



## STATE AID, THE CRITERION OF STATE RESOURCES AND RENEWABLE ENERGY SUPPORT MECHANISMS: FRESH WIND FROM LUXEMBOURG IN *EEG 2012*

DANIEL VASBECK\*

**ABSTRACT:** *EEG 2012* (judgment of 28 March 2019, case C-405/16 P, *Germany v. Commission*) deals with the assessment under EU State aid rules of a German renewable energy support mechanism in force from 2012 to 2014. The case hinged on the proper interpretation and application of the criterion of State resources. The Court of Justice set aside the judgment of the General Court on the basis that it had erroneously concluded that the measure involved State resources and thus constituted State aid, and annulled the decision of the Commission. The ruling is important as it contributes to clarifying the concept of State resources, while raising at the same time new issues regarding the proper analytical framework to determine when funds are deemed to remain constantly under public control. It reflects a rather formalistic interpretation of the notion of State resources and represents a warning to the Commission not to stretch the boundaries of this notion too far. The judgment also has significant implications for renewable energy support mechanisms, in particular those based on a system of guaranteed prices set above market rates. It will make it more difficult for the Commission to establish that such mechanisms constitute State aid and thus provide EU Member States with more flexibility in devising measures of this type without falling within the scope of EU State aid rules.

**KEYWORDS:** State aid – Art. 107, para. 1, TFEU – concept of State aid – *EEG 2012* – involvement of State resources – renewable energy support mechanisms.

### I. INTRODUCTION

By its judgment of 28 March 2019 in *EEG 2012*,<sup>1</sup> the Court of Justice set aside a judgment of the General Court,<sup>2</sup> which had confirmed the conclusion of the European Commission<sup>3</sup> that a German renewable energy support mechanism, referred to as *EEG 2012* (the “*EEG 2012*”), involved State aid. The core issue was whether or not the support mechanism

\* Associate, Baker Botts LLP, Brussels, daniel.vasbeck@bakerbotts.com. The author wishes to thank Dr. Leigh Hancher for providing comments on an earlier draft, and Catherine Miller for her assistance with this contribution. Any errors and omissions remain the responsibility of the Author.

<sup>1</sup> Court of Justice, judgment of 28 March 2019, case C-405/16 P, *Germany v. Commission* (“*EEG 2012*”).

<sup>2</sup> General Court, judgment of 10 May 2016, case T-47/15, *Germany v. Commission* (“*EEG 2012*”).

<sup>3</sup> Commission Decision 2015/1585 of 25 November 2014 on the aid scheme SA.33995.

relied on State resources within the meaning of Article 107, para. 1, TFEU. While the Commission and the General Court had responded in the affirmative, this view was now ultimately rejected by the Court of Justice. Rather unusually, the Court of Justice did not refer the case back to the General Court but proceeded to give itself final judgment, annulling the decision of the Commission.

The judgment of the Court of Justice is important for at least two reasons. First, it clarifies the criterion of State resources, which has to be met for a measure to be classified as State aid. Indeed, where a measure does not rely on State resources, it will not constitute State aid within the meaning of Article 107, para. 1, TFEU and will thus not have to be notified to the Commission under Article 108, para. 3, TFEU. Second, the judgment is of particular relevance to the energy sector and, more specifically, to renewable energy support mechanisms which have the potential of being categorised as State aid, especially those involving guaranteed prices set above market rates. In the context of the transition from fossil-based to renewable energy sources, renewable energy support mechanisms represent a significant instrument relied on by EU Member States to achieve the EU environmental policy goals<sup>4</sup> and have accounted for an increasing proportion of total State aid expenditures in recent years.<sup>5</sup>

Against that background, this contribution will, first, provide a brief overview of the criterion of State resources (section II), second, describe the main characteristics of the renewable energy support mechanism at issue – the EEG 2012 (section III), third, present and critically analyse the reasoning of the Court of Justice as to why the EEG 2012 did not involve State resources (section IV) and, fourth, consider potential implications of the judgment in general and for renewable energy support mechanisms in particular (section V).

