OPINION OF ADVOCATE GENERAL JACOBS
delivered on 26 October 2000 [1]

Table of contents

1 — Original language: English.

I — Introduction

1. The present case, referred by the Landgericht (Regional Court) Kiel, concerns a German Law designed to promote the use of electricity from renewable energy sources. The Law requires regional electricity distribution undertakings to purchase at fixed minimum prices electricity produced from renewable energy sources within their area of supply and obliges upstream suppliers of electricity from conventional sources partially to compensate the distribution undertakings for the additional costs caused by that purchase obligation.

2. The national court asks, in essence,

— whether the scheme established by that Law constitutes State aid in favour of the producers of electricity from renewable energy sources within the meaning of Article 92 of the EC Treaty (now Article 87 EC), and, as a subsidiary question,

— whether the scheme is a measure equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EC Treaty (now Article 28 EC).

3. Those questions arise in proceedings in which an upstream supplier of electricity from conventional sources contests the compatibility of the Law with Community law and seeks on that ground reimbursement of sums which it had to pay to a downstream electricity distribution undertaking subject to the purchase obligation. The plaintiff electricity supplier owns a majority of the shares of the defendant distributor and both parties agree on the incompatibility of the Law in issue with

Community law and national constitutional law.

4. The main issues in this case are whether the national proceedings are of a contrived nature within the meaning of *Foglia* v *Novello*,[2] whether only measures financed through State resources can constitute State aid and whether a national measure which treats domestic products more favourably than imported products can be justified on environmental grounds.

II — The German Stromeinspeisungsgesetz in its successive versions and the Commission's attitude towards that Law

1. *The structure of electricity supply in Germany and the purchase obligation for electricity from renewable sources before entry into force of the Stromeinspeisungsgesetz 1990*

5. It appears from the papers before the Court that three levels can be distinguished within the German electricity sector.

6. At the first level, a few large undertakings produce the major part of the electricity consumed in Germany and operate high-voltage networks (320, 220 or 110 kilovolts). The main function of those networks is the transmission of electricity over long distances, the exchange of electricity with neighbouring networks and the supply of electricity to regional distributors. Imports and exports of electricity also take place at that level but in general the supply of electricity to final customers does not.

7. At the second level, around 60 regional electricity distribution undertakings operate medium-voltage networks (20, 10 or 6 kilovolts). Those networks serve to take in electricity from the first level, distribute electricity throughout the whole national territory and supply electricity either directly to mainly industrial customers or through low-voltage networks to consumers. Some electricity is also produced at that level.

8. At the third level, electricity is delivered through low-voltage local networks to final consumers. Those networks are operated either by regional distributors themselves or by local distributors which are often owned by municipalities. There is little generation of electricity at the third level.

2 — C-104/79 *Foglia* v *Novello* [1980] ECR 745, '*Foglia* v *Novello I*'; C-244/80 *Foglia* v *Novello* [1981] ECR 3045, '*Foglia* v *Novello II*'.

9. At each of the three levels, the necessary infrastructure (e.g. the physical grid, transformers) is not duplicated in any given area.

10. In common with other governments the German authorities have for many years promoted the generation and consumption of electricity from renewable sources such as wind, water and sun with a view to increasing its share in the national electricity production.

11. It was considered necessary to support demand in parallel with taking supply-side measures such as subsidies for research and development. Before 1990 the German authorities relied in that regard on national competition law in order to oblige electricity distributors (monopolists in a given territory) to purchase electricity from renewable sources produced in their area of supply. The purchase price to be paid for that electricity was determined according to the principle of avoidable costs (*vermiedene Kosten*).[3] Depending on whether the electricity distributor concerned itself produced electricity, the purchase price for electricity from renewable sources thus followed the distributor's avoidable production or purchasing costs.

2. *The Stromeinspeisungsgesetz 1990*

12. On 7 December 1990 Germany adopted the *Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz*[4] (Law on feeding electricity from renewable energy sources into the public grid, hereinafter 'the Stromeinspeisungsgesetz 1990' or 'the StrEG 1990').

13. That Law obliged public electricity supply undertakings

— to purchase all the electricity produced within their area of supply from renewable sources such as wind, water and sun (hereinafter 'the purchase obligation');[5]

— to pay for that electricity a fixed minimum purchase price calculated

3 — That policy had been endorsed by Council Recommendation 88/611/EEC of 8 November 1988 to promote cooperation between public utilities and auto-producers of electricity, OJ 1988 L 335, p. 29.

4 — BGBl. 1990 I, p. 633; the StrEG 1990 entered into force on 1 January 1991.

5 — Paragraph 2 of the StrEG 1990.

on the basis of the average nationwide sales price for electricity; [6] as regards wind-generated electricity the purchase price was fixed at 90% of the average sales price of electricity supplied by electricity suppliers to final customers [7] (hereinafter 'the minimum price rule').

14. It is common ground that in the context of the *Stromeinspeisungsgesetz* the term 'public electricity supply undertakings' comprises undertakings both in private and in public ownership.

15. The StrEG 1990 also contained a so-called hardship clause. [8] Where compliance with the purchase obligation led to 'inequitable hardship' (unbillige Härte) for the electricity supply undertaking concerned, the upstream electricity supplier (usually an undertaking operating a high-voltage network) had to take over the purchase obligation and comply with the minimum price rule. Perhaps owing to its vague formulation the hardship rule was practically never applied.

16. Germany had notified the StrEG 1990 to the Commission for approval under Article 93(3) of the EC Treaty (now Article 88(3) EC) by letter of 14 August 1990 and thus before its adoption.

17. By letter of 19 December 1990 the Commission informed Germany of its decision not to raise objections against the law. According to its assessment under Article 92 of the Treaty the rate of aid varied from 28% to 48% depending on the renewable energy source involved and the Law would lead to additional profits of DEM 48 million for the 4 000 private producers of electricity from renewable sources. The proposed law was, however, in line with the energy policy objectives of the Community. Moreover the share of electricity from renewable sources in the energy sector and the additional gains for producers and the effect on electricity prices were small. The Commission would reexamine the Law two years after its entry into force. A modification or a continuation of the Law would have to be notified in advance.

18. The StrEG 1990 was modified for the first time by the Law of 19 July 1994. [9] Among other minor changes the minimum purchase price for electricity produced from water and several other sources,

6 — Paragraphs 2 and 3 of the StrEG 1990.

7 — Second subparagraph of Paragraph 3 of the StrEG 1990.

8 — Paragraph 4 of the StrEG 1990.

9 — BGBl. 1994 I, p. 1618.

previously set at 75%, was raised to 80% of the average sales price per kilowatthour. The minimum price for electricity produced from wind remained unchanged at 90%.

19. In a letter to the German Government of 25 October 1996 following complaints by electricity supply undertakings the Commission expressed doubts about the continued compatibility of the Stromeinspeisungsgesetz with the Community State aid rules. The greatest concern was caused by the calculation of the minimum purchase price for electricity generated from wind.

20. The Commission noted that the number of wind energy installations in Germany had increased from 500 in 1991 to almost 4 000 in 1995 and their output had increased from 20 Megawatt (MW) in 1990 to 1 100 MW in 1995. Technological progress had moreover considerably reduced the costs of producing electricity from wind. According to data from German electricity suppliers the obligatory purchase price under the StrEG 1990 of around DEM 0.17 per kilowatthour exceeded the avoidable costs by DEM 0.085. That discrepancy would lead in 2005 to extra costs for electricity distributors of DEM 900 million. Thus, if the minimum price rule remained unchanged, there was a risk of overcompensation with the ensuing detrimental consequences for competition and for trade in electricity between Member States. A mere change of the hardship clause, as envisaged by the German Parliament, [10] would not terminate the distortion of competition caused by the Law, since it would merely redistribute the extra costs.

21. The Commission therefore proposed a number of alternative amendments which would make the Law compatible with the State aid rules. The German legislature could reduce the minimum purchase price for electricity from wind to 75% of the average sales price; it could limit the support mechanism in time and/or according to electricity production; or it could adopt a rule according to which the purchase price was calculated on the basis of avoidable costs.

22. The Commission concluded that if the German legislature were not to amend the Law, it might feel obliged to propose 'appropriate measures' to Germany within the meaning of Article 93(1) of the Treaty in order to bring the Law into line with the Community State aid rules.

10 — See, for the compensation mechanism eventually adopted, below at paragraph 32.

3. The Stromeinspeisungsgesetz 1998

23. On 24 April 1998 Germany adopted the *Gesetz zur Neuregelung des Energiewirtschaftsrechts* (Law reforming the energy supply industry) [11] in order to transpose into German law Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (hereinafter 'the electricity directive'). [12]

24. That reform Law contained — among other important legislative changes — in Paragraph 3(2) the modifications of the Stromeinspeisungsgesetz 1990 which are the subject-matter of the present proceedings. The relevant rules of the Stromeinspeisungsgesetz in its amended form (hereinafter 'the Stromeinspeisungsgesetz 1998' or 'the StrEG 1998') may be summarised as follows.

25. Paragraph 1 of the StrEG 1998 states under the heading 'scope of application' that the Stromeinspeisungsgesetz governs the purchase and the purchase price of electricity produced from certain specified renewable sources (e.g. water, wind, sun and biomass). A first new element in comparison with the StrEG 1990 is that the StrEG 1998 applies to all kind of biomass and not only to biomass produced by agriculture and forestry work. Equally new is the provision according to which the Law applies only to electricity which has been generated in Germany.

26. Paragraph 2 contains under the heading 'purchase obligation' three different provisions.

27. The first sentence of Paragraph 2 lays down the central rule, namely the purchase obligation at a fixed minimum price:

'Electricity supply undertakings which operate a general supply network must purchase the electricity produced within their area of supply from renewable sources and pay for the electricity supplied the price determined according to Paragraph 3.'

28. The second sentence of Paragraph 2 lays down a new rule concerning so-called off-shore installations ('off-shore Anlagen'). Electricity produced in an installation situated outside the area of supply of an electricity supply undertaking must be purchased by a distribution or supply

11 — BGBl. 1998 I, p. 730.
12 — OJ 1997 L 27, p. 20.

system operator which operates the network located closest to the production site in question.

29. Under the equally new third sentence of Paragraph 2 supplementary costs caused by the purchase obligation under Paragraph 2 and by the new compensation mechanism under Paragraph 4 (see below paragraph 32) may for accounting purposes be allocated to the distribution or transmission activities of the electricity supply undertakings concerned, and be taken into account when calculating the tariffs for the transmission of electricity over the network of the undertakings concerned.

30. Paragraph 3 of the StrEG 1998 contains unchanged rules for the calculation of the minimum purchase price for electricity from renewable energy sources. As already stated, the minimum price per kilowatthour for electricity produced from wind energy is fixed at 90% of the average sales price per kilowatthour of electricity supplied to final customers.

31. Paragraph 4 states in its heading (as before) 'hardship clause'.

32. Paragraph 4(1) contains a new compensation mechanism, which plays a central role in the main proceedings. In so far as the electricity to be purchased under Paragraph 3 of the StrEG 1998 exceeds 5% of the total amount of electricity supplied by the undertaking concerned, the upstream network operator must compensate that undertaking for the supplementary costs caused by the compulsory purchase of the amount of electricity exceeding that 5% (the so-called 'first 5% ceiling', 'erster 5% Deckel'). Thus, in contrast to the terms of the StrEG 1990, a producer of electricity from renewable sources may in case of 'hardship' continue to supply electricity to the distributor of his area. The latter however gains a right to request from the upstream supplier financial compensation for the costs of purchasing electricity from renewable sources exceeding 5% of his output.

33. It follows from the first and the second sentence of Paragraph 4(1) that a similar 5% rule applies in favour of the upstream network operator (the so-called 'second 5% ceiling', 'zweiter 5% Deckel'). Where the amount of electricity purchased for which that operator had to pay compensation exceeds 5% of its own output, it is itself entitled to ask for compensation from a network operator situated further upstream. Where such an upstream operator does not exist (as will normally be the case) the purchase obligation under Paragraph 2 will not apply to electricity produced in installations the construction of which was not completed before the end of

the year in which the second 5% ceiling was reached.

34. It appears from documents submitted to the Court that before the adoption of the StrEG 1998 the Commission had asked the German authorities to supply information on the legal and political background to the adoption of the amendments to the Stromeinspeisungsgesetz.

35. Moreover, by letter of 13 March 1998 the plaintiff in the main proceedings PreussenElektra Aktiengesellschaft ('PreussenElektra') had asked the Commission to request Germany to notify the planned Law under the first sentence of Article 93(3) of the Treaty.

