Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 22 March 2017 [1]

Case C-329/15

ENEA SA w Poznaniu
v
Prezes Urzędu Regulacji Energetyki
(Request for a preliminary ruling

from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling — Article 107(1) TFEU — State aid — Supply obligation regarding electricity produced by cogeneration — Electricity providers whose share capital is State-owned — Concept of advantage — Increase in demand — Whether attributable to the State — Legislative measure — No use of State resources — Article 108(3) TFEU — Unlawful implementation of State aid — Direct effect — Whether that may be relied upon by electricity providers subject to the supply obligation — Financial penalty in the event of failure to fulfil the supply obligation — Exclusion in the event of unlawful implementation of State aid)

I. Introduction

1. The request for a preliminary ruling addressed to the Court by the Sąd Najwyższy (Supreme Court, Poland) formally relates to the interpretation of Article 107(1) TFEU, but concerns the interpretation of Article 108(3) TFEU as well. [2]

2. That request was addressed to the Court in proceedings between ENEA S.A. ('ENEA') and the president of the Urzędu Regulacji Energetyki (Office for the regulation of energy, 'URE') on the imposition by the latter of a financial penalty on ENEA for breach of its obligation to supply [3] electricity produced by cogeneration with the production of heat ('electricity produced by cogeneration').

3. It is not contested that ENEA failed to fulfil its obligation under national rules to supply electricity produced by cogeneration. Nonetheless, ENEA argued that that supply obligation constituted State aid within the meaning of Article 107(1) TFEU.

4. For the reasons set out below, I take the view that the supply obligation cannot be classified as State aid, for the advantage it confers upon the producers of the type of electricity in question is not granted from State resources.

1 Original language: French.

2 See points 130 to 141 of this Opinion.

3 On classification as a supply obligation not a purchase obligation, see point 38 of this Opinion.

II. Legal context

5. Article 9a(8) of the Ustawa Prawo Energetyczne[4] (Law on energy), which was enacted by an amending law of 4 March 2005,[5] establishes an obligation to purchase electricity produced by cogeneration. That provision states as follows:

'An energy company engaged in the production or trading of electrical energy and the sale of that energy to end users connected to the network within the Republic of Poland is obliged, to the extent described in the provisions adopted under paragraph 10, to purchase [electricity produced by cogeneration] from energy sources connected to the network and situated in the Republic of Poland.'

6. Under Article 56(1)(1a), of the Law on energy:

'Any person who fails to fulfil the obligation to purchase electricity and heat set out in Article 9a(6) to (8) […] shall be subject to a financial penalty.'

7. Article 56(2) of the Law provides as follows:

'The financial penalty referred to at paragraph 1 shall be applied by the president of the URE.'

8. Article 56(2b) of the Law provides as follows :

'The proceeds of the financial penalties applied in the situations set out at paragraph 1(1a) on the basis of failure to fulfil the obligations set out at Article 9a(1) and (6) to (8) shall be paid into the Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej [national fund for the protection of the environment and the management of water, Poland].'

9. For 2006, the quota to be reached in order for that obligation to be satisfied was fixed by Article 5(2) of the rozporządzenie Ministra Gospodarki i Pracy w sprawie szczegółowego zakresu obowiązku zakupu energii elektrycznej wytwarzanej w skojarzeniu z wytwarzaniem ciepła[6] (implementing regulation adopted by the Minister for the Economy and Labour concerning the exact extent of the obligation to purchase electricity produced by cogeneration, of 9 December 2004 ('the implementing regulation').

10. According to that provision, the obligation to purchase was deemed to be fulfilled if the electricity produced from combined sources of energy connected to the network or produced by the electricity undertaking concerned from its own combined sources of energy accounted in 2006 for at least 15% of the total annual sales of electricity to customers buying electricity for their own needs.

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

11. ENEA is a company governed by private law, wholly owned by the Polish State, producing, marketing and selling electricity.

12. By a decision of 27 November 2008, the president of the URE imposed a financial penalty on ENEA in the amount of 7594613.28 Polish zlotys (PLN) (approximately EUR 2 011 813) because it had not performed its obligation under Article 9a(8) of the Law on energy to buy electricity produced by cogeneration during 2006.

4 U. No 135, item 1144.

5 U. No 62, item 552.

6 U. No 267, item 2657.

13. In fact, the quantity of electricity produced by cogeneration purchased and resold by ENEA to customers acquiring such electricity for their own use in the course of 2006 accounted for only 14.596% of its total sales to such customers, rather than the 15% required by Article 5(2) of the implementing regulation.

14. ENEA brought an action against the decision of the president of the URE before the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court of Warsaw — competition and consumer protection court).

15. By judgment of 15 December 2009, that court upheld ENEA's action and overturned the penalty imposed. That judgment was, however, set aside by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) in a judgment delivered on 24 November 2010.

16. Following that judgment, the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów dismissed ENEA's action by a judgment of 27 September 2011, which was, however, also set aside by the Sąd Apelacyjny w Warszawie by judgment delivered on 29 May 2012.

17. After examining the main proceedings for the third time, the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów again dismissed ENEA's action by a judgment delivered on 10 December 2012.

18. Ruling on the appeal in a judgment delivered on 14 October 2013, the Sąd Apelacyjny w Warszawie reduced the financial penalty imposed on ENEA to 3 600 000 PLN (approximately EUR 860 760), having regard to the circumstances of the case in the main proceedings and to the extent of the failure to perform the obligation at issue.

19. The applicant appealed in cassation against that judgment before the referring court, which has made the following observations.

