

## **Support Schemes in Renewable Energy: Commentary to Judgment of the Court (Fifth Chamber) of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki***

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**ABSTRACT:** In its September 13<sup>th</sup> 2017 decision,<sup>1</sup> the Court of Justice of the European Union (CJEU) decided on a request for a preliminary ruling by the Supreme Court of Poland (Sąd Najwyższy) 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 electricity produced by cogeneration. The judgment of the Court of Justice follows many decisions of the European Commission and judgments of the EU courts assessing the involvement of State resources in support schemes in energy, particularly with the aim of switching towards more environmentally friendly sources. This case reaffirms that support schemes may, in certain circumstances, fall outside the scope of the EU State aid rules.

**KEYWORDS:** State resources, renewable energy, support schemes

### ***Introduction***

The 2030 Framework for Climate and Energy<sup>2</sup> defines EU-wide targets for achieving a more competitive, secure and sustainable energy system and to meet Europe's long-term objective of a low carbon economy. A target to

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<sup>1</sup> Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671.

<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A policy framework for climate and energy in the period from 2020 to 2030, COM/2014/015 final.

achieve by 2030 is a 27% share of renewable energy in Europe's final energy consumption.<sup>3</sup> One of the main mechanisms to help attain national and European renewables objectives is support schemes for renewable energy sources. Since the market itself, due to market and regulatory failures,<sup>4</sup> does not provide the optimal level of renewables, public intervention is necessary.<sup>5</sup> In regulated sectors and especially in the energy sector, there is a long historical tradition of public intervention. As the objectives in the sectors change, the impact of regulation on the market's functioning and on how investors participate in the market is more evident. To support the production and supply of electricity from renewable sources, EU level and national level measures can be implemented. EU level measures to promote renewable energy might include for example requiring Member States to provide priority access to electricity networks regarding electricity produced from renewable sources,<sup>6</sup> but Member States are encouraged to plan and enable their own schemes for electricity generation from renewable sources.<sup>7</sup> As determined by the Renewable Energy Directive, "support scheme" means "any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or

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<sup>3</sup> "EU Member States (MS) have already put energy and climate policies in place to reach their individual RES targets for 2020 and are now in the process of setting additional national objectives for the 2030 perspective", Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, 16-62.

<sup>4</sup> Such as low levels of competition and unfair competition with other fuels, in particular subsidies for fossil fuels and nuclear energy, the incomplete internalization of external costs rigid electricity system design inhibit the growth of renewable energy.

<sup>5</sup> In order to address market distortions that may result from public support granted to renewable energy sources, the European Commission has issued new Guidelines on State aid for environmental protection and energy 2014-2020, which define common rules for a market-based support for renewable energy.

<sup>6</sup> Penttinen, Sirja-Leena, and Kim Talus, "Development of the sustainability aspects of EU energy policy", *SSRN Scholarly Paper*. Rochester, NY: Social Science Research Network, July 6, 2014. <https://papers.ssrn.com/abstract=2472863>.

<sup>7</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, 16 (hereinafter the Renewable Energy Directive).

reductions, tax refunds, renewable energy obligations, support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments”.<sup>8</sup> These schemes are a means for Member States to reach their national targets and may be the result as well of cooperation with other Member States or third countries.

Since the intervention of the State is seen as necessary, States need to be mindful of the fact that undertakings may gain an advantage over competitors, which can trigger concerns regarding the compatibility with EU State aid rules. Under Article 107 of the Treaty on the Functioning of the European Union (TFEU), all State aid measures are prohibited unless explicitly authorized following prior notification by the Member State concerned. Non-notified aid is deemed unlawful and as such must be recovered from the beneficiaries by the Member State. However, State aid may be compatible with the internal market under Articles 107(2) and (3) of the Treaty under certain circumstances.

As public intervention can take different forms, the case at issue concerns a support scheme for electricity produced by cogeneration. Cogeneration (Combined Heat and Power or CHP) is the simultaneous production of electricity and heat, both of which are used.<sup>9</sup> Producing electricity by cogeneration is therefore “a means to secure energy savings ranging between 15-40% when compared to the supply of electricity and heat from conventional power stations and boilers”.<sup>10</sup>

### ***Facts of the case***

The dispute in the main proceedings concerns a support scheme for electricity produced by cogeneration provided for by the Polish Law on Energy.<sup>11</sup> Companies selling electricity to end users were required that, for the period ranging from 1 January 2003 to 1 July 2007, a quota of their total sales of electricity to end users be produced by cogeneration. The quota

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<sup>8</sup> Article 2(k) of the Renewable Energy Directive.

