



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 October 2020*

(Reference for a preliminary ruling – State aid – Article 107(1) TFEU – Concept of ‘State resources’ – Increased responsibility of producers – Eco-body approved by the public authorities to collect financial contributions from those who place on the market certain products in order to be able to fulfil, on their behalf, their legal obligation to treat waste from those products – Financial support paid by that eco-body to contractually bound sorting operators)

In Case C-556/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (France), made by decision of 12 July 2019, received at the Court on 22 July 2019, in the proceedings

Eco TLC

v

Ministre d’État, ministre de la Transition écologique et solidaire,

Ministre de l’Économie et des Finances,

intervening party:

Fédération des entreprises du recyclage,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, L. Bay Larsen, M. Safjan and N. Jääskinen, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Eco TLC, by F. Molinié, avocat,
- Fédération des entreprises du recyclage, by A. Gossement, avocat,
- the French Government, by A.-L. Desjonquères and P. Dodeller, acting as Agents,

* Language of the case: French.

– the European Commission, by A. Bouchagiar and K.-P. Wojcik and by C. Georgieva-Kecsma, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 May 2020,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 107 TFEU.
- 2 The request has been made in proceedings between Eco TLC, on the one hand, and the ministre d'État (Minister for State, France), the ministre de la Transition écologique et solidaire (Minister for the Ecological and Inclusive Transition, France), and the ministre de l'Économie et des Finances (Minister for the Economy and Finance, France), on the other, concerning the legality of an order providing for the revaluation of financial support paid by Eco TLC to operators contracted for the treatment of waste from clothing textile products, household linen and footwear.

Legal context

- 3 Article L. 541-10-3 of the Code de l'environnement, in the version applicable to the case in the main proceedings ('the Environmental Code'), stipulates:

'As of 1 January 2007, any natural or legal persons who, in a professional context, places clothing textile products, footwear or new household linen products on the national market, are required to contribute to or provide for the recycling and the treatment of waste from those products.

As of 1 January 2020, any natural or legal person who, in a professional context, places all textile products intended for household use, on the national market, except for those which are furnishings or which are intended to protect or decorate furnishings, are subject to the obligation laid down in the first paragraph.

The persons referred to in the first two paragraphs may fulfil their obligation:

- either by making a financial contribution to a body approved by joint order of the Ministers for Ecology and for Industry which enters into contracts with the sorting operators and local authorities or groupings of them responsible for waste management and provides them with financial support for the recycling and treatment of the waste as referred to by the first two paragraphs which they deliver;
- or by establishing, as laid out in the standard terms, an individual system for the recycling and treatment of that waste as referred to by the first two subparagraphs, approved by joint order issued by the Ministers for Ecology and for Industry.

The arrangements for the implementation of this article, in particular the method for calculating the contribution, the terms for promoting the integration of persons experiencing difficulties with regard to employment and the penalties for non-compliance with the requirement referred to in the first paragraph shall be laid down by Decree in the Conseil d'Etat.'

- 4 Under the second paragraph of Article R. 543-214 of the Environmental Code, each body is to, in support of its application for approval, provide evidence of its technical and financial means to carry out the necessary procedures to promote, through the contracts which it signs and the redistribution

of the financial contributions which it collects, the reuse, recycling, recovery and treatment of the waste referred to in Article L. 541-10-3, of that code and shall indicate how it proposes to comply with the standard terms attached to the approval.

