Provisional text

JUDGMENT OF THE COURT (Third Chamber)
28 March 2019 (*)

(Appeal — State aid — Aid granted by certain provisions of the amended German law concerning renewable energy sources (EEG 2012) — Aid supporting renewable electricity and reduced EEG surcharge for energy-intensive users — Decision declaring the aid partially incompatible with the internal market — Concept of State aid — Advantage — State resources — Public control of resources — Measure which can be assimilated to a levy on electricity consumption)

In Case C-405/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 19 July 2016,

Federal Republic of Germany, represented by T. Henze and R. Kanitz, acting as Agents, and by T. Lübbig, Rechtsanwalt,

appellant,

the other party to the proceedings being:

European Commission, represented by K. Herrmann and T. Maxian Rusche, acting as Agents,

defendant at first instance,

THE COURT (Third Chamber),

composed of M. Vilaras (Rapporteur), President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

By its appeal, the Federal Republic of Germany seeks annulment of the judgment of the General Court of the European Union of 10 May 2016, *Germany* v *Commission* (T-47/15, 'the judgment under appeal', EU:T:2016:281), by which the General Court dismissed its action, based on Article 263 TFEU, for annulment of Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA. 33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ 2015 L 250, p. 122) ('the decision at issue').

Background to the dispute and the decision at issue

On 28 July 2011, the German legislature adopted the Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien (Law revising the legal framework for the promotion of electricity production from renewable energy) (BGBl. 2011 I, p. 1634; 'the EEG 2012'). That law, in force between 1 January 2012 and 31 July 2014, aimed to increase the share in the electricity supply of electricity produced from renewable energy sources and mine gas ('EEG electricity').

The main characteristics of the mechanism established by the EEG 2012 are set out in paragraphs 4 to 12 of the judgment under appeal as follows:

In the first place, network operators at all voltage levels ("NOs") ensuring the general supply of electricity are required (i) to connect installations producing EEG electricity within their area of activity to their network (Paragraphs 5 to 7 of the EEG 2012), (ii) to feed that electricity into their network, transmit it and distribute it by way of priority (Paragraphs 8 to 12 of the EEG 2012) and (iii) to make to the operators of those installations a payment that is calculated on the basis of tariffs laid down by law, in the light of the nature of the electricity at issue and the rated or installed capacity of the installation concerned (Paragraphs 16 to 33 of the EEG 2012). Alternatively, operators of installations producing EEG electricity are entitled, first, to sell all or part of that electricity directly to third parties and, secondly, to require the NO to which the installation would have been connected but for such direct sale to pay them a market premium calculated on the basis of the amount that would have been payable had the installation been connected (Paragraphs 33a to 33i of the EEG 2012). In practice, it is not in dispute that those obligations are borne essentially by local low or medium-voltage distribution system operators ("DSOs").

In the second place, the DSOs are required to transmit the EEG electricity to the interregional upstream operators of high and very-high-voltage transmission systems ("TSOs") (Paragraph 34 of the EEG 2012). As consideration for that obligation, the TSOs are required to pay the DSOs the equivalent of the payments and market premiums received by installation operators from the DSOs (Paragraph 35 of the EEG 2012).

In the third place, the EEG 2012 provides for a 'nationwide compensation mechanism' in respect of, first, the quantities of EEG electricity which each TSO feeds into its network and, secondly, the sums paid by way of consideration to the DSOs (Paragraph 36 of the EEG 2012). In practice, each TSO that has fed in and paid for a quantity of EEG electricity greater than the quantity provided by electricity suppliers to final customers located in its area may claim, in regard to the other TSOs, an entitlement to compensation corresponding to that difference. Since the years 2009-10, the compensation no longer takes place in actual form (exchange of EEG electricity flows) but in financial form (compensation of the related costs). Three of the four TSOs concerned by that compensation mechanism are private undertakings (Amprion GmbH, TenneT TSO GmbH and 50Hertz Transmission GmbH), whilst the fourth is a public undertaking (Transnet BW GmbH).

In the fourth place, the TSOs are required to sell the EEG electricity which they feed into their network on the spot market of the electricity exchange (Paragraph 37(1) of the EEG 2012). If the price thereby obtained does not enable them to cover the financial burden imposed upon them by the statutory obligation to pay for that electricity at the rates laid down by law, they are entitled, under the conditions laid down by the legislative authorities, to require the suppliers to the final customers to pay them the difference, in proportion to the quantities sold. This mechanism is called the "EEG surcharge" (Paragraph 37(2) of the EEG 2012). The amount of the EEG surcharge may nevertheless be reduced by EUR 0.02 per kilowatt hour (kWh) in certain cases (Paragraph 39 of the EEG 2012). In order to obtain such a reduction, referred to by the EEG 2012 as a "reduction of the EEG surcharge", but also known as the "green electricity privilege", electricity suppliers must in particular demonstrate (i) that at least 50% of the electricity that they deliver to their customers is EEG electricity, (ii), that at least 20% of that electricity is derived from wind or solar radiation energy and (iii) that the electricity is sold directly to their customers.

..

