



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

15 May 2019*

(Reference for a preliminary ruling — State aid — Concept of ‘aid granted by a Member State or through State resources’ — Measures intended to compensate providers of public interest services in the electricity sector — Concept of aid ‘affecting trade between Member States’ and ‘distorting or threatening to distort competition’ — Concept of ‘selective advantage’ — Service of general economic interest — Offsetting of costs involved in the discharging of public service obligations)

In Case C-706/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 7 December 2017, received at the Court on 18 December 2017, in the proceedings

AB ‘Achema’,

AB ‘Orlen Lietuva’,

AB ‘Lifosa’

v

Valstybinė kainų ir energetikos kontrolės komisija (VKEKK),

joined parties:

Lietuvos Respublikos energetikos ministerija,

UAB ‘Baltpool’

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 6 November 2018,

* Language of the case: Lithuanian.

after considering the observations submitted on behalf of:

- AB ‘Achema’, AB ‘Orlen Lietuva’ and AB ‘Lifosa’, by G. Balčiūnas and V. Radvila, advokatai, E. Righini and G. Catti De Gasperi, avvocati, and C. Cluzel, avocate,
- UAB ‘Baltpool’, by A. Smaliukas and E. Junčienė,
- the Lithuanian Government, by R. Krasuckaitė, D. Stepanienė, R. Dzikovič and D. Kriauciūnas, acting as Agents,
- the European Commission, by P. Němečková, D. Recchia and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2019,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns, principally, the interpretation of Article 107(1) TFEU.
- 2 The request has been made in proceedings between, on the one hand, AB ‘Achema’, AB ‘Orlen Lietuva’ and AB ‘Lifosa’ and, on the other hand, the Valstybinė kainų ir energetikos kontrolės komisija (National Commission for Energy and Price Control; ‘the NCECP’) relating to NCECP Decision No O3-442 of 11 October 2013 concerning the determination of monies and prices for public interest services in respect of 2014 (‘the decision at issue’).

Legal context

EU law

- 3 Recitals 46 and 50 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) are worded as follows:

‘(46) Respect for the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.

...

- (50) The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. ...’

4 Article 3(2) of Directive 2009/72 provides:

‘Having full regard to the relevant provisions of the [FEU] Treaty, in particular Article [106] thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.’

Lithuanian law

Legislation on public interest services in the electricity sector

- 5 Article 2(51) of Lietuvos Respublikos Elektros energetikos įstatymas Nr. VIII-1881 (Law No VIII-1881 on electricity) of 20 July 2000 (Žin., 2000, No 66-1984, as amended by Law No XI-1919 of 17 January 2012; ‘the Law on electricity’) defines ‘public interest in the electricity sector’ as an action or omission in that sector, directly or indirectly connected to (i) State security in the field of energy and/or public safety, (ii) the security of the operation of the electricity system, (iii) the reduction of the negative impact of that sector on the environment, (iv) the diversification of energy sources, and (v) the other objectives of sustainable development of that sector laid down by that law.
- 6 Article 2(52) on the Law on electricity provides that, first, public interest services in the electricity sector (‘PIS’) are services provided by undertakings and, second, the Lithuanian Government or the authority empowered by that government is to draw up a list of those services and define the providers and the procedures for the provision of those services pursuant to the general requirements laid down in Article 74 of that law and the public interests in that sector.
- 7 Article 74(1) of that law defines which activities or omissions can relate to PIS, while Article 74(2) empowers the Lithuanian Government to establish the list of PIS and define the procedure for the provision of those services.
- 8 Article 74(4) of that law provides that the Lithuanian Government or the authority empowered by that government can impose an obligation on market operators to provide the PIS, on condition that it does not discriminate between them in regard to their rights or obligations.
- 9 Lietuvos Respublikos Vyriausybės nutarimas Nr. 916 ‘Dėl viešuosius interesus atitinkančių paslaugų elektros energetikos sektoriuje teikimo tvarkos aprašo patvirtinimo’ (Resolution No 916 of the Lithuanian Government approving the description of the scheme for the provision of public interest services in the electricity sector) of 18 July 2012 (Žin., 2012, No 88-4609, as amended by Resolution No 1216 of 18 December 2013; ‘Resolution No 916’) was adopted pursuant to Article 74 of the Law on electricity.
- 10 Points 7 to 7.6, of the description annexed to that resolution state:

‘7. The following, inter alia, shall be regarded as public interest services:

7.1 the generation of electricity through renewable energy sources and its balancing;

7.2 the generation of electricity by cogeneration at combined heat and power plants when such plants supply heat to district heating systems and the savings of primary energy are such that combined heat and power production can be considered efficient;

7.3 the construction of specific electric power plants in order to safeguard the security of electricity supply;

7.4 the maintenance of the reserve capacity of specific electric power plants the operation of which is necessary in order to safeguard national energy security;

7.5 the development of energy generation capacity which is of strategic importance in order to safeguard the security and reliability of the State's energy system or the independence thereof;

7.6 the implementation of strategic projects in the electricity sector relating to improving energy security by installing interconnectors with electricity systems of other States and/or by connecting the Lithuanian electricity system with those of other Member States'.

11 According to points 8 to 8.3, of the description annexed to that resolution:

'8. Public interest services shall be provided by the following persons:

8.1 electricity producers ... generating electricity from renewable energy sources;

8.2 producers appointed by the State to provide the public interest services set out in points 7.2 to 7.4 of [the annexed description];

8.3 persons designated in the national strategy, plan, implementation programmes and/or governmental decisions for energy independence to provide the public interest services set out in points 7.5 and 7.6 of [the annexed description]'.

