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Tempus Energy v Commission (C-57/19 P): The Court of Justice Defines the Commission's Investigative Duties During the Preliminary Examination Phase of State Aid Proceedings

David Pérez de Lamo (Cleary Gottlieb Steen & Hamilton LLP) · Tuesday, October 5th, 2021

On 2 September 2021, the Court of Justice (C-57/19 P) overturned the Judgment of the General Court of 15 November 2018 in the case *Tempus Energy v Commission* (T-793/14). In its ruling, the Court of Justice provided extensive guidance on which elements may (not) give rise to "doubts" as to the compatibility of a State aid measure with the internal market, thus compelling the Commission to open a formal investigation pursuant to Articles 108(3) TFEU and 4(4) of Regulation No 659/1999. In so doing, the Court of Justice circumscribed the Commission's investigative duties as a "good and diligent administration" during the preliminary examination phase of State aid proceedings.

Background

The General Court had annulled the Commission's Decision of 23 July 2014 (SA.35980) not to raise objections regarding a State aid scheme through which the United Kingdom sought to establish a capacity market by remunerating electricity providers in exchange for improved security of supply. In essence, the General Court concluded that "there was a body of objective and consistent indications, based on (i) the length and circumstances of the pre-notification phase and (ii) the incomplete and insufficient content of the decision at issue owing to the lack of appropriate investigation by the Commission […], which demonstrated that that decision had been adopted despite the existence of doubts […], which should have led the Commission to initiate [a formal investigation]" (para. 267 GC). On appeal, the Court of Justice meticulously re-examined each of the "indications" relied on by the General Court and dismissed all of its findings, largely following the Opinion of AG Tanchev.

The Judgment of the Court of Justice

On the Commission's investigative duties as a diligent administration

The General Court found that, for an applicant to successfully establish the existence of "doubts" within the meaning of Article 4(4) of Regulation No 659/1999, "it [is] sufficient [to] show either

that the Commission had not researched and examined, thoroughly and impartially, *all of the relevant information* […] or that it had failed duly to take it into account in such a way as to eliminate all doubt as to the compatibility of the notified measure" (para. 70 GC, emphasis added). That includes "all relevant information that was or *could have been available* to the Commission" at the time of the adoption of the decision (para. 72 GC, emphasis added).

On appeal, the Court of Justice concluded that the General Court had "misinterpreted the scale of the Commission's obligations" (para. 48 CJ). According to the Court of Justice, while the case law has indeed recognized that it may be necessary for the Commission, where appropriate, to go beyond a simple examination of the arguments and information presented before it,[1] that case law does not oblige the Commission, "on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case" (para. 45 CJ). The Commission is therefore not obliged to seek information that has not been brought to its attention or information of whose existence or relevance it is unaware (para. 49 CJ). As a result, an applicant cannot simply claim that there was a relevant piece of information that could have been available to the Commission in order to establish the existence of "doubts" (para. 50 CJ). Instead, the applicant has to show that the Commission was aware either (i) of the relevant piece of information and did not adequately take it into account or (ii) of other information which should have triggered the Commission to enquire beyond what was presented before it (para. 50 CJ).

On the "significance, complexity and novelty" of a State aid measure

The first specific indications on which the General Court relied to establish the existence of "doubts" were that the State aid scheme (i) involved particularly high amounts (para. 80 GC), (ii) was proving complex to define and implement (para. 81 GC), and (iii) was novel in terms of its subject and implications, given that it was the first time that the Commission assessed the compatibility of a capacity market with the 2014-2020 Guidelines on State aid for environmental protection and energy (para. 82 GC).

But the Court of Justice assessed all of these elements individually and summarily concluded that none of them necessarily give rise to "doubts". Indeed, it does not always follow from the fact that an aid measure is significant (para. 61 CJ), complex (para. 62 CJ) or novel (para. 63 CJ) that the Commission must encounter difficulties in its assessment. Size does not matter and the Commission may perfectly resolve the difficulties posed by the complexity or novelty of a case.

