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State Aid in the EU Energy Market

RES Deployment & Adaptation to the Green Deal

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*Dedicated to my brother,
Mr. PETROS GARBIS.*

I would not change you for the world.

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ABSTRACT

With the global population set to continue growing, the demand for energy will steadily increase. Fossil fuel resources are in decline, and their use is associated with environmental destruction. The purpose of this thesis is to highlight the need for massive RES deployment in order to facilitate the energy transition into a coal free future and achieve complete decarbonisation until 2050. But we all know that RES is a capital intensive business. Since not all RES technologies are mature enough, this fact reflects on investments since investors tend to be more reluctant towards new forms of RES technologies. This has made financing the RES arguably one of the biggest problems of the 21st century.

During the last years, RES projects were and still are supported throughout EU by support schemes providing security to RES producers, either that comes by FIP regimes or tenders, securing a fixed price on the wholesale market price in order to make RES more competitive. Since prices for RES infrastructure, establishment and equipment have significantly been reduced, the ultimate goal is that support schemes will eventually cease to exist. But of course we are not there yet. So in order to close the gap, the granting of state aid is usually inevitable. And as I say, where there is funding (plus in this case state intervention) there is also the need for state aid control. State aid rules are designed to prevent or limit the capacity of Member States to distort the competitive process and intra-community trade in the EU by granting an undertaking with some economic advantage. The thesis analyzes the role of competition and state aid in the EU energy market, examines all the conditions that make an aid fall within the scope of Article 107 par.1 of TFEU (notion of state aid) and presents all exceptional frameworks under which a state aid shall be deemed compatible with the EU market. Throughout this thesis it is established that there is a need for state aid to contribute even more in the energy transition, which raises the question of how the environmental considerations can be integrated into state aid policy.

Last but not least, this thesis also discusses the latest tool of the EU towards tackling energy and climate crisis, which is the EU Green Deal, and its correlation with the state aid regime. It also discusses how the current guidelines (EEAG) allow to be broadened in order to promote coherency with the EU Green Deal objectives. As long

as state aid is granted on an absolutely necessary basis with the goal of phasing out subsidies once all negative externalities have been internalized, then the distortion of competition would be kept to a minimum and the market failure linked to negative externalities rectified.

KEYWORDS:

Energy Law – State Aid – Competition – RES – European Green Deal

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ACRONYMS AND ABBREVIATIONS

RES	Renewable Energy Sources
IEA	International Energy Agency
ACER	Agency for Cooperation of Energy Regulators
RAE	Greek Regulatory Authority for Energy
EU	European Union
EC	European Commission
DG-COMP	Directorate-General for Competition
CJEU	Court of Justice of the European Union
GHG	Greenhouse Gas
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
PCI	Project of Common Interest
PV	Photovoltaics (Panels)
WWS	Wind – Water – Solar
EEAG	Energy and Environmental State Aid Guidelines
CEEAG	Climate, Energy and Environmental State Aid Guidelines
PPA	Power Purchase Agreement
ETS	Emissions Trading System
NECP	National Energy and Climate Plan
REDII	Renewable Energy Directive recast
MEIP	Market Economy Investor Principle
SGEI	Services of General Economic Interest
CM	Capacity Mechanism
FIT	Feed-in Tariff
FIP	Feed-in Premium

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MAIN LEGISLATIVE PROVISIONS ON STATE AID

Article 107 TFEU – (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108 TFEU – (ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109 TFEU – (ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

1. INTRODUCTION

Nowadays, modern societies face multiple crises worldwide. Among the most important of those is without any doubt the climate crisis. In particular, to address the climate crisis, it is crucial to intensify all efforts in order to minimize (ultimately up to zero) GHG emissions as soon as possible. In this light, RES are a key tool for achieving the much desired goal of GHG emissions reduction, thus the aim should now focus on ways to facilitate their deployment worldwide, and of course also in Greece.

This thesis is framed by the dynamics of the most ambitious European energy and climate policies, which, starting with the reduction of GHG emissions, could lead to an incredibly fast growth of RES, as reflected in the last adopted by the EC tool, the European Green Deal. However, it is understandable that we are in the middle of an ever-changing environment upon to be completely reformed by the energy transition and, therefore, any solutions or directions must take into account any downsides of such fact.

According to article 4 par. 2 of the TFEU, energy policy is established at the level of primary European law as a joint responsibility of both the EU and the Member States.

The Treaty of Lisbon introduced an autonomous legal base for energy in Article 194 of the TFEU, envisaging for an integrated EU Energy Policy, a complete and functioning internal energy market, more energy efficiency and inclusion of RES, security of supply and an international dimension to the EU energy policy. EU energy markets have undergone a liberalization process over the last 20 years with the goal of creating a single and unified EU energy market. The removal of national monopolies and development of cross-border trade was hoped to lead to lower prices and better services for consumers¹ commissioned by the EC that forecasted annual net economic benefits of up to €40 billion from a truly integrated energy market, also concluded that including longer-term potential benefits with the short-term trading and balancing benefits gives total integration benefits of €3.9 billion per year².

¹ Booz & Company, Final Report – Benefits of an Integrated European Energy Market, prepared for DG Energy, European Commission, 2013.

² D. M. Newbery, G. Strbac, I. Viehoff, The benefits of integrating European electricity markets, in Energy Policy 94:253-263 · July 2016.

It is crucial that the EU energy market maintains a healthy competition and prevents its possible distortion at all times. Let's do not forget that this used to be a market that was governed by monopolies. The first liberalization steps, i.e. the third party access regime and protection mechanisms against discrimination by vertically integrated energy utilities, took place in 1990s³. Following that, the 2nd Energy package⁴ became effective in 2003, imposing an obligation on member states to fully open up their electricity and gas markets by providing access towards third parties and by implementing the provisions regarding the legal, operational, e.g. accounting, and informational unbundling. Between each package, the EC used to launch sector inquiries in order to review the proper implementation of the package in force and to make observations about potential lacks and malfunctions that needed to be fixed, and then it proceeded with the proposal of the next energy package. In 2009, it proposed further regulatory and structural measures, known as the 3rd energy package. The 3rd energy package⁵ introduced even stricter rules on unbundling, with tighter supervision, a clearer framework regarding the function and the development of networks across member states and the establishment of the ACER. Nowadays, talk is around the European Green Deal that intends to fundamentally reform the regulatory framework, and the proposal for the first European Climate Law, in order to further accommodate all issues arisen in the energy market regarding energy and climate change targets.

To achieve an effective energy transition, an enormous amount of capital will be needed. Although the overall costs relating to energy production coming from RES have decreased significantly in recent years due to technological advancements, there has been no corresponding increase in investment. Investors are less willing to take

³ Council Directive (EC) 1996/92 concerning common rules for the internal market in electricity [1997], Council Directive (EC) 1998/30 of 22 June 1998 concerning common rules for the internal market on natural gas [1998].

⁴ Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003], along with Council Directive (EC) 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] and Council Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity [2003], and Council Regulation (EC) 1775/2005 on conditions for access to the natural gas transmission networks [2005].

⁵ Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Council Regulation (EC) 713/2009 establishing an Agency for the Cooperation of Energy Regulators, Council Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.

investment risk due to changes in policies and the amount of capital involved, making financing the RET arguably one of the biggest problems of the 21st century⁶.

State aid control is needed to maintain a level playing field for all undertakings active in the Single European Market, regardless of which Member State they are established in. While State aid can be a useful effective tool in contributing to common interest objectives it is essential to control it in a way that keeps the internal market competitive.

The EU State aid control regime is an integrated system of rules based on the rule of law and generally governed by the principles of the supremacy and effectiveness of EU law. At the same time, however, some weaknesses remain. The need to step up the process of checking the credibility of complainants, who are a very important source of information for the Commission, especially for illegal state aid, has long been suggested⁷. Nevertheless, their place in the process is limited, as is their access to the EC files, which is crucial especially in the light of the EC's new investigative powers (on the spot inspections, etc.). In general, further opening up the system so that a State aid Case is not considered to be a matter only between the EC and the concerned Member State is desirable. This could push the competitors of each beneficiary company to play a more active role in the control process and lead the Commission to more effective control by focusing its action against aid which is capable of causing significant distortion of competition within the internal market.

Access to affordable and clean energy in a cost competitive and fair manner as the EU economy decarbonises remains a key challenge for the energy sector, which faces strong global competition from producers in other regions enjoying access to cheap electricity largely due to the absence of similar regulatory costs as the ones levied in the EU (indirect carbon costs, RES charges, taxes etc.). More specifically, the costs related to the ongoing energy transition are not merely limited to RES surcharges. In fact, the energy transition has led to Europe's most electro-intensive industrial consumers being burdened with numerous other costs, which threaten their global competitiveness. To address this issue, the EC has evaluated and approved targeted

⁶ Ibid.

⁷ Το Σύστημα Διακυβέρνησης της Ευρωπαϊκής Ένωσης, Στεφάνου Κ., Γιαταγάνας Ξ., Γκόρτσος Χ, κ.α., 2020, σελ. 467-468, NB.

reductions to numerous other electricity surcharges outside the scope of the EEAG by evaluating with the Treaty provisions on the internal market under Article 107 (3). For this reason, in order to ensure consistency and legal certainty, this new State Aid case law that tends to treat RES project in a more linear manner should be imprinted into the new EEAG; the EEAG currently in force are prolonged until the end of 2021 and are also being revised. There is the proposal for adoption of new CEEAG that will include provisions specified to tackle energy and climate needs within the horizon of 2050.

While the rules on electricity at an European level were based on the effort to open up the industry to competition and to create an internal energy market, in their updated version they primarily aim at protecting the environment and in particular at tackling climate change through a profound transition, not only in terms of production but also in energy consumption. The provision of Article 194 TFEU is fundamental to the policy and EU law. Of all the forms of energy, the EU aims to develop electricity not only from new sources but exclusively from RES sources. However, another characteristic manifestation of the multilateral settlement that is present during the drafting of EU texts explicitly provides that Member States reserve the right to determine the terms of use and exploitation of their energy resources, the choice between different energy sources (energy mix) and the general structure of their energy supply. In this way, concerns of the Member States that were heavily dependent on coal and nuclear energy, were eased.