12 Points 11 and 11¹ of the description annexed to Resolution No 916 provide:

'11. Before 1 September of the current year, the Government shall approve, on a proposal from the Ministry of Energy and for the upcoming calendar years, the persons providing the public interest services set out in points 7.2 to 7.6 of [the annexed description], the projects set out in points 7.5 and 7.6 of [the annexed description] and the subsidised volume of electricity generation for public interest service providers.

11¹. The public interest services set out in point 7.2 of [the annexed description] shall be provided in accordance with the procedure set out below.

11^{1.1}. The public provider, taking account of the electricity needs of the consumers to whom the electricity rates regulated by the State for the coming calendar year apply and of the subsidised volume of electricity production set by the State for the coming calendar year and for the producer concerned, shall make an offer on 15 November of the current year at the latest to electricity producers providing the public interest service set out in point 7.2 of [the annexed description] of the quantities per month of the upcoming calendar year of subsidised electricity purchased in respect of each month of the heating season, which those electricity producers shall negotiate with the public provider 30 days at the latest after having received them, taking into account the projected heating needs for the upcoming year and the requirement to maintain the efficiency of the generation of electricity by cogeneration. The contracts for the sale of subsidised electricity between electricity producers and the public provider, in which the projected quantities of subsidised electricity to be purchased in respect of each month of the heating season are fixed, must be concluded before 31 December of the current year;

...

Legislation on PIS financing

- 13 According to Article 74(3) of the Law on electricity, the Lithuanian Government is to appoint the person responsible for administering and distributing PIS monies ('the administrator of PIS monies').
- 14 Vyriausybės Nutarimas Nr. 1157 'Dėl viešuosius interesus atitinkančių paslaugų elektros energetikos sektoriuje lėšų administravimo tvarkos aprašos patvirtinimo' (Resolution No 1157 of the Lithuanian Government approving the description of the procedure for the administration of monies for public interest services in the electricity sector) of 19 September 2012 (Žin., 2012, No 113-5704, as amended by Resolution No 1537 of 19 December 2012; 'Resolution No 1157') establishes the conditions for collecting and administering PIS monies and for distributing them among PIS providers.
- 15 Points 4.6 of Resolution No 1157 provide that the administrator of PIS monies must be an entity controlled directly or indirectly by the State.
- 16 By Vyriausybės nutarimas Nr. 1338 'Dėl viešuosius interesus atitinkančių paslaugų elektros energetikos sektoriuje lėšų administratoriaus paskyrimo' (Resolution No 1338 of the Lithuanian Government relating to the procedure for the appointment of the administrator of monies for public interest services in the electricity sector) of 7 November 2012 (Žin., 2012, No 130-6560), UAB 'Baltpool' was appointed as administrator of PIS monies for an unlimited period.
- 17 As a general rule, PIS monies are collected from end consumers of electricity by the distribution and transport system operators, which transfer them to the administrator of PIS monies, which in turn distributes them to PIS providers after deducting a sum to cover its administrative costs.
- 18 Pursuant to point 7 of Article 9(1) of the Law on electricity, the NCECP, which is a public body, determines how the PIS rates are calculated, together with the rates themselves, which are established for each year, taking into account the need for PIS monies and the projected electricity consumption for that year.
- 19 By Decision No O3-279 of 28 September 2012, the NCECP approved the procedure for calculating the PIS rates, on the basis of which the PIS rates in respect of 2014 were approved.
- 20 By the decision at issue, the NCECP determined, in respect of 2014, the exact amounts of the monies allocated to each group of PIS providers and the rates of the PIS payments to be made by the end consumers.

Legislation on the generation of electricity from renewable energy sources

- 21 Article 20, entitled 'Promotion of the use of renewable energy sources for the generation of electricity', of Lietuvos Respublikos atsinaujinančių išteklių energetikos įstatymas No XI-1375 (Lithuanian Law No XI-1375 on renewable energy sources) of 12 May 2011 (Žin., 2011, No 62-2936, as amended by Law No XII-169 of 17 January 2013) provides, in paragraphs 1 to 3 and 6:

'1. The generation of electricity from renewable energy sources and the balancing thereof constitute a public interest service. The State shall define the general principles, the procedure and the conditions applicable to the payment of fixed rates established pursuant to this law and the procedure determined by the Government and to the sale of electricity generated from renewable energy sources by approving the description of the procedure for the provision of public interest services and the description of the procedure for promoting the generation of energy from renewable sources.'

2. The generation of electricity from renewable energy sources shall be encouraged, in accordance with the public interest services procedure established by the Government, by paying the difference between the fixed rate established for a producer and the rate of the electricity sold by that producer according to the procedure laid down by the Government, which cannot be lower than the average price on the electricity market for the preceding month, calculated according to the procedure established by the [NCECP].

3. Fixed rates shall be established and promotion quotas for power plants with an installed power capacity of more than 10 kW shall be allocated by auction with a view to accomplishing the objectives referred to in Article 13(3) of the present law. Promotion quotas and the auction regions, together with the procedure for allocating promotion quotas for power plants with an installed power capacity of less than or equal to 10 kW shall be established and approved by the Government. Separate auctions shall be organised for the connection to regional electric systems for each group of producers within the time limits set by the [NCECP] but no later than 180 days after a producer's request that auctions be held for a given group of producers and region. All of the producers which signed the letter of intent referred to in Article 14(11) and provided a guarantee of discharge of producers' obligations referred to in Article 14(13) of the present law shall be entitled to participate in auctions. The maximum fixed rate shall be established by the [NCECP] every quarter. Auctions shall be won by the participant who has offered the lowest intended fixed rate, having regard to the fact that the maximum installed power capacity of a generation system in an auction region cannot represent more than 40% of the maximum heat generation capacity in that region which can be connected. ...