<sup>9</sup> Definition from [www.cogeneurope.eu](http://www.cogeneurope.eu), accessed 28 January 2018.

<sup>10</sup> Definition from [www.cogeneurope.eu](http://www.cogeneurope.eu), accessed 28 January 2018.

<sup>11</sup> Article 9a (8) of the Law on energy (Ustawa Prawo Energetyczne in Polish) of 10 April 1997 states: “An electricity undertaking engaged in the production of or trading in electricity and the sale of that electricity to end users connected to the network within the Republic of Poland shall be required, to the extent described in paragraph 10, to purchase [electricity produced by cogeneration] offered to it from energy sources connected to the network and situated in the Republic of Poland”.

could be achieved by production of CHP within the undertaking itself or the purchase of such electricity by third party producers.

The company involved in the proceedings, ENEA, a Polish State-owned company, did not comply with the quota set for the year 2006,<sup>12</sup> which resulted on a fine imposed by the President of the Office for the Regulation of Energy<sup>13</sup> on 27 November 2008. ENEA appealed the decision of the administrative body in first instance, where the case was dismissed, and on appeal where the financial penalty was reduced but the claim dismissed as to the other claims. Finally, the case was appealed before the Supreme Court of Poland, the referring court.

Before the Supreme Court, the company raised for the first time the claim that the imposition constituted State aid and as such must have been communicated to the European Commission. ENEA claimed that the measure, since it had not been notified, was unlawful, consequentially the financial penalty as well. The referring court, in its assessment, found that the measure met the conditions of a selective advantage, resulting in a possible distortion of competition or effect trade between Member States. While the Court took the view that the obligation was attributable to the State, it was not certain whether there was intervention through State resources.

As the referring court saw it necessary to seek from the Court of Justice an interpretation of its case law, it referred three preliminary questions to the Court of Justice:

- “1. Must Article 107 TFEU be interpreted as meaning that the obligation to purchase [electricity produced by cogeneration] 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

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<sup>12</sup> For the year 2006 the minimum consisted of 15%, as set by the Regulation adopted by the Minister of Economy and Labour on 9 December 2004.

<sup>13</sup> Prezes Urzędu Regulacji Energetyki.

national law means that a financial penalty may not be imposed on an undertaking that has failed to perform that obligation?”<sup>14</sup>

### **Judgment**

The Court started its decision-making by tackling the first question, as the second and third questions were asked on the condition that the answer to the first question be affirmative.

In order for a measure to be classified as State aid, as provided by Article 107(1) TFEU, four conditions<sup>15</sup> need to be met: (i) intervention by the State or through State resources, which (ii) can affect trade between Member States and (iii) confer a selective advantage on the beneficiary, which (iv) could distort or threaten to distort competition. Since the referring Court had formulated the view that three of these conditions had been met, the Court found it necessary to reformulate the first question as “whether Article 107(1) TFEU must be interpreted as meaning that a national measure [...] placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration constitutes intervention by the State or through State resources”<sup>16</sup>.

In order to assess whether the advantage had been given “by a Member State or through State resources”, the Court reiterated the importance of determining the involvement of the public authorities in the adoption of the measure at issue, stating that for it to be possible to classify the measure as State aid, first, it must be attributable to the State and be granted directly or indirectly through State resources.<sup>17</sup>

The Court took the view that the advantage granted was attributable to the Member State as the obligation was provided for under the Law on Energy and, therefore, introduced through a legal provision. Concerning the interpretation of the intervention of the State, the Court started by reiterating its jurisprudence that the aid may be granted directly by the State,

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<sup>14</sup> Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671.

<sup>15</sup> The Court has referred to these conditions in previously established judgments, such as in Judgment of 19 December 2013, *Association Vent de Colère and Others*, C-262/12, EU:C:2013:851, paragraph 15.

<sup>16</sup> Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671, paragraph 9.