In the fifth place, it is not in dispute that, although the EEG 2012 does not oblige electricity suppliers to pass the EEG surcharge on to the final customers, it does not prevent them from doing so, either. Nor is it in dispute that the suppliers, which are themselves obliged to pay the surcharge to the TSOs, in practice pass it on to their customers, as the Federal Republic of Germany indeed confirmed at the hearing. The manner in which the surcharge is to be shown on the bill sent to customers is prescribed by the EEG 2012 (Paragraph 53 of the EEG 2012), as are the conditions under which customers must be informed of the proportion of renewable energy subsidised under the Law on renewable energy that is supplied to them (Paragraph 54 of the EEG 2012).

In addition, the EEG 2012 lays down a special compensation scheme, under which the Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office for Economic Affairs and Export Control; 'the BAFA') each year caps the amount of the EEG surcharge that may be passed on by electricity suppliers to two specified categories of customers — namely, first, 'electricity-intensive undertakings in the manufacturing sector' ('EIUs') and, secondly, 'railways' — following a request which must be submitted by them by 30 June of the previous year, with the aim of reducing their electricity costs and, in so doing, of maintaining their competitiveness (Paragraph 40 of the EEG 2012).

The EEG 2012 specifies the conditions for qualifying for that scheme, the procedure that must be followed by eligible undertakings, the detailed rules for determining the cap on a case-by-case basis and the effects of decisions adopted in this connection by the BAFA (Paragraphs 41 to 44 of the EEG 2012). The EEG 2012 provides in particular that, for undertakings in the manufacturing sector whose electricity consumption costs represent at least 14% of their gross value added and whose consumption is at least 1 gigawatt hour (GWh), the cap is set at 10% of the EEG surcharge for the part of their consumption between 1 GWh and 10 GWh, at 1% of that surcharge for the part of their consumption between 10 GWh and 100 GWh, and at EUR 0.0005 per kWh above that. The EEG 2012 also provides that, for undertakings in the manufacturing sector whose electricity consumption costs represent at least 20% of their gross value added and whose consumption is at least 100 GWh, the EEG surcharge is capped at EUR 0.0005 per kWh from the first kilowatt hour. The EEG 2012 further states that electricity suppliers must inform undertakings that have received a notice capping the EEG surcharge (i) of the proportion of renewable energy benefiting from aid under the Law on renewable energy that is supplied to them, (ii) of the composition of their overall energy mix and (iii), for undertakings which are supported pursuant to the Law on renewable energy, of the composition of the energy mix that is provided to them (Paragraph 54 of the EEG 2012).

In the sixth place, the EEG 2012 contains a set of obligations requiring the provision of information and publication that are imposed on operators of installations, NOs and electricity suppliers, in particular vis-à-vis TSOs and the Bundesnetzagentur (Federal Networks Agency; "the BNetzA"), as well as a series of transparency obligations owed specifically by TSOs (Paragraphs 45 to 51 of the EEG 2012). That law also specifies the powers of supervision and control that the BNetzA possesses in respect of DSOs and TSOs (Paragraph 61 of the EEG 2012).'

After deciding, on 18 December 2013, to initiate the formal investigation procedure in respect of the measures contained in the EEG 2012, the European Commission adopted the decision at issue on 25 November 2014.

In that decision, the Commission considers that the EEG 2012 involves two types of selective advantages which lead to a classification as State aid, for the purposes of Article 107(1) TFEU, namely, first, support for the production of electricity from renewable energy sources and mine gas, which guaranteed EEG electricity producers, through feed-in tariffs and market premiums, a price for electricity above the market price and, secondly, the special compensation scheme, by virtue of which the EEG surcharge could be reduced for energy-intensive users (Article 3 of the decision at issue).

The operative part of the decision at issue reads as follows:

'*Article 1*

The State aid for the support of electricity production from renewable energy sources and from mine gas, including its financing mechanism, granted on the basis of the [EEG 2012], unlawfully put into effect by Germany in breach of

Article 108(3) [TFEU], is compatible with the internal market subject to the implementation of the commitment set out in Annex I by Germany.

...

Article 3

1. The State aid consisting of reductions in the surcharge for the funding of support for electricity from renewable sources ... in the years 2013 and 2014 for energy-intensive users ..., unlawfully put into effect by Germany in breach of Article 108(3) [TFEU], is compatible with the internal market if it falls into one of the four categories set out in this paragraph.

...

2. Any aid that is not covered by paragraph 1 is incompatible with the internal market.'

The proceedings before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 2 February 2015, the Federal Republic of Germany brought an action for annulment of the decision at issue, raising three pleas in law which the General Court rejected in turn in the judgment under appeal.

The General Court rejected as unfounded, in paragraphs 33 to 42 of the judgment under appeal, the first plea in law, alleging that the Commission committed manifest errors of assessment in its evaluation of the State's role in the operation of the EEG 2012. The General Court noted, inter alia, in paragraph 40 of the judgment under appeal, that the measures at issue were established by law and were, therefore, imputable to the German State.

The General Court also rejected, in paragraphs 49 to 70 of the judgment under appeal, the various arguments put forward by the Federal Republic of Germany in the context of its second plea in law, alleging that there was no advantage linked to the special compensation scheme. It pointed out, in paragraph 44 of the judgment under appeal, that that plea in law concerned exclusively the very existence for EIUs of an advantage, without raising either the question of the selectivity of that advantage nor that of the existence of an advantage linked to the support scheme in favour of EEG electricity producers. It held, inter alia, in paragraph 55 of the judgment under appeal, that the special compensation scheme created an advantage for EIUs, in so far as it released them from a charge that they should normally have borne.

