STATE AIDS (ELECTRICITY): THE PREUSSEN ELEKTRA CASE

Subject: State aids
Complaints

Industry: Electricity

Parties: Preussen Elektra AG
Schleswag AG
Windpark Reußenköge III GmbH
Land Schleswig-Holstein
German Government
Finnish Government
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities in Case C-379/98 (Preussen Elektra AG v Schleswag AG), dated 13 March 2001

(What constitutes a State Aid under EC Treaty rules is the subject of a large volume of case law, in which a variety of expedients designed to circumvent the rules has been tested. But, in the present case, the circumstances fell short of the requirement that the aid in question must come from the state or comprise state resources. In essence, the aid in the case came from other undertakings in compliance with a state law. This was held not to be state aid. German law requires electricity undertakings to buy electricity at minimum process and to apportion the resulting costs between those undertakings and upstream network operators. Thus, there is a kind of subsidy in existence; but it is, strictly speaking, cross-subsidisation by one sector of industry to another and does not involve state resources. It is arguable that this distorts competition and that national legislation should not be used to thwart the rules on competition in the EC Treaty. The Court's brief rejection of this argument is unconvincing: paragraphs 63 and 64. There are many instances in which national legislation results in cross-subsidisation: if the Court considers these are not covered by the Treaty as it stands, there is a case for amendment of the Treaty.)

Judgment

1. By order of 13 October 1998, received at the Court on 23 October 1998, the Regional Court, Kiel, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93(3) of the EC Treaty (now Article 88(3) EC).

2. The questions were raised in proceedings between PreussenElektra AG and Schleswag AG concerning the repayment of sums paid by the former to the latter pursuant to [German legislation].

[Paragraphs 3 to 10 describe the German legislation and, in particular, the arrangements under the SEG for compensating electricity suppliers for complying with legal obligations to buy at uneconomic rates.]

11. The order for reference and the written observations submitted to the Court show that, by letter of 14 August 1990, the German Government notified to the Commission as a State aid the draft law which, after adoption, became the SEG, in accordance with Article 93(3) of the Treaty. By letter of 19 December 1990, the Commission authorised the notified draft on the basis, first, that it was in accordance with the energy policy aims of the European Communities, and secondly that renewable sources of energy constituted only a small part of the energy sector and that the additional revenues and the repercussions on electricity prices were minor. The Commission nevertheless requested the German Government to send it information on the application of the SEG, the latter having to be re-examined two years after its entry into force, and emphasised that any amendment or extension of that law should be subject to prior notification.

12. The order for reference and the written observations submitted to the Court also show that, following numerous complaints from electricity supply undertakings, the Commission informed the Federal Minister for the Economy in a letter of 25 October 1996 of its doubts as to whether, in view of the increase in the production of electricity derived from wind energy, the SEG was still compatible with the aid provisions of the Treaty. In that letter, the Commission made several proposals for amendment in relation to the provisions on wind energy and stated that, if the [German Parliament] were not prepared to amend the SEG in that respect, the Commission might find itself obliged to propose appropriate measures to the Federal Republic of Germany within the meaning of Article 93(1) of the Treaty, to make the Law compatible with Community rules on aid.

13. It is also apparent from the written observations of Windpark Reußenköge III GmbH and of the Province of Schleswig-Holstein, who intervened in the main proceedings, and from those of the Commission, that, at the request of the latter, the German Government informed the Commission of the progress of the work on the draft new law for the energy industry. In a letter of 29 July 1998, after the entry into force of the 1998 Law, the Commission informed the Federal Minister of the Economy that, having regard to current developments at Community level, concerning in particular possible proposals for harmonising the rules on the feeding in of electricity from renewable energy sources, it did not expect to take a formal decision concerning the SEG, as amended by the 1998 Law, before the ministerial report on the effects of the hardship clause, provided for in Paragraph 4(4) thereof, was drawn up, even though the German legislature, at the time of the adoption of the 1998 Law, had not taken account of the proposals formulated in its letter of 25 October 1996.