...

6. The [NCECP] shall assess, quarterly at the most, the development of production capacity of electricity generated from various renewable energy sources, taking account of the volume of electricity actually generated during the previous calendar year, of the cumulative installed power capacity of active power plants and the cumulative installed power capacity of planned power plants. The maximum amounts of the fixed rates shall be revised on the basis of the examination of the development of production capacity of electricity generated from various renewable energy sources and its compliance with the objectives and tasks defined in the national action plan for renewable energy. The maximum amounts of the revised fixed rates shall apply only to producers whose power plants have been authorised to generate electricity after the date on which those rates become applicable.'

- 22 Pursuant to that legislation, producers of electricity generated from renewable energy sources who have won the auctions provided for in Article 20(3) of the Law on renewable energy sources are to conclude contracts with electricity purchasers, that is, transport and distribution system operators. The losses sustained by those undertakings on account of the marketing of the electricity purchased in that context are compensated by the administrator of PIS monies by means of the PIS monies.
- 23 Under that legislation, the costs incurred by transport and distribution system operators in balancing the generation of electricity from renewable energy resources are compensated by way of those funds.

Legislation on the generation of electricity in combined heat and power plants

- 24 Pursuant to Resolution No 916, electricity generated in cogeneration plants, that is to say, combined heat and power plants, constitutes a PIS, provided that those plants provide heat in heating systems and that the cogeneration is considered to be efficient.

- 25 According to the Elektros energijos supirkimo iš bendrų šilumos ir elektros energijos gamintojų taisyklės, patvirtintos Lietuvos Respublikos energetikos ministro įsakymu Nr. 1-219 (Decree No 1-219 of the Lithuanian Minister for Energy approving the rules for the purchase of electricity from producers cogenerating heat and power) of 24 November 2009 (Žin., 2009, No 140-6160), producers wishing to provide such PIS are to submit their requests to the Minister for Energy.
- 26 On a proposal from the Minister for Energy, the Lithuanian Government is to approve the list of undertakings appointed to provide such PIS for the coming calendar year and to set the maximum volume of electricity generated in that connection.
- 27 The public electricity provider is subsequently to make an offer for the coming calendar year to the electricity producers providing those PIS and negotiate with them the quantities of electricity purchased per month, as the contracts for the purchase of electricity generated in combined heat and power plants as a PIS must be signed before 31 December of the current year. Pursuant to those contracts, PIS providers receive compensation for the electricity that they have generated and delivered to the electricity system without exceeding the volume provided for; that compensation is paid directly to them by the administrator of PIS funds.

Legislation on the security of electricity supply

- 28 ‘Lietuvos Elektrinė’, a branch of AB ‘Lietuvos energijos gamyba’, was designated as the provider of the PIS relating to the security of electricity supply for 2014.
- 29 By Decision No O3-703 of 22 November 2013 on the generation of electricity of the Republic of Lithuania and setting the purchase price of electricity produced by Lietuvos Elektrinė, the NCECP set that purchase price for 2014, providing a breakdown divided into a part relating to variable costs and a part relating to fixed costs.

Legislation on the NordBalt project

- 30 Article 3 of Lietuvos Respublikos elektros energetikos sistemos integracijos į Europos elektros energetikos sistemas įstatymas No XI-2052 (Law No XI-2052 on integration of the electricity system of the Republic of Lithuania into European electricity systems) of 12 June 2012 (Žin., 2012, No 68-3465) provides that, in order to ensure that the Lithuanian electricity system is fully integrated into European electricity systems, the operation of the connection of the Republic of Lithuania’s electricity transport system with the Kingdom of Sweden’s electricity transport system (‘the NordBalt project’) was to start in 2015.
- 31 Article 6(3) of that law provides:
- ‘The implementation of the integration of the Republic of Lithuania’s electricity system into European electricity systems shall be financed through [PIS] funds in accordance with the procedure established by the Law on electricity; EU subsidies may also be used in accordance with the procedure established by the law in order to finance in part that integration, including the aid allocated to energy projects by the EU multiannual financial framework 2014-2020 and (or) other legally obtained resources.’
- 32 The provision of PIS in connection with the NordBalt project was entrusted to AB ‘Litgrid’, a transport system operator.

Legislation on the compensation for operators of solar power plants

- 33 On the basis of Article 3(3) of Lietuvos Respublikos atsinaujinančių išteklių energetikos įstatymo 2, 11, 13, 14, 16, 20, 21 straipsnių pakeitimo ir papildymo įstatymo įgyvendinimo įstatymas No XII-170 (Implementing Lithuanian Law No XII-170 amending and supplementing Articles 2, 11, 13, 14, 16, 20 and 21 of the Law on renewable energy sources) of 17 January 2013 (Žin., 2013, No 12-561), the development costs of solar power plants, in respect of which authorisations to develop capacity for the generation of electricity from renewable sources by constructing such plants were not implemented by the date provided for by the initial legislation or were not extended, are recognised as PIS-related costs.
- 34 Pursuant to that legislation, persons who have developed solar power plant projects that were called into question by the legislative changes made in 2013 have the option of requesting a compensation committee established by the Lithuanian Government to set the amount of compensation due to them in respect of costs incurred before 1 February 2013. That compensation is paid directly to those persons by the administrator of PIS funds.