2. LEGISLATIVE BACKGROUND

In April 2009, the first European Union Renewable Energy Directive (RED) went into force. What will the 2020 to 2030 decade bring? In December 2018, the recast Renewable Energy Directive (RED II) set a target of 32% share of renewable energy and at least 40% GHG emission reduction by 2030 compared to the 1990 levels⁸. **During the 25th session of the Conference of the Parties (COP25) in December 2019, the European Commission president Ursula von der Leyen presented the European Green Deal⁹** which includes a set of policy initiatives to reach climate-neutrality and make the EU economy sustainable. The European Green Deal targets climate neutrality by 2050, and aims to support companies to become world leaders in clean products and technologies, as well as to ensure a just and inclusive transition. This process is based on the urgent call to combat the climate crisis, which is affecting our lives more and more often, with vulnerable groups of citizens experiencing its effects more intensely. It is characteristic that the production and use of energy is accountable for 75% of the total EU emissions.

The previous clean energy legislation was negotiated on the basis of the EU commitment to the Paris Agreement to reduce GHG emissions by 40% by 2030. In mid-September 2020, the European Commission proposed to raise the 2030 climate targets to 55% GHG reduction by 2030. The new ambition to increase this level to at least 55% through a European Climate Law¹⁰ implies that the clean energy legislation just adopted will need to be strengthened. This raises the question of political readiness to again reopen the key clean energy dossiers¹¹. The Council has already signaled it is “taking note” of the more ambitious target, but it has refrained from commenting on further energy policy actions. Observers expect that more ambitious

⁸ European Commission Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast), vol. 61, European Parliament and the Council, Brussels, Belgium (2018).

⁹ European Commission: The European green deal (2019) vol. Communicat. Brussels, Belgium.

¹⁰ EC - European Commission, Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM/2020/80 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588581905912&uri=CELEX:52020PC0080>.

¹¹ Is clean energy contested? Exploring which issues matter to stakeholders in the European Green Deal, Marc Ringel, Nils Bruch and Michèle Knodt, published in Energy Research & Social Science, Volume 77, July 2021, 102083.

policy efforts for renewable energy and energy efficiency will largely depend on stakeholder pressure¹², as stakeholder support is crucial for democratic legitimacy.

The Communication prioritizes the creation of an international level playing field for all RES and the relevant raw materials. **The accompanying Impact Assessment¹³ demonstrates that such an increase in the climate ambition is realistic and economically feasible.** In December 2020, the European Council representing the EU's Member States finally endorsed the new binding EU target for a net domestic reduction in GHG emissions of at least 55% by 2030. **Naturally, such an increased GHG reduction target will require a revision of the renewable energy and energy efficiency policies. According to the Impact Assessment, the 55% target will require a share of renewable energy around 38.5% by 2030.**

Proposals on how to finance the Green Deal were presented in January 2020 and intended to mobilize EUR 1 trillion of sustainable investments over the next decade¹⁴. Moreover, as a response to the economic slowdown due to the COVID-19 crisis, the European Council agreed on a EUR 672.5 billion recovery and resilience facility on 21 July 2020. This fund aims to support EU's sustainable and resilient recovery from the impacts of the COVID-19 pandemic while supporting the EU's green and digital priorities. EU Member States will prepare national recovery and resilience plans with their individual reform and investment agendas for the years 2021–2023. **Each recovery and resilience plan has to include a minimum of 37% of expenditure earmarked for actions to combat climate change.** Accordingly, it is expected that the annual EU budget set in the multiannual financial framework and the recovery and resilience facility will dedicate significant amounts to clean energy systems and spur private investments in the sector.

At the end of 2019, the EU Member States (MS) submitted 10-year integrated national energy and climate plans (NECP) for the period from 2021 to 2030. NECPs outline the strategy the MS intend to address the climate and energy targets. The NECPs also include the reference of the national contribution to the common EU

¹² G. Claeys, S. Tagliapietra, G. Zachmann, How to make the European Green Deal work, Bruegel Policy Contribution 13, 2019 <http://aei.pitt.edu/100978/>

¹³ European Commission: Impact Assessment on Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people (2020).

¹⁴ European Commission: Sustainable Europe investment plan European - European green deal investment plan vol. 53 (2020).

target for a 32% share of RES by 2030, as well as the means of achieving the aforementioned contribution, including among other the RES support schemes. It indicatively includes measures for RES deployment, energy efficiency, GHG emission reductions, interconnections, research and innovation¹⁵.

Country	Capacity 2019[GWp]	Capacity 2030 (low)[GWp]	Capacity 2030 (high)[GWp]
Austria	1.70	3.00	12.00
Belgium	4.86	7.66	11.00
Bulgaria	1.07	2.90	2.90
Croatia	0.06	0.77	0.77
Cyprus	0.15	0.80	0.80
Czechia	2.22	3.98	3.98
Denmark	1.40	7.84	7.84
Estonia	0.12	0.42	0.42
Finland	0.20	1.20	1.20
France	9.90	25.00	25.00
Germany	49.18	71.88	97.92
Greece	2.91	8.00	8.00
Hungary	1.60	6.00	6.00
Ireland	0.05	1.25	1.50
Italy	20.87	27.00	51.12
Latvia	0.01	0.50	0.50
Lithuania	0.11	1.53	1.53
Luxembourg	0.19	0.7	1.11

¹⁵ Detailed information and the final NECP of the EU countries are available at: https://ec.europa.eu/energy/topics/energy-strategy/national-energy-climate-plans_en.

Country	Capacity 2019[GWp]	Capacity 2030 (low)[GWp]	Capacity 2030 (high)[GWp]
Malta	0.15	0.26	0.26
Netherlands	6.81	18.00	36.00
Poland	1.31	7.30	7.30
Portugal	0.80	9.00	9.00
Romania	1.40	5.89	5.89
Slovakia	0.57	1.20	1.20
Slovenia	0.30	1.65	1.65
Spain	10.97	44.00	44.00
Sweden	0.69	2.50	2.50
Total EU (27)	119.6	260.23	341.39

Table 1. Installed capacities in EU for 2019 and National Energy and Climate Plan (NECP) estimates for 2030 – low and high cases¹⁶. Each country provided a range of capacity depending on the level of ambition. This table presents country-level figures for both levels of ambition and the current (end of 2019) installed capacity.

In the low case, the total PV capacity in 2030 in EU is approximately 260 GWp, while for the high-ambition it exceeds 341 GWp. **This implies the need to rapidly update the NECP deployment plans and the necessary capacity additions in order to reach the upgraded target of the Green Deal that result in –55% GHG emissions¹⁷.** To note the wide range between the NECP low and high cases exceed 80 GWp. This wide range increases uncertainty and risks getting off track with the Green deal's objectives.

Following the submission of the NECPs, the EU assesses the ambition and adequacy of the objectives set and evaluates every two years the progress that has been made towards these objectives. If the objectives or measures are considered to be insufficient or the progress does not keep up with the NECP, then the EC issues

¹⁶ Source: *The role of photovoltaics for the European Green Deal and the recovery plan* Ioannis Kougias, Nigel Taylor, Georgia Kakoulaki, Arnulf Jäger-Waldau, published in *Renewable and Sustainable Energy Reviews*, Volume 144, July 2021.

¹⁷ Ibid.

recommendations toward those member states that were assessed negatively, which must be duly taken into account. The EC, therefore, acquires the power to intervene in the drafting and implementation of NECPs under secondary EU law. These powers might, to some extent, replace EU bodies' interventions made so far through state aid control.

3. COMPETITION POLICY & STATE AID RULES

3.1. THE IMPORTANCE OF COMPETITION IN THE EU MARKET

The primary reason behind the overall competition regulation is the fact that the European Economic Community has originally been defined by the single market¹⁸, and, for this reason, European Community law prohibits all sorts of behaviour that present an obstacle to the development of this single market, as well as to the preservation of what has been so far achieved¹⁹.

There is a conflict between European Union's goals of liberalization and effective competition in certain protected sectors of the economy and the duties that member states take up towards their citizens, as for example the need to kick energy poverty or their duty to ensure access to and availability of certain common goods and services, like energy. On one hand, the most important 'public service' that needs to result from the internal market process is ensuring real and effective competition on wholesale markets.²⁰ That will deliver multiple benefits to the consumers-citizens and deal with the possibility of market failures. But on the other hand, competition provisions, and therefore, competition law could not exist in sole isolation. It is supplemented by social, regional, environmental and other kind of policies which may in cases restrict its scope. The most prominent way to improve the social welfare is by public intervention that is in the case of the energy market imperative, due to the monopolistic nature that dominated, and still dominates in some ways, this sector industry.

Interpreting widely the scope of article 4 par. 3 of the TEU, one can conclude that member states have the general obligation to cooperate with the European Union to facilitate the objectives of the TFEU, one of them being the creation of a competitive internal energy market. Additionally, as already mentioned, according to article 4 par.

¹⁸ Article 2 of the Treaty of Rome: "*The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.*"

¹⁹ *State Aid in the EU – Less and More Targeted?*, Anita Pelle, Faculty of International Relations Working Papers Volume IV 13/2010.

²⁰ C. Jones, 'Introduction' in C. Jones (ed), *EU Energy Law: Volume I The Internal Market*, 4th edn, Claeys & Casteels, 2016.

2 of the TFEU, energy policy is established at the level of primary European law as a joint responsibility of both the EU and the Member States.

Competition policy rests upon the idea that a market-based economy provides the best guarantees for raising living conditions in the EU to the benefit of citizens. A functioning market is one of the primary objectives of the EU Treaty and is essential to enhance the competitiveness of the European economy²¹. Unwarranted selective advantages preventing market forces from rewarding competitive firms decrease the competitiveness of the European market, create market barriers, and eventually lead to higher prices for consumers, lower quality goods and less innovation²².

An open market requires a level playing field where undertakings compete on the strength of their commercial abilities²³ and do not depend on direct or indirect financial support from their governments. As Commissioner Neelie Kroes has explained back in 2008, from the viewpoint of the Competition Directorate General, the tool bringing long-term results in tackling a crisis is *not* state aid, but the restarting of competitive and healthy markets, as early as possible after any disruption or failure. Article 107 par. 1 of the TFEU is not just a part of the competition law chapter, but it does also explicitly prohibit state intervention by means of aid, which distorts or threatens to distort competition in the relevant market. Within this concept, only those measures which have the effect of distorting competition and trade should be targeted and thus should be prohibited. This effect based approach implicitly favours the use of economic theory to distinguish potentially harmful from less detrimental forms of aid²⁴. The energy sector wasn't always subject to EU rules on state aid. That began with the opening-up of national energy borders and the development of European energy trade, where the energy companies became affected by international competition and found themselves in the need of state aid provided by their governments.

Competition rules have an institutional content to carry out a dual process: strengthening competition in a deregulated market and certain non-competitive

²¹ Commission, 'State Aid Action Plan Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (Consultation document) COM(2005) 107.