14. Finally, a footnote published with the 1998 Law states that the latter, Paragraph 1 of which is headed Law on the supply of electricity and gas, transposed into national law Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

15. The third recital in the preamble to that directive confirms that it in no way affects the application of the Treaty, in particular the provisions concerning the internal market and competition, and Article 8(3) and (4) in Chapter IV, 'Transmission system operation, provides as follows:

> 3.A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.
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> 4.A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

16. In addition, Article 11(3) in Chapter V, 'Distribution system operation, provides:

> A Member state may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

The main proceedings and the questions referred

17. PreussenElektra operates more than 20 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network, through which it feeds electricity to regional electricity suppliers, medium-scale local undertakings and industry.

18. Schleswag is a regional electricity supplier which buys electricity to supply to its customers in Schleswig-Holstein almost exclusively from PreussenElektra.

19. PreussenElektra owns 65.3% of Schleswag's shares. The remaining 34.7% are held by various municipal authorities in Schleswig-Holstein.

20. By virtue of Paragraph 2 of the SEG, Schleswag is obliged to purchase electricity from renewable sources produced within its area of supply, including wind-generated electricity. The order for reference shows that the proportion of wind-generated electricity in Schleswag's total turnover in electricity sales, which was 0.77% in 1991, has increased continuously to an estimated 15% in 1998. In consequence, the additional costs accruing to Schleswag on account of the obligation to purchase at the minimum price laid down by the SEG rose from DM 5.8m in 1991 to an estimated DM 111.5m in 1998, of which only DM 38m remained the responsibility of Schleswag, taking into account the application of

the compensation mechanism introduced into Paragraph 4(1) of the SEG by the 1998 Law.

21. At the end of April 1998 Schleswag's purchases of electricity produced from renewable energy sources reached 5% of the total volume of electricity it had sold over the previous year. Schleswag therefore invoiced PreussenElektra, pursuant to Paragraph 4(1) of the amended SEG, for the additional costs entailed by the purchase of electricity from renewable energy sources, initially claiming from it monthly instalments of DM 10m.

22. PreussenElektra transferred the instalment for May 1998, reserving the right to claim the money back at any time. That is what it did by making an application to the Kiel Provincial Court for the repayment of DM 500,000, representing the part of the sum paid to Schleswag in compensation for the additional costs entailed by the latter's purchase of wind-generated electricity...

25. The Provincial Court found, first, that the Commission had not been informed, in accordance with Article 93(3) of the Treaty, of the amendments made to the SEG by the 1998 Law ...

26. The Provincial Court found, secondly, that the obligation to purchase electricity produced in Germany from renewable energy sources on conditions which could not be obtained on the open market might depress demand for electricity produced in other Member States, which might constitute an obstacle to trade between Member States prohibited by Article 30 of the Treaty.

27. In those circumstances, considering that interpretation of Articles 30, 92 and 93(3) of the Treaty was necessary to enable it to resolve the dispute before it, the Kiel Provincial Court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

> 1.Do the rules on payment and compensation for supplies of electricity, laid down in [the German legislation] constitute State aid for the purposes of Article 92 of the EC Treaty?
>
> Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules for the benefit of the recipient of the payment, under which the costs entailed are not met, either directly or indirectly, from the public budget but are borne by individual undertakings in a sector, which have a statutory obligation to purchase at fixed minimum prices, and which are precluded by law and circumstance from passing those costs on to the final consumer?
>
> Is Article 92 of the EC Treaty to be interpreted as meaning that the underlying concept of aid also covers national rules which merely govern the apportionment of the costs between undertakings at the various production levels which have arisen through purchasing obligations and minimum prices, where the legislature's approach creates in practice a permanent burden for which the undertakings affected obtain no consideration?
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> 2.In the event that the [first] question is answered in the negative in respect of Paragraph 4 of the amended SEG:

Is Article 93(3) of the EC Treaty to be interpreted as meaning that its restrictive effects apply not only to the benefit itself but also to implementing rules such as Paragraph 4 of the amended SEG?

3.In the event that the first and second questions are answered in the negative:

Is Article 30 of the EC Treaty to be interpreted as meaning that a quantitative restriction on imports - and/or a measure having equivalent effect as between Member States for the purposes of the aforementioned provision - arises where a provision of national law places undertakings under an obligation to purchase electricity produced from renewable energy sources at minimum prices and requires grid operators to meet the costs entailed for no consideration?

Admissibility

[In paragraphs 28 to 37, interveners raised the question of the admissibility of the proceedings. The Court expressed the following view.]

