II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 28 January 2009

on aid implemented by Luxembourg in the form of the creation of a compensation fund for the organisation of the electricity market (C 43/02 (ex NN 75/01))

(notified under document number C(2009) 230)

(Only the French version is authentic)

(Text with EEA relevance)

(2009/476/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 2 July 2001, registered as received on 16 July 2001 under number N 475/01, Luxembourg notified the Commission under Article 88(3) of the Treaty of the creation of a compensation fund for the organisation of the electricity market. The notified measure had, however, been de facto implemented on 1 January 2001. The Commission accordingly took the view that the measure could not be considered planned aid within the meaning of Article 88(3) of the Treaty and on 30 July 2001 entered it in the register of non-notified aid under number NN 75/01.

(2) Following an exchange of correspondence with the Luxembourg authorities, the Commission notified Luxembourg by letter dated 5 June 2002 of its decision to open the procedure laid down in Article 88(2) of the Treaty in respect of the measure. It also invited Luxembourg to submit its comments and provide any information that might be helpful in assessing the measure within one month from the date of receipt of the letter.

(3) The Commission's decision to open the procedure was published in the *Official Journal of the European Union* [2]. The Commission called on interested parties to submit their comments on the measure.

(4) By letter dated 22 July 2002, registered as received on 26 July 2002, Luxembourg requested an extension of the time limit for sending its comments. The Commission granted the request by letter dated 30 July 2002, fixing the time limit at 5 September 2002.

(5) The Netherlands sent the Commission its comments on the measure by fax dated 4 December 2002, registered as received on the same day. By letter dated 18 February 2003, the Commission forwarded the Netherlands' letter to Luxembourg, together with a request that the latter submit its comments within one month. After having sent a reminder on 16 May 2003, the Commission received from Luxembourg by fax dated 28 May 2003, registered as received on the same day, a request for an extension of the time limit for replying.

[1] OJ C 255, 23.10.2002, p. 15.

[2] See footnote 1.

(6) By letter dated 4 June 2003, registered as received on 5 June 2003, Luxembourg sent the Commission its comments both on the Commission's letter of 5 June 2002 and on the comments submitted by the Netherlands. Luxembourg provided additional information by letter dated 3 May 2004, registered as received on 13 May 2004.

(7) A working meeting between Luxembourg and the Commission was held on 25 January 2005.

(8) By letter dated 31 March 2005, the Commission sent Luxembourg a request for information. The Commission received a reply from Luxembourg by letters dated 20 April and 20 May 2005, registered as received on 27 April and 1 June 2005 respectively.

(9) By letter dated 22 June 2005, the Commission sent Luxembourg a request for additional information. By letter dated 22 November 2005, registered as received on 23 November 2005, Luxembourg asked for an extension of the time limit for replying, in response to which the Commission, by letter dated 5 December 2005, set the time limit at 31 January 2006. The Commission received a reply from Luxembourg by letters dated 31 January 2006, registered as received on 3 February 2006.

(10) By letter dated 27 March 2006, the Commission sent Luxembourg a request for additional information. The Commission received a reply from Luxembourg by letter dated 11 April 2006, registered as received on 18 April 2006.

(11) A working meeting between Luxembourg and the Commission was held on 12 December 2006.

(12) By letter dated 21 November 2007, the Commission sent Luxembourg a request for additional information. By letter dated 6 December 2007, registered as received on 10 December 2007, Luxembourg requested a further extension of the time limit for replying, which request the Commission granted by letter dated 14 December 2007, fixing the time limit at 17 January 2008. The Commission received a reply from Luxembourg by letter dated 28 January 2008, registered as received on 30 January 2008.

(13) A working meeting between Luxembourg and the Commission was held on 27 February 2008.

(14) The Commission received additional information from Luxembourg by letter dated 19 June 2008, registered as received on 20 June 2008, and by letter registered as received on 12 September 2008.

2. DESCRIPTION

2.1. The legislative framework to the compensation mechanism

2.1.1. *The Grand-Ducal Regulation of 30 May 1994 and the electricity market liberalisation process*

(15) The Grand-Ducal Regulation (GDR) of 30 May 1994 ([3]) concerning the production of electrical energy using renewable energy sources or cogeneration (green electricity) imposed an obligation to purchase green electricity on Cegedel, at that time the sole general distributor of grid electricity in Luxembourg. The scheme involved the production of electricity using hydro, wind and solar energy, biogas and biomass, and cogeneration.

(16) Article 1 of the 1994 GDR provided that the 'available quantities of electricity obtained from autoproduction using renewable energy sources or cogeneration shall, at the autoproducer's request, be acquired by the State of Luxembourg for the account of the public network'. The 1994 GDR also set the prices of such green electricity at a higher level than that of conventionally produced electricity. Green electricity purchase prices were adjusted over time, in particular by the GDR of 14 October 2005 ([4]). The prices in force on 1 January 2008 were set by the GDR of 8 February 2008 ([5]) on the production of electricity using renewable energy sources.

