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RECENT DEVELOPMENTS ON THE ECJ'S CONTROL
OVER STATE AID IN THE ENERGY SECTOR:
THE LITHUANIAN CASE

ABSTRACT. In this judgement the ECJ had the opportunity to return to the issue of State aid in the energy sector, after several rulings with partially divergent outcomes were issued in the last period. State intervention in the energy sector is still subject of controversial debate, different outcomes of the rulings are closely connected with the peculiarity of each Member State's legal system. In this respect, what seems to be the most distinctive element in the ECJ jurisprudence is the existence of a private or public intermediary body, which is charged by national legislation to collect, manage and distribute the financial resources at issue. In this regard, it is also necessary that the entity acts under public control. State resources are in fact involved only when control over a company is exercised by the State as shareholder. ECJ jurisprudence has so far used a formalistic approach in its relevant analysis, while sometimes the ECJ has shown to unduly mix its different case-law principles.

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1. Introduction

The European Court of Justice (ECJ), on 15 May 2019, ruled on a request for a preliminary ruling concerning the Lithuanian incentive mechanism for the purchase of electricity produced from renewable sources and its possible qualification as State aid.

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The request consists of five different questions related to:

- (i) whether the interpretation of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) allows to consider that the funds provided for financing a public interest service (PIS) in the electricity sector at stake constitute or not a State resource within the meaning of that provision;
- (ii) whether same Article 107(1) must be interpreted as meaning that the obligation provided in the Lithuanian law imposing undertakings to purchase electricity at a fixed price from certain electricity producers, and also providing that the losses suffered by undertakings due to that obligation are offset with funds possibly attributable to state resources, is or is not to be considered as aid granted to electricity producers through resources referable to the State;
- (iii) whether the legal schemes which granted support in favor of undertakings implementing projects of national strategic importance, and also in favor of undertakings aiming at ensuring the security of electricity supply, are or are not to be regarded as selective or capable of affecting trade among Member States;
- (iv) whether the Lithuanian regime of public interest service in the energy sector meets the criteria established in the *Altmark*¹ judgment or not;
- (v) whether the obligation related to the public interest service has to be regarded as distorting or threatening to distort competition.

With the aforementioned judgement, the ECJ had the opportunity to return to the issue of State aid in the energy sector, after several rulings with partially divergent outcomes were issued in the last period. Even after the well-known *PreussenElektra* judgement,² State intervention in the energy sector is still subject of controversial debate. Different outcomes of the rulings are closely connected with the peculiarity of each Member State's legal system, therefore the analysis of the relevant judgements requires further attention, especially on national backgrounds.

Despite the restrictive approach shown by the ECJ, State intervention in the energy field is essential. In terms of regulatory measures, State action is necessary to

1 ECJ, C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg*.

2 ECJ, C-379/98, *PreussenElektra*.

achieve objectives of public general interest such as energy efficiency, innovation, and environmental protection. With regards to empirical measures, State intervention is justified by the existence of market failures. Huge industrial infrastructure and projects require considerable financial investments that are not always granted in the optimum quantity requested under normal market conditions. On the other hand, the production of the socially desired level of energy produced from renewable sources may not be reached due to the additional costs of those processes where compared to the other more economically advantageous ones that exist on the market.

2. Lithuanian legislation on public interest services in the electricity sector

According to Lithuanian legislation, public interest services in the electricity sector are services provided by private undertakings that must be established by the government. Furthermore, the government also defines the providers and the procedures through which these services are guaranteed, in accordance with the general requirements provided by law. Under the general Lithuanian law on electricity, public interest services mainly concern:

- (i) aid schemes and balancing measures related to the electricity obtained through renewable sources;
- (ii) the generation of electricity through cogeneration through combined heat and power plants so far as this system is efficient in terms of energy savings;
- (iii) several methods designed to ensure the security of electricity supply and also to safeguard the security, reliability and independence of the Lithuanian energy system, including the production of identified and specific power plants of strategic importance. As a consequence, the entities that provide PISs are, on the one hand, the electricity producers who generate energy from renewable sources and, on the other hand, the electricity producers appointed by the government in order to perform the other PISs.

