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The Implementation of the European Green Deal – Tensions Between a Market-based Approach and State Aid for Renewables

by

Aleksandra Granat* and Małgorzata Kozak**

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Abstract

Energy policies which promote a green transition are of particular interest to the European Commission and are one of the key elements of the European Green Deal. This article takes a close look at the interplay and tensions between two theoretically separated frameworks, renewable energy law and the State aid regime, and analyses the impact of the European Green Deal on their revision. As State aid plays a pivotal role in the green transition and in the fulfilment of the Commission's policy objectives, the implementation of the European Green Deal can offer a great opportunity to establish new State aid control rules. More specifically, the analysis focuses on a market-based approach towards renewable energy support schemes, and attempts to answer the question of whether or not such a solution fits the purpose of achieving the newly established EU sustainable goals defined in the European Green Deal.

Resumé

Les politiques énergétiques qui favorisent une transition verte présentent un intérêt particulier pour la Commission européenne et constituent l'un des éléments clés du Green Deal européen. Cet article examine de près l'interaction et les tensions entre deux cadres théoriquement séparés, le droit des énergies renouvelables et le régime des aides d'État, et analyse l'impact du Green Deal européen sur leur révision. Étant donné que les aides d'État jouent un rôle central dans la transition écologique et dans la réalisation des objectifs politiques de la Commission, la mise en œuvre du contrat vert européen peut offrir une excellente occasion d'établir de nouvelles règles de contrôle des aides d'État. Plus précisément, l'analyse se concentre sur une approche basée sur le marché pour les régimes de soutien aux énergies renouvelables, et tente de répondre à la question si une telle solution est adaptée à la réalisation des objectifs durables de l'UE récemment établis et définis dans le Green Deal européen.

Key words: European Green Deal; State aid regime; renewable energy policy; renewable energy support schemes; green transition.

JEL: K2, K23, K32, Q4, Q48

I. Introduction

The European Commission (hereinafter: Commission) has launched numerous initiatives which attempt to mitigate the negative consequences of climate change and reinforce energy transition. One of the most important examples is the European Green Deal (hereinafter: EGD), announced on 11 December 2019, which introduced a broad ‘umbrella’ approach that aims to bring a new, more sustainable order to the European Union (hereinafter: EU).¹ As acknowledged by Verschuur and Sbrolli (2020), the EGD can be seen as the foundation of an environmental-centric industrial revolution in Europe, and is the first such project in the history of the EU. It will influence all areas of EU law and the European economy and will involve large investments from both public and private sectors (Sikora, 2021).²

The EGD is seen as the EU’s top political priority. It aims to combat the negative effects of climate change, foster green transition and transform the EU into a competitive, sustainable, resource-efficient and circular economy while leaving no one behind.³ Its overarching objective is to completely reduce net emissions of greenhouse gases and become the world’s first climate-neutral continent by 2050.⁴ In this article, we analyse the EGD’s impact on the

¹ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ‘The European Green Deal’. COM (2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

² In order to achieve the goals set out in the EGD, the Commission established the Sustainable Europe Investment Plan, including the Just Transition Mechanism. The EGDIP will be supported by contributions from national budgets and public and private investments mobilised by InvestEU and European Trading System funds.

³ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ‘The European Green Deal’. COM (2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

⁴ European Commission. (2019). A European Green Deal. Striving to be the first climate-neutral continent. Retrieved from https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

⁵ The EGD is being affected by the COVID-19 pandemic and the results of the crisis. However, the authors in their analysis do not focus on the consequences of the pandemic

renewable energy policy, in the context of the EU State aid framework, and the interplay and tensions between these two regimes.

Due to its long-term nature, the EGD's 'umbrella' strategy does not itself contain a precise plan or approach towards green energy but rather, it sets certain goals.⁶ As a policy instrument (an example of 'soft law'), it needs to be translated into binding instruments (Sikora, 2021). It stresses that the revised energy and climate plans of Member States⁷ should set out ambitious national contributions to the overall EU target.⁸ This approach follows the current decentralisation of national policies, to collectively achieve the required EU renewable energy targets in the overall energy mix, as formulated in Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (hereinafter: RED II).⁹

The EGD acknowledges that national plans 'will feed into the process of increasing ambitious climate goals for 2030, for which the Commission will review and propose to revise, where necessary, the relevant energy legislation by June 2021'.¹⁰ It also points out that a revision of the relevant State aid guidelines will, among other goals, facilitate the phasing out of fossil fuels¹¹, a necessary step to achieving carbon neutrality. This is particularly important

and the crisis. The number of contributions analysing the EGD in relation to the COVID-19 crisis reflects the importance of this issue. See, e.g. Čavoški, A. (2020); Colli, F. (2020); Siddi, M. (2020).

⁶ E.g. it indicates that 'there is a need to rethink policies for clean energy'.

⁷ According to Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ 2018 L 328, p. 1–77).

⁸ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal'. COM (2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

⁹ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82–209), (hereinafter: RED II).

¹⁰ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal'. COM (2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

¹¹ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal'. COM (2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

since there is still a significant share of aid for traditional energy¹² (Nowag et al., 2020). Consequently, the Commission recently made a commitment that existing legislation would call for 55% emission reductions by 2030 compared to 1990 levels¹³ and launched the revision of the existing renewable energy framework and State aid rules by June 2021 to ensure that this target will be met.¹⁴ The process of reviewing these frameworks is ongoing. A reduction of emissions is inevitably linked with important investments on the side of Member States. This is where the renewable energy framework intersects with the State aid regime.

This analysis centres on the support schemes – instruments such as investment aid, tax exemptions, green certificates and feed-in tariffs or premiums applied by a Member State or a group of Member States which aim to achieve renewable energy (hereinafter: RE) targets set out in EU legislation.¹⁵ If such public intervention is not carefully designed, these instruments may distort the functioning of the energy market and may lead to increasing costs for consumers and businesses.¹⁶ Thus, they must eventually be replaced in a degressive way by more market-based instruments, such as auctioning and a competitive bidding process, to ensure that subsidies are reduced to a minimum and finally phased out.¹⁷

¹² European Parliament. (2017). Fossil fuels subsidies. Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy. IP/A/ENVI 2016-18-REV.PE 595.372. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595372/IPOL_IDA\(2017\)595372_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595372/IPOL_IDA(2017)595372_EN.pdf).

¹³ European Commission. (2020). *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people'*. COM/2020/562 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:562:FIN>. This target has been enshrined in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (OJ 2021 L 243, p. 1–17), (hereinafter: European Climate Law).

¹⁴ *European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people'*. COM/2020/562 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:562:FIN>. 'The EU's current policy framework alone would not allow us to reach our 2050 goals and meet our commitments under the Paris Agreement. Projections show that simply continuing to implement the legislation currently in force would see the EU achieving a 60% reduction of greenhouse gas emissions by 2050'.

¹⁵ Article 2(5) RED II.

¹⁶ European Commission. (2020). Support schemes.

¹⁷ European Commission. (2014). *Communication from the Commission. Guidelines on State aid for environmental protection and energy 2014–2020 (2014/C 200/01)*. Official Journal of the European Union, C-200/1. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628%2801%29>.

Against this background, we attempt to analyse this question: Does a market-based approach towards RE support schemes fit the purpose of achieving the goals of the EGD? Section 2 provides an overview of the applicable legal framework, including EU renewable energy law and its State aid regime. Moreover, it focuses on the core element of renewable energy policy, namely support schemes, and analyses a market-based approach as a key rule for how public support for renewables should be designed. It also provides an evaluation of the draft Guidelines on State aid for climate, environmental protection and energy 2022¹⁸ (hereinafter: CEEAG) published in June 2021.¹⁹ Section 3 evaluates numerous tensions between RE policy and the State aid framework by analysing the relevant case law, and evaluating the implications of the tensions between renewable energy policy and the State aid regime reflected in the current framework. Finally, section 4 describes the consequences of the implementation of the EGD on the State aid framework for renewable energy. It evaluates how such changes may influence the Commission's and the Court of Justice of the European Union's (hereinafter: CJEU) approach towards State aid for renewable energy.