## II. BRIEF OVERVIEW OF THE CRITERION OF STATE RESOURCES

According to its wording, Art. 107, para. 1, TFEU captures “aid granted by a Member State or through State resources”. A literal interpretation of this wording could suggest that a measure granted by an EU Member State may be classified as State aid even if it is not financed through State resources. However, this is not the case. It is settled case-law that,

<sup>4</sup> The 2030 climate and energy framework includes EU-wide targets and policy objectives for the period from 2021 to 2030, including a renewable energy target for 2030 of at least 32% of final energy consumption. See Commission, *Energy, Climate change, Environment: Overall targets*, ec.europa.eu, and Commission, *Energy, Climate change, Environment: Climate Action: EU Action: Climate strategies & targets*, ec.europa.eu).

<sup>5</sup> According to the State aid scoreboard 2018, between 2009 and 2017, State aid expenditures in connection with environmental protection including energy saving have grown from approx. EUR 14 billion (approx. 20% of total State aid excluding railways) to approx. EUR 61 billion (approx. 53% of total State aid excluding railways). It is noted in the State aid scoreboard that a large share of the 2017 expenditures in this area is due to the approval under EU State aid rules of renewable energy initiatives (see Commission, *State Aid Scoreboard 2018*, ec.europa.eu, pp. 7, 9-10, 16 and 88).

for a measure to be classified as State aid, it must not only (i) be attributable<sup>6</sup> to the State but also (ii) be granted through State resources, be it directly or indirectly.<sup>7</sup> These are therefore distinct and cumulative criteria.

The criterion of attributability refers to the involvement of the State in the adoption of the measure,<sup>8</sup> which will typically be obvious if it results from legislation. This criterion was not the focus of the judgment of the Court of Justice in *EEG 2012* and will not be further explored in this contribution. In contrast, the concept of State resources – summarised in detail by the Court of Justice in *EEG 2012* –<sup>9</sup> refers to the funding of the measure, i.e. it seeks to determine the public or private nature of the resources which finance the advantage granted by the measure.

The precise boundary between State resources and private resources has, however, been contentious and arguably involves a certain grey area. The key legal test to determine whether a measure relies on State resources involves ascertaining whether the funds constantly remain under public control, and therefore constantly remain available to the competent public authorities.<sup>10</sup> However, it is not always clear how this general rule applies in practice. Funds financed through compulsory charges imposed by the legislation of an EU Member State, which are managed and apportioned in accordance with that legislation, may under certain circumstances be regarded as State resources even if they are managed by entities separate from the public authorities.<sup>11</sup> It is necessary, in this regard, to determine whether such entities are indeed appointed by the State to manage State resources or whether the measure merely imposes an obligation on such entities to rely on their own financial resources.<sup>12</sup> State resources are, moreover, only involved where there exists a sufficiently direct link between the advantage granted by the measure and either (i) a reduction of the State budget or (ii) a sufficiently concrete economic risk of burdens on the State budget.<sup>13</sup>

<sup>6</sup> The criterion of attributability is also sometimes referred to as imputability.

<sup>7</sup> See, for example, Court of Justice, judgment of 16 May 2002, case C-482/99, *France v. Commission* ("*Stardust Marine*"), para. 24.

<sup>8</sup> See, for example, *France v. Commission* ("*Stardust Marine*"), cit., para. 52.

<sup>9</sup> *Germany v. Commission* ("*EEG 2012*"), cit., paras 52-60.

<sup>10</sup> See, for example, Court of Justice, judgment of 16 May 2000, case C-83/98 P, *France v. Ladbroke Racing and Commission*, para. 50.

<sup>11</sup> See, for example, Court of Justice: judgment of 2 July 1974, case 173-73, *Italy v. Commission*, para. 16; judgment of 19 December 2013, case C-262/12, *Association Vent De Colère et al.*, para. 25.

<sup>12</sup> See, for example, Court of Justice, judgment of 17 July 2008, case C-206/06, *Essent Netwerk Noord et al.*, para. 74. While this distinction has mostly been drawn in relation to purchase obligations, there does not appear to be a compelling reason why this principle should be limited to this type of obligations.

