Reports of Cases

OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA
delivered on 27 February 2018[1]

Case C-135/16

Georgsmarienhütte GmbH,
Stahlwerk Bous GmbH,
Schmiedag GmbH,
Harz Guss Zorge GmbH
v
Federal Republic of Germany

(Request for a preliminary ruling
from the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main, Germany))

(Reference for a preliminary ruling on validity — Commission Decision of 25 November 2014 in State aid proceedings SA.33995 (2013/C) (ex 2013/NN) — German aid for renewable energy sources — Cap on the EEG surcharge for energy-intensive undertakings — Admissibility of the reference for a preliminary ruling — Application of the case-law in *TWD* — Concept of State aid — Advantage — Selectivity of aid — Transfer of State resources — Financial flows between private operators controlled by public authorities)

1. The German legislation at issue, which has been in force since 1 January 2012, introduced a mechanism to promote electricity from renewable energy sources ('EEG electricity'). In particular, it established a support scheme for the benefit of EEG electricity producers and, by means of feed-in tariffs and market premiums, guaranteed that such producers would be paid a price higher than that for electricity sold on the market.

2. To finance that support scheme, a surcharge ('the EEG surcharge') was introduced which, in practice, would have to be paid for by final consumers. Railway undertakings and undertakings consuming large quantities of electricity ('energy-intensive undertakings')[2] were also, in principle, subject to the EEG surcharge. However, the German legislature decided to reduce the amount of surcharge payable by the latter so as to help cut their costs and thus maintain their competitiveness.

3. On 25 November 2014, the European Commission took the view that the reduction of the EEG surcharge for those undertakings constituted State aid which was compatible with the internal market only if it satisfied certain conditions, set out in Article 3 of Decision (EU) 2015/1585 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users).[3]

1 Original language: Spanish.

2 I used this neologism, an Italian term, in my Opinion in *IRCCS - Fondazione Santa Lucia* (C-189/15, EU:C:2016:287). Although the Italian scheme forming the subject of that reference for a preliminary ruling had features similar to the scheme at issue here, that case was not concerned with issues relating to its classification as State aid.

3 OJ 2015 L 250, p. 122; 'Decision 2015/1585'.

4. Any aid (consisting in the reduction of the EEG surcharge) which did not satisfy the conditions set out in Decision 2015/1585 was declared incompatible with the internal market. As this was the case with certain undertakings in the Georgsmarienhütte GmbH group, the German authorities, acting in accordance with that decision, immediately sought to recover the amounts in question from them.

5. Some of the undertakings compelled to pay back the aid challenged the German authorities' decision before the referring court, on the ground that Decision 2015/1585 was invalid. For its part, the German Government brought an action for the annulment of that decision (Case T-47/15) before the General Court, which dismissed the action in its judgment of 10 May 2016.[4]

6. The referring court, receptive to the argument put forward by the undertakings which have applied to it to challenge Decision 2015/1585, has made a reference for a preliminary ruling on the validity of that decision which raises issues, both procedural and substantive, not previously addressed.

7. As regards the matters of procedure, the Court of Justice will have to rule on the application of the case-law in *TWD Textilwerke Deggendorf*[5] to a case such as this one, in which a number of undertakings have chosen to take action before the national courts against national decisions to recover aid declared unlawful by the Commission.

8. It will fall to the Court of Justice to determine in particular: a) whether to favour a direct action for annulment and declare the questions referred for a preliminary ruling, the content of which is similar, inadmissible; and b) whether, on the contrary, to give the undertakings the discretion to take action before the national courts and urge the latter to make a reference for a preliminary ruling on the validity of the Commission decision declaring the aid unlawful.

9. As regards the matters of substance, this dispute is another in a long series of cases relating to State aid in the energy sector. The reduction of the EEG surcharge for certain energy-intensive undertakings stands at the borderline between the measures analysed in the case-law in *PreussenElektra*[6] and those analysed in the case-law in *Association Vent De Colère! and Others*.[7] In this instance, the Court of Justice will have to settle the debate concerning the extent, greater or otherwise, of the State's control over the funds mobilised by private operators as a defining feature of the concept of State aid.

I. Legal framework

A. EU law: Decision 2015/1585

10. In accordance with Article 1:

'The State aid for the support of electricity production from renewable energy sources and from mine gas, including its financing mechanism, granted on the basis of the Erneuerbare-Energien-Gesetz (EEG Act 2012), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market subject to the implementation of the commitment set out in Annex I by Germany.'

4 *Germany* v *Commission* (T-47/15, EU:T:2016:281). The German Government has brought against that judgment an appeal which is still pending before the Court of Justice (Case C-405/16 P, *Germany* v *Commission*).

5 Judgment of 9 March 1994 (C-188/92, EU:C:1994:90; 'judgment in *TWD*').

6 Judgment of 13 March 2001 (C-379/98, EU:C:2001:160).

7 Judgment of 19 December 2013 (C-262/12, EU:C:2013:851).

11. According to Article 3:

'1. The State aid consisting of reductions in the surcharge for the funding of support for electricity from renewable sources (EEG surcharge) in the years 2013 and 2014 for energy-intensive users (Besondere Ausgleichsregelung, BesAR), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market if it falls into one of the four categories set out in this paragraph.

Where the State aid was granted to an undertaking which belongs to a sector listed in Annex 3 to the Guidelines on State aid for environmental protection and energy 2014-20 (2014 Guidelines), it is compatible with the internal market if the undertaking paid at least 15% of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which are subsequently passed on to their customers. If the undertaking paid less than 15% of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4% of its gross value added or, for undertakings having an electro-intensity of at least 20%, at least 0.5% of gross value added.

Where the State aid was granted to an undertaking which does not belong to a sector listed in Annex 3 to the 2014 Guidelines but had an electro-intensity of at least 20% in 2012 and belonged, in that year, to a sector with a trade intensity of at least 4% at Union level, it is compatible with the internal market if the undertaking paid at least 15% of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which were subsequently passed on to electricity consumers. If the undertaking paid less than 15% of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4% of its gross value added or, for undertakings having an electro-intensity of at least 20%, at least 0.5% of gross value added.Where the State aid was granted to an undertaking eligible for compatible State aid on the basis of the second or third subparagraph, but the amount of the EEG surcharge paid by that undertaking did not reach the level required by those subparagraphs, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125% of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150% of the surcharge that the undertaking actually paid in 2013.

Where the State aid was granted to an undertaking not eligible for compatible State aid on the basis of the second or third subparagraph, and where the undertaking paid less than 20% of the additional costs of the surcharge without reduction, the following parts of the aid are compatible:

(a) for 2013, the part of the aid which exceeds 125% of the surcharge that the undertaking actually paid in 2013;

(b) for 2014, the part of the aid which exceeds 150% of the surcharge that the undertaking actually paid in 2013.

2. Any aid that is not covered by paragraph 1 is incompatible with the internal market.'

12. In accordance with Article 6(1):

'Germany shall recover the incompatible aid referred to in Article 3(2) from the beneficiaries according to the method described in Annex III.'

13. Article 7 requires Germany to effect the immediate and effective recovery of the incompatible aid within a period of four months from the date of notification of the decision.

B. National law: Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus Erneuerbaren Energien[8]

14. Paragraph 40 provides:

‘Upon application, the Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office for Economic Affairs and Export Control) shall limit for a consumption point the EEG surcharge passed on by electricity suppliers to final consumers who are energy-intensive undertakings in the manufacturing sector that consume high volumes of electricity, in accordance with Paragraphs 41 and 42. The limitation is intended to reduce electricity costs for these undertakings in order to maintain their international and intermodal competitiveness, in so far as this is compatible with the goals of the Law and the limit imposed is compatible with the interests of electricity consumers as a whole.’

15. Paragraph 41 is worded as follows:‘(1) In the case of an undertaking in the manufacturing sector, the limitation applies only in so far as it demonstrates the fact that, and the extent to which:

1. in the last closed financial year,

   (a) the electricity purchased from an electricity supplier and used by the undertaking itself at a consumption point amounted to at least 1 GWh;

   (b) the ratio of the electricity costs to be borne by the undertaking to its gross added value was … at least 14%;

   (c) the EEG surcharge was passed on to the undertaking proportionately; and

2. a certified energy audit has taken place which has registered and evaluated the energy consumption and its potential for reduction; this shall not apply to undertakings whose electricity consumption is less than 10 GWh.

(2) Proof that the conditions laid down in subparagraph 1, point 1, have been met shall be provided through electricity supply contracts and electricity invoices for the last complete financial year together with a confirmation letter from an auditor, auditing firm, chartered accountant or firm of accountants based on the annual financial statements for the last … complete financial year. The conditions laid down in subparagraph 1, point 2, shall be demonstrated through the certification of the energy audit office.

…

(3) For undertakings whose purchase of electricity within the meaning of subparagraph 1, point 1a,

1. amounted to at least 1 GWh, the EEG surcharge for the electricity consumed by the undertaking itself at the relevant consumption point during the limitation period shall:

   (a) not be limited for the amount of electricity up to and including 1 GWh;

   (b) be limited to 10% of the EEG surcharge calculated pursuant to Paragraph 37(2) for the amount of electricity over 1 GWh up to and including 10 GWh;

   (c) be limited to 1% of the EEG surcharge calculated pursuant to Paragraph 37(2) for the amount of electricity over 10 GWh up to and including 100 GWh; and

8 Law laying down new rules governing the legal framework for promoting the production of electricity from renewable energy, of 28 July 2011. BGBl. 2011 I, p. 1634 (‘EEG Law of 2012’).

(d) be limited to 0.05 cents per kWh for the amount of electricity over 100 GWh; or

2. amounted to at least 100 GWh and whose ratio of electricity costs to gross added value amounted to more than 20%, the EEG surcharge calculated pursuant to Paragraph 37(2) shall be limited to 0.05 cents per kWh.

Proof shall be furnished in accordance, *mutatis mutandis*, with subparagraph 2.

(4) A consumption point is the total of all of an undertaking's electrical installations connected physically and geographically which are located on self-contained business premises and connected to the system of the system operator via one or more exit points.'