1. Tensions within the applicable framework

1.1. Primary legislation and division of competences

Pursuant to Article 4(2) TFEU²⁰, energy is a shared competence between the EU and the Member States. Pursuant to Article 4(3) TEU,²¹ which embodies the principle of sincere cooperation, the EU and its Member States should assist each other in carrying out tasks flowing from the Treaties. Limits to the Union's competences are imposed according to the principle of subsidiarity (Article 5(3) TEU) and the principle of proportionality (Article 5(4) TEU).

Energy policy is a 'young' EU policy, formally introduced in the Treaty of Lisbon (Jürgens & Solorio, 2017; Marhold, 2017).²² Previously, legislation

¹⁸ Communication from the Commission. Guidelines on State aid for climate, environmental protection and energy. (2021) XXX draft; available at: https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Draft_communication_EN.pdf (accessed 26.07.2021), (hereinafter: CEEAG).

¹⁹ The article reflects the law as of 30 June 2021.

²⁰ Consolidated Version of the Treaty of the Functioning of the European Union, (OJ 2012 C 326, p. 47–390), (hereinafter: TFEU).

²¹ Consolidated version of the Treaty of the European Union (OJ 2012 C 326, p. 13–390), (hereinafter: TEU).

²² According to Article 4(2)(i) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon (OJ 2007 C 306, p. 1–229).

related to energy was adopted on different legal bases, such as residual provisions on the internal market (Article 114 TFEU) or the environment (currently Article 191 and 192 TFEU; Talus, 2016).²³

Article 194(1) TFEU incorporates environmental concerns into the energy legal framework. It specifies that in the context of the internal market, and with regard to the need to preserve and improve the environment, energy policy should promote, among other things, the development of renewable forms of energy.²⁴ However, it also reflects tensions between the EU competence and Member State sovereignty. Paragraph 2 of Article 194 TFEU preserves a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.²⁵ Nevertheless, Member States are restricted due to their obligations deriving from the renewable energy legal framework and, more precisely, renewable energy sources (hereinafter: RES) targets (Marhold, 2017).²⁶ Because of this conundrum, and despite binding RES targets, Member States have discretion to establish their actual energy mix and decide which energy sources they will use (Marhold, 2017).

Another possible legal basis for the EU competence is Article 11 TFEU, which states that environmental protection must be integrated into EU policies and activities with a view to promote sustainable development. This provision entails an overarching goal of environmental integration applicable to all Union activities, this has broad implications for EU institutions, including direct obligations related to law making, administration, supervision and judicial control.²⁷ The implications of Article 11 TFEU for Member States are not that clear. The CJEU has held that the overarching objectives of the Treaties do not impose legal obligations on Member States and do not confer rights on individuals.²⁸ However, the actions taken by EU institutions

²³ For that reason, Directive (EU) 2009/28/EC on the promotion of the use of energy from renewable sources, (OJ 2009 L 140, p. 16–62), (hereinafter: RED I), was adopted on the basis of Article 192 TFEU, but RED II shifted the basis of renewable energy promotion matters to Article 194 TFEU.

²⁴ Article 194(1) TFEU.

²⁵ Article 194(2) TFEU.

²⁶ Justification for this can be found in Article 192(2)(c) TFEU, which states that 'By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'.

²⁷ The duty of EU institutions to act to achieve the overarching objectives of the EU also derives from Articles 1(1) and 3(6) TEU.

²⁸ Court of Justice (hereinafter: ECJ) judgment of 29.09.1987, Case 126/86 *Zaera*, ECLI:EU:C:1987:395 paras. 10 and 11. See also ECJ judgment of 24.01.1991, Case C-339/89

in accordance with their duty to comply with Article 11 TFEU may affect Member States and impose specific obligations on them. Member States also need to follow the duty of loyalty and cooperation (Sjåfjell, 2014) formulated in Article 4(3) TEU. As mentioned in *PreussenElektra*²⁹, this principle means with respect to other areas of EU law that environmental goals cannot be achieved alone, and the goal of sustainable development requires changes in all areas of law and in all industries. Therefore, in the absence of specific provisions in the instruments of the State aid regime, other than the Guidelines on State aid for environmental protection and energy 2014–2020³⁰ (hereinafter: EEAG), the Commission can and, under Article 11 TFEU, is even obliged to take due account of environmental concerns in policy areas other than environmental protection (Lünenbürger et al., 2020).

Importantly, contrary to antitrust policy (in which the main objective is consumer welfare), in the field of State aid, environmental considerations have been considered for a long time, thus their relevance is not disputed (Kingston, 2010; Sikora, 2020).

1.2. EU renewable energy law

1.2.1. Promotion of renewable energy sources in the light of the EGD

The long-term objectives of EU energy law and RE promotion as its flagship component include competitiveness, the security of supply and, most importantly, sustainable development as a response to climate change (European Commission, 2020; Jörgens & Solorio, 2017; Knudsen, 2012). At the same time, the EU's long-term aim is to have a fully interconnected energy market, which not only liberalises, decarbonises and securitises energy supply (Marhold, 2017) but also responds to climate change challenges. An essential part of this strategy is the development of RES and an increase in the share of RES in the overall energy mix (Talus, 2016). All these elements, including the promotion of RES, are among the main goals of the newly established EGD. Such ambitious objectives are, however, confronted with

Alstom Atlantique, ECLI:EU:C:1991:28 paras. 8–9; ECJ judgment of 17.03.1993, Joined cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts*, ECLI:EU:C:1993:97 para. 28 and ECJ of 16.12.2004, Case C-293/03 *Gregorio My v Office national des pensions*, ECLI:EU:C:2004:821 para. 29.

²⁹ ECJ judgment of 13.03.2001, Case C-379/98 *PreussenElektra AG v. Schleswig AG, Windpark*, ECLI:EU:C:2001:160, (hereinafter: Case C-379/98 *PreussenElektra*).

³⁰ Guidelines on State aid for environmental protection and energy 2014-2020 C 200/01, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01)) (accessed 26.07.2021), (hereinafter: EEAG).

limited EU competences at the European level (Knodt 2020) and may create tensions between the Commission and Member States (Samper et al., 2020).

1.2.2. Secondary framework: RE Directive II and the European Climate Law

The act currently in force is Directive 2018/2001 on the promotion of the use of energy from renewable sources (RED II) – a recast of Directive 2009/28 (hereinafter: RED I).³¹ RED II established a common framework for the promotion of energy from renewable sources and set a binding target for the overall share of energy from renewable sources in the Union's gross final consumption of energy in 2030.³²

RED II introduced the overall EU target for RES consumption (at least 32% by 2030³³). In light of the EGD, however, it will be revised to incorporate the goal of 55% emission reduction by 2030³⁴ as part of the 'Fit for 55 package'.³⁵ The Commission estimates that the perfect implementation of the 2030 targets could deliver a reduction in emissions of 45–47%; however the European Environmental Agency doubts that this will be possible.³⁶ Therefore, energy law needs to be amended to incorporate the recent commitments (Kulovesi & Oberthur, 2020).

