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Case Law

ECJ clarifies meaning of State Aid

Case C-262/12 *Vent De Colère and Others*, 19 December 2013

This case concerned the request for preliminary ruling submitted by the French Conseil d'État to the ECJ, following a request for annulment of a ministerial order of 2008 establishing a mechanism for offsetting in full the additional costs arising from the obligation to purchase wind-generated electricity for a price higher than the normal market price through charges payable by

the final consumers. The question submitted was whether this financing mechanism constitutes State aid within the meaning of Article 107(1) TFEU.

The ECJ pointed out that, in order for a measure to constitute State aid there must be, directly or indirectly, an intervention by the State or through State resources. Following the opinion of AG Jääskinen, the ECJ ruled that the offset mechanism at issue constitutes an intervention through State resources. The fact that the entity collecting the charges imposed on consumers (the Caisse des dépôts et consignations) is a public body led the ECJ to establish that the sums it collected from consumers “must be regarded as remaining under public control”.

The case sheds light on the application of State aid rules to indirect measures taken by the State through consumers’ financial contributions.

See also:

Case C-262/12, [Vent De Colere and Others](#), 19 December 2013

[Opinion of Advocate General](#) Jääskinen, 11 July 2013

Accidental fuel or waste?

Joined cases C-241/12 and C-242/12, [Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV](#), 12 December 2013

The present judgment concerned the request for a preliminary ruling submitted by a court in Rotterdam (Netherlands) as regard to the interpretation of the concept of waste within the meaning of Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community.

The proceedings concerned the transport of a consignment of ultra light sulphur diesel (ULSD) unintentionally mixed with methyl tertiary butyl ether (MTBE) that was accidentally left in the tanks of the ship that carried the consignment from Belgium to the Netherlands. The adventitious mix became apparent only at the time of delivery. The resulting product could not be sold as fuel (but could still be reused by Shell), therefore the client returned the consignment with a view to obtain a refund. The Rotterdam court asked the ECJ a number of questions, in particular whether that consignment constituted waste within the meanings of Regulation No 259/93 (as the ECJ noted, the newer waste shipment Regulation No 1013/2006 did not apply *ratione temporis*) and, if so, when it became waste.

The ECJ ruled that Article 2(a) of Regulation No 259/93 “must be interpreted as meaning that in a situation such as that at issue in the main proceedings, a consignment of diesel accidentally mixed with another substance is not covered by the concept of waste, provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which it is for the referring court to ascertain”. It further specified that, considering the requirement of interpreting the term waste widely, “the reasoning should be confined to situations in which the reuse of the goods or substances in question is not a mere possibility but a certainty”.

See also:

C-241/12 and C-242/12, [Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV](#), 12 December 2013

[Opinion of Advocate General](#) Jääskinen, 18 June 2013

Stricter rules on chemicals in toys temporarily allowed

Case C-426/13 P (R), [Germany v Commission](#), 19 December 2013

German law provides stricter requirements than those established under the new EU Directive 2009/48/EC on the safety of toys. In fact, the German requirements are in line with the old limit values as established in the previous Toy Safety Directive 88/378/EEC, that provided different, lower substance limits for toxic substances present in toys (in particular for lead, arsenic, mercury, barium and antimony and nitrosamine). Germany requested, *ex Article 114 TFEU*, to maintain its existing national provisions, but the Commission in essence refused to grant such permission through Decision 2012/160/EU. Thereupon, the country brought a case before the General Court asking for the annulment of the Commission's Decision, and it further pursued interim relief to maintain its national rules while awaiting the verdict in the regular case. On 15 May 2013, in case T-198/12 R, the President of the General Court granted the requested interim relief to the German government. Consequently, the Commission issued Decision 2013/492/EU which allows Germany to keep in force its current legislation. However, the Commission also appealed the order of interim relief. That appeal was dismissed by the decision of the Vice President of the ECJ on 19 December 2013. As a result, Germany can uphold its stricter provisions on the safety of toys, at least until a ruling in the main case is taken.