<sup>13</sup> See, for example, Court of Justice, judgment of 19 March 2013, joined cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v. Commission et al. and Commission v. France et al.*, para. 109.

As just noted, where private economic operators are required by a State measure to grant a selective advantage to another undertaking by means of *their own financial resources* rather than being appointed to manage State resources, such a measure will not meet the criterion of State resources and will thus escape Article 107, para. 1, TFEU. In such a situation, the financial burden associated with the measure will be borne by private economic operators. The case-law offers a number of examples in which this principle has been applied, particularly in relation to renewable energy support mechanisms involving purchase obligations. There are two main lines of case-law: the first line of case-law, in which the involvement of State resources was denied, is represented, in particular, by *PreussenElektra* (2001) and, more recently, *ENEA* (2017); the second line of case-law, in which the involvement of State resources was confirmed, is represented, in particular, by *Essent* (2008) and *Vent de Colère* (2013).<sup>14</sup>

The difficulty associated with those lines of case-law is that the precise dividing line between State resources and private resources, as well as the differentiating factual circumstances, are not always clear from the judgments. In *ENEA*, referring to *Essent* and *Vent de Colère*, the Court of Justice attached importance to the question whether extra costs arising from a purchase obligation can be passed on entirely to end-users, or whether they are financed by a compulsory contribution imposed by the State or by a full offset mechanism.<sup>15</sup> Depending on relatively subtle factual differences relating to their structure, renewable energy support mechanisms and, indeed, measures in general, have thus been classified as State aid or not, although the measures might grant similar selective advantages to beneficiaries and deploy similar economic effects. In this regard, according to settled case-law, Article 107, para. 1, TFEU does not distinguish between measures of State intervention by reference to their causes, their aims or their regulatory techniques, but defines them in relation to their effects.<sup>16</sup> In this context, it has been argued that a restrictive interpretation of the criterion of State resources could give rise to a risk of circumvention of EU State aid rules, as it might enable EU Member States to grant

<sup>14</sup> Court of Justice: judgment of 13 March 2001, case C-379/98, *PreussenElektra*; *Essent Netwerk Noord et al.*, cit.; *Association Vent De Colère et al.*, cit.; judgment of 13 September 2017, case C-329/15, *ENEA*.

<sup>15</sup> *ENEA*, cit., para. 30. For a more detailed overview of the criterion of State resources, including a presentation of the facts at issue in *PreussenElektra*, *Essent* and *Vent de Colère*, but also other relevant precedents, such as *Doux Élevage*, see, for example, N. PESARESI, K. VAN DE CASTEELE, L. FLYNN, C. SIATERLI (eds), *EU Competition Law Volume IV – State Aid*, Deventer: Claeys & Casteels Publishing, 2016, pp. 211 to 246. See also the Commission's interpretation of the criterion of State resources in the Commission Notice on the notion of State aid as referred to in Article 107, para. 1, TFEU, 2016/C 262/01, paras 47-65.

<sup>16</sup> See, for example, Court of Justice, judgment of 28 June 2018, case C-203/16 P, *Dirk Andres v. Commission*, para. 91.

a selective advantage to beneficiaries through obligations imposed on private parties rather than through the State budget.<sup>17</sup> On the other hand, a purely effects-based reasoning in relation to renewable energy support mechanisms (or other measures) could arguably lead to a dilution of the criterion of State resources.<sup>18</sup>

### III. THE MAIN CHARACTERISTICS OF THE *EEG 2012*

The EEG 2012, adopted by the German legislature in 2011, was in force between 1 January 2012 and 31 July 2014. It aimed to increase the share in the electricity supply of electricity produced from renewable energy sources and mine gas (“renewable electricity”).<sup>19</sup>

A central feature of the EEG 2012 was the requirement to pay prices above market rates to producers of renewable electricity, in the form of feed-in tariffs or market premiums. As is apparent from the summary description below, the financial burden arising from this obligation was passed on along the value chain, with some significant nuances.<sup>20</sup>

First, local low or medium-voltage distribution system operators (“DSOs”) were required to *i*) connect renewable electricity installations to their network and make payments to the operators of those installations based on tariffs laid down by law (referred to as “feed-in tariffs”) or *ii*) pay market premiums to those operators in the event of direct sales to third parties.