²² Ibid.

²³ K. Talus, *EU Energy Law and Policy: A critical account* (Oxford University Press, 2013) 285.

²⁴ R. Chari, C H Hofmann, C. Micheau 'Motivations for Aid, Why Control It, and Evolution of Aid in the EU' in *State Aid Law of the European Union*, Herwig C.H. Hofmann and C Micheau (eds) (Oxford University Press, 2016).

"public interest" objectives, in other words, regulating the deregulation. The main reason for the existence of competition law rules in the energy sector is the creation and maintenance of conditions of competition in the relevant markets and elimination of negative consequences of the monopolies that prevailed until recently. The desired competition is characterized as the means of function of the relevant state intervention in the structure and function of the market, especially in essential facilities (regulation of deregulation). However, at the same time with the competition policy, there is a strong state intervention, which especially in Greece, as evidenced by the practice in the field of RES can have a chaotic and completely occasional and fragmentary character with a catastrophic result for consumers or be opportunistic without being part of a long-term horizon.

In markets, such as the energy market, that are sealed off by anti-competitive state practices, positive integration measures were required.

Despite the technical nature of energy law, important issues that arose during these twenty years of market liberalization and ongoing transformation of the sector were eventually turned into constitutional provisions and principles in the resolution of relevant disputes. It is clear that energy law is not limited to the provisions of the Directives but rights, obligations and discretions can also be derived from the direct application of the provisions of European competition law²⁵.

3.2. NEED FOR STATE AID TO BE CONTROLLED

“... If there were no state aid rules, governments would be tempted to start a costly subsidy war, stealing the bread from each other’s table, instead of creating better ways to bake new bread.”

- Neelie Kroes, European Commissioner
for Competition 2004–2009.

One of the main aims of state aid is to increase investment in the economy. Given that investment is one of the most robust factors of growth, it is therefore possible that state aid does not foster growth directly, but has an indirect effect through increasing

²⁵ Συνοδινός Χ., Βελεγράκης Μ., *Δίκαιο ενέργειας και κρατικές ενισχύσεις*, *Ενέργεια&Δίκαιο* , 11/2009, σελ 57 επ.

investment²⁶. Designing incentives to aid the transition towards renewable energy needs to incorporate the uncertainties and risks associated with RE, which, if not measured, will lead to the failure of incentives²⁷. To achieve an effective energy transition, an enormous amount of capital will be needed. Although the overall costs relating to energy production coming from RES have decreased significantly in recent years due to technological advancements, there has been no corresponding increase in investment. Investors are less willing to take investment risk due to changes in policies and the amount of capital involved, making financing the RET arguably one of the biggest problems of the 21st century²⁸.

State aid control is needed to maintain a level playing field for all undertakings active in the Single European Market, regardless of which Member State they are established in. Another function of State aid control was to avoid subsidy races between Member States, meaning when a country subsidizes a national producer active in the internal market, other Member States could respond by subsidizing their own producers. These subsidy races have the potential of undermining the functioning of the internal market. State aid can however, as mentioned above, have an overall positive impact despite distortions of competition. By correcting market failures and contributing to achieving objectives of common interest the overall balance of the aid measure could be positive.

While State aid can be a useful effective tool in contributing to common interest objectives it is essential to control it in a way that keeps the internal market competitive. State aid without control has the possibility of doing more harm than good by preventing the market from rewarding the most efficient and innovative producers. This could lead to a situation where, in the case of environmental and energy aid, cleaner technologies and more efficient or innovative competitors are unable to enter the market²⁹.

²⁶ State Aid Policy in the European Union, ÇİĞDEM BÖRKE TUNALI and JAN FIDRMUC, 2015, JCMS Volume 53. Number 5. pp. 1143–1162.

²⁷ *Incentives and strategies for financing the renewable energy transition: A review*, Sikandar Abdul Qadir, HessahAl-Motairi, FurqanTahir and LuluwahAl-Fagih, published in Energy Reports Volume 7, November 2021, Pages 3590-3606, retrieved by <https://www.sciencedirect.com/science/article/pii/S2352484721004066>.

²⁸ Ibid.

²⁹ Zacharias Lilja Jensen, *Who Should Pay for Pollution? The Relationship between the European Green Deal, State Aid for Environmental Protection, and the Polluter Pays Principle*, 2021.

4. STATE AID CONTROL REGIME

4.1. REGULATORY FRAMEWORK

The EU State aid control regime is an integrated system of rules based on the rule of law and generally governed by the principles of the supremacy and effectiveness of EU law. At the same time, however, some weaknesses remain. The need to step up the process of checking the credibility of complainants, who are a very important source of information for the Commission, especially for illegal state aid, has long been suggested³⁰. Nevertheless, their place in the process is limited, as is their access to the EC files, which is crucial especially in the light of the EC's new investigative powers (on the spot inspections, etc.). In general, further opening up the system so that a State aid Case is not considered to be a matter only between the EC and the concerned Member State is desirable. This could push the competitors of each beneficiary company to play a more active role in the control process and lead the Commission to more effective control by focusing its action against aid which is capable of causing significant distortion of competition within the internal market.

As every legislative document, state aid rules (articles 107 to 109 TFEU) are under interpretation by the legal specialist. Thus, while others claim that article 107 TFEU sets a generic and yet absolute prohibition of state aid granting, in the way I see it, article 107 TFEU does not set an absolute prohibition of state aid, but only prohibits several cases of state aid granting that fulfill certain criteria, as they will be further elaborated below.

In other words, not all state aid is a priori prohibited in principle, contrary to popular belief. Practically, what is prohibited by article 107 TFEU is state aid which is incompatible with the internal market, that is to say, an aid which, as we shall see below, satisfies certain conditions and affects or threatens to affect the competitive function within the internal market. State aid often acts in a way of balancing out and supporting all new progressively evolving EU policies. This is because state aid can be particularly useful in achieving common interest projects (PCIs) or as a means of

³⁰ Το Σύστημα Διακυβέρνησης της Ευρωπαϊκής Ένωσης, Στεφάνου Κ., Γιαταγάνας Ξ., Γκόρτσος Χ, κ.α., 2020, σελ. 467-468, NB.

covering up market failures. However, because behind the granting of an aid measure, Member States may aim to defend and promote their own national priorities, their control by the EC is a key tool in protecting the healthy economic climate of the EU internal market. Thus, each state aid is notified by the Member State to the Commission before being activated, so that the latter can decide on its compatibility or not to the EU law provisions.

State aid is considered any granting by a Member State of an economic competitive advantage given to an undertaking or industry without any economically equivalent consideration. State aid rules are designed to prevent this capacity of member states to distort the competitive process. While granting public aid to one specific undertaking may bring along benefits to that said entity and end consumers, in the form of lower prices, but this advantage is also a disadvantage for all the other market players active in the same business. This benefit brings externalities that negatively impact market's competitiveness. In such a way, aid creates an uneven playing field between playing within the territory of EU.

This granting of aid is also not in line with the spirit of the EC guidelines on state aid in the fields of environment and energy (2014-2020), according to which for projects with a capacity of up to 500 kilowatts (kWp), the guaranteed fixed price support mechanism can be applied without these projects being obligated to participate in competitive processes.

State aid is a *sui generis* set of rules within the EU competition regime³¹. It has transformed from just being a part of the EU Competition law into the main reason why all these cases are being submitted before the European Commission and the European Court of Justice. This is justified easily if one takes into account that the majority of state aids has to go through the process of being examined for either being compatible with EU state aid rules or not. State aid rules apply to all economic sectors, including energy.

State aid is regulated by the European Commission Directorate General for Competition. Member countries have to report all state aid measures to the

³¹ Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

Commission and these measures can only be implemented after European Union approval. Although state aid has been effectively controlled by the European Union in recent years, establishing a well-functioning system for the control of state aid took a very long time³². There are several reasons behind this delay. First, state aid control is politically sensitive³³. Second, the articles of the treaty that regulate state aid are complex and do not impose rules at the national level. Thirdly, member countries were not quite eager to co-operate with the Commission in order to operationalize the articles of the treaty and to comply with the obligations imposed. Thus, oversight of member countries' state aid policies is much better now in comparison to ten years ago.

The baseline proposed by the EC is “less and better targeted” state aid³⁴. The earlier intention of the EU to have less and better targeted state aid in the common market has definitely not come true; at least not yet³⁵. The extent of state participation in the economy has considerably risen in connection with the energy transition: practically all Member States have started to implement energy policies and management strategies that set the ground for state intervention, mostly in the form of general measures, underpinned by fiscal incentives.

4.2. HOW IS STATE AID DEFINED?

The answer to that is both simple and complex: **By case law.**

Through interpretation of the Court's case law on what measures qualify as State aid a few conditions have been identified. There must be aid in the sense of an economic advantage, this advantage is granted directly or indirectly through State resources and is imputable to the State, the measure must be selective, meaning it favours certain undertakings or production of certain goods, and the measure must be liable to distort competition and affect trade between Member States.

³² State Aid Policy in the European Union, ÇIĞDEM BÖRKE TUNALI and JAN FIDRMUC, 2015, JCMS Volume 53. Number 5. pp. 1143–1162.

³³ Ibid

³⁴ https://ec.europa.eu/competition/publications/cpn/2005_2_3.pdf

³⁵ *State Aid in the EU – Less and More Targeted?*, Anita Pelle, Faculty of International Relations Working Papers Volume IV 13/2010.

Furthermore, the case law has interpreted advantage in quite a broad way, not only covering net payments, subsidies, loans, or direct investment, but also negative benefits, such as the relief from the payment of taxes or fiscal charges³⁶.

Especially for tax-related state aid, as C-387/92 Banco Exterior de Espana³⁷ case states “A measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty”. The dividing line between measures that constitute public subsidies and measures that fall within the general tax economy policy of the state is not always easy. The EC has had a constant eye on what they termed as “unfair tax competition between Member States” and have been concerned with the fact that due to a lack of tax harmonization in the EU, certain wealthier Member States were able to offer tax incentives (lower corporate tax or VAT rates, etc.) to attract investment in their territories unlike less wealthy Member States.

In the European Union, state aid expenditures are divided into two main categories: horizontal expenditures and sectoral expenditures³⁸. Horizontal expenditures cover regional development aid, environmental aid (including energy saving), research development and innovation aid and aid to small and medium-sized enterprises (including risk capital). Sectoral expenditures are composed of rescue and restructuring aid and aid to transport, agriculture, fisheries and aquaculture and coal, steel and shipbuilding.