16. Paragraph 43 provides:'(1) The application provided for in Paragraph 40(1) in conjunction with Paragraph 41 or Paragraph 42, including all complete application documents, shall be made by 30 June of the year in progress (material cut-off date). The decision shall be given with effect to the person making the application, the electricity supply company and the transmission system operator responsible for energy balancing. The decision shall become effective as of 1 January of the following year for the duration of a year. The effects triggered by a previous decision shall not be taken into account in the calculation of the ratio of electricity costs to gross added value pursuant to Paragraph 41(1), point 1(b), and (3).

…

(3) The entitlement of the transmission system operator responsible for energy balancing at the relevant consumption point to payment of the EEG surcharge from the relevant electricity supply company shall be limited in accordance with the decision of the Bundesamt für Wirtschaft und Ausfuhrkontrolle; the transmission system operators shall take account of this limitation within the scope of Paragraph 36.'

17. The detailed rules governing the EEG surcharge were laid down, in particular, in the Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (Regulation further developing the nationwide compensation mechanism) of 17 July 2009,[9] as amended by Paragraph 2 of the Gesetz zur Änderung des Rechtsrahmens für Strom aus solarer Strahlungsenergie und zu weiteren Änderungen im Recht der erneuerbaren Energien (Law amending the legal framework for electricity produced from solar radiation energy and also amending the law governing renewable energy) of 17 August 2012,[10] as well as in the Verordnung zur Ausführung der Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (Regulation implementing the Regulation further developing the nationwide compensation scheme) of 22 February 2010,[11] as amended by the Zweite Verordnung zur Änderung der Ausgleichsmechanismus-Ausführungsverordnung (Second regulation amending the regulation implementing the compensation mechanism) of 19 February 2013.[12]

9 BGBl. 2009 I, p. 2101.
10 BGBl. 2012 I, p. 1754.
11 BGBl. 2010 I, p. 134.
12 BGBl. 2013 I, p. 310.

II. The national dispute, the actions before the General Court and the questions referred for a preliminary ruling

18. On 18 December 2013, the Commission notified to the Federal Republic of Germany its decision to bring proceedings under Article 108(2) TFEU in connection with the measure to support renewable electricity and the reduced EEG surcharge for energy-intensive users.[13]

19. Nine undertakings in the Georgsmarienhütte GmbH group each brought an action for the annulment of that (initial) decision before the General Court.[14]

20. The General Court, by orders of 9 June 2015:

– discontinued the proceedings in five of those actions,[15] as they had become devoid of purpose inasmuch as, in Decision 2015/1585, the Commission had expressed the view that the aid granted by Germany to the corresponding applicant undertakings was compatible with the internal market; and

– also discontinued the proceedings in the other four actions,[16] as these, too, had become devoid of purpose, since, according to Decision 2015/1585, the applicant undertakings had received partially illegal aid which they were required to repay. In those other four orders, it declared inadmissible the request by the applicant undertakings to have the subject matter of their applications extended so as to challenge the legality of Decision 2015/1585. The General Court reminded those undertakings that they had the option of bringing an action for the annulment of Decision 2015/1585, as they had said that they would have if their requests to extend the subject matter of the application were dismissed.[17]

21. Those four undertakings in the Georgsmarienhütte group, whose business was the production, smelting and processing of steel, did not bring an appeal before the Court of Justice against the orders of the General Court of 9 June 2015. Neither did they bring before the latter Court an action for the annulment of Decision 2015/1585, unlike other undertakings that were in the same situation[18] and the German Government itself.[19]

22. The procedural strategy adopted by the four undertakings in the Georgsmarienhütte group was to apply to the German courts to challenge the (national) administrative measures which, pursuant to Decision 2015/1585, compelled them to pay back the aid in the amount considered illegal.

13 State aid — Germany — State aid SA.33995 (2013/C) (ex 2013/NN) — Support for renewable electricity and reduced EEG surcharge for energy-intensive users — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ 2014 C 37, p. 73).

14 Orders of 9 June 2015, *Stahlwerk Bous* v *Commission* (T-172/14, not published, EU:T:2015:402); *WeserWind* v *Commission* (T-173/14, not published, EU:T:2015:416); *Dieckerhoff Guss* v *Commission* (T-174/14, not published, EU:T:2015:415) ; *Walter Hundhausen* v *Commission* (T-175/14, not published, EU:T:2015:423) ; *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414) ; *Harz Guss Zorge* v *Commission* (T-177/14, not published, EU:T:2015:395) ; *Friedrich Wilhelms-Hütte Eisenguss* v *Commission* (T-178/14, not published, EU:T:2015:409) ; *Schmiedewerke Gröditz* v *Commission* (T-179/14, not published, EU:T:2015:401) and *Schmiedag* v *Commission* (T-183/14, not published, EU:T:2015:396).

15 Orders of 9 June 2015, *WeserWind* v *Commission* (T-173/14, not published, EU:T:2015:416); *Dieckerhoff Guss* v *Commission* (T-174/14, not published, EU:T:2015:415); *Walter Hundhausen* v *Commission* (T-175/14, not published, EU:T:2015:423); *Friedrich Wilhelms-Hütte Eisenguss* v *Commission* (T-178/14, not published, EU:T:2015:409); *Schmiedewerke Gröditz* v *Commission* (T-179/14, not published, EU:T:2015:401).

16 Orders of 9 June, *Stahlwerk Bous* v *Commission* (T-172/14, not published, EU:T:2015:402);, *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414); *Harz Guss Zorge* v *Commission* (T-177/14, not published, EU:T:2015:395); and *Schmiedag* v *Commission* (T-183/14, not published, EU:T:2015:396).

17 Order of 9 June 2015, *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414, paragraph 24). There is an identical paragraph in the other three orders.

18 Cases T-103/15, T-108/15, T-109/15, T-294/15, T-319/15, T-605/15, T-737/15, T-738/15 and T-743/15.

19 Case T-47/15, *Germany* v *Commission*.

23. In the course of 2012 and 2013, those four undertakings had been the subject of administrative decisions reducing the EEG surcharge payable by them by reason of their status as energy-intensive users. Those decisions were partially revoked, with retroactive effect, by other decisions of 25 November 2014 (that is to say, the same date as that on which Decision 2015/1585 was adopted), while, at the same time, the German authorities required the undertakings to pay back the aid to the extent that it was considered illegal by the Commission.[20]

24. The applicants in the main proceedings challenged the decisions partially revoking the previous decisions before the Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office for Economic Affairs and Export Control; 'BAFA'). On 26 March 2015, having failed to obtain an express response to their claim, they brought an action before the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main), the court which has referred the following question for a preliminary ruling on validity:

'Does the European Commission Decision of 25 November 2014 (Commission Decision of 25.11.2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) [implemented by Germany for the support of renewable electricity and of energy-intensive users], C(2014) 8786 final) breach the Treaty on the Functioning of the European Union in so far as the Commission qualifies the limitation of the EEG-surcharge as aid within the meaning of Article 107 TFEU?'

25. Written observations have been lodged by the undertakings in the Georgsmarienhütte group, the German Government and the Commission, which took part in the hearing held on 5 December 2017. The case was assigned to the Grand Chamber of the Court of Justice.

III. Admissibility of the question referred for a preliminary ruling

26. The Commission submits that the question referred for a preliminary ruling is inadmissible, for two reasons:

– In the first place, the case-law applicable here is that contained in the judgment in *TWD*, which states that a litigant's standing to plead the invalidity of an EU act before a national court presupposes that he had no right to bring a direct action against that act under Article 263 TFEU.

– In the second place, also applicable is the case-law in *Adiamix*,[21] to the effect that the referring court must make explicit in its order the doubts as to the validity of the EU provision, without confining itself to mentioning only the arguments put forward by the parties to the dispute.

27. The German Government and the companies of the Georgsmarienhütte group take issue with the Commission's aforementioned line of argument and consider, on the contrary, that the question referred for a preliminary ruling is admissible.

A. Application of the TWD exception

28. The '*TWD* exception' restricts the opportunities for litigants to ask national courts to use the preliminary ruling procedure to call into question the validity of EU acts. Before examining whether this case is caught by that exception, I feel it necessary to look in greater detail at its essential features.

20 Despite the fact that the German Government had challenged Decision 2015/1585 before the General Court, the BAFA took the view that it had an obligation to implement it, given that that decision was binding under Article 288 TFEU, and aid contrary to EU law which had been granted by an administrative act had to be revoked in the absence of any legitimate expectation on the part of the beneficiary, as provided for in Paragraph 48(2) of the (German) Law of administrative procedure.

21 Order of 18 April 2013, *Adiamix* (C-368/12, EU:C:2013:257, paragraphs 21 and 22).

1. Preliminary remark

29. In an action before the courts of a Member State, any party has the right to ask those courts to apply to the Court of Justice for a preliminary ruling on 'the validity … of acts of the institutions, bodies, offices or agencies of the Union' where these have formed the basis of the decisions of the national authorities against which the action in question is directed.

30. The right to trigger the preliminary ruling procedure is enjoyed exclusively by the national court,[22] which is permitted to declare an EU act valid, but not invalid.[23]

31. In the judgment in *TWD*, the Court of Justice held that 'it follows from the … requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision'.[24]

32. Since 1994, the Court of Justice has repeatedly endorsed the validity of the case-law in *TWD*. It was last confirmed and defined in the judgment of the Grand Chamber in *A and Others*,[25] which, in essence, reiterates the position adopted by the Court of Justice in the previous cases.

33. The case-law in *TWD* thus places a limit on the right to challenge the legality of EU acts producing legal effects, with a view to ensuring legal certainty.[26] That same limit applies to the Member States.[27] In so doing, that case-law does not close off the right to challenge EU acts but redirects the exercise of that right along the channels appropriate to its pursuit: any party which has unequivocal standing to challenge those acts must do so within the prescribed time limit (in principle, two months) and before the court with jurisdiction to declare them invalid (the General Court).[28]

22 Article 267 TFEU. See in this regard the judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 39 and the case-law cited).

23 Judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraphs 14 and 15). See also the judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraphs 27 and 30), and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 95).