20. It is not contested by the parties to the dispute that ENEA failed, in 2006, to fulfil the obligation set out in Article 9a(8) of the Law on energy. The dispute in the cassation proceedings relates rather to the legality of the imposition of a financial penalty under Article 56(1)(1a) of the Law on energy owing to failure to fulfil the obligation provided for in Article 9a(8) of the Law on energy.

21. The obligation to purchase electricity produced by cogeneration did not mean that an undertaking such as ENEA was bound to accept all offers for the sale of electricity produced by cogeneration, irrespective of volume, price and other parameters. Such an undertaking was bound to sell to final users a minimum quota of electricity produced by cogeneration, fixed at 15% of the quantities sold to such users in 2006. That quota could be achieved either by the production of electricity produced by cogeneration within the undertaking itself, or by the purchase of electricity produced by cogeneration by third party producers.

22. In the case of purchase from third-party producers, the price of acquiring the electricity produced by cogeneration was determined, without any external intervention, by the parties to the agreement, that is to say: the undertaking subject to the obligation to purchase and the producer of the electricity produced by cogeneration.

23. However, the president of the URE had the power to determine, when approving the tariff charged by every electricity company, the level of the price of electricity produced by cogeneration that he considered a reasonable cost in the calculating of the maximum price that could be charged when selling electricity to final users.

24. The electricity companies bound to purchase electricity produced by cogeneration would sometimes acquire it at a lower price than that considered a reasonable cost by the president of the URE. However, it would also sometimes happen that those companies purchased electricity produced by cogeneration at a price higher than that considered a reasonable cost by the president of the URE, and even higher than the sale price to the final consumer laid down in the tariff charged by the relevant undertaking, as approved by the president of the URE.

25. Thus, several electricity companies that had not performed the obligation referred to in Article 9a(8) of the Law on energy, such as ENEA in the case in the main proceedings, had rejected sales offers for electricity produced by cogeneration at a price appreciably higher than the level taken into account by the president of the URE when approving their tariffs.

26. In addition, at the material time in regard to the main proceedings, there was a shortage of electricity produced by cogeneration on the electricity market in Poland. That shortage had led the president of the URE to put in place various solutions intended artificially to increase the volume of such electricity, such as agreements for the sale of conventional electricity in exchange for electricity produced from cogeneration.

27. The court making the reference stresses that the solution of the dispute in the main proceedings depends on, in particular, the classification in the light of Article 107 TFEU of the obligation to purchase electricity produced by cogeneration laid down in Article 9a(8) of the Law on energy. If that obligation were to be classified as State aid, it points out that European Commission has not been notified of that scheme under Article 108(3) TFEU.

28. That court states that it is inclined to interpret Article 107 TFEU as meaning that that obligation does not constitute State aid on the grounds that, contrary to ENEA's contention, it does not involve the use of State resources; it refers in this regard to the case-law of the Court of Justice. [7]

29. It was in those circumstances that the Sąd Najwyższy (Supreme Court, Poland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 107 TFEU be interpreted as meaning that the obligation to purchase [electricity produced by cogeneratation] as laid down in [the national provisions] constitutes State aid?

(2) If the answer to the first question is affirmative, is Article 107 TFEU to be interpreted to the effect that an energy undertaking treated as an emanation of a Member State, and bound to perform the obligation classified as State aid, may in proceedings before a national court rely upon infringement of that provision?

(3) If the answers to the first two questions are affirmative, is Article 107 TFEU, read with Article 4(3) TEU, be interpreted as meaning that the non-compliance with Article 107 TFEU of the obligation arising from national law means that a financial penalty may not be imposed on an undertaking that has failed to perform that obligation?'

IV. Procedure before the Court

30. The reference for a preliminary ruling was lodged at the Registry of the Court on 3 July 2015.

7 Judgments of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160); of 16 May 2002, *France* v *Commission*, 'Stardust Marine' (C-482/99, EU:C:2002:294); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413), and of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851).

31. Written observations have been submitted by ENEA, the Polish Government and the European Commission.

32. ENEA, the Polish Government, and the Commission appeared at the hearing on 11 January 2017 to make oral submissions.

V. Analysis

33. By its first question, the national court is asking the Court whether the obligation to supply electricity produced by cogeneration imposed by the national rules in question in the case in the main proceedings must be classified as State aid within the meaning of Article 107(1) TFEU.

34. The two other questions are asked only if the answer to the first question is in the affirmative. For the reasons set out below, I shall suggest that the Court reply to the first question in the negative, to the effect that the supply obligation at issue in the main proceedings does not constitute State aid. Nonetheless, and for the sake of completeness, I shall briefly examine the two other questions at the end of my observations.

A. Whether there is State aid (first question)

35. Without prejudice to the derogations provided for in the Treaties, Article 107(1) TFEU declares incompatible with the internal market, in so far as it affects trade between Member States, any aid granted by a Member State, or through State resources, that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

36. According to settled case-law, classification as State aid for the purposes of Article 107(1) TFEU presupposes that four conditions have been met, namely: that there is intervention by the State[8] or through State resources, that the intervention is liable to affect trade between Member States, that it confers a selective advantage on the recipient and that it distorts or threatens to distort competition.[9]

37. In order to determine whether those conditions are met in the circumstances of the case in the main proceedings, the characteristics of the national rules at issue in those proceedings must be identified with precision.

1. Characteristics of the supply obligation at issue in the case in the main proceedings

38. Formally, Article 9a(8) of the Law on energy lays down an obligation to purchase electricity produced by cogeneration. I would, nevertheless, point out that Article 5(2) of the implementing regulation makes it possible for an electricity company such as ENEA to fulfil that obligation, not by purchasing electricity produced by cogeneration but by producing it itself, which has been confirmed by the court making the reference.[10] Therefore, that obligation, it seems to me, must be classified not as an obligation to purchase but as a supply obligation in regard to electricity produced by cogeneration.