Examples of state aid:

- Subsidy/Grant, e.g. to hire more people, to invest on low income areas, to conduct research, etc.,

³⁶ Judgment of 20 November 2003, GEMO SA, C-126/01, EU:C:2003:622, para. 28.

³⁷ Judgment of the Court of 15 March 1994. - Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia. - Competition - Public undertakings - Tax exemption - Abuse of a dominant position - State aid. - Case C-387/92 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0387>

³⁸ State Aid Policy in the European Union, ÇİĞDEM BÖRKE TUNALI and JAN FIDRMUC, 2015, JCMS Volume 53. Number 5. pp. 1143–1162.

- Soft loans, e.g. with 0% or very low interest, with no collateral required, granting long period of installments or with no ability to secure an asset to the loan,
- Tax exemption or reduction of tax rates,
- Any transfer of state resources,
- Sale of public land at prices below market level,
- Prices of electricity or sale of gas by companies owned by the state at prices below market level to an entity is an advantage given to the latter,
- Free guarantees, and
- Anything, in general, that means granting a benefit or selling below market level.

4.3. CONSTITUENT ELEMENTS

4.3.1. ECONOMIC ADVANTAGE – BENEFIT

The advantage criterion is pivotal in State aid law. For a measure to qualify as aid some advantage having a State origin must be granted to an undertaking which it otherwise would not have received under normal market conditions³⁹. An advantage is a functional concept; the defining characteristic is its effects and consequences and not the cause or intention⁴⁰, while the advantage could be direct or indirect. If the benefit reduces the normal financial burden of an undertaking it is an advantage, for instance by relieving or mitigating the costs of carrying out the economic activity. Furthermore, the case law has interpreted advantage in quite a broad way, not only covering net payments, subsidies, loans, or direct investment, but also negative benefits, such as the relief from the payment of taxes or fiscal charges⁴¹.

Especially for tax-related state aid, as elaborated previously, case law also perceives as a state aid any “... *measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers ...*”.

³⁹ Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, para. 84.

⁴⁰ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ [2016] C 262/1), para 67.

⁴¹ Judgment of 20 November 2003, *GEMO SA*, C-126/01, EU:C:2003:622, para. 28.

A benefit that is within the state's competence to be provided to public or private entities is without a doubt a state aid. However, when a benefit is given by means of the private sector like share capital increase, acquisition of shares, credit, etc. it becomes hard to tell if those cases fall within the meaning of state aid.

The criterion for that answer is whether the entity concerned obtains such a benefit that the latter could not have gained itself taking into account the usual course of its business activity. For public authorities' investments not to be considered as state aid, the behavior of the public investor must be at least similar to the behavior that a private company would have. This is the so called private investor test, which will be further elaborated below. **One must keep in mind whether a private investor would even be satisfied with the sum of the consideration he will gain back and whether he would act in the same way as the state had, being provided the same circumstances and conditions. If that assumption is confirmed then the state would have acted duly towards pursuing its own interest and not towards unlawfully supporting an entity.** Thus, assessing a subsidy as state aid is rather a complicated process of mainly economic nature. The EU Commission has focused its assessment of whether a subsidy could be a potential state aid on the existence of an advantage and whether a private investor would have entered into that transaction.

4.3.2. THE MARKET ECONOMY INVESTOR PRINCIPAL (MEIP)

Under article 345 TFEU, public authorities are allowed to act as market operators and own undertakings. As an extension of this right, the state is also allowed to invest, offer loans or guarantees to a private or public entity⁴². As previously said, the application of the MEIP is actually taking into account all the factors and conditions a private investor would have taken into account before entering into a market.

But when it comes to the State aid rules, things tend to become more complex. When assessing if a transaction conforms to the MEIP, the Commission focuses on the

⁴² Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

existence of an advantage and whether a private investor would enter into a transaction, having taken into account the existent circumstances.

An advantage, within the meaning of Article 107 par. 1 of the TFEU, although not explicitly stated, is any economic benefit which an undertaking could not have obtained under normal market conditions, meaning in the absence of state intervention. Whenever the financial situation of an undertaking is improved as a result of state intervention on terms different from normal market conditions, then an advantage is present. This comparison in order to detect if an economic transaction is in line with the normal conditions in the energy market is known as the Market Economy Investor Principle (MEIP). Some also go with the term Market Economy Operator Principle (MEOP). MEIP is a tool used to determine if state grants an advantage to an undertaking by not acting like a market economy operator, i.e. by not acting as a private investor aiming to make profit, with regards to the transaction being each time under examination by the Commission. A public authority that acts as a private investor may charge what the market can bear. **Although a public authority is not expected to face the limits of legality, if it supposed to act as a private operator, it must show similar behavior just like a private operator who aims for profit.**⁴³

Such a methodology must be based on the available objective, verifiable and reliable data, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations. However, where an investor intends to implement a new energy concept, the Commission's case decisions have admitted that it is for the private investor to determine its business plan and to pursue ambitious and mighty risky targets in terms of sales' volumes, the prospect of which cannot solely be determined on the basis of already existing figures. If a project will be profitable or unprofitable can be seen without particular difficulty as the case may be, by examining the discount rate or the expected future stream of revenue (IRR). A variation of the discount rate by even 1% can have a severe impact on net or future present value. **Thus, the investment by the State is done to obtain a rate of return**

⁴³ Application of the MEOP (Market Economy Operator Principle) to Energy Infrastructure by Phedon Nicolaides, 02.07.2019, published on stateaidhub.eu by lexxion.

that would satisfy a private investor, not to pursue a public policy objective⁴⁴. In this way, the Treaty allows for the State to intervene in the economy to generate profit but on an equal stand as when compared to a private person.

4.3.3. SELECTIVITY

A state measure only falls into the State aid rules' scope if it favours **certain** undertakings or the production of **certain** goods. Therefore, measures that are of a selective nature are captured, while generic measures that benefit all undertakings or goods are not. The selectivity criterion has been interpreted narrowly by the Courts as measures that at a glance appear as of a general characteristic may be selective when implemented⁴⁵.

The Commission distinguishes between material and regional selectivity. Material selectivity implies that the measure applies to a certain kind of undertakings or economic sectors in a state. Regional selectivity, on the other hand, means that the measure applies to a specific part of a Member State. Regional measures may not be selective under particular circumstances which so far have been only evaluated under tax measures⁴⁶.

The selectivity criterion means that the advantage is only available to some undertakings and not to others in comparable situations⁴⁷. Through case law the CJEU has found that even if a measure grants an advantage onto a recipient, it does not fulfill the condition of selectivity if it is justified by the nature or general scheme of the system of which it is part⁴⁸. In this case the CJEU ruled that, selectivity was dependent on whether investors in comparable situations might gain a selective advantage in the light of the goal under pursue.

⁴⁴ Phedon Nicolaidis and Sarah Schoenmaekers, 'The Concept of 'Advantage' in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER' (2015) European State Aid Law Quarterly 144.

⁴⁵ Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

⁴⁶ Ibid.

⁴⁷ Nowag, Julian. *Environmental Integration in Competition and Free-Movement Laws*. Oxford University Press, 2017, at p. 100.

⁴⁸ Ibid at p. 101 and Case C.143/99 Adria-Wien [2001] ECR I-8365, para 42.

4.3.4. STATE RESOURCES

4.3.4.1. RESOURCES IMPUTABLE TO THE STATE

In order for an aid to be considered as a state aid, it must, among the afore-mentioned criteria, be granted by the state or through state resources. So, for Article 107 to be applied, an aid has to be provided by the state by state measures. The definition of state is interpreted widely, including both the central management of the concerned member state, all of its administrative divisions (districts, municipalities, etc.) and all public entities. Or when it is granted by a public or private body that has been entrusted with such task by a public authority⁴⁹.

Pursuant to the Court's case law, benefits that are provided directly or indirectly by state resources are treated as aid. The distinction between aid provided by member states and aid provided by state resources does not mean all benefits given by member states are aid indeed, regardless if they are financed through state resources, but the provisions aim to include within the meaning of it all benefits granted directly by member state as well as all benefits granted by public and/or private organizations established by the member state.

For example, the fact that private electricity providers were obliged by law to buy renewable electricity at fixed prices was not considered as a direct or indirect transfer of state resources, even though that was an obvious benefit towards the renewable electricity producers⁵⁰. This case will be reviewed in detail up next. The Court did not accept either the definition of state aid to be interpreted in such way, so that it would include also support measures ordered by the state but funded by private entities. The precondition of state resources usage is imperative.

4.3.4.2. OVERVIEW OF RELEVANT CASE LAW

The criterion of state resources or aid granted by the state might be the most debated one; all case studies seem to be about that particular one.

⁴⁹ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ [2016] C 262/1), paras. 39-43.

⁵⁰ Court Decision 13/3/2001, Case C-379/98 Preussen Elektra AG versus Schlesweg AG.

In the *PreussenElektra*⁵¹ case, following a teleological interpretation of Article 107 (1) TFEU, the CJEU stated that the criterion of granting by the state or by state resources should not be interpreted broadly. The CJEU found that while the measure was imputable to the State as it had imposed a purchasing obligation through a statute, no state resources were involved. Despite the wording "by the state or by state resources", the usage of "or" sets two conditions with a cumulative contribution: both state intervention is required, i.e. the possibility of imputing a measure on the state, and evidence of transfer of state resources, i.e. a finding of burdening the state budget. In the absence of one of the two conditions, there would be no state aid. There is, however, the contradiction, that the interpretation given does not ensure that the Member States will not interfere in the proper functioning of the market, as required by the purpose of the law. In fact, there have been fears that *PreussenElektra* is offering the Member States the key for circumventing the review procedure set by state aid law. But those fears did not come true. Although, after *PreussenElektra*, the Commission has indeed become more flexible in its judgment of support schemes compatibility, agreeing to the interpretation of the CJEU, there has been no weakening or general circumvention of State aid rules.

Accordingly, in the *EEG 2012*⁵² case, the CJEU focused on the same criterion. Its analysis began with a reference to the *PreussenElektra* case law, thus confirming that the distinction made in Article 107 (1) TFEU between "aid granted by States" and aid granted by state resources does not mean that all benefits granted by States constitute aid, whether or not financed by State resources, but is merely intended to include in this sense benefits granted directly by the State, as well as benefits granted by public or private bodies designated or established by that State. The case was decided on 28 March 2019 by the ECJ, overturning the judgment by the General Court and annulling the Commission's Decision as it was incorrect to determine that these EEG surcharges constitute State resources. This was so because the surcharge was not a levy, as it does not require suppliers to pass on the amounts charged to them to end consumers, and the 'in practice' passing them indirectly through higher practices is not sufficient. Consequently, the most crucial criterion for the inclusion of a measure within the scope of Article 107 (1) TFEU is whether the financial means by which the aid is

⁵¹ <https://curia.europa.eu/juris/liste.jsf?num=C-379/98>

⁵² Case C-405/16 P Federal Republic of Germany versus European Commission
<https://curia.europa.eu/juris/liste.jsf?num=C-405/16>

granted "*remain constantly under public control and therefore at the disposal of the competent national authorities*", even if "*they are not permanently included in the property of the State*" or "*they are not permanently in the possession of the Public Fund*".

