Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 28 May 2020[1]

Case C-556/19

Société Eco TLC
v
Ministre de la transition écologique et solidaire
Intervener in the main proceedings
Fédération des entreprises du recyclage

(Request for a preliminary ruling from the Conseil d'État
(Council of State, France))

(Reference for a preliminary ruling – State aid – Extended producer responsibility – Eco-body authorised by the public authorities to collect financial contributions from undertakings placing certain products on the market in order to meet, on their behalf, their legal obligation to treat waste from those products – Financial support paid by the eco-body to sorting operators under contract – Concept of 'State resources' – Compulsory contributions – Public control of resources – Existence of a sufficiently direct link between the advantage and a reduction, at the very least potential, in the State budget)

1. Does the extended producer responsibility scheme introduced in France to manage waste from textile products, household linen and footwear ('the products at issue') constitute a State aid regime for the purposes of Article 107(1) TFEU?

2. That, in essence, is the question referred to the Court by the Conseil d'État (Council of State, France) in the request for a preliminary ruling addressed in this Opinion.

3. In the present case, the Court is faced for the first time with the question of the interconnection between the rules on State aid and extended producer responsibility schemes, introduced into EU law by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.[2]

1 Original language: French.

2 OJ 2008 L 312, p. 3. That directive has been amended on several occasions, most recently by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (OJ 2018 L 150, p. 109).

4. Extended producer responsibility schemes reflect the 'polluter pays' principle – a fundamental principle of environmental protection enshrined in Article 191(2) TFEU – and constitute a cornerstone of EU waste legislation. An extended producer responsibility scheme means a set of measures requiring producers of products to bear financial, and possibly organisational, responsibility for managing the waste stage of a product's life cycle.[3] It is a means of helping the European Union move closer to a 'recycling society', seeking to avoid waste generation and to use waste as a resource[4] with a view to creating a circular economy.[5]

5. The present case calls into question the compatibility of the extended producer responsibility scheme for the products at issue – one of a variety of such schemes in France[6]– with EU State aid rules. Eco TLC is the only eco-body in France which is authorised to meet, on behalf of producers of the products at issue, their legal obligation to treat waste from those products. It brought an action before the Conseil d'État (Council of State) seeking the annulment of a ministerial order from 2017, which changed the amount of one type of financial support which Eco TLC has to pay to waste sorting operators with which it has entered into contracts. Eco TLC submits that the extended responsibility scheme establishes a measure constituting unlawful State aid.

6. The Court is therefore requested to assess the compatibility of that scheme with Article 107(1) TFEU. In that connection, a more problematic question arises as to whether the funds paid to sorting operators may be categorised as 'State resources' in the context of the scheme at issue. The present case will thus give the Court an opportunity to clarify further its case-law on the concept of 'State resources'.

I. Law

A. EU law

7. Article 8 of Directive 2008/98, entitled 'Extended producer responsibility', provides, in paragraph 1 thereof, that, 'in order to strengthen the re-use and the prevention, recycling and other recovery of waste, Member States may take legislative or non-legislative measures to ensure that any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product) has extended producer responsibility'.

8. Article 8a of that directive, inserted by Directive 2018/851 and entitled 'General minimum requirements for extended producer responsibility schemes', provides in paragraph 1(a) thereof that Member States are to 'define in a clear way the roles and responsibilities of all relevant actors involved, including producers of products placing products on the market of the Member State, organisations implementing extended producer responsibility obligations on their behalf, private or public waste operators, local authorities and, where appropriate, re-use and preparing for re-use operators and social economy enterprises'.

3 Recital 14 of Directive 2018/851.

4 Recital 28 of Directive 2008/98.

5 In March 2020 the European Commission adopted a new plan of action for a circular economy, which is one of the main elements of the 'European Green Deal', the new European sustainable growth programme (see COM(2020) 98 final). Extended producer responsibility is referred to in that connection as a measure seeking to reduce total waste generation significantly.

6 There are 20 or so such extended producer responsibility schemes in France today, which have been gradually established by law in various sectors such as packaging, batteries, automobiles, medicine and furniture.

9. Paragraph 5 of that article provides, inter alia, that 'Member States shall establish an adequate monitoring and enforcement framework with a view to ensuring that producers of products and organisations implementing extended producer responsibility obligations on their behalf implement their extended producer responsibility obligations, including in the case of distance sales, that the financial means are properly used and that all actors involved in the implementation of the extended producer responsibility schemes report reliable data'.

B. French law

10. In France, Article L. 541-10-3 of the Code de l'environnement (Environmental Code) lays down the principle of extended responsibility for producers who, on a professional basis, place on the market the products at issue for purchase by households. Producers, importers and distributors of the products at issue ('undertakings placing the products at issue on the market') are thus under an obligation to contribute to or arrange for the recycling and treatment of waste from those products.

11. In order to comply with that legal obligation, Article L. 541-10-3 of the Environmental Code offers two alternatives to undertakings placing the products at issue on the market:

– either they may join and pay financial contributions to an *eco-body* which holds an authorisation issued by the ministers for ecology and industry on the basis of terms of reference. That body must then enter into contracts with sorting operators and regional or local authorities or groupings thereof which are responsible for waste management and transfer the financial contributions to them in the form of financial support for the waste recycling and treatment operations in question;

– or they may set up, in compliance with other terms of reference, an *individual system* for recycling and treating that waste approved by order of the ministers for ecology and industry.

12. The final paragraph of Article L. 541-10-3 of the Environmental Code provides that the detailed rules for the actual application of the provisions concerning that legal obligation, 'in particular the method for calculating the contribution, requirements as to the promotion of the employment of persons experiencing difficulty in finding work and penalties for non-compliance with [that legal obligation by undertakings placing the products at issue on the market] shall be laid down by decree in the Conseil d'État (Council of State)'.

13. As regards eco-bodies, Article R. 543-214 of the Environmental Code provides that they are to be authorised for a maximum period of six years. In addition, in its application for authorisation, an eco-body must prove its technical and financial capacity to perform the operations required with a view to promoting, through the contracts which it signs and the redistribution of the financial contributions which it collects, the re-use, recycling, recovery and treatment of waste from the products at issue. It must also state the terms on which it intends to comply with the clauses of the terms of reference which will accompany that authorisation.

14. Article R. 543-218 of the Environmental Code also provides that the terms of reference for the bodies which receive authorisation must state, in particular: (i) targets set for the quantities of sorted, re-used, recycled or recovered waste; (ii) targets for the employment of persons experiencing employment difficulties; (iii) the terms on which the holder of the authorisation will enter into a contract with each sorting operator with a view to contributing to covering the costs of recycling and treating the portion of waste resulting from waste sorting that is not re-used and the reduction of the contribution paid to a sorting operator in the event of its failure to meet the minimum target for employing such persons.

15. The first paragraph of Article R. 543-215 of the Environmental Code also provides that it is for the authorised bodies to decide the overall amount of the financial contribution which they receive from undertakings placing the products at issue on the market so as to ensure that expenditure arising from the implementation of the terms of reference is covered every year.

16. The Order of 3 April 2014 of the ministers for ecology and industry[7] ('the 2014 Order'), first, published the terms of reference with which a body wishing to contribute to the treatment of waste from the products at issue for the period 2014 to 2019 must comply and, second, authorised Eco TLC to collect financial contributions from undertakings placing the products at issue on the market for treating waste from those products and to transfer those contributions to the sorting operators in the form of financial support in compliance with the terms of reference.