Due to the lack of agreement between Member States (Knodt et al.), RED II does not specify national targets. Those set in RED I for 2020 'should constitute Member States' minimum contributions to the new 2030 framework'.³⁷ In order to comply with these targets, governments need to develop renewable energy policies (Peeters, 2014) and should establish their contributions as part of their integrated national energy and climate plans (hereinafter: NECPs).³⁸ RED II employs minimal harmonisation, which

³¹ According to Article 37 of RED I, this directive is repealed effective 1 July 2021.

³² Article 1 RED II.

³³ Article 3 RED II with a clause for a possible upwards revision by 2023. It is worth mentioning that RED I established a legally binding 20% overall target of RE by 2020 (see Article 3(1) RED I) and set legally binding national targets which are missing in RED II. The latest Eurostat data shows that in 2019, renewable energy represented 19.7% of energy consumed in the EU-27, only 0.3% short of the 2020 target of 20%. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Renewable_energy_statistics (accessed 26.07.2021).

³⁴ European Commission. (2021, July). Commission presents Renewable Energy Directive revision. News. Retrieved from https://ec.europa.eu/info/news/commission-presents-renewable-energy-directive-revision-2021-jul-14_en.

³⁵ Available at: <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/package-fit-for-55> (accessed 26.07.2021).

³⁶ For the detailed analysis see Kulovesi & Oberthur (2020).

³⁷ Preamble (10) RED II.

³⁸ Pursuant to Regulation (EU) 2018/1999 of the European Parliament and of the Council; see para. 8, RED II.

provides considerable leeway and allows Member States to experiment in their renewable energy policy and support schemes (Przybojewska, 2018).

The highly discussed European Climate Law may strengthen the implementation of the revised target. Its aim is to ‘write into law the goal set out in the EGD’, namely climate neutrality by 2050, and ensure that all EU policies contribute to this goal. It sets out a legally binding target of net zero greenhouse gas emissions by 2050³⁹, and indicates that the EU institutions and Member States need to take the necessary measures to collectively achieve this goal.⁴⁰ Moreover, the European Climate Law provides a framework for achieving progress in pursuit of this goal (for example by indicating that the Commission needs to assess progress and Union and national measures towards the achievement of the climate-neutrality objective).⁴¹ This can be seen as a major step towards transforming the policy actions specified in the EGD into legally binding obligations for EU institutions and Member States.

1.2.3. Support schemes – from national to market-based and EU steered

Support schemes are various instruments applied by a Member State or a group of Member States which aim to achieve targets set out in RED I/RED II. They include investment aid; tax exemptions or reductions; tax refunds; renewable energy obligation support schemes, including those which use green certificates; and direct price support schemes, including feed-in tariffs (hereinafter: FITs) and premium payments.⁴² Support schemes may be deemed as State aid, thus falling under EU State aid rules.

The Commission’s approach to harmonisation of support schemes has changed over time. Initially, there were tensions between the national approach towards RES promotion and the Commission’s efforts to have wider control over support schemes. At some point, the Commission took a step back and acknowledged that the full harmonisation of support schemes should be considered as more of a long-term goal (Johnston & Block, 2012).⁴³ Thus, a shift to the Commission’s preferred coordination approach occurred (Roßegger, 2013; Talus, 2016),⁴⁴ and RED I/RED II refrained from harmonising national support schemes (Solorio and Bocquillon, 2017).

³⁹ Article 1 of the European Climate Law.

⁴⁰ Article 2(2) of the European Climate Law.

⁴¹ Article 6 and 7 of the European Climate Law.

⁴² Article 2(5) RED II.

⁴³ The authors argue that renewable energy technologies are still at the early stage of development, thus it would be premature to harmonise them at the EU level.

⁴⁴ This type of regulatory development – a gradual shift from a voluntary system to mandatory and legally binding regulation – is very common in the EU.

This means that every Member State is free to establish its own policies and measures to meet their targets (Peeters, 2014; Rusche, 2015).⁴⁵

It is important to note that two instruments with the same classification, for instance, feed-in premiums, may vary between Member States (Marhold, 2017).⁴⁶ This lack of harmonisation causes geographic limitations on support schemes and a fragmentation of RE markets which, in turn, may create barriers, for example, in terms of investments (Rusche, 2015). This also means that support schemes are restrictive and apply only to producers from particular Member States. This discriminatory nature is addressed and justified in RED I (Marhold, 2017).⁴⁷ The CJEU also endorsed this approach in *PreussenElektra* and the judgments that followed (see Section 3). Thus, it can be concluded that the national structure of support schemes is acknowledged and supported in the renewable energy legal framework (Marhold, 2017). This approach towards RES promotion can be qualified as a decentralised ‘bottom-up approach’ in which different instruments may be developed across Member States to comply with pre-set targets (Peeters, 2014).

The economic crisis constrained the ability of some countries to offer support schemes (for example, Spain) while the costs of RES were reduced (Boasson, 2014). This made room to reconsider support schemes, which led to the introduction of market-based (quantity-based) instruments (support schemes) in RED II (Boasson, 2014). While support schemes are not harmonised, there is an interesting change in terms of requirements in RED II. Even though the definition of support schemes is identical in RED I and RED II, the latter has a specific provision devoted to support schemes⁴⁸, which emphasises various requirements and characteristics of support schemes; in other words, their market-based nature (for example, by introducing tendering procedures and auctioning).

In short, this means that emphasis is placed on a shift towards market-based incentives to promote RES. To avoid overcompensation, lack of innovation

⁴⁵ For an overview of RES support schemes, see: ‘Legal sources on renewable energy’. Available at: <http://www.res-legal.eu/en/compare-support-schemes/> (accessed 26.07.2021). Because of the large discretion, there is a multitude of support schemes throughout the EU.

⁴⁶ For example, Feed-In Tariffs (hereinafter: FITs) in Germany are constructed as a surcharge for consumers.

⁴⁷ See Preamble (25) RED I which indicates that ‘Member States have different renewable energy potentials and operate different schemes of support from renewable sources at the national level. The majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory. 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’.

⁴⁸ Article 4 RED II. On the other hand, the RED I mentions support schemes as a measure to achieve RES targets. Article 3(3)(a) RED I.

and competition, and increased prices for consumers, Member States should not automatically assume market failure and the need for subsidies for renewables (Szyszczak, 2014). Support schemes should provide incentives for the integration of electricity from RES in the electricity market by means of market-based and market-responsive approaches, while avoiding unnecessary distortions in the market and considering possible system integration costs and grid stability. According to RED II, support schemes should be designed so as to ensure that renewable energy producers are responding to market price signals and maximising their market revenues. Member States should ensure that support is granted in an open, transparent, competitive, non-discriminatory and cost-effective way.⁴⁹

Therefore, the goal of the Commission to secure the role of renewables by means of adequate market-based instruments⁵⁰ was finally embedded in the legal framework for RES promotion in 2018. As the Commission has pointed out numerous times, such change needs to occur gradually.

Even though support schemes are not harmonised, and RED II can still be characterised by minimal harmonisation, Member States are no longer entirely free to establish their support schemes. RED II is not the first legal act related to this matter. The shift to market-based instruments was already acknowledged in the revised 2014 State aid regime⁵¹ and is in line with the Commission's shift from full harmonisation of support schemes to a coordination of identical requirements for all Member States. Solorio and Bocquillon (2017) argued that the failure to achieve harmonisation of support schemes led the Commission to seek harmonisation by other means (such as State aid rules).

The Commission aims to have control over RES support schemes by scrutinising them through State aid control (Blauberger, 2009; Boasson, 2019).⁵² Such an approach is embodied in the current framework on State aid for renewables, which is seen as a tool for influencing RE policy (Szulecki & Claes, 2019) and, more generally, as a considerable increase in the

⁴⁹ Article 4 RED II.

