General Court of the European Union
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Order of the President of the General Court in Case T-484/10 R, T-486/10 R, T-490/10 R and T-520/10 R
Gas Natural Fenosa SDG, Iberdrola, Endesa & Endesa Generaçion and Comunidad Autonóma de Galicia v Commission

Press and Information

The President of the General Court allows the application of the Commission's decision authorising the Spanish aid scheme in favour of electrical energy production from domestic coal

He lifts the provisional suspension ordered on 3 November 2010

Spain decided to introduce a financial aid scheme in favour of electricity produced from domestic coal. By setting up the scheme, Spain aimed to support both Spanish power stations using domestic coal and Spanish coal mines which would otherwise be in danger of closure if such a system was not put in place. To this end, the system obliged ten power stations to buy domestic coal, whose price is higher than that of other fuels, and to produce a certain amount of electricity from this coal. Compensation for the additional costs caused by this system was to be paid by the State.

Within the context of this system, the ten power stations concerned benefit from a "preferential dispatch mechanism" (PDM) which ensures that the energy that they produce is effectively absorbed by the market. In practical terms, the PDM allows for energy which has been produced, firstly by power stations using imported coal and oil, and secondly by power stations using natural gas and those using combined-cycle turbines, to be withdrawn from the market. In doing so, the space on the energy market can be occupied by the energy produced by these 10 power plants. As a result, the 10 power stations which, as a result of the higher price of the fuel that they use, were unable to sell their energy on the daily electricity market will see it sold the following day.

On 12 May 2010 Spain formally notified this scheme to the European Commission. Following a preliminary examination the Commission authorised the scheme until 31st December 2014[1]. In effect the Commission concluded that the obligations imposed by the Spanish scheme on the owners of the ten power plants corresponded to the management of a service of general economic interest and that the State aid aiming to compensate for this public service was compatible with the internal market.

Endesa, Gas Natural and Iberdrola, as well as the Autonomous Community of Galicia (Spain), introduced actions before the General Court requesting the annulment of the Commission's decision. These four parties also requested that interim measures be ordered to suspend the application of the Commission's decision pending the final judgment of the General Court.

On 3 November 2010, in view notably of the imminent adoption of a decision by the competent Spanish authority which would oblige the three companies to issue, within three days, a letter of commitment as to the purchase of specified quantities of domestic coal, the President of the General Court provisionally ordered, before having heard all of the interested parties, that the decision be suspended until the adoption of a final interim measures order.

[1] Decision C (2010) 4499 of the Commission, of 29 September 2010, concerning State aid No N 178/2010 notified by the Kingdom of Spain in the form of a public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants

From 5 November, Spain has requested that this suspension be lifted. Later, Endesa, Gas Natural and Iberdrola made known their intention to drop their applications at a particularly late stage of the interim measures procedure, that is to say after the hearing of 10 January 2011.

Today, the President of the General Court has delivered four orders. In effect, on the one hand, the request for interim measures made by the Autonomous Community of Galicia is still outstanding and requires a decision. On the other hand, in the three cases brought by the energy companies, the President of the General Court considers that, pending the removal from the register of these three applications, it is nevertheless necessary to examine, in the interests of the proper administration of justice, whether the provisional suspension of the Commission's decision ordered on 3 November 2010 should be maintained or whether, on the contrary, it should be lifted as soon as possible.

In these orders, the President of the General Court recalls that the provisional suspension of a contested act can only be granted if certain cumulative conditions are met. On the one hand, it must be established that the granting of a suspension is justified, prima facie, in fact and in law ("*fumus boni juris*"). On the other hand, the adoption of such a measure must be urgent in the sense that it must be necessary in order to avoid serious and irreparable harm to the applicant's interests. Finally, in taking his decision, the judge must balance the interests in question to determine whether the interest of the applicant in obtaining the suspension of the contested act prevails over the interest of the immediate application of the act.

