

An Update on Recent Energy Case Law from the CJEU

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This talk does not contain any official position of the Court of Justice of the EU (CJEU)



Competition



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T-312(-22)/20, *EVH/Commission*, 17 May 2023

- 3 inter-linked operations:
 - RWE acquires full or joint control of certain E.ON generation assets (nuclear) – cleared (phase 1) > 1st wave of appeals
 - E.On acquires certain Innogy generation assets + RWE distribution/retail assets > 2nd wave of appeals (pending)
 - RWE takes 16,7% of E.ON (decision Bkamt)
- One procedural question: the concept of 'single concentration' cannot apply when independent undertakings gain control of different targets, as is the case in an asset swap

T-312(-22)/20, *EVH/Commission*, 17 May 2023

- Def of GEN & retail relevant (DE) markets left open (RES not an autonomous market despite specific reg. frame)
- Possibility of withholding strategies despite limited concentration?
- Use of Residual Supply Index (RSI) to assess RWE market power in wholesale market, even when low market shares:
 - Merger strengthens the pivotal role (= being indispensable to meet demand, every hour of the year) of RWE but limited and temporary (RWE pivotal only 5% of the year)
 - RSI important but other factors important – you can impact on prices through withholding but RWE is unlikely to do withholding with EON RES capacity

T-585/20, *Polwax/Commission* (oil sector): appeal rejected

Regulatory



C-580/21, *EEW Energy from Waste*, 20 April 2023 (priority access to network for mixed RES) (1)

- An operator of a waste thermal installation produces electricity out of a variable proportion of biodegradable waste – access to the grid was curtailed due to system congestion
- Article 16(2)(c) of Directive 2009/28 must be interpreted as meaning that priority access to the grid also applies to those producing from both renewable and conventional energy sources.
- An installation using a variable proportion of both renewable and conventional energy sources must be able to enjoy the priority access up to the sole variable proportion of electricity produced from renewable energy sources.

C-580/21, *EEW Energy from Waste*, 20 April 2023 (DE, priority access to network for mixed RES)

- It is sufficient in that regard that the implementation of the criteria adopted by the competent national authorities allows, over a sufficiently long and representative period of time and in so far as technically feasible, priority access to the grid in proportion to the size of the share of renewable energy sources used by that installation. (para 54)
- It is for the Member States to establish the detailed rules for applying that priority access, by setting transparent and non-discriminatory criteria which, whilst taking into account requirements relating to the maintenance of reliability and safety of the grid, make it possible to establish an order of priority according to the size of the share of renewable energy sources used by each installation for the production of electricity. (para 57)

C-5/22, *Green Network*, 30 March 2023 (IT, powers of regulator)

- Unclear whether Green Network ‘administrative management fee’ was included in the tariffs > AREGA imposed a fine and ordered repayment > competence?
- Article 37(1)(i) and (n) and Article 37(4)(d) of Electricity Directive 2009/72 and Annex I thereto must be interpreted as not precluding a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for the sums paid by those customers to cover ‘administrative management costs’ pursuant to a contractual term considered to be unlawful by that authority, including in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency (para 30)

C-394/21, *Bursa Română de Mărfuri*, 2 March 2023 (BG, NEMOs) (1)

Question: should the Electricity X-border Regulation 2019/943 (Art 1(b), 1(c), 2 and 3) be interpreted as precluding legislation of a Member State under which a national legal monopoly for intermediation services in respect of offers to sell and bids to buy electricity concerning both the day-ahead and intraday wholesale markets and the forward wholesale market [NEMO] is maintained?

C-394/21, *Bursa Română de Mărfuri*, 2 March 2023 (BG, NEMOs) (2)

- Answer: Yes!
- Aim of the X-border Regulation is to 'encourage competition on the electricity markets' but no explicit provision preventing monopoly
- CJ recalls that holding a dominant position due to special rights within the meaning of Art 106(1) TFEU is not in itself incompatible with Art 102 TFEU
- Art 5(1) of CACM guidelines 2015/1222 foresees that MS can keep national monopoly if pre-existing at the time of entry into force of the guidelines (subject to notification to the EC)
- Electricity markets not completely harmonized so might be a need to assess possible conflicts with free movement of services/establishment, if situation is not purely internal

An Update on Recent Energy Case Law from the CJEU

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State Aid Cases

- What are ‘state resources’
- Who is ‘an interested party’
- How to apply the rules on cumulation

State Resources

- **Case C-50/21 Prestige and Limousine SL**, a dispute between car-hire companies and the municipality of Barcelona.
- ECJ held purely regulatory measures may confer an advantage without granting State aid
- The municipal authorities had adopted a measure according to which already licensed car-hire companies were required to obtain another licence by the Barcelona authorities before they could legally provide services in the city. In addition, the number of licences for car-hire companies was limited to 1/30th of the number of licences for taxis operating in Barcelona.
- The municipal authorities claimed that the measure was necessary to reduce pollution and congestion in the city and to maintain the viability of normal taxi services. No link to state resources
- NB – contrary to Art 49 TFEU

C-702/20 and C17/21

Preliminary ruling on the interpretation of Article 107(1) TFEU, Article 108(3) TFEU, Regulation 1407/2013 on de minimis aid and of the procedural Regulation 2015/1589.

