General Court of the European Union
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Press and Information

Judgment in Case T-793/14
Tempus Energy Ltd and Tempus Energy Technology Ltd v Commission

The General Court annuls the Commission's decision not to raise objections to the aid scheme establishing a capacity market in the UK

The Commission should have had doubts in respect of certain aspects of the planned aid scheme and should have initiated a formal investigation procedure in order better to assess its compatibility

On 23 July 2014, the Commission decided not to raise objections to the aid scheme establishing a capacity market in the UK, on the ground that that scheme was compatible with the EU rules on State aid.[1]

Through that aid scheme, which was formally notified to the Commission one month earlier on 23 June 2014, the UK intends to remunerate capacity providers that commit to provide electricity or reduce or delay their electricity consumption during times of system stress. The legal basis for that scheme is the UK Energy Act 2013 and the regulatory acts adopted on the basis of that Act.

In order to guarantee security of supply, the UK considered that it was necessary to establish such a capacity market. For the UK, the electricity available was at risk of being insufficient in the near future for the purposes of satisfying high-demand periods. The oldest generating plants will be closing, and the electricity market is at risk of failing sufficiently to encourage generators to develop new generation capacities to make up for those closures. The UK concluded additionally that the electricity market did not offer sufficient encouragement to consumers to reduce their demand in order to remedy the situation.

The fundamental objective of the market is to encourage capacity providers, that is to say, principally, both electricity generators (power plants, including those using fossil fuels) and demand side response operators, who offer a service whereby consumption is rescheduled or reduced, to take into account the difficulties that may arise during high-demand periods.

Tempus, a group of companies with an interest in the capacity market, takes the view that the Commission could not conclude, following nothing more than a preliminary examination and in the light of the information available at the time of the decision, that the planned aid scheme did not raise doubts as to its compatibility with the internal market. According to Tempus, that scheme privileges generation over demand side response ('DSR') in a discriminatory and disproportionate manner that goes beyond what is necessary to achieve its objectives and satisfy the State aid rules.

In today's judgment, the Court notes that, in order to be in a position to carry out a sufficient examination for the purposes of the rules that apply to State aid, the Commission is not obliged to limit its analysis to the information contained in the notification of the measure at issue. It can and, where necessary, must seek relevant information so that, when it adopts the contested decision, it has at its disposal assessment factors that can reasonably be considered to be sufficient and clear for the purposes of its assessment.

[1] Commission Decision C(2014) 5083 final of 23 July 2014 not to raise objections to the aid scheme for the 'capacity market' proposed by the UK (State aid SA.35980 (2014/N-2)) (OJ 2014 C 348, p. 5).

The Court therefore examines the action to determine whether, after the preliminary examination phase, the measure notified by the UK raised doubts as to its compatibility with the internal market in the light of, inter alia, the guidelines.[2]

First, the Court points out that the concept of 'doubts' as to the compatibility of the notified measure with the internal market is exclusive. Thus, the Commission may not decline to initiate the formal investigation procedure in reliance on other circumstances, such as third-party interests, considerations of economy of procedure or any other ground of administrative or political convenience. Further, when the Commission does not succeed in eliminating all doubt within the meaning of Article 4(4) of Regulation No 659/1999,[3] that is to say at the end of a preliminary examination which may, in principle, take two months, it is obliged to initiate the formal investigation procedure. Finally, that concept is an objective one. Whether or not such doubts exist requires an investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information that could have been available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market.

In the present case, in order to prove the existence of doubts, Tempus had to establish that the Commission had not researched and examined all of the relevant information in such a way that, when it adopted the contested decision, it had at its disposal assessment factors that could reasonably be considered to be sufficient and clear for the purposes of its assessment or that, while it had those factors at its disposal, the Commission failed duly to take them into account in such a way as to eliminate all doubt as to the compatibility of the notified measure with the internal market.

Second, in that context, the Court found that the length of the discussions between the UK and the Commission, the scale of the area of investigation covered by the Commission during the preliminary examination and the circumstances surrounding the adoption of the contested decision are indications that may establish that there were doubts. In the present case, the Court holds that the measure notified by the UK is significant, complex and novel, especially as it is the first time the Commission had to assess a capacity market. The amounts involved in the multi-year aid scheme, which has been authorised for ten years, are particularly high, namely between GBP 0.9 billion and GBP 2.6 billion per year. Those who will be impacted by the effects of that scheme are existing and new generators and DSR operators, those effects being long term and experienced directly as well as indirectly.

Contrary to what was maintained by the Commission, the fact that the preliminary examination of the notified measure lasted only a month is not, however, a reliable indication allowing it to be established that doubts had not arisen by the end of the first investigation.

During the pre-notification phase, the Commission sent to the UK several sets of questions, which attest to the difficulties it encountered in carrying out a complete assessment on the measure that was to be notified. Thus, a week before that measure was notified, on 17 June 2014, the Commission delivered to the UK a third set of questions relating, inter alia, to the incentive effect of the planned measure, its proportionality and potential discrimination between capacity providers, three questions which constitute the central element of the assessment that the Commission should carry out pursuant to the guidelines on State aid for environmental protection and energy that were due to enter into force on 1 July 2014. At the same time, the Commission was also contacted informally by three types of operator (a provider of balancing services, the UK Demand Response Association and an operator that had acquired existing power plants) who shared their concerns regarding certain aspects envisaged for the capacity market. Further, it did not appear that, during the preliminary examination of the notification, the Commission carried out a specific investigation or independently assessed the information sent by the UK with regard to the role of DSR within the capacity market.

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[2] Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1).

[3] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

The Court finds that the Commission was not in a situation where it could simply rely on the information provided by the UK without carrying out its own investigation in order to examine and, if necessary, seek relevant information from, where appropriate, other interested parties for the purposes of its assessment. Given that the Commission has provided no evidence showing that such an examination was carried out, the Commission simply requested and reproduced the information submitted by the relevant Member State without carrying out its own analysis.

Third, the Court finds that the Commission failed properly to assess the role of DSR within the capacity market. The Court notes, first of all, that it was for the Commission to satisfy itself that the aid scheme was designed to allow DSR to participate alongside generation, because their respective capacities provide an effective solution to the capacity adequacy problem. In that context, the aid measures should be open and provide adequate incentives to the relevant operators.

The Court also finds that the Commission was aware of the difficulties referred to by the panel of technical experts regarding the appreciation of the potential of DSR. There was a risk that the planned capacity market would fail sufficiently to take into account the potential of DSR or, more widely, all potential that may reduce the need to resort to generation capacity in response to the capacity adequacy problem. However, in that context, the Court concludes that the Commission considered that, for the purposes of assessing the actual appreciation of DSR — and in order no longer to be in a situation where it could have doubts in that respect as to the compatibility of the aid scheme with the internal market — it was sufficient to accept without any further examination the modalities envisaged by the UK in that regard.

In the light of the elements available to the Commission and of the size of the role that could be played by DSR within the capacity market in order, inter alia, best to decide whether State intervention is needed and to limit aid for electricity generation to the appropriate amount, the Commission must have had doubts. In particular, the Commission could not be satisfied merely by the 'openness' of the measure and conclude, consequently, that it was technology neutral, without examining in greater detail the reality and the effectiveness of the appreciation of DSR in the capacity market.

The Court therefore finds that **the Commission should have concluded that there were doubts which should have led it to initiate the formal investigation procedure** in order to allow interested parties to submit their observations and to put at its disposal the relevant information in order better to assess the compatibility of the planned capacity market.

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 European Union 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.

Press contact: ☎ (+352) 4303 3355