24 Judgment in *TWD*, paragraph 17.

25 Judgment of 14 March 2017, *A and Others* (C-158/14, EU:C:2017:202, paragraph 70), which cites the judgment in *TWD*, paragraph 18, and the judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101). According to paragraph 70, '… a request for a preliminary ruling concerning the validity of an act of the European Union can be dismissed only in the event that, although the action for annulment of an act of the European Union would unquestionably have been admissible, the natural or legal person capable of bringing such an action abstained from doing so within the prescribed period and is pleading the unlawfulness of that act in national proceedings in order to encourage the national court to submit a request for a preliminary ruling to the Court of Justice concerning the validity of that act, thereby circumventing the fact that that act is final as against him once the time limit for bringing an action has expired'.

26 Judgment in *TWD*, paragraph 16: 'the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community measures which involve legal effects from being called into question indefinitely' (see, to that effect, judgment of 30 January 1997, *Wiljo*, (C-178/95, EU:C:1997:46, paragraph 19), and of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 29).

27 Judgment of 22 October 2002, *National Farmers' Union* (C-241/01, EU:C:2002:604, paragraph 36).

28 Judgment in *TWD*, paragraph 18: '… were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time-limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time limit for his bringing an action has expired'. See to the same effect the later judgments of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 30); of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 41); and of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraphs 28 and 30).

34. The scope of the case-law in *TWD* is thus confined to cases where the action for annulment brought by the individual would have been manifestly admissible before the General Court. To date, this has been the case on few occasions, [29] no doubt because of the restrictions which Article 263 TFEU [30] imposes on the standing of individuals [31] to bring actions for annulment before the General Court. Where the applicants' standing to bring proceedings is not clear, obvious and manifest, the Court of Justice elects not to apply the *TWD* exception. [32]

35. I should also like to emphasise that, in the judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português,* [33] the Court of Justice rejected, the reliance on what might be called a *TWD* exception in reverse. In that case, the Portuguese State did not bring an action for annulment before the General Court against Decision 2011/346/EU, [34] which *was* (unsuccessfully) challenged [35] by two private banking entities, but then relied on the finality of that decision, as well as on the *TWD* exception, before the General Court in the context of the reference for a preliminary ruling made in the national proceedings. [36]

36. The *TWD* exception does not prevent a national court from making a reference, at any time, of its own motion or at the request of another party (lacking manifest standing to bring an action for annulment), for a preliminary ruling on its doubts as to the validity of an EU act. [37] The sole purpose of that exception is to ensure that the remedies made available to litigants by EU law are not abused.

29 Judgments in *TWD*, paragraphs 17 to 25; of 30 January 1997, *Wiljo* (C-178/95, EU:C:1997:46, paragraphs 15 to 25); and of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraphs 29 to 40).

30 The wording of the fourth paragraph of Article 263 TFEU, which comes from the Treaty of Lisbon, sought to reinforce the judicial protection of natural or legal persons as against acts of the European Union by extending the criteria governing the admissibility of actions for annulment to regulatory acts which directly affect individuals and do not include implementing measures. The Court of Justice has nonetheless held that that extension of the admissibility criteria does not have the effect of removing the *TWD* exception. See to this effect the judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368), and of 14 March 2017, *A and Others* (C-158/14, EU:C:2017:202), paragraph 69 of which reads: 'that broadening of the conditions of admissibility of an action for annulment is not accompanied by any corresponding bar to calling in question, before a national court, the validity of an act of the European Union, where an action for annulment brought before the General Court by one of the parties to the dispute would not unquestionably have been admissible'.

31 These restrictions do not apply where the litigant is a Member State, which always has standing to bring actions for annulment.

32 See, in particular, the judgments of 23 February 2006, *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraphs 30 to 34); of 8 March 2007, *Roquette Frères* (C-441/05, EU:C:2007:150, paragraphs 35 to 48); of 29 June 2010, *E and F* (C-550/09, EU:C:2010:382, paragraphs 37 to 52); of 18 September 2014, *Valimar* (C-374/12, EU:C:2014:2231, paragraphs 24 to 38); of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraphs 27 to 32); of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 57); and of 14 March 2017, *A and Others* (C-158/14, EU:C:2017:202, paragraphs 71 to 75).

33 The judgment of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151), states in paragraph 30 that the *TWD* exception '… applies only as regards a party which invokes the unlawfulness of an EU measure before a national court, whereas it could undoubtedly have brought an action under Article 263 TFEU for the annulment of that measure, but failed to do so within the prescribed period. Consequently, the risk that Estado portugués, which does not contest the lawfulness of Decision 2011/346 before the national court, did not bring an action for annulment of that decision before the General Court is irrelevant for the purpose of assessing whether the questions concerning the validity of that decision are admissible'.

34 Commission Decision 2011/346/EU of 20 July 2010 on the State aid C 33/09 (ex NN 57/09, CP 191/09) implemented by Portugal in the form of a State guarantee to BPP (OJ 2011 L 159, p. 95).

35 Judgment of 12 December 2014, *Banco Privado Português and Massa Insolvente do Banco Privado Português* (T-487/11, EU:T:2014:1077).

36 The dispute concerned the inclusion of the Portuguese State's claim in the liabilities of BPP, in the context of its winding-up, for an amount of EUR 24 462 921.24, plus any interest due, representing the amount to be recovered of the aid, presumed to be unlawful, granted to BPP by means of a State guarantee to that bank underwriting a loan of EUR 450 million.

37 That was the conclusion reached by the Court of Justice in the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8), paragraphs 72 and 74, when it stated that the question referred for a preliminary ruling had been referred by that national court of its own motion and not at the request of one of the parties to the national proceedings which, having had the opportunity to bring proceedings for the annulment of that decision, had not done so. Advocate General Jacobs also stated in point 63 of his Opinion (C-222/04, EU:C:2005:655) that 'the potential abuse of procedure by a party who should have challenged the decision directly before the Court but did not, which in my view lies at the heart of the *TWD* case-law, is here absent'.

37. Understood in this way, the *TWD* case-law does not, I would reiterate, prevent the national court from raising questions for a preliminary ruling where it itself harbours doubts as to the validity of an EU act the national measures implementing which it is called upon to review.[38] There is no reason why the *TWD* exception should impede the *ordinary* mechanism by which the national court, through the reference for a preliminary ruling procedure, cooperates with the Court of Justice.

38. In short, the *TWD* exception requires: i) an EU act; ii) the absence of an action for annulment; iii) manifest and unquestioned standing on the part of the individual to bring proceedings for the annulment of the EU act before the General Court; and iv) national implementing measures against which a domestic legal action is brought with a view to having the EU act declared invalid.

39. It is my view that, configured in this way, the *TWD* exception, notwithstanding the criticism which it has attracted,[39] makes complete sense and I can see no reason why I should suggest that the Court of Justice abandon it. On the contrary, it strikes me as being one of the doctrines that give full effect to the principle of *stare decisis*.

40. In my opinion, the *TWD* exception serves two concurrent purposes:

– On the one hand, it compels persons (with manifest standing to do so) to avail themselves of the action for annulment remedy, because the opportunity to call into question the lawfulness of EU acts which produce legal effects must be limited in time[40] and legal certainty must be ensured.[41]

– On the other hand, it makes for a logical relationship between the action for annulment and the reference for a preliminary ruling on validity. The former is the *ideal* remedy for subjecting the lawfulness of an EU act to judicial review, given that Article 263 TFEU offers full judicial protection to individuals with standing to bring proceedings.

41. In a direct action, the exchange of procedural documents between the applicant and the EU body, agency or institution which adopted the act is followed by the opening before the General court of adversarial proceedings offering extensive opportunities for the adoption of measures of inquiry. This mechanism makes it easier to obtain the evidence necessary to arrive at a precise determination of the facts, and allows other parties to take part as interveners (such as, for example, the competing undertakings which have not benefited from the aid).[42]

38 What is more, the national court may itself apply the *TWD* exception in order not to make the reference. In paragraph 56 of the judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434), the Court of Justice held that ‘the Consiglio di Stato was right to refuse to refer to the Court a question concerning the validity of Decision 90/555, a decision which Lucchini could have challenged, but failed to do so, within the period of one month following publication of that decision by virtue of Article 33 of the ECSC Treaty’.

39 Barav, A., ‘Déviation préjudicielle’, in *Le renvoi préjudiciel dans le droit de l'Union européenne*, Bruylant, Brussels, 2011, p. 217-282; Ritleng, D., ‘Pour une systématique des contentieux au profit d'une protection juridictionnelle effective’, in *50 ans de droit communautaire*, *Mélanges en hommage à Guy Isaac*, Presses de l'Université des sciences sociales de Toulouse, 2005, volume 2, p. 735; Martínez Capdevila, C., ‘The action for annulment, the preliminary reference on validity and the plea of illegality: Complementary or alternative means?’, in *Yearbook of European Law*, 2006, vol. 25, p. 451; Schwensfeier, R., ‘The TWD principle post-Lisbon’, *European Law Review* 2012, p. 156.

40 Judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 29 and the case-law cited).

41 Judgment in *TWD*, paragraph 16.

42 The order of 6 October 2017, *Greenpeace Energy* v *Commission* (C-640/16 P, EU:C:2017:752), states in paragraphs 61 to 63 that individuals not directly and initially concerned by a Commission decision on State aid may challenge its validity before the national courts and urge the latter to use the reference for a preliminary ruling procedure. It may be inferred from this that the reference for a preliminary ruling on validity is subsidiary to the action for annulment and that the latter is the appropriate remedy for individuals to challenge Commission decisions by which they are directly and individually concerned.

42. In disputes concerning State aid, which are usually factually and technically complex, the advantages of the action for annulment are even more apparent.[43] It is in those disputes that the purpose of the exception established in *TWD* (a judgment which was delivered in a State aid case for a reason), that is to say to compel individuals with standing to bring proceedings to use that type of action, comes into its own. The parties thus have the additional guarantee of access to a second level of jurisdiction, judgments of the General Court being open to appeal to the Court of Justice.