<sup>17</sup> As previously established in the judgments of 16 May 2002, *France v. Commission*, C-482/99, EU:C:2002:294, paragraph 24, and of 19 December 2013, *Association Vent de Colère and Others*, C-262/12, EU:C:2013:851, paragraph 16.

but also by State-designated or established private bodies whose purpose is to administer the aid.<sup>18</sup> This interpretation of Article 107(1) TFEU makes it possible for different financial means by which public authorities may support companies, irrespective of whether they are permanent assets of the public sector, to be considered State resources. However, it is necessary to distinguish between a measure under public control and available to the competent national authorities at all times, and one that does not bind the company to anything but to purchase using their own financial resources, making no use of State resources.

The measure at issue in the main proceedings requires from undertakings 15% of the annual electricity sold to final users to come from electricity produced by cogeneration. The President of the URE has the right to impose a financial liability to the companies that do not comply with their obligation. Apart from setting the above-mentioned obligation, the Polish State intervened on the market by determining a maximum price for the sale of electricity to final users in order for the undertakings not to pass on to end users the extra cost imposed by the purchase obligation. As a result of the measure imposed on the undertakings, the electricity suppliers would at time be obliged to purchase electricity produced by cogeneration at a higher price than the one paid by the end users. The price would not be subject to a lower threshold and the purchase price would be decided by the parties concerned in the transaction. According to the settled case law in *Essent Network Noord and Others*<sup>19</sup> will be regarded as aid “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”.<sup>20</sup>

The added costs from purchasing electricity at a higher price intending to comply with the quota set by the purchase obligation are neither to be passed on to end users nor financed “by a compulsory contribution imposed by the State or by a full offset mechanism”.<sup>21</sup> The Court also reiter-

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<sup>18</sup> Judgment of the Court of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671, paragraph 23.

<sup>19</sup> Judgment of 17 July 2008, *Essent Network Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79.

<sup>20</sup> Judgment of 17 July 2008, *Essent Network Noord and Others*, C-206/06, EU:C:2008:413, paragraph 79.

<sup>21</sup> Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671, paragraph 30.

ated also the views expressed by the Advocate General in his Opinion that the measure does not appoint undertakings to manage a State resource. ENEA was bound to comply with the obligation under the Law on Energy and was utilizing its financial resources to fulfil that obligation.

ENEA and the European Commission also raised the claim that the purchase obligation was imposed mostly on public undertakings and as such the obligation could be classified as through State resources. In their claim they further stated that “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”.<sup>22</sup> On this claim the Court reiterated<sup>23</sup> its already established view that the resources of public undertakings may be classified as State resources in those cases where the State is able to influence or direct the use of said resources in order to finance advantages to the benefit of other undertakings.<sup>24</sup> Despite ENEA’s capital being State-owned, the company acted no different than any other entity of private capital, as shown by the fact that it rejected offers for sale due to the excessive price and that it had signed contracts which would have helped it achieve the set quota. Furthermore, the obligation imposed by the Law was imposed to all electricity suppliers, whether State owned or owned by private entities.

In conclusion, despite the fact that the measure is attributable to the Member State concerned, it does not derive therefrom that the Member State exercises an overriding influence over an undertaking in which it is the majority shareholder.<sup>25</sup> The Court did not find elements in the documents submitted, nor during the hearings, to sustain that the State had exercised a dominant influence as a majority shareholder in an undertaking.

Accordingly, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration does not constitute intervention by the State or through State resources.

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<sup>22</sup> Advocate General’s Opinion, paragraph 90.

<sup>23</sup> Judgment of 16 May 2002, *France v. Commission*, C-482/99, EU:C:2002:294, paragraph 38.

<sup>24</sup> Judgment of 13 September 2017, *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki*, C-329/15, EU:C:2017:671, paragraph 31.

<sup>25</sup> The Court has already interpreted the law and expressed its views on the matter in Judgment of 16 May 2002, *France v. Commission*, C-482/99, EU:C:2002:294.

Concerning the second and third, since the Court answers negatively to the first question, it cannot answer the other two questions.