36. In a letter to PreussenElektra of 21 April 1998 the Commission stated however that it was doubtful whether Germany was obliged to notify the planned modifications of the Stromeinspeisungsgesetz. The Commission merely referred without comment to the German Government's arguments according to which the modifications of the StrEG were either covered by the initial authorisation of 1990 (the new rules on biomass and off-shore installations) or not relevant for State aid purposes (the new compensation mechanism in Paragraph 4(1) of the StrEG 1998). In the Commission's view it was the German authorities' responsibility to decide whether to notify. The undertakings affected by the StrEG 1998 could defend their interests in 'other appropriate ways'.

37. As regards the minimum purchase price for electricity produced from wind, the Commission stated that it was continuing to examine the unchanged rules under the procedural regime for 'existing aid' and that it still did not exclude the possibility of proposing in that respect appropriate measures to the German Government.

38. In a letter to the German Government of 29 July 1998, and thus after entry into force of the StrEG 1998, Commissioner Van Miert noted that the German legislature had not incorporated any of the proposals which the Commission had made in the letter of 25 October 1996 [13] and that the mechanism to calculate the purchase price for wind-generated electricity had not been changed. Even if the purchase price for electricity from wind were *de facto* to fall (as a consequence of lower electricity sales prices after the liberalisation of the electricity market), the Law did not introduce a sufficiently degressive element as regards the purchase price. On the other hand, important legislative changes at Community level were expected in the near future in connection with the implementa-

13 — See above at paragraphs 19 to 22.

tion of the electricity directive and proposals for harmonised rules on electricity from renewable sources. The Commissioner therefore refrained from proposing to his colleagues a formal decision before the German Government established a report for the German Bundestag on the operation of the Stromeinspeisungsgesetz. As regards the drafting of that report the German Government was invited to cooperate closely with the Commission and to discuss extensively in the report the amount of the aid for electricity from renewable sources.

4. *Developments after the order for reference was made*

39. In response to a written question of the Court the Commission gave the following information about developments after the national court referred its questions to the Court.

40. On 1 April 1999 the German Law on the introduction of an ecological tax reform entered into force.

41. In the Commission's view the effects of the introduction of that tax included an increase in the purchase price for electricity from renewable sources under the StrEG 1998, which the German authorities omitted to notify in violation of the Treaty. Since the Commission had doubts whether the increase could be held compatible with the common market, it informed the German authorities by letter of 17 August 1999 of its decision to open the procedure provided for by the State aid rules of the Treaty. [14]

42. On 1 April 2000 the new Gesetz für den Vorrang Erneuerbarer Energien (Law for the priority of renewable energy sources) [15] replaced the Stromeinspeisungsgesetz 1998 in its entirety. That new Law is again based on a purchase obligation at a fixed minimum price, but contains many new features. Most notably the purchase price is no longer linked to the (apparently falling) electricity sales prices but fixed by law for each of the different energy sources. The price for wind-generated electricity for example is fixed at DEM 0.178 per kilowatthour.

43. According to Press reports the Commission has initiated a procedure under the Treaty in respect of that new Law. It apparently considers that the Law should have been notified. [16]

14 — The text of that decision is published in OJ 1999 C 306, p. 19.

15 — BGBl. 2000 I, p. 305.

16 — *Handelsblatt*, 13 April 2000; *Financial Times Deutschland*, 19 April 2000.

44. On 10 May 2000 the Commission presented a proposal for a directive on the promotion of electricity from renewable energy sources in the internal electricity market. [17]

III — The main proceedings and the questions referred

45. The plaintiff in the main proceedings PreussenElektra is one of the undertakings at the first level of the German electricity sector. It operates more than 20 power plants, conventional and nuclear, as well as a maximum-voltage and high-voltage network for the transmission of electricity. It supplies electricity over that system to regional electricity distributors, major town utility companies and large industrial undertakings.

46. The defendant Schleswag Aktiengesellschaft ('Schleswag') is a regional electricity distributor at the second level. It obtains the electricity needed for its customers in Schleswig-Holstein almost exclusively from PreussenElektra.

47. PreussenElektra owns 65.3% of Schleswag's shares. The remaining 34.7% are held by municipal authorities (Landkreise) in Schleswig-Holstein.

48. By virtue of Paragraph 2 of the StrEG 1998 Schleswag is obliged to purchase electricity from renewable sources produced within its area of supply. The area where Schleswag operates presents ideal conditions for the production of electricity from wind. The proportion of electricity from wind supplied to Schleswag has thus steadily increased from 0.77% of its total sales in 1991 to an estimated 15% in 1998.

49. The additional costs accruing to Schleswag on account of the purchase obligation and the minimum price requirement rose from DEM 5.8 million in 1991 to an estimated DEM 111.5 million in 1998. Taking into account the sums to be paid by PreussenElektra to Schleswag by virtue of the new compensation mechanism under Paragraph 4(1) of the StrEG 1998 (see next paragraph) Schleswag's additional costs for 1998 are DEM 38 million.

50. At the end of April 1998 Schleswag's purchases of electricity produced from renewable energy sources reached 5% of the total volume of electricity it had sold

17 — COM(2000) 279 final.

over the previous year. Pursuant to Paragraph 4(1) of the StrEG 1998 Schleswag invoiced PreussenElektra for the additional costs entailed by the purchase of electricity from renewable energy sources, claiming monthly instalments of DEM 10 million.

51. PreussenElektra transferred the instalment for May 1998, reserving the right to claim the money back at any time.

52. In the main proceedings PreussenElektra claims a portion of the May instalment, namely DEM 500 000.

53. According to the national court neither PreussenElektra nor Schleswag may pass on the additional costs created by the Stromeinspeisungsgesetz to final customers. We are told that it is in law and in fact impossible to charge higher prices for electricity supplied to final customers. That is because the Land Schleswig-Holstein has refused to authorise higher tariffs for electricity supplied to consumers and because competitive pressures have increased owing to the ongoing liberalisation of the electricity market. Those statements of the national court, which were based on the presentation by PreussenElektra and Schleswag of the facts before it, are strongly contested by the interveners. [18]

54. In the main proceedings PreussenElektra contends that the payment to Schleswag had no legal basis and must be reimbursed. In its view, Paragraph 4(1) of the StrEG 1998 infringes the EC Treaty. That is because Paragraph 4(1) is part of the amendments of the Stromeinspeisungsgesetz made in 1998. Those amendments altered existing aid and thus had to be notified under the first sentence of Article 93(3) of the EC Treaty. Since the German authorities did not notify the amendments and did not wait for an authorisation by the Commission they infringed the first and the third sentence of Article 93(3). Under the Court's case-law the third sentence of Article 93(3) is directly effective. Paragraph 4(1) of the StrEG should therefore be disapplied.

55. Schleswag maintains that the payment had a sound legal basis in Paragraph 4(1) of the StrEG and does not have to be reimbursed. It agrees with PreussenElektra that the StrEG 1998 must be analysed as an altered aid scheme within the meaning of the first sentence of Article 93(3) of the Treaty. However, the compensation mechanism in Paragraph 4(1) of the StrEG 1998 as such cannot be classified as an aid measure within the meaning of Article 92. It is merely a mechanism to share the burdens caused by the purchase obligation

18 — See below at paragraphs 85 and 86.

and the minimum price rule laid down in Paragraphs 2 and 3 of the StrEG. On the one hand, the referring court does not have the power to decide about the lawfulness of Paragraphs 2 and 3 of the StrEG because they are not relevant for the legal relationship and the resolution of the dispute between PreussenElektra and Schleswag. On the other hand, even if the referring court disapplies Paragraph 4(1) of the StrEG 1998, the unlawful aid measures in Paragraphs 2 and 3 of the StrEG 1998 would remain unaffected and Schleswag would have to bear the burden alone. The direct effect of the last sentence of Article 93(3) can thus not remedy or sanction effectively the unlawful situation. Paragraph 4(1) of the StrEG must therefore continue to apply.

56. The referring court states in the order for reference that if in adopting the Law in issue the German legislature infringed either its obligations in respect of the alteration of existing State aid under Article 93(3) of the Treaty or the prohibition of measures having equivalent effect to quantitative restrictions on imports under Article 30, the StrEG 1998 must be disapplied and PreussenElektra must be reimbursed.

57. According to the referring court, as regards, first, Article 93(3), the German authorities notified the StrEG 1990 as State aid and the Commission authorised it as such. The same authorities did not however notify the amendments of the Stromeinspeisungsgesetz which led to the StrEG 1998. [19] If those amendments altered existing aid within the meaning of the first sentence of Article 93(3) of the Treaty and if the outcome of those amendments (the StrEG 1998) itself constituted State aid, the amendments should have been notified.

58. The Landgericht is not sure whether the Stromeinspeisungsgesetz 1998 with its purchase obligation at a fixed minimum price and its compensation mechanism can be classified as State aid within the meaning of Article 92 of the Treaty. It refers, on the one hand, to judgments such as *Van Tiggele* [20] and *Sloman Neptun*, [21] which suggest that the StrEG 1998 does not contain State aid since the economic advantages for producers of electricity from renewable sources are financed exclusively by electricity distributors and upstream network operators and not through State resources. On the other hand, such a narrow interpretation of the concept of State aid would allow Member States easily to circumvent the control mechanisms of

19 — That statement is again strongly contested by the interveners; see below at paragraphs 85 and 87.

20 — Case 82/77 *Openbaare Ministerie of the Netherlands* v *Van Tiggele* [1978] ECR 25.

21 — Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887.

Article 93 of the Treaty with potentially grave consequences for competition. [22]

59. If the Stromeinspeisungsgesetz contains State aid, the Landgericht is convinced that owing to the Commission's authorisation the StrEG 1990 must be classified as existing aid within the meaning of Article 93(1) and that the amendments of 1998 constitute an alteration of existing aid within the meaning of the first sentence of Article 93(3) which has not been notified.

60. The Landgericht has a further doubt with regard to the compensation mechanism contained in Paragraph 4(1) of the StrEG 1998. Even if the purchase obligation at an elevated minimum price (Paragraphs 2 and 3 of the StrEG 1998) constitutes State aid in favour of the producers of electricity from renewable sources it might be argued that Paragraph 4(1) itself cannot be classified as aid. In that event the Landgericht wishes to know whether the restrictive effects of Article 93(3) apply not only to the aid itself but also to implementing rules such as Paragraph 4 of the StrEG 1998.

61. As regards Article 30 of the Treaty, the Landgericht considers that the duty to purchase electricity produced in Germany from renewable sources at prices which could not be obtained on the free market involves at least the risk of a fall in demand for electricity produced in other Member States.

62. In the light of those considerations the Landgericht referred to the Court the following questions for a preliminary ruling:

'(1) Do the rules on payment and compensation for supplies of electricity, laid down in Paragraph 2 or 3 or 4 or in Paragraphs 2 to 4 of the [Stromeinspeisungsgesetz 1998]... constitute State aid for the purposes of Article 92 of the EC Treaty?

Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules for the benefit of the recipient of the payment, under which the costs entailed are not met, either directly or indirectly, from the public budget but are borne by individual undertakings in a sector, which have a statutory obligation to purchase at fixed minimum prices, and which are precluded by law and circumstance from passing those costs on to the final consumer?

22 — The arguments of the Landgericht will be presented in more detail in paragraph 109 below.

Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules which merely govern the apportionment of the costs between undertakings at the various production levels which have arisen through purchasing obligations and minimum prices, where the legislature's approach creates in practice a permanent burden for which the undertakings affected obtain no consideration?

(2) In the event that the second question is answered in the negative in respect of Paragraph 4 of the StrEG 1998, is Article 93(3) of the EC Treaty to be interpreted as meaning that its restrictive effects apply not only to the benefit itself but also to implementing rules such as Paragraph 4 of the StrEG 1998?

(3) In the event that questions (1) and (2) are answered in the negative, is Article 30 of the EC Treaty to be interpreted as meaning that a quantitative restriction on imports — and/or a measure having equivalent effect as between Member States for the purposes of the aforementioned provision — arises where a provision of national law places undertakings under an obligation to purchase electricity produced from renewable energy sources at minimum prices and requires network operators to meet costs entailed for no consideration?'

IV — Procedure before the Court

63. Written observations were first submitted by PreussenElektra, Schleswag, the German and Finnish Governments and the Commission.

64. After the reference was made the referring court notified to the Court an order of 23 April 1999 in which it declared that the Land Schleswig-Holstein and a producer of wind-generated electricity, Windpark Reussenköge III GmbH (collectively 'the interveners') had intervened in the main proceedings by written submissions of 16 March 1999.

65. Under Article 20 of the EC Statute of the Court of Justice ('the Statute') the Court notified the order for reference to the interveners and they also submitted written observations.

66. At the hearing PreussenElektra, Schleswag, the Land Schleswig-Holstein, Windpark Reussenköge III, the German Government and the Commission were represented.