⁵⁰ European Commission. (1997, November 26). Communication from the Commission. Energy for the Future: Renewable Sources of Energy. White Paper for a Community Strategy and Action Plan. COM(97) 599 final. Retrieved from https://europa.eu/documents/comm/white_papers/pdf/com97_599_en.pdf.

⁵¹ European Commission. (2012). Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: EU State aid Modernisation (SAM). COM(2012) 209 final. Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0209:FIN:EN:PDF>.

⁵² However, this does not mean that the Commission aims to assess them as incompatible with the internal market. In addition, various authors have claimed that State aid rules are used by the Commission as a last resort to control national developments.

Commission's authority over support schemes (Boasson, 2019). Some authors consider it to be a wider 'constitutionalisation' process of EU State aid law (Boasson, 2019).⁵³

1.3. Tensions between EU State aid for renewable energy rules and support schemes

1.3.1. Market-based approach in GBER and the EEAG

The Commission has, for some time now, tried to acquire more control over support schemes, not only by assessing them as falling within the State aid regime but also by advocating for harmonised support schemes during the process of drafting directives for RES promotion. However, its attempts have been hampered by some Member States (mainly Germany), which has stopped the process of shifting to more market-based instruments (Boasson, 2019).⁵⁴ In part because of the financial crisis⁵⁵, the Commission eventually seized the opportunity to acquire more control in RES support schemes, and thus issued new guidelines radically intensifying EU steering in RES support schemes, directing them towards competitive tendering combined with feed-in premiums (Boasson, 2019). Therefore, the Commission partially achieved its goal in the EEAG, and later in the RED II (and also took into consideration that fully harmonised schemes are more achievable and desirable as a long-term goal), by introducing far more detailed requirements, meaning a more market-based approach towards support schemes, which should be exposed to energy market pricing (Boasson, 2019).

As can be observed from the timeline of the development of the RES legal framework and the State aid regime, the implementation of RED II (which included a market-based approach towards RES support schemes) occurred after the adoption of the EEAG. The Commission (because of its exclusive competence regarding the State aid regime) initially tried to achieve its goals regarding support schemes outside of the energy law framework, by introducing them into the State aid regime. Hence, the State aid framework can be considered a trigger for the changes in the renewable energy framework, as the shift to market-based instruments did not initially result from a revision of the renewable energy framework. Boasson (2019) claimed that the CJEU rulings after *PreussenElektra* opened the opportunity for the Commission to develop the current EEAG.

⁵³ Meaning that over time, the TFEU acquired the role of the EU's de facto constitution.

⁵⁴ The EEAG introduced auctioning as the main allocation mechanism.

⁵⁵ Some Member States were struggling to maintain their support schemes as mentioned before.

Since the adoption of the latest General Block Exemption Regulation (hereinafter: GBER)⁵⁶ and the EEAG in 2014, the Commission's approach to aid schemes has changed. In accordance with the GBER, many aid schemes are, in principle, exempted from notification obligations (sometimes with remedial actions). However, both the GBER and the EEAG emphasise that only certain types of support schemes – market-based – can be considered compatible with the internal market. This practice does not significantly influence the legality of RES support as such; it only promotes the gradual use of the market-based approach (such as a competitive bidding process and auctions, shift from FTTs to premium tariffs; Bellantuono, 2017). Additionally, the desired market-based nature of support schemes addresses the concerns of de facto discriminatory schemes (Bellantuono, 2017).⁵⁷

The goal of the GBER is to encourage 'good aid' which serves the common interest. The broad category of aid for environmental protection is included within aid for renewable energy and is reflected in the principles of the EEAG.

The growth of renewable energy in the overall energy mix has reinforced progress in reaching environmental objectives; however, it has also caused serious market distortions and increasing costs for consumers. Thus, the GBER and the EEAG aim to contribute to more affordable energy for consumers and businesses by, for example, promoting a gradual move to market-based support for renewable energy, designing more efficient support measures that reflect market conditions and simplifying procedures. They also promote the competitiveness of European industry and support cross-border energy infrastructure.⁵⁸

The market-based approach aims to integrate RES into the energy market and make RES support more efficient. The EEAG point out, for instance, that new operating aid should be granted as a premium in addition to the market price, or by means of a certificate system the price of which is determined by market supply and demand. The EEAG also specify that any aid after 2017 should be granted through a competitive bidding process in which all RES generators can participate (Szyszczak, 2014).

⁵⁶ Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, (OJ 2014 L 187, p. 1–78).

⁵⁷ As already stated, RED I addresses the issue of national support schemes being de facto discriminatory and hence not compatible with the internal market.

⁵⁸ European Commission. (2014). *Energy and Environmental State aid Guidelines – Frequently asked questions*. (Memo) 14/276. Retrieved from file:///C:/Users/ASOSNO~1/AppData/Local/Temp/Energy_and_Environmental_State_aid_Guidelines__Frequently_asked_questions.pdf.

The emphasis on the market-based approach in both the GBER and the EEAG aims to gradually move away from subsidies to produce renewable energy and instead integrate them into the market by means of reforming the support schemes and making them more efficient and responsive to market dynamics. This should be achieved by such means as: competitive bidding processes, auctions, fed-in premiums instead of FITs, and the opening of subsidy schemes for third-country investors (Talus, 2016). Similar rules were subsequently introduced in RED II. This was caused by the Commission's lack of exclusive powers to establish its RE policy without considering national sovereignty.

To conclude, it seems that Member States would not adjust their support schemes without the Commission steering towards market-based instruments. Due to its failure in achieving the harmonisation of the support schemes, the current framework should be seen as leading the Commission to seek harmonisation by other means, namely the EEAG (Solario & Bocquillon, 2017). Finally, it is crucial to emphasise that the EEAG and the GBER are currently being revised in order to enhance the transformation to a carbon-neutral, circular economy in the EU by 2050. Depending on the outcome of this process, it will be possible to assess whether the Commission will use its power in State aid policy to further influence RE policy.

1.3.2. Revision of the State aid framework as part of the implementation of the EGD

The EGD pays little attention to the role of national support in the process of reaching carbon-neutrality by 2050. It only indicates that national budgets play a key role in the transition, and that there is a need to redirect public investment to green priorities, and away from harmful subsidies. It also includes a statement acknowledging that the revision of the EEAG should be taken as an occasion to support the objectives of the EDG, including phasing-out of fossil fuels.⁵⁹ However, the EDG does not specifically refer to the role of State aid for RES development and does not address the interplay between these two regimes.

The Commission extended the seven instruments of State aid rules (including the GBER and the EEAG) until the end of 2021⁶⁰ and launched

⁵⁹ European Commission. (2019). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal'. COM(2019) 640 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0640>.

⁶⁰ European Commission. (2020). Communication from the Commission concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014–2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014–2020, Guidelines on State aid for rescuing and

a policy evaluation, a so-called ‘fitness check’ which also takes into account the EGD, to assess their performance and reflect on whether they are still ‘fit for purpose’.⁶¹ Its main findings show that, overall, State aid rules are fit for purpose; they are largely effective and State resources are channelled to where it really matters. Therefore, there is no need to reform the State aid system as such. However, these rules need to be simplified and adjusted to meet future challenges and priorities of the Commission and should contribute to the EGD.⁶² Distortions to trade and competition should also be minimised.⁶³ The analysis suggests that ‘the objectives of the State aid rules have been to a large extent appropriate for meeting the needs within the EU so far, but [...] they do not fully reflect recent EU policy developments and Commission priorities for the future, in particular the Green Deal (...)’.⁶⁴

The Commission’s assessment of the EEAG and the GBER specifically indicates that the policies have generally delivered on their objectives. Considering the EGD, the Commission already explicitly supports the EU’s environmental and sustainable energy objectives and supports Member States to reach their climate targets. However, since the EGD is more ambitious, the EEAG and GBER in their related provisions should be revised to better accompany the EGD in all its facets (such as a carbon neutral economy and the zero pollution ambition) and to support sustainable investments through a supportive State aid framework. Finally, the relevant EEAG/GBER provisions

restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission – Framework for State aid for research and development and innovation and Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance. C(2020) 4355 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0708%2801%29>.