8 On the cumulative nature of the conditions for imputing advantage to the State and the use of State resources, see point 63 of this Opinion.

9 See in particular judgments of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraph 15 and case-law therein cited); of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 17 and case-law therein cited), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40).

10 See point 21 of this Opinion.

39. Under Article 9a(8) of the Law on energy, the supply obligation applies to any electricity company which produces or supplies electricity and sells it to final users connected to the network in Poland ('the electricity provider').

40. That obligation requires any electricity provider to obtain at least 15% of the electricity sold to final users in the year from electricity produced by cogeneration. In other words, 15% of the electricity sold annually to final users must come from electricity produced by cogeneration.

41. The president of the URE has the power to impose a financial penalty on any electricity provider that fails to fulfil its obligation to obtain electricity produced by cogeneration. The dispute in the main proceedings relates specifically to the financial penalty imposed by the president of the URE on ENEA for that reason.

42. It is also important to stress that the purchase of electricity produced by cogeneration is not subject to any other rule. In particular, the purchase price is to be freely agreed by the parties to the transaction, and is not subject to any threshold or ceiling imposed by the public authorities.

43. Nonetheless, the maximum price that may be charged on the sale of the electricity to final users had to be approved, for every electricity provider, by the president of the URE, as stated by the national court. [11]

44. Thus, the action of the Polish State on the market for electricity produced by cogeneration is limited to the following two acts:

– first, imposing on electricity providers of a supply obligation; and

– secondly, determining a maximum price for the sale of electricity to final users, which can have the effect of limiting the capacity of electricity providers to pass on to those users the extra costs resulting from the supply obligation.

45. In this connection, I would further stress that the electricity providers to whom the supply obligation applies are undertakings governed by private law, pursuing a profit-making objective, including providers, such as ENEA, the greater part of whose capital is owned by the State.

46. With regard, more specifically, to the circumstances of the case in the main proceedings, it is not apparent from the information in the file submitted to the Court that ENEA's decisions were dictated by considerations other than its commercial interest.

47. In that connection, in its written and oral observations, ENEA stated that in the course of the year 2005 it entered into two contracts for the supply of electricity produced by cogeneration which would have enabled it to reach the threshold of 15% imposed by the Polish rules for the year 2006, but that those contracts were performed only in part, owing to the particularly mild climatic conditions experienced in Poland during that period. [12]

48. However, ENEA also acknowledged that, in the course of 2006, it refused several offers of electricity produced by cogeneration, the price of which was 46% to 75.6% above the average price for electricity on the competitive market. Furthermore, ENEA stated that the financial penalty forming the subject matter of the main proceedings was imposed on it owing to its decision to refuse those sales offers.

11 See points 23 to 25 of this Opinion.

12 This kind of electricity being produced in conjunction with heat, a reduction in the demand for heat entails a reduction in the supply of electricity produced by cogeneration.

49. In that regard, the court making the reference emphasised, first of all, that although ENEA is wholly owned by the State, its autonomy had not been limited by the public authorities, which issued no instructions relating to performance of the obligation to be supplied with electricity produced by cogeneration. Next, that court remarked that ENEA's conduct on the market in no way differed from the conduct of entities controlled by private capital, which is shown by, in particular, the rejection of the offers for sale mentioned above because their prices, regarded by ENEA as excessive. Finally, the national court stated that ENEA operated in the form of a public limited company and was treated like any other private undertaking in respect of the competition rules.

50. It is in the light of those characteristics that I shall consider whether there is State aid within the meaning of Article 107(1) TFEU, examining, one by one, whether the conditions set out at point 36 of this Opinion are met. In my view, the scheme at issue in the case in the main proceedings satisfies all those conditions, except that relating to the use of State resources, which means that it cannot be classified as State aid.

2. Whether there is a selective advantage

51. According to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid. [13]

52. The Court did not express a view on that condition in its judgment in *Association Vent De Colère! And Others*, which related to an obligation to purchase wind-generated electricity, together with an offset mechanism in respect of the extra costs engendered by that obligation [14].

53. In addition, it touched only very briefly on that condition in the judgment in *PreussenElektra*. In fact, at paragraph 54 of that judgment, the Court pointed out that it was not contested that an obligation to purchase electricity produced from renewable energy sources *at minimum prices* entails a certain economic advantage for the producers of that type of electricity, for it guarantees them, at no risk, higher profits than they would make if it did not exist. I would point out in that regard that the minimum prices laid down by the German authorities were higher than the economic value of that type of electricity. [15]

54. In such a context, it is plain that undertakings producing electricity from renewable energy sources received an advantage within the meaning of Article 107(1) TFEU, in so far as they are guaranteed sales at a price higher than the actual value of their production.

55. However, the circumstances of the case in the main proceedings may be distinguished from those giving rise to the judgment in *PreussenElektra* owing to the fact that there is no minimum price for the purchase of electricity produced from cogeneration, as I point out at point 42 of this Opinion. It is therefore for the Court to determine whether a mere supply obligation confers an advantage on the producers of the product covered by that obligation.

56. It seems to me unarguable that that is in fact the case.

57. Admittedly, the advantage conferred by a supply obligation is less immediate when it is not accompanied by a minimum price higher than the economic value of the product referred to.

13 See, inter alia, judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 79 and case-law therein cited), and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 20 and case-law therein cited).

14 See judgment of 19 December 2013 (C-262/12, EU:C:2013:851, paragraph 15).

15 Judgment of 13 March 2001 (C-379/98, EU:C:2001:160, paragraph 56).

58. Nonetheless, the practical effect of such a supply obligation is to produce an increase in demand for the product concerned which would not have come about under the normal conditions of the Polish electricity market.