67. PreussenElektra maintains that the Land Schleswig-Holstein and Windpark Reussenköge III were not entitled to submit observations to the Court since they were only interveners (Nebenintervenienten) in the main proceedings and thus not covered by the concept of 'parties' in Article 20 of the Statute. PreussenElektra relies, first, on the fact that under German law the concept of 'party' (Partei) to the proceedings does not encompass interveners and, secondly, on the Court's case-law. [23]

68. As a preliminary point it must be recalled that proceedings instituted under Article 177 of the EC Treaty (now Article 234 EC) are non-contentious and are a step in an action pending before a national court. Before the Court of Justice the parties to the main action are merely invited to state their case, but are not entitled to take procedural initiatives of their own. *Stricto sensu* there are thus no 'parties' to a preliminary ruling procedure. By the expression 'parties', Article 20 of the Statute therefore refers to the parties to the action pending before the national court. [24]

69. As regards the question what categories of actors are 'parties' to the main proceedings within the meaning of Article 20 of the Statute, it must, first, be kept in mind that the legal orders of the Member States name and classify the various participants in procedures before the national courts in different ways (terminology and classification may also vary within one legal order depending for example on the branch of the judiciary involved). The opportunity to submit observations to the Court should not however depend on those terminological and formal differences.

70. Secondly, the objective of Article 20 of the Statute is to give persons potentially affected by the Court's preliminary ruling the opportunity to present their views on the questions to be decided. In order to participate formally in national proceedings the national legal orders normally require a proven interest in the outcome of the proceedings. It follows, in my view, that all persons who participate formally in national proceedings should be considered to be parties within the meaning of Article 20 of the Statute.

23 — Order in Case C-181/95 *Biogen* v *Smithkline Beecham Biologicals* [1996] ECR I-717 and judgment in Case 62/72 *Bollmann* v *Hauptzollamt Hamburg-Waltershof* [1973] ECR 269.

24 — See Case 62/72, cited in note 23, at paragraph 4 of the judgment.

71. With regard to the particular situation in the present case it follows indirectly but clearly from the order in *Biogen*[25] that interveners in the main proceedings are 'parties' within the meaning of Article 20 of the Statute. In that case an undertaking sought leave to intervene directly in preliminary ruling proceedings before the Court of Justice. The Court held that 'a person who has not sought or been granted leave to intervene before the national court is not entitled to submit observations to this Court under that provision'.[26]

72. It follows *a contrario* that the Land Schleswig-Holstein and Windpark Reussenköge III, which have both successfully intervened before the national court, are 'parties' to the main proceedings within the meaning of Article 20 of the Statute and were entitled to submit observations to the Court.

V — Admissibility

73. The German Government and the interveners contest the admissibility of the reference on three grounds. First, the dispute is contrived and hence, on the basis of *Foglia* v *Novello I* and *II*,[27] the reference is inadmissible. Secondly, they refer to a number of lacunas and errors in the order for reference as regards the factual and legal background. Thirdly, the questions referred are irrelevant for the outcome of the main proceedings.

1. *Contrived dispute*

74. The German Government and the interveners claim that PreussenElektra and Schleswag are in agreement over the desired result of the reference, namely a declaration by the Court that the StrEG 1998 is contrary to Community law. That is evidenced by the fact that both parties have lodged several challenges to the StrEG before the German constitutional court. Furthermore, Schleswag is a subsidiary of PreussenElektra. Consequently, PreussenElektra could have recovered the sums in issue by internal measures without litigation before the courts. It follows also that the legal viewpoints adopted by the defendant in the main proceedings are ultimately determined by the plaintiff. Finally, PreussenElektra paid compensation to Schleswag in spite of being convinced of the illegality of the Law in issue. Those elements taken together show that PreussenElektra's claim for partial reimbursement of the compen-

25 — Case 181/95, cited in note 23.

26 — Paragraph 6 of the order.

27 — Cases C-104/79 and C-244/80, both cited in note 2.

sation payment is a pretext designed to obtain a particular answer from the Court. In the light of the judgments in the two *Foglia* v *Novello* cases and in *Meilicke*[28] the Court should declare the reference inadmissible.

75. The Court has held that it may in certain circumstances declare a reference for a preliminary ruling inadmissible on the ground that Article 177 of the EC Treaty is used as a 'procedural device'[29] or an 'artificial expedient'[30] by parties who engage in contrived litigation. The Court considered that that was the case where the parties to the main proceedings tried to obtain a ruling that a French tax system for liqueur wines was invalid by the expedient of proceedings before an Italian court between two private individuals who were in agreement as to the result to be attained and who had inserted a clause in a contract in order to induce the Italian court to give a ruling on the point.[31]

76. One concern underlying that case-law is that it is not the Court's task to deliver advisory opinions on general or hypothetical questions, but to assist in the administration of justice in the Member States in situations where answers to the questions referred are objectively necessary for the resolution of a real dispute.[32] The second preoccupation is that the parties should not be allowed deliberately to create a procedural situation in which third parties potentially affected by the ruling cannot arrange for an appropriate defence of their interests.[33]

77. There is admittedly some similarity between *Foglia* v *Novello* and the case now before the Court. In the first place, PreussenElektra and Schleswag are in agreement that the StrEG 1998 violates Community law. Moreover, in the particular procedural situation of the main action interested third parties such as producers of wind-generated electricity were initially precluded from putting forward their legal arguments and their version of the factual and economic background.

78. It follows however from the judgment in *Leclerc-Siplec*[34] where the parties agreed that the French Law prohibiting the distribution sector from advertising on television was contrary to Community law and where the main beneficiary of the contested Law (the French regional press) was not involved in the proceedings[35] that those elements alone do not suffice to make the reference inadmissible. It has also to be recalled that PreussenElektra and Schleswag disagree on the consequences for the

28 — C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871.

29 — *Foglia* v *Novello II*, cited in note 2, paragraph 18 of the judgment.

30 — *Foglia* v *Novello I*, cited in note 2, paragraph 10 of the judgment.

31 — *Foglia* v *Novello I*, paragraph 10 of the judgment.

32 — *Foglia* v *Novello II*, paragraph 18 of the judgment.

33 — *Foglia* v *Novello II*, paragraph 29 of the judgment.

34 — Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179.

35 — See paragraph 1 of my Opinion in that case.

main proceedings of a ruling by the Court indicating that the purchase obligation at a minimum price is incompatible with Community law. [36] Interested third parties, namely the Land Schleswig-Holstein and Windpark Reussenköge III, have in the meantime intervened in the main proceedings and had the opportunity to submit observations to the Court. [37]

79. There are, furthermore, two decisive differences between the present proceedings and *Foglia* v *Novello*. On the one hand, PreussenElektra and Schleswag contest the validity of a German Law before a German court. Consequently, a central preoccupation of *Foglia* v *Novello*, namely to prevent situations in which the courts of one State decide on the validity of the laws of another State and to grant the Member State concerned an adequate *forum* to defend its law, does not arise in the present case. On the other hand, and perhaps even more importantly, the conflict of interests between PreussenElektra and Schleswag in the main proceedings is not the result of the parties' will and of elaborate contractual arrangements, but the automatic and objective consequence of the statutory obligation laid down in Paragraph 4(1) of the StrEG 1998.

80. I accept that the danger of contrived litigation is more acute where one party to the proceedings owns a majority of the shares of the other. None the less the Court has already accepted references in cases where the action was between a parent company and a subsidiary. [38] The degree of control which PreussenElektra has over Schleswag is disputed, but even if it enjoys the degree of control alleged by the interveners, nothing before the Court in the present case suggests that PreussenElektra made use of its alleged power to determine Schleswag's course of action in order to arrange the present dispute. On the contrary we are told that PreussenElektra has brought a similar action against a second regional electricity distributor, over which it has no control, and that those parallel proceedings have been suspended pending judgment in the present proceedings.

81. Finally, I cannot see anything wrong with PreussenElektra's decision to pay the full May instalment of DEM 10 million and to claim back only the comparatively small sum of DEM 500 000. An undertaking which is convinced of the incompatibility of a national measure with Community law may freely decide on its litigation strategy and bring a test-case if it wishes to do so. [39] Such a choice is particularly understandable where legal costs are calculated by reference to the sums involved in the proceedings.

36 — See above at paragraphs 54 and 55.

37 — See above at paragraphs 64 to 72.

38 — See for example Case 244/78 *Union Laitière Normande* v *French Dairy Farmers* [1979] ECR 2663.

39 — Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, p. 1127 of the Opinion of Advocate General Reischl, and Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraphs 16 and 17 of the judgment.

82. It follows from those considerations that the main proceedings between PreussenElektra and Schleswag are not of an artificial or contrived nature within the meaning of the Court's case-law.

2. *Lacunae and errors in the presentation of the factual and legal background*

83. The interveners and the German Government contend, first, that the referring court has not sufficiently explained on what ground of German civil law PreussenElektra can claim reimbursement of the money paid to Schleswag.

84. It is however for the national court before which the main action is brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the provisions of its legal order and the special features of the case before it the need for a preliminary ruling in order to deliver judgment. In this case the referring court has set out the reasons why it would be helpful to have the Court's replies to resolve the reimbursement claim before it and it is not apparent why those replies would have no bearing on the real situation or on the subject-matter in the main proceedings. [40]

85. The interveners also challenge the correctness of two factual statements made by the national court. They claim that, contrary to what is stated in the order for reference, electricity producers and distributors are from both a legal and an economic viewpoint perfectly able to pass on the additional costs caused by the StrEG 1998 to final customers. Furthermore, the Commission has been sufficiently well 'informed' within the meaning of the first sentence of Article 93(3) about all the relevant modifications before the adoption of the StrEG 1998 and Germany has therefore correctly notified the amendments in issue.

86. It appears from replies to written questions put by the Court that there are indeed serious doubts whether PreussenElektra and Schleswag are prevented from passing on the supplementary costs to final customers. [41] The refusals by the authorities of the Land Schleswig-Holstein to authorise higher tariffs for electricity supplied to final consumers, which were invoked in order to prove that there were legal impediments to passing on supplementary costs, seem to be based on other reasons and do not imply that those authorities failed to recognise those supple-

40 — See, for example, Case C-318/98 *Fornasar and Others*, judgment of 22 June 2000 ECR I-4785, at paragraphs 27 and 28 of the judgment.

41 — See also the judgment by the Bundesgerichtshof of 22 October 1996, reproduced in NJW 1997, p. 574, at p. 578.

mentary costs as legitimate. Moreover, it appears from replies to another written question put by the Court that the StrEG 1998,[42] by allowing the supplementary costs to be taken into account in calculating tariffs, does allow network operators affected by the purchase obligation to pass on the supplementary costs to competitors who want to deliver electricity through the network in question. That in turn enables the network operators to pass on supplementary costs to final consumers without having to fear competition from suppliers who are not subject to the obligations of the StrEG 1998.

87. As regards the issue whether the German authorities 'informed' the Commission within the meaning of the first sentence of Article 93(3) of the Treaty in 1998 before the planned modifications of the Stromeinspeisungsgesetz, the Commission correctly stated at the hearing that the notification under Directive 83/189/EC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations,[43] made by the German authorities before adoption of the amendments in 1998, cannot replace the specific notification under the first sentence of Article 93(3) of the Treaty. Furthermore it is in my view also questionable whether simple preliminary consultations between a government and the Commission can be analysed as containing a proper notification of an alteration of aid for the purposes of Article 93.

88. Be that as it may, it should be remembered that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice. It is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver.[44]

89. It follows that the alleged lacunae and errors in the order for reference cannot affect the admissibility of the reference.

3. *Relevance of the questions*

90. As regards the questions on the interpretation of Articles 92 and 93 of the Treaty, the interveners claim that, independently of the issue whether the StrEG 1998 contains State aid, the standstill obligation under the third sentence of Article 93(3) does not apply and PreussenElektra cannot

42 — StrEG 1998, third sentence of Paragraph 2, above at paragraph 29.

43 — OJ 1983 L 109, p. 8. After several amendments that Directive has in the meantime been replaced by Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ 1998 L 204, p. 37.

44 — See, for example, Case C-435/97 *World Wildlife Fund and Others* v *Autonome Provinz Bozen and Others* [1999] ECR I-5613, paragraphs 31 and 32 of the judgment.

therefore seek reimbursement of the sums paid under the StrEG 1998.

91. That is, first, because the StrEG 1998 cannot be classified as an alteration of existing aid within the meaning of the first sentence of Article 93(3). The changes adopted in 1998 were not important enough to trigger the obligations to notify and to refrain from implementing unnotified alterations of aid under Article 93(3) of the Treaty.