(17) Luxembourg has estimated that, in 2000, the purchasing obligation stemming from the 1994 GDR related to a production of 112 GWh ([6]), and that these volumes were purchased at a price on average some three times higher than the price resulting from the long-term supply contracts concluded by Cegedel. According to the Luxembourg authorities, this resulted in an additional cost of LUF 275 million or EUR 6,8 million.

(18) After the electricity sector was opened up to competition by the Law of 24 July 2000 ([7]), the purchasing obligation was extended to include all distributors operating in Luxembourg. In 2001 these were 13 in number, including the largest, Cegedel, and the second largest, Sotel, both of which supplied the steel plants in the south of the country, and local distributors. In actual fact, however, Cegedel alone purchased the lion's share of the green electricity produced in Luxembourg.

([3]) *Luxembourg Official Gazette* A No 62, 12.7.1994, p. 1140.
([4]) GDR of 14 October 2005 (1) concerning the supply of electrical energy using renewable energy sources and (2) amending the GDR of 30 May 1994 concerning the production of electrical energy using renewable energy sources or cogeneration and the GDR of 22 May 2001 concerning the introduction of a compensation fund for the organisation of the electricity market (*Luxembourg Official Gazette A* No 181, 14.11.2005, p. 2948).
([5]) *Luxembourg Official Gazette* A No 16, 12.2.2008, p. 260.
([6]) According to Luxembourg, total electricity consumption in Luxembourg in 2000 came to 5 650 GWh.
([7]) *Luxembourg Official Gazette* A No 79, 21.8.2000, p. 1896.

2.1.2. *The GDR of 22 May 2001*

(19) In order to spread equitably among distributors the burden of the costs resulting from the obligation to acquire green electricity, Luxembourg decided to set up, through the GDR of 22 May 2001 ([8]) concerning the introduction of a compensation fund for the organisation of the electricity market, a compensation mechanism. The compensation fund became de facto operational on 1 January 2001.

(20) Under Article 21 of the GDR of 22 May 2001, each electricity distributor in Luxembourg was authorised to collect a contribution to the compensation fund from its final customers. The contribution was proportional to a final customer's electricity consumption. The compensation fund mechanism made it possible to divide the costs stemming from the green electricity purchasing obligation among all the distributor's customers. The level of contributions was set each year by the State so that the fund's income did not exceed the additional cost of purchasing green electricity. Under Article 13 of the GDR of 22 May 2001, large electricity consumers ([9]) were exempted from paying the contribution until 31 December 2005 ([10]). According to the Luxembourg authorities, this exemption concerned some 50 large consumers mainly in the chemical and steel industries.

(21) Under Article 23 of the GDR of 22 May 2001, the contribution for 2001 was set for all non-exempted customers at EUR 2,73/MWh.

2.1.3. *The GDR of 9 December 2005*

(22) Following bilateral talks with the Commission, the GDR of 9 December 2005 ([11]), which entered into force on 1 January 2006, amended the GDR of 22 May 2001. It abolished, in particular, the exemption from contribution payments for large electricity consumers and introduced instead three categories of customer, corresponding to three different levels of contribution ([12]):

— category A comprised customers at whose metering points annual electricity consumption was less than or equal to 25 MWh. For 2007, the contribution payable by category A consumers was set at EUR 7,00/MWh,

— category B comprised customers at whose metering points annual electricity consumption was greater than 25 MWh, with the exception of metering points classified in category C. For 2007, the contribution payable by category B consumers was set at EUR 2,70/MWh,

— category C concerned customers in category B who, in addition, had to 'commit themselves to achieving a substantial improvement in their overall energy efficiency by agreement to be concluded between the Government and the enterprise concerned […]. The agreement to be concluded will include a penalty clause in case of failure to meet commitments' ([13]). All agreements came to an end on 31 January 2008. For 2007, the contribution payable by category C consumers was set at EUR 0,75/MWh.

2.1.4. *Provisions applicable as of 1 January 2009*

(23) The Luxembourg authorities have undertaken to replace the GDR of 9 December 2005 with a new, as yet unpublished GDR, scheduled to enter into force on 1 January 2009. According to the Luxembourg authorities, the new GDR provides that distributors *may* collect a contribution towards the costs associated with green electricity from their final customers. The level of the contribution is thus no longer set by the public authorities but is left to distributors' discretion.

