JUDGMENT OF THE COURT

13 March 2001 *

In Case C-379/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landgericht Kiel (Germany) for a preliminary ruling in the proceedings pending before that court between

PreussenElektra AG

and

Schleswag AG,

in the presence of

Windpark Reußenköge III GmbH

and

Land Schleswig-Holstein,

on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón and R. Schintgen (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— PreussenElektra AG, by D. Sellner, Rechtsanwalt,

— Schleswag AG, by M. Nebendahl, Rechtsanwalt,

— Windpark Reußenköge III GmbH and Land Schleswig-Holstein, by W. Ewer, Rechtsanwalt,

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the Finnish Government, by H. Rotkirch and T. Pynnä, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and P.F. Nemitz, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of PreussenElektra AG, Schleswag AG, Windpark Reußenköge III GmbH, Land Schleswig-Holstein, the German Government and the Commission at the hearing on 27 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2000,

gives the following

Judgment

1 By order of 13 October 1998, received at the Court on 23 October 1998, the Landgericht Kiel (Regional Court, Kiel) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC).

2 The questions were raised in proceedings between PreussenElektra AG ('PreussenElektra') and Schleswag AG ('Schleswag') concerning the repayment of sums paid by the former to the latter pursuant to Paragraph 4(1) of the Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Law on feeding electricity from renewable energy sources into the public grid) of 7 December 1990 (BGBl. 1990 I, p. 2633; 'the Stromeinspeisungsgesetz'), as amended by Paragraph 3(2) of the Gesetz zur Neuregelung des Energiewirtschaftsrechts (New law for the energy industry) of 24 April 1998 (BGBl. 1998 I, p. 730; 'the 1998 Law').

Legislative background

3 The Stromeinspeisungsgesetz came into force on 1 January 1991. According to Paragraph 1, headed 'Scope of Application', it governed, in its initial version, the purchase by public electricity supply undertakings of electricity generated exclusively from hydraulic energy, wind energy, solar energy, gas from waste dumps and sewage treatment plants, or products or residues and biological waste from agriculture and forestry work, as well as the compensation payable for such electricity.

4 It is common ground that the term 'public electricity supply undertaking' covers both private undertakings and undertakings belonging partially or wholly to the public sector.

5 The Gesetz zur Sicherung des Einsatzes von Steinkohle in der Verstromung und zur Änderung des Atomgesetzes und des Stromeinspeisungsgesetzes (Law ensuring the supply of coal to power stations and amending the Law on Nuclear Energy and the Stromeinspeisungsgesetz) of 19 July 1994 (BGBl. 1994 I, p. 1618; 'the 1994 Law') extended the scope of the Stromeinspeisungsgesetz, as defined in Paragraph 1 thereof, to electricity from the wood industry. The 1998 Law replaced the reference to products or residues and biological waste from agriculture and forestry and to the wood industry by the expression 'biomass' and stated that the Stromeinspeisungsgesetz was to apply to electricity produced from the listed sources of renewable energy 'within the area of validity of this Law'.

6 Paragraph 2 of the Stromeinspeisungsgesetz, headed 'Obligation to Purchase', provides that electricity supply undertakings are obliged to purchase the electricity produced in their area of supply from renewable energy sources and

to pay for it in accordance with the provisions of Paragraph 3. As amended by the Law of 1998, which added a second and a third sentence, that article is worded as follows:

'Electricity supply undertakings which operate a general supply network shall be obliged to purchase the electricity produced in their area of supply from renewable sources of energy and to pay compensation for those inputs of electricity in accordance with Paragraph 3. For production installations which are not situated within the area of supply of a grid operator, that obligation shall apply to the undertaking whose network suitable for the feeding in of the electricity is closest to the installation. For accounting purposes, the extra costs resulting from the application of Paragraphs 2 and 4 may be imputed to distribution or transmission and taken into account when determining compensation for transit.'