17. First, the terms of reference relating to the authorisation of an eco-body, which are appended to the 2014 Order, set out the targets to be achieved by the holder of the authorisation, and its mandate (Chapter I).

18. Secondly, they lay down rules on financial organisation, including the presence on the authorised eco-body's board of directors of a State representative (Chapter II) and rules on relations with public authorities (Chapter VII).

19. Thirdly, those terms govern relations between the authorised eco-body and the contributors, that is to say, the undertakings placing the products at issue on the market which apply to join that body (Chapter III). In that connection, it also lays down provisions concerning the scale set by the eco-body for the contributions referred to in point 15 of this Opinion.

20. Fourthly, the terms of reference set out rules concerning the relationship between the authorised eco-body and the sorting operators (Chapter VI). They lay down specific performance and traceability criteria on which eligibility for a contract and financial support depend. In particular, they make the payment of financial support contingent upon a minimum level of resource recovery and recycling. The terms of reference specify three types of financial support that may be paid to sorting operators under contract: support for sustainability, support for waste sorting and support for development.

21. Annex III to the terms of reference, entitled 'Scale of financial support to sorting operators under contract in year N + 1 for year N (S_n)', sets out the method for calculating those various types of financial support. As regards specifically the amount of support for sustainability (S_{np}), that annex shows that it is equal to the sum of aid for sustainability in respect of resource recovery (S_{npvm}), energy recovery (S_{npve}) and disposal (S_{npe}) ($S_{np} = S_{npvm} + S_{npve} + S_{npe}$). Aid for sustainability in respect of resource recovery (S_{npvm}) is calculated by applying a multiplier of EUR 65 per tonne to 'sorted tonnages which have been subject to resource recovery (re-use + recycling + other forms of resource recovery)'.

22. The Order of 19 September 2017 amending the 2014 Order ('the order at issue')[8] revalued the amount of support for sustainability. Under Article 1 of the order at issue, the multiplier of EUR 65 per tonne established in the 2014 Order for aid for sustainability in respect of resource recovery (S_{npvm}) is increased to EUR 82.5 per tonne for support paid from 1 January 2018 onwards.

7 Order relating to the authorisation procedure and laying down terms of reference for bodies wishing to contribute to the treatment of waste from clothing textile products, household linen and footwear, pursuant to Article R. 543-214 of the Environmental Code, and authorising such a body, pursuant to Articles L. 541-10-3 and R. 543-214 to R. 543-224 of the Environmental Code (JORF No 0111 of 14 May 2014).

8 JORF of 4 October 2017, text No 5.

II. The dispute in the main proceedings and the question referred for a preliminary ruling

23. In November 2017, Eco TLC brought an action before the Conseil d'État (Council of State) seeking the annulment of the order at issue on the ground that it was ultra vires. Eco TLC submits, inter alia, that that order establishes a measure constituting new unlawful State aid inasmuch as it was not previously notified to the Commission, in breach of Article 107(1) TFEU.

24. In that connection, the referring court points out, in the first place, first, that none of the undertakings placing the products at issue on the market has set up an individual system for recycling and treating waste and, second, that Eco TLC is the only eco-body authorised by the public authorities in the sector of the products at issue.

25. In the second place, the referring court states that the scale of financial support paid by Eco TLC to sorting operators was fixed by the 2014 Order with reference to targets for waste recovery and the employment of persons experiencing social difficulties. It notes that, under that order, Eco TLC is required to adjust the amount of contributions collected from undertakings placing the products at issue on the market to the level strictly necessary to fulfil its obligations, namely to pay financial support to sorting operators in line with the scale set out in that order and to conduct various awareness-raising and preventative activities, without making a profit or loss or undertaking activities in other areas.

26. In the third and last place, the referring court points out that a State representative, appointed by the State, attends meetings of Eco TLC's board of directors (albeit without the right to vote), is informed of the terms of the financial investments proposed by Eco TLC prior to their approval by the board of directors, and is entitled to receive all documents relating to Eco TLC's financial management so that, in the event of its non-compliance with the rules of sound financial management, he or she can inform the competent State authorities, which may issue a fine of up to EUR 30 000 or suspend or even withdraw the authorisation. The referring court points out that, subject to those reservations, Eco TLC has the discretion to make its own management choices; in particular, the funds intended for paying contributions are not subject to any particular requirement as to their deposit.

27. In those circumstances, since the question of the compatibility of the scheme in question with Article 107 TFEU is decisive for the resolution of the dispute pending before it, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 107 [TFEU] be interpreted as meaning that a system … whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, is to be regarded as State aid within the meaning of that provision?'

III. Legal analysis

28. By its question, the Conseil d'État (Council of State) asks the Court whether Article 107(1) TFEU must be interpreted as meaning that an extended responsibility scheme for undertakings placing products on the market, such as the scheme put in place under French law for the products at issue, must be considered as a measure constituting State aid within the meaning of that article.

29. In order to answer that question, I consider it necessary, first of all, to set out briefly the main features of the scheme that is the subject of the question referred, as explained by the national court, and then to make some preliminary remarks.

A. The French extended responsibility scheme for the undertakings placing the products at issue on the market

30. The documents before the Court show that the extended responsibility scheme established in France for the undertakings placing the products at issue on the market is characterised by the following features.

31. In the first place, the undertakings placing the products at issue on the market are under a legal obligation to contribute to or arrange for the recycling and treatment of waste from those products. Legally, they have two alternatives. They can either contribute financially to an eco-body authorised by the public authorities, which will transfer their contributions to sorting operators, or set up an individual waste recycling and treatment system, which must likewise be approved by the public authorities. [9]

32. However, the file shows that none of the undertakings placing the products at issue on the market has set up an individual system, and that all of those undertakings have chosen to join the only eco-body that has been established and authorised, namely Eco TLC.

33. In the second place, the Environmental Code and the terms of reference which, under that code, are to accompany the order issuing the authorisation – in this case the 2014 Order – set out detailed rules on the eco-body's activities, which follow from the mandate for which it has been authorised. According to those terms, the authorised eco-body's main objective is to meet the obligations of the undertakings placing the products at issue on the market in respect of their extended producer responsibility and to contribute to the sustainability and development of the waste management system for the products at issue.

34. In the third place, in order to carry out its mandate, the eco-body is to collect financial contributions from undertakings placing the products at issue on the market ('incoming contributions'). The eco-body is to set the amount of those contributions (in the 'incoming scale') itself, [10] fixing them at the level needed to meet its obligation to provide financial support to sorting operators and to cover its operating costs. The incoming contributions collected by the eco-body must be fully used to perform its mandate and to cover the related operating costs, since the activities for which it is authorised are to be carried out on a non-profit-making basis.

