



OF SURCHARGES AND SUPERVISION: GERMAN RENEWABLE ENERGY ACT IS STATE AID

SEVERIN KLINKMÜLLER*

ABSTRACT: Germany's former law on renewable energy constitutes State aid illegal under EU law. The General Court dismissed Germany's action for annulment of a Commission Decision, finding that a renewable energy surcharge payable by electricity consumers for the benefit of those electricity producers using renewable sources effectively equalled the distribution of State funds. The private energy suppliers tasked with the administration of the compensation scheme remained under extensive control by German authorities. An exemption of certain energy-intensive industries from the surcharge was a further element of the law that violated EU State aid rules. Departing from earlier jurisprudence, the General Court through this judgment effectively enhanced the Commission's capacity to interfere with the Member States' national energy policy.

KEYWORDS: State aid – Art. 107, para. 1, TFEU – renewable energy – EEG surcharge – use of State resources – compensation of electricity-intensive undertakings.

I. CONTROVERSY AROUND GERMANY'S RENEWABLE ENERGY ACT

The General Court has found that the German law for the promotion of electricity from renewable energy constitutes illegal State aid.¹ It held that the compensation scheme put in place by the law, to the benefit companies producing electricity from renewable energy sources and mine gas, amounted to an advantage pursuant to Art. 107, para. 1, TFEU. Although such financial compensation was not directly administered by German public administrators, the General Court stressed their official oversight over this system and concluded that the law involved the distribution of State resources.

The Renewable Energy Act (EEG), adopted by Germany in 2012 and in force until 2014, promoted Germany's transition towards an energy supply founded on renewable resources. To this end, it put in place a compensation scheme to financially support the

* Law clerk (Rechtsreferendar), Kammergericht Berlin, sklinkmueller@gmail.com.

¹ General Court, judgment of 10 May 2016, case T-47/15, *Federal Republic of Germany v. European Commission*.

production of electricity from renewable energy sources such as solar and wind power as well as mine gas.

The support system included two central elements. First, there was a surcharge that had to be borne by the electricity suppliers but which they regularly transferred to their final customers. The funds raised by this surcharge were used to compensate the transmission system operators for the losses that occurred when selling electricity from renewable sources through the electricity exchange below market price.

The second element was that the EEG exempted certain electricity-intensive undertakings from paying the EEG surcharge to their energy suppliers in order to mitigate the negative effect of the surcharge on their production costs.

The EEG surcharge sparked the Commission's interest in the EEG, which Germany had not previously notified to the Commission in accordance with the procedure in Art. 108, para. 3, TFEU. After one year of examination, the Commission by Decision 2015/1585 of 25 November 2014 on the aid scheme in principle classified the surcharge as State aid.² At the same time, it accepted that the exemptions of the electricity-intensive undertakings (EIUs) were largely in line with the Commission's Guidelines on State aid for environmental protection and energy 2014-2020 and thus compatible with European State aid rules.³ Germany was ordered to recover only those minor parts of the exemptions granted to the EIUs which were excessive under those Guidelines on State aid.

To settle the matter as a matter of principle, Germany, objecting to the classification of the surcharge as State aid, contested the Commission's Decision 2015/1585 before the General Court.

II. TWO QUESTIONS, ONE ANSWER: THE EEG AS STATE AID

In the present judgment, the General Court confirmed the Commission's legal assessment and rejected Germany's application to have the Court annul the Commission Decision 2015/1585. At the centre of the dispute between Brussels and Berlin lay two questions: does the EEG compensation system entail the distribution of State funds? And does the exemption of certain industries from the EEG surcharge constitute an aid within the meaning of Art. 107, para. 1, TFEU? The General Court answered both questions in the affirmative.

The General Court began by recalling its consistent case law with regard to the existence of State aid. A national measure is incompatible with EU State aid rules if four

² Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) [implemented by Germany for the support of renewable electricity and of energy-intensive users].

³ European Commission Communication (EU) 2014/C 200/01 of 28 June 2014 on Guidelines on State aid for environmental protection and energy 2014-2020.

conditions are met: “[f]irst, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition”.⁴

II.1. THE STATE AID NATURE OF THE EEG SURCHARGE

In particular, the parties disputed that the first condition was met, i.e. that the EEG surcharge involved State resources. They contended that it did not, as the whole compensation system was run by the mostly private transmission system operators (TSOs), who raised and administered the funds and distributed them to those TSOs which were eligible for compensation.