7 Paragraph 3 of the Stromeinspeisungsgesetz, as amended by the 1998 Law, headed 'Amount of the compensation', provides:

'1. In respect of electricity produced from hydraulic energy, from gas from waste dumps and sewage treatment plants and from biomass, the compensation shall amount to at least 80% of the average sales price per kilowatt hour of electricity supplied to all final customers by electricity supply undertakings. In the case of hydro-electric power stations or installations for the treatment of gas arising from waste dumps or sewage treatment plants the capacity of which exceeds 500 kilowatts, that rule shall apply only to that part of the total amount of electricity fed in during a given accounting year which corresponds to 500 divided by the capacity of the installation in kilowatts; the capacity is defined by the annual average of the maximum effective capacity measured for each month. The price of the surplus electricity shall amount to at least 65% of the average sales price within the meaning of the first sentence.

2. In respect of electricity produced from solar or wind energy, the compensation shall amount to at least 90% of the average sales price within the meaning of the first sentence of subparagraph 1.

3. The average sales price to be taken into account for the purposes of subparagraphs 1 and 2 shall be the value published each year by the Federal Statistics Office for the last calendar year but one, expressed net of turnover tax in pfennigs per kilowatt hour. In calculating the compensation pursuant to subparagraphs 1 and 2, figures are to be rounded to two decimal places.'

8 Whereas, following the amendment made to the Stromeinspeisungsgesetz by the 1994 Law, the compensation fixed for the electricity referred to in Paragraph 3(1) rose from 75% to 80% of the average sales price per kilowatt hour of electricity supplied to all final customers, that fixed for electricity from solar and wind energy, referred to in Paragraph 3(2), has not varied since the entry into force of the Stromeinspeisungsgesetz.

9 In its initial version, Paragraph 4 of the Stromeinspeisungsgesetz, headed 'Hardship Clause', was worded as follows:

'1. The obligations under Paragraphs 2 and 3 shall not apply where compliance with them would cause undue hardship, or would make it impossible for the electricity supply undertaking to comply with its obligations arising from the Bundestarifordnung Elektrizität of 18 December 1989 (BGBl. 1989 I, p. 2255). In such a case, the obligations are transferred to the upstream electricity supply undertaking.

2. There is undue hardship in particular where the electricity supply undertaking would be obliged to raise its prices to a level significantly higher than those of similar or upstream supply undertakings.'

10 The 1998 Law made several amendments to Paragraph 4 of the Stromeinspeisungsgesetz. First, it added two new subparagraphs, which have become subparagraphs 1 and 4. It also made certain amendments to the former subparagraph 1, which became the new subparagraph 2. The former subparagraph 2, which remained unchanged, became the new subparagraph 3. Thus, as amended by the 1998 Law, Paragraph 4 of the Stromeinspeisungsgesetz is worded as follows:

'1. In so far as the kilowatt hours to be compensated for exceed 5% of the total kilowatt hours supplied by the electricity supply undertaking through its network during a calendar year, the upstream network operator shall be obliged to reimburse the electricity supply undertaking in respect of the supplementary costs resulting from the kilowatt hours exceeding that share. In the case of upstream network operators, the burden constituted by the right to reimbursement within the meaning of the first sentence also forms part of those supplementary costs. If there is no such operator, the obligation laid down in the first sentence of Paragraph 2 ceases, as regards electricity supply undertakings in the circumstances referred to in the first and second sentences, at the beginning of the first calendar year after those circumstances arose, in the case of installations not yet essentially completed at that time. In the case of wind turbines, the relevant time is the installation of the mast and the rotor.

2. The obligations laid down in Paragraphs 2 and 3 shall not exist where, even if the reimbursement clause in subparagraph 1 is applied, compliance with them would cause undue hardship. In such a case, the obligations are transferred to the upstream network operator.

3. There is undue hardship in particular where the electricity supply undertaking would be obliged to raise its prices to a level significantly higher than those of similar or upstream supply undertakings.

4. The Federal Minster for the Economy shall make a report to the Bundestag as to the effects of the hardship clause not later than 1999, and in any event in time for another compensatory provision to be adopted before the consequences referred to in the third sentence of subparagraph 1 arise.'

11 The order for reference and the written observations submitted to the Court show that, by letter of 14 August 1990, the German Government notified to the Commission as a State aid the draft law which, after adoption, became the Stromeinspeisungsgesetz, in accordance with Article 93(3) of the Treaty. By letter of 19 December 1990, the Commission authorised the notified draft on the basis, first, that it was in accordance with the energy policy aims of the European Communities, and secondly that renewable sources of energy constituted only a small part of the energy sector and that the additional revenues and the repercussions on electricity prices were minor. The Commission nevertheless requested the German Government to send it information on the application of the Stromeinspeisungsgesetz, the latter having to be re-examined two years after its entry into force, and emphasised that any amendment or extension of that law should be subject to prior notification.