⁶¹ European Commission. (2019). *2012 State aid modernisation package, railway guidelines and short term export credit insurance – fitness check*. Retrieved from https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en. Fitness check was launched before the announcement of the EGD.

⁶² European Commission. (2020). Commission Staff Working Document, Executive Summary of the Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance. SWD(2020) 258 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0257>.

⁶³ See https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf (accessed 27.07.2021).

⁶⁴ European Commission. (2020). Commission Staff Working Document, Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance. SWD(2020) 257 final (part ¼). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0257>.

should better cater to new developments in solutions and technologies in the market.⁶⁵

After the adoption of the EGD, the Commission stated that the relevant State aid rules will be revised in 2021 ‘in light of the policy objectives of the European Green Deal and support a cost-effective and socially-inclusive transition to climate neutrality in 2050’.⁶⁶ The revised EEAG are aimed at supporting investments in line with the EGD goal and should boost the innovation of climate-friendly technologies and the phase-out of fossil fuels (Verschuur & Sbrolli, 2020).

1.3.3. Draft CEEAG as a result of the ongoing revision of the State aid regime

As part of the revision process, the Commission published the so-called ‘Inception Impact Assessment’.⁶⁷ Overall, the Commission suggested a review of the compatibility criteria for environmental protection to widen the scope of the EEAG, in order to adjust it to the broad policy objectives set out in the EGD and to include more innovative technologies and market solutions. The extended scope of the EEAG also needs to be accompanied by a number of safeguards to ensure effective, well directed and less distorted aid.

This is reflected in the proposed draft revisions to the EEAG, published on 7 June 2021, which reveal that climate neutrality, climate change adaptation, zero pollution and green transition are the central focus of the proposed amendments.⁶⁸ The importance of these goals is reflected in the amended title of the CEEAG, which emphasises that the revision is targeted on achieving the goals of the EGD.

Aid measures covered by the CEEAG are significantly different from the EEAG. The category of renewable energy is included in a broader category of aid for the reduction and removal of greenhouse gas emissions, which includes support for renewable energy.⁶⁹ This change aims to extend

⁶⁵ European Commission. (2020). Commission Staff Working Document, Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance. SWD(2020) 257 final (part ¼). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0257>.

⁶⁶ European Commission. (2020). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable Europe Investment Plan European Green Deal Investment Plan. COM(2020) 21 final. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0021>.

⁶⁷ European Commission. (2020). Inception Impact Assessment. Ares(2020)6636736. Retrieved from [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AAres\(2020\)2877634](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AAres(2020)2877634).

⁶⁸ Para. 3 CEEAG.

⁶⁹ Paras. 73–113 CEEAG.

the scope of the Guidelines to all technologies and approaches that reduce greenhouse gases and improve energy efficiency; at the same time, it is possible for Member States to achieve RES targets within these rules through support for renewable energy and specific renewable schemes. Aid for the full net additional costs of more environmentally friendly investments and activities, and in a variety of forms (including contracts for difference), will also be possible. However, such aid will be subject to rules which ensure that the market price is not distorted.⁷⁰

In addition, the draft CEEAG introduces safeguards to guarantee that aid is directed towards improving climate and environmental protection, and limited to what is needed to achieve these goals, in order to ensure that market price formation, competition and the integrity of the single market are not distorted and to enhance transparency and ensure that such additional flexibility is well calibrated.⁷¹ For instance, Member States must consult the public on measures to be notified (the so-called ‘public consultation’ requirement).⁷²

Another new requirement is that the costs of all supported project types for climate protection must be identified according to aid amount per unit of greenhouse gas reduction achieved. In this way, the Commission attempts to discourage aid for less cost-effective investments on decarbonisation and to ensure that aid is directed towards its overarching objective.⁷³

The market-based approach remains a core rule of the revised Guidelines and is explained in more detail under the ‘proportionality’ condition. The ongoing discussion on the revision to EU State aid rules does not touch upon the market-based approach as such. It can thus be concluded that this mechanism is viewed positively and presumably will not be changed.

With regard to aid for a reduction and removal of greenhouse gas emissions, including through support for renewable energy, there are some exemptions from the requirement to allocate aid and determine the aid level through a competitive bidding process.⁷⁴ The general principle of technological neutrality remains in place – unless justified, general bidding should be open to competing technologies which can deliver the target objective of reducing greenhouse gas emissions.⁷⁵

⁷⁰ See https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf (accessed 27.07.2021).

⁷¹ See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2784 (accessed 27.07.2021).

⁷² Paras. 85–88 CEEAG.

⁷³ See https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf (accessed 27.07.2021).

⁷⁴ Namely, (a) there is insufficient potential supply to ensure competition and (b) beneficiaries are small projects. See para. 92 CEEAG.

⁷⁵ See https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf (accessed 27.07.2021).

As previously discussed, the draft CEEAG aims not only to promote RES but also to phase-out fossil fuels. Thus, it includes a new category of aid, namely aid for coal, peat and oil shale closure. The draft CEEAG envisages compatibility rules for two types of measures aimed at supporting the closure of power plants which burn fossil fuels: (1) aid to compensate for the early closure of profitable coal, peat and oil shale activities⁷⁶, and (2) aid to cover exceptional social and environmental costs arising from the closure of uncompetitive coal, peat and oil shale activities.⁷⁷

The CEEAG explicitly mention that:

measures that directly or indirectly involve support for fossil fuels (...) are unlikely to create positive environmental effects and often have important negative effects because they can increase the negative environmental externalities in the market. The same applies for measures involving new investments in natural gas (...).⁷⁸

Such measures will probably be deemed incompatible with the internal market as they will likely not meet the balancing test (therefore, State aid will not be possible).⁷⁹

The Commission acknowledges in the published draft that such measures may create space for the development of other environmentally friendly activities to offset the reduction in the power generation capacity caused by the early closure, and that they create legal certainty which may help to facilitate the closure of fossil fuels activities.⁸⁰ Regions relying on fossil fuels, and fearing the costs related to decarbonisation, will have an incentive to close uncompetitive coal, peat and oil shale activities due to aid directed towards the mitigation of the social and environmental impact of such closures.⁸¹

To conclude, the core of the EU State aid regime for renewables has not changed. Member State support for green energy may still be granted and a competitive bidding process will, in general, still be required to grant it. Decarbonisation – as a new category of aid falling within the scope of the draft CEEAG – implies that public support for renewable energy is not enough to achieve the goals of the EGD; a phase-out of fossil fuels is as important as

⁷⁶ Paras. 369–379 CEEAG.

⁷⁷ Paras. 380–392 CEEAG. The categories of covered eligible costs are defined in the proposed Guidelines. Costs resulting from non-compliance with environmental regulations and costs related to current production will not be eligible. See para. 386.

⁷⁸ Para 70 CEEAG. See also paras. 108–110 CEEAG.

⁷⁹ See https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf (accessed 27.07.2021).

⁸⁰ Para. 372 CEEAG.