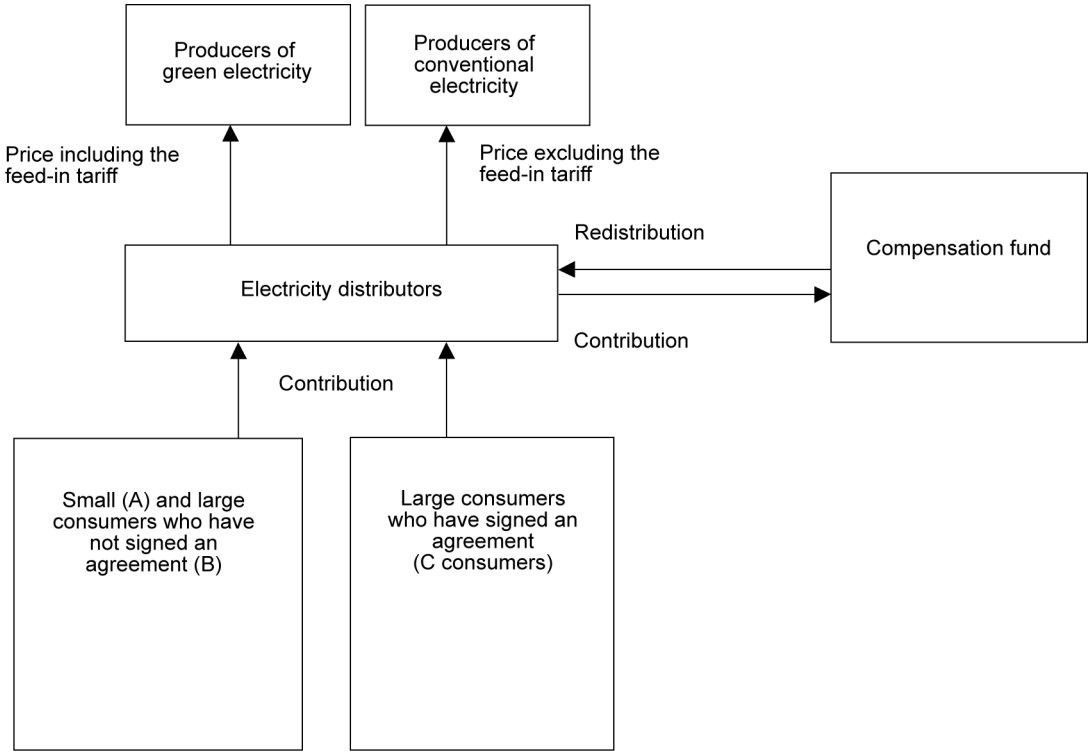
2.2. **Operation of the compensation mechanism**

(24) From a practical standpoint, the GDRs of 22 May 2001 and 9 December 2005 provided that the principal distributor in Luxembourg, Cegedel, the shares in which were majority privately owned, had to purchase all the green electricity produced in Luxembourg at the price set by the State. Cegedel made such purchases either in its own name or on behalf of other distributors who had concluded supply contracts with green electricity producers. It then sold the green electricity to its competitors according to their respective market shares in the Luxembourg market and at a selling price set by the State on the basis of the electricity market price established the previous year. The additional costs associated with green electricity corresponded to the difference between the purchase price paid to producers of such electricity (feed-in tariff) and the selling price charged to other distributors, both of which were set by the State. All distributors reported on their green electricity purchases each month to the Luxembourg energy regulator, the Institut Luxembourgeois de Régulation (ILR). At the end of the year, the regulator performed a compensation operation between distributors: if the share of green electricity produced in Luxembourg and purchased by a distributor was greater than its share of the electricity market, then it received

([8]) *Luxembourg Official Gazette* A No 70, 19.6.2001, p. 1407.
([9]) Large electricity consumers are enterprises connected to the electricity grid at a voltage greater than 65 kV.
([10]) Under Article 14 of the GDR of 22 May 2001, the number of beneficiaries of the exemption could, however, be reduced before 1 January 2006 if the contribution from customers subject to the compensation fund were to increase by more than 50 % during the 2002 and 2003 financial years.
([11]) *Luxembourg Official Gazette* A No 203, 16.12.2005, p. 3256.
([12]) Article 1 of the GDR of 9 December 2005 amending Article 21 of the GDR of 22 May 2001.
([13]) Article 1 of the GDR of 9 December 2005.

compensation from the fund; conversely, if its share of green electricity purchased was smaller than its share of the domestic market, then it had to pay a corresponding contribution to the fund. The compensation fund was therefore designed to ensure that each distributor active in Luxembourg purchased a share of green electricity produced in Luxembourg that matched its share of the domestic market.

(25) The diagram below describes the operation of the compensation fund as it was in force until 31 December 2008.



3. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

(26) In its decision to open the formal investigation procedure, the Commission took the view that the compensation mechanism *prima facie* constituted State aid within the meaning of Article 87(1) of the Treaty ([14]).

