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The EU General Court upholds the EU Commission's assessment that the Czech renewable energy support scheme involved State resources (*FVE Holýšov I*)

STATE AID, ENERGY, ENVIRONMENT, STATE AID (NOTION), JUDICIAL REVIEW, EUROPEAN UNION, STATE RESOURCES, STATE AID SCHEME, ACT OF STATE

EU General Court, *FVE Holýšov I and Others v Commission*, T-217/17, 20 September 2019

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e-Competitions News Issue Preview

In a judgment of 20 September 2019, the EU General Court (the "**General Court**") upheld a 2016 decision of the European Commission (the "**Commission**") finding that a EUR 31 billion Czech support scheme in favour of renewable energy sources ("**RES**") should be classified as State aid. The judgment confirms, in particular, the Commission's assessment that the RES support scheme at issue relied on State resources, which is a prerequisite for a finding that a measure amounts to State aid. Recent cases have highlighted that when precisely RES support schemes should be regarded as involving State resources can be contentious, particularly where they are based on State-guaranteed prices. The judgment is of interest against that background in that it provides guidance on the interpretation and application of the State resources criterion.

Factual background

In 2005, the Czech Republic introduced a RES support scheme (the "**scheme**"), which included measures in favour of RES electricity producers in the form of (i) mandatory purchase prices for electricity sold to the transmission system operator ("**TSO**") or distribution system operators ("**DSOs**") (feed-in tariffs) and (ii) premiums for electricity sold directly on the market to electricity traders (market premiums). The total estimated budget of the scheme was approximately EUR 31 billion.

The scheme was initially financed solely by a special levy (the "**RES levy**") in the form of a surcharge paid by electricity end-customers to the TSO and DSOs. With effect from 2011, the Czech Republic amended the scheme, reducing the extent of the support available to RES electricity producers, with a view to avoiding overcompensation. At the same time, the financing evolved, with State budget contributions being added to the RES levy. The cutbacks prompted investors from other EU Member States to initiate investor-State arbitration against the Czech Republic on the basis of the Energy Charter Treaty (the "**ECT**") and the bilateral investment treaty between Germany and the Czech Republic (the "**German-Czech BIT**").

The Czech Republic only notified the scheme to the Commission in 2014. In its 2016 decision (the "**Decision**"), the Commission found that the scheme involved State aid which, while unlawful (because it had not been notified), was compatible with the EU internal market in light of its environmental objective. Accordingly, the Commission approved the scheme, without ordering the Czech Republic to recover the State aid. The Decision also dismissed arguments, raised by investors during the investigation, that pointed to an alleged violation of the provisions of the ECT and the German-Czech BIT relating to fair and equitable treatment.

Judgment of the General Court

A group of 28 natural and legal persons, which included shareholders of beneficiaries of the scheme (the "**applicants**"), sought the annulment of the Decision before the EU General Court.

Although the Decision did not order the Czech Republic to recover any State aid from beneficiaries of the scheme, the applicants claimed that they had an interest in obtaining its annulment, citing, in particular, a link between the Decision and arbitration proceedings they had initiated against the Czech Republic in light of the cutbacks in the level of support to RES electricity producers. Several EU Member States intervened in the proceedings before the EU General Court, i.e. the Czech Republic, the Slovak Republic, Spain and Cyprus, essentially supporting the position of the Commission.

The General Court accepted to examine the substance of the action for annulment without ruling on its admissibility, which was contested by the Commission. The applicants challenged the classification of the scheme as State aid, relying on seven pleas in law. The primary point of interest of the judgment relates to the interpretation and application of the State resources criterion, which constitutes the focus of this article. This article also briefly discusses the pleas relating to (i) the principle of legitimate expectations and (ii) to the statements in the Decision about investor-State arbitration.

Confirmation of the Commission's finding that the scheme involved State resources

The applicants contended that, during the initial period in which it was exclusively financed through the RES levy (i.e. without direct State budget contributions), the scheme did not involve State resources and, therefore, did not amount to State aid. In assessing this plea, the General Court first summarised the general definition of the State resources criterion. It recalled that, in order for a measure to amount to State aid, the advantage conferred upon the beneficiary must be granted either directly or indirectly through State resources. In order to avoid circumvention of EU State aid rules, the concept of State resources is defined broadly. In particular, for a measure to be regarded as involving State resources, it is not necessary that the funds corresponding to the measure are permanently held by the Treasury of an EU Member State. Instead, the key criterion is whether the funds constantly remain under public control, and therefore available to the competent national authorities.