⁸¹ Para. 384 CEEAG.

the promotion of RES. This approach will likely improve the competitiveness of RES and incentivise Member States to take actions to reduce brown energy sources.

II. Tensions between State aid and RE policy

1. Difficulties in qualification of support schemes as State aid

It should be recalled that support schemes and consequently (potential) State aid can take numerous forms, such as direct grants, tax advantages, soft loans, repayable advances, or equity investments and guarantees. It is up to the Member States to decide on the most appropriate measures; however, they should consider the market failure to be addressed and choose an instrument that is likely to create the lowest possible distortive effect on competition and trade.⁸² In the assessment of any measure in terms of the State aid regime, the form of the measure does not matter; what matters is whether it fulfils the cumulative conditions. Thus, the effect of the arrangement should be deemed to be a decisive factor here (Talus, 2016). Difficulties in the application of State aid principles to energy markets are illustrated by the inconsistencies in the case law of the CJEU.

The Court of Justice (hereinafter: ECJ) in its seminal judgement in *PreussenElektra*⁸³ considered that the measure in question did not constitute State aid⁸⁴ even if the advantage was granted by the State or by a public or private body designated or established by the State (Talus, 2017).⁸⁵ In this case, the funds came from private companies and no direct or indirect state resources were involved. There was no State control over resources even if the measure was imputable to the State (a purchasing obligation was imposed through a statute).

This approach is seen as formalistic and narrow and some authors have claimed that:

such a view allows measures resembling pseudo fiscal state aid policies to be implemented, as well as granting a (very) broad opportunity for Member States to

⁸² European Commission. (2019). State aid Scoreboard 2019. Retrieved from https://ec.europa.eu/competition-policy/state-aid/scoreboard_en.

⁸³ As this case has been analysed in depth by many scholars, the authors refrain from its detailed assessment and only mention it to point out its relevance in the area of State aid for energy.

⁸⁴ Case C-379/98 *PreussenElektra*, paras 58–61.

⁸⁵ *Ibidem*, para 58.

grant an advantage to certain entities by imposing such burden on private entities that would ultimately pass on these higher costs to end consumers (Anchustegui & Bergqvist, 2020; Sanchez-Graells, 2013).

To conclude, the *PreussenElektra* judgment has opened the way to the separation of the State aid regime from the assessment of support schemes, it also constrained the Commission from influencing national support schemes by means of State aid control (Boasson, 2019).

The CJEU approach changed in 2008 as the Court seemed to support the Commission's approach and thus narrowed the scope of *PreussenElektra* (Pérez Rodríguez, 2016; Rusche, 2015). In two other cases, *Essent Network Noord*⁸⁶ and *Vent De Colère and Others*⁸⁷, the ECJ held that mandatory surcharges for electricity charged to the customers were deemed as funds attributable to the State, thus constituting State aid. These cases indicated that if private undertakings are appointed by the Member States to manage state resources, such resources should be deemed as State aid. What differentiates these cases from *PreussenElektra* is that in the latter, the undertakings 'had not been appointed by the state to manage a State resource but were bound by an obligation to purchase by means of their own financial resources'.

Therefore, the ECJ changed its approach in *PreussenElektra* and ruled that the mere intention of the Member State to control certain resources is enough to fulfil the condition of a 'State origin' despite the involvement of an entity not based on public law (Marhold, 2017). This ruling enabled the Commission to apply State aid control to RES support.

Another recent case which dealt with the question of whether support schemes constitute State aid is the so-called *German EEG surcharge*⁸⁸ decision. The Commission approved therein a scheme which imposed an obligation on network operators to acquire renewable electricity at above market prices as compatible with the internal market and, more precisely, with the EEAG; however, it also ordered partial (but limited) recovery (Anchustegui & Bergqvist, 2020).⁸⁹ This decision was appealed before the General Court

⁸⁶ ECJ judgment of 17.07.2008, Case C-206/06 *Essent Network Noord and Others*, ECLI:EU:C:2008:413, p. I-05497.

⁸⁷ ECJ judgment of 19.12.2013, Case C-262/12 *Vent De Colère and Others*, ECLI:EU:C:2013:851, paras 14–37.

⁸⁸ European Commission Decision of 25.11.2014, Case SA.33995 [2014], C(2014) 8786 final.

⁸⁹ European Commission Decision of 25.11.2014, Case SA.33995 [2014], C(2014) 8786 final. European Commission Decision (EU) 2015/1585 of 2.11.2014 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).

(hereinafter: GC) which confirmed the findings of the Commission.⁹⁰ The ECJ overturned the judgment and held that the GC incorrectly determined EEG surcharges as State resources and, consequently, as State aid.⁹¹ Its reasoning was based on the fact that ‘it was not shown that the State had power to dispose over the funds generated by the surcharge or control the distributors and transmission entities by exercising public control’ (Anchustegui & Bergqvist, 2020).

The Notice on the Notion of State aid was the final turning point in clarifying the *PreussenElektra* judgment stating that the narrow approach presented in this case was exceptionally justified because of the specific characteristics of the German support scheme (Bellantuono, 2017).⁹²

These cases are not coherent. They demonstrate that the Commission attempts to control support schemes by assessing their compatibility with the State aid framework. The CJEU, on the other hand, has ruled in some cases that a particular scheme does not constitute aid; in other cases however, it did not follow such reasoning. This also proves that every scheme needs to be assessed *in concreto*.

2. Discriminatory nature of support schemes

In *PreussenElektra*, the ECJ also had an opportunity to consider measures limited only to the territory of Germany and, thus, solely to national operators. Similarly, the *Ålands Vindkraft*⁹³ and *Essent Belgium NV*⁹⁴ cases concerned a dispute over a Member State willing to participate in RES support schemes of another Member State. In *PreussenElektra*, even though the scheme was *de facto* discriminatory, hence incompatible with the internal market, the ECJ

⁹⁰ GC judgment of 10.05.2016, Case T-47/15 *Germany v Commission*, EU:T:2016:281. This indicated that the funds generated by the EEG surcharge were under the dominant influence of the state, through the administration of the transmission entities, thus aid had a state origin.

⁹¹ ECJ judgment of 28.03.2019, Case C-405/16P *Germany v Commission*, paras 48–87.

⁹² European Commission. (2016). Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262 p. 1) par. 61–65; this argument was also raised by the AG in the *Essent Network Noord BV*, see the Opinion of Advocate General Mengozzi of 24.01.2008, Case C-206/06 *Essent Network Noord BV*, ECLI:EU:C:2008:33.

⁹³ ECJ judgment of 1.07.2014, Case C-573/12 *Ålands Vindkraft AB v Energiemyndigheten*, ECLI:EU:C:2014:2037.

⁹⁴ ECJ judgment of 11.09.2014, Joint Cases C-204/12–C-208/12 *Essent Belgium NV v. Vlaamse Reguleringsinstantie*, ECLI:EU:C:2014:2192, (hereinafter: Joint Cases C-204/12–C-208/12 *Essent Belgium*).

was in favour of it and considered the positive impact of RE in connection with environmental protection (Marhold, 2017).

In *Ålands Vindkraft*, the ECJ held that Sweden can lawfully refuse the participation of a Finnish company in a Swedish national support scheme (Marhold, 2017). In *Essent Belgium NV*, the Court similarly stated that a support scheme discriminating against foreign companies and, consequently, violating free movement of goods, was justified by environmental objectives and the importance of the public interest in RES promotion (Marhold, 2017).⁹⁵

Therefore, it can be observed that the CJEU accepted the discriminatory nature of a support scheme in the name of RES promotion. As acknowledged by Sjøfjell (2020), *PreussenElektra* is ‘a landmark case in its acceptance of discriminatory measures with reference to the environmental integration rule’. It shows that environmental considerations as a core EU objective are taken into account by the EU institutions and may justify restrictions on free movement. This analysis is also relevant for Article 11 TFEU.