- 5 In accordance with the first paragraph of Article R. 543-215 of the Environmental Code, the approved bodies are to determine the overall amount of the financial contribution which they collect from the persons referred to in the first paragraph of Article L. 541-10-3 of that code, in such a way as to cover, on an annual basis, the expenses arising from the application of the standard terms referred to in Article R. 543-214 of that code.
- 6 According to Article R. 543-218 of the Environmental Code, the standard terms referred to in Article R. 543-214 of the code specify, in particular, the targets set for the quantities of wastes sorted, reused, recycled or recovered, and the targets for the integration of persons experiencing difficulties with regard to employment within the meaning of Article L. 541-10-3 of that code, and provides for the reduction of the contribution payable to the sorting operator in the event of non-compliance by that operator with the minimum target for the integration of such persons.
- 7 The Order of 3 April 2014 relating to the approval procedure and laying down standard terms for bodies which have the objective of contributing to the treatment of waste from clothing textile products, household linen and footwear, pursuant to Article R. 543-214 of the Environmental Code, and approving such a body, in application of Articles L. 541-10-3 and R. 543-214 to R. 543-224 of the Environmental Code (JORF, 14 May 2014, p. 7969, ‘the Order of 3 April 2014’), gave Eco TLC approval to collect from those persons who place on the market textile clothing products, household linens and footwear (‘the TLC products’), financial contributions to the treatment of waste from those products, and to transfer those contributions to, in particular, the sorting operators in the form of financial support in compliance with the standard terms annexed to that order.
- 8 The Annex to the Order of 3 April 2014, entitled ‘Standard terms relating to the approval of an eco-body issued by application of Articles L. 541-10-3 and R. 543-214 to R. 543-224 of the Environmental Code for the period of 2014-2019’, contains several annexes of its own. Amongst those, Annex III, entitled ‘Scale of financial support payable to contractually bound sorting operators in year N+1, in respect of year N’, determines the method of calculating the different types of financial support which may be paid to contractually bound sorting operators, namely, support for sustainability, support for ‘sorting’ and support for development. In particular, that annex provides that the amount of the support for sustainability is to be equal to the sum of aid for sustainability in respect of materials recovery, energy recovery and disposal, and that the aid for sustainability in respect of materials recovery is to be calculated by allocating to ‘tonnage sorted which has been subject to recovery (reuse + recycling + other methods of materials recovery)’ a multiplier set at EUR 65 per tonne.
- 9 The Order of 19 September 2017 amending the Order of 3 April 2014 (JORF, 4 October 2017, text No 5, ‘the Order of 19 September 2017’) revalued the amount of support for sustainability. Under Article 1 of that order, the multiplier for the calculation of that support is set at EUR 82.5 per tonne for support provided from 1 January 2018 onwards.

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

- 10 Eco TLC is an eco-body approved by the public authorities to collect financial contributions from those who place on the market the TLC products in return for a service consisting in fulfilling their legal obligation to treat the waste originating from those products. For that purpose, Eco TLC has entered into contracts with eligible sorting operators and given them various forms of financial support, namely support for sustainability, support for materials sorting and support for the development of recycling and waste treatment operations for the TLC products.

- 11 Whereas the Order of 3 April 2014 had fixed the multiplier for the calculation of financial support for sustainability by way of material recovery at EUR 65 per tonne, the Order of 19 September 2017 revalued that support, raising the multiplier to EUR 82.5 per tonne for payments made from 1 January 2018.
- 12 Eco TLC has brought proceedings against the Order of 19 September 2017 before the Conseil d'Etat (Council of State, France) and claims, in particular, that that order establishes State aid in the sense of Article 107(1) TFEU.
- 13 The referring court observes that, in accordance with Article L. 541-10-3 of the Environmental Code with regards to the principle of increased responsibility of producers, those who place the TLC products on the market are required to contribute to or to provide for the recycling and treatment of waste arising from those products. In order to meet that obligation, the referring court specifies that those who place the products on the market must either themselves provide waste treatment for the TLC products, or transfer the responsibility to an approved body contracted to collect their contributions and provide in return on their behalf a waste treatment service by entering into contracts with sorting operators.
- 14 In the first place, in that context, the referring court points out that Eco TLC is the only approved body for that purpose and that those who place the products on the market did not make the decision to treat the waste themselves from the TLC products.
- 15 In the second place, it explains that the scale for financial support given to sorting operators by Eco TLC has been set by the Order of 3 April 2014 with reference to targets for waste recovery and the employment of people experiencing social difficulties. The referring court observes that, according to that order, Eco TLC must adjust the amount of the contributions received from those who place the products on the market to the level which is strictly necessary to enable it to meet its obligations, namely the payment of financial support to sorting operators according to the scale established by the order as well as various awareness-raising and prevention activities, without being able to make a profit or loss and without carrying out activities in other fields.
- 16 In the third and last place, the referring court points out that a State representative, appointed by the State, attends the meetings of the board of directors of Eco TLC, without, however, having a right to vote, is informed of the terms of the financial investments proposed by that company prior to their approval by the board of directors and is entitled to receive all documents relating to the financial management of the company so that, in the event of its non-compliance with the rules of sound financial management, he or she may inform the relevant State authorities which may issue a fine of up to EUR 30 000 or suspend or even withdraw the approval. It explains that, subject to those reservations, Eco TLC has the discretion to make its own management choices; in particular, the funds intended for the sorting operators are not subject to any particular requirement as to their deposit.
- 17 In those circumstances, the Conseil d'Etat (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 107 [TFEU] be interpreted as meaning that a system ..., whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, is to be regarded as State aid within the meaning of that provision?'

