Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 11 July 2013[1]

Case C-262/12

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(Request for a preliminary ruling from the Conseil d'État (France))

(State aid — Article 107(1) TFEU — Concept of aid granted by a Member State or through State resources — Electricity generated by wind power — Obligation to purchase at a price higher than the market price — Set-off in full — PreussenElektra case-law — Charges payable by final consumers of electricity)

1. The present question referred for a preliminary ruling by the Conseil d'État (France) concerns the interpretation of only one of the criteria constituting the concept of State aid, namely: aid granted by a Member State or through State resources, within the meaning of Article 107(1) TFEU in the context of the internal electricity market. The main proceedings arise out of the application submitted to the Conseil d'État by Association Vent de Colère! — Fédération Nationale and 11 other applicants ('Vent de Colère! and Others') against two ministerial orders laying down the conditions for the purchase of electricity generated by wind-power installations ('the contested orders').[2]

2. The main question submitted to the Court concerns the method of financing compensation for the additional costs imposed on distributors of electricity generated by wind power in France by reason of the obligation to purchase that electricity at a price higher than the market price. That obligation was imposed on distributors by Law No 2000-108 of 10 February 2000 relating to the modernisation and development of the public electricity service.[3] Under that Law, the additional costs arising from the obligation to purchase were offset by a public service fund for the generation of electricity managed by the Caisse des dépôts et des consignations (a public long-term investment group 'CDC') and funded by charges payable by the producers, suppliers and distributors referred to in that Law.

1 — Original language: French.

2 — Order of 17 November 2008 of the Minister of the Environment, Energy, Sustainable Development and Land Use, supplemented by an order of 23 December 2008 of the Minister for the Economy, Industry and Employment (JORF 290, 13 December 2008, p. 19032).

3 — The legal basis of the system in question is Law No 2000-108 of 10 February 2000 relating to the modernisation and development of the public service of electricity (JORF 35, 11 February 2000, p.2143), in conjunction with others. Pursuant to Article 10 of that Law, Article 8 of Decree No 2001-410 (JORF 110, 12 May 2001, p. 7543), empowers the appropriate ministers to lay down the tariffs for the purchase of electricity; consequently they made the contested orders.

3. However, the scheme at issue before the referring court, resulting from the amendment of Law No 2000-108 (‘Law No 2000-108, as amended’),[4] now provides that the additional costs arising from the abovementioned obligation to purchase are to be offset in full by charges payable by the final consumers of electricity within national territory. The applicants in the main proceedings consider that this is State aid within the meaning of Article 107(1) TFEU.

4. Consequently, the Court must answer the question referred in the light of the case-law concerning mechanisms granted indirectly, by the creation of funds or bodies responsible for managing funds that may constitute aid within the meaning of Article 107(1) TFEU,[5] and concerning aid measures financed by means of parafiscal taxes or compulsory charges.[6] Also relevant is the line of cases following on from *PreussenElektra*[7] in which, as Advocate General Jacobs observed, the sums serving to finance the support system in the renewable energy sector were at no time at the disposal of a government authority. They never in fact left the private sphere.[8]

I – Legal context

5. The funding system at issue before the Conseil d’Etat may be summarised as follows.

A – *The obligation to purchase electricity from installations using wind power*

6. Under Article 10 of Law No 2000-108, as amended, electricity producers in national territory using wind-power electricity-generating installations located within a wind-power development zone[9] have the advantage of an obligation to purchase the electricity generated in that way, if they so request and provided that they themselves fulfil certain obligations.[10]

7. The undertakings required to purchase electricity are the distributors operating the network to which the installation is connected, namely: Electricité de France (‘EDF’) and the non-nationalised distributors[11] selling the electricity in their respective supply areas. Those provisions are given effect by the conclusion of a purchase contract which is subject to the conditions laid down by the Law.[12] The procedure for calculating the tariff is laid down by a method set out by orders of the Minister for the Economy and the Minister of Energy, which were made under Article 8 of Decree No 2001-410 of 10 May 2001, ‘after consultation with the Conseil supérieur de l’énergie [Higher Council of Energy]

4 — Law No 2000-108 was amended by Law No 2003-8 of 3 January 2003 (JORF, 4 January 2003, p. 265) and by Law No 2005-781 of 13 July 2005 (JORF 163, 14 July 2005, p. 11570).