3. Difficulties in integrating environmental objectives into the State aid regime

The Commission is required to comply with Article 11 TFEU and, therefore, take into account environmental protection in other than environmental policies. In *PreussenElektra*, the ECJ referred to the requirements set out in Article 11 TFEU and acknowledged the importance of environmental protection and that it needs to be taken into account in other policies, namely energy policy.⁹⁶

The amendments to the State aid regime do not only concern the EEAG and aid for renewable energy. The State aid revision is targeted at all industries and the framework as a whole; therefore, it is expected that other State aid rules will be revised in light of the goals of the EGD. Despite the commitment to consider the environmental impact of any aid project irrespective of the sector concerned⁹⁷, the Commission has not yet implemented this approach. To date, there are no specific provisions or guidelines on the integration of environmental objectives into public support measures that target non-environmentally oriented projects (Lünenbürger et al., 2020). Even though there has been significant growth in environmentally-related legislation, and environmental protection will almost certainly become a new constitutional paradigm of the EU, the Commission in neither its decisions, nor in the policy

⁹⁵ Joint Cases C-204/12–C-208/12 *Essent Belgium*, paras 89–93.

⁹⁶ It should be noted that this judgment was published prior to the Lisbon Treaty.

⁹⁷ Recital 83 of the 2001 Environmental Protection Aid Guidelines.

making has paved the way by affecting the model of compatibility assessment (Sikora, 2020).⁹⁸

This is particularly important in light of the recent ECJ judgment *Austria v Commission*⁹⁹ (*Hinckley Point*), which pertained to the issue of the applicability of State aid and environmental rules to nuclear energy projects. The ECJ ruled that the Commission does not have to consider the negative impact on the environment when it assesses whether an aid measure aimed to facilitate the development of certain economic activities pursuant to Article 107(3)(c), which does not specifically intend to pursue environmental goals, is compatible with the internal market. It only has to assess whether it does not adversely affect trading conditions to an extent contrary to the common interest. Therefore, the assessment of the impact of the measure on the environment would only be justified if the goal of the measure is to pursue environmental objectives (Bruzzone & Capozzi, 2020).¹⁰⁰

Regarding the meaning of ‘common interest’, according to the ECJ, Article 107(3) TFEU does not require a Member State to demonstrate that the planned aid measure pursues a common interest. Aid must only ‘be intended to facilitate the development of certain economic activities or of certain economic areas’ (positive condition) and ‘it must not adversely affect trading conditions to an extent contrary to the common interest’ (negative condition).¹⁰¹ Therefore, Article 107(3)(c) TFEU ‘does not make compatibility of aid dependent on its pursuing an objective of common interest, without prejudice to the fact that decisions adopted by the Commission on that basis must ensure compliance with EU law’¹⁰² (Kingston, 2021).

This conclusion has far-reaching consequences for the Commission’s established assessment of compatibility of certain aid measures in accordance with the ‘common assessment principles’ under Article 107(3) TFEU.¹⁰³ According to this rule, a Member State needs to, *inter alia*, prove that an aid measure contributes to ‘a well-defined objective of common interest’ and it is up to the Commission to decide, while evaluating the notification, whether such objective is well defined by the Member State concerned. The Commission has a wide discretion in such assessment and has a power to determine what constitutes (European) common interest (Kingston, 2021). The *Hinckley Point* ruling means that the Commission is no longer entitled to require a Member

⁹⁸ Beyond the proportionality and limited consistency check with EU environmental rules.

⁹⁹ ECJ judgment of 22.09.2020, Case C-594/18 P *Austria v Commission* [2020] EU:C:2020:742, (hereinafter: Case C-594/18 P *Hinckley Point*).

¹⁰⁰ Case C-594/18 P *Hinckley Point*, para 101, 102.

¹⁰¹ *Ibidem*, para 20.

¹⁰² *Ibidem*.

¹⁰³ See, for instance, paras 30–32 EEAG.

State to demonstrate a ‘well defined common interest’ and can only consider ‘common interest’ when assessing whether an aid measure adversely affects trading conditions to an extent contrary to that interest (Kingston, 2021).

On the other hand, the ECJ held that ‘State aid for an economic activity falling within the nuclear energy sector that is shown upon examination to contravene environmental rules cannot be declared compatible with the internal market’.¹⁰⁴ The Commission needs to check whether that activity does not infringe rules of EU law on the environment. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.¹⁰⁵

However, in the *Hinckley Point* case, the principle of environmental protection, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant. This would not be in line with Article 194(2) TFEU which allows Member States to determine the conditions for exploiting their energy resources, their mix of energy sources, and the general structure of their energy supply.¹⁰⁶

The effect of the *Hinckley Point* judgment remains ambiguous. It seems that, as a general rule, the Commission has to consider environmental objectives when declaring that a certain measure is compatible with the internal market and, therefore, assess whether potential aid does not infringe EU environmental law.¹⁰⁷ As stated by Kingston (2021), this more expansive approach of the ECJ can be seen as ‘a major step forward in achieving real integration of the EU’s State aid and environmental rules’. Even though this judgment concerns nuclear energy, it has wider consequences on the assessment of State aid in the EU as it establishes a new balance test between State aid and environmental protection (Kingston, 2021). However, it will have to be specified how such environmental impact will be assessed. This assessment is also in line with the European Climate Law and the Commission’s legal duty to take the necessary measures to ensure that the legally binding objective of climate neutrality in the Union is attained by 2050.

On the other hand, Member States’ rights to pursue their own policies (in this case, energy policy) and freely establish their energy mix outweigh environmental considerations. Regarding ‘the common interest’ principle, it follows that even though the Commission has wide discretion to assess the compatibility of aid with the internal market, its approach must be in line with

¹⁰⁴ Case C-594/18 P *Hinckley Point*, paras 44–45.

¹⁰⁵ *Ibidem*, para 100.

¹⁰⁶ *Ibidem*, para 49.

¹⁰⁷ *Ibidem*, para 100.

the text of the TFEU; thus, the Guidelines cannot override primary legislation (Kingston, 2021).

Even though the ‘common interest’ principle does not directly fall within the topic of this analysis, it is worth mentioning that this condition of the compatibility assessment changed significantly with the introduction of the draft CEEAG. According to the EEAG, Member States intending to grant aid must precisely define their objective and explain the expected contribution of the measure towards this objective.¹⁰⁸ By contrast, in the draft CEEAG, in line with *Hinckley Point*, the aid measure must only not unduly affect trading conditions to an extent contrary to the common interest (‘negative condition’). This proves that the effects of *Hinckley Point* may have a significant influence over the State aid framework and, more precisely, on the Commission’s assessment of the compatibility of certain measures with the internal market.

4. Lenient approach by the Commission to the compatibility of support schemes with the internal market

It should be recalled that the Commission in deciding which State aid measures are compatible with the internal market should conduct a compatibility assessment, which gives it some degree of discretion. Thus, the Commission may argue that public support for a certain project does not fulfil the conditions enumerated in Article 107(3) TFEU or in the EEAG.

The Commission and the CJEU acknowledge the importance of, and public interest in, RES promotion, and thus are quite lenient in assessing the compatibility with the internal market of support schemes which aim to achieve a high share of RES in gross energy consumption. Due to the public interest involved in RES promotion, the protection of the environment outweighs the discriminatory effect of national support schemes (Marhold, 2017).

