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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Second Chamber)

19 December 2013 *

(Request for a preliminary ruling – State aid – Concept of 'intervention by the State or through State resources' – Wind-generated electricity – Obligation to purchase at a price higher than the market price – Offsetting in full – Charges payable by final consumers of electricity)

In Case C-262/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 15 May 2012, received at the Court on 29 May 2012, in the proceedings

Association Vent De Colère! Fédération nationale,

Alain Bruguier,

Jean-Pierre Le Gorgeu,

Marie-Christine Piot,

Eric Errec,

Didier Wirth,

Daniel Steinbach,

Sabine Servan-Schreiber,

Philippe Rusch,

Pierre Recher,

Jean-Louis Moret,

* Language of the case: French.

Didier Jocteur Monrozier

v

Ministre de l'Écologie, du Développement durable, des Transports et du Logement,

Ministre de l'Économie, des Finances et de l'Industrie,

intervener

Syndicat des énergies renouvelables,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça (Rapporteur), G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2013,

after considering the observations submitted on behalf of:

– Association Vent De Colère! Fédération nationale, by A. Marlange and M. Le Berre, avocats,

– the Syndicat des énergies renouvelables, by F. Thiriez and T. Lyon-Caen, avocats,

– the French Government, by G. de Bergues, J. Gstalter and J. Rossi, acting as Agents,

– the Greek Government, by I. Pouli and K. Boskovits, acting as Agents,

– the European Commission, by T. Maxian Rusche, É. Gippini Fournier, K. Herrmann and P. Němečková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 87(1) EC, now Article 107(1) TFEU.

2 The request has been made in proceedings brought by Association Vent De Colère! Fédération nationale and by 11 natural persons against two orders of the Ministre de l'Écologie, de l'Énergie, du Développement durable et de l'Aménagement du territoire (Minister for Ecology, Energy, Sustainable Development and Regional Planning) and of the Ministre de l'Économie, de l'Industrie et de l'Emploi (Minister for the Economy, Industry and Employment) of 17 November 2008, laying down the conditions for the purchase of electricity generated by wind-power installations (JORF of 13 December 2008, p. 19032) and of 23 December 2008, supplementing the order of 17 November 2008 (JORF of 28 December 2008, p. 20310) (arrêtés du ministre de l'Écologie, de l'Énergie, du Développement durable et de l'Aménagement du territoire et de la ministre de l'Économie, de l'Industrie et de l'Emploi, du 17 novembre 2008, fixant les conditions d'achat de l'électricité produite par les installations utilisant l'énergie mécanique du vent, et du 23 décembre 2008, complétant l'arrêté du 17 novembre 2008) ('the contested orders').

Legal context

French law

3 Article 5 of Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service (loi n°2000-108, du 10 février 2000, relative à la modernisation et au développement du service public de l'électricité) (JORF of 11 February 2000, p. 2143), as amended by Law No 2006-1537 of 7 December 2006 on the energy sector (loi n°2006-1537, du 7 décembre 2006, relative au secteur de l'énergie) (JORF of 8 December 2006, p. 18531, 'Law No 2000-108'), provides:

'(I) Costs attributable to the public service tasks assigned to electricity operators shall be offset in full. They shall comprise:

(a) As far as electricity generation is concerned:

(1) The additional costs, if any, that ensue from the application of the provisions of Articles 8 and 10 as compared to the costs that Électricité de France [SA (EDF) ("Électricité de France")] is spared or, where relevant, to the costs that the non-nationalised distributors referred to in Article 23 of Law No 46-628 of 8 April 1946 [on the nationalization of electricity and gas (loi n°46-628 du 8 avril 1946 sur la nationalisation de l'électricité et du gaz) (JORF of 9 April 1946, p. 2651)] are spared that are concerned. Costs spared shall be calculated by reference to the market price for electricity or, for the non-nationalised distributors, by reference to the transfer tariffs referred to in Article 4 in proportion to the amount of electricity purchased at those tariffs as a fraction of their total supply, after

deduction of the quantities purchased pursuant to Articles 8 and 10 above. The same values for costs spared shall serve as the reference for determining the additional costs to be offset where the installations concerned are operated by Électricité de France or by a non-nationalised distributor. Where the contracts concern the purchase of electricity generated by a production installation located in an area that is not interconnected with the continental metropolitan network, the additional costs shall be calculated by reference to the amount relative to production at the regulated tariffs for the sale of electricity;

...

