Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

15 September 2016*

(Reference for a preliminary ruling — State aid — Power Purchase Agreements — Compensation paid for voluntary termination — Commission decision finding State aid compatible with the internal market — Assessment of the lawfulness of aid by a national court — Annual adjustment of stranded costs — Point at which an energy generator's membership of a group of undertakings is taken into account)

In Case C-574/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 8 October 2014, received at the Court on 11 December 2014, in the proceedings

PGE Górnictwo i Energetyka Konwencjonalna S.A.

v

Prezes Urzędu Regulacji Energetyki,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, F. Biltgen, A. Borg Barthet and E. Levits, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 27 January 2016,

after considering the observations submitted on behalf of:

— PGE Górnictwo i Energetyka Konwencjonalna S.A., by A. Jodkowski, adwokat,

— the Prezes Urzędu Regulacji Energetyki, by Z. Muras and A. Walkiewicz, acting as Agents,

— the Polish Government, by B. Majczyna, M. Rzotkiewicz and E. Gromnicka, acting as Agents,

— the European Commission, by K. Herrmann, P. Němečková and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2016,

* Language of the case: Polish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107 TFEU and Article 4(3) TEU, read together with the provisions of Commission Decision 2009/287/EC of 25 September 2007 on State aid awarded by Poland as part of Power Purchase Agreements and the State aid which Poland is planning to award concerning compensation for the voluntary termination of Power Purchase Agreements (OJ 2009 L 83, p. 1).

2 The request has been made in proceedings between PGE Górnictwo i Energetyka Konwencjonalna S.A. ('PGE') and the Prezes Urzędu Regulacji Energetyki (President of the Authority for the Regulation of the Energy Sector, Poland; 'the President of URE'), concerning the determination of the annual adjustment of the compensation, for the year 2009, for which PGE is eligible by virtue of so-called 'stranded' costs.

Legal context

European Union law

Communication relating to the methodology for analysing State aid linked to stranded costs

3 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) was adopted with a view to achieving a competitive market in electricity. The implementation of that directive was accompanied, in certain Member States, by public aid in favour of national companies active in the electricity sector.

4 In that context, on 26 July 2001 the European Commission adopted a communication relating to the methodology for analysing State aid linked to stranded costs ('the Stranded Costs Methodology').

5 According to the sixth paragraph of section 2 of the Stranded Costs Methodology, its purpose is to show the methodology which the Commission intends to apply, in the context of the application of the FEU Treaty rules on State aid, with respect to aid measures designed to compensate for the cost of commitments or guarantees that it might no longer be possible to honour on account of the fact that Directive 96/92 opened up the electricity sector to competition.

6 Section 3 of that methodology states that the concept of 'stranded costs' covers commitments or guarantees of operation that may, in practice, take a variety of forms, and in particular long-term purchase contracts, investment undertaken with an implicit or explicit guarantee of sale, as well as investment undertaken outside the scope of normal activity. In particular, point 3.3 of the Stranded Costs Methodology provides that, in order to qualify as eligible stranded costs, capable of being recognised as such by the Commission, those commitments or guarantees of operation must:

'… run the risk of not being honoured on account of the provisions of Directive 96/92/EC. In order to qualify as stranded costs, commitments or guarantees must consequently become non-economical on account of the effects of the Directive and must significantly affect the competitiveness of the undertaking concerned. Among other things, this must result in that undertaking's making accounting entries (e.g. provisions) designed to reflect the foreseeable impact of the commitment or guarantee.

Especially where, as a result of the commitments or guarantees in question, the viability of the undertakings might be jeopardised in the absence of aid or any transitional measures, the commitments or guarantees are deemed to meet the requirements laid down in the preceding paragraph.

The effect of such commitments or guarantees on the competitiveness or viability of the undertakings concerned will be assessed at the consolidated level. For commitments or guarantees to constitute stranded costs, it must be possible to establish a cause-and-effect relationship between the entry into force of Directive 96/92/EC and the difficulty that the undertakings concerned have in honouring or securing compliance with such commitments or guarantees. In order to establish such cause-and-effect relationship, the Commission will take into account any fall in electricity prices or market share losses suffered by the undertakings concerned. Commitments or guarantees that could not have been honoured irrespective of the entry into force of the Directive do not constitute stranded costs.'