92. Secondly, even if the StrEG 1998 must be considered to be an alteration of existing aid, the exchange of letters between the German authorities and the Commission before and after adoption of the StrEG 1998 must be analysed as containing a correct notification of the modifications within the meaning of the first sentence of Article 93(3) and an implicit authorisation of the changes by the Commission.

93. As regards the interveners' first argument, I consider that it is indeed not yet established — supposing the scheme at issue is to be classified as State aid — whether the amendments of 1998 were substantial enough to trigger the obligations to notify and to refrain from implementing the amended Law under Article 93(3) of the Treaty.

94. However the Landgericht states, in my view correctly, that its question whether the StrEG 1998 contains State aid is relevant since the standstill obligation under the third sentence of Article 93(3) applies only if the measure in issue in its amended version itself constitutes State aid. The fact that the Landgericht did not refer questions on other conditions for the application of the third sentence of Article 93(3) (e.g. whether the alterations of 1998 were important enough to trigger the notification and the standstill obligations) cannot affect the relevance of the question it actually referred to the Court.

95. The interveners' second point boils down to a critique of the referring court's presentation of the facts with which I have already dealt above. [45]

96. The German Government claims that the classification of the purchase obligation as State aid cannot influence the main proceedings since the dispute between PreussenElektra and Schleswag concerns

45 — See paragraphs 87 and 88.

not the support mechanism itself but the apportionment of the costs of that mechanism.

97. That argument is misconceived since according to my understanding of the Law in issue the upstream electricity supplier's obligation to pay compensation under Paragraph 4(1) of the StrEG 1998 is triggered only where the downstream distributor is effectively obliged to purchase electricity from renewable sources under Paragraph 2 of the StrEG 1998. It thus seems that if the latter obligation is precluded by Community law the former cannot be enforced either.

98. As regards Article 30 of the Treaty the interveners contend that the case before the national court concerns a situation without any crossborder element and that the parties have not argued that they are prevented from importing electricity from other Member States. In their view the Landgericht's question on Article 30 is thus of a hypothetical nature.

99. At the hearing Schleswag stated however that it had received an offer to purchase electricity from renewable sources produced in Sweden at a purchase price of around DEM 0.08 per kilowatthour (around half as expensive as electricity from wind under the StrEG 1998) and that it could not accept that offer owing to its obligation to purchase all electricity produced from wind within its area of supply.

100. I consider that, independently of whether or not any such concrete opportunities to import electricity are proven, the Court should rule in the present case on the national court's question on the interpretation of Article 30 of the Treaty. That is because Paragraph 1 of the StrEG 1998 establishes a clear difference of treatment between electricity produced in Germany and imported electricity in that only electricity produced from renewable sources in Germany can benefit from the purchase obligation at an elevated minimum price as contained in the StrEG.

101. I have argued in my Opinion in *Pistre*[46] that the Court should decline to rule on the application of Article 30 to imports when it is clear from the facts of the case before it that the situation in the main proceedings is wholly confined to the national territory.

102. I continue to believe that the concerns which I there expressed are valid where the

46 — Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Pistre and Others* [1997] I-2343.

national measure in issue is applicable without distinction to domestic and imported products and where the case before the national court concerns not imported but domestic products. As regards such a measure, Article 30 has effects only in so far as it applies to imports, and does not affect the measure in so far as it applies to national products.[47] Consequently an interpretation by the Court of Article 30 in a case involving only domestic products is either irrelevant for the outcome of the main proceedings or relevant only by virtue of a national rule prohibiting reverse discrimination. In both cases the Court would be answering a hypothetical question on imported products outside its factual context.

103. However, where a national measure such as the StrEG 1998 favours in law and in fact the marketing of goods of domestic origin to the detriment of imported goods, the application of the measure to domestic producers puts imported products at a disadvantage and therefore hinders, at least potentially, intra-Community trade. Measures favouring domestic products are *ex hypothesi* often applied in purely domestic situations. In order to be effective Article 30 must therefore apply in all cases involving a measure favouring domestic products, independently of whether alternative imports are actually envisaged. Since the interpretation of Article 30 is in such cases relevant for the main proceedings, the Court should reply to the national court's questions.

104. In any event, even as regards measures applicable without distinction[48] and in other situations where the relevance of the questions for the main proceedings was doubtful,[49] the Court has replied to the questions referred. In doing so it argued mainly that it is solely for the national court before which the dispute has been brought to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court.[50]

105. I therefore conclude that the Court should reply to the questions referred.

47 — Joined Cases 314/81, 315/81, 316/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337.

48 — See Case 298/87 *Smanor* [1988] ECR 4489 at paragraphs 8 and 9 of the judgment.

49 — See for example Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161 and Case C-130/95 *Giloy* v *Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I-4291.

50 — See also recently Case C-281/98 *Angonese* v *Cassa di Risparmio di Bolzano* ECR I-4139, judgment of 6 June 2000, paragraphs 18 and 19 of the judgment.

VI — Question 1: The Stromeinspeisungsgesetz 1998 as State aid

106. By its first question the national court wishes essentially to know whether the scheme established by the StrEG 1998 constitutes State aid within the meaning of Article 92(1) of the Treaty in favour of the producers of electricity from renewable energy sources. By splitting its first question into three subquestions the Landgericht may have intended to draw the Court's attention to the special features of the national measure at issue.

107. Under Article 92(1) '... any 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 shall, in so far as it affects trade between Member States, be incompatible with the common market'.

108. According to the German Government and the interveners the StrEG 1998 does not constitute State aid. It follows, in their view, from the wording of Article 92(1), the system of the Treaty and the Court's case-law [51] that advantages which are not granted directly or indirectly through State resources cannot be classified as State aid. A different and therefore wider definition of State aid would bring practically all national legislation regulating the relationship between enterprises within the scope of the State aid rules and would upset the division of competences between the Member States and the Community as laid down in the Treaty. The StrEG 1998 merely contains a price-fixing mechanism and the ensuing advantages for the producers of electricity from renewable sources are thus financed exclusively through private resources. Since the StrEG 1998 has no impact on the State budget, it cannot be considered to be State aid within the meaning of Article 92(1).

109. The referring court, PreussenElektra and Schleswag, the Finnish Government and the Commission consider that the scheme established by the StrEG constitutes State aid. In their view, the mechanism established by the StrEG 1998 can be distinguished from the ones at issue in cases such as *Van Tiggele* [52] or *Sloman Neptun* [53] where the Court refused to apply the State aid rules. It can more readily be

51 — Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele*, cited in note 20; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer*, cited in note 20; Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629.

52 — Case 82/77, cited in note 20.

53 — Joined Cases C-72/91 and C-73/91, cited in note 21.

compared to the measures under scrutiny in *Van der Kooy* [54] and *Ecotrade*, [55] on the one hand, and *Commission* v *France* [56] and *Steinike und Weinlig*, [57] on the other hand, where the Court found that State aid was involved. It follows moreover from the function of the State aid rules, the wording of Article 92(1) and certain statements made by the Court that financing through State resources is not an essential element of the concept of aid. If the opposite were to follow from the case-law, the Court should reconsider its position in order to exclude the possibility of Member States circumventing the State aid regime. In any event the StrEG 1998 should be caught as a circumvention measure by Article 5(2) of the EC Treaty (now Article 10(2) EC) read in conjunction with Article 92.

110. As a first preliminary point it must be stressed that the issue in the present case is not whether the StrEG 1998 is compatible with the State aid rules. The assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. Supposing that the StrEG 1998 constitutes State aid, it may still be authorisable under the Community guidelines on State aid for environmental protection. [58] It should not be forgotten that the promotion of production of electricity from renewable sources is one of the most important environmental objectives of the European Union. [59]

111. At issue in the present case is therefore only the scope of application of the regime for the control of State aid. In other words, is a Member State which wishes to adopt a law such as the StrEG 1998 obliged to comply with the procedural obligations of Article 93 of the Treaty (e.g. notification and standstill), or does that type of legislation fall entirely outside that control regime?

112. Secondly, only one element of the concept of State aid is disputed. As can be seen from the arguments summarised above, the written and oral submissions have concentrated almost exclusively on the question whether the advantages for the producers of electricity from renewable sources caused by the StrEG 1998 are 'granted by a Member State or through State resources' within the meaning of Article 92(1). None of those submitting

54 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219.

55 — Case C-200/97 *Ecotrade* v *AFS* [1998] ECR I-7907.

56 — Case 290/83 [1985] ECR 439.

57 — Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595.

58 — OJ 1994 C 72, p. 3.

59 — See, for example, Council Recommendation 88/611/EEC of 8 November 1988 to promote cooperation between public utilities and auto-producers of electricity, cited in note 3; Council Resolution of 27 June 1997 on renewable sources of energy, OJ 1997 C 210, p. 1; Communication from the Commission: Energy for the future: Renewable Sources of Energy — White Paper for a Community Strategy and Action Plan, COM(97) 599 final; Council Resolution of 8 June 1998 on renewable sources of energy, OJ 1998 C 198, p. 1; Proposal for a Directive of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market, cited in note 16.

observations has argued that another constitutive element of the concept of State aid is lacking. There can indeed be little doubt that the elevated minimum price for electricity produced from renewable sources combined with the purchase obligation confers a considerable and specific economic advantage on producers of that type of electricity, thereby distorts competition between the different categories of producers and ultimately affects trade in electricity between Member States.

113. In the light of those preliminary considerations and the arguments of the parties I will discuss the following questions:

— Is financing through State resources a constitutive element of the concept of State aid under the Court's existing case-law?

— Should the Court reconsider that case-law?

— Can the advantages granted by the StrEG 1998 be regarded as being financed through State resources?

— Is the StrEG 1998 a measure equivalent to State aid prohibited by Article 5(2) of the Treaty?

1. *Financing through State resources as a constitutive element of the concept of State aid under the Court's case-law*

114. The phrase 'granted by a Member State or through State resources' in Article 92(1) might be read in two different ways.

115. On the one hand, it might be argued that the second alternative aid granted 'through State resources' covers measures financed through public funds, whilst the first alternative 'aid granted by a Member State' covers all remaining measures which are not financed through State resources. Under that extensive interpretation of Article 92(1) any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State, constitutes State aid independently of whether it involves any financial burden for the State.

116. On the other hand, Article 92(1) may be read as stating that aid must necessarily be financed through State resources and

that the distinction between aid granted by a State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State. Under that second narrower interpretation the measure at issue must necessarily cost the State money and financing through public resources is a constitutive element of the definition of State aid.

117. It is now well-established case-law that the second reading prevails and that only *advantages which are granted directly or indirectly through State resources* are to be regarded as State aid within the meaning of Article 92(1).

118. That formula was used for the first time in *Van Tiggele* [60] which concerned a measure fixing a minimum retail price for gin. The Court followed the Opinion of Advocate General Capotorti and held:

'Whatever definition must be placed on the concept of an "aid"... it is clear from the wording [of Article 92(1)] that... a measure characterised by the fixing of minimum retail prices with the objective of favouring distributors of a product at the exclusive expense of consumers cannot constitute an aid....

The advantages which such an intervention in the formation of prices entails for the distributors of the product are not granted, directly or indirectly, through State resources....' [61]

119. That principle was arguably confirmed in *Norddeutsches Vieh- und Fleischkontor* [62] which concerned the allocation of special tariff quotas for the importation of frozen beef and veal from non-member countries. German legislation determined the allocation of the national quota share between domestic traders. Three traders challenged that legislation *inter alia* on the ground that it constituted State aid in favour of certain other traders.

60 — Case 82/77, cited in note 20.

61 — Paragraphs 24 and 25 of the judgment.

62 — Joined Cases 213/81, 214/81 and 215/81 *Norddeutsches Vieh- und Fleischkontor* v *Balm* [1982] ECR 3583.

120. According to Advocate General Ver-Loren van Themaat it was possible to argue on the basis of the distinction made in Article 92(1) between aid granted 'by a Member State' and aid granted 'through State resources' that the independent grant of pecuniary advantages which were not paid for by a Member State was caught by Article 92. He mentioned the example of reduced rates which a Member State might require private electricity companies to grant to certain undertakings. [63]

121. The Court held however that the financial advantage which traders derive from receiving a share in the national tariff quota was not granted through State resources but through Community resources because the levy which was waived was part of Community resources. Since the measure in issue did no more than allocate a Community tariff quota it did not constitute 'aid granted by a Member State or through State resources' within the meaning of Articles 92 to 94 of the Treaty. [64]

122. The subsequent judgment in *Commission* v *France* [65] caused some uncertainty. In that case a special aid to poor farmers was financed by the operating surplus accumulated over several years by the French Caisse nationale de crédit agricole.