12 The order for reference and the written observations submitted to the Court also show that, following numerous complaints from electricity supply undertakings, the Commission informed the Federal Minister for the Economy in a letter of 25 October 1996 of its doubts as to whether, in view of the increase in the

production of electricity derived from wind energy, the Stromeinspeisungsgesetz was still compatible with the aid provisions of the Treaty. In that letter, the Commission made several proposals for amendment in relation to the provisions on wind energy and stated that, if the Bundestag were not prepared to amend the Stromeinspeisungsgesetz in that respect, the Commission might find itself obliged to propose appropriate measures to the Federal Republic of Germany within the meaning of Article 93(1) of the Treaty, in order to make the Law compatible with Community rules on aid.

13 It is also apparent from the written observations of Windpark Reußenköge III GmbH ('Windpark') and of Land Schleswig-Holstein, who intervened in the main proceedings, and from those of the Commission, that, at the request of the latter, the German Government informed the Commission of the progress of the work on the draft new law for the energy industry. In a letter of 29 July 1998, after the entry into force of the 1998 Law, the Commission informed the Federal Minister of the Economy that, having regard to current developments at Community level, concerning in particular possible proposals for harmonising the rules on the feeding in of electricity from renewable energy sources, it did not expect to take a formal decision concerning the Stromeinspeisungsgesetz, as amended by the 1998 Law, before the ministerial report on the effects of the hardship clause, provided for in Paragraph 4(4) thereof, was drawn up, even though the German legislature, at the time of the adoption of the 1998 Law, had not taken account of the proposals formulated in its letter of 25 October 1996.

14 Finally, a footnote published with the 1998 Law states that the latter, Paragraph 1 of which is headed 'Gesetz über die Elektrizitäts- und Gasversorgung' (Law on the supply of electricity and gas), transposed into national law Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

15 The third recital in the preamble to that directive confirms that it in no way affects the application of the Treaty, in particular the provisions concerning the internal market and competition, and Article 8(3) and (4) in Chapter IV, 'Transmission system operation', provides as follows:

'3. A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

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

16 In addition, Article 11(3) in Chapter V, 'Distribution system operation', provides:

'A Member state may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.'

The main proceedings and the questions referred

17 PreussenElektra operates more than 20 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network, through which it feeds electricity to regional electricity suppliers, medium-scale local undertakings and industry.

18 Schleswag is a regional electricity supplier which buys electricity to supply to its customers in Schleswig-Holstein almost exclusively from PreussenElektra.

19 PreussenElektra owns 65.3% of Schleswag's shares. The remaining 34.7% are held by various municipal authorities in Schleswig-Holstein.

20 By virtue of Paragraph 2 of the Stromeinspeisungsgesetz, Schleswag is obliged to purchase electricity from renewable sources produced within its area of supply, including wind-generated electricity. The order for reference shows that the proportion of wind-generated electricity in Schleswag's total turnover in electricity sales, which was 0.77% in 1991, has increased continuously to an estimated 15% in 1998. In consequence, the additional costs accruing to Schleswag on account of the obligation to purchase at the minimum price laid down by the Stromeinspeisungsgesetz rose from DEM 5.8 million in 1991 to an estimated DEM 111.5 million in 1998, of which only DEM 38 million remained the responsibility of Schleswag, taking into account the application of the compensation mechanism introduced into Paragraph 4(1) of the Stromeinspeisungsgesetz by the 1998 Law.

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

over the previous year. Schleswag therefore invoiced PreussenElektra, pursuant to Paragraph 4(1) of the Stromeinspeisungsgesetz, as amended by the 1998 law ('the amended Stromeinspeisungsgesetz'), for the additional costs entailed by the purchase of electricity from renewable energy sources, initially claiming from it monthly instalments of DEM 10 million.

22 PreussenElektra transferred the instalment for May 1998, reserving the right to claim the money back at any time. That is what it did by making an application to the Landgericht Kiel for the repayment of DEM 500 000, representing the part of the sum paid to Schleswag in compensation for the additional costs entailed by the latter's purchase of wind-generated electricity. The Landgericht states, in its order for reference, that those additional costs cannot be passed on to Schleswag's customers since the Minister for Energy of Land Schleswig Holstein refused to approve an application by Schleswag to amend its tariffs.

