

EC control of aid granted through State resources

Public undertakings, Funds, imputability and the importance of how resources are transferred – What do *PreussenElektra* and *Stardust Marine* tell us?

Christian Koenig and Jürgen Kühling*

This article examines the effect of the ECJ's judgement in *PreussenElektra* on the definition of aid granted by a Member State or through State resources. In that case, funds stemming from private undertakings were held not to amount to State aid, even where statutory obligations required them to be channelled to benefit a specified class of third parties. This development is set in the light of the recent judgement of the ECJ in *Stardust Marine*, a case raising the issues of whether the resources of public undertakings are properly to be regarded as "State resources" and under what circumstances the granting of resources by public undertakings is imputable to the State. The article also considers how the organisation of funds distributing resources can affect the legal assessment of whether State aid is involved.

I. Introduction

1. *PreussenElektra*

The judgement of the European Court of Justice in *PreussenElektra*¹ brought to an end a long-running controversy concerning the German law on feeding electricity from renewable energy sources into the public grid (the "*Stromeinspeisungsgesetz*", or "*StrEG*"²). The Court held that certain measures promoting the sale of electricity from renewable sources did not amount to State aid to the producers of "green" electricity.

The legal question at issue was the true construction of Article 87 EC, which refers to aid "granted by a Member State or through State resources in any form whatsoever". Faced with a number of possible interpretations, the Court made it clear that only advantages granted directly or indirectly through State resources are to be regarded as aid, and thus that private resources, even if channelled as a result of State intervention, do not constitute State aid.

2. *Stardust Marine*

On 16 May 2002, the Court of Justice delivered judgement in the *Stardust Marine* case,³ which raises the issue of whether the resources of publicly-owned undertakings are ipso facto State resources. In his Opinion on the case, Advocate-General Jacobs had suggested that the resources of public undertakings should be regarded as State resources, and that an analysis of how the resources were actually controlled will determine whether their transfer is imputable to the State. The Court followed this reasoning. The case prompts us to ask what "aid granted by a Member State or through State resources" really means in the context of Article 87 EC. Although the EC State aid rules have been in force for nearly 45 years, there are still fundamental questions not yet answered with respect to this criterion.

* Professor Dr. Christian Koenig LL.M. is Director of the Center for European Integration Studies, Bonn. Dr. Jürgen Kühling LL.M. is Research Associate at the Center for European Integration Studies, Bonn.
The authors wish to thank Oliver Lieth and Denis O'Sullivan – both research associates at ZEI [http://www.zei.de] – for their help in translating this document and for their valuable comments.

¹ European Court of Justice, Judgement of 13 March 2001, Case C – 379/98 *PreussenElektra* [2001] ECR 2099 *Neue Zeitschrift für Verwaltungsrecht* 2001, pp. 665. See also, Baquero Cruz/Castillo de la Torre, 26 *European Law Review* (2001), pp. 489; Bartosch, *Neue Zeitschrift für Verwaltungsrecht* 2001, pp. 643; Goossens/Emmerrechts, *Common Market Law Review* (38) 2001, pp. 991; Keppenne, *Nederlands tijdschrift voor Europees recht*, 2001, pp. 193; Koenig/Kühling, *Neue Zeitschrift für Verwaltungsrecht* 2001, pp. 768; Koenig/Kühling, *Zeitschrift für Urheber- und Medienrecht* 2001, pp. 537; Ruge, *Europäische Zeitschrift für Wirtschaftsrecht* 2001, pp. 247; Schnelle/Bartosch, *Europäisches Wirtschafts- & Steuerrecht* 2001, pp. 411, 412, 413.

² 19.07.1994 (Bundesgesetzblatt I, 1994, 1618), as amended by the Gesetz zur Neuregelung des Energiewirtschaftsrechts, (Bundesgesetzblatt I, 1998, 730). The Gesetz zur Neuregelung des Energiewirtschaftsrechts transposed into German 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.

³ Case C-482/99 *French Republic v Commission*. Judgement of 16 May 2002, not yet published in the ECR, but available on the internet at <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

II. PreussenElektra

1. The Stromeinspeisungsgesetz

The German *Stromeinspeisungsgesetz* was passed in 1990,⁴ in order to support existing producers of energy from renewable sources, and to provide an incentive for more businesses to become involved in producing “green” energy. The *Stromeinspeisungsgesetz* (now the Promotion of Renewable Energy Statute) obliges electricity distribution companies to purchase electricity produced from renewable energy sources, and to do so at prices above the actual market value of the electricity. In effect, the law imposes a duty to purchase a kind of energy distributors may not want, and that at prices which producers could not obtain on a free market, but which are fixed by statutory instrument.

From the outset, the StrEG provoked heated discussions concerning both German and EC law. At the national level, the constitutionality of the *Stromeinspeisungsgesetz* was called into question.⁵ At the Community level, the compatibility of certain StrEG provisions (paragraphs 1-4) with the principle of the free movement of goods (Article 28 EC) and with the State aid provisions of the Treaty (Arts. 87 & 88 EC) was doubted.

In *PreussenElektra*, the European Court of Justice considered the compatibility of the *Stromeinspeisungsgesetz* with Article 87 (1) of the EC Treaty. It held as follows:

“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 87 (1) of the EC Treaty.”

2. The condition that aid be “granted [...] through State resources in any form whatsoever”

The prohibition in Article 87 EC refers to aid “granted [...] through State resources in any form whatsoever”. There are three views as to how this phrase should be understood.

a. Broad View of State Resources

The broadest view states that *every* advantage granted through State intervention or regulation fulfils the condition, regardless of whether it involves a transfer

of resources.⁶ The European Court of Justice rejected this interpretation in several judgements prior to *Preussen Elektra*.⁷

b. Public Budget View of State Resources

The narrow view of what constitutes State aid requires that the resources granted have to belong to a State budget or to any other budget of a public entity or private body designated by the State.⁸ In any case, a burden on public finances is required, regardless of whether it stems from monies payed out of funds under the State’s control or from a waiver of revenues which were supposed to become part of such funds. The fact that parafiscal charges – any instrument with parallel consequences, such as taxes – are at issue does not suffice. The relevant point is rather whether those charges become part of a budget controlled by the State.