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

- 35 The applicants in the main proceedings are companies registered in Lithuania and active in, inter alia, the operation of combined heat and power plants, in which the electricity generated is consumed for their own economic needs or provided to legal persons operating within their areas. In the event of a shortfall, they purchase electricity from independent suppliers.
- 36 Under the national legislation at issue in the main proceedings, the applicants in the main proceedings are required to bear the cost of the PIS. The amounts to be paid are calculated on the basis of the quantity of electricity which they themselves generate or purchase from independent suppliers and consume for their own economic needs.
- 37 By the decision at issue, the NCECP determined the monies allocated to various PIS in respect of 2014 and the amount of the contributions to those PIS which end consumers of electricity and certain electricity producers, including the applicants in the main proceedings, are required to pay.
- 38 On 11 November 2013, the applicants in the main proceedings brought actions before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) seeking the annulment of points 1.2 to 1.4, 1.7, 2 and 3 of the decision at issue.
- 39 They challenged that decision as being unlawful in part on the ground that it forms part of a regime of State aid measures, established by means of the legislation concerning PIS, which was implemented without prior notification to the European Commission, contrary to the obligation imposed by Article 108(3) TFEU. Moreover, they are of the view that the amount of the contributions is excessively high and unlawful.
- 40 By judgment of 9 February 2016, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) dismissed the actions brought by the applicants in the main proceedings.
- 41 On 23 February 2016, those applicants appealed to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) seeking to have the judgment of 9 February 2016 set aside and asking that court to rule on their actions at first instance. They also submitted requests that the matter be referred to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.

- 42 The defendant in the main proceedings, the NCECP, together with the interested third parties, the Lietuvos Respublikos energetikos ministerija (Lithuanian Ministry of Energy) and Baltpool, have contended that the request of the applicants in the main proceedings should be rejected.
- 43 In those circumstances, the referring court's questions relate to whether certain aspects of the PIS and their financing must be regarded as State aid for the purposes of Article 107(1) TFEU. More specifically, those questions relate to the concept of 'State resources' referred to in that provision and the conditions laid down by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415).
- 44 It is in those circumstances that the Lietuvos vyriausiosios administracinės teismas (Supreme Administrative Court, Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Is the legislative framework for the provision of [PIS] and their financing (compensation) ("the PIS scheme") in force in 2014 — established in the Law on electricity, in the Law on energy from renewable sources, in the Law on integration of the Lithuanian electricity system into European electricity systems, in the Implementing Law amending and supplementing Articles 2, 11, 13, 14, 16, 20 and 21 of the Law on energy from renewable sources and in the legal measures implementing those laws, including the description of the procedure for the provision of [PIS], approved by Resolution No 916 ..., the procedure for the administration of [PIS monies], approved by Resolution No 1157 ... or part thereof, to be regarded as State aid (a State aid scheme) for the purposes of Article 107(1) TFEU, including the following questions:

- '(1) In circumstances such as those in the case in the main proceedings, is Article 107(1) TFEU to be interpreted as meaning that PIS monies are, or are not, to be regarded as State resources?
- (2) Is Article 107(1) TFEU to be interpreted as meaning that a case where an obligation is imposed on system operators (undertakings) to purchase electricity from electricity producers at a fixed price (rate) and/or to balance out that price, and the losses sustained by system operators on account of that obligation are compensated with monies which are possibly attributable to State resources, is not to be regarded as aid granted to electricity producers through State resources?
- (3) Is Article 107(1) TFEU to be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the following support is, or is not, to be regarded as selective and/or capable of affecting trade between Member States: support granted to an undertaking which implements a project of strategic importance, such as "NordBalt"; support granted to undertakings which are entrusted with ensuring the security of electricity supply for a given period; support to compensate for the losses reflecting market conditions and actually sustained by persons, such as the developers of solar photovoltaic plants here in issue, by reason of the State's refusal to fulfil commitments entered into (by reason of national regulatory changes); support granted to undertakings (system operators) with the objective of providing compensation for actual losses sustained in their discharging of the obligation to purchase electricity at a fixed price from electricity producers providing PIS and to balance the electricity?
- (4) Is Article 107(1) TFEU, read in conjunction with Article 106(2) TFEU, to be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the PIS scheme in question (or part thereof) is, or is not, to be regarded as satisfying the criteria laid down in paragraphs 88 to 93 of the judgment ... of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* [C-280/00, EU:C:2003:415]?
- (5) Is Article 107(1) TFEU to be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the PIS scheme (or part thereof) is, or is not, to be regarded as distorting or threatening to distort competition?'

Consideration of the questions referred

The first question

- 45 By its first question, the referring court asks whether Article 107(1) TFEU must be interpreted as meaning that the funds earmarked for financing a public interest service scheme, such as PIS, constitute State resources within the meaning of that provision.
- 46 It should be recalled at the outset that categorisation as ‘State aid’ within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that that intervention be liable to affect trade between Member States, that it confer a selective advantage on the recipient and that it distort or threaten to distort competition (judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 18; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 15; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 17).
- 47 It should also be borne in mind that, in order for it to be possible to categorise advantages as ‘State aid’ within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgments 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 and the case-law cited).
- 48 In the first place, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 21).
- 49 In the case in the main proceedings, as is apparent from paragraphs 5 to 34 of the present judgment, both the various PIS and the method of their financing were adopted by the State by way of various laws and government resolutions. They must therefore be regarded as attributable to the State, a fact which, moreover, has not been disputed by any of the interested parties.
- 50 In the second place, in order to determine whether the advantage has been granted directly or indirectly through State resources, it should be borne in mind that, according to the Court’s settled case-law, the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State and aid granted through a public or private body appointed or established by that State to administer it (judgments of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 20; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 23).
- 51 EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgments of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 23, and of 9 November 2017, *Commission v TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 45).
- 52 It is also apparent from the Court’s case-law that a measure consisting, inter alia, of an obligation to purchase energy may come within the concept of ‘aid’, even though it does not involve a transfer of State resources (see, to that effect, judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 19, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 24).