Second, DSOs were required to transmit the renewable electricity to interregional high and very-high-voltage transmission system operators (“TSOs”), of which three out of four were private undertakings. TSOs were required to pay DSOs the equivalent of the feed-in tariffs/market premiums, which meant that the financial burden was passed on from DSOs to TSOs.

Third, TSOs were required to sell renewable electricity which they fed into their network on the spot market of the electricity exchange. To the extent that the price obtained on the spot market was too low to cover the financial burden arising from the obligation to pay the feed-in tariffs/market premiums, TSOs were entitled to require electricity suppliers to pay them the difference. This mechanism was referred to as the EEG surcharge. The financial burden was therefore in principle<sup>21</sup> passed on from TSOs to electricity suppliers.

Fourth, while electricity suppliers were not legally required to pass the EEG surcharge on to final customers, they did so in practice.

<sup>17</sup> See, for example, H.C.H. HOFMANN, C. MICHEAU (eds), *State Aid Law of the European Union*, Oxford: Oxford University Press, 2016, p. 66.

<sup>18</sup> For different arguments on why the financing through State resources should or should not be a necessary element of the definition of State aid, see, for example, opinion of Advocate General Jacobs of 26 October 2000, *PreussenElektra*, cit., paras 134-159.

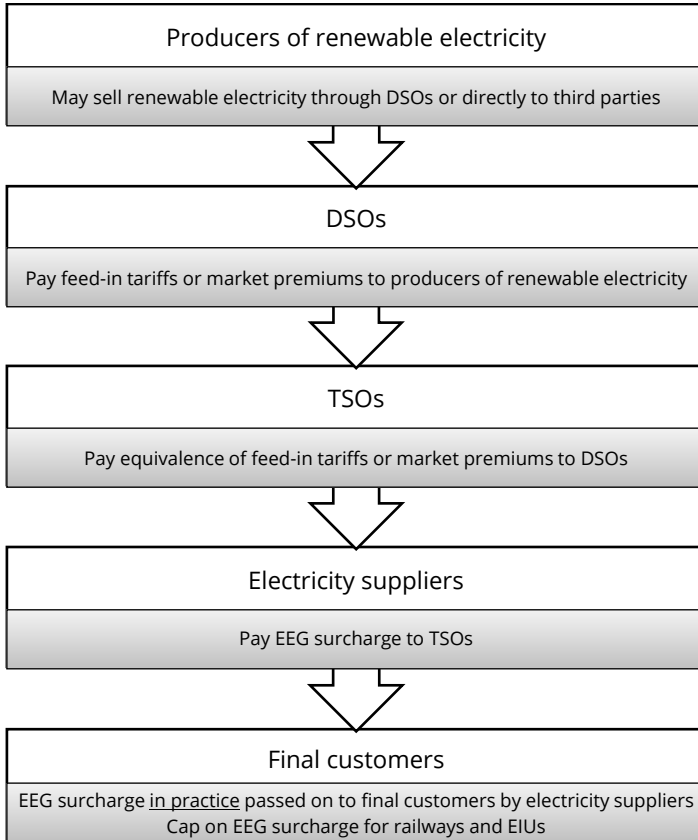
<sup>19</sup> *Germany v. Commission (“EEG 2012”)*, cit., para. 2.

<sup>20</sup> *Ibid.*, para. 3.

<sup>21</sup> The judgment indicates that the TSOs were “entitled” to require the electricity suppliers to pay them the difference, which suggests that the passing-on was not mandatory.

Finally, two types of electricity customers, namely railways and electricity-intensive undertakings in the manufacturing sector (“EIUs”), benefitted from a cap on the amount of the EEG surcharge that suppliers could pass on to them. The objective pursued by this cap was to reduce the electricity costs of those customers and thereby to maintain their competitiveness.

It is thus apparent that, subject to the cap on the EEG surcharge, the financial burden arising from the EEG 2012 was ultimately borne by final customers.