43. Indeed, I would go so far as to say that, in the specific field of State aid (and in other, similar fields to which the Commission refers in its observations),[44] the reference for a preliminary ruling may give rise to more problems than it endeavours to resolve. Where it is necessary to assess the validity of a particular decision (rather than provisions of general application) the scrutiny of which calls for a complex analysis of facts and evidence with unavoidable technical content, the national procedure is not up to the task of enabling the national court, without the presence of the institution which adopted the EU act, to define the outcome of that analysis 'in sufficient detail' before making the reference for a preliminary ruling.[45]

44. It could be countered that those shortcomings are remediable in the course of the preliminary ruling procedure before the Court of Justice. This may well be true, but that solution comes at the cost of converting the very function of that procedure into one which, within the judicial architecture of the European Union, has been entrusted to the General Court. As the Commission rightly recalls, at the time of its establishment, the General Court was intended to assume responsibility for 'actions requiring close examination of complex facts [in respect of which] the establishment of a second court will improve the judicial protection of individual interests'. Its establishment, it was further said, would enable 'the Court [of Justice] to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law'.[46]

45. Seen in this light, the criticisms of the *TWD* case-law that point up the right of individuals to effective judicial protection strike me as unconvincing. Individuals do not actually have a *right* to have a question referred for a preliminary ruling by the national court, but they do have a right — provided, I would reiterate, that they have undeniable standing to do so — to challenge an EU act before the General Court, that is to say before the *natural* forum affording them such protection.

46. Neither do I subscribe to the notion that parties must be free to choose the procedural strategy of their preference, so that, within the time limit laid down in Article 263 TFEU, they may choose between: a) bringing an action for annulment before the General Court; and b) pursuing a claim as to the invalidity of the act in question before the national courts and urging the latter to make a reference for a preliminary ruling to the Court of Justice.

43 Advocate General Jacobs had made this point in his Opinion in *TWD* (C-188/92, EU:C:1993:358, points 17 to 20).

44 The Commission cites as examples commercial policy decisions (antidumping), restrictive measures, acts in areas relating to the environment, chemistry and medicine, and those adopted under the agricultural and fisheries policies.

45 According to the Court of Justice in its Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439/01), 'the decision to make a reference for a preliminary ruling [must] be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises'.

46 Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (88/591/ECSC, EEC, Euratom), (OJ 1988 L 319, p. 1), third and fourth recitals.

47. In my view, such freedom of choice as to forum is neither desirable nor respectful of the pre-eminence of the action for annulment as a vehicle, provided for in Article 263 TFEU, that is ideally suited to reviewing the validity of acts of the European Union which are challenged by applicants with manifest standing to bring such proceedings. It is an option which would encourage the proliferation of procedurally complex situations (such as that in this case) that distort the functioning of the system of remedies provided for in EU law.[47]

2. The relevance of the time limit under the TWD *case-law*

48. The *TWD* exception is not intended only to prevent avoidance of the time limit for bringing actions for annulment. Its purpose, I would say again, is also to give priority to the action for annulment over the reference for a preliminary ruling as the *ordinary* means of challenging EU acts in cases where the individual is, technically, entitled to pursue both remedies.

49. From that perspective, the point at which the individual applies to the national courts and suggests that they make a reference for a preliminary ruling, rather than bringing an action for annulment, is not the only relevant factor. In *TWD* and *Nachi Europe*,[48] the applicants approached the national courts *after the time limit* for bringing an action for annulment *had expired*, which is the situation in which the *TWD* case-law is usually applied. To my mind, however, that case-law should also apply where the individual approaches the national courts in order, indirectly, to call into question the validity of the EU act *during the period* within which he could have used the action for annulment before the General Court to challenge that act.

50. It would not be logical for the *TWD* exception to depend on when individuals with manifest standing to bring proceedings wish to approach the national courts, or on how administratively efficient or otherwise the national authorities are in adopting decisions implementing the EU act in question. What *is* decisive is whether those individuals failed to bring an action before the General Court in the knowledge that that was the forum to which they should have applied pursuant to Article 263 TFEU.

3. Application of the case-law in TWD *to this case*

51. Georgsmarienhütte and the other three undertakings challenged the three BAFA decisions of 3 December 2014 (requiring them to pay back the aid) before the referring court before their claim to that authority had been disposed of. Taking advantage of the procedural options afforded to them by their legal system for the purposes of responding to the administration's silence, they *brought forward*, so to speak, their legal action to 26 March 2015, seeking by that action to have Decision 2015/1585 declared invalid. It has already been explained that they did not bring an action for the annulment of that decision despite having previously challenged before the General Court the decision initiating the State aid proceedings (which, of course, came ahead of the final decision).

52. This sequence of events (and omissions) compels us to focus our attention on two factors: a) the standing of the aforementioned undertakings; and b) the impact of the time limit for challenging Decision 2015/1585 before the General Court.

47 The Court of Justice has been called upon to settle the same issue of substance (whether the EEG surcharge reduction for energy-intensive undertakings constitutes State aid) in two separate disputes pursued via different forms of procedure: a) the dispute in the present reference for a preliminary ruling; and b) the dispute in the appeal brought by Germany against the judgment of the General Court conforming the lawfulness of the Commission decision at issue here (Case C-405/16 P). If, as I consider, Georgsmarienhütte and the other three undertakings had manifest standing to bring an action for annulment, the availability of two remedies would be dysfunctional. The *TWD* exception closes the door to that dysfunction and allows the Court of Justice to rule on the lawfulness of Decision 2015/1585 exclusively within the context of the appeal against the *test* judgment of the General Court (which has suspended judgment in the other actions for annulment until the Court of Justice disposes of the issue in its appeal ruling).

48 Judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101).

(a) Standing of the applicant undertakings

53. Did Georgsmarienhütte and the other three undertakings have manifest standing to bring an action for the annulment of Decision 2015/1585?

54. Decision 2015/1585 is addressed to the Federal Republic of Germany, as Article 10 thereof states. In accordance with the fourth paragraph of Article 263 TFEU, a natural or legal person may institute proceedings for the annulment of an act which is not addressed to him only if the latter is of direct and individual concern to him. It must therefore be ascertained whether the applicant undertakings are so concerned.

55. In the first place, the applicant undertakings in the dispute in the main proceedings will be *directly* concerned by Decision 2015/1585, according to the settled case-law of the Court of Justice,[49] if the latter directly affects their legal situation and leaves no discretion to its addressee (Germany), to which it falls to implement that decision in a purely automatic fashion and without recourse to intermediate rules.

56. Now, Articles 6 and 7 of Decision 2015/1585 impose on Germany the obligation to recover part of the unpaid EEG surcharge, classified as illegal aid, in the manner which I have just explained. Those two provisions stipulate the method of recovery (with reference to Annex III), the accrual of interest and how it is to be calculated, and compel Germany to effect full and immediate recovery within a maximum period of four months from notification of the decision. The German State has no discretion whatsoever and Decision 2015/1585 produces its effects on the undertakings in question simply by virtue of its administrative implementation by the national authorities.

57. In the second place, it must be determined whether those undertakings are *individually* concerned by Decision 2015/1585, within the meaning of the case-law of the Court of Justice to the effect that:

– ‘persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed’.[50]

– ‘Where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders, and that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption’.[51]

49 Judgments of 5 May 1998, *Dreyfus* v *Commission* (C-386/96 P, EU:C:1998:193), paragraph 43), and of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 48).

50 Judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 51), which cites the judgments of 15 July 1963, *Plaumann* v *Commission*, (25/62, EU:C:1963:17), and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraph 63).

51 *Ibidem*, paragraph 53, which cites the judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 59).

58. In the case of State aid, an undertaking cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme.[52] According to the Court of Justice, however:

– ‘the actual beneficiaries of individual aids granted under a system of aid of which the Commission has ordered recovery are individually concerned within the meaning of the fourth paragraph of Article 263 TFEU’.

– ‘The order for recovery already concerns all the beneficiaries of the system in question individually in that they are exposed, as from the time of adoption of the contested decision, to the risk that the advantages which they have received may be recovered, and thus find their legal position affected. Those beneficiaries thus form part of a restricted circle’.[53]

59. The four applicant undertakings in the dispute in the main proceedings, as individual beneficiaries of EEG surcharge reductions, which had been granted to them by the BAFA, were required to pay back the amount of those reductions after Decision 2015/1585 had declared them to be partially illegal, inasmuch as they constituted State aid, and ordered that they be recovered (in accordance with Articles 6 and 7). The German authorities, acting with great diligence, adopted the resultant recovery measures, pursuant to Decision 2015/1585. Consequently, those four undertakings were individually concerned, within the meaning indicated above, by that decision and therefore had manifest standing to challenge it before the General Court.

60. Those undertakings could not have been in any doubt about their standing, as is clearly evidenced by the fact that they originally brought actions for the annulment of the Commission decision initiating the procedure for verifying the legality of the aid. They also sought to extend their initial claims so as also to include the challenge to the Commission’s final decision[54] after it had been adopted. Paradoxically, they did not then bring an action for annulment, as suggested to them by the General Court, against Decision 2015/1585.[55] The other energy-intensive undertakings that were in a similar situation did bring actions for the annulment of that decision which are in abeyance before the General Court pending final judgment in the *Germany* v *Commission test* case.

61. In those circumstances, I take the view that the *TWD* exception must be applied in relation to the four undertakings that did not bring an action for the annulment of Decision 2015/1585 before the General Court even though they had clear and manifest standing to do so.

(b) The time limit for bringing an action for the annulment of Decision 2015/1585

62. At the hearing, it was shown that the ‘full and final’ text of Decision 2015/1585 was made available to the applicant undertakings on 6 January 2015, in the course of the proceedings brought before the General Court against the institution of the State aid proceedings.[56]

52 Judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission* (C-15/98 and C-105/99, EU:C:2000:570, paragraph 33), and of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 53).

53 See the judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission* (C-15/98 and C-105/99, EU:C:2000:570, paragraph 34); of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 54); and of 9 June 2011, *Comitato ‘Venezia vuole vivere’ and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 53 and 56).

54 Orders of 9 June 2015, *Stahlwerk Bous* v *Commission* (T-172/14, not published, EU:T:2015:402); *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414); *Harz Guss Zorge* v *Commission* (T-177/14, not published, EU:T:2015:395); and *Schmiedag* v *Commission* (T-183/14, not published, EU:T:2015:396).