59. Such stimulation of the demand for electricity produced by cogeneration conferred an advantage on the producers of that electricity. In fact, a rise in demand for a certain product tends to increase both the quantity of the product sold and the sale price of the product.[16] More specifically, the supply obligation improved the negotiating position of the producers of electricity produced by cogeneration, in so far as their potential customers were bound to purchase a certain quantity of the electricity they were producing.

60. That, essentially, is the criticism made by ENEA of the supply obligation at issue in the main proceedings, in that that obligation permitted producers of electricity by cogeneration to demand a price greater than the economic value of that type of electricity and, in some cases, greater even than the maximum sales price to final users imposed by the president of the URE .[17]

61. So, by altering normal market conditions in favour of the producers of electricity by cogeneration, the supply obligation confers on the latter an advantage within the meaning of Article 107(1) TFEU.

62. Moreover, there can hardly be any doubt that that advantage is selective, as required by Article 107(1) TFEU,[18] given that it favours only the production of electricity produced by cogeneration.

3. Whether the advantage can be attributed to the Polish State and the fact that there is no use of State resources

63. According to settled case-law, for it to be possible for advantages to be categorised as aid within the meaning of Article 107(1) TFEU, they must, on the one hand, be granted directly or indirectly through State resources and, on the other, must be attributable to the State. Thus, the expression 'any aid granted by a Member State or through State resources' has been interpreted by the Court as implying two cumulative conditions relating to the financing of the advantage granted, which must come from State resources, and to the decision to grant that advantage, which must be attributable to the State, respectively.[19]

64. In the context of this case, ENEA and the Commission consider that both those conditions are met. The Polish Government argues that neither of those two conditions is fulfilled.

65. For the reasons set out below, I take the view that the grant of the advantage at issue in the main proceedings is attributable to the Polish State but that it does not involve the use of State resources.

16 For a classic description of the effects of increasing in the demand for a particular good, see Samuelson, Paul A., and Nordhaus, William D., *Economics*, McGraw-Hill Higher Education, 2009, 19th edition, pp. 55 and 56.

17 See point 48 of this Opinion.

18 See in that connection judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 22 and case-law therein cited).

19 Judgment of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraph 16 and case-law therein cited); order of 22 October 2014, *Elcogás* (C-275/13, unpublished, EU:C:2014:2314, paragraph 21). See also Bacon, K., *European Union Law of State Aids*, OUP, Oxford, 2013, 2nd edition, No 2.96 et seq.; Piernas López, J. J., *The Concept of State Aid Under EU Law*, OUP, Oxford, 2015, Chapter 6.

(a) Intervention of bodies distinct from the State

66. This case relates to the grant of an advantage involving the intervention of bodies distinct from the State, that is to say: electricity providers bound by an obligation to supply electricity produced by cogeneration.

67. In that regard, it is settled case-law that it is not appropriate to distinguish cases in which aid is granted directly by the State from those in which it is granted by a public or private body designated or established by that State. [20]

68. Inclusion within the scope of Article 107(1) TFEU of advantages granted by bodies distinct from the State seeks, correctly, to preserve the useful effect of the prohibition of State aid. The Court has held that Union law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions responsible for allocating aid. [21] In other words, that case-law was intended to counteract a risk of under-inclusion.

69. However, the decision to include the advantages granted by bodies distinct from the State reveals a specific risk of over-inclusion in regard to advantages that are not attributable to the State or do not involve the use of State resources. In particular, it must be borne in mind that advantages that the State makes it compulsory to grant, though not involving the use of State resources, are not State aid. [22]

70. In the context of advantages granted by organisms distinct from the State, the interpretation of the conditions for ascribing them to the State and the use of State resources is intended to establish equilibrium between the risks attendant on under-inclusion and over-inclusion. It is having regard to that tension that I shall examine those two conditions in the circumstances of the main proceedings.

(b) The grant of the advantage in question in the main proceedings is attributable to the Polish State

71. With regard to the condition relating to the measure's being ascribable to the State, it must be examined whether the public authorities have to be regarded as having been involved in the adoption of the measure. [23]

72. In that regard, and as ENEA and the Commission have argued, the supply obligation in regard to electricity produced by cogeneration was introduced by a legislative provision, that is to say: Article 9a(8) of the Law on energy. In accordance with the case-law of the Court, it must therefore be regarded as attributable to the State. [24]

73. The Polish Government has argued that it cannot be so ascribed, emphasising that the essential elements of the purchase of electricity produced from cogeneration are determined by the parties to the transaction, under market conditions, without State intervention.

20 See, inter alia, judgments of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 21); of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448, paragraph 34 and case-law therein cited).

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

22 See, inter alia, judgments of 24 January 1978, *van Tiggele* (82/77, EU:C:1978:10, paragraphs 24 to 26), and of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraphs 59 to 61).

23 Judgment of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraph 17); Order of 22 October 2014, *Elcogás* (C-275/13, unpublished, EU:C:2014:2314, paragraph 22).

24 See, to that effect, judgment of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraph 18); order of 22 October 2014, *Elcogás* (C-275/13, unpublished, EU:C:2014:2314, paragraph 23).

74. That argument seems to me to proceed from a mistaken identification of the advantage in question in the main proceedings. It is true that the Polish State did not directly regulate the conditions — particularly, the selling price — under which electricity produced by cogeneration is bought. Thus, those transactions are conducted 'under electricity market conditions', as that Government asserted.

75. However, the advantage conferred by the supply obligation is to be found specifically in the alteration in electricity market conditions and, more particularly, in the increase in demand for electricity produced by cogeneration.[25] That alteration is undeniably caused by the supply obligation in Article 9a(8) of the Law on energy and is, therefore, attributable to the Polish State.