Finally, the General Court rejected, in paragraphs 81 to 129 of the judgment under appeal, the various parts of the third plea in law put forward by the Federal Republic of Germany, alleging that there was no advantage financed through State resources. It thus held that the Commission was fully entitled to consider that the mechanism established by the EEG 2012, namely the scheme to support producers of EEG electricity and the special compensation scheme for EIUs, involved State resources, within the meaning of Article 107(1) TFEU.

In the present case, after briefly recalling, in paragraphs 81 to 83 of the judgment under appeal, the relevant case-law of the Court of Justice concerning the concept of State resources, in particular the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 37), the General Court, first of all, summarised the decision at issue in paragraphs 84 to 90 of the judgment under appeal.

Next, in paragraphs 91 to 129 of the judgment under appeal, the General Court examined whether the Commission had been correct in finding that the EEG 2012 involved State resources, within the meaning of Article 107(1) TFEU.

In that regard, the General Court noted, at the outset, in paragraph 92 of the judgment under appeal, that 'the EEG surcharge, collected and administered by the TSOs, [was] intended ultimately to cover the costs generated by the feed-in tariffs and market premium provided for in the EEG 2012 by guaranteeing producers of EEG electricity a price for the electricity they produce[d] that is above the market price' so that 'the EEG surcharge must be considered to result, principally, from implementation of a public policy, laid down by the State through legislation, to support producers of EEG electricity'.

Finally, the General Court endeavoured to show that the Commission had not erred, first, in relying on three sets of considerations, set out in paragraphs 93 to 110 of the judgment under appeal and summarised in paragraphs 111 and 112 of that judgment and, secondly, by rejecting, in paragraphs 113 to 126 of the judgment under appeal, the arguments put forward by the Federal Republic of Germany.

Paragraphs 111 and 112 of the judgment under appeal are worded as follows:

Accordingly, it must be held that the Commission was correct in maintaining, in recital 138 of the contested decision, read in conjunction with recitals 98 to 137, that the advantage provided for by Paragraphs 16 to 33i of the EEG 2012 for producers of EEG electricity through the feed-in tariffs and market premiums is akin, in the present instance, to a levy set by the State authorities involving State resources in that the State organises a transfer of financial resources through legislation and establishes for what purposes those financial resources may be used.

That conclusion also applies to the advantage for the energy-intensive users consisting of the EIUs in that, as the Commission correctly pointed out in recital 114 of the contested decision, the compensation mechanism laid down by the EEG 2012 constitutes an additional burden for the TSOs. Any reduction in the amount of the EEG surcharge has precisely the effect of reducing the amounts collected by electricity suppliers from EIUs and may be regarded as leading to losses in revenue for the TSOs. However, those losses are subsequently recovered from other suppliers and, de facto, from other final customers, in order to offset the losses thus incurred, as the Federal Republic of Germany indeed confirmed at the hearing in reply to a question from the Court. Thus, the average final consumer in Germany is involved, in a certain way, in the subsidising of the EIUs for which the EEG surcharge is capped. Moreover, the fact that final electricity consumers who are not EIUs must bear additional costs caused by the capping of the EEG surcharge for EIUs is a further indication, when analysed with the foregoing reasoning, that the funds generated by the EEG surcharge are indeed special resources, equivalent to a levy on electricity consumption, the use of which for

strictly defined purposes was laid down in advance by the German legislature within the framework of implementation of a public policy and not of a private initiative.'

The General Court concluded its analysis in paragraphs 127 and 128 of the judgment under appeal, as follows:

It follows from that analysis that the mechanisms under the EEG 2012 result, principally, from implementation of a public policy, laid down through the EEG 2012 by the State, to support producers of EEG electricity and that, first, the funds generated by the EEG surcharge and administered collectively by the TSOs remain under the dominant influence of the public authorities, secondly, the amounts in question, generated by the EEG surcharge, are funds which involve a State resource and can be assimilated to a levy and, thirdly, it may be concluded from the powers and tasks given to the TSOs that they do not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds.

It follows from all the foregoing that the Commission was correct in finding in the contested decision that the EEG 2012 involves State resources within the meaning of Article 107(1) TFEU.'

Forms of order sought and procedure before the Court of Justice

The Federal Republic of Germany claims that the Court should:

set aside the judgment under appeal in its entirety and uphold its action against the decision at issue;

in the alternative, refer the case back to the General Court;

order the Commission to pay the costs.

The Commission contends that the Court should:

reject the first ground of appeal as inadmissible and, in the alternative, as unfounded;

reject the second ground of appeal as partially inadmissible, or in the alternative as partially ineffective and, in any event, as unfounded;

reject the third ground of appeal as unfounded; and

order the Federal Republic of Germany to bear the costs of the proceedings.

By decision of the President of the Court of Justice of 25 October 2017, the proceedings in the present case were stayed, pursuant to Article 55(1)(b) of the Rules of Procedure of the Court of Justice, pending delivery of the judgment of 25 July 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:582).