c. Economic View of State Resources

Another possible view, and one which has received some support in academic writings, is that a transfer of resources which takes place under public control is necessary, but that the resources do not have to come from a public budget.⁹ This position was advocated by the European Commission in *PreussenElektra*. In the case, the Commission argued that the State aid rules extend to measures which are established by the State but financed by private enterprises. It proposed that the rules (to be found in Articles 87 and 88 EC) are very important in order to ensure that competition is not distorted, and that they should be read in conjunction with Article 10(2) EC, which requires the Member States “to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty”. Relying on this duty of sincere co-operation, the Commission concluded that, for the purposes of Article 10(2) EC, it is immaterial whether a State measure is financed directly through public resources or indirectly through private resources the application of which is controlled by State entities.¹⁰ If this reasoning is correct, the measures in the *PreussenElektra*

4 In the meantime, the original provisions have been subsumed into the Gesetz für den Vorrang erneuerbarer Energien (“Promotion of Renewable Energy Statute”, para. 3), which entered into force on April 1, 2000 (Bundesgesetzblatt I, 2000, 305); Salje, *Recht der Energiewirtschaft* 2000, pp. 125, pp. 129.

5 See: Koch/Schütte, *Zeitschrift für Neues Energierecht* 1998, pp. 3; Ossenbühl, *Recht der Energiewirtschaft* 1997, pp. 46; Pohlmann, *Neue Juristische Wochenschrift* 1997, pp. 545; Theobald, *Neue Juristische Wochenschrift* 1997, pp. 550.

6 See, e.g. Slotboom, *ELR* (20) 1995, pp. 289, 298.

7 Joined Cases C-72/91 & C-73/91 *Sloman Neptun* [1993] ECR I-887, para. 21; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, para. 16; joined Cases C-52/97, C-53/97 and C-54/97 *Viscido* [1998] ECR I-2629, para. 14.

8 Nagel, *Zeitschrift für Neues Energierecht* 2000, p. 100.

9 Kühling, *Recht der Energiewirtschaft* 2001, pp. 93, 97 f.

10 The position of the Commission is summarised in: Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 179, 180.

situation would have to be regarded as State aid granted through non-State resources. As a result, the *Stromeinspeisungsgesetz* should be regarded either as State aid, or as a measure intended to circumvent the State aid rules.¹¹

Similarly,¹² Keppenne adopts an explicit economic approach to understanding “public resources”. According to the author, it is important to distinguish whether the resources involved may be considered “normal” resources for the beneficiaries, or resources that should have been allocated to the public budget. Public resources “should be taken as being any resources that are actually at the disposal of public authorities.”¹³ This approach is both economic and functional, since the classification of funds as public or private depends on how they are used. The Court of First Instance took a comparable position in its judgement on *Air France*.¹⁴ There, it ruled that Article 87(1) EC “covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.”¹⁵ Referring to the judgements in *Ladbroke Racing*¹⁶ and *Air France*, Keppenne concludes that the measures in question in the *PreussenElektra* case constitute State aid within the meaning of Article 87(1) EC, since public authorities effectively levy a “tax” on the purchasers of “green”

energy which is payable directly to the producer. This latter therefore benefits from resources which cannot be deemed “normal”. Moreover, the purchasers do not derive any benefit from the purchase obligations. Rather, the law pursues “classical” political goals, namely those of environmental protection. Such goals are usually financed through State resources.

3. The judgement in *PreussenElektra*

The Court of Justice, rather than following the Commission’s arguments on the economic view of State resources, preferred the second option outlined above – that State aid consists of resources provided out of the public budget. The Court found that the requirement in Article 87 EC that measures be “granted through State resources in any form whatsoever” is not fulfilled in circumstances where statutory provisions merely require private enterprises to buy at prices above market value, since the public purse is not involved. The Court also repeated its rebuttal of the broad view of what constitutes aid:

“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.”¹⁷

In his Opinion on the case, Advocate General Jacobs pointed out clearly that interpreting the condition this way means that the “measure at issue must necessarily cost the State money and financing through public resources is a constitutive element of the definition of State aid.”¹⁸ Thus, Article 87(1) EC requires a burden on public finances.¹⁹ This clarification is very important because it emphasises that “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 Art. 92 (1) of the Treaty.”²⁰

Moreover, the third view above – according to which it is not necessary for the resources to flow from the public budget for them to be State aid – is undermined by the judgement in *PreussenElektra*. In argument, the German Government had submitted to the Court that a “wider definition of State aid would bring practically all national legislation regulating the relationship between enterprises within the scope of the State aid rules and would upset the division of competences between the Member States and the Community as laid down in the Treaty.”²¹ Advocate General Jacobs did not fully agree with this argu-

11 Also dealing with a possible circumvention: Goossens/Emmerechts, CML Rev. (38) 2001, pp. 991, 1002.

12 Keppenne, Nederlands tijdschrift voor Europees recht 2001, pp. 193.

13 Keppenne, Nederlands tijdschrift voor Europees recht 2001, pp. 193, 195.

14 Case T-358/94 *Air France* [1996] ECR II-2109.

15 Case T-358/94 *Air France* [1996] ECR II-2109, para. 67.

16 Case T-67/94 *Ladbroke Racing* [1998] ECR II-1, para. 108. See Keppenne, Nederlands tijdschrift voor Europees recht 2001, pp. 193, 195; also Kühling, Recht der Energiewirtschaft 2001, pp. 93, 97 f.

17 This reading of the condition is well-established case-law, compare: Case C-379/98 *PreussenElektra* [2001], para. 58 with: Case 82/77 *Van Tiggele* [1978] ECR 25, para. 25; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, para. 19; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-16185, para. 16; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido* [1998] ECR I-2629, para. 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, para. 35; Case C-295/97 *Piaggio* [1999] ECR I-3735, para. 35.

18 Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 116.