To determine the existence of an advantage financed by State resources, the General Court took an in-depth look at the functioning of the EEG surcharge. It held that, although it was the task of the TSOs to raise and administer the levy, those funds were still under the dominant influence of German authorities. The control exerted by the German administration over the TSOs and the implementation of the EEG surcharge was primarily founded on the TSOs’ obligation to report and transmit data to the Federal Networks Agency (*Bundesnetzagentur*).

Furthermore, the various TSOs were obliged to collectively administer the funds raised through the EEG surcharge in a separate joint account that was subject to control by State authorities. In the light of all these facts, the TSOs could not use the revenues from the EEG surcharge for anything other than the financing of electricity from renewable sources.⁵

The support scheme put in place by the EEG results primarily from the implementation of a public policy as defined by the German legislator to support producers of renewable energy. Within the framework of this scheme, the TSOs as administrators of the EEG surcharge acted neither on their own behalf nor in their capacity as private entities; rather, they were managing aid granted through State-controlled funds. The role of the TSOs was comparable to that of an entity executing a State concession.⁶

Consequently, whilst German authorities had no direct access to the funds raised by the EEG surcharge, the State’s dominant influence over the use of these resources nonetheless led the General Court to conclude that State funds had indeed been distributed.⁷

⁴ *Germany v. Commission*, cit., para. 34 (citing Court of Justice, judgment of 15 July 2014, case C-345/02, *Pearle and Hans Prijs Optiek Franchise BV, Rinck Opticiëns BV v. Hoofdbedrijfschap Ambachten*, para. 33).

⁵ *Ivi*, para. 84.

⁶ *Ivi*, para. 94.

⁷ *Ivi*, para. 118.

II.2. THE EXEMPTIONS FOR ELECTRICITY-INTENSIVE UNDERTAKINGS

On the second issue of whether the exemption of EIUs from the EEG surcharge entailed the grant of an advantage, Germany had argued that the support for these industries did not represent a selective advantage but merely compensated for the reduced competitiveness of those undertakings *vis-à-vis* international competition.

However, the General Court did not accept this argument. It pointed out that, according to Art. 107, para. 1, TFEU, the classification of an official measure as State aid had to be made irrespectively of the measure's grounds or objectives; instead the Court had to focus on the measure's effects on the internal market.⁸ Hence, releasing the EIUs from a charge that was otherwise to be paid by all other industries amounted to granting an advantage to those undertakings.

III. DISTINGUISHING *PREUSSENELEKTRA AG v. SCHLESWAG AG*

This is not the first time that the Luxemburg Courts have been asked to rule on the compatibility of Germany's support for energy from renewable sources with the principles of EU State aid. Previously, the Court of Justice in *PreussenElektra AG v. Schleswag AG* came to a different conclusion when ruling on Germany's national compensation system for producers of electricity from renewable sources.⁹ In that case, it found no State aid after scrutinising the German *Stromeinspeisungsgesetz*, a law which required private electricity suppliers to purchase electricity from renewable energy sources above market price and then distributed the financial burden resulting from that obligation between those electricity suppliers and upstream private electricity network operators.¹⁰

With the present judgment, the General Court has departed from this jurisprudence. It distinguished the EEG 2012 from its predecessor, i.e., the law on which the Court of Justice had ruled in *PreussenElektra AG v. Schleswag AG*, and it pointed out that the latter did not display elements of a direct or indirect transfer of State resources.¹¹ This conclusion was based on the overall assessment that the law examined by the Court of Justice in *PreussenElektra AG v. Schleswag AG* had not provided for intermediary entities to administer the funds amounting to aid on behalf of German authorities, nor had it included exemptions for EIUs.¹²

⁸ *Ivi*, para. 60.

⁹ Court of Justice, judgment of 13 March 2001, case C-379/98, *PreussenElektra AG v. Schleswag AG*. For an in-depth analysis, see M. FERNANDEZ, J. LEFEVERE, *Case Note*, in *Review of European, Comparative & International Environmental Law*, 2001, p. 344 *et seq.*

¹⁰ *PreussenElektra AG v. Schleswag AG*, *cit.*, para. 66.

¹¹ *Germany v. Commission*, *cit.*, para. 98.

¹² *Ivi*, paras 99 to 104.