5 — Joined Cases 67/85, 68/85 and 70/85 *van der Kooy and Others* v *Commission* [1988] ECR 219, concerning the preferential tariff for natural gas applied to glasshouse growers in the Netherlands; Case 78/76 *Steinike and Weinlig* [1977] ECR 595, concerning the implementation of a State policy for the promotion of national agriculture, the national food industry and forestry; Case C-482/99 *France* v *Commission* [2002] ECR I-4397 (‘*Stardust Marine*’), concerning support for the clothing and textile sector; Case C-126/01 *GEMO* [2003] ECR I-13769, concerning a system for financing a public carcass disposal service by means of a tax on meat purchases; Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497, concerning stranded costs on the electricity market in the Netherlands.

6 — Case 173/73 *Italy* v *Commission* [1974] ECR 709.

7 — Case C-379/98 [2001] ECR I-2099, concerning the obligation of private undertakings to purchase electricity from renewable energy sources; Case C-345/02 *Pearle and Others* [2004] ECR I-7139, concerning the funding of an advertising campaign decided upon by the members of a professional organisation, and Case C-677/11 *Doux Elevage et Coopérative agricole UKL-ARREE* [2013] ECR, concerning a decision of a national authority extending to all the members of an inter-trade organisation recognised by the State an agreement introducing a compulsory levy for the purpose of financing activities for promoting and defending the interests of the sector in question.

8 — Opinion in *PreussenElektra*, paragraph 166.

9 — As defined in Article 10-1 of Law No 2000-108 (repealed), with no limit as to capacity.

10 — Arising from Decree No 410-2001 of 10 May 2001 and the orders made pursuant to Article 8 of the Decree, including those which are the subject of the present proceedings.

11 — That is to say, mixed-economy distribution companies in which the State or public authorities hold a majority, boards constituted by local authorities, cooperatives of users and agricultural cooperatives which are electricity licensees as defined in Article 23 of the Law of 8 April 1946 on the nationalisation of electricity and gas (repealed).

12 — The principles governing the fixing of the electricity purchase tariff are laid down in Article 10 of Law No 2000-108, as amended. In 2008 the term of the purchase contract was 15 or 20 years, but the eligible installations could have a contract only once (see the contested orders).

and the Commission de régulation de l'énergie [the French energy regulator' ('CRE'). The fifth paragraph of Article 10 of Law No 2000-108 also requires EDF to buy back surplus electricity on the same conditions as for the conclusion of a compulsory purchase contract, although buying back by EDF also entitles it to compensation.

B – *Offsetting mechanisms in favour of electricity operators subject to the obligation to purchase*

8. It appears from the penultimate paragraph of the abovementioned Article 10 that the additional costs to electricity distributors arising from the implementation of the obligation to purchase may be offset in full under Article 5(1) of Law No 2000-108, as amended, as 'charges imputable to the public service obligations of the electricity operators'.

9. In accordance with that provision, the calculation of the additional cost giving rise to compensation takes into account 'the costs that EDF or, as the case may be, the non-nationalised distributors are spared […] by reference to the market prices of electricity or, for non-nationalised distributors, by reference to the purchase tariffs referred to in Article 4 of Law [No 2000-108, as amended] in proportion to the share of electricity purchased at those tariffs in their total supply, after deduction of the quantities purchased under Articles 8 and 10 [of that Law]', including 'where the installations concerned are operated by Electricité de France or by a non-nationalised distributor […]'.

10. The total costs borne by the operators concerned are calculated on the basis of appropriate accounts kept by the abovementioned operators, drawn up in accordance with the rules laid down by the CRE and under its supervision. The Minister of Energy determines the total costs on the proposal of the CRE, submitted annually. At the hearing it was made clear that only the difference between the cost arising from the obligation to purchase and the charges received from its own customers is paid from the specific CDC account.

11. The amounts corresponding to the charges giving a right to compensation are repaid to the operators concerned four times a year by CDC, which maintains for that purpose a specific account into which the charges payable by the final consumer are paid and from which CDC traces the different operations.

C – *The charge payable by final consumers*

12. Finally, the compensation for operators under a purchase obligation is passed on to the final consumers of electricity established in national territory in accordance with the rules laid down in Article 5 of Law No 2000-108, as amended.

13. The amount of the charge, which is fixed each year by the Minister for Energy on the proposal of the CRE, is calculated 'in proportion to the quantity consumed' and 'so that the charges cover all the expenses … and also the management costs incurred by CDC … and the budget of the National Energy Ombudsman', within the limits of two ceilings. [13] In principle, the amounts collected in the course of one year must cover all the expenses relating to that year, but an accrual system enables unrecovered expenses for the current year to be imputed to the charge payable for the following year.