Those costs shall be calculated on the basis of appropriate accounts kept by the operators by whom they are to be borne. Those accounts, drawn up in accordance with rules laid down by the Commission de régulation de l'énergie (French energy regulatory authority), shall be audited at the abovementioned operators' expense by their auditor or, in the case of local public utility providers, by their public accountant. ... The Minister for Energy shall determine by order the total costs on a proposal from the Commission de régulation de l'énergie made annually.

The offsetting of those costs, in favour of the operators bearing them, shall be secured through charges payable by final consumers of electricity located in the national territory.

The amount of the charges referred to above shall be calculated in proportion to the quantity of electricity consumed. ...

The amount of the charge payable per consumption site, by the final consumers referred to in the first subparagraph of Article 22(I), may not exceed EUR 500 000. The same cap shall be applicable to the charge payable by the undertakings referred to in the second subparagraph of Article 22(I) for traction electricity consumed in the national territory and to the charge payable by the undertakings referred to in the fourth subparagraph of Article 22(II) for electricity consumed downstream of the electricity delivery points on an electrically interconnected network.

The amount of the charge applicable to each kilowatt hour shall be calculated so that the charges cover all the costs referred to in (a) and (b), and also the management costs incurred by the Caisse des dépôts et consignations [a French public long-term investment group], referred to below, and the national energy ombudsman's budget. The Minister for Energy shall determine that amount by order on a proposal from the Commission de régulation de l'énergie, made annually. The amount of the annual charge set for a given year shall be applicable to subsequent financial years should a new order for the year in question not come into force.

...

The charges for eligible final consumers who have exercised the rights granted in Article 22(III) supplied through the public transmission network or through a public distribution network shall be recovered by the operator responsible for the management of the network to which those consumers are connected by way of a levy additional to the network usage tariffs. ... The charges actually recovered shall be paid out to the operators that bear the costs of the public service through the Caisse des dépôts et consignations.

... The Caisse des dépôts et consignations shall pay out the sums collected, four times a year, to the operators that bear the costs referred to in [Article 5(I)(a)(1) and (2) and (b)(1) and (2)]. It shall pay to the national energy ombudsman a sum equal to the amount of its budget on the 1st of January of each year.

The Caisse des dépôts et consignations shall record those different transactions in a special account. The management fees incurred by the Caisse shall be determined annually by order by the Ministers for the Economy and for Energy.

Without prejudice to the application of the penalties provided for in Article 41, if, within two months of the date on which it is payable, payment of the charge is not made or is insufficient, the Commission de régulation de l'énergie shall send a reminder letter together with a penalty for late payment of 10% of the amount of the charge payable.

...

Where the sum of the charges collected does not correspond to the total costs established for the year, rectification shall be made the following year through the charges payable for that year. If the sums payable are not recovered in the course of the year, they shall be added to the amount of the charges for the following year.

The Commission de régulation de l'énergie shall assess the operation of the arrangements relating to the costs of the public electricity service referred to in [Article 5(I)] each year in its annual report.

...

(III) In the event of non-payment by a person liable to pay the charges provided for in [Article 5(I)] above, the Minister for Energy shall impose an administrative penalty under the conditions provided for in Article 41 of the present law.

(IV) The detailed rules for the application of the present article shall be specified by decrees of the Conseil d'État.'

4 Article 10 of Law No 2000-108 states:

'Subject to the need to preserve the proper functioning of the networks, Électricité de France and, within the framework of their statutory purpose and where the production installations are connected to the public distribution networks operated by them, the non-nationalised distributors referred to in Article 23 of Law No 46-628 of 8 April 1946 above shall be required to conclude, if the producers concerned so request, a contract for the purchase of electricity generated in the national territory by:

...

