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A more restrictive approach to 'State Resources'? The ECJ annuls the Commission's decision on the German law on renewable energy (EEG 2012)

April 2019

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On Thursday, 27 March, the European Court of Justice of the European Union (ECJ) annulled the General Court's ruling and the European Commission's decision on the EEG 2012 on the grounds that it was wrong to conclude that the funds generated by the EEG surcharge constituted State resources.[1]

In light of the Court's judgements with respect to green electricity schemes in other Member States, the ECJ's judgement with respect to the German scheme came as a surprise, but provides further guidance on where to draw the line on the notion of State resources.

In 2001, the ECJ, in its landmark ruling in *PreussenElektra*[2] found that an obligation imposed on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any transfer of State resources. A subsequent line of case law (including *Essent*[3] and *Vent de Coléré*[4], *Grünstrom*[5] *and Enedis*[6]) seemed to widen the scope of 'State resources' to include funds over which the State exercised come degree of control. Broadly speaking, these cases concerned situations where funds passed through a public or publicly controlled body, serving a public purpose, which the Court concluded, because of the design of the system, remained under 'constant public control'. This case law signified a more expansive interpretation of the notion of 'State resources' and raised questions over whether there was still is room for the "old" *PreussenElektra* doctrine and therefore whether Member States could still design schemes funded by consumers so as to escape the prohibition on State aid under Art. 107(1) TFEU.

In its judgment, the ECJ specifically noted that "*the General Court failed to establish that the State held a power of disposal over the funds generated by the EEG surcharge or even whether it exercised public control over the TSOs responsible for managing those funds*" (recital 73) or "*that the TSOs remained constantly under public control*" (recital 77). The Court also ruled that the Commission had failed to establish that the advantages provided for by the EEG 2012, namely the scheme supporting the production of electricity from renewable energy sources by the EEG surcharge and the special compensation scheme reducing that

[1] Judgment of 28 March 2019 Federal Republic of Germany v European Commission Case C-405/16 P.

[2] Case C-379/98 PreussenElektra (2001)

[3] Case C-206/06 Essent Network Noord and Others (2008)

[4] Case C-262/12 Vent Den Colère! And Others (2013)

[5] Case T-251/11 Austria V Commission (2014)

[6] Case C-515/16, Enedis SA (2017)

surcharge for EIUs involved State resources. It therefore did not refer the case back to the General Court but by giving final judgement itself annulled the Commission decision (recital 90).

As the judgement is based on legal considerations rather than factual questions, it is unlikely that the Commission can re-evaluate the scheme and still find that it involves State aid – although the scope for this appears limited. In any event, the ECJ's ruling certainly provides further guidance on where to draw the line in cases where a Member State provides for an intermediary entity to be involved (e.g. to administer the funds). This hands back a margin of manoeuvre to the Member States who may now rely on the ECJ's interpretation to design their schemes in order to avoid the notification obligation under Art. 108(3) TFEU.

Background: the 2012 EEG

In 2011, Germany amended its renewable energies act by introducing the EEG 2012, which obliged network to pay a mandated feed-in tariff to the operators of renewable energy installations.

The electricity was distributed to the transmission system operators (TSOs) who had to compensate the network operators for the payments they have made. The TSOs are then required to sell the EEG 2012 electricity on the spot market. To the extent that they are unable to recover the full costs from the market, the TSOs are entitled to require electricity suppliers to pay them the difference, in proportion to the electricity sold. This mechanism is called the 'EEG surcharge'.

In practice, suppliers typically pass this burden on to final consumers on a contractual basis , although they are not obliged to do so. A cap is also placed on the amount of the EEG surcharge that suppliers can pass on to energy intensive undertakings ((EIUs).

In its 2012 Decision, the Commission had identified two aid elements of the scheme, both of which it declared compatible:

- the higher prices paid to renewable electricity generators financed by the surcharge; and
- the caps placed on the surcharge that could be passed on to EIUs.

Germany challenged the Decision on grounds that the EEG 2012 scheme did not involve State resources. Having lost before the General Court, Germany appealed to the ECJ, arguing that the General Court had erred in its understanding of the role of the TSOs, and suppliers, in the scheme.

Findings of the ECJ

With respect to compulsory renewable support systems that are managed by entities separate from the public authorities, such as TSOs, the decisive factor, the Court held, was that the entities are appointed by the State to manage a State resource, and not merely bound by an obligation to purchase by means of their own resources.

The General Court's determination that the Commission had been correct to determine that the EEG 2012 involved State resources based on the previous case law essentially relied on three elements:

- The funds remained under the dominant influence of the public authorities;
- The EEG surcharge could be assimilated to a levy; and
- The TSOs were effectively administrators with no freedom to act such that they were just entities executing a State concession.

The ECJ considered each of these three elements in turn in determining whether the General Court correctly considered the EEG 2012 to involve State resources:

Did the funds remain under the dominant influence of the public authorities?

The ECJ held that the fact that the TSOs collectively administer the funds in accordance with defined rules, and that the funds are exclusively allocated to the financing of the support scheme, is not sufficient to conclude that the State has a power of disposal over the funds. Indeed the Court noted that the fact that the

funds are exclusively allocated to the financing of the support scheme, tends instead to show that the State was not entitled to dispose of the funds.

Could the EEG surcharge be considered a levy?

The General Court had determined that the EEG surcharge was a levy 'by analogy' to the judgment in *Essent*. However, the ECJ held that there is no analogy to be drawn because the EEG surcharge does not require suppliers to pass-on the amounts paid in respect of the EEG surcharge to consumers. The fact that they may do so in practice is not sufficient to equate the EEG surcharge to the electricity price supplement at issue in *Essent*.

The TSOs' role in the scheme: budget impacts.

The ECJ also held that the General Court had failed to establish that the TSOs were subject to public control. However, while it was acknowledged that the public authorities do have a role in monitoring the TSOs' implementation of the scheme, this does not permit the conclusion that the public authorities have control over the funds themselves. In drawing a distinction between the present case and *Vent De Colère* the Court emphasised that in this case there is no potential for the German budget to be impacted by the measure. This was distinct from *Vent De Colère* where it was established that any shortfalls in the purchase obligation would be covered by the French State (potential impact).

Conclusion

It is no secret that the Commission has been beating a steady retreat away from *PreussenElektra* and adopting ever more expansive views of what will fall in the State resources bucket, and it has drawn confidence from the post-*PreussenElektra* case law such as *Essent* and *Vent De Colère*. The EEG judgement now further clarifies the margins for State resources –towards a slightly more restrictive approach. There are certain key takeaways that will need to frame its approach going forward:

De facto pass-on of costs does not equate to legally-mandated pass-on

This case makes clear that the de facto pass-on of costs to final consumer in practice cannot be considered equivalent to a legal requirement to do so when determining if a surcharge can be considered a levy.

State resources entail a potential impact on the State budget

The Court reiterated that for the purpose of determining whether an advantage is a burden on the State, it is necessary to determine that there exists a sufficiently direct link between the advantage and a reduction (or at least a risk of burden) to the State budget.

Implementation of monitoring powers does not equate to control over resources

The Court confirmed that the grant of monitoring and oversight roles to public authorities with respect to the proper implementation of a measure, does not necessarily infer control over the funds collected.

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