19 The necessity of a burden on public finance was already indicated by the Court in Case 82/77 *Van Tiggele* [1978] ECR 25, para. 25 and in the judgement on Joined Cases 213 to 215/81 *Norddeutsches Vieh- und Fleischkontor* [1982] ECR 3583, para. 22. However, in Case 290/83 *Commission v France* [1985] ECR 439, para. 14 the Court seemed to dispense with the criterion. Later, in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, para. 21 the Court emphasises particularly that the condition is necessary. On the development of the condition see Soltész, Europäische Zeitschrift für Wirtschaftsrecht 1998, 747; Bartosch, Neue Zeitschrift für Verwaltungsrecht 2001, pp. 643, 644; Goossens/Emmerechts, CML Rev. 2001, pp. 991, 1000; Schnelle/Bartosch, Europäisches Wirtschafts- & Steuerrecht 2001, pp. 411, 412, 413; denying the necessity of the condition: Slotboom, ELR (20) 1995, pp. 289, 298. Slot, CML Rev. 1994, pp. 142, 143, and Soltész, Europäische Zeitschrift für Wirtschaftsrecht 1998, 747, 751, are of the opinion that cases in which no burden on public finance is given can be solved by applying the four fundamental freedoms. The *PreussenElektra* case shows the doubtfulness of this assumption.

20 Case C-379/98 *PreussenElektra*, para. 61.

21 See: Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 108.

ment,²² but arrived at the same result by emphasising the fact that no public authority had enjoyed any rights over the monies in question, as the funds never left the private sphere.²³ The German Government confirmed that they were exclusively financed through private resources.²⁴

As to the Commission's argument relying upon the interaction of Article 10 EC with the State aid rules, the Court pointed out that Article 87 is sufficient in itself to prohibit the conduct to which it refers, and that the obligation of sincere co-operation "cannot be used to extend the scope of Art. 87 to conduct by States that does not fall within it."²⁵ The Advocate-General had put the issue even more pointedly by stating that such an interpretation of Article 87 bears the risk of assuming what has to be proved, "namely that the rules are intended to apply to all State measures."²⁶ As a result of the judgement in *PreussenElektra*, the third view has been discredited and, of the three views outlined above, only the second can still be sustained.²⁷

Finally, the judgement in *PreussenElektra* indicates that statutory measures causing funds to flow from private undertakings to the benefit of third parties do not constitute State aid to the recipients. The Court's reasoning in that case seems to have been based on the fact that no public monies were involved in the transfer of funds.

One could nevertheless argue that the public purse was, at least indirectly, involved in the *PreussenElektra* situation, since the profits of the undertakings disadvantaged by the provisions of the *Stromeinspeisungsgesetz* would be affected, and that they would pay fewer taxes into the public purse as a result. The Court dealt with this argument and found:

"That conclusion cannot be undermined by the fact [...], 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 undertaking 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."²⁸

Advocate-General Jacobs shared this assessment, and considered that the diminution in tax receipts was an "inherent side-effect of the StrEG 1998".²⁹ This is not inconsistent with his later Opinion on *Stardust Marine*, in which he indicated that State aid may indeed occur where the State "grants aid through a waiver of revenue".³⁰ The crucial distinction is that the (probable) diminution of tax receipts in *Preussen*

Elektra was implicit in the provisions of the statute, while in other cases the State chose explicitly to forego certain tax receipts.

Whereas the Court's position on the question of inherent reductions in tax revenue is convincing, it seems, however, that its strict public budget view of State resources need to be at least clarified on some aspects. The opinion of Advocate-General Jacobs in the *Stardust Marine* case is food for thought.

III. Stardust Marine

PreussenElektra may have resolved the issue as to whether private funds influenced by statutory obligations can amount to State aid, but it begged the question of exactly what constitutes "State resources", especially if the budgets of public undertakings are involved. The *Stardust Marine*³¹ litigation revolves around precisely this problem.

Stardust Marine (in liquidation) was a French company specialised in yacht chartering and management services, with activities mainly in French overseas territories. SBT-Batif – a subsidiary of the publicly-owned Crédit Lyonnais group – acted as banker not only to *Stardust*, but also to investors purchasing shares in *Stardust's* yachts, for whom it arranged financing. In the 1990s, due to a combination of fraud, poor commercial strategy and mismanagement, *Stardust Marine* made substantial losses over several years. However, the yacht company was bailed out through a series of

22 Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 157.

23 Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 166.

24 For the German Government's argument, see: Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 108.

25 Case C – 379/98 *PreussenElektra* [2001], para. 65.

26 Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 155.

27 Keppenne, *Nederlands tijdschrift voor Europees recht*, 2001, pp. 193 assumes that the Court and Advocate-General Jacobs have taken the narrow position because they feared that the economic point of view might have an "unpredictable impact on regulatory intervention by Member States in the economic sphere." (p. 196). He continues his analysis by showing that *PreussenElektra* is a borderline case. Distinguishing between general measures and State aid Keppenne argues that most of the measures that would - at first glance - fall under Art. 87 (1) EC by taking the economic position are general measures and therefore do not constitute aid in the meaning of Art. 87 (1) EC. Apart from this the economic approach would be limited by the necessity of a direct link between the advantage granted and the public resources involved.

28 Case C – 379/98 *PreussenElektra* [2001], para. 62; referring to Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, para. 21 and Case C-200/97 *Ecotrade* [1998] ECR I-7907, para. 36.

29 Opinion of Mr. Advocate General Jacobs, Case 379/98 *PreussenElektra* [2001] ECR 2099, para. 162.

30 Opinion of A-G Jacobs on Case C-482/99 *French Republic v Commission*, para. 40, referring to Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para. 14 of the judgement; Case C-83/98 *P France v Ladbroke Racing and Commission* [2000] ECR I-3271, paras. 45 to 51.

31 Case C-482/99 *French Republic v Commission*. The Judgement and the Opinion of AG Jacobs are available on the internet at <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

loans, loan-guarantees, and injections of risk-capital provided by SBT-Batif and other members of the Crédit Lyonnais ("CL") banking group.³²

A competitor of Stardust Marine complained to the European Commission which adopted a Decision characterising the assistance granted to Stardust as State aid and requiring France to claw-back over FRF 450 million [approx. € 68 million].³³ The Commission considered that the assistance contained "elements of aid since it was not consistent with the normal actions of a private investor operating under market economy conditions", and that this was not restructuring aid, but rather aid which was designed to permit and support the rapid growth of an unprofitable firm, and therefore incompatible with the Common Market.³⁴ The French Government contested that Decision before the Court of Justice.