13 — Under Article 5 of Law No 2000-108, as amended, the charge payable for each consumption site by the final consumers referred to in the first subparagraph of Article 22(1) may not exceed EUR 500 000 and the charge applicable to each kilowatt hour may not exceed 7% of the sale tariff of the kilowatt hour, exclusive of standing charges and taxes, corresponding to a contract for a capacity of 6 kWh without curtailment or hourly/seasonal variation of prices.

14. The charge is paid by the consumer when settling its electricity bill or for the use of networks by reference to the amount of electricity supplied to the consumer. There are special provisions for the cross-border purchase of electricity and for consumers that generate their own power or power generated by a producer to which they are directly connected.

II – The case in the main proceedings, the question referred and the procedure before the Court

15. By application of 6 February 2009, Vent de Colère! and Others brought an action before the Conseil d'État for misuse of powers, seeking the annulment of the contested orders.

16. According to the referring court, the purchase of electricity generated by wind-power installations at a price higher than the market price is an advantage that may affect trade between Member States and may also affect competition. With regard to the criterion of aid granted by a Member State or through State resources, the Conseil d'État observes that, in its UNIDEN decision of 21 May 2003,[14] it applied *PreussenElektra*, ruling that the financial burden of the purchase obligation in favour of installations using wind power was shared among a number of undertakings, without Government funds contributing, directly or indirectly, to financing the aid. The Conseil d'État therefore found that the previous system for the purchase of electricity generated by installations using wind power was not State aid within the meaning of Article 107(1) TFEU.

17. However, the referring court is uncertain as to the consequences of the amendment of Law No 2000-108, particularly with regard to the *Essent Netwerk Noord and Others* judgment, in which the Court found that financing by means of a surcharge imposed by the State on purchasers of electricity, constituting a tax, and the funds also remaining under State control, had to be regarded as aid granted by the State through State resources.

18. That is the context of the decision of 15 May 2012 of the referring court to stay judgment and to refer the following question to the Court for a preliminary ruling:

'In the light of the change in the mechanism for financing in full the additional costs imposed on Électricité de France and the non-nationalised distributors referred to in Article 23 of Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas by the obligation to purchase at a price higher than the market price the electricity generated by wind-power installations, as a result of Law No 2003-8 of 3 January 2003, must that mechanism now be regarded as an intervention by the State or through State resources within the meaning, and for the application, of [Article 107(1) TFEU]?'

19. The present request for a preliminary ruling was lodged at the Registry of the Court of Justice on 29 May 2012. Written observations were submitted by Vent de Colère! and Others, the Syndicat des énergies renouvelables,[15] the French and Greek Governments and the Commission.

20. At the hearing of 24 April 2013, Vent de Colère! and Others, the Syndicat des énergies renouvelable, the French and Greek Governments and the Commission stated their views.

14 — Decision No 237466, 21 May 2003, UNIDEN.

15 — After being granted leave to intervene before the referring court in view of its interest in upholding the contested orders.

III – Analysis

A – *Treatment of the question referred*

21. As a preliminary point, I note that certain parties having lodged written observations before the Court ask it either to reword the question from the Conseil d'État or to extend its scope.

22. Vent de Colère! and Others propose, first, the inclusion of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*[16] in the analysis in order to determine whether an obligation to purchase at a fixed price, such as that at issue in the main proceedings, meets the requirements of that case-law. Secondly, that party raises a question regarding Directive 2003/54/EC[17] and suggests that the Court should settle the question whether that directive requires the national court to disregard a national measure concerning an obligation to purchase electricity, adopted contrary to the opinion of the national regulatory authority, namely, the CRE.

23. The Commission, for its part, proposes rewording the question on the ground that the change in the method of funding is not decisive with regard to the reply to be given in the present case. Consequently, the Commission proposes that the Court should give a ruling on the national legislation as a whole, *ab initio*, in so far as it provides for the additional costs imposed on operators within the meaning of Article 2 of Directive 2009/72 to be set off in full.

