsibility” then in the Directive “responsibility” and “operate” work together conjunctively, not disjunctively.

150. In conclusion on the first issue set out at paragraph [144] above the Authority did not apply the correct test. By reference to the reasoning in the Decision there is no evidence that the Authority, in actual fact, did examine in any systematic way the matters it was required to address itself to. I make no findings however as to the factual disputes between UKPNS and HAL on this issue.
151. I turn now to the second point which concerns the conclusion of the Authority that “operation or control” are applied in a relative way as between possible DEHs, as opposed to being used to identify all those persons who operate or control systems needed to connect a supplier with a customer. It follows from my conclusions above

that operation or control is not a relative test. It is the test to be applied to anyone who, even marginally, has responsibility for the system in question. I would add a final point here. At paragraph [76(f)] of the Decision (set out below at paragraph [48]) the Authority stated that UKPNS was “*the*” DEH for the Leased Network even if there could be two DEHs. This is not an answer. First, it is a conclusion about the Leased Network only. Secondly, it is inconsistent with the analysis elsewhere in the Decision to the effect that HAL has some degree of control over the Leased Network.

152. The third point concerns the fact that the Authority applied the “*operation or control*” test only to the Leased Network. Even assuming that “*operation or control*” is the correct metric to be applied it must be applied to all the infrastructure or equipment which exists between the third party supplier and the customer. For the reasons that I have already given it is not evident from the Decision that the Leased Network comprises the entirety of the infrastructure or equipment over which current must pass in order to connect a supplier to a customer. It also follows from my prior conclusions that a person who operates or controls only a very small part of the system between a third party supplier and a customer may also satisfy the test of “*operation or control*”.
153. For all the above reasons I conclude that the Authority erred in the manner in which it applied the “*operation or control*” test.

#### **N. Conclusion: The relevance of the “*workability*” test**

154. The final issue of law to consider is the relevance, if any, of the “*workability*” test applied by the Authority. This test arises only because the Authority decided that only one person could bear the DEH burden which then led the Authority to confront the resulting problem which was that it had to impose the duty upon a person who had no power, standing alone, to perform the duty. This then meant that the Authority had to decide whether this was a workable solution.
155. The gap between what a DEH has it within its power to do and that which it must do in order to comply with its obligation to secure third party access will vary from case to case. It is hence not an answer for the Authority to say that upon the facts of this case it was entitled to come to the view that the gap would not be great. The correctness of the analysis must be determined by reference to the point of principle. In other cases the gap between what a DEH is required to do and what it can do may be far greater. For example, it is possible to contemplate a scenario where the owner and operator of an electricity network appoints a distributor or agent and under the agreement the parties share responsibility equally for operation, maintenance, interconnection, development and meeting supply and demand. In such a case if the Authority imposes the DEH obligation only upon one party then the amount of contractual unravelling that would be required to ensure that the sole DEH was able, by itself, to meet the obligation might be enormous. Indeed, it might lead to the premature termination of what is, otherwise, a perfectly sensible commercial arrangement. Another example highlights the problems arising. Two companies – X and Y – might jointly own and operate a network but not through a joint venture company (thereby preventing the Authority imposing the DEH obligation upon only one incorporated entity). Such a partnership agreement may involve equal (50:50) ownership, control and operational rights. Again, it is artificial to impose the obligation only upon either X or Y in circumstances where legally they have equal functionality and equal “*responsibility*”. Common sense indicates that the obligation,

in both hypothetical scenarios, should be imposed upon all of the parties collectively to achieve the desired result, namely third party access. However, on the logic set out in the Decision in these examples the Authority must label only one person the DEH and then decide whether that is “workable”. The Decision is silent as to what happens if the result is an unworkable chaos. Mr Herberg QC, for the Authority, accepted that the Authority had, on its analysis, no power to force a solution. The Authority had no jurisdiction over the person not designated the DEH. He said they would have to “bang heads together” or use soft powers of persuasion. I find this a troubling conclusion. A person who fails to observe a DEH obligation, in principle, is subject to enforcement proceedings and fines. For the Authority to concede that it would impose such a duty knowing it to be unworkable (save for informal head-banging) is itself an indication that the analysis leading to this result is flawed.

156. In my judgment “workability” is simply not a question that needed to be answered. It wrongly assumes that there can only be one DEH per system or network. If the Authority may regulate anyone whose system (wholly or partially) is needed for the carriage of electricity from a supplier to a customer then the gap does not arise and there is no need to address the workability issue because regulation is then a seamless continuum stretching across the entirety of the electricity distribution systems connecting seller to buyer.

157. More specifically, the reasons for this conclusion are as follows:

- a) First, the optic through which Article 32 and Schedule 2ZA must be interpreted is that of the “rights” of the third party supplier and the customer whose requirements are for a seamless carriage of current from the former to the latter. The duty upon the national regulatory authority is commensurate: It is to “ensure” that the “right” is respected and the carriage, transport or conveyance is efficient and expeditious. In context the notion that the seamless flow of electricity should be interrupted because the regulator cannot supervise or enforce the duty of carriage upon some of those operators who are “responsible” for the carriage of the electricity is simply illogical.
- b) Secondly, the Decision operates upon a supposed assumption said to be found in the Directive that there can only, *in principle*, be one operator per network. But the Directive contains no such express principle which, given its signal importance, it would have done had it been true. And the reason why the Directive does not endorse such a principle is that it would contradict the very *raison d’être* of the Directive. The Directive seeks to facilitate competition. It is axiomatic that when competition is liberalised it often emerges in new and unexpected ways. Mr Beard QC, for HAL, in his written submissions post-hearing stated:

“5. Whilst historically it may have been the position that on licence exempt networks, the seller of electricity was also the operator of the network, that is not always the case (see the present case and those at Gatwick and Stansted) and there is no reason to think that in the future such “unbundled” situations

will be uncommon. The longer the legislation remains in force, the greater the likelihood that customers will have switched away from a seller/DEH and will be looking to switch again to a *different* third party supplier. The Authority was entirely right to be concerned about the effectiveness of the Directive in this context”.