1. State Resources in Stardust Marine

On the one hand, the Commission argued that the funds provided to Stardust Marine are State resources within the meaning of Article 87(1) since the Crédit Lyonnais companies involved in the financing are wholly-owned subsidiaries of a public undertaking,³⁵ are supported through loans guaranteed by the State, and their losses are borne by the State. Since the public undertakings in question are controlled by the State, their measures are always imputable to the State, and their resources are always State resources. The Commission added that the funds in question need not come from the budget of the State, since it is sufficient that they are under the control, and at the disposal of the State.

On the other hand, the French Government argued that the financing measures in favour of Stardust Marine cannot be regarded as granted by a Member

State or through State resources merely because they were granted by publicly-owned undertakings. The CL group companies involved drew exclusively upon their own resources and upon the deposits of their clients. To treat the resources of publicly-owned banks as being *ipso facto* State resources would be over-broad, and would amount to discrimination as between public and private undertakings contrary to Article 295 EC.

In making their arguments, both the Commission and the French government acknowledged that the judgement in *PreussenElektra* established that only advantages granted directly or indirectly through State resources constitute aid within the meaning of Article 87.

2. Earlier Cases

In his Opinion on *Stardust Marine*, A-G Jacobs conducted a review of the case-law concerning State resources.³⁶ He noted that in the early cases,³⁷ the Court did not yet regard financing through State resources as a constitutive element of State aid, so the issue of what constitutes such resources had not been closely considered. In later cases, the involvement of State resources was indicated by, for example, the fact that the State had created special capital funds out of which measures were financed,³⁸ or the fact that the State had renounced certain entitlements of public undertakings as creditors of undertaking placed under special administration.³⁹ However, the judgement of the Court of First Instance in *Air France*⁴⁰ was on point, holding that Article 87 covered "all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector". In that case, a public undertaking had used funds "which were permanently at its disposal" to provide aid.

3. A-G Jacobs on the resources of public undertakings

In his Opinion on *Stardust Marine*, A-G Jacobs takes the view that the resources of public undertakings such as the members of the CL group constitute State resources.⁴¹ Rather than concentrating on the *form* of the resources in question – not stemming from a particular item of the State budget, from a parafiscal fund or from reduced tax income – the Advocate-General proposes considering how the resources are *controlled*. State resources need not come directly from the State budget, as is the case where undertakings submit compulsory contributions (parafiscal charges) to funds which then pay out aid according to State

32 The CL Group was itself the recipient of a number of authorised aid measures during the period in question. These do not appear to have been material to the Stardust Marine matter, and the authorisations did not extend to the loans granted to Stardust.

33 Decision 2000/513 EC of 8 September 1999. OJ 2000 L 206, p.6.

34 *Ibid.*, para. 114.

35 The CL group companies involved are public undertakings within the meaning of the Transparency Directive. Directive 80/723/EEC, as amended.

36 Note also a useful review of the case law on State aid between 1998 and 2001 by Gerrit Schohe & Christoph Arhold in Vol. 1 (No. 0, March 2002) European State Aid Law Quarterly, pp.2-14.

37 At para. 33 of his Opinion, the A-G refers specifically to Case 290/83 *Commission v France* [1985] ECR 439 and Joined Cases 67, 68 & 70/1985 *Van der Kooy* [1988] ECR 219.

38 ENI / IRI: Cases C-303/88 *Italy v Commission* [1991] ECR I-1433 and C-305/89 *Italy v Commission* [1991] ECR I-1603.

39 Case C-200/97 *Ecotrade* [1998] ECR I-7907, Case C-295/97 *Piaggio* [1999] ECR I-3735.

40 Case T-358/94 *Air France* [1996] ECR II-2109, see paras. 66-67.

41 Opinion of A-G Jacobs on Case C-482/99 *French Republic v Commission*, para. 37. The Opinion is available on the internet at www.curia.eu.int

directions,⁴² or where the State simply waives tax receipts which would otherwise be payable.⁴³ In the latter instance, the aid remains throughout in the hands of the aid recipient.

Instead of relying on the form of the resource, A-G Jacobs suggests that the State's ability to control the funds is crucial, and that this interpretation is consistent with the judgements in *Air France* and *Ladbroke Racing*:

"The common denominator of the relevant cases is that the State exercised direct or indirect control over the resources in question despite the fact that the funds did not come from the State budget. In the case of parafiscal charges the funds were first brought under the State's control before they were redistributed to the undertakings concerned. In the case of a waiver of revenue the State renounced funds which it was legally entitled to claim. State resources are therefore those resources which are directly or indirectly under the control or in other words at the disposal of the State."⁴⁴

The A-G continues:

"In my view, it cannot make any difference whether a Member State which wishes to grant aid uses special funds transferred from the budget to public undertakings before the aid is granted or those undertakings' own resources. In both situations the State uses resources under its control within the meaning of the above case-law and in both situations the economic burden of the measure is ultimately borne by the State. Even where the State acts as proprietor of an undertaking the funds invested or ultimately lost must necessarily be financed through the State budget. Furthermore, in economic terms there is no difference between a measure financed from special funds transferred to a public undertaking before the aid is granted and a measure financed initially through a public undertaking's own resources where that undertaking at a later stage receives funds from the State. Nor can Community law permit the rules on State aid to be circumvented merely through the creation of public undertakings which are in fact charged with allocating aid."⁴⁵

According to the A-G, this justifies his conclusion that the resources of public undertakings constitute State resources within the meaning of Article 87(1) of the Treaty.

The A-G rejects the argument that this result violates Article 295 EC, reasoning that the relationships between public authorities and public undertakings are of a "special kind", different from those between the authorities and private undertakings.