The appeal

In support of its appeal, the Federal Republic of Germany puts forward three grounds of appeal, the first two of which allege infringement of Article 107(1) TFEU and the third failure to observe the obligation to state the reasons on which judgments are based. The Commission claims that the first two grounds of appeal are inadmissible and, in the alternative, ineffective and, in any event, unfounded and that the third ground of appeal is unfounded.

The first ground of appeal, alleging infringement of Article 107(1) TFEU in so far as concerns the use of State resources

Arguments of the parties

By its first ground of appeal, which is divided into two parts, the Federal Republic of Germany claims, in essence, that in concluding that the EEG surcharge system involved the grant of an advantage through State resources or, at the very least, imputable to the State, the General Court erred in law in the interpretation and application of the criterion relating to the grant of an advantage through State resources, within the meaning of Article 107(1) TFEU.

In a very general way, that Member State submits, first of all, that the General Court failed, in its assessment of the use of State resources and in concluding that the TSOs were services entrusted with a potential power of disposal and State control over the funds from the EEG surcharge, sufficiently to distinguish the roles that the State may play as both legislative authority and executive authority.

By the first part of its first ground of appeal, which mainly concerns paragraph 93 of the judgment under appeal, the Federal Republic of Germany claims that the General Court erred in assessing the role played by the TSOs in the EEG surcharge system.

The Federal Republic of Germany maintains that, in paragraph 93, the General Court found, first, that the EEG 2012 conferred on the TSOs a series of obligations and rights as regards implementation of the mechanisms that it established, so that they were the central point in the operation of the system laid down by the EEG. The General Court found, secondly, that the funds generated by the EEG surcharge did not pass directly from the final consumers to the producers of EEG electricity, but required the intervention of intermediaries, entrusted in particular with their collection and administration, that they were not paid into the TSOs' general budget or freely available to them, so that they were administered collectively by the TSOs and remained under the dominant influence of the public authorities.

By describing the operation of the allocation mechanism set up by the EEG 2012, then comparing that mechanism with the case-law of the Court of Justice, the Federal Republic of Germany seeks to demonstrate in turn, first, that the mechanism set up by the EEG 2012 did not involve any link to the budget of the State or of a public body, secondly that any rights of access rights or control exercised by the State in respect of TSOs did not involve any State control of EEG resources, and, thirdly that no levy or waiver of State revenue existed.

Thus, first, the assessment of the EEG allocation mechanism does not in any way permit the conclusion that State resources or resources attributable to the State were used, as the Court of Justice found in its judgments of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160); of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), and of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413).

According to that case-law, charges, taxes and fees are characterised by the fact that the revenue generated must, in one form or another, and directly or indirectly, flow into the budget of the State or of a public body. However, the resources received by TSOs to cover the costs of marketing EEG electricity do not in any way reduce, directly or

indirectly, the resources of the State. They are participants in the supply chain which incur those costs in exchange for the 'renewable' nature of the electricity and which offset them in the context of the private economy.

The State does not therefore enjoy any access to that revenue and has not delegated the performance of a public role to the TSOs. They do not collect the EEG surcharge on behalf of the State, with the result that the General Court erred in law in finding that they were quasi-holders of State concessions. Having inaccurately assessed the legal nature of the role of the TSOs, the General Court incorrectly applied the concept of control and of imputability of the conduct of TSOs to the State.

The EEG surcharge is not attributed to the federal budget or to the budget of a public body, as shown by the compensation mechanism for TSO costs. The TSOs set the amount of that surcharge by comparing the revenue and costs, where the revenue, to a greater or lesser extent, is subject of compensation between the TSOs the following year, without being included in the budget of a public entity. Surplus revenue is not paid into the State budget and excess expenditure is not compensated from that budget.

It is, ultimately, legally incorrect to assume, as did the General Court in paragraph 83 of the judgment under appeal that the relevant sums 'constantly' remain available to the 'competent national authorities' or even, as it did in paragraph 94 of the judgment under appeal, that the funds administered collectively by the TSOs remain under the dominant influence of the public authorities.

The General Court also gave significant weight, in paragraph 117 of that judgment, to the fact that funds received by TSOs have to be managed via a separate account, subject to control by State authorities. However, the separate accounts are held by the TSOs for reasons of transparency and to avoid abuse, and not to allow the Member State concerned to manage special assets belonging to companies.

Secondly, the General Court also erred in law in finding that the tasks relating to supervision and checking that the acts carried out by private market participants are valid and lawful, which are entrusted to State authorities, involved State control of EEG resources.

The mechanisms provided for by the EEG, which correspond to the assessment criteria developed by the Court of Justice in its judgment of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 38), are dedicated to checking that the allocation system functions properly and that the intention of the legislature is observed, but do not create a significant opportunity for guidance or influence on the part of the State authorities, which permit the view that there is 'exercise of State control'. Those authorities have only the option of adopting disciplinary measures or bringing administrative offence proceedings against private operators who infringe the EEG 2012 and do not have any authority allowing them access to the resources of those operators through the influencing of payments and financial flows.