Dispute concerning alleged loss of revenue resulting from the fixing of a too low price of electricity purchased by a distribution company from the producers of that electricity.

Producers of RES electricity claimed that the Latvian energy regulator failed to fix the price correctly - demanded compensation for damage. The damage corresponded to the difference between the price paid to the applicants by the distributor and the price at which the latter was supposed to have purchased electricity from them. The sums involved did not exceed EUR 3500.

Electricity distribution companies were obliged to purchase from small hydroelectric plants their surplus electricity for a period of 8 years at a price that was higher than the market price in a certain period

C-702/20 and C17/21/2

... **Two tests:**

(38) .. funds financed by a levy or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute ‘State resources ..

“(39) However, ..., this is not the only criterion for identifying ‘State resources’ within the meaning of that provision. The fact that sums constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as ‘State resources’”.

“(41) Furthermore, ..., the funds resulting from that surcharge are collected, managed and apportioned by a company wholly owned by the Member State concerned and cannot be spent for purposes other than those provided for by law, namely offsetting the additional cost mentioned in the preceding paragraph. Those funds thus constantly remain under public control.”

C-702/20 and C17/21/3

- Damages in compensation does not = state aid
- But if the national legislation is established as state aid - the payment of any sum claimed before national courts in accordance with that legislation = state aid

Case T-322/22 Unsa Énergie v European Commission

A trade union representing employees of Électricité de France [EDF], sought the annulment of the decision of the Commission, which rejected its complaint against an authorised France aid measures in the electricity sector.

Commission had rejected the complaint because it considered that Unsa Energie was not an interested party in the meaning of Article 1 of Regulation 2015/1589

General Court : undertaking which is not in direct competition with the beneficiary of the aid may be classified as an ‘interested party’ provided that it claims that its interests may be affected by the grant of aid, which requires that undertaking to demonstrate, to the requisite legal standard, that the aid is likely to have a specific impact on its situation. Therefore, the status of ‘interested party’ does not necessarily presuppose a competitive relationship with the beneficiary of the aid.

The alleged harm to the interests of the union had no direct or certain link with the aid measure. In particular, the reduction in the staff of EDF did not the result from the aid measure, but from an autonomous decision of EDF.

Cumulation of subsidies from different Member States

- **Case T-626/20, Landwärme GmbH v European Commission**
- When multiple Member States grant aid for the same purpose, there is a risk of overcompensation of undertakings that operate across Member States.
- High risk when state aid is granted to RES in one Member State and then that energy is exported to another Member State.
- Where the aid is in the form of tax relief, it may be necessary to adjust the amount of the tax relief so that imported energy does not receive an unfair advantage. This is a complex process -> Member States must also comply with Article 110 TFEU that prohibits discriminatory taxes

Institutional issues - T-607/20 APG and others v ACER

- The limits of ACER's competence?
- TSOs and NRAs had failed to agree some but not all the of the terms of frameworks for operating frequency restoration reserve platforms: matter referred to ACER;
- ACER considers it can depart from items already agreed by NRAs and take a new decision imposing obligation on TSOs to set up a separate entity/or consortia to manage the platforms in question and to transfer additional functions – the so called capacity management function - to the platforms - to be managed in accordance with the governance rules set out in the EBGL
- **GC upholds ACER decision**
- ACER derives its competence to act on TCMs from the Recast ACER Regulation 2019
- ACER B o A has 'de facto' exercised a full judicial review

ACER Board of Appeal - The scope of review

- C-46/21 P Aquind
- ECJ upholds ruling of GC and confirms opinion of its AG that BoA must conduct a full review – not a marginal review limited to errors of law and manifest errors - even with limited resources and limited timeframe
- ACER argument that ‘de facto’ full review carried out is rejected

ACER after Brexit

- Regulations 2019/942 and 2019/943 do not give ACER the power to consider a request for an exemption relating to an interconnector between a Member State and a third State,
- Or confer on the Board of Appeal the competence to assess a decision by ACER upon such a request.
- Following Brexit, the proposed Aquind interconnector related thereafter to an interconnector between a Member State and a third State.
- Neither ACER nor the Board of Appeal were entitled to base a decision containing measures to comply with the judgment of 18 November 2020, Aquind v ACER

T-295/20 Aquind v Commission

- Appeal by Aquind companies (‘promoters of the Aquind interconnector’) to seek annulment of Commission Delegated Regulation 2020/389 (adopted on the basis of Regulation 347/2013 on guidelines for trans-European energy infrastructure (‘TEN-E Regulation’)
- France refuses to include Aquind on PCI list – could EC overrule?
- GC - TFEU has clearly established limits on the competence of the European Union in the field of Union PCIs, since the Commission is prevented from including, in the list of those PCIs, a project which has not received the approval of the Member State on whose territory the project is to be implemented.