Consideration of the question referred

- 18 At the outset, it should be noted that, according to the Court's settled case-law, classification of a measure as 'State aid', for the purposes of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 6 March 2018, *Commission v FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 43 and the case-law cited).
- 19 As regards the first of those conditions, it should be borne in mind that, in order for it to be possible to categorise 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 (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 47 and the case-law cited).
- 20 Moreover, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With that in mind, the Court may have to reformulate the questions referred to it (judgment of 2 April 2020, *Ruska Rederacija*, C-897/19 PPU, EU:C:2020:262, paragraph 43 and the case-law cited).
- 21 It is clear from the order for reference that the referring court is in reality asking only about the first of the conditions raised in paragraph 18 of the present judgment, and that the factual elements that it has provided the Court in essence relate to that first condition.
- 22 In that context, it must be considered that the referring court, by its question, is asking, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a system whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, is to be regarded as State aid within the meaning of that provision.
- 23 In the first place, in order to assess whether a measure may be attributed to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 48 and the case-law cited).
- 24 In this case, it is clear from the order for reference that the provision relating to the increased responsibility of producers in the management of waste from the TLC products has been established by documents of a legislative and regulatory nature, in particular the Environmental Code as well as the Order of 3 April 2014, as amended by the Order of 19 September 2017. That provision must therefore be considered to be attributable to the State, within the meaning of the case-law cited in the previous paragraph of the present judgment.
- 25 In the second place, in order to determine whether the advantage has been granted directly or indirectly through State resources, it should be borne in mind that, according to the Court's settled case-law, the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State and aid granted through a public or private body appointed or established by that State to administer it (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 50 and the case-law cited).

- 26 The distinction established in that provision between ‘aid granted by a Member State’ and aid granted ‘through State resources’ does not mean that all advantages granted by the State constitute aid, whether they are financed with State resources or not, 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 (judgment of 28 March 2019, *Germany v Commission*, C-405/16 P, EU:C:2019:268, paragraph 53 and the case-law cited).
- 27 EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgment of 9 November 2017, *Commission v TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 45).
- 28 In the present case, by virtue of the principle of the increased responsibility of producers established in Article L. 541-10-3 of the Environmental Code, those who place the TLC products on the market, be they producers, importers or distributors, are required to provide or contribute to the treatment of waste from those products.
- 29 To meet that requirement, they must either themselves provide waste treatment for the TLC products or make financial contributions to an eco-body approved by public authorities with the purpose of ensuring the management of that waste by entering into contracts with sorting operators and providing them with financial support for recycling operations and the treatment of that waste.
- 30 Although it is clear from order for reference that, to fulfil their obligation arising from Article L. 541-10-3 of the Environmental Code, those who place on the market the TLC products have chosen to work with Eco TLC, a body approved for that purpose by the Order of 3 April 2014, such a circumstance in and of itself does not allow for the contributions made by them to that eco-body to be considered as compulsory charges imposed by the legislation of a State.
- 31 Furthermore, Eco TLC has collected financial contributions from those who place on the market the TLC products in return for a service consisting in fulfilling their legal obligation to treat the waste originating from those products. To that end, Eco TLC has entered into contracts with eligible sorting operators and given them financial support for recycling and waste treatment operations resulting from those products.
- 32 In that context, it must be established that the provision at issue in the main proceedings requires, first, the transfer of financial contributions from private undertakings to a company governed by private law and, second, the transfer of these contributions from that company to other private undertakings.
- 33 As the Advocate General states at point 85 of his Opinion, these contributions remain private throughout their life cycle. The funds created by the payment of those contributions never pass through the State budget or that of another public entity, nor at any point do public authorities have access to them. Furthermore, it is apparent from the file before the Court that the Member State in question has not relinquished any resources, in whatever form, such as taxes, duties, charges and so on, which, according to national legislation, should have been paid into the State budget.
- 34 It follows that the provision at issue does not result in any direct or indirect transfer of State resources.
- 35 However, it follows from the Court’s settled case-law that measures which do not include a transfer of State resources may fall within the concept of ‘aid’, within the meaning of Article 107(1) TFEU (judgment of 9 November 2017, *Commission v TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 43 and the case-law cited).