24. On that point it must be observed that when the Court is requested to give a preliminary ruling, its task is to provide the national court with guidance on the scope of the rules of Union law so as to enable that court to apply the rules correctly to the facts in the case before it, and it is not for the Court of Justice to apply those rules itself, *a fortiori* because it does not necessarily have available to it all the information essential for that purpose.[18]

25. In the present case, given that, on the one hand, the file does not contain sufficient information to enable the Court to determine whether the compensation for the obligation to purchase in question could be covered by the concept of economic service of general interest (ESGI) within the meaning of *Altmark* and that, secondly, neither the question of the ESGI nor that of Directive 2003/54 was considered by the parties to the present proceedings, the Court cannot give a ruling in that respect.

26. In addition, in the context of the procedure for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer that will be of use to it and enable it to determine the case before it.[19] The wording of the question, as chosen by the referring court, must be presumed to be relevant and also to serve a 'useful purpose' for the decision in the main proceedings.

27. Consequently, as the wording of the question referred seems to me clear and well delimited, it is not for the Court to widen the scope of the argument.

16 — Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

17 — Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity (OJ 2003 L 176, p. 37), repealed by Directive 2009/72/EC of 13 July 2009 concerning common rules for the market in electricity (OJ 2009 L 211, p. 55).

18 — Case C-259/05 *Omni Metal Service* [2007] ECR I-4945, paragraph 15.

19 — Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30.

B – *Categorisation of the measure at issue by reference to the case-law on the concept of aid granted by a Member State or through State resources within the meaning of Article 107(1) TFEU*

28. First of all, the viewpoints of the parties to the present proceedings are diametrically opposed with regard to the reply to the question from the referring court. The Commission and Vent de Colère! and Others both consider that there is no doubt that State resources are used in the funding system in question. On the other hand, the French Government and the Syndicat des énergies renouvelables take the opposite view. The Greek Government suggests that the final categorisation of the measure should be left to the national court.

29. The Court has consistently held that categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires 'all the conditions set out in that provision to be fulfilled'.[20] For a measure to be categorised as State aid, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition.[21]

30. The question from the referring court concerning only the first of those conditions, it must be observed that, if advantages are to be categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, their grant must be attributable to the State.[22] It is settled case-law that both those conditions must be fulfilled.[23]

1. Whether the measure may be attributed to the State

31. As regards the question whether the measure may be attributed to the State, the concept includes aid granted directly by the State in the broad sense[24] and also aid granted by public or private bodies established or appointed by the State to administer the aid.[25] It should be noted that the case-law has passed from an institutional approach to attributability[26] to the approach that the latter cannot be presumed, that is to say, inferred from the mere fact that the measure in question was adopted by a public undertaking.[27] However, it is clear that that test of State control does not apply to public authorities if they form a constituent part of the State itself.

32. In the present case, the information in the file shows that the fixing of the charge in question was the result of acts attributable to the French State. As the charge to final consumers was instituted by Law No 2000-108, as amended, there are grounds for considering that the State originated the scheme at issue.

20 — Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraph 38.

21 — See, to that effect, Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 52 and cases cited.

22 — Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 11; *GEMO*, paragraph 24; and *Pearle and Others*, paragraph 35 and cases cited.

23 — On the basis of *France* v *Commission*, paragraph 24.

24 — Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraphs 17-18.

25 — *Steinike & Weinlig*, paragraph 21.

26 — *Italy* v *Commission*, paragraph 12, and Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 14. See M. Dony, *Contrôle des aides d'État*, Editions de l'Université de Bruxelles 2006, 3rd ed., p. 26 et seq.

27 — *Stardust Marine*, paragraph 52: the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be attributed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.

2. The requirement of the State origin of the resources

33. With regard to the requirement that the resources should originate from the State, the distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State.[28]

34. Article 107 TFEU includes all the financial resources which the State may in fact use to support undertakings. That those resources constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources and for the measure to fall within the scope of Article 107(1) TFEU.[29]

35. That appears to be the situation here. As shown by the file, under Law No 2000-108, as amended, the obligation to purchase electricity is offset by charges payable by all final consumers of electricity established in France.[30] The amount of the charge is determined by ministerial decree. The funds collected in that way are administered by CDC which for that purpose has at its disposal a specific account fed by the charges payable by final consumers and from which it traces the different operations. The amounts enabling the financing of the additional costs resulting for EDF and the other distributors from the obligation to purchase wind-power energy are paid to the operators concerned by CDC four times a year. The amount of the charge is calculated in proportion to the quantity of electricity consumed, subject to a maximum of EUR 500 000 for each consumer site.

a) Control exercised by the State

36. As the State has direct or indirect control of the resources used,[31] public-law bodies play an important part in the system laid down by Law No 2000-108, as amended.