76. In other words, the advantage at issue in the dispute in the main proceedings was not spontaneously granted by the electricity providers to producers of electricity produced by cogeneration, but is the result of legislative and regulatory acts emanating from the Polish State. Viewed in that light, the grant of that advantage is, in my view, undeniably attributable to that State.

77. It remains, however, to be ascertained whether the grant of that advantage is financed from State resources.

(c) The grant of the advantage at issue in the dispute in the main proceedings does not entail the use of State resources

78. ENEA and the Commission have claimed that the advantage conferred on the producers of electricity by cogeneration was financed by State resources.

79. I am, however, persuaded that this advantage was not financed by State resources, as the Polish Government has rightly contended. In my view, the circumstances of the case in the main proceedings are comparable, with regard to the concept of State aid, to those giving rise to the judgment in *PreussenElektra*.[26]

80. In that regard, and as I have set out below,[27] it seems to me particularly important not to read the judgment in *France* v *Commission*, known as '*Stardust Marine*' ('the judgment in *Stardust Marine*'),[28] formalistically and selectively, for to do so would risk appreciably extending the scope of the concept of State aid.

(1) No use of State resources

81. As I have explained at points 58 to 61 of this Opinion, the advantage from which producers of electricity produced by cogeneration benefit is the rise in demand caused by the supply obligation at issue in the case in the main proceedings, which increases the volume of sales and/or the sales price for that kind of electricity.

82. It must be determined whether that advantage is granted from State resources.

25 See points 58 to 61 of this Opinion.

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

27 See points 89 to 104 of this Opinion.

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

83. I consider that that is not the case. In fact, I consider that such advantage is granted by means of transfers of resources between private persons. More specifically, that advantage is granted to the detriment of producers of other types of electricity, in so far as they will sell less of their electricity or sell it at a lower price, and of electricity providers, in so far as they are obliged to acquire electricity produced by cogeneration at a higher price than the selling price of electricity offered by producers of other kinds of electricity.

84. In other words, the advantage granted by the Polish State to producers of electricity produced by cogeneration is 'financed' by the producers of other types of electricity and by electricity providers.

85. I find confirmation of that reasoning at paragraph 59 of the judgment in *PreussenElektra*, in which the Court found that the obligation imposed on private electricity-supply undertakings to buy electricity from renewable energy sources at minimum fixed prices entails no direct or indirect transfer of State resources to the undertakings producing such electricity. Just like the advantage at issue in the case in the main proceedings, the advantage under examination in that case was likewise financed by private operators.[29]

86. Therefore, in the circumstances both of the case in the main proceedings and of *PreussenElektra*, the undertakings subject to the supply obligation are not mandated by the State to manage a State resource but are bound by an obligation to purchase using their own financial resources.[30]

87. ENEA and the Commission have attempted to distinguish the circumstances in the *PreussenElektra* case from those in the present case, basing their argument on the majority participation of the Polish State in the capital of several of the electricity providers subject to the supply obligation provided for in Article 9a(8) of the Law on energy[31].

88. For the reasons set out below, however, I consider that that argument must be rejected.

(2) The State majority shareholding in the capital of certain electricity producers

89. According to the argument mounted by ENEA and the Commission, the mere fact that the State owns a majority shareholding in the capital of various electricity providers is sufficient to transform the resources of those providers into State resources, in line with the Court's findings at paragraphs 33 to 38 of the judgment in *Stardust Marine*.[32]

90. ENEA states in that regard that in the course of the year 2006 the undertakings controlled by the Polish Government held more than 80% of the market share in the sale of electricity to final users and bought more than 85% of the electricity produced from cogeneration.

91. I cannot agree with that reasoning. In my view, the fact that the Polish State owned the majority of the capital of an electricity provider is not in itself sufficient to find that State resources were used.

92. More specifically, the interpretation of the judgment in *Stardust Marine*[33] proposed by the Commission is, in my view, the product of a formalistic and selective reading that takes some points of the judgment in isolation, without taking account either of the situation before the Court for appraisal in that case or of the reasoning it has subsequently developed.

29 See judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraphs 17 to 22 and 56).

30 See, in that connection, judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 74), and of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraphs 34 and 35).

31 If the majority shareholder in undertakings bound by the supply obligation in this case was the State, the majority shareholders in the undertakings in *PreussenElektra* were private operators. See judgment of 13 March 2001 (C-379/98, EU:C:2001:160, paragraph 55).

32 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

33 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

93. In fact, in the first place, that judgment [34] related to a very specific situation, namely, that of a financial advantage granted to a private undertaking (*Stardust Marine*) by another private undertaking (Crédit Lyonnais and its subsidiaries), in which a majority shareholding was held by the State and which the State had used as its financial arm.

94. Thus, that situation relates to the exercise by the State of the power of control conferred on it by its status as the majority shareholder in a private undertaking. As the Court stated at paragraph 38 of that judgment: 'The State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings'.

95. This case, however, concerns a situation very different from that before the Court in the latter judgment, that is to say: an advantage provided for by legislation of general scope. In other words, the State's supervisory power as majority shareholder, mentioned at paragraph 38 of the judgment in *Stardust Marine*, [35] is irrelevant in the context of this case, the advantage being granted in the exercise of the State's legislative power.

96. The irrelevance of the State's supervisory power as the majority shareholder is borne out by the fact that, like the legislation at issue in *PreussenElektra*, the legislation in question applies equally to electricity providers in which the State is the majority shareholder and to those in which private operators are the majority shareholders.

97. In light of the foregoing, I consider that the reasoning set out by the Court in *Stardust Marine* [36] is not applicable in the circumstances of this case, given that it relates to a situation distinct from that before the Court in this case.