The question of a prima facie case ("fumus boni juris")

The President of the General Court considers that **this condition is satisfied**. In effect, a reading of the Commission's decision does not allow one, at first, to determine whether the authorisation which has been granted concerns only the financial compensation of the service of general economic interest or if it also extends to the mechanisms of the State aid in question, notably the PDM. As a result, given that doubts exist as to the scope of the decision, it cannot be excluded that the Commission was confronted by serious difficulties during the examination of the compatibility of the aid with the internal market. As such, in the presence of potential difficulties of this nature, the Commission could not have restricted itself to the preliminary examination but ought to have opened a formal investigation which would allow for a more thorough and adversarial investigation. It is for the General Court to decide definitively on this matter at a later stage of the judicial proceedings, specifically during the examination of the action for annulment brought against the Commission's decision.

The question of urgency

The President of the General Court considers that **neither the three companies, nor the Autonomous Community of Galicia has proven the existence of sufficiently urgent circumstances such as to justify the granting of the requested interim measures. Consequently, the condition of urgency is not satisfied.**

In particular, **the three energy companies believe they will suffer two types of financial harm if the aid scheme were to be implemented immediately.** Firstly, that caused by the, allegedly too high, fixed prices for the obligatory purchase of domestic coal and, secondly, that resulting from the fines they would have to pay if they failed to respect their international contracts for the provision of gas and coal by virtue of "take or pay" clauses in those contracts. In this regard the President of the General Court holds that the companies do not allege that this damage would be such as to call into question their very existence before the main procedure is finished. As the companies have not established that they would be unable to claim damages at a later stage, such financial harm is not irreparable.

Furthermore, **as regards the alleged harm advanced by the Autonomous Community of Galicia which would be caused by the closure of power plants on its territory,** Galicia has not shown, nor even alleged, that the electricity production in the plants in question is not just an activity undertaken by a limited number of companies but rather a sector of crucial importance for

Galicia, of a kind that the harm caused to this production would compromise the general economic interests of the entire autonomous community.

The balance of interests

On this point the President of the General Court notes that there is no imperative reason which would justify why the interests of plants using domestic coal, those of mining companies and their employees or the economic interests of the regions or communes where such plants or mines are situated, must give way to the opposing, but comparable, interests invoked by the three energy companies and the Autonomous Community of Galicia.

Moreover, the President of the General Court finds that the examination carried out by the Commission which led to the authorisation of the service of general economic interest in question does not appear, prima facie, to be vitiated by a manifest error of appreciation as to its substance. In effect, prima facie, by virtue of the applicable provisions of EU law, the Commission was not legally obliged to verify, in place of the Spanish government, that the competitive position of one or other of the Autonomous Communities was not the subject of preferential treatment. This task forms part of the prerogatives of the Spanish public authorities, under the relevant constitutional provisions. Moreover, it cannot be overlooked that in the order of the Spanish Supreme Court of 22 December 2010 refusing to provisionally suspend the implementation of the Spanish scheme, it was admitted that the Spanish scheme responded, prima facie, to a real need for security of the energy supply and that it aimed to protect domestic coal production because of its strategic importance. Security of energy supply is being pursued not only by Spain but also by the entire European Union

Finally the President of the General Court recalls the important role played by services of general economic interest in the Union and the large discretionary power held by the national authorities as to their provision, execution and organisation.

In view of these considerations, **the President of the Tribunal considers that the interests of putting in place, as quickly as possible, a Spanish service of general economic interest and its associated compensation, authorised by the Commission's decision, must take precedence over the opposing interests put forward by the three energy companies and the Autonomous Community of Galicia**.

It therefore follows that the request for interim measures of the Autonomous Community of Galicia must be rejected and that the orders of 3 November 2010 granting the provisional suspension of the Commission's decision as regards the three energy companies must be revoked.

NOTE: The General Court will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceedings. An appeal, limited to points of law only, may be brought before the President of the Court of Justice against the decision of the President of the General Court within two months of notification of the decision.

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