See also:

[Commission Decision 2012/160/EU](#) concerning the national provisions notified by the German Federal Government maintaining the limit values for lead, barium, arsenic, antimony, mercury and nitrosamines and nitrosatable substances in toys beyond the entry into application of Directive 2009/48/EC, 1 March 2012.

Order of the President of the General Court, [interim relief order in Case T-198/12 R](#), 15 May 2013.

[Commission Decision 2013/492/EU](#) authorising Germany to maintain the limit values for antimony, arsenic, barium, lead and mercury beyond the entry into application of the limit values for chemical substances (...) in application of the Order of the President of the General Court of 15 May 2013 (T-198/12 R), 7 October 2013.

Energy

Commission only recommends safety rules for fracking

Intense lobbying by countries like the UK and Poland and opposition from the side of DG Energy resulted in the Commission's decision not to propose EU-wide legally binding rules regulating the safety of unconventional shale gas activities in the EU Member States. Instead, a mere recommendation was issued.

In the past years, DG Environment, European Parliament and more cautious Member States have pushed the Commission to propose binding legislation on the exploration and exploitation of shale gas in order to ensure minimum standards of protection of human health and the environment. A Directive proposal had been already drafted last year, but strong opposition of member states like the UK, Poland, Hungary, Slovakia and the Czech Republic brought the Commission to reconsider the form of its proposal.

Instead, a Recommendation providing "minimum principles" for the exploration and exploitation of shale gas was presented by the Commission on 22 January 2014. The Recommendation suggests Member States to ensure that companies carry out an *ex-ante* environmental impact assessment (EIA) that analyses cumulative effects and potential future uses of the surrounding surface and

underground area, and to ensure minimum separation distances from residential and water protection areas. It is noteworthy that, during the discussions on the revision of the EIA Directive, the European Parliament (EP) had initially asked the Commission to include fracking activities under Annex I Directive, which would have made it compulsory for all operators to carry out an EIA before starting their activities. That demand was dropped by EP, however, at the end of 2013.

Furthermore, Member States are asked to ensure that operators register the chemicals used in fracking operations in accordance with the REACH Regulation, and that they identify “hydraulic fracturing” as the relevant use. As was pointed out in a recent [report of the Joint Research Centre](#), so far no companies in Europe have registered any chemical for hydraulic fracturing use, mainly due to the lack of binding provisions, the lack of adequate compliance check and the complaint of the industry regarding the potential economic damage they would suffer if disclosing such information.

As regards liability issues, the Recommendation calls on Member States to ensure that adequate financial guarantee to cover liabilities for potential environmental damage is provided by the operator, and that Directive 2004/35/EC (the Environmental Liability Directive) is applied to all activities taking place at an installation site.

The instrument chosen by the Commission to provide mere recommendations to Member States on such a sensitive issue is arguable, especially considering the Preamble of the Recommendation, which acknowledges the existence of high risks to the environment and human health connected to fracking activities. In the leaked draft of the Recommendation, the Commission acknowledged the existence of important “*gaps* in current legislation”, in particular as regards the use and the disclosure of chemicals, the underground risk assessment and the capture of methane emissions. However, in the final version, the wording has been slightly changed, so that it now merely states that “certain environmental aspects associated with the exploration and production of hydrocarbons involving this practice *are not comprehensively addressed* in current Union legislation” (emphasis added).

Most strikingly, the Commission has wiped out the provision regarding *inspections and sanctions* that was instead included in the leaked draft. The provision would have required Member States to organise inspections for checking the operational and environmental performance of installations, and to provide for effective, dissuasive and proportionate sanctions in case of non-compliance.

A closing provision of the Recommendation does establish an annual review of the measures that Member States have adopted to implement the Recommendation. The review will also include an assessment of the “need for developing harmonised and legally binding provisions” on fracking, should Member States fail to fully implement the Recommendation into national law. This compromise seems to leave room for future EU legislation, if the Commission would find it necessary to fill the legislative gaps. For the time being, the Member States will need to make do with the Recommendation.

The Recommendation is supported by two other documents, a Communication to the Parliament and the Council on the opportunities and challenges stemming from the exploitation of shale gas in Europe and a detailed environmental and socio-economic impact assessment of the different policy options taken into account.

