



Update State aid law: European Commission must conduct final assessment of existence of State aid

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On 16 November 2022, the General Court of the European Union (GC) has delivered a landmark judgment in EU State aid law (T-469/20, Netherlands v Commission, > **ECLI:EU:T:2022:713**).

The judgment will attract attention not only because of its relevance for the coal-phase out in the Netherlands. The GC puts a stop to a common practice of the European Commission, according to which it regularly leaves the existence of aid open in its decisions if the aid can be justified under the relevant provisions anyway. In the future, the European Commission will therefore have to determine whether aid is present and can only then address a possible justification.





What was the subject of the court proceedings?

In 2019, the Netherlands decided to phase out the use of coal for electricity generation. From 01 January 2030 at the latest, no more coal-fired electricity is to be generated. Four of the five coal-fired power plants operating in the Netherlands have been granted a transition period of five to ten years. During this period, they have the opportunity to recoup investments made, adjust to another energy source or prepare for decommissioning. However, the fifth power plant, Hemweg 8, already had to close at the end of 2019, because the conversion of the technology was not possible here and the efficiency of the coal-fired power generation was low in comparison. Without this closure order, Hemweg 8 would have continued to operate for several more years.

Against this background, the Dutch government decided to compensate the operating company for the damage caused by the early closure (e.g. no amortisation of investments in the plant) in the amount of EUR 52.2 million.

By decision of 12 May 2020, the European Commission declared this compensation to be compatible with the internal market. In doing so, it left open whether the compensation actually involved aid within the meaning of Art. 107(1) TFEU, basing its decision on the fact that the aid had been declared compatible with the internal market anyway.

The Netherlands then brought an action for annulment before the GC and requested the annulment of the decision of 12 May 2020.

How did the General Court rule?

The GC clarifies that the European Commission cannot decide on the compatibility of a national measure with the internal market without having previously established that this measure constitutes State aid within the meaning of Art. 107(1) TFEU. Only if it affirms the existence of aid, the European Commission should be able to address the question of whether the aid is compatible with the internal market.

Furthermore, according to the GC, the European Commission violated the principle of legal certainty because the decision of 12 May 2020 did not provide the Netherlands with precise knowledge of the rights and obligations of the Member State.

What does the ruling mean for the coal phase-out in the Netherlands?

As a result of the annulment of the European Commission's decision, its approval effect ceases, which revives the prohibition of implementation under State aid law (Art. 108(3) sentence 3 TFEU). However, this only applies if the compensation indeed is aid. The Netherlands dispute

this and it has not yet been decided by the European Commission. Until a final decision is made by the European Commission on the nature of the aid, uncertainty therefore remains for the aid grantor and the aid recipient as to whether the compensation could be granted legally.

What significance does the ruling have beyond this individual case?

The GC's request to the European Commission to take a clear position on the question of whether aid is involved is likely to have significant effects beyond this individual case. This is because, according to established case law, if the European Commission cannot come to the (final) conclusion that there is no aid within the meaning of Art. 107(1) TFEU or that such aid is compatible with the internal market after completing the preliminary assessment (so-called phase 1), it must initiate the in-depth examination of the state measure (so-called phase 2). The European Commission enjoys no discretion in this respect. Even if the justification of an aid is clear, it must initiate phase 2 if there are doubts as to whether aid is present at all.

For the European Commission, the examination of state measures under Art. 107 TFEU could thus become significantly more extensive if it now must initiate phase 2 proceedings more frequently. However, the ruling will also be a reason for the European Commission to take – where possible – a clearer position on the existence of State aid within phase 1 and thus rule out the initiation of phase 2. For the parties to the State aid proceedings and the market participants otherwise affected, this should provide additional legal certainty.

It remains to be seen whether the European Commission will challenge the GC's ruling with an appeal to the Court of Justice.