55 Order of 9 June 2015, *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414, paragraph 24). There is an identical paragraph in the other three orders.

56 On 10 December 2014, the General Court had asked the Commission to produce the text of Decision 2015/1585 for disclosure to the applicant undertakings, which it did on 6 January 2015. On the same day, the General Court asked the parties to comment on the consequences of the adoption of that decision. See the order of 9 June 2015, *Georgsmarienhütte* v *Commission* (T-176/14, not published, EU:T:2015:414, paragraphs 13 to 16).

63. Since the publication of Decision 2015/1985 (very belated by comparison with the date of its adoption) was not a condition of its effectiveness, it being sufficient that the undertakings to which it was of direct and individual concern should have taken due cognisance of it, as they did here, the time limit for challenging it began, so far as those undertakings were concerned, on 6 January 2015, according to the information corroborated at the hearing.[57]

64. On that premise, the aforementioned undertakings had exhausted the two-month mandatory time limit laid down in Article 263 TFEU (plus ten days for distance)[58] when, on 26 March 2015, they lodged their action before the referring court. On the expiry of that time limit, they were no longer able to 'overcome the definitive nature which [Decision 2015/1585 assumed] as against [them]'[59] by bringing an action before the national courts with a view to challenging the validity of that decision.

65. In accordance with the submissions I have set out above, the *TWD* exception would apply even if that time limit had not been exceeded. I have already mentioned that the German authorities were extremely prompt in enacting the national aid recovery measures on the same day as the Decision was adopted, on 25 November 2014. It is not, to my mind, too much of a stretch of logic to accept the proposition that the *TWD* exception would be applicable to those undertakings if they had approached the German courts more than two months after taking proper cognisance of Decision 2015/1585, but not if their action had been lodged with those courts before that time limit expired because of the speed with which the national administrative authorities acted.

66. In short, I consider that the doctrine established in the judgment in *TWD* is applicable to the present reference for a preliminary ruling, and for that reason I propose that the latter is inadmissible.

B. Application of the case-law in Adiamix

67. The Commission submits, in support of its second objection of inadmissibility, that the case-law in *Adiamix* is applicable.[60] In its view, the referring court has not examined independently or explained the reasons why it has doubts about the validity of Decision 2015/1585, since it has referred only to the lines of argument put forward by the applicants.

68. According to the Court of Justice, 'it is … important that the national court should set out, in particular, the precise reasons which led it to question the validity of certain provisions of EU law and set out the grounds of invalidity which, consequently, appear to it capable of being upheld (see to that effect, inter alia, judgment in *Greenpeace France and Others*, C-6/99, EU:C:2000:148, paragraph 55, and order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 22). Such a requirement also arises under Article 94(c) of the Rules of Procedure of the Court'.[61]

69. Furthermore, it is settled case-law that the information provided in decisions making references must not only enable the Court to reply usefully but also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties, together with a translation into the official language of each Member State, with the exception of national orders which the referring

57 It was also confirmed at the hearing that the applicant undertakings could have consulted a non-confidential English-language version of Decision 2015/1585 which was published on the Commission's website in December 2014.

58 Article 60 of the Rules of Procedure of the General Court.

59 Judgment in *TWD*, paragraph 18.

60 Order of 18 April 2013, *Adiamix* (C-368/12, not published, EU:C:2013:257).

61 Judgment of 4 May 2016, *Philip Morris Brand and Others* (C-547/14, EU:C:2016:325, paragraph 48).

court has sent to the Court of Justice.[62] It follows that the fact that the national court refers to the observations of the parties in the main proceedings, which may vary according to the interests of those parties, does not safeguard the opportunity for the governments, EU institutions and other interested parties to submit appropriate observations in preliminary ruling proceedings.[63]

70. In this case, the referring court does not reflect its own doubts about the validity of Decision 2015/1985, but confines itself in this regard to the following:

'In these proceedings, the applicants have raised doubts about the Commission's interpretation of EU law (Articles 197 and 108 TFEU) …

So far as concerns the applicants' detailed arguments, the court, with a view to avoiding repetition, refers to the explanations contained in the application of 26 March 2015 …

In this regard, the applicants have raised substantiated doubts sufficient to support a reference to the Court of Justice for a preliminary ruling on the matter …

Consequently, this reference is not conditional upon whether the court shares the doubts raised by the applicants with respect to the Commission's interpretation of Articles 107 and 108 TFEU. The court considers in any event that the doubts raised by [the applicants] with respect to the Commission Decision merit consideration.'[64]

71. A reading of that extract from the order for reference leads me to the view that, on a strict application of the case-law summarised in the foregoing points, this reference for a preliminary ruling would be found to be inadmissible, given its shortcomings in relation to the presentation of the court's *own* reasons for making it.

72. I recognise, however, that, on other occasions, the Court of Justice has applied that case-law more flexibly, bearing in mind that the preliminary reference mechanism is founded on the idea of judicial cooperation. From that point of view, the objection of inadmissibility might be dismissed on the ground that the order for reference *reproduces* as doubts the arguments put forward by the parties with respect to the validity of Decision 20015/1585.

IV. Substance

73. In the alternative, in the event that the Court of Justice finds the reference for a preliminary ruling to be admissible, I shall analyse whether Decision 2015/1585 is invalid on the ground that it classifies the EEG surcharge reduction as State aid within the meaning of Article 107 TFEU.

74. Paragraph 1 of that article defines as being incompatible with the internal market, in so far as it affects trade between Member States, aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

62 See in particular the judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 23); the order of 18 April 2013, *Adiamix* (C-368/12, not published, EU:C:2013:257, paragraph 24); and the judgment of 4 May 2016, *Philip Morris Brand and Others* (C-547/14, EU:C:2016:325, paragraph 49).

63 Order of 18 April 2013, *Adiamix* (C-368/12, not published, EU:C:2013:257, paragraph 25).

64 Paragraph 11 of the order for reference.

75. There are therefore four conditions that must be met in order for aid to be considered incompatible: a) there must be an intervention by the State or through State resources; b) that intervention must be liable to affect trade between Member States; c) it must confer an advantage on the recipient; and d) it must distort or threaten to distort competition.[65]

76. It seems to me to be common ground that the EEG surcharge cap for energy-intensive undertakings meets the second condition (potential effect on trade between Member States) and the fourth condition (distortion or threat of distortion of competition). The other two conditions, on the other hand, are a matter of some dispute, and it is therefore necessary to ascertain whether that cap confers a selective advantage on the beneficiary undertakings, and, above all, whether that measure is attributable to the State and involves the use of State resources.

77. In the absence of any views expressed by the referring court *itself* with respect to some of the key points at issue (in particular, the German authorities' functions of controlling and supervising the administration of the funds generated by the EEG surcharge), regard must be had to what Decision 2015/1585 says in this regard, unless it can be clearly demonstrated that the Commission made an error when issuing it.

A. The existence of a selective advantage

78. In the context with which we are now concerned, an advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say without State intervention.[66] There is an advantage if an undertaking's financial situation improves as a direct result of action by the State rather than the operation of the free market.

79. The concept of aid embraces not only positive benefits (such as subsidies, for example) but also State measures which mitigate or eliminate the charges which are normally included in the budget of an undertaking.[67]

80. To my mind, by reducing the EEG surcharge payable by energy-intensive undertakings, the German authorities grant such undertakings an undeniable economic advantage, since they prevent TSOs and electricity suppliers from recovering the additional costs of EEG electricity consumed by energy-intensive undertakings which the latter would otherwise have to meet.

81. Paragraph 40 of the EEG 2012 establishes a cap on the amount of the EEG surcharge which electricity suppliers can pass on to energy-intensive users: on application, the BAFA issues an administrative document which prohibits the electricity supplier from passing on the full EEG surcharge to a final user where the latter is an energy-intensive undertaking. Under Paragraph 41 of the EEG 2012, energy-intensive undertakings must meet certain conditions, connected principally with the volume of energy they consume, in order to qualify for the cap.

65 Judgments of 17 March 1993, *Sloman Neptun* (C-72/91 and C-73/91, EU:C:1993:97, paragraph 18); of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448, paragraph 33); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 15); of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 17); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 38); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 17).

66 Judgments of 11 June 1996, *SFEI and Others* (C-39/94 EU:C:1996:285, paragraph 60); of 29 April 1999, *Spain* v *Commission* (C-342/96, EU:C:1999:210, paragraph 410); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 79); of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 20); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 65).

67 Judgments of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 13); of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467, paragraph 25); of 19 May 1999, *Italy* v *Commission* (C-6/97, EU:C:1999:251, paragraph 15); of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 36); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 66).

82. The German Government recognises that the exemption scheme provided for in those articles is intended to limit the excessive economic burden which support for the production of EEG electricity imposes on energy-intensive undertakings. It thus seeks to mitigate one of the charges normally included in the budgets of such undertakings.

83. The applicants and the German Government submit, however, that the EEG surcharge cap, rather than conferring an *advantage* on energy-intensive undertakings, offsets their competitive *disadvantage* by comparison with undertakings from other Member States.

84. That argument does not detract from the classification of the measure at issue as an advantage, if only because it is contrary to the case-law of the Court of Justice to the effect that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.[68]

85. What is more, the Commission has produced data[69] to refute the factual premise on which that argument is based: the electricity prices paid by those undertakings in Germany do not appear to be any higher, despite the EEG surcharge, than average prices across the EU. The competitive *disadvantage* allegedly suffered by those undertakings has not therefore been shown to be present.

86. The applicants further state that 'normal market conditions' should be taken to mean those present in the complete absence of the EEG surcharge rather than those created following its introduction. On that basis, the EEG surcharge cap for which they are themselves eligible would cease to be an advantage because there would be no EEG surcharge to cap.

87. That submission is not convincing either. Given that the EEG surcharge is a mechanism which imposes charges on all operators in the German electricity sector, it is necessary, in order to determine whether an advantage is present, also to include within normal market conditions those that arise from the introduction of the EEG surcharge. Part and parcel of reducing that cost for energy-intensive undertakings is an exemption scheme which confers a specific advantage on those undertakings inasmuch as it reduces the price which they would otherwise have to pay for the electricity they consume.