7 According to the wording of points 4.2, 4.3 and 4.5 appearing in the fifth paragraph of Section 4 of the Stranded Costs Methodology:

'4.2 The arrangements for paying the aid must allow account to be taken of future developments in competition. Such developments may be gauged in particular by way of quantifiable factors (prices, market shares, other relevant factors indicated by the Member State). Since changes in the conditions of competition have a direct effect on the amount of eligible stranded costs, the amount of the aid paid will necessarily be conditional on the development of genuine competition, and the calculation of aid paid over time will have to take account of changes in the relevant factors in order to gauge the degree of competition achieved.

4.3 The Member State must undertake to send to the Commission an annual report that, in particular, describes developments in the competitive situation on its electricity market by indicating among other things the changes observed in the relevant quantifiable factors. The annual report will give details of how the stranded costs taken into account for the relevant year have been calculated and will specify the amounts of aid paid.

…

4.5 The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance. It must take account of productivity gains that may be achieved by the undertaking.

Similarly, the detailed arrangements for calculating and financing aid designed to offset stranded costs and the maximum period for which such aid can be granted must be clearly spelt out in advance. Notification of the aid will specify in particular how calculation of the stranded costs will take account of changes in the various factors mentioned in point 4.2.'

Decision 2009/287

8 Article 1 of Decision 2009/287, relating to long-term power purchase agreements ('PPAs') between the publicly owned Polish electricity network operator, Polskie Sieci Elektroenergetyczne S.A. ('PSE') and a certain number of companies operating in the sector at issue, is worded as follows:

'1. The Power Purchase Agreements between [PSE] and the companies listed in Annex 1 to the [Ustawa o zasadach pokrywania kosztów powstałych u wytwórców w związku z przedterminowym rozwiązaniem umów długoterminowych sprzedaży mocy i energii elektrycznej (Act on the rules governing the covering of costs incurred by [electricity generators] in connection with the early

termination of Power Purchase Agreements) of 29 June 2007 (Dz. U. of 2007, No 130, Item 905, ('the KDT')] constitute [, from the date of Poland's accession to the European Union,] State aid within the meaning of Article [107(1) TFEU] to electricity generators.

2. The State aid referred to in paragraph 1 was awarded unlawfully and is incompatible with the [internal] market.'

9 Article 4 of that decision provides:

'1. The compensation provided for in the [KDT] constitutes State aid within the meaning of Article [107(1) TFEU] to the electricity generators listed in Appendix 2 to that Act.

2. The State aid referred to in Article 4(1) is compatible with the [internal] market on the basis of the Stranded Costs Methodology.

3. The maximum amount of compensation provided for in the [KDT] shall be the amount following deduction of the total revenue generated by the assets under the PPAs and which is available to cover investment costs.'

Polish law

10 In the 1990s, the modernisation of Poland's electricity infrastructure required significant investment. Since the financial position of national electricity generators did not allow such investment to be made, those generators entered into long-term Power Purchase Agreements ('PPAs') with PSE.

11 Under these agreements, the electricity generators concerned undertook to set up new generation facilities, modernise their equipment and supply to PSE a fixed minimum volume of electricity, produced at specific plants. For its part, PSE undertook to purchase at least the agreed minimum volume of electricity, at a price based on the principle of passing costs on to the consumer.

12 Following the entry into force of Directive 96/92, the KDT provided to the generators referred to in Annex 1 to the KDT the option of terminating the PPAs entered into with PSE.

13 In particular, the KDT introduced, for generators who terminated those agreements at their own initiative, a right to stranded costs compensation, in accordance with prescribed conditions. Those electricity generators, which were parties to PPAs, can thus benefit from such compensation each year, in principle for a period of time corresponding to the length of the PPA terminated early.

14 Under the KDT, the compensation must cover stranded costs. In particular, the compensation mechanism laid down in that law provides for the payment of an advance in respect of stranded costs for the amount proposed, which must not however exceed the amount laid down in the KDT, then an annual auditing of the amount of the advance paid by the President of the URE on the basis, in particular, of the actual financial results.

15 To this end, the President of URE establishes the amount of compensation owed in respect of a given year. Accordingly, either the generator is under an obligation to pay back a part of the advance to the system, or he is awarded additional resources. Then, at the end of the adjustment period, a final account of the sums paid and owed to the generator is drawn up as a final adjustment.