The Commission had found that two aspects of the EEG 2012 involved State aid, i.e. *i*) the support mechanism itself (financed by the EEG surcharge), which guaranteed producers of renewable electricity a price above the market price (through feed-in tariffs and market premiums), and *ii*) the special compensation scheme, whereby the EEG surcharge could be capped for certain energy-intensive users. Given that Germany had not notified the EEG 2012 to the Commission, it was deemed unlawful State aid. However, the Commission

found the State aid measures to be largely compatible with the internal market, except for a limited portion of the cap on the EEG surcharge which it regarded as excessive.<sup>22</sup>

The Commission's conclusion that the EEG 2012 involved State resources was based on the following main reasons: *i*) through the EEG 2012, the State had introduced a special levy, the EEG surcharge, and had defined its purpose as the financing of the difference between the costs TSOs incurred in purchasing renewable electricity and the revenue they generated from selling this electricity; *ii*) the TSOs had been designated to administer the surcharge; and *iii*) the TSOs were being strictly monitored by the State in the administration of the surcharge.<sup>23</sup>

Since the opening of the Commission's investigation, Germany has replaced the EEG 2012 with revised renewable energy support mechanisms, in particular those adopted respectively in 2014 (the "EEG 2014") and 2017 (the "EEG 2017"). In contrast with the EEG 2012, the EEG 2014 and EEG 2017 moved away from a system of feed-in tariffs towards an auction-based support mechanism, i.e. rates determined by auction rather than guaranteed tariffs determined by the State.<sup>24</sup>

#### IV. THE REASONING OF THE COURT OF JUSTICE

The General Court had upheld the Commission's finding that the EEG 2012 involved State resources, relying on three main factors: first, the funds generated by the EEG surcharge and administered collectively by the TSOs remained under the dominant influence of the public authorities; second, the amounts generated by the EEG surcharge could be assimilated to a levy; third, in light of their powers and tasks, the TSOs did not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds.<sup>25</sup>

Reviewing the first part of the first ground of appeal put forward by Germany, the Court of Justice ruled that none of the factors relied on by the General Court could justify the conclusion that the measure involved state resources.<sup>26</sup>

##### IV.1. ASSIMILATION OF THE EEG SURCHARGE TO A LEVY

The General Court had taken the view that, in light of its effects, the EEG surcharge constituted a levy by analogy to the judgment of the Court of Justice in *Essent*. The General Court had pointed out that, in practice, electricity suppliers passed the financial burden resulting

<sup>22</sup> *Germany v Commission ("EEG 2012")*, cit., paras 5-6. See also the press release of the Commission of 25 November 2014, available at [europa.eu](http://europa.eu).

<sup>23</sup> Commission Decision 2015/1585, cit., in particular paras 105-107.

<sup>24</sup> Both the EEG 2014 and the EEG 2017 were approved by the Commission: [europa.eu](http://europa.eu) and [europa.eu](http://europa.eu).

<sup>25</sup> *Germany v. Commission ("EEG 2012")*, case T-47/15, cit., para. 127.

<sup>26</sup> The Court of Justice did not have to rule on the second and third grounds of appeal, which alleged errors relating respectively to the establishment of an advantage and insufficient reasoning.

from the EEG surcharge on to final consumers, noting that this was a consequence foreseen and organised by the German law. Accordingly, final consumers were *de facto* required to pay the surcharge. On that basis, the General Court had classified the EEG surcharge as a charge that was unilaterally imposed by the State which could be assimilated, from the point of view of its effects, to a levy on electricity consumption in Germany.<sup>27</sup>

However, the Court of Justice disagreed with this analogy. It recalled the precise wording of the judgment in *Essent*, according to which the price supplement in that case constituted a charge unilaterally imposed by law which the consumers were required to pay. It then held that this case-law was not applicable because the EEG 2012 did not require electricity suppliers to pass the EEG surcharge on to final customers. The fact that the EEG surcharge was in practice passed on was deemed insufficient.<sup>28</sup>