88. In order for State aid to be present, it is also essential that the advantage granted to undertakings be *selective*. The applicants argue that the surcharge cap does not have that quality in relation to them because it is objectively justified and necessary for the purposes of safeguarding fundamental rights.

89. In the light of the case-law of the Court of Justice,[70] that argument is also unsustainable. I share the Commission's view that the EEG surcharge cap is selective, since it is available only to certain energy-intensive undertakings in the manufacturing sector.

90. The selectivity of an advantage is more readily apparent in the case of positive measures which benefit one or more nominally identified undertakings. It is more difficult to gauge, however, where the Member States adopt rules applicable to persons who meet certain criteria and whose economic charges are mitigated as a result of those rules. The EEG surcharge cap for energy-intensive undertakings satisfies the definition of that (second) scenario.

68 Judgment of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 54 and the case-law cited).

69 Commission, 'Energy Prices and Costs in Europe', SWD(2014) 20 final, Annex III. The Eurostat data available at the time when Decision 2015/1585 was adopted showed that the electricity prices paid by industrial customers in Germany were the eighth lowest in the European Union and those paid by consumers were lower than the EU average.

70 Judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 22 and the case-law cited).

91. In such cases, selectivity is usually analysed in three stages:

– First, it is necessary to identify the reference scheme of law;

– Secondly, it is necessary to consider whether a given measure constitutes an exception within that scheme of law inasmuch as it differentiates between economic operators which, in the light of the scheme's intrinsic objectives, are in a comparable factual and legal situation. The existence of an exception will be key to being able to ascertain whether that measure is prima facie selective;

– Thirdly, if that measure is an exception, it will be necessary to determine whether it is justified by the nature or the general scheme of the reference scheme. [71]

92. Under the scheme introduced by the EEG 2012, the general rule is that the EEG surcharge is payable by all electricity consumers (in reality, what that Law provides for is the possibility of passing on the surcharge to those consumers, which is what invariably happens in practice).

93. The EEG surcharge reduction for certain companies in the manufacturing sector such as the applicants is an exception to that general rule, the benefit of which is enjoyed by those companies alone but not by energy-consuming undertakings in other productive sectors. The EEG surcharge cap available to those undertakings is therefore selective.

94. The applicants submit that the reduction of the EEG surcharge payable by them contributes towards climate and environmental protection as well as towards sustainable development and guaranteed energy supply. However, those interests could be said to be served, at most, by the general rule governing the EEG surcharge, but not by its reduction for a specific category of industrial operators. It is also the case that, by exempting them (in part) from the general charge associated with the EEG surcharge, the legislature simultaneously incentivises increased energy consumption on the part of that category of economic operator and reduces the revenue available to finance renewable energy. This is not therefore a reason such as to justify the exception, according to the case-law of the Court of Justice. [72]

95. Neither is the measure justified by the alleged safeguarding of fundamental rights invoked by the applicants. They submit that full payment of the EEG surcharge would increase their production costs to such an extent as to prevent them from pursuing their economic activities, in breach of Article 16 of the Charter of Fundamental Rights of the European Union, which guarantees the freedom to conduct a business.

96. Apart from the fact that the foregoing is a general-interest ground external to and not inherent in the general rule governing the EEG surcharge, neither the undertakings nor the German Government have produced precise information to show that payment of the surcharge, under the conditions set out in Decision 2015/1585, makes their existence unviable. That lack of evidence is a sufficient basis on which to dismiss the foregoing submission without the need for a detailed analysis of the relationship between the freedom to conduct a business and the content of the sectoral regulatory measures concerned.

71 Judgments 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 19); of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62); of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49 et seq.); and of 8 November 2001, *Adria-Wien Pipeline* (C-143/99, EU:C:2001:598, paragraph 48).

72 Judgments of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 69 and 70); of 6 September 2006, *Portugal* v Commission (C-88/03, EU:C:2006:511, paragraph 81); of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551); of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757); and of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 27 et seq.).

97. Finally, it should not be forgotten that, in Decision 2015/1585, the European Commission acknowledged that the aid provided for in the EEG 2012 (that is to say, the reduction of the costs associated with support for EEG [electricity]) would be permissible if [the beneficiaries] met the 'eligibility criteria laid down in points 185, 186 y 187 of the 2014 Guidelines'[73] and that reduction were 'proportionate according to the criteria set out in points 188 and 189 of the 2014 Guidelines'.[74]

98. It is thus recognised that, if the EEG surcharge really did jeopardise the competitive position of undertakings that are intensive electricity users, it would, within the limits laid down in the 2014 Guidelines, be compatible with the internal market. What that decision amounts to, therefore, is an absolute prohibition not on reducing the cost of the surcharge but on reducing it beyond what is permitted by those Guidelines. It has not been demonstrated in these preliminary ruling proceedings that the conditions laid down in Decision 2015/1585 do not satisfy that criterion.

99. In short, the reduction of the surcharge established by the EEG 2012 confers a selective advantage on the undertakings benefiting from that exception to the general scheme applicable to all other consumers.

B. The existence of an intervention by the State or through the transfer of State resources

100. According to the case-law of the Court of Justice, in order for a selective advantage to be capable of being categorised as 'aid' within the meaning of Article 107(1) TFEU, it must, first, be granted directly or indirectly through State resources, and, second, be attributable to the State.[75] These two conditions, although cumulative,[76] are usually considered together when a measure is evaluated in the light of that provision.

101. The applicant undertakings and the German Government take the view, in essence, that the EEG surcharge cap from which they benefit is not attributable to the State and does not entail a transfer of State resources.

1. Whether the measure is attributable to the State

102. In order to assess whether a measure is attributable to the State, according to the case-law of the Court of Justice, it must be analysed first of all whether the public authorities intervened in its adoption. This is the case, obviously, where the selective advantages available to a category of undertakings have been established by a law.[77]

103. Both the EEG surcharge and its reduction for the benefit of certain energy-intensive undertakings in the manufacturing sector were provided for in the EEG 2012 (Paragraphs 40 to 44). The reduction is not *spontaneously* awarded to those undertakings by electricity suppliers, but derives from legislative and regulatory acts, adopted by the German State, which determine the law applicable to it. As I see it, the grant of that advantage is therefore undeniably attributable to that State.

73 Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1).

74 Point 215 of Decision 2015/1585.

75 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 24); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 16); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 20).

76 See, for example, the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 24).

77 Judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 18); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 22); and order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 23).

2. Transfer of State resources for the benefit of certain undertakings

104. As well as being attributable to the State, the measure must involve the transfer of State resources to the beneficiary undertakings.

105. The Court of Justice has adopted a broad interpretation of the concept of 'State resources', which includes not only funds from the public sector in a strict sense, but also, in certain circumstances, funds held by private bodies.

106. An indirect reduction of State revenue brought about by the adoption of national rules or measures does not constitute a transfer of State funds if that repercussion is inherent in those rules or measures.[78] Thus, an exception to the provisions of labour law which alters the framework of contractual relations between undertakings and workers is not regarded as a transfer of State resources despite the fact that it may reduce the social security contributions or taxes which undertakings and workers must pay to the State.[79]

107. It becomes more difficult to ascertain whether or not there has been a transfer of State resources where the States adopt mechanisms for intervening in economic affairs as a result of which certain undertakings may obtain a selective advantage. In particular, the *uncertainty* arises in cases where the State's intervention, although more extensive than the mere adoption of a set of general rules to regulate the sector, do not actually amount to a direct transfer of resources. The present reference for a preliminary ruling is concerned with just such a situation, the resolution of which calls for account to be taken first of all of the complex (and not always linear) case-law of the Court of Justice in this regard.

(a) The case-law of the Court of Justice on indirect transfers of State resources: from PreussenElektra ***to*** Association Vent De Colère! and Others

108. Intervention by the State or through State resources includes both aid granted directly by the State and that granted by public or private bodies established or appointed by it to administer the aid.[80] EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.[81]

109. A State measure favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned.[82]

110. After all, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and are therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources'.[83]

78 Judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 62).

79 Judgments of 7 May 1998, *Viscido and Others* (C-52/97, C-53/97 and C-54/97, EU:C:1998:209, paragraphs 13 and 14), and of 30 November 1993, *Kirsammer-Hack* (C-189/91, EU:C:1993:907, paragraphs 17 and 18).

80 Judgments of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 21); of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 58); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 23).

81 Judgment of 16 May 2002, *France* v *Commission*, (C-482/99, EU:C:2002:294), paragraph 23.

82 Judgment of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 22).

83 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 37); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 70); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 21); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 25).

111. So far as concerns the electricity sector, in the judgment of 19 December 2013, *Association Vent De Colère! and Others*, the Court of Justice held that ‘funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities’.[84]

112. It follows from that case-law that the decisive factor in determining whether the resources at issue are State resources within the meaning of Article 107(1) TFEU is the extent to which the public authorities intervene and exercise control in relation to them.

113. The lack of control on the part of the public authorities explains why the Court of Justice does not regard as aid, for example, cases where funds collected from the members of a trade association are intended to finance a specific initiative in the interests of those members, which is decided upon by a private organisation and serves purely commercial purposes, and the State acts merely as a vehicle for conferring compulsory status on the contributions introduced by the commercial organisations. Examples of such cases can be found in *Pearle*[85] and *Doux Élevage*.[86]

114. The lack of State control over transfers of resources also explains why the Court of Justice does not consider to be aid cases involving regulations giving rise to the redistribution of financial resources from one private entity to another without further State intervention. In principle, there is no transfer of State resources where the money moves directly from one private entity to another without passing through a public or private body appointed by the State to manage the transfer.[87]

115. Neither will there be a transfer of State resources where the undertakings, private for the most part, have not been appointed by the State to manage a State resource, but simply have an obligation to purchase using their own financial resources.[88] That is the situation at issue in the judgment in *PreussenElektra*, in which the Court held that an obligation imposed by a Member State on private suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity, that position being unaffected by the fact that the reduced revenue of the undertakings subject to that obligation will probably lead to a diminution of tax receipts because that consequence is inherent in the measure.[89] In that case, the undertakings affected (that is to say, private electricity suppliers) were bound by an obligation to purchase a specific type of electricity using their own financial resources, but had not been appointed by the State to administer a scheme of aid.