A Snapshot of *Selected* Pending Cases

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A Snapshot of Selected Pending Cases (1)

Crisis:

EU emergency measures

- Regulation 2022/1854 (price intervention – use of Art 122 as legal basis):
 - T-759/22, *Electrawinds Shabla South EAD/Council*; T-775/22, *TJ e.a./Council*; T-795/22, *TV & TW /Council*; T-802/22, *ExxonMobil/Council*, T-803/22, *TZ/Council*
- Regulation 2022/1369 (coordinated demand reduction): C-675/22, *Poland/Council*
- Gas joint purchasing scheme: T-1/23, *Enmacc/Commission*

National state aid schemes

- T-596/22, *RH e.a./Commission* (Spain)
- T-240/23, *LichtBlick/Commission* (Germany)

A Snapshot of *Selected* Pending Cases (2)

Taxonomy cases:

- **Delegated regulation 2021/2139:**
 - T-575/22, *Robin Wood e.a. / Commission*, T-579/22, *ClientEarth / Commission*
 - T-583/22, *Fédération environnement durable e.a. / Commission (Aahrus)*
- **Delegated regulation 2022/1214 (nuclear):**
- T-567/22, *ATPN/Commission* 30 March 2023 ; T-628/22, *Repasi/Commission* 21 June 2023 : inadmissible
- T-214/23, *Greenpeace/Commission* ; T-215/23, *ClientEarth / Commission*
- T-625/22, *Austria/Commission*

See C-212/21 P - C-223/21 P *BEI/ClientEarth* (EN) – AG opinion of 15 Dec 2022

A Snapshot of *Selected* Pending Cases (3)

ACER cases:

- T-283/19, *Germany / ACER* (follow up T-631/19 *BNETZA/ACER*)
- T-212/20, *Gaz-System / ACER* (capacity booking platform); C-282/23 P APG/ACER (European platform for the exchange of balancing energy);
- T-446/21, *Commission de régulation de l'énergie / ACER*; T-472/21, *RTE / ACER*; T-482/21, *TenneT TSO et TenneT TSO / ACER*; T-476/21, *TransnetBW / ACER*; T-485/21, *BNetzA / ACER*; T-483-4/21, *Polskie sieci elektroenergetyczne / ACER* (Methodology for coordinating operational security analysis)
- T-95/23, *RWE Supply & Trading / ACER* ; T-96/23, *Uniper Global Commodities / ACER* (Methodology for fixing price of balancing energy)

A Snapshot of *Selected* Pending Cases (4)

Regulatory:

- T-526/19, RENV, *Nord Stream 2 / Parlement et Conseil*
- C-48/23 : *Alajärven Sähkö e.a.* - powers/independence of regulators (Finland, remuneration of TSOs)
- C-428/22, *Devnia tsiment* - who should constitute minimum oil stocks? (Bulgaria)
- Many other (energy taxation, consumer protection, TSO obligations, EU ETS, etc.)...

Review of climate plans by EC (mainly based on Aarhus Regulation):

- T-331/22, *NLVOW/Commission* ; T-345/22, *Stöttingfjällets Miljöskyddsförening/Commission* ; T-346/22, *Föreningen Svenskt Landskapsskydd/Commission*; T-344/22, *Stichting Nationaal Kritisch Platform Windenergie/Commission*

A Snapshot of *Selected* Pending Cases (5)

Competition:

- Antitrust: T-136/19, *BEH/ Commission*
- Mergers: T-5/21 e.a.: *EON/RWE asset swap* (second wave)

State aid:

- C-790/21 P, *Covestro DE/Commission e.a* (network charges exemption)
- C-739/21 P, *Commission / DEI* (preferential tariffs / arbitration in Greece)
- C-59/23P, *Austria/Commission* (HU nuclear)
- T-409/21, *Germany / Commission* T-690/21, *LW Capital / Commission* (COGEN support scheme in DE)
- C-73/22 P et C-77/22 P, *Grupa Azoty S.A.* (EU ETS state aid guidelines, AG opinion of 2 March 2023)

Thank you for your attention



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