(27) The measure conferred an advantage on green electricity producers, who ultimately benefited from the proceeds of the compensation fund. Moreover, the exemption from compensation payments applicable until 31 December 2005 favoured large electricity-consuming enterprises over other enterprises which had to contribute to the compensation fund. On the other hand, distributors enjoyed no advantage as they simply played the part of intermediary in collecting the contributions made by final customers and paid on to green electricity producers.

(28) This advantage was provided through State resources, not by reason of the introduction of the green electricity purchasing obligation but by reason of the creation of the compensation fund. The latter was set up by the State, was financed by a system of compulsory contributions, and the sums paid into it were controlled by the State.

(29) The measure was selective in that it favoured only certain enterprises or certain activities, and in particular green electricity producers as opposed to other electricity producers and large electricity-consuming enterprises as opposed to other electricity-consuming enterprises.

(30) Lastly, the granting of an advantage to green electricity producers was liable to affect intra-Community trade in electricity and distort competition, as was the advantage enjoyed by large electricity-consuming enterprises, active as these were in various sectors of the economy.

([14]) See paragraphs 14 to 19 of the decision to open the formal investigation procedure (OJ C 255, 23.10.2002, p. 15).

(31) The Commission then examined the compatibility of the compensation mechanism with the common market under Article 87(3)(c) of the Treaty in the light of the 2001 Community guidelines on State aid for environmental protection (the 2001 guidelines) ([15]). It expressed the following concerns in this regard.

(32) First, the Commission considered that the aid for green electricity producers prima facie did not satisfy the conditions laid down in the following provisions of the 2001 guidelines:

— the system did not ensure that the aid was limited to the difference between the production cost and the market price of the energy concerned. It did not limit the duration of the operating aid to that necessary to cover plant depreciation. Nor did it take account of any investment aid received by producers for their plants, such as the ecological premium in Luxembourg ([16]) (point E.3.3.1 of the 2001 guidelines),

— the system made no provision for a market mechanism such as green certificates (point E.3.3.2 of the 2001 guidelines),

— the operating aid was not calculated on the basis of the external costs avoided (point E.3.3.3 of the 2001 guidelines),

— the operating aid was not limited to five years' duration, it was not degressive, and its intensity was not limited to 50 % of the extra costs (point E.3.3.4 of the 2001 guidelines).

(33) Secondly, the Commission considered that the exemption from contribution payments granted to large electricity-consuming enterprises prima facie did not fulfil the criteria laid down in the 2001 guidelines: exempted enterprises had not undertaken to achieve environmental protection objectives ([17]); such enterprises were not required to pay a significant proportion of the tax ([18]); and lastly, the exemptions were not degressive within the meaning of the 2001 guidelines and their intensity was not limited to 50 % ([19]).

(34) Lastly, the Commission questioned the measure's compatibility with Articles 25 and 90 of the Treaty. The compensation mechanism did not make provision for any exemption from contribution payments for imported electricity or from the tax on exports. The measure ultimately benefited only domestic producers of green electricity. Imported electricity was therefore taxed without ultimately benefiting from the support enjoyed by green electricity produced in Luxembourg.

(35) The new GDR referred to in paragraph 23, scheduled to enter into force on 1 January 2009, amends the compensation mechanism in such a way that it no longer numbers among the reasons for opening the formal investigation procedure. Consequently, this Decision examines the existence of State aid and the compatibility or otherwise of the compensation mechanism under Article 87(3)(c) of the Treaty up until 31 December 2008.

4. COMMENTS FROM LUXEMBOURG ON THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

4.1. On the description of the measure

(36) Luxembourg pointed out first of all that, under the GDR of 30 May 1994, Cegedel was alone obliged to purchase Luxembourg-produced green electricity. Other, competing distributors had since emerged owing to liberalisation (they were 13 in number in June 2003). They had all been placed under an obligation to purchase green electricity. In actual fact, however, the additional costs still fell largely on one operator, Cegedel. Consequently, the compensation fund in reality promoted fair competition between distributors since it divided among them the additional costs associated with the green electricity purchasing obligation.

(37) Luxembourg pointed out secondly that the measure produced significant environmental benefits and helped to achieve the environmental protection objectives to which Luxembourg has committed itself in accordance with the Community anti-climate change policy: for Luxembourg, the target was to reduce carbon emissions by 28 % compared with 1990. The Luxembourg authorities accordingly called on the Commission to assess the potential competition-distorting effects or the effect on intra-Community trade in the light of the environmental benefits of the measure.

4.2. On the existence of State aid

(38) Luxembourg considered that the creation of the compensation fund did not constitute State aid within the meaning of Article 87(1) of the Treaty.

