

Market integration of RES – which role for State aid?

Energy Community State Aid Network

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- ▶ Accredited professionals: ca. 250; total staff: ca. 550
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Agenda

Broadening of
the Concept of
State Aid in the
Energy Sector

Impact on
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RE Policy

Way Forward

Broadening of the concept of state aid in the energy sector

Renewable Energy Support Schemes: State aid or not?



- ▶ **For all different support schemes: Do they constitute state aid within the meaning of Art. 107 (1) TFEU?**
- ▶ All four elements of state aid need to be fulfilled:
 - An advantage: Are FiTs advantageous for RES producers?
 - Granted by the state or through state resources: Are state resources committed?
 - Selectivity: Are only certain undertakings favoured?
 - Potentially distorting competition and trade: Is there potential for such a distortion?
- ▶ **The legal controversy so far focussed mainly on the issue of state resources**

Point of departure: Preussen Elektra

- ECJ in **PreussenElektra (Case C-379/98)** regarding German Stromeinspeisegesetz = no State aid
 - The funds at issue in that case could not be considered to be a State resource since:
 - they were **not at any time under public control**
 - and there was **no mechanism**, established and regulated by the State, for offsetting the additional costs arising from the obligation to purchase
- An obligation to purchase at minimum prices does not constitute State aid **merely because it is imposed by statute**
 - Rather: a mechanism relying on obligations between private actors

Broadening the understanding of state imputability



- ▶ Establishment of RE support schemes all across the EU
- ▶ Changing perceptions: Essent, Electricity Act Austria, Vent de Colère
- ▶ **Final turnaround by the Commission Decision on EEG 2012 after in-depth investigation launched in 2013 (25 November 2014):**
 - Not relevant if entity administering the funds is public or private
 - Transfer of resources is organised by the State + State establishes for what purposes the financial resources may be used
- ▶ **General Court Judgment in T 47/15 on German EEG 2012:** Mechanisms 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”* (Nr. 127 of judgment)

Ex. Germany: current status of procedure reg. EEG



- ▶ Germany has lodged an appeal before the Court of Justice
- ▶ ECJ has not decided yet; Opinion of Advocate General published on 27 February 2018
- ▶ Germany (prudently) notified EEG 2014 and EEG 2016/2017 to the European Commission
 - Although the demands from the Commission regarding its design were by and large accepted
- ▶ Commission confirmed its earlier decision that EEG 2014 and 2017 constitute State aid



If decision upheld: Permanent broadening of State aid

Impact on Member State RE Policy

Background: EU policy on Renewable Energy




- **Article 194 (4) TFEU:** EU energy policy is aimed at promoting the development of new and renewable forms of energy.
- The EU Renewable Energy Sources Directive (RES Directive) sets a binding target of 20% final energy consumption from renewable sources by 2020.
- The 2030 climate and energy framework sets three key targets for the year 2030:
 - At least 40% cuts in greenhouse gas emissions (from 1990 levels)
 - At least 27% share for renewable energy
 - At least 27% improvement in energy efficiency
- All EU countries have adopted national renewable energy action plans showing what actions they intend to take to meet their renewables targets.
- The new Clean Energy Package of the Commission and the Re-Cast of the RED will set out EU targets (RE likely around 35%)

Member States in the driving seat

- ▶ Recital 25 of the Directive:

“For the proper functioning of national support schemes it is vital **that Member States can control** the effect and costs of their national support schemes according **to their different potentials.**”



Member States are
different = different
rules may be
needed...

Policy making via state aid control

- ▶ Broad concept of state aid covers a wide range of RE support schemes
 - All surcharge-based support schemes qualify as State aid
- ▶ Guidelines on State Aid for environmental protection and energy, 2014-2020
 - Legal nature: Communication from the Commission; no legally binding effect on third parties; no legal standing of private companies/persons to file action of annulment against „internal“ Communication
- ▶ Detailed requirements and specifications for RE support schemes
 - Design and implementation of tender schemes throughout the whole of Europe + exemptions for electricity-intensive users
 - Detailed provisions on exemptions (e.g. small scale plants; 6 MW rule)

Results of tenders – example from Germany (source BNetzA)



	Apr 15	Aug 15	Dez 15	Apr 16	Aug 16	Dez 16	Feb 17	Jun 17
Ausgeschriebene Menge (MW)	150	150	200	125	125	160	200	200
Eingereichte Gebote	170	136	127	108	62	76	97	133
Eingereichte Gebotsmenge (MW)	715	558	562	539	311	423	488	646
Zuschläge	25	33	43	21	22	27	38	32
Zuschlagsmenge (MW)	157	159	204	128	118	163	200,079	200,646
Gebotsausschlüsse	37	15	13	16	9	5	9	17
Gebotsausschlussmenge (MW)	144	33	33	57	46	19	27	56
durchschnittliche Förderhöhe (ct/kWh)	9,17	8,49	8	7,41	7,25	6,9	6,58	5,66
zulässiger Höchstwert (ct/kWh)	11,29	11,18	11,09	11,09	11,09	11,09	8,91	8,91
niedrigster Gebotswert (mit Zuschlag) (ct/kWh)	8,48	1	0,09	6,94	6,89	6,26	6	5,34
höchster Gebotswert (mit Zuschlag) (ct/kWh)	9,43	8,49	8	7,68	7,25	7,17	6,75	5,9

Putting RE energy policy in limbo?

- ▶ State aid is the Commission's sharp sword
 - Notification requirement; prohibition on putting matters into effect; obligation to remunerate illegal state aid
- ▶ Preliminary/prudent notification of measures that might amount to State aid
 - E.g. Germany: Since case against COM is still pending, notification of nearly every reform plan (e.g., CHP, self-generation, almost annually EEG, capacity reserve, lignite reserve, etc.)
- ▶ Open questions:
 - Is current level of State aid control still appropriate?
 - What are the essential goals that need to be taken into consideration?

The way forward

Fundamental transition period

- ▶ **New regulatory framework for energy and State aid**
 - Clean Energy for all Europeans and recast of RED II (no more national binding targets but overall EU target)
 - Current State Aid Guidelines in force until 31 December 2020
- ▶ **Fundamental change of political framework**
 - New Commission in autumn 2019; EP election in 2019
 - New and fundamentally changed budget after Brexit: Term of current 7-year EU budget ends on 31 December 2020
- ▶ This can give room for fundamental discussion and improvements of the current State aid control level

What kind of RE energy policy do we need?



- ▶ **Ambitious RE targets and RE deployment are necessary to reach goals of Paris Climate Agreement**
 - Assumption: EU will agree on ambitious targets but leave discretion to Member States on how to reach targets
 - Member States must be able to take on this task and design and implement bold RE policies
 - The same holds true for Energy Community Member States
- ▶ **What is an appropriate level of state aid control in the energy sector?**
 - Ensuring fundamental issues such as market access vs. overly detailed regulation
 - Where do markets fail and how to allow for appropriate support levels?
 - Leave more room for Services of General Economic Interest?
 - Is the energy transition a common interest or should it be conducted purely market based?

(Preliminary) Conclusions

- ▶ State aid control is potentially limitless
- ▶ Currently very high level of State aid control
 - Qualifying all types of support regimes as State aid and laying down detailed rules leaves little room for domestic energy policy
- ▶ Tender schemes are the new status quo and seem to produce sound results
- ▶ Overly detailed State aid regulation vs. fundamental market issues
- ▶ Open question what is the right balance for the coming years



Thank you very much
for your attention.

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