The EEG payment by NOs is itself excluded from State control. The NOs alone take the decision whether or not to make that payment and determine the amount. Likewise, collection of the EEG surcharge is subject only to limited supervision, with the TSOs being the sole parties to decide whether or not to require it. Contrary to what the General Court stated in paragraph 125 of the judgment under appeal, the TSOs are not strictly monitored by the competent German administrative bodies, and in particular not by the BNetzA, whose supervisory task consists, in essence, of ensuring the correct implementation of the provisions relating to the EEG surcharge. The BNetzA does not have the right to determine the amount of the EEG surcharge, which is calculated by the TSOs under their own responsibility.

The legal requirement for an abstract system of calculation and the obligations of transparency and supervision rights that that entails serve only to prevent the unjust enrichment of an operator during the stages in the chain whereby the surcharge is passed on, with protection against abuse having to be exercised before the civil courts, in the context of the private law relationships between the participants. Those participants are not beneficiaries of a delegation or a State concession and have no opportunity to ask an administrative authority to invoke their rights.

Thirdly, the EEG surcharge is not a levy and, consequently, capping thereof does not constitute a waiver of State resources. The General Court erred in law in finding, in paragraph 95 of the judgment under appeal that, in so far as final consumers were required to pay a price supplement, the EEG surcharge constituted a charge unilaterally imposed by the State in the context of its policy to support producers of EEG electricity, which can be assimilated, in terms of its effects, to a levy on electricity consumption in Germany. The mere fact that the EEG allocation mechanism allows the payments to be made to operators of installations to be passed on to the final electricity consumers does not support the conclusion that a levy exists.

The EEG surcharge constitutes an increase applied to a purchase price of a private nature paid by electricity suppliers in return for the 'green' electricity label and thus falls within the scope of a relationship involving a service and consideration, unlike a levy which is collected on a compulsory basis without consideration. In addition, the case-law of the Court of Justice requires, in order for a levy to be classified as State aid, it must be hypothecated to the aid measure, which is not so in the case of the EEG surcharge. That surcharge does not constitute revenue of a Member State, determined in an abstract manner. The EEG 2012 thus constitutes a continuation of the Stromeinspeisungsgesetz (Law on feeding electricity from renewable energy sources into the public grid, BGBl. 1990 I, p. 2633) which the Court of Justice did not classify as aid in its judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160) the only difference between the two schemes arising being that the electricity suppliers buy not the physical electricity but the renewable nature of that electricity at a fixed price (EEG surcharge).

Ultimately, the essential characteristics of a levy are lacking, in so far as, first, the EEG does not require electricity suppliers to invoice that surcharge to their customers, secondly, the passing on of that surcharge, which electricity suppliers include in their sales price, cannot be enforced under public law, but only through a civil action and, thirdly,

the 'revenue' generated by that surcharge forms part of the general assets of the electricity suppliers, with the State having no authority to exercise the slightest influence over the management or use of those funds.

By the second part of its first ground of appeal, the Federal Republic of Germany maintains that the General Court also erred in disregarding the fact that, under the system established by the EEG 2012, recognition of aid granted through State resources essentially depended on the role of the electricity suppliers, which in the present case was not sufficiently taken into consideration.

First, while the General Court was correct in finding that the EEG 2012 does not require electricity suppliers to pass on the EEG surcharge to the end customers, but does not, however, prohibit this, it misconstrued the role of those suppliers in concluding, in paragraphs 95 et seq. of the judgment under appeal, that that surcharge was a de facto levy and that it cannot be analysed as the TSOs' own resource, for which the Member State simply prescribed a particular use by a legislative measure.

Secondly, the General Court failed to have regard to the fact that the role and task of the electricity suppliers are much less regulated by law than those of the TSOs. Those suppliers are not required to keep separate accounts or to ensure that assets are kept separately, in so far as the EEG surcharge should be regarded as a normal share of their revenues. They are not subject to any legal requirement concerning conduct regarding prices or use of resources. No State control is exercised over their relationships with their customers, who allegedly finance the aid system criticised by the Commission and the General Court. The EEG surcharge and any passing-on thereof to final consumers by electricity suppliers are part of a commercial relationship between private undertakings or individuals without the intervention of a public authority. The fact that the funds in question do not pass directly from consumers to electricity producers but require the intervention of intermediaries responsible for collecting and managing them has no bearing on their being regarded as private resources.

Thirdly, while the General Court had examined the role of the electricity suppliers in sufficient detail, it should have reached the conclusion that the State had no access to EEG resources. This is particularly true since the relationship between electricity suppliers and the final consumers is of a purely private nature. The General Court misconstrued the scope of the concept of control and thus infringed Article 107(1) TFEU by classifying the activity of a private company as 'State control', when the latter is not subject to any legal obligation to collect the EEG surcharge, the amount of that surcharge to be passed on, if that is the case, is not subject to legal requirements, the authorities cannot exercise any influence on price setting by electricity suppliers, the turnover of those suppliers which may contain the payment of the surcharge forms part of their assets and State authorities are not empowered to exercise an influence over the use, by the latter, of those resources.

The Commission claims that the first ground of appeal raised by the Federal Republic of Germany is inadmissible and, in the alternative, that it is partly ineffective and, in any event, unfounded.

Findings of the Court

– *Admissibility of the ground of appeal in its entirety*

The Commission claims that the first ground of appeal raised by the Federal Republic of Germany is inadmissible in its entirety in that it criticises not the General Court's legal interpretation of the concept of State control, but its findings relating to national law, which form part of the assessment of the facts.