(39) It maintained first of all that, as the Court of Justice of the European Communities (the Court of Justice) had found in its judgment in *PreussenElektra* ([20]), the fund did not involve any State resources. Before the fund was introduced, the additional costs associated with the green electricity purchasing obligation had been borne exclusively by the final customers of a private

([15]) OJ C 37, 3.2.2001, p. 3.
([16]) Commission Decision of 17 October 2001 in Case N 842/2000 (OJ C 5, 8.1.2002, p. 5).
([17]) See point 51.1(a).
([18]) See point 51.1(b), second indent.
([19]) See point 46.
([20]) Case C-379/98 [2001] ECR I-2099.

company, Cegedel. Since the introduction of the fund, the additional costs had been divided among all customers of all distributors in Luxembourg, without, however, involving more State resources. In support of its argument Luxembourg cited paragraph 66 of the *PreussenElektra* judgment: '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) (now Article 87(1)) of the Treaty'.

(40) Luxembourg pointed out secondly that the compensation fund did not create any advantage for green electricity producers inasmuch as there was no contractual or financial link between the fund and the producers. The latter were remunerated directly by the distributors when they purchased green electricity, according to the tariffs set at the time by the GDR of 30 May 1994. The compensation fund, for its part, made compensatory payments only between distributors.

(41) The compensation fund likewise did not create any advantage for large electricity-consuming enterprises compared with enterprises which contributed to the fund. The beneficiaries of the exemption — the chemical and steel industries — had no competitors in Luxembourg which should have contributed to the fund. Luxembourg considered, moreover, that the beneficiaries of the exemption were not placed at an advantage compared with competitors situated outside of Luxembourg.

(42) Luxembourg considered lastly that the competition-distorting effect and the effect on intra-Community trade associated with the compensation fund were no more than theoretical. In particular, it was not proven that the exemptions from which Luxembourg heavy industry benefited affected trade between Member States.

4.3. **On the infringement of Articles 25 and 90 of the Treaty**

(43) Luxembourg considered that the compensation mechanism did not infringe Articles 25 and 90 of the Treaty. According to Luxembourg, the system did not treat electricity produced in Luxembourg any differently from imported electricity. Moreover, green electricity produced in accordance with the GDR of 30 May 1994 was not exported. Therefore, a producer situated in another Member State but having customers in Luxembourg was treated in exactly the same way as a producer situated in Luxembourg and selling in the domestic market. The same was true if the customers of the two producers were situated in another Member State.

4.4. **On the compatibility of potential State aid with the Treaty**

(44) Although they challenged the assertion that the exemption from contribution payments for large electricity-consuming enterprises constituted State aid, the Luxembourg authorities maintained that the measure might be deemed compatible with the 2001 guidelines.

(45) Luxembourg pointed out that the exemption was granted on the basis of a voluntary agreement comprising energy efficiency improvement objectives for signatory companies. The voluntary agreement had been concluded between Luxembourg and the Fédération Nationale des Industries (National Industries Federation — FEDIL) in March 1996 and renewed in April 2001.

(46) While it acknowledged that the agreement did not stipulate any penalties in case of failure to meet commitments, Luxembourg undertook to include such a mechanism in order to bring the agreement into line with point 51.1(a) of the 2001 guidelines.

5. **COMMENTS FROM THIRD PARTIES**

(47) Only the Netherlands submitted comments following the opening of the formal investigation into the Luxembourg compensation mechanism.

(48) The Netherlands pointed out that aid to domestic green electricity producers was authorised on condition that it did not exceed the unprofitable extra cost of producing such electricity. The Dutch authorities were in favour of compensating fully for such unprofitable extra cost in order to develop green electricity production. Such support was necessary to enable Member States to achieve the environmental objectives to which they had committed themselves by ratifying the Kyoto Protocol ([21]).

(49) The Netherlands pointed out further that each Member State had to be left some latitude when it came to achieving the environmental objectives of the Kyoto Protocol. It suggested, therefore, that the Commission should adopt a case-by-case approach to the green electricity support measures taken by each Member State.

(50) In conclusion, the Netherlands called on the Commission to view the measure proposed by Luxembourg favourably given the current need to further promote green electricity production.

([21]) Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on 11 December 1997.

6. LUXEMBOURG'S RESPONSE TO THE COMMENTS FROM THIRD PARTIES

(51) Luxembourg did not respond to the comments submitted by the Netherlands.

7. ASSESSMENT

7.1. Existence of State aid

(52) In its decision to open the formal investigation procedure, the Commission took the view that the compensation mechanism *prima facie* constituted State aid within the meaning of Article 87(1) of the Treaty ([22]). The two categories of beneficiary of this State aid were green electricity producers and, through the exemption from contributing to the compensation fund, large electricity-consuming enterprises.

(53) In previous decisions, the Commission also took the view that feed-in tariff schemes, financed in a manner similar to the one in the present case, constituted State aid. This was so, for example, in the decisions in Case N 504/2000 ([23]) (United Kingdom), Joined Cases N 707/02 and N 708/02 ([24]), prolonged by measure N 543/05 ([25]) then by measure N 478/07 ([26]) (Netherlands), Cases NN 162/03 and N 317/06 ([27]) (Austria) and Case C 7/05 (Slovenia) ([28]).