(2) Renewable-energy installations, with the exception of wind-power installations located in areas interconnected with the continental metropolitan network, or which use high performance energy efficiency techniques, such as cogeneration. The limits on installed capacity of the production installations that qualify for the obligation to purchase shall be set by decree of the Conseil d'État. Those limits, which may not exceed 12 megawatts, shall be set for each category of installation that qualifies for the obligation to purchase on a production site. ...

...

(3) Wind-power electricity production installations that are located within the perimeter of a wind-power development area, defined in accordance with the rules laid down in Article 10-1;

... The obligations incumbent on producers qualifying for the obligation to purchase, and the conditions under which the Ministers for the Economy and for Energy are to lay down by order, after obtaining the opinion of the Commission de régulation de l'énergie, the conditions for the purchase of the electricity so generated shall be specified by decree. Without prejudice to the maintenance of "obligation to purchase" contracts in force on the date of publication of Law No 2004-803 of 9 August 2004 on the public electricity and gas service and electricity and gas companies [(loi n°2004-803 du 9 août 2004 relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières)], the installations qualifying for the obligation to purchase pursuant to the present article or pursuant to Article 50 of the present law shall be entitled to avail of an 'obligation to purchase' contract only once.

Any additional costs of the electricity production installations operated by Électricité de France or by the abovementioned non-nationalised distributors that are covered by the present article shall be offset under the conditions laid down in Article 5(I).

...

The additional costs that may arise shall be offset under the conditions laid down in Article 5(I).

...'

5 Article 8(2) of Decree No 2001-410 of 10 May 2001 on the conditions for the purchase of electricity generated by producers qualifying for the amended purchase obligation (décret n°2001-410, du 10 mai 2001, relatif aux conditions d'achat de l'électricité produite par des producteurs bénéficiant de l'obligation d'achat modifié) (JORF of 12 May 2001, p. 7543), is worded as follows:

'The conditions for the purchase of electricity generated by installations qualifying for the obligation to purchase provided for in Article 10 of the Law of 10 February 2000 shall be set by orders of the Ministers for the Economy and for Energy, adopted after obtaining the opinion of the Conseil supérieur de l'électricité et du gaz (Higher Council for Energy) and after obtaining the opinion of the Commission de régulation de l'énergie. ... Those purchase conditions shall specify inter alia:

...

(2) the tariffs for the purchase of the electricity'.

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

6 By the contested orders, the Ministre de l'Écologie, de l'Énergie, du Développement durable et de l'Aménagement du territoire and the Ministre de l'Économie, de l'Industrie et de l'Emploi laid down the conditions for the purchase of electricity generated by wind-power installations.

7 Those orders were subsequently the subject of an action for annulment before the Conseil d'État (French Council of State) brought by Association Vent De Colère! Fédération nationale and 11 other applicants.

8 Those applicants claim, in particular, that the orders in question introduce State aid within the meaning of Article 107(1) TFEU.

9 According to the referring court, the purchase of the electricity generated by wind-power installations at a price higher than its market value constitutes an advantage liable to affect trade between Member States and to have an impact on competition.

10 With regard to the criterion relating to intervention by the State or through State resources, the Conseil d'État states that, in a decision dated 21 May 2003, it applied the judgment in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, holding that the financial burden of the obligation to purchase enjoyed by wind-power installations was shared amongst a certain number of undertakings, without public resources contributing, directly or indirectly, to the financing of the aid,

and the Conseil d'État had therefore taken the view that the mechanism then in force for the purchase of the electricity generated by wind-power installations did not constitute State aid within the meaning of Article 87(1) EC.