Regarding the budgets of public undertakings as State resources without reservation would lead to a broad impact on the everyday commercial activities of public undertakings and to an unworkable situation of unnecessary and unjustified control. Therefore A-G

Jacobs refers to a well established restrictive element: the transaction at issue has to be imputable to the State.⁴⁶ A-G Jacobs accepts that it would be going too far to classify autonomous decisions of public undertakings and other entities distinct from public authorities automatically as State measures. Day-to-day business decisions of a publicly owned company taken without any interference by the public authorities should be considered as falling outside the scope of the State aid rules as they are not imputable to the State.⁴⁷ In this way, A-G Jacobs thinks that the French Government's concerns about the consequences of his broad view on budgets of public undertakings as State resources can be met.⁴⁸

Considering whether it is possible to establish a test for when a given measure of a public undertaking is attributable or imputable to the State, A-G Jacobs concedes that the fact that the public authorities may directly or indirectly exercise a dominant influence does not prove that they actually did so in a given case. On the other hand, the State aid rules could be circumvented if public undertakings act as a "relay" for State support of certain undertakings or industries. The involvement of the State does not therefore have to go so far as to constitute an explicit instruction. In A-G Jacobs' view, it is sufficient to establish on the basis of an analysis of the facts and circumstances of the case that the undertaking in question could not take the decision to allocate the resources in question without taking account of the requirements of the public authorities.⁴⁹

42 Opinion of A-G Jacobs on Case C-482/99 *French Republic v Commission*, para. 39.

43 *Ibid.*, para. 40.

44 *Ibid.*, para. 41.

45 *Ibid.*, para. 44.

46 Opinion of A-G Jacobs on Case C-482/99 *French Republic v Commission*, para. 53 referring to Joined Cases 67, 68 and 70/85 *Van der Kooy* [1988] ECR 219, paras. 28 and 35 to 38; Cases C-303/88 *Italy v Commission* [1991] ECR I-1433 and C-305/89 *Italy v Commission* [1991] ECR I-1603, para. 11; Case T-358/94 *Air France* [1996] ECR II-2109, para. 55.

47 *Ibid.*, para. 55.

48 Without this condition there would in fact be a breach of Article 295 EC, as the French Government argued in *Stardust Marine*, para. 35.

49 *Ibid.*, paras. 65-66.

The A-G suggested that the following indicia be taken into account:

- evidence that the measure was taken at the instigation of the State;
- the scale and nature of the measure (here there might be some overlap with the private investor/creditor test);
- the degree of control which the State enjoys over the public undertaking in question; and
- a general practice of using the undertaking in question for ends other than commercial ones or of influencing its decisions.

On the facts of *Stardust Marine*, the Advocate-General did not find any evidence to suggest that the lending decisions of the CL group companies were directly or indirectly influenced by the French authorities or even known to those authorities. Indeed, it appeared that the companies took their decisions on Stardust in full commercial autonomy without taking account of any real or assumed requirements of the public authorities.⁵⁰

To put it in a nutshell, A-G Jacobs considers budgets of public undertakings as a type of "potential" State resources. They can only be considered as State aid if their granting is imputable to the State. If this attribution is not possible one might say that there are no State resources or that there are State resources, but that their granting is not imputable to the State. In any case, there is no State Aid.

50 *Ibid.*, para. 73. If this was really the case in *Stardust Marine* and if the analysis of A-G Jacobs is convincing on this point is not the subject of this article. In any case, with respect to financial transactions of public undertakings in the form of public banks a strict test seems necessary, as public banks are usually established in order to allow the financing of projects where private banks would withdraw.

51 ECJ Judgement of 16 May 2002 in Case C-482/99 *French Republic v Commission*, at para. 22.

52 *Ibid.*, para. 23, referring to Case 78/76 *Steinike and Weinlig v Germany* [1977] ECR 595, para. 21; Case 290/83 *Commission v France* [1985] ECR 439, para. 14; Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, para. 35; and Case C-305/89 *Italy v Commission* [1991] ECR I-1603, para. 13.

53 *Ibid.*, para. 23, referring to Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099, para. 58. Also to Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* [1993] ECR I-887, para. 19; Case C-189/91 *Kirsammer Hack v Sidal* [1993] ECR I-6185, para. 16; Joined Cases C-52/97 to C-54/97 *Viscido and Others v Ente Poste Italiane* [1998] ECR I-2629, para. 13; Case C-200/97 *Ecotrade Srl v Altiformi e Ferriere di Servola SpA* [1998] ECR I-7907, para. 35; Case C-295/97 *Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH, Ministero della Difesa* [1999] ECR I-3735, para. 35. *Van der Kooy*, para. 35; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para. 11; Case C-305/89 *Italy v Commission*, para. 13.

54 *Ibid.*, para. 34.

55 *Ibid.*, para. 36, referring to Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877, para. 14; Case C-6/97 *Italy v Commission* [1999] ECR I-2981, para. 16.

56 *Ibid.*, para. 37, referring to Case C-83/98 *P France v Ladbroke Racing and Commission* [2000] ECR I-3271, para. 50.

57 *Ibid.*, para. 38.

58 *Ibid.*, para. 39.

4. The Judgement of the ECJ in *Stardust Marine*

a. The Proper Definition of "State resources"

In its judgement of 16th May, the Court of Justice has, in large part, followed the advice of A-G Jacobs. It annulled the contested Decision of the Commission, and ordered the commission to bear the costs of the legal action.

Concerning the French Government's plea that the Commission erred in classifying the funds used to finance *Stardust Marine* as State aid, the Court made a number of general observations: that Article 87 refers to "State resources in any form whatsoever";⁵¹ that no distinction is to be drawn between cases where aid is granted directly by the state and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid;⁵² and, that for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State.⁵³

As to the proper construction of the term "State resources", the Court considered that the *Crédit Lyonnais* group lenders were indeed to be considered as public undertakings within the meaning of the Transparency Directive, over which the French authorities were able, directly or indirectly, to exercise a dominant influence.⁵⁴ The Court then considered whether this situation of State control allows the financial resources of the controlled undertakings to be regarded as "State resources" within the meaning of Article 87. In that respect, neither is it necessary to establish in every case that there has been a *transfer* of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid,⁵⁵ nor must the means in question be permanent assets of the treasury, since the fact that they constantly remain under public control - and therefore available to the competent national authorities - is sufficient for them to be categorised as State resources.⁵⁶ According to the Court, the Commission had not erred in categorising the funds as "State resources" since, "The State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings".⁵⁷ The Court added that such an interpretation "cannot be regarded as a possible source of discrimination against public undertakings as compared with private undertakings".⁵⁸

b. Imputability of supportive measures to the State

The Court went on to consider in what circumstances the application of State resources can properly be regarded as imputable to the State. Like Advocate-

General Jacobs, it rejected the Commission's inference of such imputability from the mere fact that the measure in question was taken by a public undertaking,⁵⁹ and added that "it is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures".⁶⁰

Like A-G Jacobs, the Court preferred a pragmatic approach to establishing when the business activities of Public undertakings can be imputed to the State for the purposes of the State aid rules.