- 53 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 sums corresponding to the aid 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’ (judgments 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 and the case-law cited).
- 54 The Court has, more specifically, held that funds financed through compulsory charges imposed by State legislation, and administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separate from the public authorities (judgments of 2 July 1974, *Italy v Commission*, 173/73, EU:C:1974:71, paragraph 35, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 25).
- 55 The decisive factor in that regard is that such undertakings are appointed by the State to administer a State resource and are not merely bound by an obligation to purchase by means of their own financial resources (see, to that effect, 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, paragraphs 30 and 35; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraphs 26 and 30).
- 56 In the present case, it is apparent from the file before the Court that the PIS regime has the following characteristics.
- 57 First of all, an obligation is imposed by that regime on end consumers to pay a contribution to the distribution and transport system operators, which is included in and increases the price of electricity, the precise amount of which is fixed by the NCECP, pursuant to Article 9(1), point 7, of the Law on electricity, in relation to each kilowatt-hour consumed. Electricity producers which consume, for their own needs, the electricity which they generate are also subject to that regime and are charged a rate, fixed by the NCECP in relation to each kilowatt-hour consumed, which differs from the rate applicable to end consumers.
- 58 As is apparent from the order for reference, in order to fix those rates, the NCECP takes account, for each year in question, of the need for PIS monies for that period and of the projected consumption of electricity over the same period.
- 59 Next, the sums collected on that basis by the distribution and transport system operators are paid to the administrator of PIS monies, which, as clarified at the hearing by the parties to the main proceedings and the Lithuanian Government, must, pursuant to point 4.6 of Resolution No 1157, be controlled directly or indirectly by the State. On the basis of those sums, the administrator of PIS monies is required to calculate the PIS monies and to apportion them among the various PIS providers after deducting a maximum amount of 500 000 Lithuanian litai (LTL) (approximately EUR 145 000) per year, covering its administrative costs.
- 60 Consequently, the administrator of PIS monies pays those monies to the various PIS providers, whose names have been, pursuant to point 11 of the description annexed to Resolution No 916, approved by the Lithuanian Government, except with regard to electricity producers generating electricity from renewable energy sources, which are selected by the NCECP through auction procedures for promotion quotas.

- 61 On that basis, the distribution and transport system operators receive PIS monies to offset the additional costs that they incur as a result of the obligation imposed on them to purchase electricity generated from renewable energy sources and to balance it.
- 62 Finally, the referring court states that the purpose of the funds paid to PIS providers is to offset the obligations of those providers imposed on them by the State in connection with PIS.
- 63 As a result, the PIS regime is based, first, on several obligations that it imposes on both economic operators and end consumers and, second, on the intervention, as the sole entity responsible for administering PIS monies, of a body controlled directly or indirectly by the State.
- 64 Thus, PIS monies are collected by the distribution and transport system operators from all end consumers of electricity without any legal possibility of derogation. Such a payment obligation imposed by the PIS regime is therefore in the nature of an obligatory contribution. In addition, those system operators are required under that regime to purchase PIS from various providers, without being able to refuse to comply with that obligation either.
- 65 In the light of the case-law recalled in paragraph 54 above, however, such funds may be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are administered by entities separate from the public authorities.
- 66 Moreover, PIS monies are apportioned among PIS providers, in accordance with the PIS regime, by a body under public control, which has, according to the information in the file available to the Court, no discretion as to the determination and intended use of those funds. Resolution No 1157 and the decisions of the NCECP, which is a public body, determine precisely the detailed rules for calculating PIS monies which must be paid to PIS providers. This shows that those monies must, as observed by the Advocate General in point 32 of his Opinion, strictly follow the path set out by that regime.
- 67 Consequently, in such circumstances, the PIS monies must be regarded as remaining under public control.
- 68 As the Court has already held, a mechanism for offsetting additional costs that is financed by all end consumers of electricity in the national territory and where the sums thus collected are apportioned and distributed to the recipient undertakings, under the legislation of a Member State, by a public entity must be regarded as constituting an intervention by the State or through State resources within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 37, and order of 22 October 2014, *Elcogás*, C-275/13, not published, EU:C:2014:2314, paragraph 30).
- 69 Furthermore, a situation such as that in the main proceedings differs from those in respect of which the Court has held that the obligation imposed on private electricity supply undertakings to purchase electricity generated from renewable energy sources at fixed minimum prices cannot be regarded as an intervention through State resources in so far as it does not lead to any direct or indirect transfer of State resources to the undertakings producing that type of electricity (see, to that effect, judgments of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 59, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 34).
- 70 In such cases, the Court noted that private undertakings had not been appointed by the Member State concerned to administer a State resource, but were bound by an obligation to purchase by means of their own financial resources (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 35).

- 71 In the present case, it appears, first, that the administrator of PIS monies is appointed to administer an obligatory contribution, which constitutes a State resource, imposed on all end consumers of electricity and, second, that the PIS obligation to purchase imposed on distribution and transport system operators is offset by the payment to those operators of PIS monies.
- 72 As a result, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that the funds earmarked for financing a public interest service scheme, such as the PIS, constitute State resources within the meaning of that provision.