123. The Commission assumed that the State was the initiator of the decision to grant the aid, but that the surplus from which it was financed was generated by the management of private funds and not of State resources. It considered therefore that the aid in question was not State aid within the strict meaning of the expression but a measure having an equivalent effect to State aid prohibited by Article 5 of the Treaty. [66]

124. Advocate General Mancini stated on the basis of a different interpretation of the facts that the aid was not only initiated by the State, but also financed through State resources. He therefore considered that State aid within the meaning of Article 92(1) of the Treaty was involved. [67]

125. The Court did not examine whether or not the grant was in fact financed from State resources. It nevertheless held that the grant constituted State aid and made the following statements:

'By virtue of the generality of the terms employed in [Article 92(1)]... any State

63 — Point 5 of the Opinion.

64 — Paragraphs 22 and 24 of the judgment.

65 — Case 290/83, cited in note 56.

66 — Paragraphs 6 to 9 of the judgment.

67 — Under point 3 of the Opinion.

measure, in so far as it has the effect of according aid in any form whatsoever, may be assessed on the basis of Article 92....

As is clear from the actual wording of Article 92(1), aid need not necessarily be financed from State resources to be classified as State aid.' [68]

126. In *Van der Kooy* [69] and *Greece* v *Commission*, [70] two cases decided shortly after *Commission* v *France*, the Court again did not require financing through State resources.

127. The law as it currently stands was then formulated in *Sloman Neptun*. [71] In issue was a measure enabling certain shipping undertakings flying the German flag to subject seafarers who were nationals of non-member countries to working conditions and rates of pay less favourable than those applicable to German nationals.

128. Advocate General Darmon suggested after a thorough discussion of the issue that the origin of the financing of an aid measure was irrelevant. In his view, Article 92(1) required only that the aid measure was the result of conduct for which a Member State was responsible. [72]

129. The Court however cited *Van Tiggele* and held that only advantages which were granted directly or indirectly through State resources were to be regarded as State aid within the meaning of Article 92(1). That was because the wording of that provision and the procedural rules in Article 93 of the Treaty showed that advantages granted from resources other than those of the State did not fall within the scope of the State aid rules. The distinction between aid granted by the State and aid granted through State resources served to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State. [73]

130. As regards the question whether or not the advantages arising from the measure in issue were to be viewed as being granted through State resources, the Court held that the measure sought not to create an advantage, which would constitute an additional burden for the State, but only to alter in favour of shipping undertakings the framework within which contractual rela-

68 — Paragraphs 13 and 14 of the judgment.

69 — Cited in note 53, paragraphs 28 and 32 to 38 of the judgment.

70 — Case 57/86 [1988] ECR 2855, paragraph 12 of the judgment and the Opinion of Advocate General Slynn at p. 2867.

71 — Cited in note 21.

72 — See in particular paragraphs 40 to 43 of the Opinion.

73 — Paragraph 19 of the judgment.

tions were formed with their employees. The consequences arising from the measure, in so far as they related to the difference in the basis for the calculation of social security contributions and to the loss of tax revenue because of the low rates of pay, were inherent in the system and not a means of granting a particular advantage to the undertaking concerned. Accordingly, the measure did not constitute State aid. [74]

131. The principle that State aid has to be financed directly or indirectly through State resources has been confirmed in all relevant judgments since *Sloman Neptun*: *Kirsammer-Hack* v *Sidal*, [75] *Viscido*, [76] *Ecotrade* v *AFS* [77] and *Piaggio*. [78]

132. Recently, in *Ladbroke* [79] the Community Courts examined legislation defining the range of uses to which the French Pari mutuel urbain ('PMU') could put unclaimed winnings from bets on horse-races. Under the original legislation the use of unclaimed winnings was restricted to certain types of social security expenditure. Winnings not used for the authorised purposes had to be paid to the State. Then the French legislature extended the range of eligible uses to other activities in order to help the PMU to finance special redundancy payments to former employees. This Court agreed with the Court of First Instance that in doing so the French authorities in effect waived revenue which in principle should have been paid over to the Treasury, so that State funds were transferred to the recipient within the meaning of Article 92(1) of the Treaty. As regards the argument that the sums in question had never been directly held by the State, the Court stated that those sums were continuously subject to the State's control and therefore at the disposal of the competent national authorities, which was sufficient for them to be characterised as State resources within the meaning of Article 92(1). [80]

133. It follows that under the law as it stands financing through State resources is a constitutive element of the concept of State aid.

74 — Paragraphs 20 to 22 of the judgment.

75 — C-189/91, cited in note 51.

76 — Joined Cases C-52/97, C-53/97 and C-54/97, cited in note 51.

77 — Case C-200/97, cited in note 55.

78 — Case C-295/97 *Piaggio* v *IFITALIA and Others* [1999] ECR I-3735.

79 — Case C-83/98 P *France* v *Ladbroke Racing and Commission*, judgment of 16 May 2000, confirming the judgment of the Court of First Instance in Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1.

80 — See paragraphs 45 to 51 of the Court's judgment.

2. *Should the Court reconsider its case-law?*

134. The national court, the Commission, PreussenElektra, Schleswag and the Finnish Government consider that financing through State resources should not be a constitutive element of the concept of aid. In their view Article 92(1) requires only that a measure is the result of action by a Member State.

135. They refer to judgments of the Court and Opinions of its Advocates General in which financing through State resources was not considered a necessary element of the concept of aid. [81] They also point out that both the German Government and the Commission have always treated the mechanism contained in the successive versions of the Stromeinspeisungsgesetz as State aid.

136. They make the following arguments in favour of an extensive interpretation of Article 92(1).

137. In the first place, Article 92(1) applies to aid granted 'in any form whatsoever'. That phrase suggests an extensive interpretation of the concept of aid.

138. Secondly, it follows from Article 3(g) of the EC Treaty (now Article 3(g) EC) that the State aid rules are one of the cornerstones of a system designed to ensure that 'competition in the internal market is not distorted'. The objective of Article 92 et seq. is thus to maintain equal conditions of competition between traders. A broad interpretation of the concept of aid is necessary for Article 92 to make a meaningful contribution towards the achievement of that objective. [82] That is probably the reason why the Court has held that in applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured. [83]

139. From that teleological viewpoint a State measure conferring specific advantages on certain undertakings does not become less anticompetitive where it is financed through private and not through public resources. On the contrary, the distortion of competition might be greater where the cost of the measure is borne by competitors of the aided undertakings and not by the general public.

81 — See, above, paragraphs 120, 122 to 126 and 128 and notes 63, 68, 69, 70 and 72.

82 — Advocate General Lenz in his Opinion in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, at p. 2269.

83 — Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR I-595.

140. The present case is a perfect illustration of such a potentially harmful situation. The StrEG 1998 affects producers of electricity from conventional sources in two ways.

141. As competitors they must live with the fact that the StrEG 1998 guarantees the producers of electricity from renewable sources a considerable amount of operating aid (the most harmful form of aid). Moreover the amount of that operating aid is determined on the basis of the amount of electricity produced and of average sales prices of the previous year (not on the basis of production costs). Producers of electricity from renewable sources can thus unilaterally increase the aid to which they are entitled by increasing production and by reducing production costs. And owing to the purchase obligation the producers of electricity from renewable sources do not run the usual risks of overcapacity or price fluctuations.

142. Moreover, it is not the general taxpayer but the producers of electricity from conventional sources themselves which have to pay the bill for the aid measure in question. Consequently they also lose valuable resources which they could otherwise use in order to compete. The mechanism established by the StrEG therefore affects competition between the different categories of electricity producers to a greater extent than would a simple State subsidy financed from the general budget.

143. Thirdly, it has also to be kept in mind that all State revenue is ultimately provided by private individuals through taxes. Whatever the nature and the number of intermediate entities, the financial burden of an economic advantage conferred by the State on specific undertakings is thus in any event always borne by individuals and traders. [84]

144. It is therefore formalistic to apply the State aid rules in cases where certain undertakings are required to pay money into a State fund whence it is redistributed to competitors, [85] and not to apply those rules in cases such as the present where affected undertakings have to make direct payments to their competitors.

145. Finally, it is argued that there is a danger of circumvention of the State aid rules. If financing through State resources were a necessary element of the definition of aid, Member States might be tempted to devise schemes which confer important economic advantages on certain domestic

84 — Advocate General Darmon, in his Opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun*, cited in note 21, at paragraph 40.

85 — See, for example, Case 78/76 *Steinike und Weinlig* v *Germany*, cited in note 83; Case 290/83 *Commission* v *France*, cited in note 56.

undertakings, entail grave consequences for competition and cross-border trade in Europe, do not cost the Member State concerned any money, and, on top of all that, escape the Commission's control under Article 93 of the Treaty.

146. The Commission expressly invites the Court to reconsider its existing case-law in view of recent developments in the Community legal order and in the light of the mechanism established by the StrEG 1998. After the completion of the internal market and with the beginning of monetary Union, selectively applied aid measures are the last remaining instrument which the Member States can use to confer competitive advantages on their domestic undertakings. On examination by the Commission those aid measures may well be found compatible with the common market. It is however of paramount importance to subject them to the control mechanisms contained in Article 93 of the Treaty which guarantee the necessary discipline and transparency. In defining the concept of State aid the Court should thus give more weight to the objective of the State aid rules and their overall effectiveness.

147. PreussenElektra and the Commission also argue that the StrEG 1998 cannot be compared with the measures under scrutiny in the cases where the Court held that State aid has to be financed through State resources. The rule established in those cases should therefore not be of general application and should in particular not be applied in the present case.

148. In *Van Tiggele* the measure in issue, fixing a minimum retail price for gin, had different effects because consumers were free to buy or not to buy gin and could also choose between different brands. The financial burden was on final consumers. The intention was to protect domestic producers against lower cost imports. Therefore the measure infringed Article 30 of the Treaty. By contrast, under the regime established by the StrEG 1998 the advantage for producers of electricity from renewable sources is financed by competitors and not by the general public. [86] The undertakings affected are obliged to purchase all the electricity produced from renewable sources within their area and cannot take a free purchase decision. Upstream suppliers are also automatically obliged to pay compensation. They pay even without receiving anything in return. The purpose of the StrEG 1998 is primarily not to impede imports but to improve the competitive position of the producers of electricity from renewable sources.

149. Furthermore, in contrast to the measures in issue in *Sloman Neptun*, *Kirsam-*

86 — See, for the doubts as regards that statement, paragraph 86.

mer-Hack and *Viscido*, the StrEG obliges competitors to transfer money directly to the aided undertakings. The economic advantages for the producers of electricity from renewable sources and the costs for the affected undertakings are obvious and can be easily quantified.

150. I accept that there is some force in the above arguments in favour of an extensive understanding of the concept of State aid. I am none the less of the opinion that financing through State resources is a necessary element of the concept of State aid and that the Court should adhere to its current case-law.

151. That is, first, because, even if the phrase 'granted by a Member State or through State resources' can be interpreted in different ways, the reading suggested by the Court in *Sloman Neptun*, *Kirsammer-Hack* and *Viscido* is more natural and raises fewer consequential problems.

152. According to the Court's understanding, the first alternative, 'aid granted by a Member State', covers normal aid measures financed from public funds and granted directly by the State. The second alternative (aid granted through State resources) covers the rarer and residual category of aid financed through State resources which is granted not directly by the State but by public or private bodies designated or established by the State. If one adheres to that interpretation, the presence of the second alternative in Article 92(1) can be easily explained by the fact that the authors of the Treaty wanted to preclude circumvention of the State aid rules through decentralised and/or privatised distribution of aid.

153. Under the alternative reading suggested by the supporters of an extensive interpretation of Article 92(1), the second alternative (aid granted through State resources) covers measures financed through public funds, whilst the first alternative (aid granted by a Member State) covers all remaining measures which are not financed through State resources. Such an understanding of Article 92(1) presupposes that the authors of the Treaty put a concept covering a residual category of cases (aid not financed through State resources) before the concept covering the normal category of cases. That is neither the natural nor the usual way to proceed when drafting legislation.

154. Moreover, in a systematic interpretation of the Treaty, the heading of the section 'Aids granted by States' must be intended to cover both alternatives in Article 92(1) namely 'aid granted by a Member State' and aid granted 'through

State resources'. Since the wording of the first alternative is almost identical [87] with the wording of that heading, it seems difficult to argue (as the supporters of an extensive interpretation must do) that the first alternative 'aid granted by a Member State' covers only the residual category of State measures which are financed through private resources.

155. Secondly, there is a fundamental problem with the teleological argument developed by the supporters of an extensive reading of Article 92(1). When defining the objective of the State aid rules they run the risk of assuming what has to be proved, namely that the rules are intended to apply to all State measures. In the light of the heading of the relevant section and the wording of Article 92(1) it could equally be argued that the State aid rules are intended to protect competition only from State measures which are financed through public funds and not from all types of State measures. If that is the objective of Article 92 et seq., 'aid granted by a Member State or through State resources' cannot be interpreted as extensively as suggested.