The reasoning of the Court of Justice is based on a formalistic approach. It appears to follow on from *ENEA*, where the Court of Justice had similarly taken into account the fact that the financial burden could not be systematically passed on to end-users. Considering that State aid measures are defined by reference to their effects, this approach could be subject to criticism, particularly from an economic perspective. It was indeed not disputed by Germany that the EEG surcharge was *de facto* passed on to final customers. The EEG 2012 even organised the manner in which the surcharge had to be shown on the bill sent to customers, which presumably further contributed to the *de facto* passing-on. Accordingly, it could be argued that the EEG 2012 had similar economic effects as the measure at issue in *Essent*. On the other hand, accepting an analogy based on *de facto* passing-on of the EEG surcharge might raise certain issues. Thus, a renewable energy support mechanism could attract the classification as State aid or lose such a classification depending on the behaviour of economic operators, i.e. depending on whether or not electricity suppliers pass the surcharge on to final consumers, which would give rise to legal uncertainty. Also, from a practical and evidentiary perspective, taking into account *de facto* passing-on of a surcharge may give rise to difficulties: What happens if the surcharge is passed on only in part or not systematically, and where to draw the line? Although suppliers presumably have an economic interest in passing a surcharge on to final consumers, they might still decide against it for reasons of price competition with other suppliers.

Another related question is whether the principle established in *Essent* relating to unilaterally imposed charges is itself sound and convincing in light of the key legal test which, as noted in Section II. above, requires assessing whether the funds constantly remain under public control. Is the fact that the final customers are legally required to pay the surcharge really determinative for the purposes of this assessment?<sup>29</sup>

<sup>27</sup> *Germany v. Commission* (“EEG 2012”), cit., paras 66-67.

<sup>28</sup> *Ibid.*, paras 68-71.

<sup>29</sup> On that point, see P. NICOLAIDES, *State Control: The Case of EEG 2012*, in State Aid Hub, 23 April 2019, [www.stateaidhub.eu](http://www.stateaidhub.eu): “Legally, it should make no difference whether a levy is paid directly by consumers or a surcharge is paid by distributors who may then try to pass it on to consumers”.



## IV.2. DOMINANT INFLUENCE OF THE PUBLIC AUTHORITIES OVER THE EEG SURCHARGE

The General Court had found that the funds generated by the EEG surcharge remained under the dominant influence of the public authorities. It had based that finding on the fact that those funds were, first, managed for purposes of general interest by the TSOs, in accordance with detailed rules defined by the law and, second, allocated exclusively to the financing of the support and compensation mechanism.<sup>30</sup>

The Court of Justice disagreed with this assessment. It first suggested that the General Court had applied the wrong legal criterion by finding that the funds generated by the EEG surcharge were under the dominant influence of the public authorities, rather than at the *disposal* of the State. The Court of Justice went on to draw a distinction between (i) the legal origin of the support mechanism and the influence of the State over that mechanism and (ii) the power of disposal of the State over the funds managed and administered by the TSOs. It held that the elements taken into account by the General Court were only indicative of the clear influence of the State over the EEG 2012 mechanism. However, they were insufficient to establish a power of disposal over the funds, which was what really mattered in the view of the Court of Justice. The Court of Justice added that the exclusive allocation of the funds resulting from the EEG surcharge tended to show that the State was specifically not entitled to dispose of those funds, that is to say to decide on an allocation which differed from that laid down in the EEG 2012.<sup>31</sup>

Thus, this part of the reasoning of the Court of Justice centres on the notion of “power of disposal” held by the State over the funds, which it tied to the requirement in the case-law that the sums constantly remain under public control, and therefore remain available to the competent national authorities. This notion of “power of disposal” appears to originate from *Stardust*.<sup>32</sup> The Court of Justice thereby appears to equate public control over the funds with a power of disposal over the funds. However, while the judgment clearly indicates what power of disposal does not mean (i.e. State influence over a support mechanism), it provides little positive guidance on how the concept should be understood. The

<sup>30</sup> *Germany v. Commission* (“EEG 2012”), cit., para. 74.