35. In the fourth place, the eco-body is to enter into contracts with eligible sorting operators and pays them 'outgoing' financial support per tonne of sorted waste from the products at issue. The terms of reference annexed to the 2014 Order provide that the financial support that must be paid to sorting operators is comprised of three components, namely: (i) support for the sustainability of the waste management system for the products at issue through contributing to the costs of that management; (ii) support for the sorting of materials; and (iii) support for the development of that system. Annex III to those terms of reference also specifies, on the basis of environmental and social objectives, the method to be used in calculating the amount of financial support paid to sorting operators and the applicable scale (the 'outgoing scale'). [11]

9 See point 11 of this Opinion.

10 See point 15 of this Opinion.

11 See point 21 of this Opinion.

36. In the fifth place, a State representative, appointed by the State, is to sit on the eco-body's board of directors. He or she may attend meetings of the eco-body's board of directors but cannot vote. He or she is to be informed of the terms of the financial investments proposed by Eco TLC prior to their approval by the board of directors. He or she is entitled to receive all documents relating to Eco TLC's financial management, and in the event of non-compliance with the rules of sound financial management, to notify the competent public authorities, which may impose a fine or suspend, or even withdraw, the authorisation.

37. In addition, the eco-body must regularly inform the ministries which issued the authorisation of its activities, whether it is performing its obligations, and whether its financial forecasts have been fulfilled. It must provide all other documents and information requested by the competent ministers.

B. Preliminary remarks

38. Against this background, I feel it appropriate, as a preliminary point, to clarify the scope of the question referred by the Conseil d'État (Council of State).

39. When undertakings placing the products at issue on the market choose to use an authorised eco-body to meet their legal obligation to arrange for the treatment of waste from those products, the scheme whose main features I have just described envisages two kinds of financial flow: first, the incoming contributions paid to the eco-body by the undertakings placing the products at issue on the market and, second, the outgoing financial support transferred by the eco-body to sorting operators under contract.

40. It is apparent from the order for reference and the documents before the Court that, although the question referred by the Conseil d'État (Council of State) concerns the scheme at issue as a whole, the referring court's doubts regarding the interpretation of Article 107(1) TFEU concern the outgoing part of the system. Thus, the question referred by the Conseil d'État (Council of State) seeks, in essence, to ascertain whether the financial support paid to sorting operators, determined using the outgoing scale set out in the 2014 Order and amended by the order at issue, constitutes State aid that benefits those sorting operators. However, the Conseil d'État (Council of State), entertains no doubts as to whether the incoming contributions paid to the eco-body may be classified as 'aid'.[12] In my view, it is therefore in that sense that the question referred must be understood.

41. In that regard, it should be borne in mind that classification as 'State aid' within the meaning of Article 107(1) TFEU presupposes that four cumulative conditions have been met, namely: that there is intervention by the State 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.[13]

42. Furthermore, according to the Court's case-law, 'State aid', as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors.[14]

12 In that connection, the Commission points out that the Conseil d'État (Council of State) has stated in its case-law that the contributions to an eco-body made by undertakings placing products on the market are direct consideration for a service provided, cannot therefore be regarded as a payment that may be equated to a tax or charge introduced by a public authority and hence do not constitute a State resource (see Conseil d'État (Council of State), of 11 July 2011, No 346698, and of 28 December 2017, No 408425, FR:CECHS:2017:408425.20171228).

13 See, inter alia, judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); of 21 December 2016, *Commission* v *World Duty Free Group SA and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53); and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 46 and the case-law cited).

14 See, inter alia, judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 111).

43. However, I think it must also be observed that, according to the case-law, when the Court of Justice is requested to give a preliminary ruling, its task is to provide the national court with guidance on the scope of the rules of EU law so as to enable that court to apply the rules correctly to the facts in the case before it, and it is not for the Court of Justice to apply those rules itself, a fortiori because it does not necessarily have available to it all the information essential for that purpose. [15]

44. In that connection, the Court of Justice has consistently held that national courts are authorised to interpret and apply the concept of 'State aid' and, in proceedings pending before them, it is for those courts to verify that the requirements laid down in Article 107(1) TFEU are met. [16]

45. It is therefore in the light of that 'division of labour' [17] between the Court of Justice and national courts that I shall consider, on the basis of the information provided in the file, each of the cumulative conditions comprising the concept of 'State aid' referred to in point 41 above. It will, however, be for the referring court, which has at its disposal the data and other factual information necessary to carry out a complete assessment, to make the final determination as to whether the scheme in question should be classified as 'State aid', in the light of the guidance that will be provided by the Court of Justice on the meaning and scope of Article 107(1) TFEU.

C. Existence of an intervention by the State or through State resources

46. According to settled case-law, in order for it to be possible to categorise advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State. [18]

47. As regards the condition that the scheme in question must be attributable to the State, it has been held that, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure. [19]

48. In the present case, there is no doubt that the extended responsibility scheme for the undertakings placing the products at issue on the market can be attributed to the State. As is apparent from point 10 et seq. of this Opinion, that scheme was put in place by the State through the Environmental Code and its implementing orders, specifically the 2014 Order and the order at issue. The scheme in question must therefore be regarded as attributable to the State.

49. By contrast, the question of whether the resources which the eco-body uses to pay financial support to sorting operators must be classified as 'State resources' is the most complex issue in the present case.

50. In examining that question, I consider it appropriate, first of all, to identify the principles established in the case-law with regard to the concept of 'State resources' and then to examine the scheme in question in the light of those principles.

15 See judgment of 21 June 2007, *Omni Metal Service* (C-259/05, EU:C:2007:363, paragraph 15), as well as the Opinions of Advocate General Jääskinen in *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:469, point 24), and of Advocate General Wahl in *Achema and Others* (C-706/17, EU:C:2019:38, point 16).

16 See, to that effect, judgments of 5 October 2006, *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 39), and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 22).

17 See, to that effect, Opinion of Advocate General Wahl in *Achema and Others* (C-706/17, EU:C:2019:38, point 17).

18 See, inter alia, judgments of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 47).

19 See, to that effect, judgments of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 21 and the case-law cited), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 48).

1. The Court's case-law concerning the concept of 'State resources'

51. It should be noted at the outset that, according to the case-law, only advantages granted directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of that provision and the procedural rules laid down in Article 108 TFEU show that advantages granted from resources other than those of the State do not fall within the scope of the articles in question. [20]

52. Furthermore, according to the settled case-law of the Court, the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State or through State resources and aid granted by public or private bodies established or designated by the State with a view to administering the aid. [21]

53. The distinction made in Article 107(1) TFEU between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State. [22]

54. Inclusion within the scope of Article 107(1) TFEU of advantages granted by bodies separate from the State seeks to preserve the useful effect of the prohibition of State aid. [23] The Court has held that EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions responsible for allocating aid. [24]

55. It is also apparent from the Court's case-law that it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as State aid within the meaning of Article 107(1) TFEU. [25]

56. Article 107(1) TFEU covers all the financial means by which public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the aid measure are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources'. [26]

57. In other words, funds may be categorised as 'State resources' even if originating from private persons, if they are collected by the State, on behalf of the State, or by virtue of a State intervention, and are made available to the competent national authorities who have the power to decide on their final use. [27]

20 Judgments of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 58), and of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 99 and the case-law cited).

21 See, *ex multis*, judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 50 and the case-law cited).

22 Judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 53 and the case-law cited).

23 See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *ENEA* (C-329/15, EU:C:2017:233, point 68 and the case-law cited).

24 See, *ex multis*, judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 23); of 9 November 2017, *Commission* v *TV2/Danmark* (C-656/15 P, EU:C:2017:836, paragraph 45); and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 51).

25 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 36); of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109); of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 34); and of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 55).

26 See, inter alia, judgments of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671[, paragraph 25] and the case-law cited); of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 57); and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 53).