The ECJ recalled indicia of imputability recognised in the earlier case law: the fact that the body in question could not take its decisions without taking account of the requirements of the public authorities;⁶¹ and, the fact that public undertakings had to take account of directives issued by a ministerial committee.⁶² The Court added that other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State. These indicia include:

"the level of the undertaking's integration into the structures of the public administration; the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators; the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law); the intensity of the supervision exercised by the public authorities over the management of the undertaking; and any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains."⁶³

Although the Court recognised that, in relation to public undertakings established as capital companies under ordinary law, it is "impossible to exclude from the outset any imputability to the State of a measure taken by such a company",⁶⁴ the Court found that the Commission, in *Stardust Marine*, was wrong to rely on the public nature of the companies (the so-called "organic criterion") as the sole touchstone of imputability of their actions to the State.⁶⁵ It seems, therefore, that the public nature of undertakings is a persuasive, but not sufficient, element in establishing the imputability of their actions to the State.

IV. State Resources, Imputability to the State and the Budgets of Public Undertakings

If one accepts this concept of imputability, one may contrast *PreussenElektra* with the recent opinion and judgement in *Stardust Marine*. In *PreussenElektra*, the Court limited to *private* companies its analysis of the obligation to buy "green" electricity at prices above market value⁶⁶. In that case, the resources transferred came out of the budgets of the plaintiffs, all of which were private undertakings according to the Court. This begs the question whether the situation would be different if *public* enterprises had been subject to the purchasing obligations. In other words: do we face the granting of resources imputable to the State if statutory provisions require public undertakings to use their resources in a way which financially benefits third parties?

The indicia proposed by A-G Jacobs and the Court in *Stardust Marine* seem to constitute a "rule of reason" approach to deciding when State resources are actually being used as State aid. To answer the question of whether there is imputability to the State one has to consider all of these indicia. The list is not exhaustive, and one cannot say which one or more of the listed criteria is sufficient. All possible indicia, both those listed and others not yet enumerated, must be taken into account overall. Regarding our question, it remains unclear whether the circumstance (as in *PreussenElektra*) that payments are mandated by statute constitutes, *ipso facto*, evidence that the State is influencing the public undertaking in question or using it for ends other than commercial ones. Furthermore, if a statutory obligation applies to public and to private undertakings alike, can payments by the private undertakings constitute State aid, while those from private firms (following *PreussenElektra*) do not?⁶⁷ Interestingly, however, the indicia proposed by A-G Jacobs, together with the full Court's list of pragmatic criteria for establishing the imputability to the

59 *Ibid.*, para. 51.

60 *Ibid.*, para. 52.

61 *Ibid.*, para. 55, referring to the Van der Kooy case, para. 37.

62 *Ibid.*, para. 55, referring to Case C-303/88 *Italy v Commission*, paras. 11 and 12 and Case C-305/89 *Italy v Commission*, paras. 13 and 14.

63 *Ibid.*, para. 56.

64 *Ibid.*, para. 57.

65 *Ibid.*, para. 58.

66 Case C – 379/98 *PreussenElektra* [2001], paras. 56 to 60; see also the remark of Baquero Cruz/Castillo de la Torre, 26 *European Law Review* (2001), p. 489.

67 The consequences of this in a situation like that of *PreussenElektra* would be absurd: the StrEG would constitute illegal State aid to the "green" electricity producers as far as the public undertakings acting as purchasers are concerned. As a consequence, the advantages for the public electricity producers would have to be recovered. This would not be the case with respect to the private purchasers. They might thus be disadvantaged.

State of the behaviour of public undertakings, clearly signal a preference for the kind of economic analysis favoured by the Commission and advocated by Keppenne, but ultimately rejected by the Court in *PreussenElektra*⁶⁸. It is submitted that this approach could usefully be retained, since the consequences of the *PreussenElektra* judgement on the affairs of public undertakings are unhelpful.

First of all, it seems that the resources of public undertakings may have to be regarded as State resources for the purposes of Article 87, since it is not clear that they can properly be qualified as private or non-State resources. If this is the case, what indicia are relevant to determining whether the granting of such resources is imputable to the State? The Court in *Stardust Marine* has given some useful examples.

Under the Transparency Directive,⁶⁹ the presence of a dominant public influence on an enterprise indicates that it is to be regarded as a public undertaking, to which certain obligations as to transparency and reporting attach.⁷⁰ Would, however, a dominant public influence be sufficient to brand the undertaking's decisions and behaviour as making use of State resources, and is this "dominant influence" being exercised when a statute of general application requires public undertakings to make certain payments?

This simple "dominant influence" point of view is formalistic and quite inflexible. It does not take into account the different kinds of decisions that are taken in enterprises, and the different tasks of public institutions. Furthermore, this opinion is not shared by the Court, as is clear from paragraph 35 of the judgement in *Stardust Marine*: "It ... needs to be examined whether such a situation of State control allows the financial resources of the undertakings subject to that control to be regarded as "State resources", within the meaning of Article 87(1) EC". Nevertheless, the fact

that, in *PreussenElektra*, prices were fixed by statutory instrument might suggest that the threshold level of relevant influence by the State had been reached.

However, the opposite is the case. It is necessary to distinguish between the capacities in which the State acts. On the one hand, it acts through its bodies vested with public authority, and on the other, the State may behave as an ordinary shareholder. On the facts of *Preussen Elektra*, neither private nor public undertakings would have had an alternative to buying the products at prices above their market value, by virtue of the statutory obligation. As long as public undertakings behave like private ones – or are subject to the same rules – they do not show any non-market behaviour. This refers to the Court's criterion that there is no imputability if the undertaking exercises its activities "on the market in normal conditions of competition with private operators."

