

European Court of Justice Upholds German Electricity Pricing Scheme

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[1] A German law known as the *Stromeinspeisungsgesetz* (Law on feeding electricity from renewable resources into the public grid) requires producers of electricity to purchase (at a fixed, minimum price) and pass along to electricity distributors energy produced from renewable resources in the producer's area of service. (*Bundesgesetzblatt* (BGBl. [Register of German Federal Law] 1990 I, p. 2633). As required by Article 88 of the Consolidated EC Treaty, the German government notified the Commission of the European Communities of the law's state aid provisions in 1990, and received authorization for those provisions from the Commission. The Commission concluded that the law was consistent with the energy policy aims of the European Communities and that its impact on the industry would be slight.

[2] The *Stromeinspeisungsgesetz* was amended in 1998 to impose a system for sharing the burden created by the required purchase (at a fixed, minimum price) of electricity produced from renewable resources. The burden-sharing rules required upstream network operators [distributors] . . . to reimburse the electricity supply undertaking [producers] in respect of the supplementary costs resulting from the kilowatt hours exceeding [5% of the total kilowatt hours supplied by the producer during a calendar year]. (*Bundesgesetzblatt* (BGBl. [Register of German Federal Law] 1998 I, p. 730). Under the 1998 amendments, the producers were to bear the burden of the additional costs created by the required purchase of energy from renewable resources, up to the first 5% of their total production of kilowatt hours of electricity. Upstream distributors of electricity were to bear the burden of the additional costs created by the required purchase of energy from renewable resources, above 5% of the producers' total production of kilowatt hours of electricity.

[3] While the 1998 amendment of the *Stromeinspeisungsgesetz* appeared to be a response to repeated expressions of concern from the Commission regarding the law's continued compatibility with the Communities' rules regarding state aid, the German government did not submit the amended law to the Commission for review.

[4] In the present action, the producer Schlesweg applied to PreussenElektra, an upstream distributor of electricity, to recover those costs that could be attributed to its required purchase of energy from renewable resources that exceeded 5% of Schlesweg's total production of kilowatt hours of electricity. PreussenElektra brought an action in the *Landgericht* Kiel (Regional Court of the city Kiel) seeking to recover that payment, claiming that the amended *Stromeinspeisungsgesetz* constitutes a violation of Community law as an amended system of state aid that had not been notified to the commission. Pursuant to Article 234 of the Consolidated EC Treaty,⁽¹⁾ the *Landgericht* Kiel referred the matter to the Court of Justice for the European Communities for the resolution of, *inter alia*, the following question:

Do the rules on payment and compensation for supplies of electricity, laid down in Paragraph 2 or 3 or 4 or in Paragraphs 2 to 4 of the [*Stromeinspeisungsgesetz*], as amended [in 1998] constitute State aid for the purposes of [former] Article 92 of the EC Treaty [Article 87 of the Consolidated EC Treaty]?(2)

[5] The Court of Justice began its analysis by affirming that minimum-pricing schemes like that at issue in the *Stromeinspeisungsgesetz* deliver clear, competitive advantages to certain sectors. The Court explained, however, that it had previously interpreted Article 87 of the Consolidated EC Treaty to prohibit only "direct" or "indirect" state aid that generates such advantages. In light of this precedent, the Court explained, the benefit under the *Stromeinspeisungsgesetz* that accrues to the energy producers that make use of renewable resources runs afoul of Article 87's state aid prohibition only if the benefit can be traced directly or indirectly to state resources. The Court concluded that a legislative or regulatory scheme that requires the transfer of resources from private undertakings to benefit a targeted sector do not constitute prohibited direct or indirect state aid. The Court held that:

. . . the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).

(*PreussenElektra AG and Schlesweg AG Case* [European Court of Justice C-379/98, 13 March 2001, paras. 61-62

<http://europa.eu.int/cj/en/cp/aff/>).

[6] With its decision in the *PreussenElektra Case*, the Court merely extended, to the specific circumstances of the private energy market, the well established rule of Community jurisprudence that holds that prohibited state aid consists only of advantages "granted directly or indirectly through resources or constituting an additional charge for the State . . ." (*Piaggio Case* [European Court of Justice C-295/97, 17 June 1999, para. 35 <http://europa.eu.int/jurisp/cgi-bin/>]).(3)

For more information:

Decision of the European Court of Justice online:
<http://europa.eu.int/cj/en/cp/aff/cp0110en.htm>

(1) Article 234 (Consolidated EC Treaty) reads:

The Court shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

(2) Article 87 (Consolidated EC Treaty) reads:

1. Save as otherwise provided in this Treaty, 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 insofar as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interests;

(d) aid to promote cultural and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interests;

(e) such other categories of aid as may be specified by decision of the Council acting by qualified majority on a proposal from the Commission.

(3) The court has previously applied this rule to legislation that imposed fixed-term employment contracts on certain industries. (*Viscido Case* [European Court of Justice C-52/97, 53/97 and 54/97, 7 May 1998, para. 13 <http://europa.eu.int/jurisp/cgi-bin/>]). The transfer of public capital has also been found to meet the terms of this rule, when the transfer was conducted under normal market circumstances. (European Court of Justice C-261/89, 1991). For a more complete treatment of the principle of state aid, see Thomas Opperman, *Europarecht* (2.ed), para. 1108-1135 (C.H. Beck 1999).