156. Thirdly, a systematic argument in favour of the Court's interpretation can be made in connection with the procedural rules contained in Article 93. That provision protects the interests of the competitors of the aided undertaking and the Member States in which those competitors are established, [88] the interests of the Member State granting the aid and of the aided undertaking who both want the aid to be implemented as rapidly as possible, [89] and the interests of the Member States in their entirety. [90] By contrast, no rule in the system established by Article 93 addresses the specific problems of undertakings which have to finance the aid granted to other undertakings. If however Article 92(1) systematically covered measures financed from private resources, one would expect to find in Article 93 rules dealing with their procedural rights and obligations. Furthermore, it is difficult to see how a decision by the Commission ordering the recovery of unlawful State aid could be implemented where that aid has been paid by one group of undertakings to another group of undertakings.

157. A fourth argument in favour of the Court's solution is that it provides more legal certainty. I do not agree with the interveners and the German Government who claim that the more extensive interpretation of Article 92(1) would bring practically all national legislation regulating the relationship between enterprises within the scope of the State aid rules. Most national legislation of that type would in any event not constitute State aid because it does not satisfy the require-

87 — In the German version of the Treaty the wording is actually identical, namely in both cases 'staatliche Beihilfen'.

88 — Article 93(2).

89 — See, for example, 'without delay' in Article 93(3).

90 — Third subparagraph of Article 93(2).

ment of selectivity which means that it does not favour *certain* undertakings or the production of *certain* goods within the meaning of Article 92(1). It follows however that the more extensive interpretation would oblige the Member States, affected undertakings, the Commission, the national courts and ultimately the Community Courts to decide in respect of all legislation regulating the relationship between enterprises whether it does confer selective advantages on certain undertakings within the meaning of Article 92(1). Since such an assessment is a difficult exercise with an uncertain outcome, it seems preferable that legislation regulating the relationship between private actors is as a matter of principle excluded from the scope of the State aid rules.

158. Finally, the danger of the Member States adopting on a large scale support measures for certain domestic undertakings which are financed through private resources, have the same anticompetitive effects as normal State aid and escape the Commission's control, should not be exaggerated. The undertakings required to finance such measures will use all legal and political means at their disposal to combat the measures in question. In the present case PreussenElektra and Schleswag have challenged the StrEG 1998 in a number of proceedings before the German constitutional court. Moreover a measure which has the same negative effects on competition and intra-Community trade as aid financed through State resources is likely to infringe other rules of the Community legal order. [91] The Commission can then act under Article 169 of the EC Treaty (now Article 226 EC).

159. I therefore conclude that financing through State resources is a constitutive element of the concept of State aid under Article 92(1) of the Treaty and that the Court should not depart from its case-law.

3. Can the advantages conferred by the StrEG 1998 be regarded as being financed through State resources?

160. The referring court, PreussenElektra and the Commission argue that the advantages conferred by the StrEG 1998 on producers of electricity from renewable sources should be regarded as financed through State resources. They reach that conclusion on the basis of three alternative lines of reasoning.

91 — For example Article 30 of the Treaty; see Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele*, cited in note 20.

(a) Potential loss in tax revenue

161. The national court states that the StrEG 1998 negatively affects the earnings of the undertakings which are subject to the purchase obligation and to the obligation to pay compensation. A reduction in earnings entails in turn a corresponding loss in tax revenue.

162. It follows however from the case-law that a potential loss of tax revenue for the State as a result of the application of a system such as the one established by the StrEG 1998 cannot in itself justify treating that system as aid. [92] It is true that State aid may sometimes be financed through a waiver of State revenue. [93] But in the present case the resources from which the advantages for producers of electricity from renewable sources are financed do not come from the alleged loss in tax revenue but from the undertakings subject to the StrEG and probably ultimately from consumers. The loss in question is thus merely an inherent side-effect of the StrEG 1998.

(b) Conversion of private resources into State resources

163. According to the Commission and PreussenElektra the mechanism established by the StrEG 1998 converts private resources into public resources. In their view, it has effects analogous to the ones produced by taxation in that it withdraws resources from the private sphere and commits them to a public interest objective. That is particularly evident as regards the obligation to pay compensation under Paragraph 4(1) of the StrEG 1998. Under that provision upstream suppliers have to pay money to downstream distributors without receiving anything in return. There is thus no relevant difference between the present case and cases in which parafiscal charges are used to finance aid measures.

164. It is true that State aid is often financed through revenue from parafiscal charges. [94] Furthermore, State resources within the meaning of Article 92(1) are not necessarily owned by public authorities and may in fact have always remained in the hands of the aided undertakings. That is the normal situation where the State grants aid through a waiver of revenue. A good example in that regard is the extension of the range of eligible uses to which the PMU could put unclaimed winnings from bets on horse-races in *Ladbroke*. [95] It is also established that State resources do not necessarily come from permanent assets of the public sector. In *Air France* the balance produced by deposits with and withdrawals

92 — See Joined Cases C-72/91 and C-73/91 *Sloman Neptun*, cited in note 21, paragraph 21 of the judgment; Case C-200/97 *Ecotrade* v *AFS*, cited in note 55, paragraph 36.

93 — Case C-83/98 P *France* v *Ladbroke Racing and Commission*, cited in note 79.

94 — See, for example, Case C-72/92 *Herbert Scharbatke* v *Germany* [1993] ECR I-5509, paragraph 18.

95 — Case C-83/98 P, cited in note 79, paragraphs 45 to 51 of the judgment.

from the accounts of the French Caisse des dépôts et consignations, which the Caisse was able to use as if the funds represented were permanently at its disposal, was therefore covered by the concept of State resources. [96]

165. The common denominator of all the relevant cases is however that in one way or another the State exercised control over the resources in question. In the case of parafiscal charges the money becomes the property of the State before it is redistributed to the aided undertakings. In the case of a waiver of revenue the State renounces sums which it was in principle entitled to claim. State resources within the meaning of Article 92(1) of the Treaty are therefore only resources which are *at the disposal* of public authorities. [97]

166. In the present case the sums to be transferred under the StrEG 1998 never are and never will be at the disposal of the German authorities. No public authority enjoys at any moment any rights with regard to those sums. In fact they never leave the private sphere. If one of the undertakings refuses to comply with its obligations under the StrEG 1998 the other has to go to court. If the argument of the Commission and PreussenElektra were to be accepted then all sums which one person owes another by virtue of a given law would have to be considered to be State resources. That seems an impossibly wide understanding of the notion. It follows that the private resources to be transferred under the StrEG 1998 are at no time State resources within the meaning of Article 92(1) of the Treaty.

167. In reality the Commission and PreussenElektra are inviting the Court to treat the StrEG 1998 by analogy with measures financed through parafiscal charges. But any legitimate analogy presupposes a lacuna or, in other words, a situation which is not governed by an existing rule. It follows from the discussion above that such a clear-cut rule already exists, namely that measures financed exclusively through private resources are outside the scope of the State aid rules. The analogy suggested by the Commission and PreussenElektra would thus effectively abolish the distinction between publicly financed and privately financed measures.

96 — Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraphs 66 and 67 of the judgment.

97 — See the formulae used in *Ladbroke* at paragraph 50 and in *Air France* in paragraph 68.

(c) Reduced earnings of publicly owned undertakings as State resources

168. According to the Commission it follows from the judgments in *Ecotrade*[98] and *Van der Kooy*[99] that an aid measure financed by undertakings which are partially or entirely owned by the State must be viewed as being financed through State resources within the meaning of Article 92(1). The Commission relies on data published in 1996[100] and contends that a majority of the capital of six of the nine big undertakings at the first level of the German electricity market is owned by the State and that 60% of the shares of all regional electricity suppliers are equally owned by public authorities (in most cases by cities and communes). It follows, in the Commission's view, that the purchase obligation and the compensation mechanism established by the StrEG 1998 constitute State aid at least in so far as they affect undertakings owned by the State. Since the StrEG 1998 does not differentiate between publicly and privately owned undertakings, the Law in its entirety should have been notified.

169. In *Van der Kooy* the Court had to decide whether a preferential tariff applying to natural gas sold by Nederlandse Gasunie to glasshouse growers in the Netherlands constituted State aid. Nederlandse Gasunie was a company incorporated under private law 50% of whose capital was held directly or indirectly by the State.

170. Advocate General Slynn discussed not only whether the tariff had been imposed by the State but also whether State resources were involved. The Commission had held in the contested decision that the aid was financed through State resources and the applicants had contested that finding.[101] In the Advocate General's view the aid in question was financed through public funds since the State surrendered its share of the profits which would have been made by Nederlandse Gasunie had prices been higher.[102]

171. The Court however did not examine whether State resources were involved. It asked only whether the State was responsible for fixing the tariff in question. That might be explained by the uncertainty at the time about the state of the law caused by *Commission* v *France*.[103] Whatever the reasons, since the Court apparently did not view financing through State resources as a constitutive element of the concept of State

98 — Case C-200/97, cited in note 55.

99 — Joined Cases 67/85, 68/85 and 70/85, cited in note 54.

100 — The Commission refers to Eugene D. Cross, *Electric Utility Regulation in the European Union — A Country by Country Guide*, 1996, pp. 133 to 136.

101 — See the report for the hearing, point III A 3 at p. 236.

102 — See the Opinion at p. 250.

103 — See above at paragraph 122.

aid, *Van der Kooy* cannot be invoked as authority for the proposition that a reduction in profits of a State-owned undertaking amounts to financing through State resources.

172. *Ecotrade* [104] and *Piaggio* [105] both concerned an Italian Law which allowed certain insolvent industrial undertakings to be placed under extraordinary administration and to be granted special protection from execution by creditors by way of derogation from the ordinary rules of insolvency. The Court held that the expression 'aid' necessarily implied advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose. In the Court's view, the Italian Law under examination was intended to apply selectively for the benefit of certain undertakings which owed particularly large debts to certain, mainly public, classes of creditors. It was highly likely that the State or public bodies would be among the principal creditors of the undertakings in question. Moreover several other features of the system established by the Law could entail an additional burden for the State, compared to the situation that would have arisen had the usual insolvency rules been applied. On the basis of those indications the Court left it to the national court to make the necessary findings in order to establish whether State aid was involved.

173. I must confess that I am not entirely sure how to interpret the judgments in those two cases. [106] It is for example not clear whether the Law under examination as such or only its application in a particular case might constitute State aid. Furthermore, contrary to what the Commission seems to assume, the Court did not expressly state that financing of an aid measure through reduced earnings of State-owned undertakings might be viewed as financing through State resources within the meaning of Article 92(1) of the Treaty. In order to explain why State resources might be involved, the Court mentioned as potentially affected creditors merely 'public classes of creditors', [107] 'the State or public bodies' [108] and 'public authorities'. [109] In my view, therefore the judgments in those cases again provide no clear authority.

174. If *Ecotrade* and *Piaggio* are none the less to be interpreted as suggesting that financing of a measure through reduced

104 — Case C-200/97, cited in note 55.

105 — Case C-295/97, cited in note 78.

106 — See also the comments of Advocate General Ruiz-Jarabo, Opinion in *Piaggio*, paragraph 30.

107 — Case C-200/97 *Ecotrade*, cited in note 54, paragraph 38 of the judgment.

108 — Paragraphs 38 and 41 of the judgment.

109 — Paragraphs 41 and 43 of the judgment.

earnings of publicly owned undertakings may constitute financing through State resources, then two qualifications are necessary.

175. First, I consider that a general measure which confers advantages on one group of undertakings at the expense of another group of undertakings cannot be classified as State aid merely because one or a small number of undertakings of the latter group are partially or totally owned by the State. Such an understanding of the concept of financing 'through State resources' would bring a vast amount of legislation regulating the relations between enterprises within the scope of the State aid rules. Moreover, it would have absurd results in that a Member State would probably have to exempt the publicly owned undertakings from the obligations affecting the other undertakings in order to comply with the State aid rules. That would obviously distort competition between the different types of undertakings on the financing side of the measure. Those considerations might explain why the Court emphasised in *Ecotrade* and in *Piaggio* that the State or public bodies should be the 'principal creditors' or be among the 'chief creditors' of the undertaking in difficulty.

176. In the present case the German Government stated, in its reply to a written question of the Court, that currently only two out of eight undertakings at the first level of the German electricity market are controlled by the State. As regards the second level of regional distribution, no detailed data could be provided, but ownership structures were subject to rapid change with a clear tendency towards private ownership. It is also important to note that in contrast to *Ecotrade* and *Piaggio* no other public bodies such as social security institutions or public banks are involved on the financing side.