With regards to the energy generated by renewable sources, law provided that PIS funds must be administrated by an entity directly or indirectly controlled by the State. As a general rule, PIS funds are collected from end consumers by distribution and transport system operators, which had the duty to entirely transfer them to the administrator controlled by the State. The administrator in turn distributes them to all the undertakings that provide PISs. Since the administrator of the funds is not financed

from public resources, its administrative costs are covered by the same PIS funds. Rates and distribution criteria are set by a public body in relation to the energy consumption that is expected for each year. In relation to the production of energy from renewable sources, the obligation consists in paying the difference between the fixed price established for a producer and the price of the electricity sold by that producer according to the procedures established by the government. This price however, cannot be lower than the average price market calculated by public administration. PIS providers that generate electricity from renewable energy sources are selected through a tender procedure based on the lowest offer price, and are obliged to conclude contracts with electricity purchasers, namely the distribution and transport system operators. In this way, losses incurred due to the marketing of the electricity bought in the context of PISs are compensated by the administrator of the funds through monies allocated to PISs. Consequently, the undertaking's cost of balancing with renewable energy is fully supported by those funds. PIS funds cannot be used for a purpose other than restoring PIS supply and do not, in any way, constitute amounts to be included in the State budget. All electricity consumers pay the price of PISs in relation to the amount of energy actually consumed. Consumers who fail to pay PIS rates are subject to general procedures established for civil matters.

Concerning the electricity generated in cogeneration plants, undertakings can submit an application to the Minister for Energy in order to be appointed as PIS providers. In this case, the interested undertakings conclude contracts with the public electricity suppliers, establishing the quantities of electricity to be periodically purchased. For this reason, PIS providers receive a compensation which is payed through PIS funds.

3. The Court's decision

The ECJ's ruling on the first preliminary question is apparently an easy task. The Court, in this respect, recalls its own precedents, noting that in order to be qualified as State aid within the meaning of Article 107(1) TFEU, economic advantages must be granted directly or indirectly through State resources and simultaneously be attributable to the State. However, the demonstration of these elements does not seem to be fully valued, considering that the following arguments of the Court focus on other aspects. The Court's decision states that the Lithuanian legal regime constitutes an intervention

by State resources within the meaning of European law. In stating this, the relevant element of the Court's evaluation is represented by the fact that the administrator of PIS funds is under public control, although the nature and the extent of this control does not clearly emerge from the request for preliminary ruling. In recalling its jurisprudence, the Court ruled that even if the sums corresponding to the aid measures are not permanently held by the State or do not constitute a financial asset of the public sector, as long as those funds remain under public control and are thus available to the national authorities, they must be considered as State resources.

In this case, PIS funds are collected by a formal private entity, without any legal chance to derogate from PIS regime. The administrator of the funds is the sole entity in charge of this duty according to Lithuanian law. As stated by the referring court, this private body is directly or indirectly controlled by the State, without any discretion as to the determination as well as the assignment and the use of these funds.³ Once the legal regime has been determined, the Court has no alternative but to consider PIS sums as remaining under State control.

The answers given to the second, third and fifth preliminary requests are in some way dependent on the solution adopted for the first question.

PIS funds have the purpose of compensating the additional cost that operators may sustain when obliged to purchase electricity at a fixed rate from certain electricity producers. This compulsory purchase system is neutral for distribution and transport system operators, *i.e.*, it does not give them a direct economic advantage. On the one hand, PIS funds are distributed through a mechanism that allows operators only to compensate financial losses deriving from energy purchased at a higher price than the market one. On the other hand, it is not possible for energy sellers to charge the additional costs on the costumers. PIS funds allow renewable energy producers to sell a certain amount of energy at a higher price than the market price, and, in any case, to sell a higher quantity compared to a scenario without financial incentives. As a result, energy

³ It must be noted also that PIS monies cannot be used for purposes other than payment for the provision of PIS, and do not form part of the State budget. Consumers who fail to pay PIS obligations are responsible in accordance with the general procedure laid down for civil matters, *i.e.*, they are not subject to liability under public law rules.

producers must be regarded as the indirect beneficiaries of the support measures. Therefore, there is no doubt about the selective nature of the support measures attributable to the State, whereas the aim of the Lithuanian legislation is to promote the production of renewable energies together with the pursuit of specific goals related to independence, security and reliability of the national energy network. Moreover, since the electricity market has been recently liberalized at the European level, State intervention is capable, at least potentially, to have effect on trade between Member States both in terms of competitive advantage for the entry of national producers in foreign markets, and also in the possible existence of entry barriers for foreign producers in the national energy market. Finally, the Court clarified that PIS regime must be regarded as distorting or liable to distort competition.