37. As appears from the file, the amount of the tax that every final consumer of electricity must pay in France is determined annually by an order of the Minister of Energy on a proposal of the CRE, which is the independent administrative authority responsible for ensuring the efficient functioning of the electricity and gas markets in France.[32] As explained at the hearing, in default of a ministerial order, the charge is increased for the following year by EUR 3 per MGWh. As pointed out at the hearing, although that does not ensure exact equivalence between the additional costs borne by the distributors and the charge paid over to the latter, Law No 2000-108, as amended, lays down the principle that the purchase obligation must be covered in full, which in itself proves that the State guarantees the scheme as a whole.

38. Furthermore, Law No 2000-108, as amended, provides mechanisms for administrative penalties for non-payment of the charge.[33] Under Article 5 of Law No 2000-108, as amended, if a person liable fails to make payment, the Minister of Energy imposes an administrative penalty in the conditions laid down by Article 41 of the Law.[34]

28 — Case 290/83 *Commission* v *France* [1985] ECR 439, and Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19.

29 — Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 52.

30 — In the period from 2000 to 2003 the charges were paid by the operators who supplied electricity to final customers established in France, by auto-producers and by final customers who imported electricity or purchased electricity within the Community.

31 — *Stardust Marine*, paragraph 37.

32 — The CRE is the national regulatory authority within the meaning of Article 23 of Directive 2003/54, which requires the Member State to designate one or more competent bodies with the function of regulatory authorities. The autorities are completely independent of the electricity industry. However, as the law lays down an upper limit for any increase if there is no ministerial order, the CRE's role appears to be affected.

33 — See, by contrary inference, *Doux Elevage*, paragraph 32.

34 — It is true that, by virtue of Article 4 of Order No 2011-504 of 9 May 2011, Article 41 of Law No 2000-108, as amended, was repealed. However, By virtue of Article 6 of the Order, the repeal has not yet taken effect.

39. According to the case-law, funds that are financed through compulsory contributions imposed by State legislation and managed and apportioned in accordance with the provisions of that legislation must be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are administered by institutions distinct from the public authorities.[35]

40. That finding is not called into question by the Court's reasoning in the recent case of *Doux Elevage*, concerning the lawfulness of the decision of a national authority extending to all traders in the agricultural industry of turkey farming and production an agreement introducing a compulsory contribution for the purpose of financing certain activities on behalf of the interests of that industry. In that case, the public authorities acted only as 'vehicles' in order to make the contributions introduced by the inter-trade organisations compulsory.[36]

b) The status of the body acting in the transfer of funds

41. Secondly, regarding the system for transferring the funds intended for financing the aid measure between the persons liable for payment and the recipients, it must be observed that the resources obtained from the charges imposed on all consumers pass through the body established under public law and expressly authorised by the State, that is to say, CDC.

42. I wish to state in this connection that it is only if the benefit is granted by a private body that it is necessary in order to determine whether the resources used are of State origin, to consider in detail whether the State has assigned the administration of the aid scheme to that private body. This presupposes that the State makes the resources necessary for administering the aid directly or indirectly available to the private body which it designates.[37]

43. That was the case, in particular, in *Essent Netwerk Noord and Others*, where the recipient of the tax received and the administrator of the disputed monies was a company designated by law (namely, SEP). However, the whole of SEP's capital was held by four national electricity generation undertakings which operated in the national market before liberalisation and were also responsible for importing and transmitting electricity. Consequently, the Court examined the degree of independence of the designated company, which was found to be strictly monitored in carrying out its task, for it was required to have the detailed account of the sums received and transferred certified by an auditor and was not entitled to use the proceeds from the charge for purposes other than those provided for by law.[38]

44. In the present case, inasmuch as the body responsible for administering the accounts and distributing the monies is a public establishment *par excellence*,[39] and, above all, because the monies in question are left entirely at the disposal of the national authorities,[40] examination of the details of CDC's functioning is, in my opinion, irrelevant with regard to the criterion of the State origin of the resources.[41]

35 — *Italy* v *Commission*, paragraph 35.

36 — Opinion of Advocate General Wathelet in *Doux Elevage*, paragraph 90.

37 — See, to that effect, Case 173/73 *Italy* v *Commission* paragraphs 33-35, and *Steinike & Weinlig*, paragraph 22.

38 — *Essent Netwerk Noord and Others*, paragraphs 68-70.

39 — For a detailed description of CDC, see Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109.