23 Before the Landgericht, PreussenElektra argued that the sum claimed had been paid to Schleswag without a valid legal reason and should be recoverable, since Paragraph 4 of the Stromeinspeisungsgesetz, as amended, on which that payment was based, was contrary to the directly applicable provisions of the Treaty on State aid and could not therefore be applied. The plaintiff argued that prior to the entry into force of the 1998 Law it would have been necessary, in order to amend the scope of the Stromeinspeisungsgesetz and introduce a rule for sharing additional costs, as the 1998 Law did, to have recourse to the procedure laid down by Article 93 of the Treaty; this the Federal Republic of Germany had omitted to do. PreussenElektra therefore requested that Schleswag be ordered to repay to it the sum of DEM 500 000, together with interest at 5% as from 15 July 1998.

24 Schleswag contended that that claim should be dismissed. Whilst recognising that the Stromeinspeisungsgesetz, as amended, contained a modified aid scheme, it maintained that Paragraph 4 was merely a redistribution rule, intended to mitigate the consequences which electricity supply undertakings suffered by reason of Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, and,

taken on its own, was not therefore in the nature of aid within the meaning of Article 92 of the Treaty. In the first place, Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz did not affect the legal relationship between Preussen-Elektra and Schleswag, with the result that the Landgericht could not disapply them in the main proceedings. Secondly, the non-application of Paragraph 4 of the amended Stromeinspeisungsgesetz left intact the obligation of Schleswag to purchase electricity produced from renewable energy sources at fixed minimum prices. The penalty effect of the direct application of the third sentence of Article 93(3) of the Treaty did not, therefore, enable the unlawful aid constituted by Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz to be penalised or prevent the application of Paragraph 4 of the amended Stromeinspeisungsgesetz, so that the payment in question must be regarded as having been made on a sound legal basis.

25 The Landgericht found, first that the Commission had not been informed, in accordance with Article 93(3) of the Treaty, of the amendments made to the Stromeinspeisungsgesetz by the 1998 Law, and considered that the question whether the new version of the latter represented in whole or in part constituted State aid within the meaning of Article 92 of the Treaty remained relevant, even if the German Government and the Commission had already classified the original content of the Stromeinspeisungsgesetz as aid in the context of the notification made in 1990. The Landgericht considered that even if the amendments to the Stromeinspeisungsgesetz by the 1998 Law were to be regarded as modifying the original scheme, the procedure under Article 93(3) of the Treaty did not have to be applied to the modified scheme unless the latter itself constituted a system of aid within the meaning of Article 92 of the Treaty.

26 The Landgericht found, secondly, that the obligation to purchase electricity produced in Germany from renewable energy sources on conditions which could not be obtained on the open market might depress demand for electricity produced in other Member States, which might constitute an obstacle to trade between Member States prohibited by Article 30 of the Treaty.

27 In those circumstances, considering that interpretation of Articles 30, 92 and 93(3) of the Treaty was necessary to enable it to resolve the dispute before it, the Landgericht Kiel decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do the rules on payment and compensation for supplies of electricity, laid down in Paragraph 2 or 3 or 4 or in Paragraphs 2 to 4 of the Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz of 7 December 1990 (BGBl. 1990 I, p. 2633), as amended by Article 3(2) of the Gesetz zur Neuregelung des Energiewirtschaftsrechts of 24 April 1998 (BGBl. 1998 I, p. 730 (734-736)) constitute State aid for the purposes of Article 92 of the EC Treaty?

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

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

2. In the event that the [first] question is answered in the negative in respect of Paragraph 4 of the [amended] Stromeinspeisungsgesetz:

Is Article 93(3) of the EC Treaty to be interpreted as meaning that its restrictive effects apply not only to the benefit itself but also to implementing rules such as Paragraph 4 of the [amended] Stromeinspeisungsgesetz?

3. In the event that the first and second questions are answered in the negative:

Is Article 30 of the EC Treaty to be interpreted as meaning that a quantitative restriction on imports — and/or a measure having equivalent effect as between Member States for the purposes of the aforementioned provision — arises where a provision of national law places undertakings under an obligation to purchase electricity produced from renewable energy sources at minimum prices and requires grid operators to meet the costs entailed for no consideration?'