177. Consequently the advantages for the producers of electricity from renewable sources are financed exclusively by undertakings incorporated under private law of which apparently a majority is privately owned. In those circumstances the mechanism established by the StrEG 1998 cannot be viewed as being financed 'through State resources'.

178. Secondly, PreussenElektra itself is privately owned and holds, as already stated, 65.3% of the shares of Schleswag. The application of the StrEG 1998 in the concrete case did not therefore involve any additional financial burden for the State or reduced earnings of publicly owned undertakings.

179. It follows that the Commission's argument relying on financing of the aid

through reduced earnings of publicly owned undertakings must be rejected.

4. Is the StrEG 1998 a measure equivalent to State aid prohibited by Article 5(2) of the Treaty?

180. The Commission maintains that if the StrEG 1998 is not to be regarded as State aid in the strict sense it constitutes a measure intended to circumvent the State aid rules. The Court has held in connection with Articles 3(g) and 85 of the Treaty that Article 5 requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. [110] The StrEG 1998 which has all the harmful effects of State aid in spite of being financed by private resources poses a similar threat to the effectiveness of Articles 92 and 93. A measure such as the StrEG 1998 therefore infringes Article 5(2) of the Treaty read in connection with Articles 92 and 93. Since there are already appropriate procedures under Article 93 to deal with infringements of the State aid rules it would be wrong to sanction the infringement of Article 5 through the procedure under Article 169 of the EC Treaty (now Article 226 EC). An infringement of Article 5 read in conjunction with Articles 92 and 93 is therefore best dealt with by a teleological extension of the notion of State aid in Article 92(1).

181. The Commission had already used a similar line of argument in *Commission* v *France*. [111] That case concerned a special aid to poor farmers financed by the operating surplus accumulated over several years by the Caisse nationale de crédit agricole. Since the surplus was generated by the management of private funds the Commission considered that no State aid within the strict meaning of the expression was involved. It argued therefore that it was a measure having an equivalent effect to State aid prohibited by Article 5 of the Treaty and on the basis of that assumption it brought proceedings under Article 169 of the Treaty. [112]

182. The Court held that the procedure under Article 169 of the Treaty did not provide all parties concerned with the same guarantees as the procedure under Article 93(3). The Commission therefore had to use the latter procedure if it wished to establish that a scheme was aid incompatible with the common market. Articles 92 and 93 left no space for a parallel concept of 'measures equivalent to aid' which were subject to different rules from those which apply to aid properly so-called.

110 — See for example Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14 of the judgment.

111 — Case 290/83, cited in note 56.

112 — Paragraphs 6 to 9 of the judgment.

183. It is clear from that judgment that the idea of 'measures equivalent to aid' which infringe Article 5(2) and can be sanctioned under Article 169 of the Treaty has no foundation in the Treaty.

184. In the present case the Commission suggests, if I understand its arguments correctly, something slightly different, namely that the StrEG 1998 as a 'measure equivalent to aid' infringes Article 5(2) of the Treaty and that it should be sanctioned under Article 93 by virtue of an extensive interpretation of the concept of aid under Article 92(1).

185. In my view that argument is flawed. There are several conceivable sanctions for an infringement of a prohibition such as Article 5(2). But I cannot see how the infringement of that general prohibition can trigger an extension of the scope of application of another set of special rules prohibiting a particular kind of State measures. One has also to keep in mind that the assumption underlying the Commission's argument is that measures financed through private resources do not constitute State aid. If the Commission's argument were to be accepted, Article 5 of the Treaty could be used to extend the reach of the Treaty. In reality the Commission suggests an extensive teleological interpretation of Article 92(1) which includes measures financed through private resources. For the reasons indicated above I am not in favour of such an extensive interpretation.

186. I accordingly conclude that the mechanism established by the StrEG 1998 does not contain State aid within the meaning of Article 92(1) of the Treaty.

VII — Question 2: The reach of the stand-still obligation in Article 93(3) of the Treaty

187. By its second question the referring Court wishes to ascertain whether the restrictive effects of Article 93(3) of the EC Treaty apply not only to the aid measure itself but also to implementing rules such as the compensation mechanism under Paragraph 4(1) of the StrEG 1998.

188. It asks that question however only in the event that the purchase obligation at a minimum price under Paragraphs 2 and 3 of the StrEG 1998 constitutes State aid whilst the compensation mechanism in Paragraph 4(1) does not.

189. Given the reply to the first question the second question does not therefore arise.

VIII — Question 3: The Stromeinspeisungsgesetz 1998 as a measure having equivalent effect to a quantitative restriction on imports

1. *Preliminary considerations*

190. By its third question the referring court wishes to know whether a mechanism such as that established by the StrEG 1998 constitutes a quantitative restriction on imports or a measure having equivalent effect within the meaning of Article 30 of the Treaty.

191. In the referring court's view, the obligation on German network operators to purchase electricity produced from renewable sources within their area of supply might reduce demand for electricity produced in other Member States and is therefore to be classified as a measure having equivalent effect to a quantitative restriction on imports.

192. Both PreussenElektra and Schleswag consider that the StrEG 1998 is incompatible with Article 30 of the Treaty. In their view, the obligation to purchase a certain amount of electricity produced from renewable sources in Germany affects their ability to import electricity from other Member States. That restriction on imports cannot, as a directly discriminatory measure within the meaning of the Court's case-law, [113] be justified on environmental grounds. It cannot be justified under Article 36 of the Treaty either since the protection of the environment is not included among the interests protected by that article. In any event, the StrEG 1998 infringes the principle of proportionality.

193. The interveners, the German Government and the Commission argue essentially that the measure in issue either does not restrict intra-Community trade to an appreciable extent or is justified on grounds of the protection of the environment or of security of electricity supply.

194. In view of the suggested reply to the first two questions the Court's answer to the national court's third question may be decisive for the outcome of the main proceedings. Moreover the legal issues

113 — Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraph 11 of the judgment.

raised by that question are both complex and of general importance.

195. Unfortunately, however, the issues have not been fully discussed by the parties, and the Court is not fully informed of the facts. Until now the litigation about the validity of the Stromeinspeisungsgesetz has concentrated on its effects either on the undertakings which have to finance the mechanism [114] or on the undertakings competing with the producers of electricity from renewable sources. [115] The national court's third question deals by contrast with a third effect of the StrEG 1998, but one hitherto largely neglected, namely its impact on cross-border trade in electricity. Moreover, it is not clear precisely how and to what extent imports of electricity from other Member States are in practice affected by the operation of the StrEG 1998, and in particular for example whether imports of electricity from renewable resources are technically feasible at all and whether such electricity can be distinguished from electricity generated from conventional sources.

196. Owing to that lack of argument and background information the Court might find it necessary to reopen the oral procedure in respect of the third question. In the alternative it might merely indicate in general terms the interpretation of the rules on free movement of goods and leave the final assessment to the referring court. For the same reasons I will consider the issues, despite their importance, only briefly. In the absence of argument, only tentative views seem possible.

2. *Article 30 of the Treaty*

197. The first point to be made is that the rules on the free movement of goods apply. Electricity constitutes goods for the purposes of Title I in Part Three of the EC Treaty and thus also for Article 30 which is part of that Title. [116] Furthermore the mechanism established by the StrEG 1998 does not in my view constitute State aid within the meaning of Article 92(1) of the Treaty. On that view the difficult question whether a measure which falls under the State aid rules might nevertheless also be caught by Article 30 of the Treaty [117] does not arise.

114 — As already stated, PreussenElektra and Schleswag have challenged the constitutionality of the Stromeinspeisungsgesetz before the German constitutional court.

115 — That is the logic behind the referring court's first and second question.

116 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 28 of the judgment; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraphs 14 to 20.

117 — See, on the one hand, Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, paragraphs 10 to 17 of the judgment, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 41; see, on the other hand, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraph 18, Case 18/84 *Commission* v *France* [1985] ECR 1339, paragraph 13, Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 19 and Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR 889, paragraph 20.

198. Since the StrEG 1998 does not prohibit totally or partially the importation of electricity from other Member States it cannot be considered a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

199. I consider however that the purchase obligation at a minimum price as laid down in the StrEG 1998 is to be regarded as a measure having effect equivalent to a quantitative restriction on imports.

200. PreussenElektra and Schleswag contend in that respect that the mechanism established by the StrEG 1998 restricts imports of electricity in two ways. In the first place, the purchase obligation obliges the network operators in Germany to purchase a certain proportion of their electricity supplies from national producers of electricity from renewable sources and to that extent limits the possibility of importing electricity for example from Scandinavia. In that connection Schleswag claims, as already mentioned, [118] that it was offered electricity produced from renewable sources in Sweden at a relatively low price and that in fact it could not accept that offer owing to its obligation to purchase all the wind-generated electricity produced within its area of supply. PreussenElektra claims, secondly, that the operation of the StrEG 1998 in northern Germany affects transmission capacities for the import and export of electricity, since the feeding of wind-produced electricity into the medium-voltage networks of the German regions close to the Danish border creates bottlenecks in electricity transmission between Denmark and Germany at the high-voltage level.

201. According to the Court's case-law Article 30 covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. [119] Any obligation to purchase a certain amount of products from national suppliers limits to that extent the possibility of importing the same product. [120] Even the mere encouragement by the legislature to purchase domestic products must be regarded as a measure having an effect equivalent to a quantitative restriction on imports. [121]

202. In the present case Paragraph 1 of the StrEG 1998 expressly limits the purchase

118 — See above at paragraph 99.

119 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5 of the judgment.

120 — Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727, paragraph 16 of the judgment; see also Case C-21/88 *Du Pont de Nemours Italiana*, cited in note 117, paragraphs 11.

121 — Case 249/81 *Commission* v *Ireland*, cited in note 117, paragraphs 27 to 29 of the judgment, and Case 103/84 *Commission* v *Italy*, cited in note 117, paragraph 24.

obligation to electricity generated in Germany. [122] It appears from replies to a written question put by the Court that the newly introduced 'off-shore' rule contained in the second sentence of Paragraph 2 of the StrEG 1998 [123] is not designed to extend the purchase obligation to electricity generated from renewable sources outside Germany but merely covers coastal installations producing on German territory. The StrEG 1998 therefore favours the marketing of electricity of German origin to the detriment of imported electricity and prevents the undertakings concerned from purchasing some of the supplies they need from undertakings situated in other Member States. Since the StrEG 1998 thus hinders, at least potentially, intra-Community trade, it must be regarded as falling under Article 30 of the Treaty.

203. The interveners and the German Government argue that the electricity from renewable sources which falls under the StrEG 1998 corresponds to only 1% of German electricity consumption. Since the purchase obligation affects only an insignificant part of the electricity market, intra-Community trade is, in their view, not really affected.

204. Under the Court's current case-law it is not clear whether there is a *de minimis* rule in relation to Article 30 of the Treaty, excluding from the scope of Article 30 of the Treaty all measures lacking an appreciable effect on trade. [124] Even if there were such a rule, it would not apply in the present case. Both in absolute and in relative terms (for example in terms of potential imports from Denmark or Sweden), cross-border electricity trade amounting to 1% of total German electricity consumption is manifestly not a negligible quantity. That would be so *a fortiori* if one looked at effects on trade in electricity from renewable sources alone.

205. Accordingly, a mechanism such as that established by the StrEG 1998 must be considered as a measure having effect equivalent to a quantitative restriction on imports and is therefore in principle prohibited by Article 30 of the Treaty.

3. *Justification*

206. The referring court asks only whether a mechanism such as that established by the

122 — See above at paragraph 25.

123 — See above at paragraph 28.

124 — See, on the one hand, for example, Case 16/83 *Prantl* [1984] ECR 1299, paragraph 20 of the judgment, Joined Cases 177/82 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, paragraph 13, Case 269/83 *Commission* v *France* [1985] ECR 837, paragraph 10, Case 103/84 *Commission* v *Italy*, cited in note 117, paragraph 18; see, on the other hand, for example, Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del Porto di Genova and Others* [1998] ECR I-3949, paragraph 31, Case C-44/98 *BASF* v *Präsident des Deutschen Patentamts* [1999] ECR I-6269, and by implication Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst Sass*, judgment of 13 January 2000, paragraph 30.

StrEG 1998 must be considered to fall under Article 30 of the Treaty. In order to give a useful reply I will also examine possible justifications for the restriction of trade entailed by the measure in issue.

(a) Security of supply

207. As regards, first, Article 36 of the Treaty, the interveners, the German Government and the Commission rely on the possibility afforded by that rule of restricting imports on grounds of public security, which includes, in their view, security of electricity supply. In that connection they also refer to Article 8(4) of the electricity directive [125] which provides:

'A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.'