84 Judgments C-262/12, EU:C:2013:851, paragraph 25; and of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 35).

85 Judgment of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448, paragraph 41). In that case, concerning the funding of an advertising campaign in favour of opticians, the funds to pay for the advertising were raised from private undertakings through a trade association governed by public law. The Court of Justice rejected the proposition that these were ‘State resources’ because the trade association ‘[had] never had the power to dispose … freely’ of the levies ‘compulsorily earmarked for the funding of that [advertising] campaign’.

86 Judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 36). In that case, concerning a decree which extended to all traders an agreement concluded within a trade association (agricultural industry of turkey farming and production) which had introduced the levying of a contribution for the purpose of financing common activities decided on by that association, State resources were found not to be present. The national authorities could not actually use the resources resulting from those contributions to support certain undertakings, the use of those resources being decided upon by the inter-trade organisation in the interests of objectives determined by that organisation. Such resources were not constantly under public control or available to the State authorities.

87 Judgment of 24 January 1978, *Van Tiggele* (82/77 (EU:C:1978:10, paragraphs 25 and 26).

88 Judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 74); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 35); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 26).

89 Judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraphs 59 to 62). See also the judgment of 5 March 2009, *UTECA* (C-222/07, EU:C:2009:124, paragraphs 43 to 47), concerning compulsory contributions imposed on broadcasters for cinematographic production, which do not entail a transfer of State resources.

116. Neither did the Court of Justice consider there to have been any State control (or, therefore, a transfer of State resources) in the case of the Polish mechanism imposing on suppliers the obligation to sell a quota of the electricity produced by cogeneration accounting for at least 15% of their annual electricity sales to end users.[90]

117. However, State control reappears and there is a transfer of State resources where the sums paid by individuals pass through a public or private entity appointed to channel them to the beneficiaries. This was the situation in *Essent Netwerk Noord*, where a private entity was commissioned by law to levy on behalf of the State a surcharge on the price (tariff) for electricity the proceeds from which it was required to channel to beneficiaries but was not authorised to use for purposes other than those indicated by law. The fact that that surcharge (which the Court of Justice classified as tax) was entirely under public control was sufficient for it to be categorised as a State resource.[91]

118. The Court of Justice also found State control to be present in *Vent de Colère! and Others*, concerning a mechanism, financed by all final consumers, for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity (at a price higher than the market price). There was intervention through State resources even where that mechanism was based in part on a direct transfer of State resources between private undertakings.[92]

119. Forming part of the same line of case-law is the order of the Court of Justice in *Elcogás*, which concerned whether 'amounts allocated to a private electricity producer which are financed by all end users of electricity situated in national territory constituted intervention by the State or through State resources'.[93]

120. The Court's answer was that the mechanism for offsetting additional costs from which that undertaking benefited (which was financed by means of the final electricity tariff payable by all Spanish consumers and users of the transport and distribution network in national territory) was to be construed as intervention by the State or through State resources within the meaning of Article 107(1) TFEU. In that regard it made no 'difference … that the sums intended to offset the additional costs do not come from a specific supplement to the electricity tariff and that the financing mechanism at issue does not strictly belong to the category of tax, fiscal levy or parafiscal charge under national law'.[94]

121. There is also public control, and the Court of Justice therefore considers State resources to be present, in the case of the revenue generated, under Danish legislation, to compensate the public undertaking (TV2 Reklame) for the aid it administers in the form of the right to sell advertising space on TV2.[95]

90 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraphs 27 to 30). The competent Polish authority approved the maximum prices for the sale of electricity to final consumers, with the result that undertakings could not pass on to them the financial burden associated with that obligation to purchase. As a result, in some circumstances, electricity suppliers purchased electricity generated by cogeneration at a price higher than that charged for sale to end consumers, which gave rise to extra costs for the suppliers. The fact that those extra costs could not be passed on to final consumers and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism prompted the Court to find that the supply undertakings were not appointed by the State to manage a State resource, but were funding a purchase obligation imposed on them by having recourse to their own financial resources.

91 Judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 69 to 75).

92 Judgment of 19 December 2013, *Vent de Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 25 and 26).

93 Order of 22 October 2014 *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 20).

94 *Ibidem*, paragraphs 30 and 31. The latter clarification may be relevant for the purposes of refuting the objection (referred to in point 116 of Decision 2015/1585) to the effect that 'the EEG surcharge did not constitute a special contribution (*Sonderabgabe*) within the meaning of German constitutional law because the proceeds from the EEG surcharge were not allocated to the State budget and because the public authorities did not have the funds at their disposal, even indirectly'.

95 Judgment of 9 November 2017, *Commission* v *TV2 Danmark* (C-656/15 P, EU:C:2017:836), paragraphs 59 and 63). In that case, two public undertakings (TV2 Reklame and the TV2 Fund) had been created, controlled and appointed to administer the revenue from the sale of the advertising space of another public undertaking (TV2/Danmark) by the Danish State. That revenue was always under the control and at the disposal of the State, whose Ministry of Culture was able to decide that it should be used for purposes other than its transfer to the TV2 Fund.

(b) Transfer of State resources in this case

122. According to the German Government and the applicant undertakings, the EEG surcharge and the surcharge cap available to certain energy-intensive undertakings are mechanisms introduced by law but do not entail a transfer of State resources and are not subject to the control of the German authorities. In their opinion, that mechanism is caught by the case-law in *PreussenElektra*, inasmuch as the EEG 2012 has not introduced any substantive changes to the German legislation of 1990, which the Court of Justice did not consider to be State aid.

123. On the other hand, the Commission submits, as it did in Decision 2015/1585, that there is a transfer of resources in favour of energy-intensive undertakings which operates under the control of the German authorities. In its view, the scheme at issue is a mechanism for the promotion of renewable energy which differs from that analysed in the judgment in *PreussenElektra* and is comparable, rather, with those used in other Member States (Belgium, France, Spain, Austria), which the Court of Justice has categorised as State aid on the ground that they entail a flow of resources, under the control of the administrative authorities, for the benefit of certain undertakings.[96]

124. On the basis of this analysis of the case-law of the Court of Justice in this field, I am minded to share the view taken by the Commission. As a starting point, I would recall that the EEG surcharge, collected and administered by the TSOs, was established by the German authorities to cover the costs generated by the feed-in tariffs and the market premium, provided for by the EEG 2012, which guaranteed a higher than market price for green (EEG) electricity producers. The EEG surcharge therefore forms part of a German State policy aimed at supporting EEG electricity producers which was laid down by the EEG 2012 and its supplementary provisions. The reduction of that surcharge for certain energy-intensive undertakings in the manufacturing sector was intended to mitigate the impact of the cost of that support on their respective budgets.

125. The principal features which highlight the control exercised by the German authorities over the funds generated by the EEG surcharge (including its reduction for the benefit of certain energy-intensive undertakings) and, therefore, the nature of those funds as ‘State resources’ are:

– the public nature of those resources;

– the fact that the EEG surcharge is administered by the TSOs, pursuant to a statutory obligation; and

– the fact that the German authorities exercise control over the EEG surcharge and the surcharge cap available to certain energy-intensive undertakings.

(1) Public nature of the resources obtained by way of the EEG surcharge and the reduction of the amount of that surcharge for energy-intensive undertakings

126. Producers of electricity generated from renewable sources benefit from the guarantee that local distribution network operators will purchase such electricity from them as preferred suppliers and pay the price payable for it (by way of the feed-in tariffs laid down by law). The network operators transfer the electricity produced from renewable sources to the TSOs, which are obliged to reimburse the

96 Judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413); and of 19 December 2013, *Association Vent De Colère! and Others* C-262/12, EU:C:2013:851); order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314); and judgment of the General Court of 11 December 2014, *Austria* v *Commission* (T-251/11, EU:T:2014:1060).

network operators for the premiums they have paid. The EEG surcharge is calculated according to the price at which the electricity sells on the electricity stock market. The EEG surcharge is then distributed on a purely financial basis among the TSOs, which pass it on to the undertakings that supply electricity to final consumers.

127. Whether to pass on the EEG surcharge is a business decision taken by the supplier undertakings. *In practice*, however, it is passed on almost as a matter of course and this is consistent with the scheme underpinning the EEG 2012. The surcharge cap available to certain energy-intensive undertakings is offset by a corresponding increase for other consumers,[97] that is to say those that do not qualify for the cap.

128. According to the German Government and the applicant undertakings, the EEG surcharge (and, therefore, the surcharge cap) is no more than a means of mobilising private funds between similarly private undertakings, the relations between which remain subject to civil law, on a purely contractual basis. It is a system for fixing, by law, a minimum price for the sale of a product by private undertakings.

129. I do not support that argument. The EEG surcharge is the product not simply of an initiative on the part of the TSOs but of the application of the German legislation, which has identified the beneficiaries of the advantage (producers of EEG electricity and certain energy-intensive undertakings), the so-called ‘eligibility criteria’ and the level of the aid, with a view to raising the financial resources necessary to cover the costs of supporting EEG electricity.

130. The TSOs are not free to impose the EEG surcharge of their choice and the German authorities oversee not only the way in which that surcharge is calculated, collected and administered but also the cap applicable to energy-intensive undertakings, which is dependent on a prior administrative act. The provisions governing the surcharge ensure that it generates enough financial cover to pay for the support for EEG electricity, including the reduction for energy-intensive undertakings. Those provisions do not allow for the raising of additional revenue beyond that necessary to cover those costs and the TSOs cannot use the EEG surcharge to finance any other type of activity.

131. The financing of the EEG surcharge and the surcharge cap have been designed in such a way that the costs of supporting the production of EEG electricity are passed on over multiple stages to operators on the German electricity market. As I have already explained, the rationale behind the scheme is as follows:

– the EEG surcharge is paid by final consumers of electricity, its impact being mitigated for the benefit of energy-intensive undertakings;

– green electricity producers receive the corresponding financial support; and

– local distributors, TSOs and suppliers are responsible for passing on the amount of the EEG surcharge, under the constant control of the German authorities.