98. In the second place, and even if the Court were to consider that the reasoning in *Stardust Marine* [37] was applicable to the facts in this case, the Court expressly stated, at paragraphs 50 and 51 of the judgment in that case, that a majority shareholding by the State in the capital of an undertaking is not sufficient for the condition relating to the advantage being attributable to the State, which I examined in the previous section, to be deemed to be met. [38]

99. In fact, as the Court stated at paragraph 52 of that judgment, in such a situation the attributability of the advantage to the State must be demonstrated by establishing the actual exercise by the State of the supervisory power which its status as majority shareholder confers upon it. I note in that regard that the actual involvement of the public authorities, envisaged by the Court at paragraphs 52 to 56 of the judgment, is the result of the exercise, not of legislative power, but of the supervisory power conferred on the State by its status as the majority shareholder.

100. In the case in the main proceedings, the national court expressly emphasised the fact that ENEA's conduct had not been dictated by instructions from the public authorities. More generally, and as I explained at points 45 to 49 of this Opinion, it is clear from the documents before the Court that ENEA's conduct, in particular the decision to refuse offers of electricity produced by cogeneration during the year 2006, was the result of commercial decisions taken autonomously by a undertaking governed by private law.

34 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

35 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

36 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

37 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

38 See also to that effect judgment of 17 September 2014, *Commerz Nederland* (C-242/13, EU:C:2014:2224, paragraph 31).

101. In reality, the very existence of the dispute in the main proceedings between ENEA and the Polish State demonstrates *ab absurdo* that that condition is not satisfied, for ENEA did not perform its supply obligation in regard to electricity produced from cogeneration, contrary to the will of the Polish State.

102. In the third place, I would add that, in practice, the interpretation suggested by ENEA and the Commission comes up against the risk of over-inclusion, identified at point 69 of this Opinion. Indeed, that interpretation would lead to the classification as State aid of any advantage provided for by national legislation, when it entails any disadvantage whatsoever for the resources of an undertaking in whose capital the State holds a majority interest. By way of illustration, legislation establishing a minimum price higher than the actual value of goods or services would have to be classified as State aid in so far as an undertaking the majority of whose capital is owned by the State acquires those goods or services. Such an outcome seems to me to be difficult to reconcile with the judgment in *Van Tiggele*.[39]

103. In my view, that broad interpretation comes of a formalistic reading artificially mixing different lines of authority in the Court's case-law. To be more precise, it does not seem to me possible to take the view that the condition as to attributability is met by the existence of legislation, in accordance with paragraph 18 of the judgment in *Association Vent De Colère! And Others*,[40] and then to claim that the condition of use of State resources is met by the State's majority shareholdings in undertakings covered by that legislation, pursuant to Paragraph 38 of the judgment in *Stardust Marine*.[41] Those two lines of authority, in fact, refer to different situations, namely: an advantage granted by the State in the exercise of legislative power (judgment in *Association Vent De Colère! And Others*) and an advantage granted by the State in the exercise of its supervisory power as the majority shareholder (judgment in *Stardust Marine*). Accordingly, the lessons they teach must be applied separately.

104. I conclude from the foregoing that the fact that the State holds majority shareholdings in certain undertakings subject to the supply obligation laid down in Article 9a(8) of the Law on energy does not lead to the conclusion that State resources, as defined in Article 107(1) TFEU, have been used.

(3) Absence of compulsory contribution or offsetting mechanism

105. Having regard to certain arguments invoked by the parties, I wish again briefly to distinguish the circumstances of the case in the main proceedings from those which gave rise to the judgments in *Essent Netwerk Noord and Others* and *Association Vent De Colère! And Others*[42].

106. By way of reminder, those two judgments related to compulsory contributions the amount and allocation of which were laid down by law. The Court found that such financing mechanisms constituted interventions by means of State resources.[43]

107. The circumstances of the case in the main proceedings must be distinguished, inasmuch as they involve no equivalent financing mechanism by which the Polish State organises the collection of compulsory contributions, the amount and allocation of which are laid down by law.

39 Judgment of 24 January 1978, *van Tiggele* (82/77, EU:C:1978:10, paragraphs 24 to 26). The Court found that fixing the minimum retail prices did not constitute State aid because the advantages of such an intervention in the formation of prices entails for the distributors of the product are borne exclusively by the consumers and are not awarded directly or indirectly by means of State resources.

40 Judgment of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851).

41 Judgment of 16 May 2002, *France* v *Commission* (Stardust Marine) (C-482/99, EU:C:2002:294).

42 Judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413), and of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851).

43 See judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 19 and 65 to 75), and of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraphs 3 and 22 to 37).

108. In fact, and as I explained at point 44 of this Opinion, the intervention of the Polish State is limited to establishing a supply obligation borne by electricity providers and fixing a maximum price for the sale of electricity to end users.

109. In such a context, which is comparable to that in the *PreussenElektra* case, electricity providers are not mandated by the State to manage a State resource, but are bound by an obligation to purchase by means of their own financial resources. [44]

110. In this connection, I would emphasise that the fixing of a maximum price for the sale of electricity to end users was intended to balance the interests of electricity providers against those of end users, as the Polish Government argued at the hearing, by preventing the former passing on in full to the latter the extra costs engendered by the supply obligation concerning electricity produced by cogeneration.

111. The fixing of the maximum price in such a way as to limit the ability of electricity providers to pass on the extra costs resulting from the supply obligation thus permits the facts of this case to be distinguished from those in *Association Vent De Colère! And Others*, which concerned national legislation guaranteeing, in particular, that the extra costs entailed by an obligation to purchase wind-generated electricity would be offset. [45]

112. Contrary to the Commission's claims, the fact that there is a maximum selling price does not mean that an electricity producer such as ENEA manages State resources within the meaning of the *Italy* v *Commission* and *Steinike & Weinlig* cases [46].