16 Article 2(12) of the KDT defines 'stranded costs' as the costs of a generator which are not covered by income from the sale of the electricity generated, reserve capacity and network services in a competitive market following the early termination of a PPA, resulting from that generator's investment in assets related to the generation of electricity made up to 1 May 2004.

17 Article 32(1) of the KDT, which governs the mechanism for calculating the adjustment of stranded costs for generators who are part of a group of undertakings, provides that:

'Where a generator who entered into a termination agreement is part of a group of undertakings, account must be taken of the values designated by the symbols "N", "SD", "R" and "P", referred to in Article 27(1), relating to any generator and entity belonging to that group of undertakings and carrying out economic activities in the field of electricity generation within the territory of Poland in the generation plants referred to in Annex No 7 to this law.'

18 Annex 1 to the KDT contains a list of the generators who are a party to the PPAs and stipulates the generation plants for which these agreements are relevant.

19 Annex 7 to the KDT contains a list of the generation plants taken into consideration in the calculation of the generators' stranded costs; that list is taken into account in the adjustments of the stranded costs.

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

20 It is clear from the order for reference that PGE, which, at the material time in the main proceedings, carried out its activities under the name Zespół Elektrowni Dolna Odra S.A., and Elektrownia Bełchatów S.A. ('ELB') were not part of the same group of undertakings in the period during which PGE entered into the commitments repayment for which gave rise to the stranded costs at issue in the main proceedings. Zespół Elektrowni Dolna Odra S.A. was listed in Annex 1 to the KDT as an electricity generator and a party to a PPA with PSE. As for ELB, its generation plants were listed in Annex 7 to that law and that company was shown as being a part of the holding company BOT, that is to say a group other than that to which PGE belonged. Nevertheless, on the date of the adoption of the KDT and on the date of the adoption of Decision 2009/287, PGE and ELB were part of the same group.

21 ELB was not a party to a PPA with PSE and, as such, did not have the status of a 'generator', within the meaning of the KDT. It had, nevertheless, the status of an 'entity', within the meaning of Article 32 of that law, the financial results of which are to be taken into account during the adjustment of the stranded costs of a generator covered by the KDT.

22 By decision of 30 July 2010, the President of URE fixed the amount of the annual adjustment of PGE's stranded costs at 24 077 793 Polish zlotys (PLN) (approximately EUR 4 988 900) for the year 2009. Pursuant to Article 32 of the KDT, he carried out the adjustment of PGE's stranded costs, which was part of a group of undertakings as defined in Article 2(1) of the KDT. According to the findings of the President of the URE, ELB belonged, in 2009, to the same group of undertakings as PGE and was a party to the State aid scheme, though it did not receive funds to cover the stranded costs.

23 PGE brought an action against the decision of the President of URE before the Sąd Okręgowy w Warszawie (Warsaw Regional Court, Poland). In particular, it asked for the annual adjustment of the stranded costs to be fixed at PLN 116 985 205 (approximately EUR 26 435 046) or the annulment of that decision in its entirety. In its action, PGE claimed that Article 32(1) of the KDT applied exclusively to entities designated as forming a group of undertakings listed in Annex 7 to that law. According to PGE, to the extent that, in accordance with that annex, ELB was not a member of the same group of undertakings as PGE, the President of URE was not entitled to take into account ELB's financial results for the adjustment of PGE's stranded costs.

24 By decision of 4 June 2012, the Sąd Okręgowy w Warszawie (Warsaw Regional Court) upheld PGE's action and fixed the amount of the stranded costs adjustment at the sum of PLN 116 985 205 (approximately EUR 26 435 046).

25 The President of URE brought an appeal against that judgment before the Sąd Apelacyjny w Warszawie (Warsaw Court of Appeal, Poland) which dismissed the appeal by judgment of 17 January 2013. In that judgment, the appeal court held that in order to take into account, at the time of the adjustment of the stranded costs, the actual financial results of another entity, it was necessary for that entity to be part of the same group of undertakings as PGE at the time the KDT was adopted. Nonetheless, under Annex 7 to the KDT, to which Article 32 refers, it was not necessary for ELB to be considered to be a member of the same group of undertakings as PGE for the purposes of calculating the adjustment of the stranded costs compensation.