27 See, to that effect, Opinion of Advocate General Wahl in *Achema and Others* (C-706/17, EU:C:2019:38, point 25).

58. More specifically, the Court has held that funds financed through compulsory contributions imposed by State legislation, 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 managed by entities separate from the public authorities. [28]

59. The decisive factor, in that regard, consists of the fact that such entities are appointed by the State to manage a State resource and are not merely bound by an obligation to purchase by means of their own financial resources. [29]

60. However, on that point the Court has also explained that, for the purposes of establishing whether the advantage given to the beneficiary is a burden on the State budget, it is necessary to determine whether there exists a sufficiently direct link between, on the one hand, that advantage and, on the other hand, a reduction of that budget, or a sufficiently concrete economic risk of burdens on that budget. [30]

2. The classification as 'State resources' of the funds used by an eco-body to pay financial support to sorting operators under the scheme in question

61. It is in the light of the principles set out in the preceding section that it must be determined whether, in the present case, the funds which, under the scheme at issue before the Conseil d'État (Council of State), an eco-body such as Eco TLC uses to pay financial support to sorting operators must be regarded as 'State resources'.

62. In that respect, I would note, at the outset, that the scheme in question is not comparable to any of the schemes which the Court has examined in its fairly extensive case-law on the concept of State resources.

28 See judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 25); of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 58); and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 54 and the case-law cited).

29 See judgments of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 59), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 55 and the case-law cited).

30 See judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 60). See also, to that effect, judgments of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 47); of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 34); and of 16 April 2015, *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, paragraph 19).

63. Thus, the scheme in question can be distinguished from schemes requiring private undertakings to purchase electricity as part of national measures to support energy from renewable sources, which, in *PreussenElektra*[31] and *ENEA*,[32] the Court held did not constitute State aid within the meaning of Article 107(1) TFEU.[33] The scheme in question also differs, however, from the national schemes adopted in the energy sector which the Court has considered in other cases, such as *Essent Netwerk Noord and Others*,[34] *Association Vent De Colère!*[35] and *Achema*,[36] where, by contrast, it held that the funds in question could be regarded as State resources within the meaning of that provision.

64. Nor is the French extended responsibility scheme for the undertakings placing the products at issue on the market comparable to the measures examined by the Court in *Pearle and Others*[37] and *Doux Élevage*,[38] which it held did not constitute State aid within the meaning of Article 107(1) TFEU. Those cases concerned compulsory contributions from certain undertakings fixed by law and collected and administered by entities to which the State had granted certain powers. However, those compulsory contributions had been established at the initiative of private undertakings which also decided on their final use, and did not have to be used in furtherance of a public interest objective determined by the public authorities.[39]

65. However, all these cases provide a series of pointers which enable an assessment, on the basis of an overall examination of the various features of the national scheme in question, as to whether the funds in question must be classified as 'State resources'.

66. The present case concerns, specifically, contributions paid by undertakings under a legal obligation to arrange the treatment of waste to a private entity authorised by the State, which transfers those contributions to operators which, since they complied with certain conditions, have entered into contracts with that private entity.

67. Against that background, on the basis of the case-law cited above, I shall address, in the first place, the question of the compulsory nature of the incoming contributions paid to the eco-body by the undertakings placing the products at issue on the market. In the second place, I shall analyse the degree of control which the public authority retains over the eco-body and those funds under the national scheme in question. In the third place, I shall examine the question of whether there is a sufficiently direct link between the alleged advantage and a reduction, at the very least potential, in the State budget.

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

32 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671).

33 In those cases, the Court held that the private undertakings required to purchase electricity produced from renewable energy sources at fixed minimum prices had not been appointed by the Member State concerned to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources. In that regard, see judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 34 and 35), and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 30). In the judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268), the Court of Justice, on appeal, found that the General Court and the European Commission had failed to establish that the scheme supporting the production of electricity from renewable energy sources in question involved State resources and therefore constituted State aid within the meaning of Article 107(1) TFEU.

34 Judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413). That case concerned a charge consisting of a surcharge on transmitted electricity.

35 Judgment of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851). That case also concerned a legal obligation to purchase electricity.

36 Judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407). That case concerned an obligation to contribute to the provision of public interest services in the electricity sector.

37 Judgment of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448).

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

39 In that regard, see also point 30 of the Opinion of Advocate General Wahl in *Achema and Others* (C-706/17, EU:C:2019:38).

(a) The question of whether the contributions paid to the eco-body by undertakings placing products on the market are compulsory

68. Under the case-law referred to in point 58 of this Opinion, funds financed through compulsory contributions imposed by State legislation may be regarded as State resources within the meaning of Article 107(1) TFEU.

69. The question therefore arises as to whether the incoming contributions paid to the eco-body by the undertakings placing the products at issue on the market are compulsory.

70. In that regard, it is apparent from points 10 and 11 of this Opinion that, under the Environmental Code, undertakings placing the products at issue on the market are required to arrange for waste from those products to be treated. They are therefore under a legal obligation in that respect which, moreover, arises from EU legislation, namely Directive 2008/98.

71. However, the relevant provisions of the Environmental Code provide them with two alternatives for performing that legal obligation: either they set up an individual recycling and treatment system for such waste, or they join an eco-body to which they assign their legal obligation by paying a contribution. Therefore, when an undertaking placing products on the market decides to join an eco-body, it becomes legally bound to pay the contribution to that entity in order to fulfil its legal obligation to arrange for the waste to be treated.

72. In those circumstances, having regard to the choice which the law offers undertakings placing products on the market, it must be held that the contributions paid to Eco TLC by the undertakings placing the products at issue on the market are not *de jure* compulsory.

73. In its observations, however, the Commission considers it necessary to consider whether a contribution that is de facto compulsory should be regarded as having the same effects as a *de jure* compulsory contribution. According to the Commission, if it were held that the contributions which undertakings placing products on the market pay to Eco TLC, which is the only eco-body authorised in France in the sector of the products at issue, are de facto compulsory, since the alternative of setting up an individual system is 'purely hypothetical as it is impossible in practice', then the resources formed by those contributions would have to be classified as 'State resources'. [40]

74. In that regard, I am aware of the requirement, highlighted by the Commission in its observations, that situations in which a Member State offers a purely hypothetical choice are not excluded from the concept of State aid. In such cases, there is a risk that, by providing in national legislation for alternatives for the operators in question that exist in law but are impossible to implement in practice, Member States could circumvent the EU rules on State aid.

75. However, I consider that the assessment leading to a finding that the legal alternative provided for in national legislation is 'purely hypothetical' because it is impossible to implement must necessarily be very strict since there is a risk of arbitrariness if this is not the case.

40 In that regard, I would point out that, in his submissions in the case pending before the Conseil d'État (Council of State) (Case No 416103), the rapporteur public, Mr Louis Dutheillet de Lamothe, considered that the option for undertakings placing products on the market to set up their own recycling system was 'purely hypothetical'.

76. Such an assessment should, in my view, first ascertain whether there is in fact a choice from a legal point of view. That may not be the case, for example, if the authorities have not put in place a legal framework allowing one of two options to be implemented. In the present case, however, it appears that a regulatory framework was established, albeit allegedly late, enabling individual recycling and treatment systems for waste from the products at issue to be set up.[41]

77. Secondly, in order for an option to be 'purely hypothetical as it is impossible in practice', it is not sufficient for it to be merely more costly or less advantageous from an economic point of view. That alternative course has to be so expensive or difficult that it must be held to be de facto impossible to implement.