(54) It will be examined below whether the compensation mechanism constituted State aid during the period in question, i.e. up to 31 December 2008.

7.1.1. *Determination of the presence of State resources*

(55) According to case-law, in order to be capable of being categorised as State aid a measure must, first, be granted directly or indirectly through State resources and, second, be imputable to the State ([29]).

(56) On the question of the existence of State resources, the Court of Justice has held that the financial resources of a measure do not necessarily have to constitute permanent assets of the public sector in order for them to be categorised as State resources; in order for such resources to be so categorised, it is sufficient that they constantly remain under public control and therefore available to the competent national authorities ([30]). Conversely, according to the case-law of the Court of Justice ([31]), State resources are not involved where the public authorities at no stage enjoy or acquire control over the funds which finance the economic advantage in issue. It must be determined, therefore, whether the State exercised direct or indirect control over the resources in question, despite the fact that the funds did not come directly from the State budget. In the *PreussenElektra* case, the feed-in tariffs were financed directly by private electricity suppliers who had to purchase electricity from green electricity producers at a price higher than the market price for electricity. In the present case, from January 2001 to December 2008 the State collected from consumers compulsory contributions which were then passed on to green electricity producers via distributors. The compensation fund, which was set up by the Luxembourg State, saw to the allocation of the compensation among distributors. In its judgment in *Stardust Marine* ([32]), the Court of Justice held that, once resources came under State control, they remained State resources. The Commission considers, therefore, that the aid was granted directly or indirectly through State resources.

(57) As regards imputability, the ILR calculated the aid and distributed it to each beneficiary according to a formula laid down by law. The State thus exercised control, through the law, not only over the amounts distributed and the beneficiaries, but also over the granting of the aid. The Commission considers, therefore, that the aid was imputable to the State.

7.1.2. *Selectivity*

(58) The compensation mechanism was directed only at some electricity producers, namely green electricity producers in Luxembourg.

(59) The mechanism provided for exemption from compensation payments or, as from 1 January 2006, a reduced contribution for one category of consumer only, namely large electricity consumers ([33]).

7.1.3. *Existence of an advantage*

(60) The compulsory contribution imposed by the compensation mechanism manifestly conferred an advantage on green electricity producers, since the very aim of the scheme was to enable such producers to sell their electricity at a price higher than the market price.

([22]) See paragraphs 14 to 19 of the decision to open the formal investigation procedure.
([23]) OJ C 30, 2.2.2002, p. 15.
([24]) OJ C 148, 25.6.2003, p. 12.
([25]) OJ C 221, 14.9.2006, p. 8.
([26]) OJ C 39, 13.2.2008, p. 3.
([27]) The cases were divided into two parts, part A (renewable energy sources) and part B (cogeneration) (OJ C 221, 14.9.2006, p. 8).
([28]) OJ L 219, 24.8.2007, p. 9.
([29]) See, for example, the judgment of the Court of Justice in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24.
([30]) See the judgment of the Court of Justice in Case C-83/98 *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50, and the judgment of the Court of First Instance in Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 67.
([31]) See the conclusions of Advocate-General Jacobs in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraphs 38 to 42, and the judgment in Case C-379/98, cited in footnote 20, paragraphs 59 to 61.
([32]) See the judgment of the Court of Justice in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 37.
([33]) See paragraph (22).

(61) Large electricity-consuming enterprises manifestly enjoyed an advantage due to the exemption from — or, from 1 January 2006, the reduction in — the contribution to the compensation mechanism.

7.1.4. *Distortion of competition and effect on intra-Community trade*

(62) The measure affected economic operators in sectors open to competition, be they the electricity production sector or sectors in which large electricity-consuming enterprises operate (including chemicals and steel) and which engage in trade with other Member States.

(63) Consequently, the aid was liable to distort competition and affect intra-Community trade.

7.1.5. *Conclusion on the existence of State aid*

(64) On the basis of these elements, the Commission considers that the version of the compensation mechanism that was in place between 1 January 2001 and 31 December 2008 constituted State aid within the meaning of Article 87(1) of the Treaty.

7.2. **Assessment of the compatibility of the aid under Article 87(3)(c) of the Treaty**

(65) For the reasons given in paragraphs 32, 33 and 34, the Commission decided to open a formal investigation procedure in this case as it had doubts about the compatibility of the measure with the common market — a compatibility which also implied its conformity with Articles 25 and 90 of the Treaty.

(66) In view of the fact that the aid in the form of a compensation mechanism pursued an environmental protection objective, its compatibility must be assessed in the light of the Community guidelines on State aid for environmental protection. Between 1 January 2001 and 31 December 2008, two sets of guidelines were applicable in succession, with the 2001 guidelines being replaced by new Community guidelines on State aid for environmental protection ([34]) (the 2008 guidelines). Inasmuch as the aid at issue was registered as non-notified aid, its compatibility must, in accordance with point 205 of the 2008 guidelines, be assessed in the light of the rules applicable when the aid was granted.

