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24 MARCH 2017

FRANCE: EUCJ ORDER OF 15 MARCH 2017 ON 2006 AND 2010 PHOTOVOLTAIC FEED-IN TARIFFS

In a reasoned order dated 15 March 2017, the European Union Court of Justice (EUCJ) had to determine whether the feed-in tariff mechanism that applies to photovoltaic power plants qualifies as a State aid under EU rules.

Under Law No. 2000-108 of 10 February 2000 (today, codified in the French Energy Code), photovoltaic power plants are able to sell the electricity they generate at a price higher than the market. EDF and local distributors must buy this electricity within the frame of specific power purchase agreements (PPAs). The price of the PPAs is set by Ministerial Orders.

A photovoltaic power producer, Ombrière Le Bosc, took action against Enedis (the main distribution system operator - formerly, ERDF) on the grounds that Enedis did not fulfil its obligation to connect its plant to the grid. Ombrière le Bosc claimed damages on the basis of a former photovoltaic tariff order, the order of 10 July 2006.

The matter was referred to the Court of Appeal of Versailles. Enedis' insurance company, Axa Corporate Solutions, argued that the order of 10 July 2006 is unlawful because it constitutes a State aid according to Article 107 of the Treaty on the Functioning of the European Union (TFEU) and had not been notified to the European Commission prior to its implementation.

EUCJ ORDER OF 15 MARCH 2017

The Court of Appeal of Versailles decided to refer two questions to the EUCJ for a preliminary ruling:

1. Does the French feed-in tariff mechanism for photovoltaic power plants qualify as a State aid under Article 107 (1) TFEU?
2. If so, does the failure to notify the order of 10 July 2006 to the European Commission affects its validity?

On 15 March 2017, the EUCJ issued its reasoned order on these two questions (Case C-515/16).

In order to qualify as State aid under Article 107 (1) TFEU, four criteria must be met (§17):

- there has been an intervention by the Member State or through State resources;
- the intervention gives the recipient an advantage on a selective basis;
- competition has been or may be distorted;
- the intervention is likely to affect trade between Member States.

Although the Court of Appeal's first question dealt with all of the four criteria, the EUCJ decided to rephrase the question and to analyse only the first one of them (§20).

The EUCJ states that the mechanism introduced by Law No. 2000-108 for photovoltaic power plants is the same as the mechanism that applies to onshore wind power plants. According to the Court, the photovoltaic scheme "*is identical in substance to the case that gave rise to the decision of 19 December 2013, Association Vent de Colère !*", i.e. the wind scheme (§21). The Court's analysis of the State aid criteria was therefore the same for both mechanisms.

Thus, the EUCJ considers that the feed-in tariff mechanism for photovoltaic power plants constitutes an intervention by the Member State or through State resources. The first State aid criteria is considered as fulfilled.

OTHER STATE AID CRITERIA

The Court of Justice decided not to assess whether the other criteria were met. It expressly stated that the Court of Appeal of Versailles had to analyse the three other conditions before reaching a conclusion on the validity of the measure.

However, the Court of Justice provided some guidance in this respect, by stating that the photovoltaic scheme is identical to the onshore wind scheme in the *Vent de Colère !* case (§21). In the case of wind energy, the French Supreme Administrative Court (*Conseil d'Etat*) considered that "*the purchase of electricity produced by installations using mechanical wind energy at a price higher than its market value grants an advantage to the producers of that electricity; in view of the liberalization of the electricity sector at EU level, this advantage is likely to affect trade between Member States and have an impact on competition*" (CE, 15 May 2012, *Association Vent de Colère !*, No. 324852).

Consequently, the feed-in tariff in the wind energy sector was regarded as a State aid by the *Conseil d'Etat* (CE, 28 May 2014, *Association Vent de Colère !*, No. 324852). Similarly, in its decision dated 27 March 2014 on the compatibility of this same mechanism, the European Commission stated that it qualified as a State aid scheme in favour of wind power producers.

It should be noted that the analysis of the EUCJ in its reasoned order of 15 March 2017, as well as the position to be held by the Court of Appeal of Versailles, deal with the Ministerial Order of 10 July 2006. But two other orders were passed on 12 January 2010 and 31 August 2010 for photovoltaic projects, that rely on the same scheme. The 2006 order and the 2010 orders must be analysed similarly.

NEXT STEPS

The Court of Appeal of Versailles will now need to determine whether the three other criteria of Article 107 (1) TFEU are met. The Court will then decide whether the measure at stake qualifies as a State aid or not.

Should the Court of Appeal consider that the feed-in tariff mechanism for photovoltaic power plants qualifies as State aid, the EUCJ indicated that State aid measures under Article 107 (1) of the TFEU that were implemented in breach of the prior notification obligations of Article 108 (3) TFEU should be deemed illegal. National courts should therefore draw the consequences of such unlawfulness.

However, the impact of the order on on-going PV projects is yet to be assessed. It will mostly depend on the behaviour of the French State. In 2014, following the EUCJ ruling for wind energy, the French State passed a new tariff order (Ministerial Order of 17 June 2014) that allowed on-going PPAs to be maintained.

The Minister for Energy still has not officially declared how the French State will respond to this order.

CONTACTS

MICHEL GUENAIRE
guenaire@gide.com

PIERRE-ADRIEN LIENHARDT
pierre-adrien.lienhardt@gide.com

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