26 On 15 July 2013 the President of URE brought an appeal on a point of law before the referring court, the Sąd Najwyższy (Supreme Court, Poland), against the judgment of 17 January 2013 of the Sąd Apelacyjny w Warszawie (Warsaw Court of Appeal). He claims that to interpret the concept of 'group of undertakings', within the meaning of Article 2(1) of the KDT, reference should not be made to Annex 7 to the KDT, but only those entities belonging to a given group of undertakings at the time the KDT came into force should be taken into account.

27 On the other hand he argues that, as is clear from points 3.3 and 4.2 of the Stranded Costs Methodology, those costs must be calculated taking into account the KDT listed energy generators' actual membership of a group of undertakings for each year in which a stranded costs adjustment is performed. Given that PGE belonged, on the date of adoption of the decision of the President of URE, to the same group of undertakings as ELB, the financial results of the latter should be taken into account at the time of the adjustment of PGE's stranded costs.

28 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 107 TFEU, read together with Article 4(3) TEU and Article 4(2) of Decision [2009/287], to be interpreted as meaning that, where the Commission classifies State aid as being compatible with the internal market, a national court is not entitled to review whether the domestic provisions which have been deemed to constitute permitted State aid are consistent with the principles laid down in the [Stranded Costs Methodology]?

(2) Is Article 107 TFEU, read together with Article 4(3) TEU and Article 4(1) and (2) of Decision [2009/287], interpreted in the light of points 3.3 and 4.2 of [the Stranded Costs Methodology], to be understood as meaning that, in the context of the implementation of a State aid programme which the Commission has found to be compatible with the internal market, the annual adjustment of the stranded costs incurred by group-affiliated generators is carried out on the assumption that the position with respect to the group affiliation of the generator as recorded in the annexes to the legislative measure examined by the Commission is alone decisive, or is it necessary to verify in respect of every year for which stranded costs are adjusted whether, during that period, the beneficiary of the State aid programme linked to the stranded costs actually belongs to the group to which the other generators covered by the aid programme also belong?'

Consideration of the questions referred

The first question

29 By its first question, the referring court asks, in essence, whether Article 107 TFEU and Article 4(3) TEU, read together with Article 4(2) of Decision 2009/287, must be interpreted as precluding, where the Commission has assessed a State aid scheme in the light of the Stranded Costs Methodology and

classified it as being compatible with the internal market before its implementation, the national authorities and courts from reviewing in turn, at the time the State aid in question is implemented, whether it is consistent with the principles set out in that methodology.

30 In order to answer that question, it must be stated that, in accordance with the Court's settled case-law, in the context of the system of State aid control established by the FEU Treaty, the national courts, on the one hand, and the Commission, on the other, have complementary but distinct roles (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

31 In particular, national courts ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28 and the case-law cited). For this purpose, proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of 'State aid', contained in Article 107(1) TFEU, in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought or ought not to have been subject to this procedure (see, to that effect, judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 50 and the case-law cited).

32 On the other hand, national courts do not have jurisdiction to give a ruling on whether aid measures or a State aid regime are compatible with the internal market. Indeed, in accordance with the Court's settled case-law, that assessment falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (see, to that effect, judgments of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 51 and 52 and the case-law cited, and of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28 and the case-law cited).

33 It is also important to note that the application of the European Union rules on State aid is based on an obligation of sincere cooperation between, on the one hand, the national courts and, on the other, the Commission and the Courts of the European Union, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure the fulfilment of the obligations under European Union law and refrain from taking those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional (see judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41).

34 In this case, as is apparent from the order for reference, the referring court is seeking to ascertain whether it is appropriate to assess the compatibility of the aid regime established by a national law, such as the KDT, with the principles laid down in the Stranded Costs Methodology, even though the Commission, in Decision 2009/287, has already established compatibility with the internal market.

35 In this respect, it must be stated that, after having held, in Article 1 of that decision, that the compensation scheme at issue in the main proceedings amounted to 'State aid', within the meaning of Article 107(1) TFEU, in favour of electricity generators, the Commission gave final approval to that scheme, having held, in Article 4(2) of that decision, that stranded costs compensation was compatible with the internal market, precisely 'on the basis of the Stranded Costs Methodology'.

36 That being the case, to allow national courts, in the context of the implementation of a State aid scheme such as that at issue in the main proceedings, to review the compatibility of such a scheme with the internal market would amount in essence to giving those courts the power to substitute their own assessment for that of the Commission, in this instance in its Decision 2009/287. Therefore, it

would be open to those courts, contrary to the case-law cited in paragraph 32 of this judgment, to encroach on the Commission's exclusive competences relating to the assessment of the compatibility of State aid with the internal market.

