The Case-law of European Courts on State Aid for the Production of Electricity from Renewable Sources*

Viktor Kreuschitz

I. Introduction

This contribution is limited to the presentation of four judgments of European Courts and in particular to those parts of these judgments which concern the very much disputed question, weather the support mechanisms for the production of electricity from renewable sources constitute "State aid granted by a Member State or through State resources" in terms of the definition of State aid in Article 107(1) TFEU.

II. The notion of State aid

It should be recalled in that respect that Article 107(1) TFEU provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

An examination of a support mechanism in regard to the question of whether State aid is involved must therefore concern the following elements:

- Is the beneficiary an undertaking?
- Is the measure selective?
- Is the benefit granted by a Member State or through State resources?
- Is it to be attributed to the State?
- Distortive effect on competition and affect on trade are secondary and do not need to be established, if the reply to the previous questions is yes[1].

III. The Case-law on State aid to electricity produced from renewable sourrces

A. Case C-379/98, PreussenElektra (preliminary ruling request):

The applicable legislation in the case pending before a national court in Germany, which asked for a preliminary ruling, the "Stromeinspeisungsgesetz", provided that electricity supply undertakings which operate a general supply network shall purchase the electricity produced in their area of supply from renewable sources of energy and pay a compensation for those inputs at prises above the market price[2].

In so far as the kilowatt hours to be compensated for exceeded 5% of the total kilowatt hours supplied by the electricity supply undertaking through its network during a calendar year, the upstream network operator was obliged to reimburse the electricity supply undertaking in respect of the supplementary costs resulting from the kilowatt hours exceeding that share. PreussenElektra – the Applicant in the proceeding before the national court – was such an upstream network operator, the defendant was an electricity supply undertaking (Schleswag), in which the Applicant had a 65% share.

The question to be answered was weather the compensation paid by electricity supply undertakings for electricity produced from renewable sources exceeding the market price constitutes State aid.

The ECJ ruled that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1) of the EC Treaty – today Article 107 (1) TFEU. The ECJ stated that 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[3].

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

It was obvious in the proceeding before the ECJ that the disputed measures aimed at the promotion of the production of electricity from renewable sources, but the traditional "effects doctrine", according to which Article 107 (1) TFEU does not distinguish between the measures of state intervention concerned by reference to their causes or aims but defines them in relation to their effects[4] remained unapplied.

The Court also did not take into account the fact that the compensation payment paid for electricity from renewable sources was foreseen by law and that legislation is a basic function of the State. Thus an advantage obtained due to a statutory obligation to pay a price higher than the market price is necessarily "granted directly by the State", even if the amounts transferred never pass the State budget.

B. Case C-262/12, Association Vent de Colère (preliminary ruling request):

This case concerns a support mechanism established by French law for the production of electricity generated by wind power installations. The additional costs are offset through the charges payable by the final consumers of electricity located in the territory of France. The amount is calculated in proportion to the quantity of electricity consumed and determined by public authorities[5].

The Conseil d'État referred to Case C-206/06 *Essent Netwerk*, in which the Court held that "the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity." By its question, the Conseil d'État asked, in essence, whether a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that is financed by final consumers, such as that resulting from French legislation, must be regarded as an intervention by the State or through State resources within the meaning of Article 107(1) TFEU.

In case PreussenElektra, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.

By contrast, in Essent Network[6] – which was about the State aid character of provisions on stranded costs – the Court held that financing by means of a price surcharge imposed by the State on purchasers of electricity, constituting a charge, with the monies remaining, furthermore, under the control of the Member State, had to be regarded as an intervention by the State through State resources.

In Vent de Colère the Court of Justice held that the concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid[7].

The Court has also held that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.

Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, 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 [8].

In the case in the main proceedings, the sums intended to offset the additional costs arising from the obligation to purchase imposed on the undertakings are collected from all final consumers of electricity in France and entrusted to the Caisse des dépôts et consignations. The amount of the charge imposed on each final consumer of electricity is determined annually by the Minister for Energy. The fact that part of the sums collected is not channelled through the account of the Caisse des dépôts et consignations, is not sufficient to exclude there being an intervention through State resources.

C. Case T-251/11, Austria *v* Commission (direct action):

Austria contested a Commission Decision concerning a State aid measure favouring energy-intensive businesses under the Green Electricity Act in Austria. It considered, in essence, that the mechanism at issue constituted a selective advantage, consisting of the partial exemption of energy-intensive businesses from a burden which they would normally have had to bear. In its view, such a mechanism would entail losses of State resources and would be imputable to the State.

The relevant legislation was set out in the "Ökosteuergesetz", the aim of which was the promotion of the production of electricity from renewable sources. In the contested decision the Commission established that the measures constituted State aid, but it objected only to the exemptions in favour of big electricity consumers. The assessment of State resources was based on the existence of a special agency, which managed the funds, collected the contributions from the consumer and purchased the green electricity.