11 That mechanism has, however, been amended by Law No 2003-8 of 3 January 2003 on the gas and electricity markets and the public energy service (loi n° 2003-8, du 3 janvier 2003, relative aux marchés du gaz et de l'électricité et au service public de l'énergie) (JORF of 4 January 2003, p. 265). Previously, the additional costs arising from the obligation to purchase imposed on Électricité de France and the non-nationalised distributors were offset in full through a public service fund for the generation of electricity financed by charges payable by the producers, suppliers and distributors referred to in the law. Those additional costs are now offset through the charges payable by the final consumers of electricity located in national territory, the amount of which is calculated in proportion to the quantity of electricity consumed and determined by the Minister for Energy by order on a proposal from the Commission de régulation de l'énergie.

12 The Conseil d'État observes also that, in Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497, having pointed out that, in the case giving rise to the judgment in *PreussenElektra*, the undertakings in question had not been appointed by the Member State to manage a State resource, 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.

13 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the light of the change in the mechanism for financing in full the additional costs imposed on Électricité de France and the non-nationalised distributors referred to in Article 23 of Law No 46-628 ... by the obligation to purchase the electricity generated by wind-power installations at a price higher than the market price for that electricity, as a result of Law No 2003-8 ..., must that mechanism now be regarded as an intervention by the State or through State resources within the meaning, and for the application, of Article [107 TFEU]?'

Consideration of the question referred

14 By its question, the referring court asks, 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 Law No 2000-108, must be regarded as an intervention by the State or through State resources within the meaning of Article 107(1) TFEU.

15 It must be stated at the outset that, while categorisation as State aid within the meaning of Article 107(1) TFEU presupposes that four conditions are met, namely, that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between Member States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition (see, to that effect, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 18, and Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE* [2013] ECR I-0000, paragraph 25), the present question concerns the first of those conditions only.

16 For it to be possible to classify advantages as State aid, first, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State (see, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24, and *Doux Élevage and Coopérative agricole UKL-ARREE*, paragraph 27).

17 As regards, in the first place, the condition that the measure must be attributable to the State, it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of that measure (see, to that effect, *France* v *Commission*, paragraph 52).

18 It is clear that the offset mechanism at issue in the main proceedings was established by Law No 2000-108 and must therefore be regarded as attributable to the State.

19 As regards, in the second place, the condition that the advantage must be granted directly or indirectly through State resources, it is to be recalled that measures not involving a transfer of State resources may fall within the concept of aid (see, to that effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16).

20 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 (see, to that effect, inter alia, Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21; *Sloman Neptun*, paragraph 19; and *Doux Élevage and Coopérative agricole UKL-ARREE*, paragraph 26).

21 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 (see *France* v *Commission*, paragraph 37;

Essent Netwerk Noord and Others, paragraph 70; and *Doux Élevage and Coopérative agricole UKL-ARREE*, paragraph 35).

22 It is clear from the documents submitted to the Court that, 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.

23 Under the French legislation applicable in the main proceedings, the amount of the charge imposed on each final consumer of electricity is determined annually by the Minister for Energy by order on a proposal from the Commission de régulation de l'énergie. If no such ministerial order is made, the amount of the charge is increased automatically each year.

24 Furthermore, Article 5 of Law No 2000-108 provides for an administrative penalty in the event of a consumer's failure to pay the charge.

25 The Court has held that funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities (see, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 35).

26 Lastly, it was explained, at the hearing, that Law No 2000-108 had established a principle that the obligation to purchase would be covered in full by the French State, requiring the French State to discharge past debts and to cover in full the additional costs imposed on undertakings should the sum of the charges collected from final consumers of electricity be insufficient to cover those additional costs.

27 Consequently, it follows from paragraphs 20, 25 and 26 of the present judgment that the fact, relied on by the French Government at the hearing, that the undertakings subject to the obligation to purchase retain the charges received from final consumers in so far as they do not cover the undertakings' own total additional costs, with the result that part of the funds 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.

28 In any event, so far as concerns the funds channelled through the Caisse des dépôts et consignations, it should be pointed out that, in accordance with Law No 2000-108, the Caisse des dépôts et consignations centralises the sums collected in a special account before paying them out to the operators concerned, thereby acting as an intermediary in the management of those funds.