The fourth question is related to compliance with the conditions set by the *Altmark* ruling in relation to the existence of a service of general economic interest, which is up to the national judge to verify.

4. State aid in EU courts case law

In order for a measure to be considered State aid within the meaning of Article 107(1) TFEU, it must fulfill the following cumulative conditions: (i) the existence of a certain economic advantage; (ii) the economic advantage must be directly or indirectly granted through State resources and must be imputable to the State; (iii) the advantage must favor certain undertakings according to the selectivity criterion; (iv) the measure must distort or threaten to distort competition and affect trade between Member States. The assessment of the second condition has proved to be the most problematic in the ECJ case law and its investigation constitutes a sort of assumption: only once this condition is fulfilled, the analysis of the other conditions becomes useful in order to consider a measure as State aid. Therefore, the analysis carried out in this paper will focus on this aspect.

It must be preliminary noted that even within the second condition, the ECJ jurisprudence is now clear in claiming that a State aid measure must both be directly or indirectly granted through State resources and be imputable to the State. Those characteristics must be satisfied cumulatively, and it is therefore necessary that the two requirements are examined separately and not confused in the analysis.

When the advantage is granted by a legislative provision or by an administrative act of general application or, more in general, by any provision issued and attributable to public bodies, the imputability to the State is somehow inevitable. The analysis becomes more complex if the measure refers to an undertaking that is owned by a public body or is subject to its control. In this regard, it is necessary to question the involvement of public bodies in the adoption of the measure: it must be examined to which extent a public influence has been exercised on the decision taken by the undertaking. The circumstances and the context in which the decision is taken by public undertakings might constitute key elements for a measure to be considered as imputable to the State. In this regard, some indicators have been provided such as, for example, the degree of integration of the undertaking into the structures of the public administration, the nature of the undertaking's activities and its behavior in normal market conditions with private operators, the legal status of the undertaking, the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicators showing an involvement by the public authorities in the adoption of a measure.⁴ Therefore, on the one hand, the mere fact that a public undertaking has been constituted in the form of capital company according to the civil law cannot be regarded as sufficient to exclude the existence of aid measures taken by undertakings and also imputable to the State. On the other hand, the imputability to the State cannot be declared only because an economic advantage is granted through resources of a public undertaking.

Following an extensive interpretation, the definition of aid granted by a Member State or through State resources could include all resources that are under State control and thus all resources that are available to public authorities. In this sense, the definition could cover every transfer of resources that is determined by the State, either involving public budget or not.

State aid could therefore be originated by a transfer of resources directly borne by a public budget, such as government funds or assets, even those owned and administered by public undertakings but also private entities designed by the State. Member States are in fact precluded from circumventing State aid law by assigning to other en-

4 ECJ, case C-482/99, *Stardust Marine*, par. 56

ties the transfer of State resources.

Therefore, funds financed through compulsory charges imposed by State legislation, and administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separated from public authorities.⁵ In the landmark ruling *PreussenElektra*,⁶ the ECJ examined the German incentive mechanism based on an obligation imposed on electricity distribution and transport companies to purchase certain amounts of electricity from renewable energy sources at a fixed minimum price established by public authorities. The electricity supply companies had to partially pay the difference between those prices and the market prices. In this case, the Court held that the purchase obligation did not constitute State aid because companies fulfilled the obligation by using their own financial resources. The allocation of the financial burden arising from that obligation between those electricity companies and other private undertakings, while constituting an economic advantage for some private undertakings, did not involve a direct or indirect aid granted through State resources.⁷ The interpretative outcome that one could immediately draw from this judgement is that for a measure to be considered as State aid it must entail an actual financial burden for a public body. The subsequent *Stardust Marine* case seems to confirm the general orientation expressed in the *PreussenElektra* case but has nevertheless added important indications. The Court in fact had to deal with the support measures to the electricity production granted by a French company that formally appeared to be private, but was instead mainly owned by the French government, which used it to financially intervene in the energy market with support measures. Unlike the incentive systems based on legislative measures, in this case the financing measures derived from an intervention of the State as shareholder. It was therefore necessary to update the previous jurisprudential approach in order to safeguard the effectiveness of European law on State aid. The *Stardust Marine* case clarified the cumulative nature of the State resources conditions, and also elaborated a test