Mr Beard QC was right in his underlying thesis that as liberalisation occurs different forms of “*unbundled*” commercial arrangements might arise. The evolution of sub-contracting arrangements is one such development (with ownership unbundled and separated from day to day operation). Yet the Defendant’s analysis assumes that the principle of monopoly provision is built into the Directive and therefore it can only regulate the one (monopoly) supplier per network. As I have emphasised above the purpose of the Directive is to increase and facilitate competition, not ossify monopoly structures. The Defendant says that the Directive “*essentially contemplates a single DSO for a particular area*” but this elides economic happenstance with a principle of law. I have already explained that “*on the ground*” markets have generally evolved with one operator per geographical network. However, acknowledging this is a far cry indeed from elevating that practical circumstance into a binding principle of law.

- c) Thirdly, the citations in the Decision from the Directive and from the Court of Justice in *Citiworks* relied upon by the Authority to support the conclusion (reflecting arguments advanced to it by HAL) do not in fact support the conclusion drawn from them. None of the references to the Directive entrench a principle of monopoly provision; on the contrary, they all reflect a desire to facilitate competition in the market. The same applies to the statements of the Court of Justice. For example, paragraph [43] of *Citiworks* takes as its starting point “...*a fully open market*”. It also talks of third party suppliers and customers having a “*right*” of access to the “*different*” transmission and distribution “*systems*” which carry electricity. These can only be understood in the context of the legislature having made no assumptions whatsoever as to the structure of the different market operating in the different Member States. The Defendant also cites paragraph [55] of *Citiworks* (Decision paragraphs [31] and [76(c)]) seemingly for the proposition that Member States enjoy a margin of discretion as to implementation. However, paragraph [55] of the judgment makes clear that whilst Member States are left to choose the form and method of implementation there is no discretion to depart from the principle of third party access and the Court, to the contrary, explains that third party access involves access to distribution and transmission “*systems*”, i.e. in the plural. A review of the Directive, its recitals and the *travaux préparatoires* show that the basis of the Directive was not any sort of detailed assessment of market structures in the different Member States. Recital 22 makes clear that the legislature recognised the heterogeneity of the national markets.

158. The solution to any practical “workability” problem which arises is universal proportionate regulation. The Directive makes clear that the Authority can exercise formal or informal powers. Further, it must use its powers proportionately. There is no reason why the burden of securing third party access necessarily falls equally upon all DEHs. Take the present case, a requirement upon HAL and UKPNS jointly to secure third party access can be largely achieved under the present Distribution Agreement. On this premise there is no reason why that should be substantially renegotiated so as to impose increased obligations and powers on UKPNS and commensurately decreased obligations and powers on HAL. Proportionate regulation would require the two parties simply to co-operate in whatever manner they saw fit to ensure third party access. Regulatory intervention would hence reflect the underlying economic and commercial reality between the parties. Such an outcome would not be discriminatory or unfair or disproportionate. If the response from HAL is that it has reserved the right to terminate because third party access has distorted the financial assumptions upon which the Distribution Agreement was entered into, then so be it. Either the parties will modify the terms of the Distribution Agreement, or HAL will terminate and assume the exclusive DEH responsibility for third party access. The Authority need only be concerned if the termination hindered or obstructed effective third party access. But given that whilst the untangling process was ongoing both parties would still have the duty to secure third party access, I can see no reason why problems would necessarily arise. And in any event, if they did, the Authority possesses sufficient, formal and informal, regulatory powers to resolve the problem.
159. In conclusion, the Authority was required to address the question of workability only as a conditional reflex of its erroneous prior decision that there could only be one DEH. The question of workability does not arise if there can be more than one DEH. It is, accordingly, a rod of the Authority’s own making for its own back. It necessarily follows that the Authority misdirected itself in applying a test of workability.

### **O. Materiality of legal errors**

160. Having arrived at the conclusion that the Defendant erred in law in its approach to be adopted to the dispute between HAL and UKPNS I have to consider whether those errors are material. I can deal with this briefly. In my judgment the errors are material. When the exercise is re-performed it might lead to a different practical outcome. It could, for instance, lead to the conclusion that both UKPNS and HAL are DEHs. It seems to me that this is a sufficiently important matter for the Authority to be given a second chance to articulate the relevant legal principles and arrive at a conclusion. I have refrained from expressing any view as to the factual merits or demerits of the competing arguments of the parties. These will be for the Authority to consider on the remission.

### **P. Remission**

161. I have concluded that the Defendant erred in law. Accordingly, I grant permission for the Claimant to apply for judicial review. Further, I grant the claim and remit the matter to be reconsidered by the Authority.