

**Case C-556/19****Request for a preliminary ruling****Date lodged:**

22 July 2019

**Referring court:**

Conseil d'État (France)

**Date of decision to refer:**

12 July 2019

**Applicant**

Société Eco TLC

**Defendant:**

Ministre de la transition écologique et solidaire

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**CONSEIL D'ÉTAT**

(Council of State, France)

Judicial Division

[...]

By a summary application, a supplementary pleading and three statements of reply, registered on 29 November 2017, 12 January 2018, 7 May 2018 and 22 June 2018, 4 June 2019 at the Judicial Affairs Secretariat of the Conseil d'Etat (Council of State), Eco TLC requests the Conseil d'Etat to:

1) annul as ultra vires the Order of 19 September 2017 of the ministre d'Etat, ministre de la transition écologique et solidaire (State Minister, Minister for the Ecological and Inclusive Transition) and of the ministre de l'économie et des finances (Minister for the Economy and Finance) amending the Order of 3 April 2014 relating to the approval procedure and laying down standard terms for bodies wishing to contribute to the treatment of waste from clothing textile products, household linen and footwear, in accordance with Article R. 543-214 of the Code de l'environnement (Environmental Code and approving such a body, in

accordance with Articles L. 541-10-3 and R. 543-214 to R. 543-224 of the Environmental Code;

[...]

It contends that the contested order:

[...]

- establishes a measure constituting a new, unlawful State aid in that it was not notified to the European Commission in advance, contrary to Article 107(1) of the Treaty on the Functioning of the European Union; **[Or. 2]**

[...].

By a statement of defence, registered on 1 June 2018, the ministre d'Etat, ministre de la transition écologique et solidaire submits that the application should be rejected. The defendant claims that the application is inadmissible because Eco TLC lacks a legal interest in challenging the contested order and that the pleas raised in the application are unfounded.

By two statements in intervention, registered on 2 March 2018 and 25 June 2018, the Fédération des entreprises du recyclage (Federation of Recycling Companies) requests the Conseil d'Etat to dismiss the application [...]. It submits that its intervention is admissible, that the application is inadmissible because Eco TLC does not have a legal interest in challenging the order, and that the pleas relied on in the application are unfounded.

The application was communicated to the ministre de l'économie et des finances (Minister for the Economy and Finance), who did not submit a statement.

Having regard to the other documents in the file;

Having regard to:

- the Treaty on the Functioning of the European Union;
- the Environmental Code;
- [...];

[...] **[Or. 3]** [...]

Whereas:

- 1 Article 69 of the loi du 21 décembre 2006 de finances pour 2007 (Law of 21 December 2006 on finances for 2007), inserted into the Environmental Code Article L. 541-10-3 on the principle of extended producer liability for producers who *‘on a commercial basis place on the national market, new clothing textile products, footwear or household linen, intended for domestic use’*, requiring them to contribute to or provide for the recycling and treatment of the waste from those products, 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 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 in question, or by establishing, in accordance with standard terms, an individual system for the recycling and treatment of that waste, approved by joint order issued by the ministers for ecology and for industry. The final paragraph of that article provides that: *‘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.’* The second paragraph of Article R. 543-214 of that code provides that: *‘Each body shall, 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 it collects, the re-use, recycling, recovery and treatment of the waste referred to in Article L. 541-10-3 and shall state how it proposes to comply with the standard terms attached to the approval’.* The first paragraph of Article R. 543-215 of the code provides that: *‘The approved bodies shall 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 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’.* Article R. 543-218 of the code provides that the standard terms referred to in Article R. 543-214 of the code must 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 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.
- 2 The Order of 3 April 2014 on the approval procedure and laying down the standard terms for bodies desiring to contribute to the treatment of waste from clothing textile products, household linen and footwear makes the payment of support conditional on a minimum rate of material recovery and recycling. It includes an Annex entitled *‘Scale of financial support payable to contracted sorting operators in year N+1, in respect of year N’* which determines the method of calculating the different types of financial support which may be paid to contracted 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 shall 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 [Or. 4] ‘tonnage sorted which has been subject to recovery (reuse + recycling + other methods of recovery)’ a coefficient set at 65 euros per tonne. Furthermore, the Order of 3 April 2014 grants an approval to Eco TLC to collect contributions for the treatment of waste from clothing textile products, household linen and footwear and to redistribute them in the forms of financial support to sorting operators and to local authorities with responsibility for waste management, in compliance with the standard terms annexed to that order. Article 1 of the Order of 19 September 2017 amending the aforementioned Order of 3 April 2014, the annulment of which as ultra vires is sought by Eco TLC, provides for the coefficient of 65 euros per tonne set by the Order of 3 April 2014 to be increased to 82.5 euros per tonne for support paid from 1 January 2018.