5 ECJ, case C-262/12, *Association Vent De Colère! And Others*, par. 25

6 ECJ, C-379/98, *PreussenElektra*

7 *Ibid*, par. 58-60

for the imputability to the State connected with the role of the State as majority shareholder of a private company. The judgment also provided the aforementioned non-exhaustive list of indicators of the imputability to the State. The Court has indeed emphasized that the imputability condition requires the exercise of a dominant influence and also an effective control over a public owned or controlled company. The Court has also stated that financial resources must be at the disposal of the State.⁸ Starting from the *Stardust Marine* case, it appears to be clear that the cost of the incentive systems for the production of electricity produced by renewable sources could not be borne only by private companies. The trend developed in these years was to make the financial burden of incentives increasingly “public” through withdrawals on the community of consumers or supply companies, generally linked to the energy consumption. Thus, several public or even private bodies were designed in various European legislations to ensure the efficient management of the financial flow consequent to the imposed withdrawals.

In the *Essent Netwerk*⁹ case consumers were obliged to pay a surcharge to the supply companies which were subject to the obligation to purchase and resell electricity produced by renewable sources. These supply companies were compensated with the funds formed by the surcharges paid by consumers, which were collected by a public company operator, then allocated and distributed according to the law. The Court ruled that this incentive mechanism constituted an aid granted through State resources. The same outcome was achieved in the *Iride*¹⁰ case that, from a factual point of view, can be compared to the *Essent Netwerk* case.

In the *Vent de Colère*¹¹ case the French law provided a legal mechanism forcing supply undertakings to purchase wind-generated electricity at a higher price than the market price of the energy, which was periodically updated by a public authority. Those additional costs for undertakings are fully transferred to and charged on final consumers and collected and managed by a public law corporation established by law, whose gen-

8 ECJ, case C-482/99, *Stardust Marine*, par. 52

9 ECJ, case C-206/06, *Essent Netwerk Noord B.V.*

10 ECJ, case T-25/07, *Iride and Iride Energia*.

11 ECJ, case C-262/12, *Vent de Colère and Others*.

eral manager and Supervisory Board are nominated by the Government and other public institutions, and therefore act under a mandate of the French State. This public body acts as an intermediary in the management of those funds, it could determine late payments or defaults in payment by final consumers and reports to the administrative regulatory authority. In addition, this public entity could also invest the funds collected from final consumers. The remuneration from those investments was to be deducted from the amount of the payable charges, which is periodically updated. All those elements allowed the Court to affirm that the sums collected and managed by the French public law investment group must be regarded as remaining under public control, therefore that mechanism for offsetting the additional cost constitutes an intervention granted through State resources.¹² Yet, another case¹³ concerns the Austrian law, which instructed a private law company to administer the entire system of compulsory contributions. In this case, the Court strengthens its principle according to which the funds that are financed through compulsory contributions imposed by the legislation of the Member State, administered and apportioned in accordance with that legislation, could be regarded as State resources even if they were administered by entities separate from the public authorities. In this regard, it must be noted that a transfer of State resources is not a necessary condition to consider the advantage granted to one or more companies as State aid pursuant to Art. 107(1) TFEU.¹⁴

The recent *ENEA*¹⁵ judgment seems to have changed the orientation so far taken by the ECJ.

The Polish law on energy provided for an incentive mechanism by imposing an obligation on electricity suppliers and producers to purchase certain volumes of electricity produced by cogeneration. That obligation applied to supplier companies that sold electricity to end consumers, requiring that an established percentage of the total sales of energy must be produced by cogeneration. Companies that fail to comply with

12 *Ibid*, par. 29-37.