More specifically related to RES support schemes, the General Court then went on to refer to previous case-law according to which funds financed through compulsory charges imposed by the legislation of a Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources even if they are managed by entities separate from the public authorities. The decisive factor, in that regard, is that such entities are appointed by the State to manage State resources and are not merely bound by an obligation to purchase by means of their own financial resources. [***1***]

Against this background, the General Court confirmed the Commission's assessment that the scheme involved State resources during the period in which it was exclusively financed through the RES levy. The General Court reached this conclusion taking into account the following three main factors:

- First, the RES levy was a special levy which was compulsory and imposed by law on end-customers. The General Court rejected as unfounded the applicants' assertion that the TSO and the DSOs remained free to choose whether or not to pass on to end-customers the additional cost arising from the purchase of RES electricity. It determined that the RES levy had the nature of a parafiscal charge levied on electricity, similar to the situation which arose in *Essent*. [*2*] The General Court considered that such a financing mechanism substantially distinguished the scheme from other cases found not to involve State resources where electricity suppliers were (i) subject to an obligation to purchase RES electricity at fixed minimum prices by means of their own financial resources (*PreussenElektra*) [*3*] or (ii) merely had the possibility but no legal obligation to pass on to end-customers the amounts paid in respect of the RES electricity (*Germany v Commission*). [*4*]

- Second, the TSO and a number of the DSOs, i.e. the bodies appointed by the Czech Republic to charge the RES levy and to collect the resulting funds, were wholly or predominantly owned by the State. The General Court clarified, however, that whether the TSO and the DSOs were bodies governed by public or private law, and their precise ownership, were not in itself decisive. Instead, what mattered was whether the bodies had been appointed or were under a mandate from the State to manage aid. The General Court found that that was the case here (see third point below).

- Third, the TSO and the DSOs were designated by law to administer the scheme under the control of the State. In this context, the General Court found, in particular, that the funds resulting from the RES levy collected by the TSO and the DSOs were not freely available to them, but subject to compulsory redistribution on the basis of an equalisation scheme, adopted and controlled by the State, which was designed to balance the different exposure of the DSOs to the additional costs arising from the purchase of RES electricity. In addition, the funds could not give rise, in principle, to losses or profits for the TSO and the DSOs, since any deficit or surplus had to be passed on to the amount of the RES levy for the following year. Consequently, the funds received by the TSO and the DSOs remained under the control of the State (in particular, the national energy regulator) and could not be used for purposes other than those provided by the law.

The General Court also clarified certain other points in connection with the previous case-law. In particular, it held that the scheme had to be regarded as relying on State resources even though (i) the funds collected by the TSO and the DSOs were not centralised by an additional intermediary body, unlike in *Essent* and (ii) the TSO and the DSOs did not have separate accounts specifically dedicated to the management of the RES levy, in contrast with the scenario at issue in *Austria v Commission*. [*5*]

The principle of legitimate expectations may be relied on in the absence of State aid recovery

The applicants claimed that the classification of the scheme as State aid in the Decision infringed the principle of legitimate expectations. In this regard, they primarily referred to a letter of 2004 in which the Commission had informed them that, on the basis of the evidence in its possession, it considered that the scheme did not constitute State aid, as it did not involve State resources. The General Court disagreed with the Commission's position that a plea based on the principle of the protection of legitimate expectations could only concern the recovery of State aid (which was not at stake in this case). Instead, it clarified that it was a general principle of EU law which applied in any context falling within the scope of EU law. However, the General Court rejected the plea on the facts of the case noting, in particular, that, when issuing the letter in 2004, the Commission's services (i) were not aware that

the scheme was financed through a levy, which only materialised subsequently at the time of its adoption in 2005 and (ii) reserved the right to alter their position based on new evidence, so that the information contained in the letter could not be regarded as providing precise, unconditional and consistent assurances that the scheme did not constitute State aid.

Enforceability of compensation granted by an arbitral tribunal

During the administrative proceedings, a number of investors had submitted arguments based on an alleged violation of the provisions of the ECT and the German-Czech BIT relating to fair and equitable treatment. In response to those arguments, the Decision included a number of statements relevant to the relationship between EU State aid rules and arbitration. In particular, the Decision stated that (i) any provision providing for investor-State arbitration between two EU Member States was contrary to EU law and the ECT was not applicable in an intra-EU situation, which meant that the investors could not rely on the ECT or the German-Czech BIT; (ii) in any event, there was no violation of the fair and equitable treatment provisions, as the Czech Republic had not infringed the principles of legitimate expectation and equal treatment; (iii) any compensation which the arbitral tribunals were to grant to the investors would constitute in and of itself State aid: such an award of compensation would infringe Article 108(3) TFEU and not be enforceable. [*6*] The applicants challenged part of these statements, contending that, by making these assertions in the Decision, the Commission had exceeded the scope of its powers, in breach of Article 5 TEU. It was this part of the case which had attracted interventions from several EU Member States. However, the General Court largely did not rule on this issue. It noted that the Commission could not authorise a measure which was contrary to the specific provisions of the TFEU and the general principles of EU law. Therefore, it found that, in examining whether the Czech Republic had breached the principle of the protection of legitimate expectations established in EU law, the Commission did not infringe Article 5 TEU. As regards the statement about the classification of an arbitral award as State aid and its enforceability, the General Court emphasised that this part of the reasoning was only included in the Decision for the sake of completeness, as it referred to a hypothetical situation, and was not part of the necessary reasons for the Decision.