Such an argument must be rejected.

While it is true that the Federal Republic of Germany relies on the wording of the EEG 2012 to invoke its various arguments, the fact remains that, in the first part of its first ground of appeal, it claims essentially that the General Court erred in law, because it gave too broad an interpretation of the concept of State control, inter alia, by classifying the amounts generated by the EEG surcharge as funds involving a State resource which can be assimilated to a levy, on the one hand, and in its finding of public control on the part of the Member State over those funds via the TSOs, on the other hand.

It follows that the first ground of appeal is admissible.

– *The first part of the first ground of appeal, alleging that the General Court erred in assessing the role played by the TSOs in the EEG surcharge system*

It must be noted that, for it to be possible to classify advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited).

In the first place, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission*, 67/85, 68/85 and 70/85, EU:C:1988:38, paragraph 35, of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraphs 17 and 18, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 21).

In the present case, the General Court held, in paragraph 40 of the judgment under appeal, that the support and compensation mechanisms at issue in the present case were established by the EEG 2012, with the result that they should be regarded as imputable to the State.

However, while the Federal Republic of Germany repeatedly raises the issue of the imputability of the measures at issue to the State in its appeal, it has not formally contested the finding thus made by the General Court or even argued that the General Court erred in law in that regard. Consequently, the arguments in that regard must, in any event, as the Commission has argued, be rejected as inadmissible.

In the second place, it follows from the settled case-law of the Court of Justice that the prohibition laid down in Article 107(1) TFEU covers both aid granted directly by the State or through State resources and aid granted by public

or private bodies established or designated by the State with a view to administering the aid (judgments of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 21; of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 23 and the case-law cited).

The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (judgments of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58; and of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 26).

EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23, and of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 45).

It also follows from the case-law of the Court of Justice that it is not necessary to establish in every case that there has been a transfer of State resources for the advantage conferred on one or more undertakings to be capable of being regarded as State aid, within the meaning of Article 107(1) TFEU (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 36; and of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 34).

Thus, the Court of Justice has held that a measure consisting, inter alia, in an obligation to purchase energy may fall within the definition of 'aid' even though it does not involve a transfer of State resources (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 19, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 24).

Article 107(1) TFEU covers all the financial means by which public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the aid measure concerned are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 37; of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 25 and the case-law cited).

The Court of Justice has, more specifically, held that funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities (judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 35, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 25).

The decisive factor, in that regard, consists of the fact that such entities are appointed by the State to manage a State resource and are not merely bound by an obligation to purchase by means of their own financial resources (see, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74; of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraphs 30 and 35; and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraphs 26 and 30).

It must, however, also be noted that, for the purposes of establishing whether the advantage given to the beneficiary is a burden on the State budget, it is necessary to determine whether there exists a sufficiently direct link between, on the one hand, that advantage and, on the other hand, a reduction of that budget, or a sufficiently concrete economic risk of burdens on that budget (see, to that effect, judgments of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 111, of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109, of 9 October 2014, *Ministerio de Defensa and Navantia,* C-522/13, EU:C:2014:2262, paragraph 47, and of 16 April 2015, *Trapeza Eurobank Ergasias,* C-690/13, EU:C:2015:235, paragraph 19).

It is in the light of those factors that it is appropriate to examine the first part of the first ground of appeal put forward by the Federal Republic of Germany, in which it claims that the General Court erred in law in finding, first, that the mechanism established by the EEG 2012 was connected with the budget of the Member State or of a public body, secondly, that the supervisory and control tasks assigned to the State authorities involved public control of EEG resources and, thirdly, that the EEG surcharge constituted a levy and the capping of that surcharge relinquishing of State resources.

It must be noted, in that the regard, that the General Court's finding, set out in paragraph 128 of the judgment under appeal, that the Commission was correct in considering, in the decision at issue, that the EEG 2012 involved State resources, within the meaning of Article 107(1) TFEU, is based on the findings made in paragraphs 92 to 126 of that judgment and summarised in paragraph 127. In that paragraph, the General Court noted that the mechanisms resulting from the EEG 2012 derived, principally, from the implementation of a public policy, laid down by the State through the EEG 2012, to support producers of EEG electricity. It then indicated, first, that the funds generated by the EEG surcharge and administered collectively by the TSOs remained under the dominant influence of the public authorities, secondly, that the amounts in question, generated by the EEG surcharge, were funds which involve a State

resource and can be assimilated to a levy and, thirdly, that it could be concluded from the powers and tasks given to the TSOs that they did not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds.

However, the General Court's statement that, in essence, the mechanisms resulting from the EEG 2012 derived from implementation of a public policy, laid down by the State, to support producers of EEG electricity merely repeats the conclusion, previously set out in paragraph 40 of the judgment under appeal, that those mechanisms must be regarded as imputable to the State. As is apparent from the case-law cited in paragraph 48 of the present judgment, that factor, although necessary for the purposes of classifying the advantages resulting from the mechanisms set up by the EEG 2012 as 'aid' within the meaning of Article 107(1) TFEU, is not sufficient in itself for such a classification to be accepted. It is necessary to demonstrate that the advantages in question are granted directly or indirectly through State resources.