Austria argued that the facts of the case were comparable with those giving rise to the judgment in *PreussenElektra*. It emphasised, in particular, that in that case the decisive factor was that the payment of funds had been made exclusively between private undertakings, those funds never leaving the private sector and never being under the control of the State.

The General Court observed that, according to settled case-law, only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 107(1) TFEU. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted by the State, but also aid granted by public or private bodies designated or established by the State[9].

The General Court also observed that it is not necessary to establish in every case that there has been a transfer of State resources in order for the advantage granted

to one or more undertakings to be capable of being regarded as a State.

In the third place, the General Court also emphasised that it has already been established in the case-law of the Court of Justice that Article 107(1) TFEU covers all the financial means by which authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, 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.

For that reasons, the General Court rejected Austria´s arguments on the lack of State resources by referring to Case 78/76 *Steinike & Weinlig*.

D. Case T-47/15, Germany v Commission (direct action):

One of the main arguments of Austria in the Ökosteuergesetz case was that Austria has been discriminated by the Commission, since it did not examine the identical legislation in Germany and only penalised poor small Austria. In those circumstances the Commission had to act and opened a formal investigation procedure pursuant to Article 108 (2) TFEU on the so called Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus Erneuerbaren Energien ("EEG 2012", Law revising the legal framework for the promotion of electricity production from renewable energy). That investigation procedure ended with a partially negative Decision of the Commission.

The dispute was on the State aid character of certain provisions of the amended German law concerning renewable energy sources, which reduced the EEG surcharge for energy-intensive users.

The main elements of the legislation at stake:

- Network operators at all voltage levels ('NOs') ensuring the general supply of electricity are required to connect installations producing green electricity within their area of activity to their network
- They are required to feed that electricity into their network, transmit it and distribute it by way of priority
- and to make to the operators of those installations a payment that is calculated on the basis of tariffs laid down by law, in the light of the nature of the electricity at issue and the rated or installed capacity of the installation concerned;
- Distribution system operators are required to transmit the green electricity to the interregional upstream operators of high and very-high-voltage transmission

systems.

- The legislation in EEG 2012 provides for a “nationwide compensation mechanism” in respect of, first, the quantities of green electricity which each high and very-high-voltage transmission system operator feeds into its network and, secondly, the sums paid by way of consideration to the Distribution system operators;

- Finally, there is a reduction of the EEG surcharge in certain cases.

It was not in dispute that, although the EEG 2012 did not oblige electricity suppliers to pass the EEG surcharge on to the final customers, it did not prevent them from doing so either.

The contested Decision:

First, the Commission considered that the feed-in tariffs and market premiums, which guarantee producers of EEG electricity a higher price for the electricity they produce than the market price, constitute State aid compatible with the internal market. Secondly, it considered that the reduction of the EEG surcharge for certain energy-intensive users[10] also constitutes State aid, the compatibility of which with the internal market is recognised only if it falls into certain categories.

By its third plea which is the one relevant in our context, Germany contested that State resources were involved, given that the relevant legislation provides neither for the financing of aid for renewable energy by State resources nor are the measures foreseen imputable to the State. In Germany’s view, according to the case-law, payments between individuals which are ordered by the State without being imputable to the budget of the State or of another public body and in respect of which the State does not relinquish any resources, in whatever form, retain their private law nature.

The General Court rejected that argument.

- The General Court held that it is not in dispute that the EEG surcharge, collected and administered by the operators of high and very-high-voltage transmission systems (“TSO”s), is intended ultimately to cover the costs generated by the feed-in tariffs and market premium provided for in the EEG 2012 by guaranteeing producers of EEG electricity a price for the electricity they produce that is above the market price. Therefore, the EEG surcharge must be considered to result, principally, from implementation of a public policy, laid down by the State through legislation, to support producers of green electricity.

- TSO-s are entrusted by the EEG 2012 with managing the system for supporting the production of electricity from renewable sources. As the Commission

correctly found, the EEG 2012 clearly confers on these operators a series of obligations and rights as regards implementation of the mechanisms resulting from that law, so that the TSOs are the central point in the operation of the system laid down by it. Their role is comparable to the role of the bodies administrating the mechanism in Essent Netwerk.

- There is a dominant influence of public authorities, which can be assimilated to an entity executing a State concession.

- It is on account of the EEG 2012 that final electricity consumers are, *de facto*, required to pay the price supplement or additional charge of the measures at stake. It is a charge that is unilaterally imposed by the State in the context of its policy to support producers of EEG electricity and can be assimilated, from the point of view of its effects, to a levy on electricity consumption.

The judgment is under appeal.

Finally, a preliminary ruling request on the same subject[11] has been rejected – in line with the opinion of Advocate General Campos Sánchez-Bordona – recently, which did not respect the admissibility criteria set out in the settled case law[12].