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State aid & support measures for renewable energy : overview of the case law

Judge Savvas Papasavvas

General Court of the European Union



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Introduction

- Directive 2009/28/EC
- Communication “A policy framework for climate and energy in the period from 2020 to 2030”
- Package “Clean Energy for All Europeans”
- Guidelines on “State aid for environmental protection and energy 2014-2020”
- Judicial review by the judge of the conditions of Art 107§1 TFEU : State aid is defined as ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods [...], in so far as it affects trade between Member States’

I – State intervention

- *A- Imputability of the measure to the State*
 - Examine whether the public authorities must be regarded as having been involved in the adoption of the measure
 - A measure must be regarded as attributable to the State if it was established by law or by a regulatory act

I – State intervention

- *B- State resources*
 - Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Art 107§1 TFEU
 - The concept of State aid covers advantages granted directly by the State & those granted through a public or private body appointed or established by that State to administer the aid
 - Measures not involving a transfer of State resources may fall within the concept of aid
 - 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

I – State intervention

- *B- State resources*
 - Cases “Vent de Colère” & “Enedis” : 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 all final consumers of electricity in the national territory constitutes an intervention through State resources
 - Case “PreussenElektra” : 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

I – State intervention

- *B- State resources*
 - Case “Enea” : a national measure placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration with the production of heat does not constitute intervention through State resources
 - Case “Germany” : the support for undertakings producing electricity from renewable energy sources constitutes intervention through State resources, in particular because the funds generated by the measure can be assimilated to a levy and remain under the dominant influence of the public authorities

I – State intervention

- *B- State resources*
 - Criteria :
 - Subsidy/reduction of financial charges ?
 - Freedom of action of the operator managing the funds ?
 - Compensation ?



II – Selective advantage

- *A – Advantage*
 - **Definition** : any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention
 - **Condition rarely examined by case law** : cases “PreussenElektra”, “Vent de Colère”, “Enea”
 - **Case “Germany”** : the reduction of the surcharge for electricity-intensive undertakings conferred upon them an advantage, because that reduction released them from a charge which they would normally have had to bear

II – Selective advantage

- *B – Selectivity*
 - To fall within the scope of Art 107§1 TFEU, a measure must favor ‘certain undertakings or the production of certain goods’.
 - Condition rarely examined by case law
 - Case “Austria” : the measure concerned is selective because it differentiated between undertakings which, in the light of the objective pursued, were in a comparable factual and legal situation, although that differentiation was not the result of the nature and structure of the system of charges at issue.



III- Effect on trade and competition

- Public support to undertakings only constitutes State aid under Art 107§1 TFEU if it ‘distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods’ and only insofar as it ‘affects trade between Member States’.
- Conditions easily met : case “Essent Network Noord ” *(not in the field of renewable energy)*



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Cases discussed

- *Judgment* Association Vent De Colère! a.o., C-262/12, EU:C:2013:851
- *Order* ENEDIS, C-515/16, EU:C:2017:217
- *Judgment* PreussenElektra, C-379/98, EU:C:2001:160
- *Judgment* ENEA, C-329/15, EU:C:2017:671
- *Judgment* Germany v Commission, T-47/15, EU:T:2016:281
- *Judgment* Austria v Commission, T-251/11, EU:T:2014:1060
- *Judgment* Essent Netwerk Noord, C-206/06, EU:C:2008:413



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Thank you for your attention