It is therefore necessary to examine whether the General Court could, without erring in law, have found, on the basis of the three other factors referred to in paragraph 127 of the judgment under appeal and recalled in paragraph 62 of the present judgment, that the funds generated by the EEG surcharge constituted State resources.

As regards the claim that the amounts generated by the EEG surcharge are funds involving a State resource which can be assimilated to a levy, it must be recalled that, in point 105 of the decision at issue, the Commission classified that surcharge as a 'special levy'.

The General Court noted, in paragraph 95 of the judgment under appeal, that 'electricity suppliers in practice pass[ed] on the financial burden resulting from the EEG surcharge to the final customers', that that passing on should have been regarded 'as a consequence foreseen and organised by the German legislature' and that the price supplement or additional charge that the final electricity consumers were 'de facto' required to pay' constituted 'a charge that is unilaterally imposed by the State in the context of its policy to support producers of EEG electricity [which] can be assimilated, from the point of view of its effects, to a levy on electricity consumption in Germany'.

It was on the basis of those findings that the General Court stated, in paragraph 96 of the judgment under appeal, with reference 'by analogy' to the judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 66) that the amounts generated by the EEG surcharge were funds involving a State resource that can be assimilated to a levy; that statement was repeated in paragraph 127 of the judgment under appeal.

However, in paragraph 66 of the judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413), the Court of Justice, for the purposes of classifying a price supplement imposed on the electricity purchasers in question in that case, referred to paragraph 47 of that judgment. The finding set out in the latter paragraph, to the effect that the supplement in question ought to have been classified as a levy, was based, inter alia, on the fact, referred to by the Court of Justice in paragraph 45 of that judgment, that that price supplement constituted a charge unilaterally imposed by law, which the consumers were required to pay.

The findings of the General Court in paragraph 95 of the judgment under appeal did not permit an analogy to be drawn between that price supplement and the EEG surcharge.

As the General Court noted in paragraphs 7 to 9 of the judgment under appeal, the EEG surcharge represents any difference between the price obtained by the TSOs on the spot market of the EEG electricity exchange which they feed into their network and the financial burden imposed on them by the statutory obligation to pay for that electricity at the rates laid down by law, a difference that the TSOs are entitled to require the suppliers to the final customers to pay. By contrast, the EEG 2012 does not require those suppliers to pass on the amounts paid in respect of the EEG surcharge to the final customers.

The fact, noted by the General Court in paragraph 95 of the judgment under appeal, that 'in practice', the financial burden resulting from the EEG surcharge was passed on to the final customers and, consequently, could 'be assimilated, from the point of view of its effects, to a levy on electricity consumption' is not sufficient for it to be concluded that the EEG surcharge had the same characteristics as the electricity price supplement examined by the Court of Justice in the judgment of 17 July 2008. *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413).

Consequently, it is necessary to determine whether the other two factors, referred to by the General Court in paragraph 127 of the judgment under appeal and recalled also in paragraph 62 of the present judgment, allowed it nonetheless to conclude that the funds generated by the EEG surcharge constituted State resources, since they constantly remained under public control and were therefore available to the public authorities, within the meaning of the case-law cited in paragraph 57 of the present judgment. In that situation, it is irrelevant whether or not the EEG surcharge may be classified as a 'levy'.

It must, however, be noted that the General Court failed to establish that the State held a power of disposal over the funds generated by the EEG surcharge or even whether it exercised public control over the TSOs responsible for managing those funds.

First, the General Court held that the funds generated by the EEG surcharge were not at the disposal of the State but solely under the dominant influence of the public authorities, in so far as they were collectively administered by the TSOs, which could be collectively assimilated to an entity executing a State concession. It merely found, in that regard, that the funds from the EEG surcharge were, first, managed for purposes in the general interest by the TSOs, in accordance with detailed rules defined beforehand by the legislature, and, secondly, allocated exclusively to the financing of the support and compensation schemes, to the exclusion of any other purpose.

Without it being necessary to rule on the merits of the classification as a State concession thus applied by the General Court, it must be held that, although it is true that the factors thus accepted indicate the legal origin of the support for

EEG electricity implemented by the EEG 2012, they are, however, not sufficient to conclude that the State nevertheless held a power of disposal over the funds managed and administered by the TSOs.

In particular, the fact that the funds resulting from the EEG surcharge are allocated exclusively to the financing of the support and compensation schemes, by virtue of the provisions of the EEG 2012, does not mean that the State may dispose of them, within the meaning of the case-law cited in paragraph 57 of the present judgment. That legal principle of exclusive allocation of the funds resulting from the EEG surcharge tends rather to show, in the absence of any other evidence to the contrary, that the State was specifically not entitled to dispose of those funds, that it is say to decide on an allocation which differs from that laid down in the EEG 2012.

Secondly, the General Court failed to establish that the TSOs remained constantly under public control, or that they were subject to public control.

In that regard, it must be noted that the General Court, indeed, endeavoured to show, in paragraphs 105 to 110 of the judgment under appeal, that the TSOs, responsible for managing the system of aid for the production of EEG electricity, were monitored in several respects in that task.

