Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 September 2017*

(Reference for a preliminary ruling — State aid — Concept of 'aid granted by a Member State or through State resources' — Obligation on a limited liability company in the energy sector, wholly owned by the State, to purchase energy produced by cogeneration with the production of heat)

In Case C-329/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 16 April 2015, received at the Court on 3 July 2015, in the proceedings

ENEA S.A.

v

Prezes Urzędu Regulacji Energetyki,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2017,

after considering the observations submitted on behalf of:

– ENEA S.A., by K. Cichocki and T. Młodawski, radcowie prawni,

– the Polish Government, by B. Majczyna, M. Rzotkiewicz and K. Rudzińska, acting as Agents,

– the European Commission, by É. Gippini Fournier, K. Herrmann and P. Němečková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2017,

gives the following

* Language of the case: Polish.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU and Article 108(3) TFEU.

2 The request has been made in proceedings between ENEA S.A. and the Prezes Urzędu Regulacji Energetyki (president of the Office for the regulation of energy, Poland; 'URE') concerning the imposition of a financial penalty on ENEA for breach of its obligation to purchase electricity produced by cogeneration with the production of heat ('electricity produced by cogeneration') from energy sources connected to the network and situated in the Republic of Poland.

Legal context

3 Article 9a(8) of the Ustawa Prawo Energetyczne (Law on energy) of 10 April 1997 (Dz. U. No 135, item 1144) in the version applicable to the main proceedings ('the Law on energy'), provides:

'An electricity undertaking engaged in the production of or trading in electricity and the sale of that electricity to end users connected to the network within the Republic of Poland shall be required, to the extent described in paragraph 10, to purchase [electricity produced by cogeneration] offered to it from energy sources connected to the network and situated in the Republic of Poland.'

4 Under Article 56(1)(1a), of the Law on energy:

'Any person shall be subject to a financial penalty if:

(1a) he fails to fulfil the obligation to obtain a certificate of origin and to submit it to the president of the URE for clearance purposes, fails to make the compensation payment in accordance with Article 9a(1) or fails to fulfil the obligation to purchase electricity and heat set out in Article 9a(6) to (8)'.

5 Article 56(2) of the Law on energy states:

'The financial penalty referred to in paragraph 1 shall be applied by the president of the [URE].'

6 Article 56(2b) of that law is worded as follows:

'The proceeds of the financial penalties applied in the situations set out in paragraph 1(1a) on the basis of failure to fulfil the obligations laid down in Article 9a(1) and (6) to (8) shall be paid into the Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej (national fund for environmental protection and water management).'

7 Article 5(2) of the rozporządzenie Ministra Gospodarki i Pracy w sprawie szczegółowego zakresu obowiązku zakupu energii elektrycznej wytwarzanej w skojarzeniu z wytwarzaniem ciepła (implementing regulation adopted by the Minister for the Economy and Labour concerning the precise extent of the obligation to purchase electricity produced by cogeneration) of 9 December 2004 provides:

'The obligation referred to in Article 9a(8) of the [Law on energy] shall be deemed fulfilled if purchased electricity produced from combined sources of energy connected to the network, or electricity produced by the electricity undertaking concerned from its own combined sources of energy, and sold to customers buying electricity for their own needs, accounts, out of the total annual sales of electricity to such customers, for at least:

…

(2) 15% in 2006'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 For the period from 1 January 2003 to 1 July 2007, the Law on energy provided for a support scheme for electricity produced by cogeneration by imposing an obligation to purchase. That obligation applied to undertakings selling electricity to end users, including producers and suppliers acting as intermediaries, and required that a quota of the total sales of electricity by those undertakings to end users, in this instance a minimum of 15% for the year 2006, be produced by cogeneration.

9 ENEA is a company which produces and sells electricity and is wholly owned by the Polish State. For the year 2006, ENEA did not fulfil its quota obligation to purchase electricity produced by cogeneration since only 14.596% of its total electricity sales to end users was produced by cogeneration. Consequently, by decision of 27 November 2008, the president of the URE imposed a financial penalty on ENEA.

10 ENEA brought an action against that decision, but the action was dismissed at first instance. The financial penalty was reduced on appeal but the appeal was dismissed as to the remainder. ENEA therefore appealed on a point of law to the referring court. In support of that appeal, ENEA, for the first time, raised the claim that the obligation to purchase electricity produced by cogeneration constituted new State aid, which was unlawful, given that it had not been notified to the European Commission. According to ENEA, it follows that imposition of the financial penalty was also unlawful.

11 With regard to the classification of the obligation at issue as 'State aid' within the meaning of Article 107(1) TFEU, the referring court considers that the requirements that a selective advantage be conferred and that there be a possible distortion of competition or effect on trade between Member States are satisfied. It also considers that the purchase obligation is attributable to the State given that it is imposed by law. However, it entertains doubts as to whether there is intervention through State resources.

12 In that regard, the Sąd Najwyższy (Supreme Court, Poland) notes that ENEA was bound to sell to end users a minimum quota of electricity produced by cogeneration, either by producing such electricity itself or by purchasing it from third party producers. In the latter case, the purchase price of electricity produced by cogeneration was to be set by mutual agreement between the undertaking subject to the purchase obligation and the producer of such electricity.

13 The president of the URE had the power, when approving the tariff charged by electricity companies, to fix the price of electricity produced by cogeneration at a level that he considered reasonable when calculating the maximum price that could be charged when selling electricity to end users.