38. It should remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93, *Bosman*, paragraph 59).

39. Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, to assess whether it has jurisdiction (see, to that effect, Case 244/80, *Foglia*, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61; Case C-36/99, *Idéal Tourisme*, paragraph 20; Case C-322/98, *Kachelmann*, paragraph 17).

40. In this case, as regards, first, the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, in particular, Case C-435/97, *World Wildlife Fund*, paragraph 32).

41. Second, it should be noted that the action brought by PreussenElektra seeks repayment of the sum which it had to pay to Schleswag to compensate for the additional cost arising for the latter from the purchase of wind-generated electricity, made pursuant to the purchase obligation laid down by the amended Stromeinspeisungsgesetz, from producers of that type of electricity established in its area of supply.

42. The dispute in the main proceedings cannot, therefore, be regarded as hypothetical in character.

[For these reasons and for the reasons set out in paragraphs 43 to 52, the Court concluded as follows.]

53. It follows from the above considerations that answers must be given to the questions referred.

The interpretation of Article 92 of the Treaty

54. It should be noted as a preliminary observation, first, that there is no dispute that an obligation to purchase electricity produced from renewable energy sources at minimum prices, such as that laid down by Paragraphs 2 and 3 of the amended SEG, confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence.

55. ...

56. In the light of the above, the first question referred should be understood as asking, essentially, whether legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, constitutes State aid within the meaning of Article 92(1) of the Treaty.

57. It should be recalled in that respect that Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

58. In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between 'aid granted by a Member State and aid granted 'through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the

State and those granted by a public or private body designated or established by the State (see Case 82/77, *Van Tiggele*, paragraphs 24 and 25; *Sloman Neptun*, paragraph 19; Case C-189/91, *Kirsammer-Hack*, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97, *Viscido*, paragraph 13; Case C-200/97, *Ecotrade*, paragraph 35; Case C-295/97, *Piaggio*, paragraph 35).

59. In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

60. Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.

61. In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

62. That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State.That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).

63. In the alternative, the Commission maintains that, in order to preserve the effectiveness of Articles 92 and 93 of the Treaty, read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which, like those laid down by the amended SEG, are decided upon by the State but financed by private undertakings. It draws that argument by analogy from the case-law of the Court of Justice to the effect that Article 85 of the EC Treaty (now Article 81 EC), read in conjunction with Article 5 of the Treaty, prohibits Member States from introducing measures, even of a legislative or regulatory nature, which may render the competition rules applicable to undertakings ineffective (see, in particular, Case C-2/91, *Meng*, paragraph 14).

64. In that respect, it is sufficient to point out that, unlike Article 85 of the Treaty, which concerns only the conduct of undertakings, Article 92 of the Treaty refers directly to measures emanating from the Member States.

65. In those circumstances, Article 92 of the Treaty is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty, the

second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it.

66. The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.

67. In the light of that answer, there is no need to reply to the second question referred, which was raised only in so far as the obligation to purchase at minimum prices did constitute State aid, whereas the allocation of the resulting financial burden did not.

[Paragraphs 68 to 81 are concerned with the interpretation of Article 30 (now 28) of the EC Treaty and are therefore outside the scope of the rules on competition. The Court's ruling on the main question is in the same terms as paragraph 66 above. Its ruling on the interpretation of Article 30 is that, in the current state of Community law concerning the electricity market, such provisions are not incompatible with Article 30 of the EC Treaty.] ■

State Aids: The SCI Case

The Commission has decided that €1.5m aid granted to the computer assembly factory of SCI in Heerenveen, the Netherlands, is not compatible with the common market and has to be recovered by the Dutch authorities. Aid for the creation of jobs for several categories of disadvantaged workers is approved, as the Dutch authorities will ensure that this aid, combined with investment aid, will remain below the ceiling of 20% of eligible cost. The current estimate of the combined aid which can be allowed is about €6.6m. The illegal aid resulted from a land sale below the market price and a low rent for temporary production facilities. Furthermore, the regional authorities paid the renovation of these facilities and the security services around them. Under normal market conditions, SCI would have had to pay for these expenses itself.

Source: Commission Statement IP/01/199, dated 13 Febraury 2001