78. Thirdly, before finding that a choice which exists in law is purely hypothetical, all the courses open to the operators concerned must be considered. Thus, for example, in the present case, it cannot be ruled out that, even if it were de facto impossible to set up an individual system, undertakings placing products on the market could, even so, establish a different eco-body from Eco TLC to meet their obligation to arrange for waste to be treated.[42] If such a course were open to undertakings placing products on the market as an alternative,[43] the existence of an alternative of this type would have to be taken into account in the assessment before it would be possible to find that the alternative to paying contributions to Eco TLC offered to those undertakings was 'purely hypothetical'.

79. In any event, I consider that the file before the Court does not provide all the factual information necessary to carry out such an assessment conclusively. It is thus for the national court, on the basis of the guidance that the Court of Justice will provide, to determine whether the contributions to Eco TLC made by the undertakings placing the products at issue on the market are compulsory. If the referring court were to find that such is not the case, then the funds at issue would have to be classified as not being State resources.

(b) Public control of the eco-body and the funds

80. Under the case-law referred to in points 56 and 59 of this Opinion, in order to determine whether funds financed through compulsory contributions imposed by State legislation may fall within the concept of State aid for the purposes of Article 107(1) TFEU, it is essential to ascertain whether the entity, separate from the public authority, which manages them under that legislation has been appointed by the State to manage a State resource. To be classified as 'State resources', it is not necessary for the funds to belong permanently to the State; it suffices that they constantly remain under public control and therefore available to the competent national authorities.

81. In this case, in the light of that case-law, it must thus be ascertained whether Eco TLC may be regarded as having been appointed by the State to manage resources which constantly remain under public control and therefore available to the national authorities.

82. In that regard, in the first place, as regards the nature of the entity, separate from the public authority, which manages the funds, in this case there is no doubt that Eco TLC is not a public entity but a private company established by private operators whose relationships are governed by private law.

41 Order of 19 September 2017 relating to the authorisation procedure and laying down terms of reference for individual systems for managing waste from clothing textile products, household linen and footwear in accordance with Articles L. 541-10-3 and R. 543-217 to R. 543-224 of the Environmental Code (JORF No 0226 of 27 September 2017).

42 The existence of such a course was considered by the rapporteur public, Mr Louis Dutheillet de Lamothe, in his submissions cited in footnote 40 of this Opinion, in his assessment of Eco TLC's interest in bringing proceedings before the Conseil d'État (Council of State).

43 I must clarify that I refer to that course only by way of example, since it is pure speculation based on the incomplete information available to me. It is for the referring court to ascertain whether or not such an option actually exists.

83. From that point of view, the circumstances of the present case appear to be closer to those of the cases giving rise to the judgments in *Pearle and Others* and *Doux Élevage*,[44] in which the Court held that funds managed by private operators could not be classified as 'State resources', than to those of the cases giving rise to the judgments in *Association Vent De Colère!*[45] and *Achema*,[46] in which the Court held that the funds in question were State resources. The present case differs, however, from *Pearle and Others* and *Doux Élevage* in the – by no means insignificant – fact that, as I stated in point 64 of this Opinion, in those two cases the resources were used in furtherance of objectives which were not in the public interest but set by the private operators in question.[47]

84. In the second place, under the principles laid down in the case-law referred to in point 80 above, it must nevertheless be ascertained whether the funds which an eco-body uses to pay financial support to sorting operators under the scheme in question can be regarded as constantly remaining under public control.

85. In that regard, I would point out that the funds in question are paid by private entities (undertakings placing products on the market) to a private entity (Eco TLC), which passes them on to other private entities (sorting operators). The contributions hence remain private throughout their life cycle.[48] The mechanism created by the scheme in question does not involve any direct or indirect transfer of public revenue, since the funds created by the payment of contributions never go through the State budget or another public entity and never enter the hands of the public authorities.[49] Moreover, at no point do the public authorities have effective access to those resources.[50]

86. Furthermore, in the event of non-payment, the eco-body must follow the normal civil or commercial judicial process to collect payment and does not have any State prerogatives.[51]

87. Nevertheless, even though they do not have access to those funds, the public authorities play an important role in allocating them and determining their amount, which led the Commission to consider, in the observations submitted to the Court, that the State retains, in essence, tight control over the financial circuit of those funds.[52]

88. In those circumstances, it must be ascertained, in the third place, whether the public authorities still control those funds in so far as they have a power of disposal over them, even though they do not have access to them.

89. As regards the test used in making such an assessment, according to the case-law, it is not sufficient for the relevant features of the mechanism in question merely to show that the State has a degree of influence over the mechanisms which that scheme establishes. Instead, those features must indicate that the State holds a power of disposal over the funds managed and administered by the entity separate from the public authorities.[53]

44 Judgments of 15 July 2004, *Pearle and Others* (C-345/02, EU:C:2004:448), and of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348; see paragraphs 31 and 33).

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

46 Judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407).

47 The scheme under consideration in the present case is also different from that examined in *Essent Netwerk Noord*, in which the separate entity from the public authority was indeed a private company, but one that had been tasked by statute to levy a charge (see judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 67 and 68)). This is not the situation in the present case, since the contributions made by undertakings placing products on the market are not a charge (see point 106 of this Opinion).

48 See, to that effect, judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 32).

49 See, to that effect, judgments of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 32); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 28 to 33); and of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 85).

50 In that regard, see judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 81).

51 See, to that effect, judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 32).

52 The rapporteur public, Mr Louis Dutheillet de Lamothe, expressed the same view in his submissions cited in footnote 40 of this Opinion.

53 See, to that effect, judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 75).

90. To that end, it is essential to consider the degree of autonomy over the funds enjoyed by the separate entity which manages them pursuant to national legislation. In particular, it is necessary to ascertain whether the legislation at issue in the main proceedings confers on the competent authority the power to direct or influence the administration of the funds, and also to assess the type and extent of control which the public authorities exercise over that separate entity. [54]

91. In that context, the following considerations seem to me relevant with regard to the scheme in question.

92. First, as regards the initiative to pay the funds, while it is clear that their use pursues specific political objectives, set and defined by the public authorities, [55] and that the obligation to deal with the waste comes directly from the State, the initiative to pay the contributions, by contrast, does not come directly from the State, but rather from the choice by undertakings placing products on the market to join the eco-body. [56]

93. Secondly, as regards the exclusive allocation of the funds for objectives specified by the public authority, the Court has already held that, although this is one of the criteria to be considered, [57] it is not in itself sufficient to establish, for the purposes of the case-law cited in point 56 of this Opinion, that the State may dispose of them. [58] By contrast, the Court has held that the legal principle of exclusive allocation of the funds at issue tends rather to show, in the absence of any other evidence to the contrary, that the State is specifically not entitled to dispose of those funds, that is to say, to decide on an allocation different from that laid down in the legislation at issue. [59]

94. Thirdly, as regards the degree of autonomy exercised by the eco-body over the funds, in the present case, there can be no doubt that the State retains a certain level of control over the financial flows involving those funds. Indeed, in determining the 'outgoing scale', it exercises a decisive influence on the amount of the financial support paid to sorting operators. Furthermore, the 'incoming scale', which determines the contributions which must be paid to the eco-body by undertakings placing products on the market, depends to a large extent on those amounts, since the eco-body must carry on the activities for which it has been authorised without making a profit.