See also:

Commission Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing, C(2014) 267/3, 22 January 2014

Commission Communication to the Council and the European Parliament on the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing, Draft - 22 January 2014

Commission Staff Working Document – Impact Assessment accompanying the Communication on the exploration and production of hydrocarbons using high volume hydraulic fracturing, Draft - 22 January 2014

Joint Research Centre, [Assessment of the use of substances in hydraulic fracturing of shale gas reservoirs under REACH](#), September 2013

European Voice, [Commission prepares shale-gas guidelines](#), 16 January 2014

RTCC, [UK and Poland announce plans to push fracking across Europe](#), 10 January 2014

Commission reveals new climate and energy policy post-2020

The Commission has revealed the long awaited new targets for the EU climate and energy strategy post-2020. The 2030 framework comprises a binding GHG emissions reduction target of 40% below 1990 levels, which also includes a 30% reduction below 2005 levels for the non-ETS sectors (such as agriculture and transports) through national effort sharing schemes, and an EU-wide renewable energy target of “*at least*” 27%. No targets have been agreed for a renewed energy efficiency strategy, as the Commission announced they will be established only once the revision of the Energy Efficiency Directive will be completed next summer.

Critiques came from many directions as to the weakness of such a framework, notably in relation to the deletion of binding national targets for the share of renewables in the energy mix, which could jeopardise the effectiveness of low-carbon energy policies and will also leave Member States more freedom to finance other less sustainable power-generation technologies.

The 40% GHG emissions reduction target has also been widely read as inadequate in a long-term perspective and in order to maintain the credibility and influence of the EU climate action at global level.

In early January, the EU Parliament energy and environment Committees had voted on a draft that called the Commission to propose three ambitious and binding targets. The Parliament will vote on the current proposal next February 2014, whereas the Council is expected to discuss it in March 2014.

See also:

EU Commission [Press Release](#), 22 January 2014

N. Mabey, [Europe dithers while the door closes on a 2C future](#), 22 January 2014

European Voice, [Commission proposes 40% emissions target for 2030](#), 22 January 2014

EurActiv, [Efficiency and renewables make Europe competitive](#), EU study says, 22 January 2014

Climate Change

Council and Parliament find agreement on F-gases emissions reduction

The COREPER has approved the draft regulation on the reduction of fluorinated gases that the Council and the Parliament agreed upon last December 2013. If approved by the Parliament at the next plenary vote, this regulation would constitute an important step forward in reducing the concentration of highly hazardous pollutants which, although constituting only the 2% of total GHG emissions, have a much higher global warming potential than CO₂.

The regulation ambitiously aims at reducing emissions of f-gases by two thirds by 2030, and is hoped to lead to a 70/78% reduction by 2050. It introduces quantitative limits which will gradually lead to bans on the placing on the market of different appliances that contain hydrofluorocarbons

(HFCs), such as domestic refrigerators, refrigerators and freezers for commercial use, air-conditioning systems, technical aerosol and foam containing HFCs. Other provisions regard the conditions for containment, use, recovery and disposal of HFCs.

See also:

EU Council Press release, [Fluorinated Greenhouse Gases](#), 18 December 2013

Lithuania Presidency website, [Member States approve the agreement by the co-legislators on the Regulation on reduction of emissions of Fluorinated greenhouse gases \(F-gases\)](#), 18 December 2013

A. Gaved, [Decision reached on F-gas regulations: further updated](#), 16 December 2013

New Publications

EU Performance in the International Climate Negotiations in 2013: Scope for Improvement

The European Union (EU) has long been an important player and even a leader in the international cooperation on climate change. In 2013, preparations for a new global climate agreement in 2015 moved centre stage in the international negotiations. This policy brief assesses the EU's performance in 2013 culminating in the Warsaw conference in November 2013. We find that the EU was actively engaged in the negotiations and pursued partially ambitious/progressive policy objectives, which it was partly successful in realising. The policy brief argues that international EU leadership for a 2015 agreement requires (1) building an international leadership alliance including the EU and other progressive countries and (2) serious homework by the EU to advance domestic climate mitigation efforts both by 2020 and 2030, and to enhance its position on climate finance.

Colofon

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