The second question

- 73 By its second question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that, when distribution and transport system operators receive PIS monies in order to offset the losses sustained by reason of the obligation to purchase electricity at a fixed rate from certain electricity producers and to balance it out, that compensation constitutes an advantage, within the meaning of that provision, granted to the electricity producers.
- 74 In that regard, it must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 65).
- 75 It must also be borne in mind that the case-law has acknowledged that an advantage directly granted to certain natural or legal persons may constitute an indirect advantage and, therefore, State aid for other natural or legal persons that are undertakings (see, to that effect, judgment of 13 June 2002, *Netherlands v Commission*, C-382/99, EU:C:2002:363, paragraphs 38 and 60 to 66).
- 76 In the present case, it follows from Article 20 of the Law on renewable energy sources that distribution and transport system operators, as undertakings purchasing electricity, are required to purchase the electricity generated from renewable energy sources at a fixed rate, which may be higher than the cost of electricity sold by the producers of such electricity. Nonetheless, the losses sustained by those operators are offset through PIS monies, paid by the administrator of PIS monies.
- 77 Although the sums intended to offset those losses are paid to distribution and transport system operators, it appears that, in a situation such as that in the main proceedings, it is the producers of energy generated from renewable energy sources that are the actual recipients of the aid which that compensation mechanism involves.
- 78 First, the offsetting of the losses sustained by those operators through PIS monies is inherently connected to the advantage envisaged in favour of the producers of electricity generated from renewable energy sources, as intended by Article 20(2) of the Law on renewable energy sources, when that article highlights the fact that the generation of such electricity is encouraged, pursuant to PIS procedure, ‘by paying the difference between the fixed rate established for a producer and the rate of the electricity sold by that producer’. That difference corresponds to the additional costs incurred or losses sustained by those operators, offset by PIS monies.
- 79 Second, no provision of the Law on renewable energy sources requires producers of electricity from such sources to participate in the auctions which will enable them, as the case may be, to benefit from the rate mentioned in the previous paragraph. In such a context, the effect of their participation

in that sale mechanism and of the payment of compensation to the distribution and transport system operators is to enable those producers to sell volumes of electricity at a higher price than the market price and, in any event, to sell larger volumes.

- 80 Consequently, the answer to the second question is that Article 107(1) TFEU must be interpreted as meaning that, when distribution and transport system operators receive PIS monies in order to offset the losses sustained by reason of the obligation to purchase electricity at a fixed rate from certain electricity producers and to balance it out, that compensation constitutes an advantage, within the meaning of that provision, granted to the electricity producers.

The third question

- 81 By its third question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that funds, such as monies intended for certain PIS providers, must be regarded as conferring a selective advantage, within the meaning of that provision, on those providers and regarded as liable to affect trade between Member States.
- 82 The referring court mentions four categories of recipients of PIS monies. These are: (i) the undertaking implementing the project of strategic importance, namely NordBalt, (ii) the undertakings which are entrusted with ensuring the security of electricity supply for a given period, (iii) the operators of solar power plants concerned by the State's refusal to fulfil its commitments, which are compensated for the losses reflecting market conditions and actually sustained, and (iv) the distribution and transport system operators, on account of the offsetting of actual losses sustained in their discharging of the obligation to purchase electricity at a fixed price from electricity producers providing PIS and to balance that obligation.
- 83 In the first place, it must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are considered to constitute State aid (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 65).
- 84 In that regard, the Court has ruled that, in order to assess that condition relating to the selectivity of the advantage, it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as 'discriminatory' (judgments of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 53 to 55, and of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54).
- 85 All of the economic operators mentioned in paragraph 82 above benefit from PIS monies, which, although they are intended to offset additional costs incurred or losses sustained by those operators, can be categorised as a 'selective advantage granted through State resources'.
- 86 Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (judgments of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87, and of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 48).

- 87 It is apparent from the information provided by the referring court and from the clarifications provided by the interested parties in the written observations which they submitted to the Court that each category of operators mentioned in paragraph 82 above is granted an advantage on a selective basis. As is apparent from Resolution No 916, the PIS scheme provides an advantage only to certain electricity producers including, in particular, those generating electricity from renewable energy sources or by cogeneration and those contributing to the security of supply or national energy security or independence, to the security and reliability of the national energy system or to the implementation of strategic supply projects. Moreover, each of those operators, with the exception of the operators of solar power plants concerned by the State's refusal to fulfil its commitments, is designated by name as a potential recipient of PIS funds by the Lithuanian Government on the basis of points 11 and 11¹ of the description annexed to Resolution No 916.
- 88 Subject to the checks that the referring court must carry out, Article 107(1) TFEU must be interpreted as meaning that funds, such as the monies intended for certain PIS providers, must be regarded as conferring on them a selective advantage within the meaning of that provision.
- 89 In the second place, in order to categorise a national measure as 'State aid', it is necessary, not to establish that the aid has an actual effect on trade between Member States, but only to examine whether the aid is liable to affect such trade (judgments of 26 October 2016, *Orange v Commission*, C-211/15 P, EU:C:2016:798, paragraph 64, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 29).
- 90 However, the adverse effect on trade between Member States cannot be purely hypothetical or presumed. Thus, it is necessary to determine why the measure concerned is liable, by reason of its foreseeable effects, to have an impact on trade between Member States (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 30 and the case-law cited).
- 91 In that regard, it is apparent from the information provided by the referring court and from the observations submitted by Baltpool during the hearing that, in 2014, there was already trade between the Republic of Lithuania and other Member States on the electricity market by reason of connections with the electricity systems of the Republic of Estonia and the Republic of Latvia, which were used to import electricity. That information, which is not disputed by the Lithuanian Government, weakens that government's argument that the electricity market in that country was relatively isolated.
- 92 In addition, when aid granted by a Member State strengthens the position of one undertaking in comparison with other undertakings competing in intra-Community trade, the latter must be regarded as being affected by that aid (judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 141, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 31).
- 93 In that regard, it is not necessary that the recipient undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (judgments of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 32).
- 94 Moreover, the fact that an economic sector, such as the energy sector, has been involved in a significant liberalisation process at EU level may serve to determine that the aid has a real or potential effect on trade between Member States (see, to that effect, judgments of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 51, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 34).