<sup>31</sup> *Ibid.*, paras 74-76. The reference to the clear influence of the State over the EEG 2012 mechanism is not included in the English-language version (marked as “provisional”) of para. 75 of the judgment, but in other language-versions, such as the French (“*emprise certaine de l’État sur les mécanismes établis par l’EEG de 2012*”) or German (“*daher die mit dem EEG 2012 geschaffenen Mechanismen sicherlich unter staatlichem Einfluss stehen*”) versions.

<sup>32</sup> *France v. Commission* (“*Stardust Marine*”), cit., para. 38: “by holding in the contested decision that the resources of public undertakings [...] fell within the control of the State and were therefore at its disposal, the Commission did not misinterpret the term “State resources” in Article 87(1) EC” The notion is also referred to in the opinion of Advocate General Cosmas in *Ladbroke* (opinion of Advocate General Cosmas of 23 November 1999, *France v. Ladbroke Racing and Commission*, cit., para. 45: “Accordingly, the fact that the sums in question, while not held by the State throughout, are continuously subject to its control and therefore to the power of disposal of the competent national authorities is sufficient for them to be characterised as State resources [...]”).

judgment also raises potential issues of consistency with prior case-law. In particular, in *Essent*, one of the factors taken into account by the Court of Justice for finding that the measure at issue involved State resources was precisely the fact that the funds could not be used for any other purpose than that provided for by the law, which is what the General Court had relied on in *EEG 2012* when referring to the exclusive allocation of the funds.<sup>33</sup>

#### IV.3. ACTION OF THE TSOs AS ADMINISTRATORS OF AID

The General Court had found that it could be concluded from the powers and tasks given to the TSOs that they did not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds. In this regard, the General Court had pointed out that the TSOs were monitored in several respects: they could not use the funds for purposes other than those laid down in the law; they were obliged to administer the funds in a specific joint account; and they were strictly monitored by the national energy regulator, which verified, *inter alia*, that the TSOs sold electricity in accordance with the EEG 2012 and established, set, published and charged electricity suppliers the EEG surcharge in compliance with the legislative and regulatory requirements. The General Court had also found that the fact that the State did not have actual access to the resources generated by the EEG surcharge, in the sense that they did not pass through the State budget, did not affect the State's dominant influence over the use of those resources and its ability to decide in advance (through the adoption of the EEG 2012) which objectives were to be pursued and how the resources in their entirety were to be used.<sup>34</sup>

The Court of Justice took the view that the General Court had failed to establish that the TSOs remained constantly under public control, or even that they were subject to public control. It held that that the factors taken into account by the General Court only allowed for the conclusion that the public authorities monitored the proper implementation of the EEG 2012, but not for the conclusion that there was public control over the funds generated by the EEG surcharge themselves.

The Court of Justice then referred to its judgment in *Vent de Colère*, in which it was held that funds financed through compulsory charges imposed by legislation, managed and apportioned in accordance with legislation, may be regarded as State resources even if they are managed by entities separate from public authorities. It distinguished *EEG 2012* on the basis of two factors which, according to the Court of Justice, were key in *Vent de Colère* but not present in the case at issue. First, the law required the French State to cover in full additional costs imposed on undertakings should the sum of the charges collected from final consumers be insufficient. Thus, there was a link between the advantage and a reduction, at the very least, potential, in the State budget. Second, the

<sup>33</sup> *Essent Netwerk Noord et al.*, cit., paras 69 and 72.

<sup>34</sup> *Germany v. Commission ("EEG 2012")*, cit., paras 78-79 and 81.

sums intended to offset the additional costs were entrusted to a public body appointed by the French State, i.e. the *Caisse des dépôts et consignations*. Consequently, those sums had to be regarded as remaining under public control.<sup>35</sup>

The distinction between public monitoring of the implementation of a support mechanism and public control over the funds appears appropriate in light of the key legal test which refers to the fact that the sums themselves have to constantly remain under public control. It is also noteworthy how the Court of Justice distinguishes *EEG 2012* from *Vent de Colère*. Similar to the discussion above regarding the passing-on of the surcharge, the first differentiating factor appears to focus on the existence or absence of a full offset mechanism guaranteed by law (more precisely, the State), which was also referenced in *ENEA*. The second differentiating factor relates to the existence of an intermediary body entrusted with the management of the funds, although the emphasis on the status of that body as public law entity is somewhat surprising. Finally, the statement by the Court of Justice in para. 77 that the General Court had failed to establish that the TSOs remained constantly under public control appears confusing. It could be understood as meaning that what needs to be established is public control over the private bodies in charge of administering the funds at issue, in this case the TSOs, rather than public control over the funds themselves.