95. However, in its observations submitted to the Court, the French Government put forward a whole series of factors which appear to demonstrate a certain level of autonomy which the eco-body enjoys under the scheme in question, specifically with regard to the funds.

96. Thus, the incoming scale is fixed by the eco-body itself and is not approved by the public authority, but is subject only to an obligation to inform. However, as I have just pointed out, the amounts of the incoming contributions set in that scale depend significantly on the amount of support paid to sorting operators as determined in the outgoing scale. In addition, the eco-body must adjust the amounts of the contributions which it receives from undertakings placing products on the market to the level strictly necessary to fulfil its obligations. [60] Nevertheless, it appears that the amount of financial

54 In that regard, see judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 38).

55 And are not set by the separate entity itself, as in *Pearle and Doux Élevage* (see points 64 and 83 above).

56 Clearly, that consideration is influenced by any finding that the contributions are de facto compulsory, as stated in point 79 above. If the contributions are de facto compulsory, the view could be taken that the initiative of paying them does not result from a free choice by undertakings.

57 In that regard, see judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 69), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 66).

58 See, to that effect, judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 76).

59 See judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268).

60 See Article L. 543-215 of the Environmental Code.

support is not the only factor influencing the setting of the incoming scale, since the incoming contributions also depend on other factors over which, according to the French Government, the eco-body has an influence, such as its management costs and the adjustment of the scale according to eco-design criteria.[61]

97. The French Government also maintains that the authorised eco-body likewise takes a leading role in setting the outgoing scale: that scale corresponds to the average net cost of sorting, which is determined by the public authority on the basis of proposals contained in the annual report of the group, set up by the authorised eco-body, responsible for the environmental, economic and social monitoring of the sorting and recovery of waste from the products at issue.[62]

98. It is also relevant to note that, as regards the eligibility of sorting operators – which would ultimately benefit from the alleged State aid – to conclude contracts with the eco-body, the terms of reference annexed to the 2014 Order lay down eligibility criteria which those operators must meet if they are to be able to enter into contracts.[63] However, the French Government points out that the eco-body may itself add eligibility criteria, which it did in introducing a size criterion for sorting operators and other contractual obligations which those operators must satisfy. It thus appears that, contrary to the situation in the schemes examined in cases where the Court found that the funds in question were State resources,[64] in the present case, the entity has a certain degree of autonomy in determining which sorting operators will benefit from financial support.

99. It is for the referring court to ascertain whether, in this particular case, all those factors listed by the French Government actually confer a certain degree of autonomy on the eco-body over the funds which is sufficient to rule out the possibility that the public authority has the power to direct and influence the administration of funds.

100. Fourthly, as regards the degree of control exercised by the public authorities over the eco-body, this takes two forms. During the authorisation phase, the eco-body appears to be subject to fairly rigorous control since, in order to obtain that authorisation, it must be able to meet all the requirements specified in the terms of reference. Subsequently, as is apparent from points 18, 26, 36 and 37 of this Opinion, that control mainly takes the form of participation by the State representative in meetings of the authorised eco-body's board of directors and the eco-body's obligations to provide information to the public authorities so as to allow them to monitor its compliance with requirements in respect of the extended responsibility scheme for the undertakings placing the products at issue on the market.

101. In that regard, I note, in the first place, that, as the rapporteur public pointed out in his submissions on the case pending before the Conseil d'État (Council of State),[65] that control is certainly not comparable to a ministry's supervision of a public institution or the powers conferred by a substantial shareholding in a company. Where an alert is issued by the representative, the State can assert itself only through its powers of enforcement and sanction if legislation has been breached.

102. Second, it should also be noted that EU law itself, in particular Directive 2008/98, requires Member States to establish an adequate monitoring and enforcement framework for the implementation of extended producer responsibility schemes.[66]

61 See Chapter III, Section C.4., of the terms of reference.

62 Chapter VI, Section D, of the terms of reference.

63 Chapter VI, Section B, of the terms of reference. See points 20, 128 and 129 of this Opinion.

64 For example, in the scheme at issue in *Achema*, the State approved the names of aid beneficiaries (see judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraphs 60 and 87)).

65 See the submissions of the rapporteur public, Mr Louis Dutheillet de Lamothe, cited in footnote 40 above.

66 See Article 8a(5) of Directive 2008/98. In that respect, it should also be pointed out, however, that, since that provision was inserted by Directive 2018/851, it is not as such applicable *ratione temporis* to the case at issue before the Conseil d'État (Council of State).

(c) The existence of a sufficiently direct link between the advantage at issue and a reduction, at the very least potential, in the State budget

103. As has been pointed out in point 60 above, for the purposes of establishing whether an advantage granted to a beneficiary directly or indirectly through State resources places a burden on the State budget, it is necessary to determine whether there exists a sufficiently direct link between, on the one hand, that advantage and, on the other hand, a reduction in that budget, or a sufficiently concrete economic risk of burdens on that budget.

104. In that regard, the Court has clarified that it is not necessary that such a reduction, or even such a risk, should correspond or be equivalent to that advantage, or that the advantage has as its counterpoint such a reduction or such a risk, or that it is of the same nature as the commitment of State resources from which it derives.[67] It is, however, at least necessary for there to be a sufficiently concrete risk of an additional burden being imposed on the State in the future.[68]

105. However, in the present case, there is nothing in the information in the file before the Court to suggest that there is a link between, on the one hand, the advantage constituted by the payments of financial support to sorting operators and, on the other hand, a reduction in the State budget or a sufficiently concrete economic risk of burdens on that budget.

106. In that regard, I would point out, in the first place, that the incoming contributions paid to the eco-body by undertakings placing products on the market are not comparable in nature to a charge or tax. They are not contributions unilaterally imposed by law which those undertakings are required to pay.[69]

107. On that point, it is relevant to note that, as has already been pointed out,[70] the Conseil d'État (Council of State) itself has made plain in its case-law, albeit in respect of extended producer responsibility schemes in sectors other than that of the products at issue, that the contributions paid to an eco-body constitute direct consideration for a service provided and therefore cannot be regarded as a payment that may be equated to a tax or a charge introduced by the public authority.

108. In the second place, the file does not show that there is a mechanism, established and regulated by the Member State, for offsetting the costs resulting from the obligation to arrange for the treatment of waste from the products at issue through which the State offers undertakings placing products on the market the certain prospect that those costs will be covered in full, as has been the case, for example, in other cases decided by the Court.[71] Nor does the scheme require those undertakings to recoup the amounts paid by way of contributions to the eco-body from the final customer.[72]

67 Judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 110).

68 Judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 106). See also, to that effect, judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraph 41).

69 See, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraphs 45 to 47 and 66), and of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 68).

70 See footnote 12 of this Opinion and the case-law of the Conseil d'État (Council of State) cited.

71 See, for example, judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 26 and 36), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 71). In that regard, see also judgments of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 30), and of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 84).

72 See judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 70).

109. It follows from those considerations that, on the basis of the information contained in the file before the Court, first, it appears that the scheme in question does not require the State to relinquish any resources, in whatever form (such as taxes, duties, charges and so on), which, under national legislation, should have been paid into the State budget[73] and that, therefore, it is not capable of depriving the treasury of the Member State of certain sources of liquidity and, therefore, of reducing the latter's budget.[74] Nor, second, does that scheme seem to create a sufficiently concrete risk of an additional burden being imposed on the State in the future.