IV. TOWARDS THE EUROPEANIZATION OF NATIONAL ENERGY POLICY

At first view, the General Court's Decision 2015/1585 will have no direct impact on the application of the EEG in Germany. The EEG, on which the ruling is based, has already expired and it was replaced by the EEG 2014. Under the current law, the compensation scheme for producers of energy from renewable sources has been restructured in compliance with EU law and therefore has received the Commission's approval.¹³ Meanwhile, Germany has enforced the disputed Commission Decision 2015/1585 from November 2014 and has reclaimed from EIUs those exemptions from the EEG surcharge which were deemed excessive by the Commission.

Yet, on closer inspection, the judgment of the General Court is likely to have a significant influence on national energy policy. It indicates a changing tide running in favour of the European Commission, which is gaining a stronger position of oversight as concerns the Member States' energy sector, in particular when it comes to subsidising energy production from renewable sources. Applying the language of State aid, the Commission has successfully moved into this field of national prerogative, for which the EU Treaties confer only limited competence to the Union.¹⁴

Under primary EU law, the Union shares with the Member States competence in the area of energy, according to Art. 4, para. 2, let. i), TFEU. However, the European Union's competence in this field is rather limited. Most importantly, European Union measures as regards to energy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply".¹⁵ This leaves the EU primarily with the two tasks of integrating the national energy markets and enforcing competition across national borders within a European energy market on the one hand, and the contribution of the energy sector to the Union's environmental policies on the other hand.¹⁶ It is on the basis of the latter competence field, that the Union has adopted its primary tool for promoting the use of energy from renewable sources within the Member States, Directive 2009/28/EC.¹⁷ The Directive sets mandatory national targets for the overall share

¹³ Commission Decision 2015/1585 of 23 July 2014 on the aid scheme SA.38632 (2014/N).

¹⁴ On the role of the European Commission see A. JOHNSTON, *The Impact of the New EU Commission Guidelines on State Aid for Environmental Protection and Energy on the Promotion of Renewable Energies*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, Frankfurt: Peter Lang, 2015, p. 39 *et seq.*

¹⁵ Art. 194, para. 2, sub para. 2, TFEU.

¹⁶ See further on the distribution of primary law competences between the Union and the Member States in the field of renewable energies, D. FOUQUET, J.V. NYSTEN, A. JOHNSTON, *Potential Areas of Conflict of a Harmonised RES Support Scheme with European Union Law. A report compiled within the project beyond2020* (work package 3), 2012, pp. 16 –19.

¹⁷ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directive 2011/77/EC and 2003/30/EC.

of renewable energy and lays down rules for a comprehensive cooperation of Member States in light of the Union's environmental policies.

However, the Member States' energy policies through which national governments pursue the promotion of energy production from renewable sources fall outside this scope of EU competences. It is an area of competence, closely linked with economic motivations of the Member States and their financial support for domestic energy companies, which is vigorously defended against interventions from Brussels.¹⁸

The Commission's principal publication on State aid and renewable energies, the Guidelines on State aid for environmental protection and energy 2014-2020,¹⁹ focus upon the integration of renewable energies into the European market. The Guidelines on State aid for environmental protection and energy 2014-2020, while representing a soft law instrument, are arguably an important contribution to the consolidation of EU State aid rules in the market for renewable energies. Given the limited scope of the Union's competences, this begs the question whether the Commission uses the Guidelines' quasi-legislative nature to by-pass the Treaties' limitation in order to harmonise national renewable energy support mechanisms.²⁰

In light of the General Court's judgment, Member States when adopting future national compensation schemes to support renewable energy will have to ask the Commission to verify compliance with EU State aid rules as set forth by Art. 108, para. 3, TFEU. This equally holds true for amendments to the current German EEG 2014 law. It therefore comes as little surprise that Germany has filed an appeal against the judgment to have the Court of Justice settle the fundamental dispute with regard to determining the EEG's State aid character.²¹

¹⁸ See on the European Courts' case law on Member States' renewable energies laws, K. TALUS, *Renewable Energy Disputes in the European Union: An Overview of Current Cases*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, cit., p. 129 et seq.

¹⁹ European Commission Communication 2014/C 200/01.

²⁰ In the affirmative, see A. JOHNSTON, *The Impact of the New EU Commission Guidelines on State Aid for Environmental Protection and Energy on the Promotion of Renewable Energies*, in F. SÄCKER, L. SCHOLZ, T. SVEEN (eds), *Renewable Energy Law in Europe: Challenges and Perspectives*, cit., p. 43 et seq.

²¹ Appeal brought on 19 July 2016 by the Federal Republic of Germany against the judgment of the General Court (Third Chamber) of 10 May 2016, Case T-47/15, *Federal Republic of Germany v. European Commission*.