To prove such statement, under both of the previous Guidelines (2001 and 2008), all support schemes were approved (mostly unconditionally while just a few needed a modification).¹⁰⁹ Some authors claimed that this was caused by political negotiations on Directive 2001/77/EC on the promotion of electricity produced from RES in the internal electricity market (hereinafter: RES-E)¹¹⁰, RED I and both Guidelines. Some degree of harmonisation was accepted in exchange for freedom to adopt national support schemes (Bellantuono, 2017;

¹⁰⁸ Case C-594/18 P *Hinckley Point*, para 31.

¹⁰⁹ The Commission’s practice since the 1990s is analysed by Rusche (2015).

¹¹⁰ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ 2001 L 283, p. 33 (hereinafter: RES-E).

Rusche, 2015). Additionally, the CJEU has systematically allowed Member States to establish their own RES support schemes (Marhold, 2017).

It can be concluded that the Commission tries to increase its influence over the energy sector (Maltby, 2013) and, more specifically, control of RES support schemes. The Commission is determined to combat any circumvention of State aid rules and to develop stronger EU steering in RES support schemes (Szulecki & Claes, 2019). However, in most cases, it approves State aid regarding environmental protection and energy. At the same time, the case law of the CJEU is not consistent and depends on the analysis *in concreto*.

To summarise, two trends in the Commission and CJEU approaches towards State aid for RES promotion can be observed: (1) increased steering of the EU in renewable energy support schemes (Boasson, 2019), and (2) a lenient approach to the compatibility of support schemes with the internal market as explained by the public interest in RES support (Marhold, 2017).

III. Impact of the EGD on the assessment of the State aid framework

1. Compatibility of the State aid framework for renewable energy with the EGD

The EGD triggered the revision of the State aid framework, including a revision to the EEAG to align State aid control instruments to the objectives set out by the Commission in the EGD. For this reason, the draft CEEAG brings forward amendments which reflect these goals. Consequently, the Commission should consider the goals of the EGD and the 2030 and 2050 climate and energy targets when revising the EEAG and the relevant GBER provisions. The revisions should also be flexible enough to cover innovative solutions and to simplify procedures for the approval of State aid, as acknowledged by various scholars¹¹¹ (e.g., Bruzzone & Capozzi, 2020). The RED II will also be amended to reflect the newly established target of 55% reduction of emissions.

The framework for State aid for renewable energy will not change significantly. The aid will have to be granted in the form of market-based instruments, which means Member States will not be completely free in designing their support schemes. They will have to comply with various requirements envisaged in the revised Guidelines (such as the ‘public consultation’ requirement).

¹¹¹ As part of the debate, the European Commission organised a call for contributions. See: https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf (accessed 27.07.2021).

It may be assumed that the Commission will follow its lenient attitude towards Member States granting aid for renewable energy projects and will accept the discriminatory nature of support schemes. In this context, we do not expect any shifts in the Commission's actions towards support for renewables.

The most important novelty in the upcoming State aid framework concerns the phase-out of fossil fuels and the integration of environmental objectives into other State aid measures.

2. Commission's approach towards harmful subsidies

Given the Commission's approach and its current practice of preventing operating aid and favouring investment aid (which, generally speaking, should support and incentivise the setup of activities rather than subsidising existing ones), some authors have claimed that the Commission can base its conclusion that a certain measure is not compatible with the internal market on the assessment that the aid continues to support non-environmentally friendly projects and is missing an incentive effect (Nowag et al., 2020).¹¹² The fact that an undertaking bears normal operating costs associated with its compliance with environmental legislation does not constitute a condition for lawful aid to be granted due to lack of an incentive effect. If the undertaking invests in technology beyond EU standards or aims for an early implementation of such standards, then such aid may be deemed compatible with the EEAG (Verschuur & Sbrolli, 2020). Therefore, the Commission can take advantage of its discretion to pursue environmental goals set up in the EGD.

With regard to the incentive effect, the EGD is likely to lead to 'new' EU standards (for instance, in the European Climate Law) and thus undertakings which currently receive State aid may no longer be eligible for it. Given that the EGD sets out high standards, it remains to be seen whether undertakings will be able to go beyond such targets and, hence, receive State aid. More likely, they will be able to benefit from State aid if they decide to implement these targets before 2050 (Verschuur & Sbrolli, 2020).

¹¹² The EEAG contain the compatibility assessment principles under Article 107(3) TFEU, including contribution to a well-defined objective of common interest, need for State intervention, appropriateness of the aid measure, incentive effect, proportionality of the aid, avoidance of undue negative effects on competition and trade between Member States and transparency (Article 3 EEAG.) See also para 27(d) 'incentive effect: the aid changes the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner' and para 49.

The Commission, by exercising its powers, may thus *de facto* favour ‘green’ aid and enhance its competitiveness with ‘brown’ aid. It is likely that under the draft CEEAG, the Commission will employ the State aid framework and use its discretion to further tighten the requirements for State aid to fossil fuels that are still compatible with the internal market, in order to gradually phase-out public support for fossil fuels.

State aid control in a broad understanding (meaning not only the EEAG and the relevant GBER provisions) can, therefore, be seen as a relevant tool to respond to climate change (Sikora, 2020). This may influence the position and competitiveness of RES in the market. However, such an approach will clash with other (national) interests and objectives which will have to be addressed by the Commission and the CJEU (Sikora, 2020).

IV. Conclusion

Surprisingly, the EGD touches to a small extent upon both the RE policy and the State aid regime. Even though clean energy is one of its main priorities, and it is emphasised that a sustainable transition will require large investments, it does not address this matter by means of any legislative or non-legislative measures. However, revisions to both frameworks (RE law and the State aid regime) will reinforce consistency with the goals of the EGD.

The Commission’s goal to acquire broader control over RE policy and, more specifically, the design of the national RES support schemes, was finally envisaged in the EEAG and the relevant GBER provisions. These provisions restricted the freedom of Member States to establish support schemes by means of a market-based approach, aimed at mitigating the detrimental effect of public support for RES. Moreover, it opened the floor for an amendment of the RE framework and, more precisely, RED I. It should thus be concluded that tensions between RE policy and the State aid regime are already addressed – RED II and the EEAG are consistent and provide the same requirements for aid to be compatible with the internal market – only support schemes in compliance with the requirements may serve as measures to achieve the targets.

The ongoing revision of State aid rules, including State aid for renewables, is mainly focussed on adjusting the current rules to the ambitious goals of the EGD and does not touch upon the market-based approach. As the green transition requires massive investments, State aid rules must play a fundamental role in the energy shift; however, to ensure that scarce resources are allocated in the best way possible, the rules should rely on competitive mechanisms to be effective. The ongoing discussion on the revision of State aid rules does

not touch upon the market-based approach, leading to the conclusion that the mechanism is positively seen and will presumably not be changed. To achieve the goals of the EGD, it is more important to encourage green aid, to ease the administrative procedures (to make RES more competitive) and to pursue environmental goals in other areas of State aid (most importantly, State aid for fossil fuels). This is and will be the main focus of the EU State aid framework revision.

The current market-based approach may not be enough to achieve the goals of the EGD. Without the phase-out of fossil fuel subsidies, which are costly and undermine energy transition, these goals will not be achieved. It is not only necessary to promote RES but also to complement such actions with an end to subsidies for traditional energy sources by scrutinising them through State aid control reinforced by the inclusion of Article 11 TFEU. This is acknowledged in the draft CEEAG – the Commission does not only focus on a market-based approach but also on the phase-out of fossil fuels and certain new requirements to ensure that aid is efficient and well calibrated and that it is in line with the EGD objectives.

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