(67) It is necessary therefore to assess, firstly, the measure's compatibility in the light of the 2001 and 2008 guidelines and, secondly, its conformity with Articles 25 and 90 of the Treaty.

7.3. **Compatibility of the aid in the light of the 2001 and 2008 guidelines**

(68) The Commission has assessed the compatibility of the aid, during the period from 1 January 2001 to 31 December 2008, with respect to two types of beneficiary: on the one hand, green electricity producers, which benefited indirectly from contributions to the compensation fund, and, on the other, large electricity-consuming enterprises, which benefited first from exemption from, then — from 1 January 2006 onwards — from a reduction in, contributions to the compensation fund.

7.3.1. *Compatibility of the aid to green electricity producers in Luxembourg*

(69) The aid granted to green electricity producers through the compulsory contribution included in the compensation mechanism concerned certain renewable energy sources (hydro, solar and wind power, biomass and biogas) and cogeneration, covered by the 2001 and 2008 guidelines ([35]).

(70) The Luxembourg authorities have submitted to the Commission two reports produced by the research institute […] * ([36]) analysing the levels of compensation granted to green electricity producers in Luxembourg. The first report covers the period to the end of 2005 ([37]) and the second the period from 2006 to 2008 ([38]).

(71) The calculations relate to all the renewable energy sources eligible under the compensation mechanism ([39]), and concern also cogeneration. Besides feed-in tariffs, they take account of other support schemes, operating aid (notably the ecological premium ([40])) and investment aid. The calculations compare the cost of producing green electricity and the market price for such electricity. The reports conclude that there was no over-compensation during the periods concerned, either in the case of renewables or in that of cogeneration.

(72) On the basis of these elements, the Commission considers that the aid was limited to the difference between the cost of producing green electricity and the electricity market price.

([34]) OJ C 82, 1.4.2008, p. 1.

([35]) See points 70(5) and 70(10) of the 2008 guidelines.

* Business secret.

([36]) […].

([37]) […].

([38]) […].

([39]) The energy sources concerned are hydro, solar and wind energy, biomass and biogas.

([40]) Commission Decision of 17 October 2001 in Case N 842/2000.

(73) For the period from 1 January 2001 to 1 April 2008, during which the 2001 guidelines were applicable, the Commission considers therefore that the aid granted to green electricity producers was in keeping with the 2001 guidelines, and in particular points 58 to 60 thereof concerning operating aid, and that it was accordingly compatible within the meaning of Article 87(3)(c) of the Treaty.

(74) For the period from 2 April 2008 to 31 December 2008, during which the 2008 guidelines were applicable, the Commission considers that the aid granted to green electricity producers was in keeping with the 2008 guidelines, and in particular points 109 and 119 thereof concerning operating aid for renewable energy sources and cogeneration ([41]), and that this aid was accordingly compatible within the meaning of Article 87(3)(c) of the Treaty.

7.3.2. *Compatibility of the aid to large electricity-consuming enterprises*

(75) In its decision to open the formal investigation procedure, the Commission expressed doubts about the compatibility of the exemption from contribution payments enjoyed by large electricity-consuming enterprises up until 31 December 2005. As from 1 January 2006, such enterprises contributed to the compensation fund, albeit at a reduced rate.

(76) As to the determination of the rules applicable to assessing the aid's compatibility, it should be noted that the contribution for 2008 was calculated on the basis of data for 2007, and that the decision to grant the aid was taken before 2 April 2008, the date on which the 2008 guidelines entered into force. Consequently, for the whole of the period from 1 January 2001 to 31 December 2008, the compatibility of the aid granted to large electricity-consuming enterprises falls to be assessed in the light of the 2001 guidelines.

(77) The Luxembourg authorities have made clear first of all that all exempted large electricity-consuming enterprises undertook to improve their energy efficiency under voluntary agreements concluded with the State in 1996, then in 2002, covering the period from 2000 to 2006. Luxembourg amended these agreements, moreover, on 13 April 2005 at the Commission's request.

(78) The main amendments, which entered into force with the GDR of 9 December 2005, consisted of the inclusion of an energy efficiency improvement target for signatory enterprises: in 2005, energy efficiency had to be improved by 15 % compared with 1990. In addition, penalties were introduced into the agreement in case of failure to meet commitments:

— enterprises which did not meet their commitments had to purchase a certain quantity of green electricity on the market or produce it for their own consumption ([42]),

— enterprises which did not meet their commitments to have the improvement in their energy efficiency certified by auditors at the beginning and end of the period had to purchase or produce themselves volumes of green electricity representing 1 % of their consumption.