37 Furthermore, to accept that national courts may undertake such an assessment would in fact have the consequence that those courts would exceed the limits of their own jurisdiction aimed at ensuring compliance with EU law on State aid, referred to in paragraph 31 of this judgment, and would be in breach of their duty of sincere cooperation with the institutions of the European Union, referred to in paragraph 33 of this judgment. Indeed, it is conceivable — as moreover seems to be the case here — that the assessment undertaken by the national court in question would lead it to take a decision that runs counter to the decision, which is final, made by the Commission.

38 Admittedly, when the Commission rules on the compatibility of a State aid scheme with the internal market, it is conceivable that the facts taken into consideration by that institution evolve between the time it assesses those facts and the adoption of its final decision. That situation can indeed be of such a nature as to lead the national court, responsible for assessing whether a given measure comes under an authorised aid scheme, to question the relevance of the Commission's decision in that respect.

39 Nonetheless, as the Advocate General stated in point 54 of his Opinion, such a problem cannot be resolved by giving the national courts powers that are exclusive to the Commission; the solution must instead be sought in defining the boundaries of the complementary, but distinct, roles, referred to in paragraphs 30 to 33 of this judgment, played by those parties in the field of State aid.

40 Thus, if a national court entertains doubts regarding the interpretation of a decision of the Commission which classified a specific measure as State aid, that court may seek clarification from the Commission or, depending on the circumstances, may or must, in accordance with the second and third subparagraphs of Article 267 TFEU, refer a question to the Court of Justice for a preliminary ruling on the interpretation of Article 107 TFEU (see, to that effect, in particular, judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 50 and 51, and of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 44).

41 In the light of the foregoing, the answer to the first question is that Article 107 TFEU and Article 4(3) TEU, read together with Article 4(2) of Decision 2009/287, must be interpreted as precluding, where the Commission has assessed a State aid scheme in light of the Stranded Costs Methodology and classified it as being compatible with the internal market before its implementation, the national authorities and courts from reviewing in turn, at the time the State aid in question is implemented, whether it is consistent with the principles set out in that methodology.

The second question

42 By its second question, the referring court asks, in essence, whether Article 4(1) and (2) of Decision 2009/287, read in the light of the Stranded Costs Methodology, must be interpreted as meaning, in circumstances such as those in the main proceedings, that when calculating the annual adjustment of the stranded costs compensation to be paid to a generator that is a member of a group of undertakings, account must be taken of that group membership and, therefore, the financial results of that group, at the time when the Commission assessed the compatibility of the stranded costs compensation scheme with the internal market or, rather, on the date when that adjustment is carried out.

43 In order to provide a useful answer to the referring court, it must be noted that that court seeks to identify the criteria applicable to the calculation, in the light of the circumstances of the case in the main proceedings, of the amount of the annual adjustment of the stranded costs compensation awarded to PGE under the KDT, for the year 2009.

44 In particular, as is apparent from the order for reference, the national court must determine whether, for the purposes of that calculation, a 'static' or, rather, a 'dynamic' approach should be adopted. Under the first approach, only the structure of the group of undertakings, as described in Annex 7 to the KDT and on the basis of which the Commission authorised the State aid scheme in the main proceedings, is to be taken into account. Under the second approach, the amount of compensation owed to PGE must be adjusted taking into account also the financial results of ELB - which, despite not being listed in that annex as belonging to the same group as PGE, was incorporated in that group in the course of 2009 - on the date of adoption of the decision of 30 July 2010 of the President of URE, referred to in paragraph 22 of this judgment.

45 In that respect, it must be noted, as stated in paragraph 35 of this judgment, that pursuant to Article 4(2) of Decision 2009/287, the Commission authorised the stranded costs compensation regime laid down in the KDT, that regime having been considered compatible with the internal market for the very reason that it was calculated 'on the basis of the Stranded Costs Methodology'.

46 It follows that the relevant provisions of that decision should be interpreted in the light of that methodology in order to define the criteria according to which the annual amount of stranded costs compensation as well as its possible final adjustment should be calculated.