4.3.5. COMPETITION DISTORTION

The final criterion for a measure to be qualified as potential State aid is that the measure distorts or threatens to distort competition, and only insofar as it affects trade between Member States. Affectation of trade and distortion of competition are distinct, but they are often treated jointly because they are generally considered to be linked. **There is a distortion of competition when the aid strengthens the competitive position of the beneficiary vis a vis competing undertakings.** It is not necessary that the distortion of competition or the effect on trade between member states be appreciable or substantial, but only potential, provided it is not hypothetical or presumed. Accordingly, whenever a Member State grants an advantage to an undertaking in a liberalised sector, such as electricity and gas, it distorts competition, even if competition is not actual but possible⁵³. In other words, the existence of competitors is irrelevant as long as there is potential for competition. Nonetheless, the effect must be demonstrated – there must be an establishment of reasons why the measure is able to affect trade⁵⁴. Competition is liable to be distorted even if the aid simply allows the aid beneficiary to maintain a stronger competitive position than it would without the aid⁵⁵.

State aid may have an effect on trade between member states even if the aid beneficiaries do not participate directly in cross-border trade. State aid that maintains or increases local supply makes it more difficult for operators of other member states to enter the market⁵⁶. The relatively small amount of aid or the relatively small size of the recipient undertakings does not exclude a priori the possibility that trade can be affected. Therefore, a public subsidy to an undertaking which provides only local or

⁵³ Judgment of 15 June 2000, *Alzetta and Others v Commission*, T-298/97, EU:T:2000:151, paras. 141-147.

⁵⁴ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ [2016] C 262/1), para 195.

⁵⁵ Zacharias Lilja Jensen, *Who Should Pay for Pollution? The Relationship between the European Green Deal, State Aid for Environmental Protection, and the Polluter Pays Principle*, 2021.

⁵⁶ Judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, para 65.

regional services and does not provide any service outside its country of origin may affect trade between member states whenever undertakings from other member states could provide such services, and whenever this possibility is not purely hypothetical.

5. STATE AID AND COMPATIBILITY

To begin with, two things should be clarified: firstly, state aid is *in general* prohibited, but, secondly, that doesn't necessary mean that *all* state aid is prohibited too.

Turning back to the general provision that prohibits state aid from member states, one may wonder: If granting is prohibited, then how are the ≈122€ billion spent on energy projects provided? The TFEU finds some grants to be compatible and/or to review first some measures to be content according to the derogations listed in the below section. The following sections describe all exceptions or frameworks that allow under certain conditions the “more favourable” granting of aid.

The Treaty allows Member States to grant an economic advantage to an undertaking(s) in certain circumstances if such intervention is necessary for a well-functioning economy and to remedy a market failure. In the case of energy, this could be for instance to promote certain policy goals, such as the promotion of renewable energy, the general provision of minimum energy services to end consumers, or to foster economic development of less-developed regions by promoting investment in energy infrastructure or renewable sources⁵⁷.

A state measure that qualifies as aid may be declared compatible with the internal market on the basis of either the second or third paragraph of Article 107 TFEU:

In the case of Article 107 (2) this provision contains automatic exceptions in which the Commission has no discretion and must declare these types of aid as compatible with the internal market. The provision sets a *numerus clausus* of excluded aids, meaning there is no room for further wider interpretation of aid that may fall within this provision.

However, in the case of Article 107 (3) certain type of aid may be declared compatible with the internal market pursuant an individual decision by the EC. These are discretionary exceptions in which the Commission enjoys a wide margin of

⁵⁷ Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

appreciation and the Courts have a limited power to review such appreciation. This is type of aid that this paper will further examine.

5.1. THE EXTENT OF THE EC'S DISCRETION IN STATE AID CONTROL

The EC has been authorized with significant powers of enforcement in competition law matters under the European Treaties. Pursuant to Article 3(1)(b) TFEU, the EU has exclusive competence in establishing the rules of competition required for the internal market to function. Article 108 TFEU provides that the EC has all enforcement powers for competition rules, including keeping State aid under review of existing and planned aids (Articles 108(1) and 108(3)), and taking a decision against a Member State in case of non-compliance requiring the abolishment or alteration of the aid (Art. 108(2)). In addition, if the EC's decision is not followed by the Member State, the matter can be referred to the CJEU (Art. 108(2)). Aid measures can only be implemented after the EC approval. Once adopted, the EC's decisions are binding on both the companies and national authorities covered by the decision. In the event an aid measure is implemented before approval and the aid is deemed unlawful, the EC has the power to recover these amounts granted through the aid. The consequences from a negative decision from the EC could therefore have extensive consequences for the Member States and the beneficiary of an unlawful national measure.

Pursuant to Article 108 TFEU, the assessment of the compatibility of the aid measures with the internal market under Article 107(3) TFEU is an exclusive competence of the Commission. The Commission enjoys broad discretion when exercising that competence, which presupposes complex economic and social assessments that must be made in a Community context⁵⁸.

Whilst the assessment of compatibility of a State aid measure remains the exclusive competence of the Commission according to Article 107 TFEU, national competition authorities and national courts play a 'complementary' role in enforcing State aid

⁵⁸ *STATE AID GUIDELINES FOR ENVIRONMENTAL PROTECTION AND ENERGY (EEAG), Review process, possible changes and opportunities*, Centre on Regulation in Europe (CERRE), Catherine Banet, September 2020.

rules, but not the primary one. In particular, national courts can rule on whether the measure amounts to aid in the first place, and can request opinions from the European Commission or refer questions to the Court of Justice for a preliminary ruling (under Article 267 TFEU). National courts are also expected to use all appropriate measures and provisions of national law to implement the direct effect of Article 108(3) prohibition on implementation of unauthorized state aid. If the interpretation of a state aid measure is under dispute, the EU Courts are in competence and not the national one. The decisions made by the Commission in State aid cases can also be appealed to the EU's General Court (Article 263 TFEU) and further to the Court of Justice (on points of law only for the latter)⁵⁹.

5.2. THE CONCEPT OF GOOD AID

In order for State aid to be compatible there are six (6) conditions that are apparent from Article 107(3)(c) TFEU and must be met for every allowed aid. Not only should an aid be compatible with the internal market, but it should also fulfill the concept of the “good aid”. An aid is good when the benefits from its implementation will surpass the respective costs.

- Aid must be capable of contributing to an objective of common interest.
- Is addressed to a market failure.
- Must be the appropriate instrument in terms of addressing that market failure.
- Must have incentive effect.
- Must be proportional, and
- Does not result in extensive distortion of competition⁶⁰.

The State aid must support an objective of common interest, meaning an objective pursued by a Member State. Furthermore, the measure must generate benefits or positive effects, as well as the negative effects should not outweigh the positive effects. This happens for example in the case of a project of common interest. Lastly, one or more Member States may be adversely affected as long as trade is not excessively distorted⁶¹. There is however no guidance from either the Commission or

⁵⁹ Art. 58 Statute of the Court of Justice of the European Union.

⁶⁰ When is State aid allowed and what is "good aid"? Phedon Nicolaides on <https://www.youtube.com/watch?v=koxASijbbPM>.

⁶¹ Phedon Nicolaides, ‘What should State aid control protect? A proposal for the next generation of State aid rules.’ *European Competition Law Review* 2019 40(6), 276–283.

EU courts on how distortive or acceptable magnitude of negative effects before State aid would be deemed incompatible, aside from the requirement that the effects of the aid must be proportional⁶². As mentioned the Commission did however in the EEAG state that, the negative effects of the aid must be sufficiently limited, so that the overall balance is positive. The EEAG also state that in principle, an aid measure and the context in which it is applied need to be analysed to identify the extent to which it can be deemed distortive. In addition, the state aid must be addressed towards a market failure (Art. 107 par. 3 of the TFEU) aiming to correct the function of this market, so that the market itself can deliver a result that is good and beneficial to the society.

A state aid measure must be appropriate instrument in addressing, let us say the market failure, effectively. For example, it may be a policy instrument, a regulation that can be very effective, an infrastructure project, etc. Appropriateness is closely related, almost vital to the concept of the good aid. For a state aid to be appropriate does not only mean to be capable to address effectively the situation it intends of fixing but also bearing in mind at what cost. Some academics are frustrated, stating that a state aid that is on the one hand the most appropriate and capable measure to fix and/or be implemented towards a policy objective concerned, but is at the same time unbearable and excessively costly is also incompatible with the internal market, if proven that the situation addressed can be dealt in a similar way with another method that requires significantly less costs and difficulties.

The aid has to provide an incentive effect. Otherwise, if a state provides a subsidy to an undertaking to do an investment it would do on its own sooner or later, then there is no point, it is just a waste of public resources. It needs to give you an incentive.

5.3. BASIC PROCEDURAL STEPS – THE NOTIFICATION OBLIGATION

According to article 108 par. 3 of the TFEU: *“The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in*

⁶² Ibid.

paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

Whereas par. 2 at its beginning states: *“If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.”*

Article 107 par. 1 of the TFEU permits a declaration of incompatibility with the common market, but not a directly applicable prohibition of an aid. The prohibition is not directly applicable because the procedure provided by the Article 108 is required in order for an aid to be deemed compatible or not with the internal market. However, Article 108 par. 3(c) is directly applicable, introducing the standstill obligation for new- and not for the modifications on existing- aid schemes prior to their notification to the Commission. The notified measures should not be implemented until the Commission has decided whether the measure is compatible or not. This means that for an aid to be prohibited, it has to first be notified to the Commission and be deemed incompatible by the latter. If the State fails to comply with its notification obligations or if the Commission considers the aid to be incompatible and the Member State nevertheless implements the measure, then there is the risk that such aid will be recovered, even with interest from the day it was granted. This thesis does not examine the matter and consequences of unlawful aid and its recovery procedure.