40 — By contrary inference, see *Pearle*, paragraph 36.

41 — For comparison, in *van der Kooy*, before the Court the parties submitted that the company that imposed the tariff capable of constituting a State aid was a private-law company in which the Netherlands State held only 50% of the shares and that the tariff was the result of a private-law agreement between different operators, the Netherlands State not being a party. The Court therefore had to consider those factors, which led it to conclude that the State was fully implicated in imposing the tariff in issue.

45. Regarding the funding mechanism, I would add that the present case differs expressly from *Pearle*, which concerned an arrangement for financing an advertising campaign for the benefit of the undertakings in the field of optical services. In that case, the monies were actually collected by a public-law professional body from its members, who benefited from the campaign, by means of a compulsory levy earmarked for the organisation of the campaign. According to the Court, the monies were neither revenue for the State nor monies which remained under State control.[42] However, the Court pointed out that the initiative in promoting the advertising campaign in question came from a private association of opticians and not from the public-law professional body. Consequently, unlike the mechanism in question in the present case, the decisive factor in *Pearle* was that the measure could not be attributed to the Netherlands State.[43] The public-law body served only as a vehicle for levying and allocating resources collected for a purely commercial objective previously determined by operators in the professional sector in question and was in no way part of a policy decided upon by the Netherlands authorities.[44]

46. Consequently, in view of the particular features of the *Essent Netwerk Noord and Others* and *Pearle* cases, I cannot agree with a general assertion that the public nature of a body means that the resources available to it must be categorised as State resources.[45]

47. The function of CDC in the present case bears out the argument that these resources are public although, as pointed out at the hearing, CDC receives only part of the monies passing through to the recipients of the charge. If, on the one hand, it is beyond doubt that the grant may be attributed to the State and if, on the other, the intermediary bodies involved in the administration of the monies used to finance the measure are public-law bodies, the criterion of State resources is presumed to be satisfied.

c) The nature of the resources in question

48. Third, regarding the source and the extent of the resources used to fund a measure which might constitute State aid, it must be observed that, contrary to the arguments of the parties in favour of the view that there are no State resources in the present case, it cannot be treated in the same way as the mechanism examined in *PreussenElektra*, in which the Court found that the arrangement in question did not entail a transfer of State resources to undertakings generating electricity.[46]

49. In that case, the Court examined the requirement that private electricity supply undertakings should purchase electricity produced in their area of supply at minimum prices higher than the real economic value of that type of electricity. The mechanism in question also provided that the financial burden resulting from that obligation was to be shared between those electricity supply undertakings and the private electricity network operators. Furthermore, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources,[47] the resources from individual payments were not merged in a global resource separate from the assets of the undertakings concerned and managed by a separate body and the final consumers did not fund the mechanism in question by means of a generally applicable uniform charge which was uniformly determined.[48]

42 — *Essent Netwerk Noord and Others*, paragraph 72.

43 — See also paragraph 110 of the Opinion in *Essent Netwerk Noord and Others*.

44 — See paragraph 76 of the Opinion in *Pearle*.

45 — See paragraph 104 of the Opinion of Advocate General Mengozzi in *Essent Netwerk Noord and Others*.

46 — *PreussenElektra*, paragraph 59.

47 — See *Essent Netwerk Noord and Others*, paragraph 74.

48 — See, by contrary inference, *Pearle*, paragraph 36.

50. Therefore, the primary factor distinguishing the present case from the mechanism examined by the Court in *PreussenElektra*[49] is that the burden of financing the obligation to purchase electricity from wind power at a price higher than the market price applies to all consumers of electricity in France, irrespective of whether they purchase green energy or not, knowing that, in the liberalised electricity market, the achievement of which is one of the primary objectives of the Union,[50] competition exists between the producers and the suppliers of energy.

51. While conceding that, physically, electricity from different sources is mixed together in the distribution network, I note that, with regard to the mechanism in issue in the main proceedings, it is impossible for the suppliers to differentiate, for tariff purposes, between the different categories of consumers, and that it is impossible for consumers to opt for or against purchasing renewable energy. The rules applicable in the liberalised internal market in electricity are designed to offer consumers a real choice at fair and competitive prices, to stimulate the production of clean energy and to strengthen the security of supply. The objective of disclosing information on energy sources for the production of electricity had already been pointed out in Directive 2003/54.[51]

52. Therefore, unlike the funding system set up by the Rural Code, which was examined by the Court in *Doux Elevage*, and was found by Advocate General Wathelet to be a ‘closed’ system in the sense that the sums in question were always managed and controlled by private entities,[52] the system established by Law No 2000-108, as amended, could be described as ‘open’.