47 The Stranded Costs Methodology provides for a two-step assessment of the State aid awarded in the form of stranded costs compensation. The purpose of the first step, which is presented in section 3 of that methodology, is to define the costs which can be considered 'stranded costs'. The second step, which is dealt with in section 4 of the Stranded Costs Methodology, concerns the mechanism for calculating the actual compensation to be paid to the beneficiary generator in respect of stranded costs, taking into account the development of genuine competition on the market.

48 As noted by the Advocate General, in essence, in point 63 of his Opinion, the Stranded Costs Methodology is based on the premiss that there are appreciable developments in the conditions of competition in the electricity market and thus legitimises account being taken of changes relating to certain aspects of that market in the Member State concerned.

49 In particular, it should be noted that, in accordance with point 4.2 of that methodology, 'the arrangements for paying the aid must allow account to be taken of future developments in competition', which may be gauged in particular by way of quantifiable factors, such as prices and market shares. Furthermore, in accordance with that same point, since changes in the conditions of competition have a direct effect on the amount of eligible stranded costs, 'the amount of the aid paid will necessarily be conditional on the development of genuine competition, and the calculation of aid paid over time will have to take account of changes in the relevant factors in order to gauge the degree of competition achieved'.

50 It must also be noted that, pursuant to point 4.3 of the Stranded Costs Methodology, Member States are under an obligation to send to the Commission an annual report that, in particular, 'describes developments in the competitive situation' in the electricity sector, by indicating, among other things, the changes observed in the relevant quantifiable factors. That report must in particular contain information concerning possible alterations to the structure of the energy market in the Member State concerned.

51 In these circumstances, given that Decision 2009/287, in accordance with Article 4(2) thereof, is precisely based on the Stranded Costs Methodology and that it is designed, as is apparent from, in particular, recitals 36, 38 and 40 thereof, to apply to stranded costs compensation owed for the 2006 to 2025 period, it must be held that it follows the same evolutionary logic as that methodology and must therefore be interpreted in accordance with a 'dynamic' approach.

52 Accordingly, the annual adjustment of stranded costs compensation must be undertaken by reference to the actual situation of the market at the time that amount is calculated, which entails an assessment of developments in competition in the market concerned.

53 It follows that Decision 2009/287 must be interpreted as meaning that any changes in the ownership structure of companies that generate electricity fall within the scope of that decision and, accordingly, must be taken into account by the national authorities or courts when they carry out the correction of the annual amount of stranded costs compensation.

54 Furthermore, as the Commission rightly stated at the hearing, the very idea of correction, as distinct from the advance payment, consists in taking account of new elements arising after the award of the stranded costs compensation and cannot be reduced to a mere reference to the structure of the group of undertakings as it was previously described in a measure of national legislation.

55 Moreover, the taking into account of such elements in the context of calculation of the compensation has the benefit of making it possible to avoid the systematic re-opening of the review procedure provided for in Article 108 TFEU as soon as there is the slightest change in the structure of the groups of undertakings concerned.

56 Taking into account the above considerations, the answer to the second question is that Article 4(2) of Decision 2009/287, read in the light of the Stranded Costs Methodology, must be interpreted as meaning that, in circumstances such as those in the main proceedings, when calculating the annual adjustment of the stranded costs compensation to be paid to a generator that is a member of a group of undertakings, account must be taken of that group membership, and, therefore, the financial results of that group, on the date when adjustment is carried out.

Costs

57 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 107 TFEU and Article 4(3) TEU, read together with Article 4(2) of Commission Decision 2009/287/EC of 25 September 2007 on State aid awarded by Poland as part of Power Purchase Agreements and the State aid which Poland is planning to award concerning compensation for the voluntary termination of Power Purchase Agreements must be interpreted as precluding, where the European Commission has assessed a State aid scheme in the light of the Commission Communication of 26 July 2001 relating to the methodology for analysing State aid linked to stranded costs and classified it as being compatible with the internal market before its implementation, the national authorities and courts from reviewing in turn, at the time the State aid in question is implemented, whether it is consistent with the principles set out in that methodology.**

2. **Article 4(1) and (2) of Decision 2009/287, read in the light of the Commission Communication of 26 July 2001 relating to the methodology for analysing State aid linked to stranded costs must be interpreted as meaning that, in circumstances such as those in the main proceedings, when calculating the annual adjustment of the stranded costs compensation to be paid to a generator that is a member of a group of undertakings, account must be taken of that group membership and, therefore, the financial results of that group, on the date when adjustment is carried out.**

[Signatures]