13 EuGC, case T-251/11, *Austria c. Commission*.

14 *Ibid*, par. 55.

15 ECJ, case C-329/15, *ENEA*.

the obligation established by law are subject to a financial penalty while the proceeds of the financial penalties applied are poured into the national fund for environmental protection and water management. The purchase price of electricity produced by cogeneration shall be freely set by mutual agreement between the parties in the transaction, i.e., the companies subject to the purchase obligation and the producer of such electricity. Anyhow, the Polish regulatory body had the power to approve the maximum price for the sale of electricity to end users. ENEA is a company that produces and sells electricity and is wholly owned by the Polish State. In this case the Court held that a national measure such as the Polish one, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration, does not constitute an intervention of the State or through State resources. The Court stated that an obligation imposed on electricity suppliers and producers to purchase electricity produced by cogeneration, even when a price is set by a public authority, does not in itself involve any direct or indirect transfer of State resources within the meaning of Article 107(1) TFEU.

The Polish mechanism implied that the purchase obligation could not be systematically passed on to end users by undertakings. Moreover, those extra costs are not financed by a compulsory contribution imposed by the State or by a full offset mechanism. The electricity supplier and producer companies were not appointed by the State to manage State resources but were bounded by a purchase obligation imposed on them by means of their own financial resources.¹⁶

5. Conclusions

It could be said that the main element that distinguishes the *PreussenElektra* and the *ENEA* judgments from all the rest of the ECJ jurisprudence is the existence of a private or public intermediary body, which is charged by national legislation to collect, manage and distribute the financial resources at issue. In this regard, it is also necessary that the entity acts under public control. In the *PreussenElektra* and *ENEA* cases, the undertakings have to fulfill the obligations established by national law financing on their own resources, while in the other cases various entities were charged with the duty

16 *Ibid*, par. 23-30.

to administer the financial resources and an offset mechanism to compensate the burdened companies for the additional costs they have to bear. Such an offset mechanism, in the consolidated opinion of the Court, would imply that supply or producer undertakings do not spend their own financial resources but they are requested by the State to manage and redistribute State resources. In these cases the financial resources mostly take place directly between private parties, *i.e.*, energy supply/producer undertakings or end consumers. It could be stated that those financial transfers may be considered as transfers of State resources mainly due to the presence of two elements: (i) a law provision and (ii) the State control over the entities that manage those funds. The element of the law provision is generally linked to the imputability: it refers to a measure or an obligation on the State, although in some circumstances it may not be a sufficient condition.¹⁷ However, law provisions may not always be relevant. The State can in fact act as a shareholder of a public or formally private company and then generate more distortive effects on competition. Therefore, it is necessary to separate the State-legislator from the State-shareholder. State resources are in fact involved only when control over a company is exercised by the State as shareholder. In any case, it can be said that the ECJ jurisprudence has so far used a formalistic approach in its relevant analysis, while sometimes the ECJ has shown to unduly mix its different case-law principles. As an example, on the one hand it could be impossible to say that the imputability condition has been met by solely the existence of a national law provision, while on the other hand the condition on the existence of aid measures granted through State resources is not fully satisfied just because the State has the majority shareholding in the undertaking regulated by energy legislation. Those outcomes and principles deriving from case-law refer to different situations, and therefore must be separately applied. However, a public

17 In this regard, it has been claimed that a formalistic interpretation would require that “all legislation regulating the relationship between enterprises is assessed under State aid rules”, that might be a “difficult exercise with an uncertain outcome.” As a matter of fact “most national legislation of that type would in any event not constitute State aid because it does not satisfy the requirement of selectivity which means that it does not favor certain undertakings or the production of certain goods within the meaning of Article 92(1).” Therefore, one must conclude that “it seems preferable that legislation regulating the relationship between private actors is as a matter of principle excluded from the scope of the State aid rules” ECJ, C-379/98, *PreussenElektra*, Opinion of AG Jacobs, par. 151-157. Reflecting on these arguments AG Maduro has stated that a narrow interpretation would disregard that there should be a distinction “between direct interventions in the market and general measures to regulate economic activities” ECJ, case C-237/04, *Enirisorse*, Opinion of AG Maduro, par. 44.

undertaking and an intermediary entity may not be present at the same time. The ECJ jurisprudence has always analyzed the State control over the public undertakings in relation to the condition of the measures directly or indirectly granted through State resources. In any case, these principles must be applied, or at least adapted, to a situation in which there is only a formally private intermediary entity entrusted with the duty of managing those funds, which is, to some extent, subject to the State control.