### **Conclusion**

For the first time ever since *PreussenElektra* and after trial and error, it seems that a Member State has managed to design a State aid-compliant legal measure for funding and supporting the change towards more environmentally friendly sources and mixes. Furthermore, it seems that this Decision might be signaling a slight shift towards a more committed involvement of the State, such as a transfer of State resources and the link between treasury and the advantage. Despite this being a contribution to the interpretation of State resources, the decision differing from the Opinion of the Advocate General is not as detailed in its interpretation and as such it is valuable for a complete understanding of the case to take into consideration the analysis of the Advocate General.<sup>26</sup>

Among the conditions for a measure to be classified as State aid, Art. 107 TFEU provides that the measure must have been “granted by a Member State or through State resources”. The wording of the article, “or” (alternative), may make it appear as if not implying a cumulative requirement for a measure to qualify as State aid. However, in its established case law the Court of Justice has clarified that in addition to the involvement of State resources, the measure must be attributable, or “imputable”, to the State. The reasoning of both the Court and the Advocate General in this case seems to point to a narrower interpretation of the two layered State resources criterion. He stresses the need for an actual transfer of State resources and control to be exerted, rather than only having majority shareholding.<sup>27</sup> Furthermore, majority shareholding, in his view, is not sufficient to conclude that there has been involvement of State resources. The interpretation of State resources has been broad in order to leave little room for a finding of no State resources and therefore no aid. The decision seems to point that maybe this cannot be applied for the cases where the State has provided for a framework but not for the mechanisms, especially in cases of transitioning towards environmentally friendly energy sources.

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<sup>26</sup> Opinion of Advocate General Saugmandsgaard ØE, Case C-329/15, *ENEA SA w Poznaniu v. Prezes Urzędu Regulacji Energetyki*, EU:C:2017:233.

<sup>27</sup> In the *Stardust Marine* case, which will be discussed further below, the Court of Justice had previously ruled that “for advantages to be capable of being categorized as State aid, they must, first, be granted directly or indirectly through State resources, and, second, be imputable to the State”.



The parties have claimed that the circumstances of the case under consideration are comparable to those which gave rise to the Court's pronouncements in *Essent Netwerk*, *Association Vent de Colère* and *PreussenElektra*. The AG drew a comparison between the case in the main proceedings with *PreussenElektra*,<sup>28</sup> in which the obligation imposed on private electricity-supply undertakings to buy electricity from renewable energy sources at minimum fixed prices did not, in the Court's opinion, involve a direct or indirect transfer of State resources to the undertakings producing that electricity.

*PreussenElektra AG* (*PreussenElektra*), an undertaking operating conventional fossil fuel and nuclear power plants in Germany, was a majority shareholder and almost exclusive supplier for *Schleswig AG* (*Schleswig*), a regional electricity supplier. *Schleswig* was required by German legislation to purchase electricity from renewable energy sources produced within its supply area at a fixed minimum price.<sup>29</sup> The additional costs resulting from the legal obligation were regulated by a compensation mechanism. The case came to the Court as a result of the request for preliminary ruling by the Regional Court asking for an interpretation of Article 107 and whether the Member State legislation constituted State aid. The Court took the view that the purchase obligation did not involve any direct or indirect transfer of State resources, which is a necessary element for the measure to be considered State aid under EU law.<sup>30</sup> Furthermore, the financial burden the undertakings were subject to as a result of the purchase obligation was viewed as a characteristic of feed-in tariffs and "does not constitute an advantage for the producers of electricity at the expense of the State".<sup>31</sup> The support scheme was established through a legal provision, but financed by private undertakings.

In relation to the Court finding whether the measure could be classified as State aid due to the involvement of State resources, *PreussenElektra* and *Doux Élevage* are particular, as State involvement had been very limited. The *Doux Élevage* case raised the question whether obligatory contributions to an inter-trade organization could be classified as State resources.<sup>32</sup> The Court of Justice held that they did not involve any direct or indirect

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<sup>28</sup> Judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraphs 17 to 22 and 56.

<sup>29</sup> Judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraphs 17-19.

<sup>30</sup> Judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 59.

<sup>31</sup> Judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 62.

<sup>32</sup> Judgment of 30 May 2013, *Doux Élevage SNC*, C677/11, EU:C:2013:348.

transfer of State resources since the sums deriving from the obligatory contributions did not go through the State budget or through another public body and the State did not incur any losses or gains from exercising any control on the contributions.