29 The Caisse des dépôts et consignations is a public law corporation, established by the 1816 Finance Law (loi sur les finances de 1816). Its general manager, who is

the chief executive, is appointed by the President of the Republic within the Council of Ministers. Its Supervisory Board and the specialised committees set up within that board are composed of persons appointed by the French Chamber of Deputies, Senate and other public institutions. The chairman of the Supervisory Board is designated by the board from amongst its members. The chairman is, in practice, a member of either the Chamber of Deputies or the Senate.

30 The Caisse des dépôts et consignations – a public body – under a mandate from the French State, provides administrative, financial and accounting management services for the Commission de régulation de l'énergie, the independent administrative authority responsible for ensuring the proper functioning of the market for electricity and gas in France. The Caisse des dépôts et consignations also determines late payments or defaults in payment by final consumers and reports them to that regulatory authority.

31 In addition, that public entity may invest the charges collected from final consumers, it being specified that the remuneration from those investments is to be deducted each year from the amount of the charges payable for the following year.

32 Furthermore, the Caisse des dépôts et consignations does not make any profits from that activity and its management costs are set off against the charges paid by final consumers of electricity.

33 Therefore, the sums thus managed by the Caisse des dépôts et consignations must be regarded as remaining under public control.

34 All those factors taken together serve to distinguish the present case from that which gave rise to the judgment in *PreussenElektra*, in which the Court held that an obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable sources at fixed minimum prices could not be regarded as an intervention through State resources where it does not lead to any direct or indirect transfer of State resources to the undertakings producing that type of electricity (see, to that effect, *PreussenElektra*, paragraph 59).

35 As the Court has already had occasion to point out – in paragraph 74 of the judgment in *Essent Netwerk Noord and Others* – in the case which gave rise to the judgment in *PreussenElektra*, the private undertakings had not been appointed by the Member State concerned to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.

36 Consequently, the funds at issue [in *PreussenElektra*] could not be considered a State resource since they were not at any time under public control and there was no mechanism, such as the one at issue in the main proceedings in the present case, established and regulated by the Member State, for offsetting the additional costs arising from that obligation to purchase and through which the State offered

those private operators the certain prospect that the additional costs would be covered in full.

37 Accordingly, Article 107(1) TFEU must be interpreted as meaning that 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, such as that resulting from Law No 2000-108, constitutes an intervention through State resources.

Limitation of the temporal effects of the judgment

38 In the alternative, should the Court find that a method of financing such as that at issue in the main proceedings constitutes an intervention by the State or through State resources, the French Government has requested that the temporal effects of the judgment delivered be limited.

39 It should be recalled in this connection that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (see, inter alia, Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 27; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 50; and Case C-92/11 *RWE Vertrieb* [2013] ECR I-0000, paragraph 58).

40 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Union legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, *Skov and Bilka*, paragraph 51, and *RWE Vertrieb*, paragraph 59).

41 So far as concerns the case in the main proceedings, it must be pointed out, in the first place, as regards the condition that those concerned should have acted in good faith, that the French Government could not have been unaware of the prohibition, laid down in Article 108(3) TFEU, of putting an aid measure into effect or of the legal consequences of the failure to notify the measure at issue.

42 As regards, in the second place, the requirement that there should be a risk of serious difficulties, the Court has made it clear that the financial consequences which might result for a Member State from a preliminary ruling have never, in themselves, justified limiting the temporal effect of such a ruling (see to that effect, inter alia, Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 37 and the case-law cited).

43 In those circumstances, there is nothing in the present case to warrant a derogation from the principle that a ruling on the interpretation of Union law takes effect from the date on which the rule interpreted came into force (see Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 49 and the case-law cited).

44 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 107(1) TFEU must be interpreted as meaning that 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, such as that resulting from Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service, as amended by Law No 2006-1537 of 7 December 2006 on the energy sector, constitutes an intervention through State resources.

[Signatures]