Not only the EC but also private companies and individuals are important players who may trigger investigations by lodging complaints with the EC. Information from third parties is also valuable source of information for the EC in monitoring and addressing unnotified aid. If a competitor wishes to challenge a Commission’s decision to approve a state aid, they must prove that they are harmed by this granting of aid. They must be entitled to submit an appeal before the Commission that should be admissible due to the existence of a proven legal interest. Only the fact that an aid is capable of affecting the competition in a market is not sufficient, but there has to be a causal connection between the granted aid and the harmed company-competitor. There are two kinds of such appeal, the first is against the Commission’s decision in its essence,

and the second is against the righteousness of the Commission not to open a formal investigation.

State aid measures are examined in 2 phases:

- i) Preliminary phase
- ii) Formal investigation

In the preliminary phase, the Commission does not have to inform third parties. In the formal investigation the Commission is obliged to give notice to the parties involved so that they can submit their observation.

More specifically, the EC's procedure for handling state aid notifications are codified in the Procedural Regulation (EU) 2015/1589 requiring the EC to conduct a preliminary investigation following notification, and to then to make an initial decision within 2 months of receipt whether to approve the aid or to initiate a formal investigations pursuant to Article 108(2). The EC may request further information if an initial notification is considered incomplete and if a Member State fails to provide the requested information, the notification will be deemed as withdrawn, unless the Member State can show that the requested information is not available.

Where the EC has failed to take a decision within two months of receiving a complete notification the aid will be deemed to have been authorised providing the Member State has already communicated the intention to implement the aid. It is important to note that the EC is not bound by these same time limits in respect of unnotified aid.

Where the EC decides to launch a formal investigation under Art 108(2) TFEU the decision will be published in the Official Journal summarising the aid and the EC's issues as to its legality. Submissions are invited from the Member State, entities receiving the aid and third parties such as competitors (normally within 30 days). There are no formal time limits for completion of the EC's investigation, the regulations requiring the EC to endeavour to adopt a position within 18 months of opening a formal investigation. However, upon expiry of the 18 month period, the Member State concerned may request the EC to take a decision within 2 months, on the basis of the information available to it. The EC's final decision following completion of the investigation will be to clear the aid, clear the aid subject to certain conditions, or to prohibit it.

In principle, member states need to notify the European Commission of their plans to offer aid, unless it falls within the notion of automatic exceptions. **However one should keep in mind that state aid is an EU legal concept defined in the TFEU and as such is subject to interpretation by the EU courts and not by the national ones.** Whether a state intervention amounts to aid or not must be assessed in concreto by the Commission. In practice, each aspect of this process raises difficult policy questions, beginning with, what is a state aid, and, if it is for the Commission to decide on that, how will the Member states be able to decide on what they should notify or not. This could be a major issue taking into account EU's apparent growing appetite for the extraterritorial application of these rules through trade agreements, especially in the energy sector, as described further on, where the majority of EU's energy suppliers come from countries outside of its territory.

5.4. SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

5.4.1. FRAMEWORK – ALTMARK CRITERIA

A special case within the state aid rules are the services of general economic interest (SGEI), meaning services of common good. These services are obligatorily entrusted to undertakings by the public authorities of the Member States in accordance with Article 14 TFEU. Each Member State has the discretion to determine which service constitutes an SGEI. However, in areas which have been harmonized at EU level and for which the objectives of general interest have been taken into account, the discretion of the Member States shall not be contrary to the rules governing such harmonization. In the field of energy, Member States can decide which services constitute SGEIs and be inspected only due to obvious fault.

Pursuant to Article 106 (2) TFEU, undertakings entrusted with services of general economic interest shall be subject to the provisions of the Treaties in so far as this does not prevent them from fulfilling the specific task assigned to them. Therefore, in order to exclude SGEI providers from State aid rules, the application of these rules should prevent them from fulfilling their mission. In addition, however, this exception should not disproportionately distort competition. The purpose of this exception is not to prohibit the general application of the provisions of the Treaties in the case of SGEIs, but to provide balance between the proper functioning of the internal market

on the one hand and the fulfillment of the public interest on the other. Thus, this provision should be interpreted strictly and always in accordance with the principle of proportionality.

Due to its characteristics, the energy sector is a problematic sector for the creation of conditions of free competition but also a necessary good for the citizens, a fact that in some cases includes its production and supply in the SGEI. In the Altmark⁶³ case, the CJEU considered that the financial consideration received by an undertaking for SGEIs is not considered State aid but financial compensation provided that the following four criteria are cumulatively met:

1. The requirement of a public service obligation.

The first Altmark-criteria concerns the need for the undertaking to be subject to a public service obligation. This ensures that the Altmark-criteria do not benefit undertakings in cases where a private undertaking carries out activities that could have been considered to be in the general economic interest but where there has been no State control in the sense that the State has organized that “SGEI”.

2. The requirement that the parameters of compensation are established beforehand.

The second Altmark-criterion requires that the parameters on which the compensation is based have been established beforehand in an objective and transparent manner. In the view of the Commission this requirement is supposed to ensure that the recipient undertaking does not benefit from an economic advantage that could favour it over competing undertakings. Thus, it is a safeguard against distortions of competition. However, the Member States have a wide discretion, not only when defining a SGEI-mission, but also when deciding the parameters of compensation. This means that the Member States may choose how to comply with the criterion as long as the rules for determining the compensation are transparent and objective.

3. Prohibition on overcompensation.

⁶³ Judgment of the Court of 24 July 2003, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0280> .

The third criterion requires that the compensation does not exceed what is necessary in order to discharge the public service obligations. The Commission holds the view that the reasonable profit shall be the rate of return on capital required by a typical company when considering whether or not to provide the SGEI for the period of the entrustment act with consideration of the level of risk⁶⁴.

4. The selection of provider.

The fourth Altmark-criterion provides that the SGEI-operator must be chosen through a public tender procedure. Alternatively, it can be chosen in a way that ensures that the operator is compensated only to the extent that the costs arising from the SGEI-mission for a typical undertaking that is well run and adequately equipped so as to meet the public service obligations, is covered. The effect of this requirement is that the provider chosen will be the one who incurs the least costs for society, i.e., the most efficient operator. The interesting part of this criterion is that it leaves Member states with a choice whether to do a benchmarking exercise or to use a public procurement procedure. Through public procurement this problem may be avoided, and corruption and mismanagement of public funds may be mitigated. Moreover, the public procurement procedure ensures that the most efficient operator is chosen.

However, not all cases of aid towards SGEI fall under this provision (106 par.2 TFEU). It is possible that the financial compensation does fall within the concept of State aid but then again, it may be considered compatible with the EU market following state aid rules.

5.4.2. SGEI DE MINIMIS REGULATION

Lastly, the Regulation⁶⁵ on the application of Articles 107 and 108 of the TFEU to de minimis aid granted to undertakings providing services of general economic interest

⁶⁴ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest OJ C 8, 11.1.2012, p. 4–14 para. 60.

⁶⁵ COMMISSION REGULATION (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R0360>.

stipulates that below a certain amount, ie EUR 500 000 over a period of for a period of three years, the compensatory measure is not considered State aid.

In parallel, the Commission has recently proposed⁶⁶ to prolong the SGEI de minimis Regulation, which is not part of the “fitness check” exercise but which will also otherwise expire on 31 December 2020, by three years, i.e. until 31 December 2023. In this context, the Commission is also proposing to introduce an adjustment to this regulation to allow undertakings that entered into difficulty because of the coronavirus outbreak to remain eligible for this type of aid for a limited period of time. My understanding is that the prolongation on the SGEI de minimis Regulation has not yet been decided, since no official EU documents and announcement can yet be found. However, the prolongation of the Regulation on de minimis State aid to undertakings providing services of general economic interest is of high importance to be prolonged until 2023. This is needed because the expiry of the SGEI de minimis Regulation while the rest of the SGEI package remains in force, would increase legal uncertainty to essential social services implemented under this directive and administrative burden to public administrations.

5.5. DE MINIMIS REGULATION

Following three public consultations⁶⁷, the EC has adopted a revised Regulation⁶⁸ on small aid amounts that fall outside the scope of EU state aid control because they are deemed to have no impact on competition and trade in the internal market. Measures that fulfill the criteria of the Regulation do not constitute "state aid" in the meaning of EU rules and therefore do not need to be notified to the Commission for approval before they are implemented. This reform has significantly reduced administrative burden for companies and Member States.

The main criteria of the current regulation, which exempts aid amounts of up to €200 000 per undertaking over a three year period, remain unchanged, while the treatment of small aid measures will be further simplified. In particular, companies undergoing

⁶⁶ https://ec.europa.eu/competition-policy/public-consultations_en

⁶⁷ https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1293

⁶⁸ COMMISSION REGULATION (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.352.01.0001.01.ENG .

financial difficulties are no longer excluded from the scope of the regulation and will therefore be allowed to receive de minimis aid. Moreover, the definition of what constitutes an "undertaking" has been simplified and clarified. In addition, subsidised loans of up to €1 million may also benefit from the de minimis Regulation if certain conditions are met.

In light of the Commission's experience and the data gathered, including through three public consultations, there is no evidence that a higher ceiling than €200.000 would be justified. The data received from Member States show that the majority of beneficiaries receive rather small amounts of aid and indicate that for the vast majority of beneficiaries this ceiling is not reached. The EC concluded that increasing the ceiling would bear important risks for competition and trade in the Single Market, in particular because of the aggregate effects of a potentially widespread use of the exemption in the current economic and financial context where Member States' budgetary capacities also vary widely. Furthermore, Article 107(1) of the TFEU defines state aid as a selective advantage granted through state resources to one or more companies that distorts or threatens to distort competition and affects trade between Member States. Since de minimis measures are legally deemed not to constitute aid, the de minimis rule can only cover measures that have no potential effect on trade and competition.

Other well-designed and targeted measures with a limited potential of distorting competition in the Single Market can be exempted through the General Block Exemption Regulation (GBER), as we will see in the next chapter of this thesis.

The EC has announced⁶⁹ the prolongation of the validity of certain State aid rules which would otherwise expire at the end of 2020. In this context, and to take the effects of the current crisis into due consideration, the Commission, after consulting Member States, has decided to make certain targeted adjustments to the existing rules with a view to mitigate the economic and financial impact of the coronavirus outbreak on companies. To this end, the Commission has adopted a new Regulation⁷⁰

⁶⁹ https://ec.europa.eu/commission/presscorner/detail/el/ip_20_1247 .

⁷⁰ COMMISSION REGULATION (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments
https://ec.europa.eu/competition/state_aid/what_is_new/prolongation_gber_deminimis_en.pdf

amending the General Block Exemption Regulation (GBER) and the de minimis Regulation, **prolonging both until the end of 2023**.