ENEA and the Commission presented the argument that due to the majority participation of the Polish State in ENEA and several other electricity providers, the reasoning in *PreussenElektra* did not apply in this case. To support that argument the parties related to the findings of the court in the *Stardust Marine* judgment.<sup>33</sup> In the *Stardust Marine* case, the Court developed the criterion of “having been involved”.<sup>34</sup> *Stardust Marine*, a French company operating in the leisure-boat market and financed through loans and guarantees by SBT-Batif, incurred financial difficulties in 1994.<sup>35</sup> By conversion of debt into capital, the undertaking eventually became under control of the *Crédit Lyonnais* group, which was principally owned and supported by the French State. The case came to the Court of Justice as the French government appealed a Commission decision which assessed the capital increases injected into *Stardust Marine* as State aid. Regarding imputability of the measure to the State, the most important contribution of this case is that the Court of Justice held that the exercise of the control and dominant influence into the operations of the undertaking cannot be presumed by the fact that the State might hold the shares necessary to exercise it. The control of the resources by the State and the imputability of the measure to the State are two necessary criteria to establish the concept of transfer of State resources.<sup>36</sup>

The Court explicitly said in *Stardust Marine* that “such an interpretation of the condition that, for a measure to be capable of being classified as State aid within the meaning of Article 87(1) EC, it must be imputable to the State, which infers such imputability from the mere fact that that measure was taken by a public undertaking, cannot be accepted. Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act

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

<sup>34</sup> Judgment of 16 May 2002, *France v. Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraph 52.

<sup>35</sup> The situation was a result of fraud, poor commercial strategy, inappropriate management and several unexpected losses.

<sup>36</sup> Judgment of 16 May 2002, *France v. Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraph 54.

with more or less independence, according to the degree of autonomy left to it by the State. [...] Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State”.<sup>37</sup> Despite the fact that both in Stardust Marine and in the present case the State was the majority shareholder in the undertaking, in Stardust Marine the State had used the undertaking as its “financial arm”.<sup>38</sup>

The findings in Stardust Marine are important to support the view that majority shareholding does not imply imputability, and also the difficulty to prove “on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty. Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities”.<sup>39</sup>

The Advocate General in ENEA also distinguished among the circumstances of Essent and Vent de Colère with the circumstances that gave rise to the case in the main proceedings. He clarified that in the case, in the main proceedings the intervention of the State is limited and there is no financing mechanism used for the collection of compulsory contributions.<sup>40</sup> In Essent, one of the main drivers for the Court’s decision was that the funds were raised through a levy that posed a financial burden for the users and had been established by a decision of the Dutch government. Furthermore distributors operating under instructions by the

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<sup>37</sup> Judgment of 16 May 2002, *France v. Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraphs 51-52.

<sup>38</sup> “It would in my view go too far to classify autonomous decisions of public undertakings and other entities distinct from public authorities automatically as State measures”. Opinion of Advocate General Jacobs, 13 December 2001, Case C-482/99, EU:C:2001:685, paragraph 55.

<sup>39</sup> Judgment of 16 May 2002, *France v. Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraphs 53-54.

<sup>40</sup> Opinion of Advocate General Saugmandsgaard ØE, *ENEA SA w Poznaniu v. Prezes Urzędu Regulacji Energetyki*, Case C-329/15, EU:C:2017:233, paragraph 107.

Dutch government were tasked with managing the funds, which meant that the State had exercised control over the latter. The circumstances in *Vent de Colère* differ, as in *ENEA* the maximum price is fixed with the intent to limit the ability for the providers to pass on the extra cost, instead of it being offset.<sup>41</sup>

Another element that the Court did not tackle in its decision was the intention of the measure. The lack of the minimum price is seen as weakening the selective advantage, but at the same time the intention of the measure was to increase the demand for a certain product that would not have been achieved if left under normal market conditions. This intervention resulted in an increase of both the sales and the sale price of the product, as well as in the strengthening of the position of the producers. The Advocate General, in his Opinion, deduced that “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”.<sup>42</sup>

The Court of Justice decided that the advantage granted to producers of electricity by cogeneration was not granted directly or indirectly through State resources. An important contribution of the decision in this case is that, in its assessment, the Court expressed clearly that there is a difference between the role of the State as a legislator and the role of the State as a shareholder. Ever since *PreussenElektra*, Member States have been looking for the holy grail of mechanisms design to help them pass the State aid test. It remains to be seen if this development will mean that the Polish legislator has found the loophole that has been searched for so long.

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<sup>41</sup> Paragraph 111 of the Advocate General’s Opinion.

<sup>42</sup> Paragraph 61 of the Advocate General’s Opinion.

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