- 95 In that regard, it should be noted that Directive 2009/72 has completely liberalised the electricity market within the European Union and, at the time of the facts in the main proceedings, the Member States were required to have adopted the laws, regulations and administrative provisions necessary to transpose that directive.
- 96 In so far as electricity is the subject of cross-border trade, the grant of PIS funds to the PIS providers mentioned in paragraph 82 above is liable to affect trade between those States (see, to that effect, judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 35).
- 97 However, it falls to the referring court, in order to assess the effect on trade between Member States, to take account, in respect of each of the categories of PIS providers mentioned in paragraph 82 above, of the specific features of the exercise of the activity which is subject to compensation by way of the payment of the funds intended for those providers, in order to determine whether the payment of those funds to those providers is liable to strengthen their situation on the Lithuanian electricity market in comparison with other undertakings competing in trade between Member States.
- 98 Consequently, the answer to the third question is that Article 107(1) TFEU must be interpreted as meaning that, in circumstances such as those in the main proceedings, funds, such as the monies intended for certain PIS providers, must be regarded as conferring a selective advantage, within the meaning of that provision, on those providers and must be regarded as liable to affect trade between Member States.

The fourth question

- 99 By its fourth question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the PIS regime, must be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, within the meaning of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415).
- 100 In that regard, the Court has stated that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, with the result that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of placing them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87, and of 8 March 2017, *Viasat Broadcasting UK v Commission*, C-660/15 P, EU:C:2017:178, paragraph 25).
- 101 In accordance with paragraphs 88 to 93 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), in order for such a measure not to be categorised as ‘State aid’, a number of conditions must be met. First, the recipient undertaking must in fact have public service obligations to discharge, and those obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations. Fourth, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.
- 102 The purpose of the verification of the conditions laid down in the *Altmark* case-law is to determine whether the measures at issue must be categorised as ‘State aid’, which is an issue that must be resolved before that which consists in examining, where necessary, whether incompatible aid is

nevertheless necessary for the performance of the tasks assigned to the recipient of the measure at issue, under Article 106(2) TFEU (judgment of 8 March 2017, *Viasat Broadcasting UK v Commission*, C-660/15 P, EU:C:2017:178, paragraph 34).

- 103 By contrast, the conditions laid down in the *Altmark* case-law are no longer to be applied where it has been found that a measure must be categorised as ‘aid’, in particular in so far as the recipient undertaking is unable to pass the test of comparison with a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, and it is necessary to examine whether that aid can be justified under Article 106(2) TFEU (judgment of 8 March 2017, *Viasat Broadcasting UK v Commission*, C-660/15 P, EU:C:2017:178, paragraph 35).
- 104 In the first place, it should be borne in mind that the Member States are entitled, while complying with EU law, to define the scope and organisation of their services of general economic interest, and may take into account, in particular, objectives pertaining to their national policy and, in that respect, the Member States enjoy a wide discretion, which may be called into question only in the event of a manifest error (judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others v Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraphs 69 and 70).
- 105 On that point, Article 3(2) of Directive 2009/72 provides that Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection.
- 106 In that regard, it falls to the referring court to satisfy itself that, in defining PIS, the Republic of Lithuania exercised its discretion without committing a manifest error of assessment, in particular in the light of the objectives pursued by PIS, which must relate to those set out in Article 3(2) of Directive 2009/72.
- 107 In the second place, it is apparent from the reasoning underlying the exception established by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that the first condition laid down by that judgment presupposes, as noted by the Advocate General in point 78 of his Opinion, that the recipient undertaking is under a genuine obligation to provide the service in question under given conditions, and that it is not merely authorised to provide such a service.
- 108 As it is, in the light of the information provided by the referring court relating to the national legal framework and the facts of the case, it is doubtful whether, *prima facie*, several PIS satisfy that condition.
- 109 Such is the case, first, of the producers of electricity generated from renewable energy sources. Those producers have no obligation whatsoever under national legislation to provide the electricity that they produce under specific conditions relating, *inter alia*, to the universal nature or duration of the services to be provided. On the contrary, pursuant to Article 20 of the Law on renewable energy sources, producers of that type of electricity merely agree to sell the electricity generated and the administrators of distribution and transport systems merely agree to buy it, with those transactions taking the form of contracts entered into on a voluntary basis.
- 110 Second, a similar observation may be made regarding the generation of electricity in combined heat and power plants. Again, it may be observed that the participation of the producers in question in the PIS regime is voluntary, as it is apparent from Decree No 1-219 that those producers are to submit a request to the Lithuanian Minister for Energy to participate in the provision of PIS. What is more,

once that request has been accepted, electricity generated by cogeneration is provided under contracts concluded with the public electricity provider, in which only the maximum volume of electricity that must be provided in respect of a given year is imposed by decision of the Lithuanian Government.

