Kwartaalbijdrage Europees Recht Ars Aequi December 2014 (133)

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Jurisprudentie

Appeal — Competition — Articles 82 EC and 86(1) EC — Maintenance of preferential rights granted by the Hellenic Republic in favour of a public undertaking for the exploration and exploitation of lignite deposits — Exercise of those rights — Competitive advantage on the markets for the supply of lignite and wholesale electricity — Maintenance, extension or strengthening of a dominant position – 17 July 2014, Case C-553/12 P European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)

The electricity company DEI was created in 1950 in the form of a public undertaking belonging to the Greek State. It enjoyed the exclusive right to generate, transmit and supply electricity in Greece. In 2001, it was converted into a limited liability company in accordance with Greek law, which, *inter alia*, transposed Directive 96/92/EC concerning common rules for the internal market in electricity. Under Article 43(3) of the Greek law, the State's shareholding in DEI's capital may not in any case be lower than 51% of the shares with voting rights, even after an increase of capital. All Greek power stations operating on lignite (brown coal) belong to DEI. From the 4 590 million tonnes of lignite reserves which exist in Greece, the Hellenic Republic has allocated to DEI exploration and exploitation rights in respect of 2 200 million tonnes and approximately 300 million tonnes to private third parties. No rights have yet been allocated in respect of the remaining 2 000 million tonnes.

In 2008, the European Commission adopted a decision by which it found that the grant and maintenance of exploration and exploitation rights to DEI was contrary to Article 86 (1) EC (now Article 106 (1) TFEU), read together with Article 82 EC (now Article 102 TFEU), since it created a situation of inequality of opportunity between economic operators as regards access to primary fuels for the purposes of generating electricity. This practice had allowed DEI to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering any new entrants. DEI brought an action for annulment of the contested decision claiming primarily errors of law in applying the combined provisions of Article 106(1) and 102 TFEU. In the case T‑169/08 *DEI v Commission*, the General Court annulled the contested decision on the grounds that the Commission had not established an abuse of dominant position.

By the appeal at issue, the Commission seeks to have set aside the aforementioned judgment of the General Court. The ECJ is essentially called upon to answer whether in order to establish an infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU it is necessary to prove an abuse of dominant position or whether it is sufficient to show that potential or actual anti-competitive consequence is liable to result from the State measure at issue.

The Court's interpretation is primarily based on the notion of "equality of opportunity between economic operators". More precisely, a Member State is in breach of Article 106(1) TFEU jo. Article 102 TFEU if it adopts a measure that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position or when those rights are liable to create a situation in which that undertaking is led to commit such abuses. In that respect, it is not necessary that any abuse should actually occur. All that is necessary is for the Commission to identify a potential or actual anti‑competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.

This case sheds some light on the controversial question whether the mere fact that a former monopolist undertaking enjoys a privileged access to natural resources (in this case lignite) constitutes in itself an abuse of dominant position. It is also a politically sensitive case as it relates to the upcoming liberalisation of the Greek energy sector as a key component of the Greek economic adjustment programme. It might not be a coincidence that the judgment was issued 6 days after the adoption by the Greek government of a highly controversial law on the privatisation of DEI. In the Greek political discourse, the previous judgment of the General Court offered an important counter-argument against privatisation. However, by setting aside this judgment, the Court of Justice in essence put an end to this political debate and consented to the envisaged liberalisation of the Greek energy sector.