14 The referring court also notes that the case in the main proceedings is very similar to the case which gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160) in so far as the purchase obligation imposed on companies is funded by the financial resources of those companies. However, in contrast to the case giving rise to that judgment, in the main proceedings here, most of the undertakings bound by the purchase obligation are public undertakings wholly owned by the Polish State. In that context, the referring court considers it necessary to seek from the Court of Justice an interpretation of its case-law, in the light of the specific facts of the main proceedings.

15 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 107 TFEU be interpreted as meaning that the obligation to purchase electricity produced by cogeneration, as laid down in Article 9a(8) of the [Law on energy] constitutes State aid?

(2) In the event of an affirmative answer to Question 1, must Article 107 TFEU be interpreted as meaning that an electricity undertaking treated as an emanation of a Member State and bound to perform an obligation classified as ‘State aid’ may invoke infringement of that provision in proceedings before a national court?

(3) In the event of an affirmative answer to Questions 1 and 2, must Article 107 TFEU in conjunction with Article 4(3) TEU be interpreted as meaning that where an obligation imposed by national law is inconsistent with Article 107 TFEU, a financial penalty may not be imposed on an undertaking that has failed to comply with that obligation?’

Consideration of the questions referred

The first question

16 By its first question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a national measure placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration constitutes State aid.

17 It should be recalled at the outset that categorisation as ‘State aid’ within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition (judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 18, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 15).

18 It is apparent from the decision of the referring court that it considers the last three of those conditions to be satisfied in the present case.

19 Accordingly, it is necessary to reformulate the first question as seeking to ascertain whether Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration constitutes intervention by the State or through State resources.

20 In that regard, it should be noted that, for it to be possible to classify advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

21 First, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 52, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17).

22 In that regard, it is sufficient to point out that the obligation at issue in the main proceedings, to supply electricity produced by cogeneration, was imposed by the Law on energy, and that measure must therefore be regarded as attributable to the State (see, to that effect, judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 18).

23 Secondly, the condition that there must be intervention by the State or through State resources is satisfied not only where aid is granted directly by the State but also where it is granted by public or private bodies established or designated by the State with a view to administering the aid (judgments of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21, and of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58).

24 A measure consisting, inter alia, in an obligation to purchase energy may thus fall within the definition of 'aid' even though it does not involve a transfer of State resources (judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 19 and the case-law cited).

25 Article 107(1) TFEU covers all the financial means by which public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the aid measure are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 37; of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 70; and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21).

26 Such circumstances must, however, be distinguished from those in which undertakings, mostly private undertakings, are not appointed by the State to manage a State resource, but are merely bound by an obligation to purchase using their own financial resources (judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 35).

27 It should be noted in that regard that the mechanism at issue in the main proceedings required electricity suppliers to sell a quota of the electricity produced by cogeneration accounting for at least 15% of their annual electricity sales to end users.

28 The President of the URE set the maximum tariffs for sale of electricity to end users, so that the financial burden resulting from that purchase obligation could not be systematically passed on to end users by undertakings.

29 It is thus apparent from the information before the Court that, in certain circumstances, electricity suppliers purchased electricity produced by cogeneration at a higher price than that charged to end users, which resulted in extra costs for the suppliers.

30 Consequently, given that those extra costs cannot be passed on entirely to end users and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851), it must be concluded, as the Advocate General observed in point 86 of his Opinion, that the supply undertakings were not appointed by the State to manage a State resource, but were funding a purchase obligation imposed on them by having recourse to their own financial resources.

31 As regards the argument put forward by ENEA and the Commission that most of the undertakings bound by the purchase obligation were public undertakings governed by private law and therefore that obligation could be regarded as being financed through State resources, it should be noted that the resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 38).

32 As the Advocate General noted in points 91, 94 to 96 and 100 of his Opinion, the mere fact that the State held the majority of the capital in some of the undertakings subject to the purchase obligation does not lead to the conclusion that, in the main proceedings, the State exercised a dominant influence that enabled it to direct the use of the resources of those undertakings within the meaning of the case-law referred to in the preceding paragraph.

33 It appears that the purchase obligation applied equally to all electricity suppliers, regardless of whether their capital was predominantly held by the State or by private operators.

34 In addition, it is not clear from the information submitted to the Court, in particular from the information provided at the hearing, that ENEA's conduct was dictated by instructions from public authorities. On the contrary, it was indicated that the decision to decline offers for the sale of electricity produced by cogeneration during the year 2006 was the result of wholly autonomous business decisions.

35 Moreover, contrary to the Commission's submissions, the fact that the measure is attributable to the Member State concerned, as established in paragraph 22 above, does not mean that it may be inferred that that Member State exercises a dominant influence over an undertaking in which it is the majority shareholder, within the meaning of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraphs 38 and 39). There is nothing in the State's conduct as legislator to suggest that it exercised such influence in its capacity as majority shareholder in an undertaking.

36 As regards the argument of ENEA concerning the fact that monies collected as a result of financial penalties imposed for the failure to comply with the purchase obligation are to be transferred to the national fund for environmental protection and water management, none of the evidence before the Court makes it possible to determine whether such monies were, at the time of the material facts, allocated for the support of undertakings producing electricity by cogeneration.

37 Accordingly, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration does not constitute intervention by the State or through State resources.

The second and third questions

38 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration with the production of heat does not constitute intervention by the State or through State resources.

[Signatures]