- 111 In those circumstances, it falls to the referring court to ascertain whether those two categories of producers of electricity are nevertheless subject to obligations imposed in a binding manner by the Lithuanian Government.
- 112 More fundamentally, it must, third, be noted that the PIS monies intended to offset the development costs of solar power plant projects do not appear to relate to any services that are provided by the operators of those plants in favour of end consumers or operators in the electricity sector in Lithuania. The purpose of that PIS is to offset the costs incurred by those operators on account of the amendment to Lithuanian law, introduced in 2013, which resulted in the authorisations held by them to operate such plants not being implemented. Moreover, it is not clear at first glance that the 'activity' thus subject to compensation relates to any of the objectives listed in Article 3(2) of Directive 2009/72 to which public service obligations that the Member States can impose on operators in the electricity sector may be subject.
- 113 In the third place, the second and third conditions laid down by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), require that the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, and that the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations.
- 114 However, the information provided by the referring court in its request for a preliminary ruling does not make it possible to determine, even with the clarifications provided in the observations of the interested parties, to what extent those two conditions, which, together, ensure that no undertaking responsible for discharging public service obligations is overcompensated, are met in the present case.
- 115 Such is the case of the PIS relating to (i) the maintenance of the reserve capacity of specific electric power plants, the operation of which is necessary in order to safeguard national energy security, and (ii) the development of electricity generation capacity which is of strategic importance in order to safeguard the security and reliability of the State's energy system or the independence thereof, referred to in points 7.4 and 7.5 of the description annexed to Decree No 916. In that regard, the referring court does not provide any information on the procedure according to which the PIS monies are calculated.
- 116 The same applies with regard to the PIS relating to the security of electricity supply, in respect of which only the price for the purchase of electricity, broken down into a part covering variable costs and a part covering fixed costs, is apparent from the relevant legislation, as set out by the referring court.
- 117 It will therefore be for the referring court to establish whether, for the categories of PIS providers mentioned in paragraphs 115 and 116 above, the applicable national legislation provides that the parameters on the basis of which the compensation paid to those various providers is calculated are established in advance in an objective and transparent manner, and whether that compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations.
- 118 In the fourth place, the fourth condition laid down by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), does not appear to have been met in respect of the PIS referred to in paragraphs 115 and 116 above. The lack of information concerning the procedure according to which the monies earmarked for those PIS are calculated necessarily entails that it is not possible to know whether the level of compensation needed for that purpose has been

determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

- 119 Moreover, it is not possible for the Court to rule on whether that fourth condition is met, as it is unable to determine whether the costs incurred by the PIS provider responsible for the NordBalt project and by the distribution and transport system operators, as regards the balancing of the electricity generated from renewable energy sources, can correspond to those of a typical undertaking, such as that referred to in the previous paragraph, and since it is apparent from the information provided by the referring court that those providers were not chosen in accordance with a public procurement procedure.
- 120 It will therefore be for the referring court to satisfy itself that, in the present case, the PIS providers were chosen in accordance with a procedure which enables the fourth condition laid down by the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), to be met.
- 121 Consequently, the answer to the fourth question is that Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the PIS regime, must not be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, within the meaning of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), unless the referring court establishes that any one of the PIS does in fact meet the four conditions set out in paragraphs 88 to 93 above.

The fifth question

- 122 By its fifth question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the PIS regime, must be regarded as distorting or liable to distort competition.
- 123 It should be noted that, by this question, that court expresses uncertainty as to the effect of the various PIS on competition, and not only as to the effect that some of them may have.
- 124 For the purpose of categorising a national measure as ‘State aid’, it is necessary, not to establish that competition is actually being distorted, but only to examine whether that aid is liable to distort competition (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 29 and the case-law cited).
- 125 However, actual distortion of competition cannot be purely hypothetical or presumed. Thus, it is necessary to determine why the measure concerned distorts or threatens to distort competition (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 30 and the case-law cited).
- 126 In that regard, it must be borne in mind that aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 33 and the case-law cited).
- 127 For the reasons already set out in paragraphs 95 and 96 above in connection with the examination of the condition relating to the effect on trade between Member States, the PIS regime, with regard to the various services that form part of that regime, must be regarded as distorting or liable to distort

competition, subject to the referring court carrying out the necessary verifications, as clarified in paragraph 97 above, in the light of the effects of the specific features of the exercise of their activity by various PIS providers on competition within the Lithuanian electricity market.

128 Consequently, the answer to the fifth question is that Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the PIS regime, must be regarded as distorting or liable to distort competition.

Costs

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

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

1. Article 107(1) TFEU must be interpreted as meaning that the funds earmarked for financing a public interest service scheme, such as the public interest services in the electricity sector, constitute State resources within the meaning of that provision.
2. Article 107(1) TFEU must be interpreted as meaning that, when distribution and transport system operators receive monies intended to finance public interest services in the electricity sector in order to offset the losses sustained by reason of the obligation to purchase electricity at a fixed rate from certain electricity producers and to balance it out, that compensation constitutes an advantage, within the meaning of that provision, granted to the electricity producers.
3. Article 107(1) TFEU must be interpreted as meaning that, in circumstances such as those in the main proceedings, funds, such as the monies intended for certain providers of public interest services in the electricity sector, must be regarded as conferring a selective advantage, within the meaning of that provision, on those providers and must be regarded as liable to affect trade between Member States.
4. Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the regime of public interest services in the electricity sector, must not be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, within the meaning of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), unless the referring court establishes that any one of the public interest services in the electricity sector does in fact meet the four conditions set out in paragraphs 88 to 93 of the present judgment.
5. Article 107(1) TFEU must be interpreted as meaning that a State measure, such as the regime relating to the provision of public interest services in the electricity sector, must be regarded as distorting or liable to distort competition.

[Signatures]