5.6. COVID-19 EXCEPTIONAL TEMPORARY FRAMEWORK

During the first weeks of the pandemic outbreak worldwide, in Spring 2020, the EU provided member states with guidance on using the flexibility provided by the EU State aid Framework, notably under Article 107(2)(b) TFEU (enabling member states to compensate companies for the damage **directly** caused by exceptional occurrences) and Article 107(3)(b) (enabling member states to remedy a **serious disturbance** to their economy). State aid could be practically unlimited for the foreseeable future. The EU Treaties explicitly allows state aid to make good damages in “exceptional occurrences”. Importantly, the EU adopted a dedicated Temporary Framework to support the economy of the member states in the context of the coronavirus outbreak (Temporary Framework)⁷¹. The reason is that in times of crisis, state aid law dominates by its absence, or, more precisely, through its lenient application. This takes the form of an EU Communication laying down the assessing criteria of the notified national aid measures⁷². It has been subject to several amendments. In its approach to state aid approval, the EU has been permissive, meaning that the interpretation of the compatibility criteria has been flexible. The aid has also been approved within a very short timeframe. At the same time, it has also been communicated that: first, the approval of State aid measures related to the recovery could be made conditional on ‘green’ criteria; and second, that State aid rules will again be applied ‘as normal’ when the pandemic threat and the need for heavy state intervention, is over.

The experience gained from applying the Temporary Framework raises a series of general questions for the future of the EU State aid regime; more specifically, it may have some indirect effects on the EEAG scope and methodology⁷³. It should also be

⁷¹ Temporary Framework to support the economy in the context of the coronavirus outbreak, as amended https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html .

⁷² https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

⁷³ *STATE AID GUIDELINES FOR ENVIRONMENTAL PROTECTION AND ENERGY (EEAG), Review process, possible changes and opportunities*, Centre on Regulation in Europe (CERRE), Catherine Banet, September 2020.

noted, preliminarily, that the notified aid measures in the context of Temporary Framework are assessed under Article 107(2)(b) TFEU and Article 107(3)(b) TFEU, while the aid measures assessed under the EEAG are notified on the basis of Article 107(3)(c) TFEU, as previously described. The Temporary Framework, in its amended and consolidated version, encourages Member States to design national measures in line with those two objectives and request large companies receiving recapitalisation support to report on “*how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050*”⁷⁴. In this content, the EC emphasizes in the Temporary Framework that when the aid measure has for primary objective to “*support green and digital innovation and investment, and increase the level of environmental protection*”, it must be granted in line with the relevant State aid rules, which primarily are the EEAG.

However, the covid-19 crisis creates another issue to be considered when revising the EEAG. There is now the question as to whether the approval of State aid measures notified by member states in the context of COVID-19 temporary framework should be made conditional to environmental or ecological criteria (such as climate performance and biodiversity), and if so, how should those conditions be interpreted. A single definition of the environmental/ecological conditions at the EU level is needed to avoid any further distortions of competition on the internal market, as a result of different national approaches adopted by each member state. The EC refuses so far to adopt joint environmental conditions under the Temporary Framework, based on the reason that it does not have the competence to do so, and claiming that the framework allocates a temporary situation. Since the Temporary Framework has already been adopted, introducing environmental conditions only for future aid measures may create distortions of competition. Would the Commission decide to introduce environmental conditions, those should coincide with the criteria to be laid down in the revised EEAG and applied in a consistent matter. Differing criteria would create further distortions of competition and slow down the decarbonisation process.

EU GDP will nevertheless take a hit. This will have knock-on effects for any funding that is based on shares of GDP. If the member states impose ceilings as a percentage

⁷⁴ Consolidated Version of the Temporary Framework, par. 45.

of GDP, the financial size of the EU budget will have to be revised to account for the downturn, curtailing the budget. Revisions of EU budget ceilings based on inflation and growth are a normal practice, often not questioned when GDP grows beyond initial estimations, but controversial in a recession. If the EU budget is curtailed, it can have adverse consequences for climate-related investment and innovation funding⁷⁵.

As the crisis will invariably make some investments more difficult, securing Green Deal priorities in the recovery programmes will be essential to ensure that the EU's climate action will not be undermined after the crisis. Once the pandemic passes, the temporary impacts, e.g. the CO₂ emissions reduction, may quickly be overcompensated by the need to 'recover' lost time and to introduce incentives to spur demand to save suppliers in distress. This pandemic crisis may actually offer a unique opportunity for the EU to live up to the Green Deal's promise of economic modernisation along the Paris decarbonisation objectives.

The current crisis may hold a lesson for climate change. Climate change is like a pandemic in slow motion; once our systems are 'overwhelmed', the impacts are likely to be unprecedented⁷⁶.

On the good news side, although it is without any doubt that there will be a fall in overall investment in the energy sector after the COVID-19 pandemic, RES investments have emerged as more resilient than conventional fuel investments⁷⁷. Investment in renewable energy comes with risk-mitigating measures for the investors, such as PPAs and guaranteed access to the grid; therefore, these investments are expected to grow at a substantial rate even after the pandemic.

⁷⁵ Elkerbout, Milan & Egenhofer, Christian & Nuñez, Jorge & Catuti, Mihnea & Kustova, Irina & Rizos, Vasileios (2020): *The European Green Deal after Corona: Implications for EU climate policy*.

⁷⁶ Ibid.

⁷⁷ *Incentives and strategies for financing the renewable energy transition: A review*, Sikandar Abdul Qadir, HessahAl-Motairi, FurqanTahir and LuluwahAl-Fagih, published in Energy Reports Volume 7, November 2021, Pages 3590-3606.

6. SHORT RECAP OF THE STATE AID CONTROL REGIME

Article 107(1) TFEU both defines what constitutes a state aid and provides for a general prohibition against it. According to which:

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

The four criteria of Article 107(1) TFEU must be fulfilled concomitantly, where the aid:

- a. is granted by the state or through state resources,
- b. is selective, and thus, provides an advantage to the beneficiary,
- c. distorts, or threatens to distort competition, and
- d. may affect trade between Member States.

The interpretation of these criteria has been subject to extensive case law in the Court of Justice of the EU. The EC services have attempted to summarise it in the Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU⁷⁸. Even if those criteria are fulfilled, and the aid is in principle prohibited, derogations to the general prohibition are possible under:

- Art. 107(2) TFEU, which sets a list of aid measures which are always exempted (“... *shall be compatible with the internal market*”) (automatically exempted aids);
- Art. 107(3) TFEU, which sets a list of aid measures which can be exempted (“... *may be considered to be compatible with the internal market*”), subject to the discretion of the European Commission (aid subject to discretionary compatibility);
- Article 107(3)(e) TFEU and Article 108(2), subparagraph 3. TFEU, providing both the Council with the competence to adopt derogations;

⁷⁸ 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, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50.

- Article 109 TFEU, providing the Council with the competence to adopt regulations for the application of Articles 107 and 108, enabling notably the adoption of block exemptions;
- Article 106(2) TFEU, which provides for exemption for undertakings delivering services of general economic interest (SGEIs);
- Aid granted under an aid scheme already authorised by the European Commission.

The derogations provided for in Articles 107(2) and Article 107(3) TFEU, because they constitute exemption to a general prohibition, are to be interpreted narrowly. As a consequence, the burden of proof lies on the person invoking the derogation, which equals the beneficiary or the Member State notifying the aid.

7. ENERGY AND STATE AID

“That is a difficult balance. On the one hand, energy transitions cost money On the other hand, we must ensure that our industry remains competitive Competition is not just in Europe, but on the global market.”

- Sigma Gabriel, German Minister of Economic Affairs and Energy, 2014.

This exactly highlights the two sides behind state aid policy. These two sides relate to avoiding unnecessary distortion of competition while simultaneously enforcing public policy goals, such as the promotion of energy generation from renewable sources. Especially regarding the development of RES, the Commission has in the past expressed its doubts whether the public support given to producers of renewable energy in the form special pricing schemes constitutes state aid that might be incompatible with EU aid state rules. Alongside, it also raised serious doubts as to the compatibility of reductions from charges for funding renewable energy for energy intensive undertakings (EIUs) with the internal market. These doubts were portrayed in the 2008 Guidelines on state aid for the environmental protection.

However, over the years, the Commission has broadened its interpretation for the notion of state resources in its analysis under Article 107(1) of the TFEU for state aid. Commission’s position seems under the 2014 Guidelines to have aligned with the previously contested provisions on surcharges reductions for EIUs. These reflected an uncertainty on whether they indeed constituted aid pursuant to Article 107(1) of the TFEU. This position was developed by the fact that surcharge reductions do not comprise any **state resources** as in the case of tax exemptions.

State aid rules are a basic component of energy regulation in the EU. They establish in their way negative and also positive limitations for the provision of aid by the member states to undertakings involved in the energy sector of the internal market, from generation to transmission and/or distribution. These rules, and in particular Articles 107 and 108 of the TFEU, preclude member states from providing benefit to an undertaking by granting some advantage, unless this benefit is compatible with the

internal market and the conditions set by the above-mentioned articles. In addition, the decision of the member state to provide such benefit, has to be notified to and approved by the Commission, in order to ensure competition in the market is not distorted⁷⁹.

The true importance of the state aid rules for the energy sector has been proven through the years. According to the Commission's state aid scoreboard of 2018, 53% of all approved state aid that was approved and given out, was attributed to measures related to environmental and energy services, including RES as well⁸⁰. There are several grounds to explain why state aid and state aid rules do have such an active role in the energy sector. To begin with the most important explanation of all in my opinion, this is mainly due to large capital that is needed for all energy projects, especially for the infrastructure and for investment in RES. The energy sector requires large financial investment for, particularly, infrastructural projects and with very high sunk costs⁸¹.

According to the Commission's Communication on the Energy Roadmap 2050: "*The Roadmap demonstrates that while prices will rise until 2030 or so, new energy systems can lead to lower prices after that. Distortions to the internal energy market, including through artificially low regulated prices, should be avoided, since they would send wrong signals to markets and removing incentives for energy savings and other low-carbon investments – this would hold back the transformations which will ultimately bring prices down in the long-run. Society needs to be prepared for and adapt to higher energy prices in the coming years. Vulnerable customers and energy-intensive industries may need support in a transitional period. The clear message is that investments will pay off, in terms of growth, employment, greater energy security and lower fuel costs. The transformation creates a new landscape for European industry and can increase competitiveness.*"⁸² That means that the average capital

⁷⁹ Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

⁸⁰ European Commission, State Aid Scoreboard 2018: Results, trends and observations regarding EU28 State aid expenditure reports for 2017 (January 2019).