(79) Moreover, the exemption from contribution payments was created at the same time as the contribution to the compensation fund itself, on 1 January 2001.

(80) On the basis of the elements outlined in paragraphs 77, 78 and 79, the Commission considers that the exemption from, then — from 1 January 2006 — the reduction in, contributions to the compensation fund for large electricity-consuming enterprises in exchange for the conclusion of voluntary agreements was in keeping with point 51.1(a) of the 2001 guidelines. Consequently, the measure was compatible within the meaning of Article 87(3)(c), as from December 2005.

(81) For the period from January 2001 to December 2005, the Commission notes that the exemption from contribution payments was also obtained in exchange for energy efficiency improvement commitments by large electricity-consuming enterprises. These agreements, which were first concluded in 1996, were renewed in 2002 for the period between 2000 and 2006. Moreover, the penalties introduced in 2005 applied if enterprises had not improved their energy efficiency in 2005 by 15 % compared with 1990. The Commission considers, therefore, that the environmental target and the penalties applied to the conduct of the beneficiaries of the exemption between 2001 and 2005. Consequently, the Commission considers that the exemption from contribution payments for large electricity-consuming enterprises between January 2001 and December 2005 was in keeping with point 51.1(a) of the 2001 guidelines and that it was therefore compatible within the meaning of Article 87(3)(c) of the Treaty.

([41]) The Luxembourg authorities have also pointed out that cogeneration systems had to meet the high-efficiency criteria set out in point 70(11) of the 2008 guidelines.

([42]) The quantity had to reflect the diversity of green energies supported by the compensation fund and, in accordance with the terms of the amendment of 13 April 2005, was determined on the basis of the following three factors: '1. the enterprise's electricity consumption during the period when it benefited from exemption; 2. the rate of cover of national electricity consumption by the production of electricity supported by the compensation fund; 3. the percentage difference between the enterprise's energy efficiency improvement rate and the general rate [of energy efficiency improvement]'. The percentage difference could not exceed 100 %. The target of a 15 % energy efficiency improvement was adjusted pro rata in the case of enterprises which had started business after 1990.

7.4. **Conformity of the aid with Articles 25 and 90 of the Treaty**

(82) For the period from 1 January 2001 to 31 December 2008, the additional costs associated with the green electricity purchasing obligation were ultimately borne by consumers on the basis of their consumption. According to the settled case-law of the Court of Justice, recently confirmed by the judgment in *Essent* ([43]), such a compulsory contribution imposed on final consumers constitutes a parafiscal levy, and the conformity of its financing mechanism with the Treaty falls to be examined by the Commission ([44]). The Commission also adopted a similar approach in the decisions cited in paragraph 53.

(83) As regards the risk of imported green electricity being discriminated against compared with green electricity produced in Luxembourg, which alone benefits from the revenue from contributions, the Luxembourg authorities have undertaken, by a ministerial letter, to set up a procedure for reimbursing contributions to the fund for green electricity imported up until 31 December 2008. To benefit therefrom, consumers will have to prove that they have purchased imported green electricity.

(84) […]

(85) […] ([45])

(86) […]

(87) On the basis of these elements, the system in place in Luxembourg appears very similar to the reimbursement procedures in place in Austria, which have been declared compatible by the Commission ([46]).

8. **CONCLUSION**

(88) The Commission finds that Luxembourg unlawfully implemented the measure of creating a compensation fund for the organisation of the electricity market, in infringement of Article 88(3) of the Treaty.

(89) However, in the light of all the above elements, the Commission concludes that, for the period from January 2001 to December 2008, the aid granted to green electricity producers in Luxembourg and the exemption from, then — from 1 January 2006 — the reduction in, contributions for large electricity-consuming enterprises, constitute aid compatible under Article 87(3)(c) of the Treaty, as stated in the 2001 and 2008 guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The creation and administration, between 1 January 2001 and 31 December 2008, by Luxembourg of a compensation fund for the organisation of the electricity market constituted State aid under Article 87(1) of the Treaty for green electricity producers in Luxembourg and for large electricity-consuming enterprises.

The aid was compatible with the common market under Article 87(3)(c) of the Treaty.

Article 2

This Decision shall be valid subject to amendment of the compensation mechanism, such as Luxembourg has undertaken to provide in its legislation.

Article 3

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 28 January 2009.

For the Commission
Neelie KROES
Member of the Commission

([43]) Judgment of 17 July 2008 in Case C-206/06, not yet reported.
([44]) See, for example, the judgment of the Court of Justice in Joined Cases C-261/01 and C-262/01 *Belgium* v *Eugene van Calster, Felix Cleeren and Openbaar Slachthuis NV* [2003] ECR I-12249.
([45]) […].
([46]) Commission Decision of 4 July 2006 in Cases NN 162/03 and N 317/06 (see footnote 27).