125 — Cited in note 12.

208. In my view, Article 8(4) of the electricity directive cannot be invoked in the present case. That rule must be interpreted strictly since it is an exception to the general principle contained in Article 8(2) of the directive, namely that transmission system operators must dispatch generating installations and make use of interconnector transfers in their area on the basis of objective, transparent and non-discriminatory criteria with due regard to the proper functioning of the internal market in electricity. According to its clear wording Article 8(4) applies only in respect of 'generating installations using *indigenous* primary energy *fuel* sources', in the French version 'sources *combustibles indigènes*' and in the German version '*einheimische* Primärenergieträger als *Brennstoffe*'. Wind is neither a 'fuel source' in that sense nor an 'indigenous' commodity. Consequently, Article 8(4) does not apply. In any event Article 8(4) allows differential treatment only on the basis of the origin of the primary energy fuel source used and not on the basis of the location of the generation installation.

209. In my view, Article 36 cannot be relied on either in respect of security of supply. The Court admittedly held in *Campus Oil* that the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as capable of constituting an objective covered by the

concept of public security.[126] In the first place, however, it is doubtful whether recourse to Article 36 is still possible given the fact that the electricity directive provides for types of measures necessary to ensure security of supply.[127] Moreover wind as an energy source is not yet as important for the modern economy as petroleum products. The special economic role of petroleum products was a decisive factor in the Court's rather exceptional judgment in *Campus Oil*.[128] Finally the StrEG 1998 pursues essentially environmental objectives and the admittedly positive consequences for security of energy supply are only side-effects of the Law in issue.

210. In any event, the measure as it stands might be found incompatible with the second sentence of Article 36 of the Treaty and the principle of proportionality. It is not clear that the exclusion from the scope of the StrEG 1998 of electricity from renewable sources produced in other Member States contributes to the achievement of the objective of security of supply. It might therefore constitute arbitrary discrimination against electricity from renewable sources from other Member States.

126 — Case 72/83, cited in note 120, paragraph 35 of the judgment.

127 — Paragraph 27 of the judgment.

128 — Paragraph 34 of the judgment.

(b) Protection of the environment

211. The second ground of justification relied on by the interveners, the Commission and Germany is the protection of the environment. In that connection they refer, first, to Articles 3(2), 8(3) and 11(3) of the electricity directive and, secondly, to the protection of the environment under the Treaty.

212. I am not convinced that the mechanism established by the StrEG 1998 is covered by any of those provisions of the electricity directive.

213. Under Article 3(2) of the directive Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate among other things to environmental protection. It is however expressly stated that those obligations must be non-discriminatory. In the present case the purchase obligation imposed on network operators applies only to electricity produced in Germany.

214. Articles 8(3) and 11(3) entitle Member States to require transmission system operators and distribution system operators when dispatching generation installations

to give priority to generating installations using renewable energy sources. Those provisions must be interpreted narrowly as exceptions to the general non-discrimination rules in Articles 8(2) and 11(2). Unlike Article 8(4) which allows within certain limits discrimination on grounds of the geographical origin of the 'primary energy fuel source' concerned, Articles 8(3) and 11(3) allow only distinctions between different modes of production of electricity. It follows that a measure such as the StrEG 1998 which favours domestic electricity over imported electricity of the same type cannot be justified on the basis of those provisions.

215. Can the restriction on imports caused by the StrEG 1998 none the less be justified under the Treaty in the interest of environmental protection?

216. The protection of the environment is not listed in Article 36 of the Treaty. The Court has however held that certain obstacles to free movement must be accepted in so far as those obstacles may be regarded as necessary in order to satisfy imperative requirements recognised by Community law. [129] According to settled case-law the protection of the environment is one of the imperative requirements which may limit the application of Article 30 of the Treaty. [130]

217. The StrEG 1998 undoubtedly pursues environmental objectives of considerable importance. The production of electricity from renewable sources may make a significant contribution to the reduction of the emission of greenhouse gases and to the preservation of finite conventional energy sources. As can be seen from the impressive figures quoted by the Commission, [131] the StrEG 1998 seems to be a particularly efficient mechanism for increasing the use of renewable sources of energy.

218. It is however doubtful whether it is possible to rely in the present case on grounds of environmental protection.

219. The first problem is that since the electricity directive provides for the above harmonised rules on permissible national measures for the promotion of electricity from renewable sources, the possibility of relying on imperative requirements under the Treaty might be excluded. However, specific Community measures on the promotion of electricity from renewable

129 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8 of the judgment.

130 — Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 9 of the judgment.

131 — See above at paragraph 20.

energy sources in the internal market are currently being discussed but have not yet been adopted, [132] which means that the Member States continue to enjoy a degree of freedom in that field.

220. The second problem is that, as PreussenElektra correctly contends, it was until recently well-established case-law that imperative requirements could not be relied on to justify national measures which were not applicable to domestic products and imported products without distinction. [133]

221. As regards the StrEG 1998, electricity produced from renewable sources in Germany benefits from the purchase obligation at a minimum price and the same type of electricity produced in neighbouring Member States does not. The StrEG 1998 thus treats electricity of domestic origin differently, both in law and in fact, from imported electricity. On the basis of the case-law mentioned in the previous paragraph, environmental protection could not therefore be invoked by way of justification.

222. The Commission seeks to rely on the *Walloon Waste* case. [134] It suggests that a similar approach should be followed in the present case in order to rely on grounds of environmental protection.

223. That case concerned a measure which prohibited the storage, tipping, or dumping in Wallonia of waste originating in another Member State or in a region of Belgium other than Wallonia. On the issue whether the measure could be justified by imperative requirements of environmental protection the Court reasoned essentially as follows.

224. According to the Court, it was true that imperative requirements could be taken into account only in the case of measures which applied without distinction to both domestic and imported products. But, in assessing whether or not a barrier was discriminatory, account had to be taken of the particular nature of waste, of the principle under Article 130r(2) of the EC Treaty (now, after amendment, Article 174(2) EC) that environmental damage should be remedied at source and of the principles of self-sufficiency and proximity set out in the Basle Convention on the control of transboundary movements of hazardous wastes and their disposal. Having regard to the differences between waste produced in different places and to the

132 — See above at paragraph 44.

133 — See, for example, Case 113/80 *Commission* v *Ireland*, cited in note 113, paragraph 11 of the judgment; Case 207/83 *Commission* v *United Kingdom* [1985] ECR 1201, paragraph 22; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 13.

134 — Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431.

connection of waste with its place of production the measure in issue could not be regarded as discriminatory. [135]

225. In my view, the reasoning in *Walloon Waste* is flawed and should not be relied on in the present case. The question whether or not a measure applies without distinction to domestic and imported products is from a logical point of view a preliminary and neutral one. Its only function under the Court's case-law is to determine which grounds of justification are available. I consider therefore that in assessing whether a measure is directly discriminatory regard cannot be had to whether the measure is appropriate.

226. But the judgment in *Walloon Waste* also shows something else, namely that it is desirable that even directly discriminatory measures can sometimes be justified on grounds of environmental protection.

227. Moreover there are indications that the Court is reconsidering its earlier case-law. The Court has relied on imperative requirements in cases in which it was at least doubtful whether the measure could be considered as applying without distinction. [136] In *Dusseldorp* the Court expressly left open whether a discriminatory restriction of exports could in principle be justified on environmental grounds. [137] Perhaps the most striking case is *Aher-Waggon*. [138] That case concerned a German measure making registration of aircraft in Germany conditional upon compliance with noise limits. That measure did, it seems to me, directly discriminate between domestic aircraft and imported aircraft in that aircraft previously registered in another Member State could not be registered in Germany even though aircraft of the same construction which had already obtained German registration before the German measure was adopted could retain that registration. The Court held however without assessing whether the measure was directly discriminatory that a barrier of that type could be justified by considerations of public health and environmental protection. [139]

228. Thus, on the one hand, 'it cannot be ruled out that the relevance of the distinc-

135 — Paragraphs 34 to 36 of the judgment.

136 — See, for example, Joined Cases C-34/95, C-35/95, C-36/95 *KO* v *De Agostini and TV-Shop* [1997] ECR I-3843, paragraphs 44 and 45 of the judgment; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraphs 36 and 39; and with regard to services Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraphs 35 and 41.

137 — Case C-203/96 *Dusseldorp and Others* v *Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075, paragraphs 44 and 49 of the judgment.

138 — Case C-389/96 *Aher-Waggon* v *Germany* [1998] ECR I-4473.

139 — Paragraph 19 of the judgment.

tion between Article 30 [formerly Article 36] interests and rule of reason exceptions is on the decline'. [140] On the other hand the Court has not formally abandoned the rule that imperative requirements cannot be invoked in connection with directly discriminatory measures.

229. In view of the fundamental importance for the analysis of Article 30 of the Treaty of the question whether directly discriminatory measures can be justified by imperative requirements, the Court should, in my view, clarify its position in order to provide the necessary legal certainty.

230. Two specific reasons might be invoked in favour of a more flexible approach in respect of the imperative requirement of environmental protection. In the first place the amendments to the Treaties agreed in Amsterdam show a heightened concern for the environment even though Article 36 itself was not amended. [141]

231. Of particular importance is Article 6, which now provides that: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies referred to in Article 3' including therefore the internal market, and which adds: 'in particular with a view to promoting sustainable development'. As its wording shows, Article 6 is not merely programmatic; it imposes legal obligations.

232. Special account must therefore be taken of environmental concerns in interpreting the Treaty provisions on the free movement of goods. Moreover harm to the environment, even where it does not immediately threaten — as it often does — the health and life of humans, animals and plants protected by Article 36 of the Treaty, may pose a more substantial, if longer-term, threat to the ecosystem as a whole. It would be hard to justify, in these circumstances, giving a lesser degree of protection to the environment than to the interests recognised in trade treaties concluded many decades ago and taken over into the text of Article 36 of the EC Treaty, itself unchanged since it was adopted in 1957.

140 — Jan H. Jans, *European Environmental Law* 2nd ed., 2000, p. 251; see also Peter Oliver, 'Some further reflections on the scope of Articles 28-30 (30-36) EC', *Common Market Law Review* 1999, p. 783, at pp. 804 to 806.

141 — See, for example, the preamble to the EU Treaty, Article 2 EU, Article 2 EC, Article 6 EC, Article 95 EC, Article 174 EC and Article 175 EC.

233. Secondly, to hold that environmental measures can be justified only where they

are applicable without distinction risks defeating the very purpose of the measures. National measures for the protection of the environment are inherently liable to differentiate on the basis of the nature and origin of the cause of harm, and are therefore liable to be found discriminatory, precisely because they are based on such accepted principles as that 'environmental damage should as a priority be rectified at source' (Article 130r(2) of the EC Treaty). Where such measures necessarily have a discriminatory impact of that kind, the possibility that they may be justified should not be excluded.

234. On the assumption that environmental requirements can properly be invoked (on whatever basis) in the present case, it must next be established whether the StrEG 1998 complies with the principle of proportionality. Again only the briefest comments are possible at this stage.

235. The Commission contends that the mechanism established by the StrEG 1998 is proportionate since it rectifies environmental damage, namely the damage caused by gas emissions resulting from conventional generation of electricity, at source in accordance with Article 130r(2) of the Treaty. Furthermore, by feeding electricity from renewable sources into local networks less electricity is lost through transmission over long distances.

236. In relation to the Commission's first argument I cannot see why electricity from renewable sources produced in another Member State would not contribute to the reduction of gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany. In both cases the domestic production of electricity from conventional sources, and the attendant pollution, will be reduced to the same extent. In that respect the limitation of the purchase obligation to electricity produced in Germany does not seem proportionate.

237. As regards the Commission's second argument, I consider that the national court must make the assessments needed to establish whether it is really necessary that producers in other Member States of electricity from renewable sources should be excluded from the scope of the StrEG 1998.

238. I accordingly conclude that a mechanism such as that established by the Stromeinspeisungsgesetz 1998 must be regarded as a measure having effects equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty and is therefore prohibited unless it can be justified on the facts on grounds of environmental protection.

IX — Conclusion

239. For the above reasons the questions referred should in my opinion be answered as follows:

(1) A measure such as the Stromeinspeisungsgesetz 1998, in obliging privately owned electricity undertakings to purchase electricity from renewable energy sources at a minimum price, does not constitute State aid within the meaning of Article 92(1) of the EC Treaty (now Article 87(1) EC);

(2) Where the obligation to purchase is confined to electricity generated in the Member State concerned, such a measure is prohibited by Article 30 of the EC Treaty (now, after amendment, Article 28 EC) unless it is justified on grounds of protection of the environment.