53. I note that in *Doux Elevage*, which clearly follows the line of the *Pearle* case-law, the contributions originated from private economic operators — whether or not members of the inter-trade organisation involved — engaged in economic activity on the markets concerned. In addition, the monies did not pass through the State budget or through another public body, which led the Court to find that the monies remained private throughout their life cycle.[53]

54. All in all, it must be found that the system established by Law No 2000-108, as amended, introduces a tax on electricity consumption which is offset by a general charge in accordance with rules laid down in a uniform manner by the State and which is payable by all electricity consumers in national territory. The configuration of the charge entirely rules out its being categorised as a measure confined to one category of undertakings, to be imposed, administered and controlled by private operators.

55. Finally, I observe that the aim pursued by State intervention does not suffice to prevent its immediately being categorised as aid. Article 107(1) TFEU makes no distinction according to the causes or aims of the aid in question, but defines it in relation to its effects.[54]

56. I cannot, therefore, share the viewpoint of the French Government which, while pointing out that the obligation to purchase is neutral for the State budget, in that the State does not waive revenue,[55] submits that the charge on final consumers is only a way of recovering the additional costs borne by the undertakings required to purchase electricity generated by wind power. Finally, the designation of

49 — Another factor illustrating the difference between the two mechanisms lies in the institution of a body such as CDC, which is responsible for administering and managing the monies originating from the tax.

50 — The internal market in energy was established gradually, first by Directive 96/92/EC (OJ 1997 L 27, p. 20), which was replaced by Directive 2003/54. In view of the aim of pursuing the liberalisation of the internal market in electricity, Directive 2009/72, repealing Directive 2003/54, was adopted. The period for transposing it expired in March 2011.

51 — While recognising that Directive 2009/72 is not applicable to the present case because of the time factor, I note that, under Article 3(9), the Member States are to ensure that electricity suppliers specify in or with the bills made available to final customers the contribution of each energy source to the supplier’s overall fuel mix.

52 — See the Opinion in *Doux Elevage*, paragraph 66.

53 — *Doux Elevage*, paragraph 32.

54 — Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraphs 84 and 85 and cases cited.

55 — On that point, see the Opinion of Advocate General Jacobs in *PreussenElektra*, paragraph 162.

CDC as the entity responsible for centralising charges and sharing out the monies collected arises, according to the French Government, from practical considerations relating to the number of undertakings under a purchase obligation. Those submissions explaining the national legislature's motives cannot support the argument that there are no State resources in the funding system in question. Furthermore, although CDC's function appears to be technical and for accounting, both the distribution of income and the determination of the costs in the system depend on decisions of the French State in the form of decrees of the competent minister.

57. Therefore I consider that the reply to the question from the referring court must be that the mechanism resulting from Law No 2000-108, as amended, is covered by the concept of aid granted by the State or through State resources within the meaning of Article 107(1) TFEU.

IV – The application for limitation of the effects in time

58. Should the Court find that a method of funding, such as that provided for by the national legislation in issue in the main proceedings, constitutes aid through State resources, the French Government asks the Court to limit in time the effects of the judgment. At the hearing the French Government made it clear that, in its opinion, the referring court considers that the other conditions of the concept of State aid are fulfilled, which leads to categorisation of the system concerned as State aid which, without notification of the Commission, will be found illegal.

59. I have no hesitation in considering that the application to limit in time the effects of the judgment is unfounded for two reasons.

60. First, the application cannot succeed in view of the scope of the question referred, the Court being required to give a ruling on only one element of the concept of State aid.

61. It is true that the Conseil d'Etat appears to have examined the criteria set out in Article 107(1) TFEU. However, a finding of a national court with regard to the categorisation of the measure as State aid is only one aspect of the complex procedure for the review of State aid.

62. In addition, the documents in the file seem to indicate that the issue of a service of general economic interest was not settled by the Conseil d'État.

63. On that point, it must be borne in mind that, with regard to the review of the Member States' fulfilment of their obligations under Articles 107 TFEU and 108 TFEU, it is necessary to take into account the complementary and separate roles of the national courts and the Commission.[56] Whilst the assessment of compatibility falls within the exclusive competence of the Commission and is thus subject to review by the Court, it is for the national courts to ensure that the rights of individuals are safeguarded when there has been a breach of the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) TFEU of the Treaty. In that way, a national court may have cause to interpret the concept of aid.[57]

56 — As noted by the Court in Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41 et seq.