Implications

The judgment, which may be appealed to the CJEU on points of law, confirms the Commission's finding that the scheme amounted to State aid and, in particular, that it relied on State resources.

Over the last years, a number of Commission decisions and EU court judgments have highlighted that, in the context of RES support schemes, the condition that State intervention must rely on State resources to amount to State aid within the meaning of Article 107(1) TFEU may prove particularly contentious. The key question to determine is whether economic operators that are under an obligation to purchase RES electricity are bound to do so by means of their own financial resources or by means of resources that constantly remain under public control. While this distinction is clear in theory, applying it in practice may raise significant difficulties, depending on the factual circumstances at issue. EU court rulings have established different lines of case-law corresponding to different types of financing structures, with relatively subtle factual differences capable of affecting the assessment. [*7*]

The General Court judgment in *FVE Holýšov I* adds to this body of case-law. As previous Commission decisions and EU court rulings (in particular *Germany v Commission*), [*8*] the judgment emphasises again that the extent to which additional costs arising from the purchase of RES electricity are passed on by electricity network operators to end-customers (and whether this passing-on is a legal requirement as opposed to a mere possibility) can be a decisive factual circumstance. The judgment also highlights factors which, although they can be indicative of the

use of State resources, are not necessarily determinative. This includes, for example, the questions whether the bodies in charge of collecting the funds are public or private, whether the funds are centralised by an additional intermediary body and whether network operators have separate accounts specifically dedicated to the management of a RES surcharge.

Overall, the distinctions made in the case-law between different types of financing of RES support schemes appear complex, as the precise factual differences which trigger one outcome (involvement of State resources) or the other (no involvement of State resources) may be difficult to identify. Also, the rationale for these distinctions with regard to the State resources criterion is not always clear. Therefore, it can be expected that the question when precisely RES support schemes rely on State resources will remain controversial. Governments of EU Member States, beneficiaries and investors are well-advised to conduct a thorough analysis of funding mechanisms to determine whether a given measure involves State resources and may thus fall within the scope of EU State aid rules. The question is of significance as State aid intervention in the form of RES support schemes is expected to increase in the light of the EU's environmental policy goals, which include a renewable energy target for 2030. Where such schemes can be devised in a way which does not involve State resources, they will fall outside the scope of EU State aid control and will thus not require prior notification to the Commission.

[1] In this context, the General Court referred to the following judgments: CJEU, judgment of 2 July 1974, *Italy v Commission*, Case 173/73, ECLI:EU:C:1974:71; CJEU, judgment of 19 December 2013, *Association Vent De Colère and Others*, Case C-262/12, ECLI:EU:C:2013:851; CJEU, judgment of 28 March 2019, *Germany v Commission*, Case C-405/16 P, ECLI:EU:C:2019:268.

[2] CJEU, judgment of 17 July 2008, *Essent Netwerk Noord and Others*, Case C-206/06, ECLI:EU:C:2008:413.

[3] CJEU, judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160.

[4] CJEU, judgment of 28 March 2019, *Germany v Commission*, Case C-405/16 P, ECLI:EU:C:2019:268.

[5] General Court, judgment of 11 December 2014, *Austria v Commission*, Case T-251/11, ECLI:EU:T:2014:1060.

[6] Commission, Decision of 28 November 2016, State Aid SA.40171 (2015/NN) – Czech Republic, Promotion of electricity production from renewable energy sources, Section 5.4, paras. 143-150.

[7] 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* (CJEU, judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160) and, more recently, *ENEA* (CJEU, judgment of 13 September 2017, *ENEA*, Case C-329/15, ECLI:EU:C:2017:671) and *Germany v Commission* (CJEU, judgment of 28 March 2019, *Germany v Commission*, Case C-405/16 P, ECLI:EU:C:2019:268); the second line of case-law, in which the involvement of State resources was confirmed, is represented, in particular, by *Essent* (CJEU, judgment of 17 July 2008,

Essent Netwerk Noord and Others, Case C-206/06, ECLI:EU:C:2008:413) and *Vent de Colère* (CJEU, judgment of 19 December 2013, *Association Vent De Colère and Others*, Case C-262/12, ECLI:EU:C:2013:851).

[*8*] CJEU, judgment of 28 March 2019, *Germany v Commission*, Case C-405/16 P, ECLI:EU:C:2019:268.