On the length and content of the pre-notification contacts

Another indication that the General Court relied on to find the existence of "doubts" was the length of the pre-notification contacts. According to the General Court, even if the Commission had assessed the compatibility of the State aid measure within the two-month period provided for the preliminary examination phase,[2] "the length of the pre-notification phase [had been] significantly longer than the two-month period that is envisaged, as a general rule, [in paragraph 14 of the Code of Best Practice]" (para. 106 GC).[3]

The Court of Justice found, however, that the length of the pre-notification phase could not in itself be an indication that there were "doubts". Indeed, pursuant to paragraph 10 of the Code of Best

Practice, the Commission and the Member State may discuss the problematic aspects of the measure during the pre-notification phase (para. 77 CJ). And paragraph 12 of the Code of Best Practice similarly indicates that "[a] fruitful pre-notification phase [allows] discussions […] of any substantive issues raised by a planned measure" (para. 77 CJ). Therefore, contrary to the General Court's assertions, "it is entirely possible that, during a long pre-notification phase, the Member State [and the Commission] could have benefited from [the] exchanges [and amended] the planned measure in such a way as to resolve any problems which [it] may have had in its original form, so that […] when it is notified, no longer [raises doubts]" (para. 79 CJ).

On the multiplicity and origin of informal contacts by third parties

A further circumstance that the General Court took as evidence of the existence of "doubts" was the multiplicity and variety of operators which had submitted spontaneous observations to the Commission on the compatibility of the measure (paras. 109 and 101 GC).

But once again, the Court of Justice found that the General Court had committed an error in law because it had merely relied on the "number" of operators, without specifying the substantive grounds for their observations or whether they raised any issues capable of creating difficulties (paras. 83-86 CJ).

On the content of the Decision

The General Court further concluded that the Commission had failed to conduct an appropriate investigation into certain aspects of the capacity market in the United Kingdom that should have given rise to "doubts", including the potential of 'DSR'[4] (paras. 146, 152 and 154-156 GC), the duration of the capacity contracts (paras. 160-193 GC), the cost recovery method (paras. 194-213 GC) and the conditions of participation in auctions (paras. 214-258 GC). In this regard, the General Court found that the Commission had "simply requested and reproduced the information submitted by the [United Kingdom] without carrying out its own analysis" (paras. 113-114 GC).

The Court of Justice dismissed all of the General Court's findings, ruling in a manner consistent with point (i) *supra*. In particular, the Court of Justice held that the General Court had "imposed on the Commission the obligation to seek evidence going beyond the available elements", without verifying whether the applicant had demonstrated that the information available to the Commission should have given rise to doubts (para. 119 CJ), or indicating the specific elements that should have triggered the Commission to enquire further (para. 120 CJ). In addition, the Court of Justice found that the specific considerations and circumstances relied on by the General Court did not necessarily reveal that there were difficulties in the assessment (paras. 122, 129, 150, 161 and 174 CJ). Nor were there reasons to doubt about the position submitted by the United Kingdom (paras. 129, 165, 170 CJ).

Conclusion

The Court of Justice thus upheld all of the Commission's grounds of appeal and decided to give

final judgment, dismissing Tempus Energy's action (paras. 188 and 212 CJ).

Final Comments

Tempus Energy is a significant judgment.

First, it greatly limits the Commission's investigative duties during the preliminary examination phase of State aid proceedings, as it will generally be entitled to focus exclusively on the evidence and considerations presented before it. The Commission will only be required to investigate further in limited circumstances and always departing from the information available to it. This gives great prevalence to the position submitted by the relevant Member State, thus consolidating the preliminary examination phase as a bilateral procedure between the Commission and Member States. However, these limitations are justified by the current structure of Article 108 TFEU, which does not allow third-parties to participate in the preliminary examination phase. This is unfortunate because the Member States' national objectives are not necessarily aligned with the EU's interest in preserving undistorted competition.

Second, the ruling of the Court of Justice provides extensive guidance on which elements may give rise to "doubts" as to the compatibility of a State aid measure with the internal market under Article 4(4) of Regulation No 659/1999. In essence, an applicant will not be able to rely on abstract indicia but will have to show specifically why certain elements create difficulties for the assessment of the measure.

Third, in terms of substance, this is the first case where the Court of Justice reviewed the compatibility of a capacity mechanism with the 2014-2020 State aid guidelines for environmental protection and energy, making it a relevant precedent for the pending cases before the General Court on the Polish (T-167/19) and Italian (T-793/19) capacity mechanisms.

Finally, it is worth mentioning that *Tempus Energy* is possibly the last State aid case concerning the United Kingdom, which makes it a final example of the significant contributions made to the development of EU law by the United Kingdom.

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[1] See, for instance, *Commission v Sytraval and Brink's France*, C?367/95 P,EU:C:1998:154, paragraph 62.

[2] Article 4(3) and (5) of Regulation No 659/1999.

[3] A new Code of Best Practice has been issued in 2018 (available here). *See* T. Wilson, *New Code of Best Practices for State Aid Procedures*, Kluwer Competition Law Blog, 10 August 2018.

[4] DSR or demand-side response is an electricity consumption management technology, which Tempus Energy sold to individuals and professionals.

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