113. In fact, and as the Commission itself has pointed out, the Court held in those two judgments that funds financed through compulsory contributions imposed by State legislation, and managed and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are administered by institutions distinct from the public authorities. [47]

114. Those cases are not, however relevant, to the circumstances of the case in the main proceedings because, as I have already explained, the Polish State merely imposed a supply obligation and a maximum sales price without providing for any compulsory contribution or fund distributing the proceeds of those contributions.

115. Having regard to the foregoing, I take the view that the supply obligation in regard to electricity produced by cogeneration in issue in the main proceedings does not involve the use of State resources and, therefore, does not constitute State aid for the purposes of Article 107(1) TFEU.

4. Liability of the advantage to affect trade between Member States and distort competition

116. For the sake of completeness, and supposing the Court were to take the view that the supply obligation at issue in the main proceedings is financed by State resources, I should like briefly to examine the conditions relating to whether the advantage is liable to affect trade between Member States and distort competition.

44 See, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 74), and of 19 December 2013, *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraphs 34 to 36).

45 *Association Vent De Colère! And Others* (C-262/12, EU:C:2013:851, paragraphs 14, 26, 36 and 37).

46 Judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71), and of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52).

47 See, to that effect, judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 35), and of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraphs 1 and 21).

117. In that connection it must be noted that, in order for a national measure to be classified as State aid, it does not have to be established that the aid has a real effect on trade between Member States and that competition is actually being distorted; it has only to be examined whether that aid is liable to affect such trade and distort competition. [48]

118. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid . [49]

119. Furthermore, it is not necessary that the beneficiary undertaking should itself participate in the intra-Community trade. In fact, aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. In addition, the strengthening of an undertaking which has not previously participated in intra-Community trade may place it in a position that enables it to penetrate the market of another Member State. [50]

120. Finally, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. In fact, neither the relatively small amount of the aid, nor the relatively small size of the beneficiary undertaking, excludes a priori the possibility of an impact on trade between Member States. [51]

121. In the context of the case in the main proceedings, the supply obligation at issue improves the competition position of producers of electricity from cogeneration, because it increases demand for that kind of electricity, which increases the quantity sold and the sales price. [52]

122. Therefore, it seems to me unquestionable that that obligation is liable to distort competition in the market for electricity.

123. Furthermore, intra-European trade is affected by the supply obligation in the sense that it improves the competitive position of the producers of electricity by cogeneration on both the domestic and export markets, in relation to producers of that kind of electricity established in other Member States.

124. I would add that the Court found, at paragraph 77 of the judgment in *Essent Netwerk Noord and Others*, that financial aid granted to producers of electricity in the Netherlands was liable to affect intra-European trade, having regard, firstly, to the fact that they were in competition with electricity producers in other Member States and, secondly, to the background of the liberalisation of the electricity market and the resulting intense competition. [53] I see no reason not to extend that reasoning to the facts of the case in the main proceedings.

48 See, inter alia, judgments of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 34 and case-law therein cited), and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 23).

49 See, inter alia, judgments of 17 September 1980, *Philip Morris Holland* v *Commission* (730/79, EU:C:1980:209, paragraph 11); of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 47), and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 24 and case-law therein cited).

50 See, to that effect, judgments of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 47); of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraphs 77, and 78), and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 25).

51 See, inter alia, judgments of 21 March 1990, *Belgium* v *Commission* (C-142/87, EU:C:1990:125, paragraph 43); of 29 April 2004, *Greece* v *Commission* (C-278/00, EU:C:2004:239, paragraph 69 and case-law therein cited); of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130, paragraph 32), and of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 76).

52 See points 58 to 61 of this Opinion.

53 Judgment of 17 July 2008 (C-206/06, EU:C:2008:413). The Court nonetheless stated that the amounts paid did not constitute State aid unless they represented an economic advantage and not compensation for the implementation of public service obligations (paragraph 96 of the judgment). See also judgment of 29 April 2004, *Greece* v *Commission* (C-278/00, EU:C:2004:239, paragraph 70), in which the Court emphasises that the fact that undertakings benefiting operate in a sector which is particularly exposed to competition may play a determining role in the assessment of the effect of aid.

125. In consequence, I take the view that the supply obligation at issue in the case in the main proceedings is such as to affect trade between Member States and distort competition.

B. Consequences of the hypothetical existence of State aid (second and third questions)

126. These two questions are referred by the national court, and are relevant, only if the supply obligation at issue in the case in the main proceedings were to be classified as State aid within the meaning of Article 107(1) TFEU.

127. Since I am proposing that the Court answer the first question to the effect that the obligation does not constitute State aid, I likewise propose that it should not answer the two other questions referred.

128. I should nonetheless like to examine them briefly, should the Court find that that obligation constitutes State aid.

1. Whether ENEA can rely upon an infringement of the prohibition of implementing State aid (second question)

129. By its second question, the national court is asking the Court whether an electricity provider treated 'as an emanation of the State' and subject to the supply obligation at issue in the case in the main proceedings may rely before a national court upon an infringement of Article 107 TFEU.