(d) Finding as to the classification as 'State resources' of the funds used by an eco-body to pay financial support to sorting operators under the scheme in question

110. In conclusion, in the light of all the foregoing considerations, I am inclined to take the view that the funds used by an eco-body such as Eco TLC, under the extended responsibility scheme for undertakings placing the products at issue on the market, to pay financial support to sorting operators do not constitute State resources.

111. As has been pointed out in point 45 of this Opinion, it will, however, be for the referring court, which has at its disposal all the data and other factual information necessary to carry out a complete assessment, to make the final determination in that regard. To that end, it will, in particular, have to ascertain, in the light of the guidance that will be provided by the Court, first, whether the contributions to Eco TLC made by the undertakings placing the products at issue on the market are de facto compulsory, secondly, whether, although the funds in question are managed by Eco TLC, given Eco TLC's lack of autonomy over them and the public authorities' degree of control over that body, the funds in question must be regarded, all the same, as constantly remaining under public control and available to the competent national authorities and, thirdly, whether there is a sufficiently direct link between the advantage in question and a reduction, at the very least potential, in the State budget.

D. The existence of an economic advantage

112. Among the conditions referred to in point 41 of this Opinion, I will now consider the condition relating to the existence of an economic advantage.

113. In that regard, it should be noted that, according to the settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid.[75]

73 Judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 32).

74 See, to that effect, judgments of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 107); of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 48); and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 28).

75 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 65 and the case-law cited); of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank* (C-579/16 P, EU:C:2018:159, paragraph 44); and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 74 and the case-law cited).

114. Thus, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to be aid.[76] Whenever the financial situation of an undertaking is improved as a result of State intervention on terms differing from normal market conditions, an advantage is present.[77]

115. In the present case, on the basis of the information available to the Court, it appears that the various types of financial support which Eco TLC pays to sorting operators under contract does not necessarily correspond to the market prices for sorting and recycling waste from the products at issue.[78]

116. Thus, as the Commission has pointed out, first, the objective pursued by the support to sorting operators does not appear to be to pay a price for a service, but, as the terms of reference put it,[79] 'both to sustain the system for managing that waste by contributing to the costs of that management and to develop the system's performance in terms of increasing the quantity of waste sorted and minimising the quantity of waste disposed of without recovery'. The financial support thus mainly pursues an environmental objective, namely that of discouraging the disposal of waste from the products at issue without recovery. That support also seeks to achieve the social objective of favouring undertakings which employ more people who have difficulty entering the labour market.

117. Secondly, the formulae for calculating support set out in the terms of reference are not based on the costs of sorting and recycling.[80] They do not take account of either the costs of the service or the market price. By contrast, the calculation is based on the operator's overall activity and takes into account other factors, which may constitute an economic advantage.

118. Thus, for example, support for development is complementary to support for sustainability and is intended, among other objectives, to offset the costs of investments by sorting operators in setting up new sorting centres or building extensions. Offsetting the costs of those investments, without reference to a consideration received by Eco TLC, would seem to grant an economic advantage to the sorting operators under contract.

119. Furthermore, since costs linked to employee remuneration naturally place a burden on the budgets of undertakings, under the Court's case-law, compensation for those costs confers an economic advantage.[81] Thus, compensation for the costs of employing persons with social difficulties may also constitute such an advantage.

120. It appears from the foregoing that, owing to the calculation formula used to determine the level of financial support and the consideration for that purpose of factors other than the costs of the waste recycling and treatment operations in question, the financial support paid to sorting operators by Eco TLC under the scheme at issue in the main proceedings may be regarded, subject to checks to be carried out by the national court, as conferring an economic advantage on those operators which they would not have if they were in a pure market situation.[82]

76 Judgments of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 66).

77 See, to that effect, inter alia, judgments of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 40), and of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (C-148/19 P, EU:C:2020:354, paragraph 46 and the case-law cited).

78 To the same effect, see the submissions of the rapporteur public, Mr Louis Dutheillet de Lamothe, cited in footnote 40 of this Opinion.

79 Chapter VI, Section C.

80 See points 20 and 21 of this Opinion.

81 Judgment of 12 December 2002, *Belgium* v *Commission* (C-5/01, EU:C:2002:754, paragraphs 38 and 39).

82 See, in that regard, judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank* (C-579/16 P, EU:C:2018:159, paragraph 45). To the same effect, see the submissions of the rapporteur public, Mr Louis Dutheillet de Lamothe, cited in footnote 40 of this Opinion.

E. The selectivity of the economic advantage conferred on sorting bodies under contract

121. As regards the condition of selectivity, it should be borne in mind that, in order to fall within the ambit of Article 107(1) TFEU, the measure at issue must confer the advantage selectively on certain undertakings or categories of undertakings or on certain economic sectors by placing them in a more favourable situation than that of others. [83]

122. In order to assess the condition regarding the selectivity of the advantage, it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as 'discriminatory'. [84] The concept of 'State aid' does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective, where that differentiation arises from the nature or the overall structure of the system of which they form part. [85]

123. The examination of whether a measure is selective is thus, in essence, coextensive with the examination of whether it applies to that set of economic operators in a non-discriminatory manner. The concept of selectivity is thus linked to that of discrimination. [86]

124. While it is true, as the Commission submits in its observations, that the measure is restricted to sorting operators in the sector of the products at issue, the Court has nevertheless made clear that a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective, as follows from the reasoning set out in the two preceding points, only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation. [87]

125. In the present case, in order to determine whether there is any selectivity in the advantage granted to sorting operators under contract, it must be assessed whether the measure at issue introduces distinctions between operators who are, in the light of the objective pursued by the legislation in question, in a comparable factual and legal situation. [88]

83 See, to that effect, judgments of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 59), and of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraph 48).

84 Judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 84). It is common knowledge that that case-law stems from the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598; see, specifically, paragraph 41), concerning the reduction in energy tax granted in Austria to undertakings which mainly operated in the manufacturing sector. It was subsequently confirmed in tax matters in two judgments delivered by the Court in Grand Chamber, namely the judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 86), and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 22). However, the Court has expressly explained that this method is not limited solely to the examination of tax measures (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 55)). Thus, the Courts of the European Union have used that method of analysis in matters other than tax; in addition to the previous judgment cited, see, for example, judgments of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, EU:C:2011:533, paragraph 36), and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 55 et seq.).

85 Judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 41 and the case-law cited).

86 See judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 53).

87 See judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 58).

88 See, to that effect, judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 56).

126. First of all, as regards the national extended producer responsibility scheme for the management of waste from the products at issue, it should be noted that the primary objective of that scheme is to sustain and develop a system for managing the waste from those products which promotes, in particular and in accordance with the hierarchy of waste treatment methods set out in Directive 2008/98,[89] material recovery, that is, re-use and recycling.[90]

127. On that point, it should be noted, as is evident from points 4 and 7 to 9 of this Opinion, first, that EU law itself provides for the introduction of extended producer responsibility schemes and, second, that the primary objective of the scheme at issue is coextensive with the objective of EU waste legislation and, more generally, the European Union's primary objective of promoting sustainable growth. In that connection, in its observations the French Government stated that the French legislature introduced the legislative and regulatory framework at issue in order to meet the objectives and obligations laid down by Directive 2008/98.