- 36 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 concerned 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, and of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 53).
- 37 It must be determined whether the funds used by Eco TLC to provide financial support to contractually bound sorting operators remain constantly under public control, and thus available to the competent national authorities.
- 38 In that regard, in the first place, as was pointed out at paragraph 33 of the present judgment, those funds never passed through the State budget, nor at any point did public authorities have access to them.
- 39 Besides, it is apparent from the file before the Court, that (i) those funds are not subject to any particular requirement as to their deposit, (ii) in the event of the discontinuance of activities of the eco-body, the amounts that might be available, after the attribution of costs connected to the discontinuance of activities and after the deduction of debts owed by that eco-body to the State and its collective creditors, are not paid to the public authorities, and (iii) disputes regarding the revaluation of contributions owed by those who place products on the market by way of the provision at issue in the main proceedings fall within the jurisdiction of civil or commercial courts.
- 40 It follows that the State does not, at any moment, have effective access to those funds, and that the eco-body has no prerogatives of the public authorities.
- 41 In the second place, the funds used by Eco TLC pursuant to the provision at issue in the main proceedings are exclusively used for carrying out the tasks which have been legally assigned to them. The legal principle of exclusive allocation of those funds tends rather to show, in the absence of any other evidence to the contrary, that the State is specifically not entitled to dispose of those funds, that it is say to decide on an allocation which differs from that laid down by law (see, to that effect, judgment of 28 March 2019, *Germany v Commission*, C-405/16 P, EU:C:2019:268, paragraph 76).
- 42 In the third place, it is true that the scale of financial support paid by the approved eco-body to sorting operators is set by the State.
- 43 However, first, as is apparent from paragraphs 5 and 15 of the present judgment, the approved bodies determine the global amount of the financial contribution collected from those placing products on the market, so as to cover, each year, the expenses resulting from the application of the standard terms, namely the payment of financial support to sorting operators, running costs and various awareness-raising and prevention activities.
- 44 Second, in its written observations, the French Government notes that, in line with the standard terms in the annex to the Order of 3 April 2014, the scale of the financial support paid by the approved eco-body to the sorting operators corresponds to the average net cost of sorting. As regards, more particularly, the revaluation made by the Order of 19 September 2017, this would have been determined by the public authorities on the basis of proposals contained in the annual report of the Observatoire environnemental, économique et social du tri et de la valorisation des déchets de TLC (Observatory responsible for the environmental, economic and social monitoring of the sorting and recovery of TLC waste). That observatory, established by Eco TLC, has identified, for the purposes of that report, the sorting operator’s expenses and revenue, and has noted an underpayment of sorting activities.

- 45 According to the French Government the approved eco-body thus has a leading role in setting and developing the scale of financial support paid to sorting operators, which is however for the referring court to determine.
- 46 In the fourth place, although it follows from the order of reference that the Order of 3 April 2014 lays down certain eligibility conditions which sorting operators must observe in order to benefit from that financial support, the French Government has however made clear, in its written observations, that the approved eco-body has a degree of contractual freedom in its relationship with sorting operators with regards to setting additional eligibility conditions. Moreover, according to the that government, Eco TLC used that discretion to make more restrictive eligibility conditions than those set by the State.
- 47 Eco TLC has, as a consequence, influence in choosing the beneficiaries of financial support which may be granted by way of the system at issue in the main proceedings. It is, however, for the referring court to determine whether that is in fact the case.
- 48 In the fifth and final place, it is clear from the order for reference that a State representative, appointed by the State, attends the meetings of the board of directors of Eco TLC, is informed of the terms of the financial investments proposed by Eco TLC prior to their validation by the board of directors and is entitled to receive all documents relating to the financial management of the body so that, in the event of its failure to observe the rules of sound financial management, he or she may inform the relevant public authorities which may issue a fine or decide to suspend the approval or even to withdraw it.
- 49 However, it is apparent from the file before the Court, that first, that State representative does not have a right to vote within the board of directors of Eco TLC that would allow him or her to exert influence over the administration of the funds used by Eco TCL to grant financial support to sorting operators. Second, it is clear that the role of that representative is solely to ensure that the financial capacities of Eco TLC are maintained.
- 50 It follows from the foregoing that, subject to the determinations which are for the referring court to carry out, the funds used by Eco TLC to pay financial support to sorting operators are not under constant public control within the meaning of the case-law cited in paragraph 36 of the present judgment, and that they therefore do not constitute State resources within the meaning of Article 107(1) TFEU.
- 51 Having regard to all of the preceding considerations, the answer to the question referred is that Article 107(1) TFEU must be interpreted as meaning that a system whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, does not constitute an intervention through State resources within the meaning of that provision, as long as those subsidies are not constantly under public control, which is for the referring court to determine.

Costs

- 52 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 (First Chamber) hereby rules:

Article 107(1) TFEU must be interpreted as meaning that a system whereby a private, non-profit eco-body, approved by the public authorities, receives contributions from those who place on the market a particular category of product and who enter into a contract with it to that effect, in return for a service consisting in the organisation on their behalf of the treatment of the waste from those products, and redistributes to operators responsible for the sorting and recovery of that waste, subsidies the amount of which is set out in the approval, in the light of environmental and social targets, does not constitute an intervention through State resources within the meaning of that provision, as long as those subsidies are not constantly under public control, which is for the referring court to determine.

[Signatures]