



Press and Information

General Court of the European Union
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Judgment in Case T-251/11
Austria v Commission

The General Court confirms the Commission's decision that the partial exemption from the obligation of purchasing green electricity, which Austria plans to grant to energy-intensive businesses, constitutes unlawful State aid

The Renewable Energy Directive¹ provides that Member States are to achieve by 2020 mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy. The directive sets these targets, but leaves to the Member States the choice of means for achieving them.

In order to achieve its national target of 34%, Austria amended its Green Electricity Act in 2008. The new version of the act guarantees each green electricity producer the possibility of disposing of the total quantity of green electricity at a fixed price. This price is higher than the market price for electricity and is fixed each year by the Federal Minister for the Economy. The purchases are made by a green electricity settlement centre, the performance of tasks is ensured, under a concession, by an ordinary public limited company, Abwicklungsstelle für Ökostrom AG ('ÖMAG').²

The costs incurred by ÖMAG in the purchase of green electricity are transferred to electricity consumers in two different ways. First, each end consumer connected to the public grid must pay an annual contribution, irrespective of consumption, of between €15 and €15 000 according to the level of connection to the grid. Secondly, the electricity distributors are obliged to purchase from ÖMAG the entirety of the green electricity at a price fixed by legislation. They may pass the extra costs thereby incurred onto their clients.

However, by a provision of the Green Electricity Act which has not yet entered into force, Austria plans to establish a specific scheme for energy-intensive businesses.³ These businesses are considered to be particularly affected by the additional expenses of green electricity and particularly exposed to international competition. Accordingly, the payments that an energy-intensive business must pay to ÖMAG are limited to an amount corresponding to 0.5% of the net value of production of the previous calendar year. The cap on the purchase obligation of those businesses will not affect the total amount paid by the electricity distributors to ÖMAG, since it is only the breakdown of that amount between the various categories of consumers that changes.

In the Commission's view, the measures planned by the Austrian law for green electricity producers do constitute State aid, but are compatible with the Community guidelines on State aid for environmental protection.

¹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

² The Commission's decision states that 49.6% of ÖMAG's shares were held by publicly controlled shareholders and that 50.4% were held by privately controlled shareholders. According to that decision, the Commission had no evidence to suggest that the publicly controlled shareholders could exercise control (or at least joint control) over ÖMAG.

³ It should be noted that a similar scheme had already been implemented in the context of aid in an amount below the thresholds for notifying aid to the Commission (*de minimis* rules).

However, the Commission found, by decision of 8 March 2011, that the specific scheme for energy-intensive businesses constituted State aid incompatible with the internal market. It thus concluded that that aid could not be granted.⁴

By today's judgment, the General Court dismisses the proceedings brought by Austria against that decision.

In the Court's view, the Commission was correct in classifying the partial exemption of energy-intensive businesses as State aid.⁵

In particular, the Commission did not commit any error in considering that that partial exemption involved the use of State resources. The mandatory surcharge for green electricity laid down by the Green Electricity Act amounts to a parafiscal levy. ÖMAG acts neither for its own account nor freely, but under the strict control of the State, as concession holder and manager of aid granted by means of State funds to green electricity producers. The Commission was therefore correct to consider that the partial exemption at issue is akin to additional burden on the State, to the extent that any reduction in the amount of the levy owed by energy-intensive businesses may be regarded as having resulted in lost State revenue. The Court also emphasises that the aid mechanism for green energy and the exemption mechanism for energy-intensive businesses were established by law and must therefore be deemed to be attributable to the State.

The Commission was also correct to consider that the partial exemption at issue is selective: that measure introduces differentiations between undertakings which are, as regards the objective pursued, in a comparable factual and legal situation, without that differentiation arising from the nature and structure of the system of charges at issue.

Moreover, the Court considers, like the Commission, that the State aid at issue is incompatible with the common market.

That aid is not, in particular, compatible with the Community guidelines on State aid for environmental protection.⁶ It is true that, contrary to what the Commission argued, the aid at issue falls within the scope of the guidelines. However, the Commission, in continuation of its analysis, correctly held that it did not fulfil the conditions of the guidelines so as to be regarded as compatible with the internal market. The Court underlines in this context that the partial exemption at issue does not reflect harmonisation at EU level regarding taxation in the area of renewable energy.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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⁴ Decision 2011/528/EU on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ 2011 L 235, p. 42).

⁵ Such a classification requires four conditions to be met: (i) there must be interference by the State or with State resources, (ii) that interference must be capable of affecting trade between Member States, (iii) it must confer an advantage on its recipient, and (iv) it must distort or threaten to distort competition.

⁶ OJ 2008 C 82, p. 1.