130. In that connection, it is clear from settled case-law that implementation of the system for supervision of State aid, under Article 108 TFUE and the relevant case-law of the Court, is a matter, on the one hand, for the Commission and, on the other, for the national courts. [54]

131. In fact, whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the EU courts, it is for the national courts to ensure that the rights of individuals are safeguarded in the event of breach of the prohibition of implementing State aid laid down in Article 108(3) TFEU. [55]

132. It follows from that division of roles between the Commission and the national courts that persons may not rely before the latter upon the incompatibility of an aid measure with Article 107 TFEU. In other words, Article 107 TFEU does not have direct effect. [56]

133. On the other hand, those same persons may rely before the national courts upon the illegal implementation of a State measure pursuant to Article 108(3) TFEU. The involvement of national courts is the result of the direct effect conferred on the last sentence of Article 108(3) TFEU. [57]

54 See, inter alia, judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants and transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraph 8), and of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 25).

55 See, inter alia, judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants and transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 9 and 10), and of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 27 and case-law therein cited).

56 See, to that effect, judgments of 19 June 1973, *Capolongo* (77/72, EU:C:1973:65, paragraphs 4 to 6); of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraph 12), and of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraphs 9 and 10).

57 See, to that effect, judgments of 11 December 1973, *Lorenz* (120/73, EU:C:1973:152, paragraphs 7 and 8); of 21 October 2003, *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 53), and of 13 January 2005, *Streekgewest* (C-174/02, EU:C:2005:10, paragraph 17).

134. The Court has stated that the immediate applicability of the prohibition of implementation referred to in that article extends to all aid implemented without being notified and, in the event of notification, operates during the preliminary period and, if the Commission sets in motion the consultative examination procedure, until the final decision.[58]

135. The national court pointed out in this connection that the legislation at issue in the main proceedings was not notified to the Commission in accordance with Article 108(3) TFEU.[59] If, therefore, the Court were to take the view that the supply obligation laid down by that legislation must be classified as State aid, the conclusion would have to be drawn that it was implemented in breach of that provision.

136. In that context, I see no reason why an electricity provider such as ENEA would be deprived of the possibility of relying upon an infringement of the last sentence of Article 108(3) TFEU on the grounds that most or all of its share capital is owned by the State.

137. As the Commission has correctly pointed out, the Court has on several previous occasions accepted that the entity granting unnotified aid may rely upon Article 108(3) TFEU in order to recover the aid or terminate its grant.[60]

138. Consequently, I consider that the reply to the second question referred should be that an electricity provider such as ENEA, subject to the supply obligation at issue in the main proceedings, may before a national court invoke an infringement of Article 108(3) TFEU.

2. Whether a fine may be imposed penalising the refusal to grant State aid (third question)

139. By its third question, the national court is asking whether the possible incompatibility with Article 107 TFEU of the supply obligation in regard to electricity produced by cogeneration prevents a financial penalty being imposed on the undertaking that has not performed that obligation.

140. As I explained in the previous section, persons may not before the national courts rely upon incompatibility with Article 107 TFEU but may, on the other hand, rely upon infringement of the last sentence of Article 108(3) TFEU.

141. Consequently, I consider it appropriate to reformulate the question asked as seeking in essence to determine whether the performance, perhaps unlawful under Article 108(3) TFEU, of the supply obligation at issue in the case in the main proceedings, would preclude the imposition of a financial penalty on the undertaking not performing its supply obligation.

142. At the hearing, a disagreement arose between ENEA and the Polish Government as to the use made by the National fund for the protection of the environment and water management of the proceeds of financial penalties imposed under Article 56 of the Law on energy. According to ENEA, the Fund used the proceeds of those financial penalties, in particular, to grant loans and subsidies to projects for the production of electricity produced by cogeneration. According to the Polish Government, such use was permitted by the relevant national legislation only from 2007.

58 See, inter alia, judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants and transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraph 11).

59 See point 27 of this Opinion.

60 See judgments of 3 March 2005, *Heiser* (C-172/03, EU:C:2005:130); of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814), and of 17 September 2014, *Commerz Nederland* (C-242/13, EU:C:2014:2224). The court also found that an individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 108(3) TFEU, not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision: see, inter alia, judgment of 13 January 2005, *Streekgewest* (C-174/02, EU:C:2005:10, paragraph 19).

143. In that connection, I would point out that the Court was asked, not about the use made by that Fund of financial penalties imposed under Article 56 of the Law on energy, but only about the national measures laying down the supply obligation at issue in the case in the main proceedings. The order for reference gives no indication of the use to which the proceeds of those financial penalties is put. Without excluding the possibility that that use might imply State aid within the meaning of Article 107(1) TFEU, I consider that the Court cannot express a view in that connection in the context of this case.

144. That being said, if the Court should find that the supply obligation at issue in the case in the main proceedings constitutes aid within the meaning of Article 107(1) TFEU, it would then have to be considered that the performance of that obligation, unlawful under Article 108(3) TFEU, means that a financial penalty may not be imposed on an undertaking that has not performed that obligation.

145. It follows from settled case-law that a system of penalties must be considered contrary to EU law if it penalises infringement of an obligation that has itself been held to be contrary to EU law.[61]

VI. Conclusion

146. Having regard to the foregoing, I propose that the Court should answer the questions referred by the Sąd Najwyższy (Supreme Court, Poland) as follows:

The supply obligation in respect of electricity produced by cogeneration imposed by the national legislation at issue in the case in the main proceedings cannot be classified as State aid within the meaning of Article 107(1) TFEU, because the advantage it confers upon producers of that kind of electricity is not granted through State resources.

61 See, to that effect, judgments of 16 February 1978, *Schonenberg and Others* (88/77, EU:C:1978:30, paragraph 16); of 28 March 1979, *Rivoira* (179/78, EU:C:1979:89, paragraph 14); of 3 July 1980, *Pieck* (157/79, EU:C:1980:179, paragraph 16), and of 11 September 2003, *Safalero* (C-13/01, EU:C:2003:447, paragraph 45).