## V. POTENTIAL IMPLICATIONS OF THE JUDGMENT

The judgment has implications for the interpretation of the notion of State aid in general as well as more specifically for measures adopted in the energy sector, particularly those in support of renewable energy.

The case hinged on the proper interpretation and application of the criterion of State resources. Many of the considerations of the Court of Justice are not limited to renewable energy support mechanisms and are thus capable of applying more broadly.

### V.1. IMPLICATIONS FOR THE NOTION OF STATE AID

Overall, in line with *PreussenElektra* and *ENEA*, the judgment reveals a rather formalistic interpretation of the notion of State resources and represents a warning to the Commission not to stretch the boundaries of the concept of State resources too far. It provides some useful guidance in distinguishing the facts from *Essent* and *Vent de Colère*. The main reason why *Essent* was found to be inapplicable relates to the distinction drawn between *de jure* and *de facto* passing-on of a surcharge to final customers. As noted, this clarification has the merit of legal certainty, but the rationale (in particular economic) for such distinction does not appear obvious. The Court of Justice pointed out that, in *Vent de Colère*, State re-

<sup>35</sup> *Ibid.*, paras 77, 80 and 82-85.

sources were found to be involved because the State was required to cover in full the financial burden arising from the purchase obligation and the sums intended to offset the additional costs were entrusted to a public body appointed by the State.

More generally, the judgment provides guidance on the requirement that the funds have to constantly remain under public control. In para. 73 of the judgment, the Court of Justice made clear that, for this assessment, it is not determinative whether the funds are under the dominant influence of public authorities, but whether the State holds a power of disposal over the funds or, at least, whether the State exercises public control over the bodies responsible for managing the funds. This observation appears to introduce criteria which, so far, have not been relied on (at least not constantly) in the case-law of the Court of Justice relating to State resources, thereby raising new questions on their interpretation and application, as well as on their suitability.

Overall, it appears that, while the judgment provides some clarification on the relationship between the different lines of case-law regarding State resources, additional clarity is needed. It is unfortunate that no Advocate General opinion was issued, as it could have shed further light on the rationale of the judgment. Also, the question remains whether the formalistic interpretation pursued by the Court of Justice is the most appropriate one. The EU courts will likely have further opportunities in the next months and years to clarify the case-law on these points.<sup>36</sup>

## V.2. IMPLICATIONS FOR RENEWABLE ENERGY SUPPORT MECHANISMS

The judgment also has significant implications for renewable energy support mechanisms, in particular those based on a system of guaranteed prices set above market rates. It will make it more difficult for the Commission to establish that such mechanisms involve State resources, and thus constitute State aid. Accordingly, it will provide EU Member States with additional flexibility in devising measures without falling within the scope of EU State aid rules. From a public policy perspective, EU Member States might have an interest in developing mechanisms which fall outside the scope of EU State aid rules because it avoids triggering a notification requirement. Going through a notification process each time before a support mechanism can be adopted or revised by law may be cumbersome and add complexity to the political debate. Interestingly, some commentators in the industry have now voiced calls for a reorientation of renewable energy support mechanisms towards feed-in tariffs.<sup>37</sup> It remains to be seen whether the judgment will lead to a renewed interest in such support mechanisms.

<sup>36</sup> By way of example, in the recent *Achema* judgment, issued only shortly after the judgment in *EEG 2012*, the Court of Justice had again to decide on a question relating to the criterion of State resources: Court of Justice, judgment of 15 May 2019, case C-706/17, *Achema et al. v. VKEKK*, paras 45-72.

<sup>37</sup> See, for example, World Wind Energy Association, *Landmark decision: European Court of Justice rules feed-in tariffs do not constitute State aid*, 29 March 2019, available at [wwindea.org](http://wwindea.org).