Admissibility

28 Windpark and Land Schleswig-Holstein ('the interveners in the main proceedings') and the German Government challenge the admissibility of all or part of the reference for a preliminary ruling.

29 First, the interveners in the main proceedings argue that there are a number of omissions or errors of fact in the order for reference.

30 They submit that the referring court was wrong to hold, first, that the Commission had not been informed of the amendments made to the Stromeinspeisungsgesetz by the 1998 Law and, secondly, that electricity supply undertakings could not, for practical and legal reasons, pass on to final consumers the expenses borne by them by way of the compensation referred to in Paragraph 3 of the amended Stromeinspeisungsgesetz.

31 Second, the interveners in the main proceedings and the German Government maintain that the dispute in the main proceedings is not a genuine dispute but a spurious one.

32 The plaintiff and the defendant in the main proceedings agree that the combined provisions of Paragraphs 2 to 4 of the amended Stromeinspeisungsgesetz are contrary to Community law. PreussenElektra nevertheless made the compensatory payment provided for in Paragraph 4 of the amended Stromeinspeisungsgesetz, but immediately demanded partial repayment. Furthermore, PreussenElektra is the main shareholder in Schleswag and therefore has a dominant influence on the decisions and legal positions of the latter.

33 Third, the interveners in the main proceedings and the German Government argue that the questions referred are not relevant for the purposes of resolving the dispute in the main proceedings.

34 As to the questions concerning the interpretation of Articles 92 and 93 of the Treaty, the interveners in the main proceedings point out that, in accordance with the case-law of the Court of Justice (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 9), it is for the internal legal system of every Member State to determine the legal procedure which will ensure that the third sentence of

Article 93(3) of the Treaty has direct effect. The referring court has not indicated whether, and on what conditions, PreussenElektra might be entitled in German law to repayment of the sums it claims, and has therefore not demonstrated the relevance of the questions referred in relation to national law.

35 The interveners in the main proceedings further argue that, according to settled case-law (see, in particular, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraphs 11 and 12), the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only where the preliminary examination procedure provided for in Article 93(3) of the Treaty has not been complied with. However, in the first place the initial version of the Stromeinspeisungsgesetz was notified to the Commission and authorised by it and in the second place the amendments made to it by the 1998 Law did not alter the aid within the meaning of Article 93(3) of the Treaty, which would have required fresh notification. In any event, the exchange of correspondence which took place before and after the adoption of the 1998 Law between the German authorities and the Commission was equivalent to, on the one hand, notification by the German Government of the amendments which that law had made to the Stromeinspeisungsgesetz, and, on the other, implied authorisation by the Commission of those amendments.

36 The German Government takes the view that a reply to the questions concerning Article 92 of the Treaty is not necessary in order to enable the referring court to give judgment because the only decisive question in the main proceedings was whether Schleswag was entitled to a compensatory payment under Paragraph 4 of the amended Stromeinspeisungsgesetz, a provision which, however, governed merely the distribution of the costs resulting from the payment of compensation for the feeding in of the electricity and did not include any aid for the benefit of the persons to whom that compensation was directed.

37 As for the question concerning Article 30 of the Treaty, the interveners in the main proceedings and the German Government argue that the dispute in the main proceedings has no cross-border element, and furthermore the plaintiff and the

defendant in those proceedings have not demonstrated that the amended Stromeinspeisungsgesetz prevents them from importing electricity from other Member States.

38 It should remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

39 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, paragraph 61; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 17).

40 In this case, as regards, first, the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, in particular, Case C-435/97 *World Wildlife Fund* [1999] ECR I-5613, paragraph 32).

41 Second, it should be noted that the action brought by PreussenElektra seeks repayment of the sum which it had to pay to Schleswag to compensate for the additional cost arising for the latter from the purchase of wind-generated electricity, made pursuant to the purchase obligation laid down by the amended Stromeinspeisungsgesetz, from producers of that type of electricity established in its area of supply.