If one has to consider the financial transfers between private companies and end consumers as State resources, it must be necessarily proven that the State is able to exercise an effective and dominant influence over the intermediary entity. It must be also proven that the State is capable of directing the use of those financial resources managed by the intermediary entity. The mere fact that the law enables certain public authorities to exercise a generic form of control, or the mere fact that the State holds the majority of the capital in the intermediary entity does not lead to the conclusion that the State may exercise a dominant influence and therefore does not enable public authorities to direct the use of the resources. Indeed, the State ownership over public undertakings in itself or solely a national law provision are not sufficient to consider a public undertaking or an intermediary entity different from any other institution that employs its own resources to comply with a legislation or a regulatory requirement. As stated in the *Stardust Marine* case, actual exercise of that control cannot be automatically presumed. Nevertheless, the *ENEA* case has some peculiarities, it can be an example to better clarify this aspect. In this case, the State only acted as a legislator. The purchase obligation provided by law indistinctly applied to both private and public undertakings. As said before, ENEA was a fully public undertaking. It has been proved that ENEA's decision not to fulfill the purchase obligation has been taken independently of any external public influence, as a part of its autonomous business plan. This circumstance empirically proves that there is not always a coincidence between the State as legislator and the State as shareholder. Indeed, the interests at stake of the two subjects can also be divergent. If the interests were the same and the State exercised its dominant influence over ENEA, this public company would have in fact fulfilled the obligation.

The *ENEA* ruling remarks once again that the two State subjectivities remain distinct and therefore must be analyzed separately. In relation to the transfer of State resources, the *ENEA* ruling seems to establish a relationship of direct proportionality

between the degree of interference of the public control and the existence of an aid measure granted through State resources.

However, in contrast to what has been expressed by the Court, it could be noted that the existence of a State control, as well as the possibility for public authorities to influence the relevant decision taken by the intermediary entity, have little to do with the condition of the State resources. These elements could instead be used more properly to consider that a financial measure taken by the intermediary body is imputable to the State. The condition of the State resources could instead be more genuinely relevant when discussing financial aid measures through a more substantial approach: as an example, when those measures directly or indirectly entail a financial burden for the State's accounts, whatever is the form taken by the aid. Further examples could be those particular circumstances where the public authorities have total and effective control over the intermediary entities so that public instructions cannot be disregarded. In these cases, the financial resources that formally come from the private sector could be considered State resources only when the public authorities could allocate those resources by using full discretion. The Court on this aspect has instead generally adopted a superficial and formalistic approach. In the Court's opinion what seems to distinguish a measure constituting State aid from all other measures that do not fall within the scope of Article 107 (1) TFEU, is solely a full offset mechanism, according to which certain undertakings are required to transfer funds into an intermediary entity subject to the State control, even if the degree and the intensity of this public control it is not fully examined by the Court. One might wonder which is the difference between a system in which undertakings make direct payments to their competitors and a system in which there is an intermediary entity subject to a 'non-invasive' form of public control limited, for example, to the lawfulness of the acts or simply directed at verifying the correct destination of the funds previously established by a law of general application. This type of reasoning is confirmed by the fact that the two different systems could have the same practical effects on competition among energy companies. Therefore, one could hypothesize a "non-invasive" State control limited to a pure control of legitimacy, and in particular, focused on the respect of the criteria of allocation of the funds, which are already established by national law. This situation could be compared, from a substantial point of view, to the situation in which a purchase obligation, in the absence of an in-

intermediation, is not considered as State aid. In this respect, it would be rather desirable the use of a pragmatic approach more focused on the effects of the aids on the undertakings and also more focused on the existence of an effective State control over the intermediary entities. The use of an effects-based approach could in fact replace the current formalistic approach used by the Court, focused instead only on the status of those intermediary entities entrusted with the task of administering the funds.