The plea of inadmissibility by the ministre d’Etat, ministre de la transition écologique et solidaire:

- 3 The Order of 19 September 2017 provides for the revaluation of the support payable by the eco-body established in the clothing textiles products, household linen and footwear sector to the contracted operators responsible for the treatment of the waste from those products. In view of the impact of that revaluation on that company, the sole approved operator in this sector, Eco TLC has sufficient interest to give it standing to bring an action challenging that order as ultra vires.

The admissibility of the intervention:

- 4 The Federation of Recycling Companies has sufficient interest in the retention of the contested Order. Its intervention is therefore admissible.

The pleas relied on in the application:

- 5 [...] [Or. 5]  
[...]
- 6 [...]
- 7 [...] [pleas which are irrelevant to the question referred for a preliminary ruling] [Or. 6]

The classification as State aid:

- 8 According to paragraph 1 of Article 107 of the Treaty on the Functioning of the European Union: ‘Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal

*market.’ According to paragraph 3 of Article 108 of that Treaty: ‘The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’*

- 9 It follows from the provisions of Article L. 541-10-3 and Article R. 543-218 of the Environmental Code referred to in paragraph 1 that producers who place clothing textiles, household linen and footwear on the French market must either arrange for themselves for the treatment of the waste from those products or transfer the responsibility to an approved body, responsible for collecting their contributions and for organising, on their behalf, the treatment of the waste by entering into contracts with sorting operators for that purpose. Those provisions seek to implement at national level, in relation to the waste from such products, the objectives of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste.
- 10 The Order of 3 April 2014, referred to in paragraph 3, includes standard terms in an annex which, in particular, define the scale of financial support payable to sorting operators, the amount of which is set according to targets for the recovery of waste and for the employment of socially disadvantaged people. That order granted the approval for the textiles, household linen and footwear waste sector to a sole company, Eco TCL, a private body, created and managed by those who place the goods on the market in that sector. It is not clear from the documents in the file whether another body has been approved for that purpose or whether any of those who place the goods on the market have chosen to arrange for themselves for the treatment of the waste from those products.
- 11 It follows from the provisions of the Order of 3 April 2014 and from the standard terms annexed thereto that the approved body must adjust the amount of the contributions received from those who place the goods 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. It is clear from the file and in particular from the inquiry undertaken by the Sixth Chamber of the Judicial Division, in accordance with Article R. 623-1 of the code de justice administrative (Administrative Justice Code), that a State representative, appointed by the State, attends the meetings of the board of directors of this company, without, however, having a right to vote, is informed of the terms of the financial investments proposed by the 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 may inform the relevant State authorities which may issue a fine of up to 30 000 euros or suspend or [Or. 7] even withdraw

the approval. Subject to those provisos, Eco TLC freely determines its own management choices. In particular, the funds intended for payment of the contributions are not subject to any specific deposit requirement.

- 12 In those circumstances, the response to the plea that the support paid to the sorting operators for the recovery of material, in accordance with the scale provided for by the contested order, constitutes State aid and that the contested order providing for the revaluation of that scale is unlawful since neither it nor the Order of 3 April 2014, introducing the provision in question which it amends, was notified to the European Commission in advance, depends on the reply to the question as to whether Article 107 of the Treaty on the Functioning of the European Union must be interpreted as meaning that a system such as that described in paragraphs 9 to 11, whereby a private, non-profit eco-body, approved by the public authorities, receives financial contributions from those who place a particular category of product on the market and who enter into a contract with it to that effect, in return for a service consisting in the organisation, on their behalf, of their obligation to treat the waste from the products which they place on the market, and redistributes to operators, approved by it on the basis of standard terms agreed by the State, who are responsible for the sorting and recovery of that waste, sums the amount of which is set by the order approving the eco-body, on the basis of environmental and social targets, must be regarded as State aid within the meaning of that article.
- 13 That question is decisive for the outcome of the case upon which the Conseil d'Etat must give judgment and presents a serious difficulty. It is for that reason appropriate to refer it to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union and, pending a ruling by the Court of Justice, to stay the proceedings relating to the application.

HAS DECIDED AS FOLLOWS:

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[...]

Article 2: The proceedings relating to the application are stayed until the Court of Justice has given a preliminary ruling on the following question:

Must Article 107 of the Treaty on the Functioning of the European Union be interpreted as meaning that a system such as that described in paragraphs 9 to 11, 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?

[...] **[Or. 8]** [...]

WORKING DOCUMENT