128. Next, although the scheme in question does not appear to formally derogate from a given legal reference framework, its effect is nonetheless to exclude sorting operators which do not satisfy the conditions determined under that scheme from the payment of financial support.[91] In that regard, it must be borne in mind that Article 107(1) TFEU defines State interventions on the basis of their effects, independently of the techniques used.[92]

129. It cannot, therefore, be ruled out a priori that such a scheme enables an advantage to be given, in practice, to 'certain undertakings or the production of certain goods' for the purposes of Article 107(1) TFEU by granting them financial support.

130. In that regard, however, the documents before the Court show that, subject to checks to be carried out by the referring court, the possibility of entering into a contract with the eco-body and hence receiving the financial support provided for under the scheme in question appears to be open to all operators in the sector throughout the European Union.

131. It would therefore seem that, in principle, the scheme in question does not give rise to any discrimination between operators in the sector as regards access to the financial support provided for under the scheme in question.

132. However, in order for a sorting operator to enter into a contract with the eco-body and thus be eligible for financial support, the terms of reference stipulate that it must comply with two types of condition.[93] First, it must comply with national legislation on environmental protection and the safety of transfer, consolidation, sorting and treatment facilities or with equivalent legislation in other countries of the European Union. Secondly, its sorting centres must comply, each year, with performance and traceability criteria, the purpose of which is to promote, as a priority, material recovery (re-use, recycling and other types of material recovery).

133. More specifically, according to the terms of reference, first, at least 90% of sorted waste from the products at issue must undergo material recovery (re-use, recycling and other types of material recovery); secondly, at least 20% of the sorted waste must be recycled (pulled into fibres and/or turned into industrial cleaning cloths) in order to contribute to the development of that market alongside re-use; and, third, a maximum of 5% of waste may be disposed of.

89 See recital 31 and Article 4 of Directive 2008/98.

90 The scheme also seeks to optimise waste management from an environmental, economic and social perspective. In that regard, see the preamble to the 2014 Order.

91 The Court used a similar analytical method, albeit in respect of a national measure conferring a tax advantage, in the judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, specifically, paragraph 46 et seq.).

92 Judgments of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 47), and of 7 November 2019, *UNESA and Others* (C-105/18 to C-113/18, EU:C:2019:935, paragraph 64 and the case-law cited).

93 See Chapter VI, Section B.

134. On that point, it cannot be disputed that such conditions – which are objective in so far as they aim to significantly promote material recovery, specifically recycling, and to discourage the disposal without recovery of waste from the products at issue – are consistent with the objectives pursued by the EU legislation on waste and extended producer responsibility referred to in points 122 and 123 above, which is implemented by the French legislation establishing the scheme in question. [94]

135. In those circumstances, such criteria differentiate between operators that are not in a comparable situation in the light of the objectives pursued by the legislation that imposed those criteria. [95]

136. Sorting operators whose technical capacity or organisational structure does not allow them to meet such conditions are in a factual situation which is sufficiently different to substantiate a finding that their situation is not comparable, in the light of those objectives, to that of operators who, by contrast, are able to meet them. Thus, in being unable to access the financial support provided for under the scheme at issue in the main proceedings, those operators are not subject to different treatment that can, in essence, be classified as 'discriminatory'.

137. It follows that the scheme at issue does not confer a selective economic advantage on sorting operators which, since they are able to comply with the objective criteria laid down in the terms of reference, may enter into a contract with the eco-body and thus have access to financial support.

138. In that regard, I must also point out, however, that, as has been observed in point 98 of this Opinion, it appears that, under the scheme at issue, the eco-body itself may establish additional criteria which sorting operators must satisfy in order to enter into a contract with it. In that context, it is relevant to note that the terms of reference state that the eco-body must set out detailed arrangements for the traceability of waste prior to sorting in its application for authorisation and the standard contract which it concludes with sorting operators.

139. Since the Court does not have sufficient information regarding those factors, it will be for the referring court to assess whether those conditions give rise to different treatment that can, in essence, in the light of the objective pursued by the scheme at issue, be classified as 'discriminatory'.

F. The effect of the measure on competition and trade between Member States

140. As regards the other two conditions referred to in point 41 above, according to the Court's case-law, for the purpose of categorising a national measure as 'State aid', it is necessary, not to establish that the aid at issue has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. [96]

141. However, the harm to trade between the Member States cannot be purely hypothetical or presumed. Thus, it is necessary to determine the reason why the measure concerned is liable by its foreseeable effects to have an impact on trade between the Member States. [97]

94 See, to that effect, judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, specifically, paragraph 53). In that regard, see footnote 91 of this Opinion.

95 See, to that effect, judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280, paragraph 55). In that regard, see footnote 91 of this Opinion.

96 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 78 and the case-law cited). See also judgment of 19 December 2019, *Arriva Italia and Others* (C-385/18, EU:C:2019:1121, paragraph 42).

97 Judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 90 and the case-law cited).

142. On that point, as regards the condition that competition must be distorted, it should be noted that, if the scheme at issue confers an advantage on sorting operators under contract which they would not have had under normal market conditions and which is liable to overcompensate the costs of the waste recycling and treatment operations in question, that advantage is liable to strengthen the competitive position of those operators in relation to other competing undertakings. Thus, there does not appear to be any doubt that that condition should be regarded as met.

143. As regards the condition that trade between Member States must be affected, it should be noted, first, that the financial support relates only to waste of French origin. Thus, under the scheme, sorting operators under contract are encouraged to deal with French goods alone, to the detriment of trade within the European Union. Second, if contracts with Eco TLC are a prerequisite for entering the French sorting and recycling market for waste from the products at issue, that could make it more difficult for operators from other Member States to enter that market. In those circumstances, I consider that the scheme at issue may be regarded as liable by its foreseeable effects to have an impact on trade between Member States.

IV. Final remarks

144. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Conseil d'État (Council of State, France) as follows:

(1) Article 107 TFEU must be interpreted as meaning that an extended producer responsibility scheme for waste management, such as that provided for in the national legislation at issue, whereby a private, non-profit eco-body, authorised by the public authorities, receives contributions from undertakings placing a particular category of product on the market which enter into a contract with it to that effect, in consideration for the service of organising, on their behalf, the treatment of waste from those products, and redistributes to the operators responsible for the sorting and recovery of that waste subsidies, the amount of which is set out in the authorisation, in the light of environmental and social objectives, must not, in principle, be regarded as State aid within the meaning of that provision.

(2) It is, however, for the referring court, which has at its disposal the data and other factual information necessary to carry out a complete assessment as to the possible classification of the scheme in question as 'State aid', to ascertain, first, whether the contributions to the eco-body made by those undertakings are de facto compulsory; secondly, whether, although managed by the eco-body, the funds in question must, by reason of the eco-body's lack of autonomy over those funds and the extent of the public authorities' control over that eco-body, be regarded as nonetheless constantly remaining under public control and available to the competent national authorities; thirdly, whether there is a sufficiently direct link between the advantage in question and a reduction, at the very least potential, in the State budget; and, fourthly, whether the additional criteria that the eco-body may itself establish and that sorting operators must meet in order to enter into a contract with it give rise to different treatment that can, in essence, in the light of the objective pursued by the scheme in question, be classified as 'discriminatory'.