To be more general: a transfer of public resources, imputable to the State, is characterised by the fact that a public entity decides on their use according to political (and not necessarily economic) criteria. This might be the rationale behind A-G Jacob's approach. Such a political decision on budgets is not taken if a political entity *other than* the one holding the shares takes a political decision on the use of the budgets of enterprises in a relevant market and if this decision is taken *regardless of the public or private status of the undertakings*.

As a result, in the case where the bodies taking political decisions on the use of the budgets and those handling the budgets are one and the same, the granting of those resources has to be considered as attributable to the State. Then the granting of resources is not only influenced by general rules applying to all enterprises in a relevant market, but it is subject to a political decision.

By contrast, State resources within the meaning of Article 87 EC are not being used if public undertakings have to decide policy according to entrepreneurial criteria within the context of a regulatory regime which applies to public and private enterprises alike without discrimination. Bearing this in mind, the special nature of certain funds which fulfil public tasks or operate in the general interest and which sometimes are entitled to raise and distribute money becomes clear. In contrast to this type of fund, public undertakings might also be subject to the same market rules and conditions as private enterprises. In the *PreussenElektra* situation, public undertakings behave as ordinary competitors. They do not decide to support the producers of renewable energy, but are instead forced to do so by law.

This view does not conflict with the judgements of the Court in *Ecotrade*⁷¹ and *Piaggio*.⁷² In those cases, State authorities were allowed to take specific decisions on the use of particular budgets of public enti-

68 This is particularly the case with regard to the test proposed by the Court of whether the undertaking exercises its activities "on the market in normal conditions of competition with private operators".

69 Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings, OJ 1980 L 195, p. 35, as most recently amended by Commission Directive 2000/52/EC of 26 July 2000, OJ 2000 L 193, p. 75.

70 "Public undertakings" are defined according to Art. 2 of the Directive as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it". The Article continues with a definition of "dominant influence": "A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

(a) hold the major part of the undertaking's subscribed capital; or
(b) control the majority of the votes attaching to shares issued by the undertakings; or
(c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body".

71 Case C-200/97 *Ecotrade* [1998] ECR I-7907.

72 Case C-295/97 *Piaggio* [1999] ECR I-3735.

ties. In the *PreussenElektra* case in contrast, general regulatory rules applied which did not allow of any discrimination regarding the status of public or private enterprises.

To conclude, it seems to be reasonable to treat public and private enterprises equally with regard to the entrepreneurial use of resources. State aid control need be applied only where public undertakings or the relevant State entities controlling the public undertakings are taking political decisions on the use of their budgets. If the use of the budget is regulated only by general rules applying to both public and private enterprises without discrimination, the economic transactions caused by these general rules cannot be considered a transfer of public resources imputable to the State. In this situation, the State is not making use of its privileged access to the budgets of public undertakings. There is no use of its dominant influence. The State is merely applying general rules without exercising its control over public undertakings.

This analysis is not restricted to a certain structure of the market. The fact that 90% of enterprises buying the products are public and only 10% are private or vice-versa does not change the analysis. A different analysis would only be feasible if the public undertakings on the market were in a position to influence the statutory fixing of prices.⁷³ This influence does not depend on the extent to which the demand side of the market consists of public or private enterprises, since prices are fixed by statutory provisions and are not influenced by the undertakings. Therefore, if one says that statutory purchase obligations at minimum prices do not constitute State aid, this has to hold true regardless of whether the undertakings which are obliged to pay are private or public.

V. PreussenElektra and Funds – the unintended message to “creative” Member States

As shown above, the Court’s assessment in *PreussenElektra* should, under certain conditions, not depend on whether the undertaking that buys products at prices above market value is private or public. This analysis does not answer the question in what respect the *organisation* of the transfer of resources is relevant. On the facts of *PreussenElektra*, the producers of “green” energy received payment *directly* from the purchasers. However, it is conceivable that purchasers might be required to pay the excess over market value to a fund set up by the State which would then redistribute or transfer it to the sellers.

As far as funds are concerned, the decision whether a State aid within the meaning of Art. 87(1) EC takes place depends once again on the question of whether

the transfer of monies from those funds can be considered as transfers of State resources imputable to the State.

As the characteristics of funds can be quite different, the question cannot be answered for funds in general. In this context one has to distinguish between three types of funds:

Those which redistribute monies, those which just transfer resources according to strict rules laid down by law, without leaving a margin of discretion to the management of the fund; and, those which merely operate accounts on behalf of the private enterprises being favoured by the law.

1. Funds which redistribute resources

With regard to a fund redistributing resources which became part of its budget in order to fulfil particular public tasks and whenever the management of the fund has a certain margin of discretion as to the spending of the monies, the condition concerning “aid granted [...] through State resources in any form whatsoever” is usually fulfilled. This is clear from the Court’s judgements in *Aid to textiles*,⁷⁴ *Steinike and Weinlig*,⁷⁵ *Van Tiggele*,⁷⁶ *FIM*,⁷⁷ *Sloman Neptun*⁷⁸ and from the judgement of the Court of First Instance on *Air France*.⁷⁹ Following *Air France*, the analysis does not depend on the fact whether the fund established under statutory provisions is independent from the State.⁸⁰ In any case we are faced with State resources granted in a way imputable to the State: Typical public resources are involved, since the funds are managed according to political preferences and not according to entrepreneurial or market economy decision-making.

73 Joined Cases 67, 68 and 70/85 *Van der Kooy* [1988] ECR 219, para. 37.

74 Case 173/73 *Aid to textiles* [1974] ECR 709, para. 16.

75 Case 78/76 *Steinike and Weinlig* [1977] ECR 595, para. 20-22.

76 Case 82/77 *Van Tiggele* [1978] ECR 25, para. 25, para. 23-26.

77 Case 102/87 *FIM* [1988] ECR 4067, para. 2, 4, 5, 14, 19.

78 Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, para. 11-15 and 17-21.

79 Case T-358/94 *Air France* [1996] ECR II-2109, para. 55-68.

80 *Ibid.*, paras. 58, 62, 63.