First, the General Court found in paragraph 106 of the judgment, that the TSOs could not use the funds resulting from the EEG surcharge for purposes other than those laid down by the legislature. Next, it noted, in paragraph 107 of the judgment under appeal, that the TSOs were under an obligation to administer those funds in a specific joint account and added that compliance with that obligation was subject to control by State authorities, under Paragraph 61 of the EEG 2012, without, however, expressing a view on the nature and extent of that control. Finally, the General Court set out, in paragraphs 108 to 110 of the judgment under appeal, that the State authorities, namely, in the present case, the BNetzA, carried out strict monitoring at various levels of the activities of the TSOs, checking, inter alia, that the TSOs sold EEG electricity in accordance with Paragraph 37 of the EEG 2012 and established, set, published and charged electricity suppliers the EEG surcharge in compliance with the legislative and regulatory requirements.

While the factors thus accepted permit the conclusion that the public authorities monitor the proper implementation of the EEG 2012, they cannot, by contrast, permit the conclusion that there is public control over the funds generated by the EEG surcharge themselves.

The General Court, however, concluded its analysis, in paragraph 110 of the judgment under appeal, by finding that that monitoring, which fell within the general approach of the overall structure provided for in the EEG 2012, corroborated the conclusion, drawn from analysis of the tasks and obligations of the TSOs, that they did not act freely and on their own behalf, but as administrators of aid granted through State funds. It added that, even if that monitoring has no direct effect on the day-to-day administration of the funds in question, it was an additional factor designed to ensure that the TSOs' activities do indeed remain circumscribed within the framework laid down in the EEG 2012. Finally, it noted in paragraph 118 of the judgment under appeal, that the fact that the State does not have actual access to the resources generated by the EEG surcharge, in the sense that they indeed do not pass through the State budget, did not affect the State's dominant influence over the use of those resources and its ability to decide in advance, through the adoption of the EEG 2012, which objectives were to be pursued and how those resources in their entirety were to be used.

It is true that, as the General Court held in paragraph 125 of the judgment under appeal, and as stated in paragraph 58 of the present judgment, the Court of Justice has had occasion to hold that funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities (judgment of 19 December 2013, *Association Vent De Colère! and Others,* C-262/12, EU:C:2013:851, paragraph 25).

However, the solution adopted by the Court of Justice in that case was based on two key factors, which are lacking in the present case.

The Court of Justice took care to point out, on the one hand, that the national legislation at issue in the case giving rise to that judgment had established a principle that the obligation to purchase would be covered in full by the French State, requiring the French State to discharge past debts and to cover in full the additional costs imposed on undertakings should the sum of the charges collected from final consumers of electricity be insufficient to cover those additional costs (judgment of 19 December 2013, *Association Vent De Colère! and Others,* C-262/12, EU:C:2013:851, paragraph 26). In doing so, the Court of Justice found that there was a link between the advantage in question and a reduction, at the very least potential, in the State budget.

In paragraphs 28 to 33 of the judgment of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851), the Court of Justice held, on the other hand, that the sums intended to offset the additional costs arising from the obligation to purchase imposed on the undertakings were entrusted to the Caisse des dépôts et consignations [a French public long-term investment group], that is to say a public law entity appointed by the French State to provide administrative, financial and accounting management services for the Commission de régulation de l'énergie (French energy regulation authority), the independent administrative authority responsible for ensuring the proper functioning of the market for electricity and gas in France, with the result that those sums must be regarded as remaining under public control.

It is therefore necessary to conclude that nor did the other factors referred to by the General Court in paragraph 127 of the judgment permit the conclusion that the funds generated by the EEG surcharge constituted State resources.

It follows from all the foregoing considerations that the first part of the first ground of appeal put forward by the Federal Republic of Germany is well founded and that, without it being necessary to examine the second part of the first ground of appeal and the other two grounds of appeal, the judgment under appeal must be set aside.

The action before the General Court

In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits.

In the present case, the Court has the necessary information to give final judgment on the action for annulment of the decision at issue brought by the Federal Republic of Germany before the General Court.

In that regard, it is sufficient to note that, for the reasons set out in paragraphs 48 to 87 of the present judgment, the Commission has failed to establish that the advantages provided for by the EEG 2012, namely the scheme supporting the production of electricity from renewable energy sources and mine gas financed by the EEG surcharge and the special compensation scheme reducing that surcharge for energy-intensive users involved State resources and therefore constituted State aid within the meaning of Article 107(1) TFEU.

It is therefore necessary to uphold the third plea in law raised by the Federal Republic of Germany in the context of its action brought at first instance before the General Court, alleging that there was no advantage financed through State resources, and to annul the decision at issue.

Costs

Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the Federal Republic of Germany has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs relating to both the appeal proceedings and the proceedings at first instance.

On those grounds, the Court (Third Chamber) hereby:

Sets aside the judgment of the General Court of the European Union of 10 May 2016, *Germany* v *Commission* (T-47/15, EU:T:2016:281);

Annuls Commission Decision (EU) 2015/1585 of 25 November 2014 in State aid proceedings SA. 33995 (2013/C) (ex 2013/NN) [implemented by Germany for the support of renewable electricity and energy-intensive users];

Orders the European Commission to pay the costs relating to both the appeal proceedings and the proceedings at first instance.

[Signatures]

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* Language of the case: German.