42 The dispute in the main proceedings cannot, therefore, be regarded as hypothetical in character.

43 It is true that, like PreussenElektra, Schleswag has an interest in Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, laying down that purchase obligation and fixing the price to be paid in consequence, being regarded as constituting unlawful aid, thereby enabling it to escape payment. However, the dispute in the main proceedings does not concern the aid which, pursuant to Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, Schleswag allegedly gives to the producers of electricity from renewable energy sources, but the part of that alleged aid which PreussenElektra has had to reimburse to Schleswag by virtue of Paragraph 4 of the amended Stromeinspeisungsgesetz.

44 Since those obligations on Schleswag and PreussenElektra flow directly from the amended Stromeinspeisungsgesetz, the dispute in the main proceedings between the plaintiff and the defendant cannot be regarded as a procedural device arranged by the parties to the main action in order to induce the Court of Justice to take a position on certain problems of Community law that do not serve any objective requirement inherent in the resolution of the dispute.

45 That conclusion is supported by the fact that the referring court allowed Windpark and Land Schleswig-Holstein to intervene in the main proceedings in support of Schleswag, arguing that Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz are lawful.

46 In those circumstances, the fact that PreussenElektra is Schleswag's main shareholder is not capable of depriving the dispute between them of its genuine character.

47 Finally, it should be noted that, in its order for reference, the Landgericht sufficiently defined the national legislative background and clearly explained why it considers that the questions which it raises are relevant and that a reply to those questions is necessary for resolving the dispute.

48 Concerning, first, the questions relating to Articles 92 and 93, the referring court has indicated in particular, as is apparent from paragraph 26 of this judgment, that the question whether the amended Stromeinspeisungsgesetz constitutes aid needs to be resolved before going on to consider whether the amendments which the 1998 Law made to the initial version of the Stromeinspeisungsgesetz constitute an alteration of aid, within the meaning of Article 93(3) of the Treaty, requiring implementation of the procedure laid down in that provision in order to adopt the alteration.

49 The referring court has also explained that if, wrongly, the preliminary examination procedure has not been complied with, it will be its responsibility,

in accordance with its national law, to draw the consequences from the direct effect of the third sentence of Article 93(3) of the Treaty by holding the altered scheme in the Stromeinspeisungsgesetz inapplicable and ordering return of the payments made by PreussenElektra to Schleswag.

50 As the interveners in the main proceedings themselves acknowledge, the argument that the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only when the preliminary examination procedure under Article 93(3) has not been complied with requires an interpretation of the criterion of 'alteration of aid' or of the scope of the suspensory effect of the third sentence of Article 93(3), and such interpretation is precisely the subject-matter of some of the questions referred.

51 The same applies to the argument of the German Government that a reply to the questions concerning Article 92 of the Treaty is unnecessary in so far as, in the main proceedings, only Paragraph 4 of the amended Stromeinspeisungsgesetz governs relations between PreussenElektra and Schleswag. Indeed, the questions concerning Article 92 of the Treaty concern precisely the point whether Paragraph 4 of the amended Stromeinspeisungsgesetz constitutes, on its own or in combination with Paragraphs 2 and 3, a system of aid for the purposes of that provision.

52 As for the question concerning Article 30 of the Treaty, suffice it to say that it is not obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose.

53 It follows from the above considerations that answers must be given to the questions referred.

The interpretation of Article 92 of the Treaty

54 It should be noted as a preliminary observation, first, that there is no dispute that an obligation to purchase electricity produced from renewable energy sources at minimum prices, such as that laid down by Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence.

55 In addition, as the reply by the German Government to a written question of the Court shows, the public authorities have a majority shareholding in only two of the eight main German undertakings which produce electricity and operate high-tension transmission networks, one of which is PreussenElektra. That reply also shows that PreussenElektra is a wholly-owned subsidiary of another company which is 100% privately owned. Moreover, as stated in paragraph 19 of this judgment, Schleswag is held as to 65.3% by PreussenElektra and as to only 34.7% by certain municipal authorities of Land Schleswig-Holstein.

56 In the light of the above, the first question referred should be understood as asking, essentially, whether legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, constitutes State aid within the meaning of Article 92(1) of the Treaty.

57 It should be recalled in that respect that Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form

whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

58 In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision 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 (see Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 24 and 25; *Sloman Neptun*, paragraph 19; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido* [1998] ECR I-2629, paragraph 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 35).

59 In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

60 Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.