2. Funds which transfer resources according to statutory rules

The situation will become more difficult if the fund only exists in order to transfer monies to certain enterprises on a statutory basis. Here, one could be of the opinion that the amount of the levies and the way of distributing the money thereby collected is determined by law. As a result, the fund has no influence on how it uses its own budget. The situation seems to be similar to that of public enterprises acting in accordance with statutory rules, as in the *PreussenElektra* case. Nevertheless, a transfer of State resources takes place, because the money becomes part of a public designated budget that was established to guarantee certain advantages to (private or public) enterprises to the disadvantage of other (private or public) enterprises. In this sense, the monies come under the control of the State and the money transfers are also imputable to the State. This situation meets the criterion set out by the Court of First Instance in its judgement on *Ladbroke Racing*.⁸¹ In our view, that case indicates that controlling money means that the State can use particular budgets according to specific political purposes. Therefore, the Court should properly be inclined to submit such funds to State aid control, if such a case arises.

3. Private entities which only collect monies and operate accounts on behalf of enterprises favoured by statute

By contrast, funds which only collect the monies for certain enterprises and which merely operate accounts for those enterprises fall in a third category if the collecting entities are designated by the enterprises themselves. The fact that the private entity collects the monies for the enterprises will not turn it into a State resource, since the collecting body cannot be considered as a body designated by the State. This is, for example the case for the German centre for collecting radio and television license fees ("*Gebühren-einzugszentrale*" or GEZ).⁸² This body was established by the public radio and television stations in order to

collect and redistribute compulsory license fees which are shared amongst the various public broadcasters according to fixed rules. This accounting system does not involve any State intervention as far as the redistribution of the money is concerned. The GEZ does not operate as a fund in the strict sense, but merely as a joint account manager for the public broadcasters. The situation is therefore comparable to *Preussen Elektra*, where the producers of "green" energy received payment *directly* from the purchasers.

4. Conclusion

The crucial issue is to distinguish between public funds on the one hand, and mere joint accounts on the other. Regarding the collection of radio and television fees, this distinction becomes very important. In Europe the systems of financing public radio and television programmes are organised in different ways,⁸³ and whether they are subject to State aid provisions depends on their organisation. It is quite astonishing that the Commission does not refer to this problem in its Communication on the application of State aid rules to public service broadcasting. The Commission only states that "the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding"⁸⁴. No reference however is made to the judgement in *Preussen Elektra*.⁸⁵ The Commission obviously considers financing through a levy on TV-set holders as fulfilling the condition of being "granted through State resources".⁸⁶

The example of financing public radio and television programmes shows that the question of whether the same type of money transfer is submitted to State aid control under the regime of Art. 87 EC depends on how the transfer is organised, as there are no State resources involved if the payments flow *directly* from private undertakings to other undertakings. The same holds true if the monies are collected and distributed by entities merely working as joint account managers.

VI. Concluding remarks

Although the EC State aid rules have been in force for nearly 45 years, what "aid granted by a Member State or through State resources" really means is still anything but clear. On the basis of the judgement in *Preussen Elektra*, the condition that aid be "granted through State resources in any form whatsoever" requires that the resources become part of a public budget. As a result, two theories as to what constitutes State resources are no longer tenable. The judgement has discredited both the view that every advantage granted by State intervention or regulation fulfils the condition independent from whether a transfer of

81 Case T-67/94 *Ladbroke Racing* [1998] ECR II-1; confirmed by the Court of Justice, Case C-83/98 *Ladbroke Racing* [2000] ECR I-3271, para. 48-50.

82 See Koenig/Kühling, *Europäische Zeitschrift für Wirtschaftsrecht* 2000, pp. 197; Koenig/Kühling, *Zeitschrift für Urheber- und Medienrecht* 2001, pp. 537, 544.

83 See Communication from the Commission on the application of State aid rules to public service broadcasting, OJ 2001 C 320/5, para. 17: "Public service broadcasters are normally financed out of the State budget or through a levy on TV-set holders."

84 *Ibid.*

85 *Ibid.*, para. 19, referring to Cases T-106/95, *FFSA and Others v Commission* [1997] ECR II-229; T-46/97, *SIC v Commission* [2000] ECR II-2125 and C-332/98, *France v Commission* [2000] ECR I-4833.

86 See footnote 83.

resources is involved, and the opinion that although a transfer of resources under public control is necessary, the resources need not become part of a public budget. Furthermore, the case-law has now established that an effect on public tax revenues may be an inherent feature of legislative measures, without thereby amounting to State aid within the meaning of Art. 87 (1) EC. Nevertheless *PreussenElektra* begged the question of exactly what constitutes "State resources", particularly if the budgets of public undertakings are involved. The *Stardust Marine* litigation deals with this question. The Court and Advocate-General Jacobs suggest in *Stardust Marine* that budgets of public undertakings are State resources. The granting of those resources is nevertheless only imputable to the State if certain criteria are met. This approach of an additional test whenever the resources of public undertakings are concerned is to be welcomed although particularly with respect to financial transactions of public undertakings in the form of public banks the test has to be strict. Generally speaking, public and private enterprises have to be treated equally with regard to the entrepreneurial use of resources – also with regard to Art. 295 EC. Only where public undertakings or the relevant State entities controlling the public undertakings are taking political decisions on the use of their budgets are State resources being used to grant aid. This is not the case if the use of the budget is regulated by general rules applying to all enterprises without discrimination as in the *PreussenElektra* case. If one rejects this result, one has to change the first premise and consider purchase obligations at minimum prices as State aid. Not to do so is economically unreasonable. But one still cannot correct a first level mistake by committing a second level mistake.

The analysis shows that revisiting *PreussenElektra* seems advisable anyway: According to that judgement, whether State aid law is applicable largely depends on the organisation of the money transfers. Whereas monies part of a public fund financed through charges collected from undertakings constitute State resources, direct payments from undertakings to other undertakings are not considered as State aid even if they are collected and distributed by entities working as joint account managers. Apart from not being reasonable from an economic point of view, this result enables the EC Member States to circumvent State aid law. This consequence should not be underestimated: Member States are now in a position to prevent the application of State aid regime by choosing a certain procedure for money transfers. It is more than doubtful whether this possibility serves the purpose of State aid control. The European Court of Justice seems to consider such developments as either not very probable or not very risky.