132. The EEG is therefore in the nature of State resources used to support the production of green electricity, and not in the nature of mere private funds held by businesses and consumers which those two groups are able to negotiate between themselves.

97 This is mentioned in point 54 of Decision 2015/1585: ‘the German Association of Energy Consumers (Bund der Energieverbraucher), which initially complained to the Commission about the EEG-Act 2012, argued that the reductions in the EEG-surcharge do indeed constitute State aid … to energy-intensive users and that they harm those German undertakings and consumers that have to pay a higher EEG-surcharge without benefiting from similar reductions. …’.

133. Its nature as such is not precluded by the fact that, in Germany, there is no public body specifically designed to manage those funds, a task which is allocated to electricity market operators (in particular, acting collectively, the TSOs). As I have already recalled, the Court of Justice has held that, in order for a transfer of State resources to exist for the purposes of Article 107 TFEU, it is not necessary that those resources should emanate from the budget or assets of the State or that they should be collected, redirected and managed by a public body.

134. In order for funds to be classified as being in the nature of State resources, it is sufficient that they are to be contributed by one set of individuals to another in order to be passed on to the final beneficiaries, including under the management of entities separate from the public authority, provided that the transfer of economic resources (in this case, from end users to green electricity producers) is effected pursuant to a statutory obligation and under administrative control. It is just such an aid scheme which is provided for in the EEG 2012, which, in my view, is comparable to the schemes that gave rise to the case-law in *Association Vent De Colère! and Others*. [98]

135. Given that the structure of the aid scheme was determined by the German legislature, the position here is not comparable with that at issue in the judgment in *Doux Élevage*. [99] What is more, the intended purpose of those funds (support for the production of EEG electricity) is established by the legislature itself and their use does not lie at the discretion of the TSOs. [100]

136. Contrary to what the German Government and the applicant undertakings have submitted, the situation under consideration here is not comparable with that at issue in the judgment in *PreussenElektra*. In that judgment, the Court of Justice considered that the possibility, provided for in the German legislation, that producers of electricity from renewable sources might sell that electricity at a higher price than the market price did not entail a mobilisation of State resources. The basic differences between the two cases are, to my mind, as follows:

– in *PreussenElektra*, the private undertakings were not commissioned by law to administer State resources, but had an obligation to purchase energy using their own financial resources. [101] On the contrary, the obligation to pay more to EEG electricity producers, which is incumbent on the TSOs, is discharged not through the use of the TSOs' own resources but through the EEG surcharge, the proceeds from which are exclusively earmarked for financing the support and compensation schemes created by the EEG 2012;

– The mechanism examined in *PreussenElektra* did not contain a compensation scheme, whereas, by the EEG 2012, the State guarantees that the additional costs incurred by private operators in connection with the production of green electricity will be covered in full and allows those costs to be borne in full by consumers;

– The EEG 2012 establishes the EEG surcharge (together with a cap on that surcharge for energy-intensive undertakings) and provides for it to be passed on over multiple stages by the TSOs, with the result that the full amount of that surcharge is *effectively* paid by consumers in their bills and received by EEG electricity producers. This was not the position, however, in *PreussenElektra*.

98 Judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 25); and of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 70); and order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 32).

99 Judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348).

100 Judgment of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 46 and the case-law cited).

101 See, to that effect, the judgment of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 35).

137. The aforementioned features of the scheme at issue make it impossible for it to be classified as simply a mechanism for fixing the minimum price for the sale of a product (EEG electricity) between private undertakings, as was the case in the judgments in *PreussenElektra* and *Van Tiggele*. It is, on the contrary, a more comprehensive scheme for the promotion of renewable energy the producers of which are guaranteed to receive State resources, emanating ultimately from final consumers, which are administered on a centralised basis by the TSOs under the control and supervision of three German authorities, namely the Bundesnetzagentur (Federal Networks Agency, 'BNetzA'), the BAFA and the Umweltbundesamt (Federal Environment Agency). I shall refer to those functions at length.

(2) The TSOs' statutory obligation to administer the EEG surcharge and the surcharge cap available to energy-intensive undertakings

138. Taking issue with the assessment contained in Decision 2015/1585, the German Government and the applicant undertakings deny that the TSOs have been collectively appointed to administer a State resource. In their view, the various operators affected by the EEG 2012, in common with other economic operators, simply settle between themselves the private claims arising from the rights conferred on them by law. They thereby differ from the public or private bodies whose intervention in mechanisms for providing aid for EEG electricity was analysed in the judgment in *Association Vent De Colère! and Others*.

139. I take the view, conversely, that the TSOs are necessarily obliged to administer the EEG surcharge (including the surcharge cap for energy-intensive undertakings) by virtue of the duty imposed on them by the EEG 2012, and thus become the fulcrum for the operation of the EEG electricity support scheme. This follows from the functions provided for, in particular, in Articles 34 to 39 of EEG Law 2012.[102]

140. The EEG surcharge is defined by funds earmarked for purposes previously and exclusively determined by the German legislature, the collection of which requires the intervention of certain intermediaries responsible for raising and administering them. These sums are accounted for separately, are not entered in the general budget of the TSOs and cannot be freely disposed of by

102 According to recital 106 of Decision 2015/1585, it falls to the TSOs to:

'purchase EEG electricity produced in their area either directly from the producer when it is directly connected to the transmission line or from distribution system operators (DSOs) at feed-in tariffs, or pay the market premium. As a result, the EEG electricity as well as the financial burden of the support provided for the EEG-Act 2012 are centralised at the level of each of the four TSOs);

apply the *green electricity privilege* to suppliers which ask for it and fulfil the relevant conditions, set out in Paragraph 39(1) of the EEG-Act 2012;

equalise between themselves the amount of EEG electricity so that each of them purchases the same proportion of EEG electricity;

sell the EEG electricity on the spot market according to rules defined in the EEG-Act 2012 and its implementing provisions, which can be done jointly;

jointly calculate the EEG-surcharge, which has to be the same for each kWh consumed in Germany, as the difference between revenues from the sale of EEG electricity and expenditure linked to the purchase of EEG electricity;

jointly publish the EEG-surcharge in a specific format on a joint website;

publish also aggregate information on the EEG electricity;

compare the forecasted EEG-surcharge with what it should really have been in a given year and the surcharge for the following year;

publish forecasts for several years in advance;

collect the EEG-surcharge from electricity suppliers;

(each) keep all financial flows (expenditure and revenues) linked to the EEG-Act 2012 in separate bank accounts'.

them. The TSOs are thus commissioned by the State to facilitate the financial flow from the final consumers to the producers pursuant to an obligation imposed on them by law. They do not therefore settle private claims but administer, under State supervision, a surcharge the nature of which falls within the scope of public law.

(3) The German authorities' control over the EEG surcharge

141. The German Government and the applicant undertakings submit that the powers of the public authorities, in particular the BNetzA and the BAFA, are too limited to give them any significant control over the EEG surcharge (and, consequently, the surcharge cap for the benefit of energy-intensive undertakings). According to Germany, the provisions of the EEG 2012 relating to the method for calculating the surcharge, the transparency requirements and the supervision carried out by the BNetzA are aimed only at preventing the unjust enrichment of any of the private operators along the line of payment.

142. However, the German authorities not only supervise the legality of the actions of the operators involved in collecting the EEG surcharge but also, if necessary, impose sanctions (BNetzA) or ascertain the right of an energy-intensive undertaking to benefit from a reduction of the surcharge (BAFA). The control and supervision they exercise is, in my opinion, undeniable.

143. In particular, pursuant to Paragraph 61 of the EEG 2012, the BNetzA has a duty, as part of its supervisory tasks, to monitor whether the TSOs sell EEG electricity in accordance with Paragraph 37 of that Law, and whether they determine, fix and publish the EEG surcharge and invoice electricity suppliers for it with due regard for the relevant statutory and regulatory provisions. Furthermore, in accordance with Paragraph 48 of the EEG 2012, the TSOs provide the BNetzA with the information used by the compensation mechanism.[103]

144. The BNetzA has enforcement powers and functions related to the various costs and revenues which the TSOs are authorised to include in the calculation of the EEG surcharge. It can adopt enforceable decisions to correct the level of the EEG surcharge, and fine operators involved in the scheme with a view to ensuring compliance with the EEG Law 2012.

145. The actions of the administrative authorities are also relevant in relation to the energy-intensive undertakings: these companies must provide the competent ministry with the information necessary to enable it to ascertain whether the objectives pursued under Paragraph 40 of the EEG 2012 will be achieved. The BNetzA must ensure that the EEG surcharge is reduced only for electricity suppliers that meet the conditions laid down in Paragraph 39 of the EEG 2012. In addition, the BAFA decides whether energy-intensive undertakings which have applied for it are eligible to pay only a capped EEG surcharge, such decisions being open to challenge before the German administrative courts rather than the civil courts.

103 According to recital 39 of Decision 2015/1585, the BNetzA must ensure that:

the TSOs sell on the spot market the electricity for which feed-in tariffs are paid in accordance with applicable rules;

the TSOs properly determine, set and publish the EEG surcharge;

the TSOs properly charge electricity suppliers for the EEG surcharge;

feed-in tariffs and premiums are properly charged by network operators to TSOs.
…'

146. In the light of that non-exhaustive list of supervisory and control powers which the German authorities exercise over the funds collected via the EEG surcharge, I cannot find enough reasons to support the proposition that Decision 2015/1585 is invalid, given that such funds are under the control of those State authorities.

147. I therefore take the view that, in the manner in which it was applied to the applicant undertakings, the EEG surcharge cap entails for its benefit a transfer of State resources within the meaning of Article 107(1) TFEU.

V. Conclusion

148. In the light of the foregoing considerations, I propose that the Court of Justice:

(1) Declare the question referred for a preliminary ruling by the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main, Germany) inadmissible;

(2) In the alternative, find that these proceedings have not revealed any factors such as to support a declaration as to the invalidity of Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable and of energy-intensive users), so far as concerns the reduction, for the benefit of certain undertakings consuming large quantities of electricity, of the general surcharge established by German law.