61 In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

62 That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).

63 In the alternative, the Commission maintains that, in order to preserve the effectiveness of Articles 92 and 93 of the Treaty, read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which, like those laid down by the amended Stromeinspeisungsgesetz, are decided upon by the State but financed by private undertakings. It draws that argument by analogy from the case-law of the Court of Justice to the effect that Article 85 of the EC Treaty (now Article 81 EC), read in conjunction with Article 5 of the Treaty, prohibits Member States from introducing measures, even of a legislative or regulatory nature, which may render the competition rules applicable to undertakings ineffective (see, in particular, Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14).

64 In that respect, it is sufficient to point out that, unlike Article 85 of the Treaty, which concerns only the conduct of undertakings, Article 92 of the Treaty refers directly to measures emanating from the Member States.

65 In those circumstances, Article 92 of the Treaty is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty, the second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it.

66 The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.

67 In the light of that answer, there is no need to reply to the second question referred, which was raised only in so far as the obligation to purchase at minimum prices did constitute State aid, whereas the allocation of the resulting financial burden did not.

Interpretation of Article 30 of the Treaty

68 In its third question, the referring court asks in substance whether the rules concerned are compatible with Article 30 of the Treaty.

69 In that respect, it must first be borne in mind that, according to the case-law of the Court, Article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

70 Secondly, the case-law of the Court also shows that an obligation placed on traders in a Member State to obtain a certain percentage of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product by preventing those traders from obtaining supplies in respect of part of their needs from traders situated in other Member States (see, to that effect, Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 16; Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 11).

71 In this case, Paragraphs 1 and 2 of the amended Stromeinspeisungsgesetz expressly state that the purchase obligation imposed on electricity supply undertakings applies only to electricity produced from renewable energy sources within the scope of that statute and within the respective supply area of each undertaking concerned, and is therefore capable, at least potentially, of hindering intra-Community trade.

72 However, in order to determine whether such a purchase obligation is nevertheless compatible with Article 30 of the Treaty, account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market.

73 The use of renewable energy sources for producing electricity, which a statute such as the amended Stromeinspeisungsgesetz is intended to promote, is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

74 Growth in that use is amongst the priority objectives which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change, approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 (OJ 1994 L 33, p. 11), and by virtue of the Protocol of the third conference of the parties to that Convention, done in Kyoto on 11 December 1997, signed by the European Community and its Member States on 29 April 1998 (see *inter alia* Council Resolution 98/C 198/01 of 8 June 1998 on renewable sources of energy (OJ 1998 C 198, p. 1), and Decision No 646/2000/EC of the European Parliament and of the Council of 28 February 2000 adopting a multiannual programme for the promotion of renewable energy sources in the Community (Altener) (1998 to 2002) (OJ 2000 L 79, p. 1)).

75 It should be noted that that policy is also designed to protect the health and life of humans, animals and plants.

76 Moreover, as stated in the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies. The Treaty of Amsterdam transferred that provision, in a slightly

modified form, to Article 6 of the Treaty, which appears in Part One, headed 'Principles'.

77 In addition, the 28th recital in the preamble to Directive 96/92 expressly states that it is 'for reasons of environmental protection' that the latter authorises Member States in Articles 8(3) and 11(3) to give priority to the production of electricity from renewable sources.

78 It should also be noted that, as stated in the 39th recital in its preamble, the directive constitutes only a further phase in the liberalisation of the electricity market and leaves some obstacles to trade in electricity between Member States in place.

79 Moreover, the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced.

80 In that respect, the Commission took the view, in its Proposal for a Directive 2000/C 311 E/22 of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market (OJ 2000 C 311 E, p. 320), submitted on 31 May 2000, that the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice.

81 Having regard to all the above considerations, the answer to the third question must be that, in the current state of Community law concerning the electricity market, legislation such as the amended Stromeinspeisungsgesetz is not incompatible with Article 30 of the Treaty.

Costs

82 The costs incurred by the German and Finnish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landgericht Kiel by order of 13 October 1998, hereby rules:

1. Statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area

of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators do not constitute State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

2. In the current state of Community law concerning the electricity market, such provisions are not incompatible with Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

Rodríguez Iglesias	Gulmann	Wathelet
Skouris	Edward	Puissochet
Jann	Sevón	Schintgen

Delivered in open court in Luxembourg on 13 March 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President