57 — See, to that effect, *SFEI and Others*, paragraphs 49 to 51.

64. In principle, national courts must allow an application for repayment of aid paid in breach of Article 108(3) TFEU.[58] They must therefore ensure that all appropriate inferences are drawn, in accordance with their national law, from an infringement of the last sentence of Article 108(3) TFEU, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision.[59]

65. However, the finding by the Conseil d'État that the system resulting from Law No 2000-108, as amended, falls within the definition of State aid does not rule out a positive decision by the Commission if the system is examined following notification.

66. On the other hand, it is clear that, if the direct effect of the last sentence of Article 108(3) TFEU is not to be compromised, the Commission's final decision does not have the effect of regularising, *ex post facto*, implementing measures that were invalid because they had been taken in breach of the prohibition laid down by that article. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness.[60]

67. Finally, in *CELF*,[61] the Court held that, when a claim based on the last sentence of Article 108(3) TFEU is examined after the Commission has adopted a positive decision, the national court, notwithstanding the declaration of the compatibility of the aid in question with the common market, must adjudicate on the validity of the implementing measures and on the recovery of the financial support granted. However, Union law does not impose on the national court an obligation of full recovery of the unlawful aid,[62] but requires the national court to order the recipient of aid that is compatible with the common market, but unlawfully given effect, to pay interest for the period of illegality.[63]

68. In the second place, I would observe that the interpretation of a rule of Union law given by the Court in the exercise of the jurisdiction conferred on it by Article 267 TFEU clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions under which an action relating to the application of that rule may be brought before the courts having jurisdiction are satisfied.[64]

69. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the legal order of the Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties.[65]

58 — *SFEI and Others*, paragraph 70.

59 — *SFEI and Others*, paragraph 40; Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 64; and Case C-368/04 *Transalpine Ölleitung in Österreich* [206] ECR I-9957, paragraph 47.

60 — *van Calster*, paragraph 63.

61 — Case C-199/06 *CELF and Minister of Culture and Communication* [2008] ECR I-469.

62 — *CELF*, paragraph 46.

63 — See, to that effect, *SFEI and Others*, paragraph 75, and *Transalpine Ölleitung in Österreich*, paragraph 56. However, the Court added that, in the context of its national law, the national court may, if necessary, also order recovery of the unlawful aid, without prejudice to the Member State's right to put it into effect again at a later date. It may also have to grant claims for indemnification by reason of the unlawful nature of the aid.

64 — Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 44; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 41; and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 34.

65 — Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51, and Case C-2/09 *Kalinchev* [2010] ECR I-4939, paragraph 50.

70. More particularly, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices incompatible with Union legislation by reason of objective, significant uncertainty regarding the implications of provisions of Union law, uncertainty to which the conduct of other Member States or the Commission may even have contributed.[66]

71. Although, hypothetically, I could take the view that the criterion concerning the large number of legal relationships formed under the disputed legislation is fulfilled in the present case, the provisions of Union law applicable in the area of State aid, particularly with regard to the obligation of notification under Article 108(3) TFEU, cannot be regarded as in any way uncertain.[67]

72. I therefore propose that the Court dismiss the application for limitation in time of the effects of its judgment.

V – Conclusion

73. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Conseil d'État as follows:

A system for financing the obligation to purchase electricity generated by installations using wind power, which is based on a tax levied on all final consumers of electricity in national territory, such as that resulting from Law No 2000-108 relating to the modernisation and development of the public service of electricity, as amended, is covered by the concept of aid granted by a Member State or through State resources within the meaning of Article 107(1) TFEU.

66 — Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42; *Kalinchev*, paragraph 51; and Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC* [2012] ECR, paragraphs 59-60.

67 — On that point I note an established administrative practice recounted in the Commission's observations. In the last 10 years it has examined a large number of similar systems of support in other Member States. See, for example, a final decision adopted after a formal examination procedure, Decision 2007/580/EC of 24 April 2007 on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — State aid C 7/2005 (OJ 2007 L 219, p. 9, recitals 66 to 78) and, as an example of a decision not to raise objections, the Decision of 2 July 2009 — N 143/2009 — Cyprus — Aid scheme to encourage electricity generation from large commercial wind, solar, photovoltaic systems and biomass.