⁸¹ Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* (September 1, 2019). Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Alvarez, G (eds), Routledge, 2019 – Forthcoming.

⁸² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Energy Roadmap 2050 /* COM/2011/0885 final */

spent on energy system will significantly be increased due to investments made on power plants and networks that need structural reforms that will result at least for the transitional period in the increase of electricity prices. For the time being, prices have maintained respectively low prices due to regulations and subsidies.

The modernization of the EU energy system requires high levels of investment, and in order for that to happen, it is necessary to provide the appropriate incentives to investors. Every support measure should be implemented in accordance with EU internal market and state aid provisions, and should also include phasing out provisions.⁸³

At the same time, member states have a political interest and legal duty, combined with social pressure (even moral and ethical pressure at times) to meet their energy targets set out by the EU. That leads us to conclude that if a member state wants to fulfil its national policies that it has adopted in accordance to the EU targets, it has to find a way to get the funds needed for constructing and implementing the appropriate energy project(s). And, admittedly, the most efficient way to get funds is through the EU, for example by characterizing the project as being a Project of Common Interest (PCIs).

Industries are in need of an enabling state aid framework in order to become more energy-efficient, competitive, circular, and sustainable for the goal of delivering and investing in climate neutrality while operating in a free and fair-trade environment.

State aid rules are thus a key tool to create the right framework for preventing carbon leakage and enabling European industry to remain competitive versus its global competitors, while meeting EU's and global climate and sustainability objectives agreed under the Paris Agreement and the 2030 Agenda.

State aid to the energy sector is already the second largest category of aid in Member States across the EU. At the same time, the definition of aid and the terms of its application are becoming increasingly complicated while state aid control is increasingly becoming the instrument of choice of the Commission in managing the markets and developing the energy sector in the context of the energy transition.

⁸³ *Ibid*, par. 3.3.

The Commission also stated that State aid can, and should, contribute further to the European Green Deal and that the revision of the EEAG would have to facilitate appropriate measures to promote accomplishing the set goals, while ensuring limited distortions of competition and adequate safeguards to the integrity of the single market⁸⁴.

⁸⁴ Commission, 'Commission publishes results of evaluation of EU State aid rules' (Press release).

8. EUROPEAN GUIDELINES

8.1. THE 2014-2020 GUIDELINES

The aim of modern European Energy Policy: At stake now is the formation of a single market, with a completely different philosophy from that of the traditional central model, which will be dominated by RES and will be supported by storage infrastructure and, for a transitional period, also by flexible conventional units.

Another step in this direction was the announcement by the EU of the Guidelines for State Aid in the fields of Environment and Energy 2014-2020 (EEAG), which attempted to formulate uniform rules on how to strengthen RES in all Member States. The European Commission's guidelines on environmental protection and energy provide guidance for Member States to develop State aid schemes for certain environmental and energy measures. The purpose of the guidelines is to inform the criteria that the Commission will apply when assessing compatibility⁸⁵. The EEAG currently but not for long in force acknowledge electro-intensity and exposure to international trade as key criteria for granting aid. The Commission has proposed to broaden these guidelines in order to conform to the European Green Deal's goal of achieving climate neutrality by 2050.

Guidelines are applicable on state aid measures that facilitate energy goals in compliance with TFEU and not on environmentally harmful measures, such as subsidies for fossil fuels extraction. The common principles for assessing the compatibility of State aid on which the Guidelines are based are strengthening the internal market, the effectiveness of public spending, tighter control of incentives, limiting aid to a minimum and preventing adverse market effects, and the competition.⁸⁶

In EU law parlance, Guidelines adopted by the European Commission go by the friendly-sounding title of "soft law". Appearances can be deceiving, though.⁸⁷

⁸⁵ Catherine Banet, *Legal Status and Legal Effects of the Commission's State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020)*, 2020 Eur St Aid LQ 172.

⁸⁶ Guidelines par. 12

⁸⁷ The 2014 State Aid Guidelines: How 'soft law' turns into 'hard law' by Francesco Salerno, published on December 6, 2019 on <https://fsr.eui.eu/2014-state-aid-guidelines-soft-law-turns-hard-law/>.

The 2014-2020 Guidelines on State aid for environmental protection and energy impact some of the most critical issues in the energy transition: they set out new rules on subsidies to renewables, on special measures for energy-intensive consumers to reduce their burden of financing renewables, and on capacity payments. In particular, the reduction of RES surcharges has been vital for preserving competitiveness and preventing carbon leakage.

These guidelines are not legislative documents and cannot be regarded as rule of law, they are however seen as “rules of conduct” for the European Commission. With these Guidelines, the EC has limited and/or bound its own discretion. If the Commission were to stray from the guidelines in their assessment of aid compatibility they would risk breaching general principles of law such as legal certainty, equal treatment or the protection of legitimate expectations. It has to always apply the Guidelines it has previously announced to the type of aid that the member states notify. Furthermore, these guidelines may never contradict Treaty rules or secondary legislation as this would be beyond the competence of the EC. As a consequence of this, Member States must take these guidelines into account when designing aid schemes in order to avoid a negative decision as well as avoiding recovery of illegal State aid⁸⁸.

In order to ensure that an aid measure leads to an increase in environmental protection or energy objectives without adversely affecting trading conditions to an extent contrary to the common interest the Commission established *Common Assessment Principles*⁸⁹. In order for a State aid measure to be compatible it had to contribute to a well-defined objective of common interest. The main concept behind them is that the Commission will apply a common assessment to all types of aid in the energy sector. The EC will assess whether the aid meets a well-defined objective of common interest, whether is targeted, appropriate and has an incentive effect. The definition of the objectives of common interest should be aligned with the latest EU law and policy framework for environmental and energy policy, including the Clean Energy Package and the EU Green Deal. It should also refer to the EU legal framework on sustainable finance in order to ensure consistency in investment signals. More importantly, the

⁸⁸ Catherine Banet, *Legal Status and Legal Effects of the Commission’s State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020)*, 2020 Eur St Aid LQ 172.

⁸⁹ Guidelines par. 26

definition of objectives of common interest with an environmental or energy perspective should be common to the EU State aid framework, and should not only be stated in the EEAG, but also in the GBER, which are binding on Member States. There also had to be a need for State intervention, for example the existence a well-defined market failure. In addition, it has to be proportionate, meaning that the aid is limited to the minimum needed to achieve the objective, not affecting negatively competition and, lastly, everything has to be transparent. However, individual aid granted under approved schemes and notified to the Commission in accordance with an individual notification obligation will be assessed on the basis of the guidelines applicable to the approved aid scheme on which individual aid is based.⁹⁰

But the regulatory character of the 2014-2020 Guidelines also elicited legal challenges alleging the Commission's lack of competence and misuse of powers. The General Court eventually dismissed the action taken on procedural grounds (i.e. Case T-694/14) justifying that Member States are not obliged "neither in law nor fact, to amend their legislation on operating aid in order to bring it into line with the contested guidelines", so the Guidelines were not of "direct concern" to the applicant. However, the General Court ruling betrays awareness that, in practical terms, these Guidelines are difficult to distinguish from Directives. In fact, in the same ruling, the General Court admits in a way that, while a Member State remains theoretically free to notify a measure of aid which does not satisfy the Guidelines' criteria, it is "very probable" that such a notification would receive a negative decision from the Commission⁹¹.

Thus, for operators and regulators, the 2014 Guidelines are at the cross-roads where soft law meets hard law. In any case, one thing is of certainty; they are unlikely to slide over.

8.2. PROLONGATION OF EEAG

The EEAG are among the State aid rules that were to expire on 31 December 2020. However, in early January of 2019, the EC announced its intention to prolong the validity of those rules and Guidelines for a maximum of a further two years, i.e. until

⁹⁰ Guidelines par. 247

⁹¹ The 2014 State Aid Guidelines: How 'soft law' turns into 'hard law' by Francesco Salerno, published on December 6, 2019 on <https://fsr.eui.eu/2014-state-aid-guidelines-soft-law-turns-hard-law/>.

31 December 2022. In July of 2020, it published the formal decision to prolong the EEAG until 31 December 2021⁹². The extension of the EEAG validity wishes to provide predictability and legal certainty, while preparing for the future update. Currently, the new EEAG framework has been announced to be under consultation and revision. This indicates that 2021 will be a crucial year for the finalization of the revised EEAG, with a public consultation already happening and the adoption of the revised EEAG scheduled for the second half of the year⁹³.

Other revision processes have started, such as the revision of the EU ETS State aid guidelines. The question will be to know to the extent to which the revised EEAG need to align on those other recently revised guidelines⁹⁴.

8.3. REVISION OF GUIDELINES – PROPOSED CEEAG

Previous revision processes of State aid Guidelines indicate that there is a need for constant updates to the content of the Guidelines at the end of each validity period. This is particularly the case for sectors such as energy, which are subject to rapid and deep changes in terms of economic models, technologies and actors. There is also a need to align on newly adopted policy objectives that the implementation of the Guidelines supports. Importantly, pursuant to Article 108(1) TFEU), the Commission is obliged not only to keep all systems of aid existing in the Member States under constant review in cooperation with the latter, but also to propose to them any appropriate measures required by the progressive development or by the functioning of the internal market. This entails, as confirmed by the case law, that the EC shall keep the Guidelines under continuous review for the purposes of anticipating any

⁹² *State aid: Commission prolongs EU State aid rules and adopts targeted adjustments to mitigate impact of coronavirus outbreak*, European Commission, Press Release IP/20/1247, 02.07.2020. 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 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 EU to short-term export-credit insurance, C(2020) 4355, 02.07.2020.

⁹³ Timeline for State aid policy reviews:

https://ec.europa.eu/competition/state_aid/legislation/timeline_table_SA_final.pdf

⁹⁴ *STATE AID GUIDELINES FOR ENVIRONMENTAL PROTECTION AND ENERGY (EEAG), Review process, possible changes and opportunities*, Centre on Regulation in Europe (CERRE), Catherine Banet, September 2020.

major developments not covered by those measures⁹⁵. This means that the EC has the authority to amend or repeal its Guidelines. This makes the Guidelines “one element” of the obligation of regular, periodic cooperation on the part of the Commission and the Member States. To fulfill this obligation, the practice has been to adopt guidelines for a set time period, ensuring they will be regularly reviewed.

Lowering the costs of strategic measures while maintaining competition is frequently a key objective when discussing eligibility criteria in State aid guidelines revision. This consideration remains central in the revision of the EEAG, but an additional dimension relates to the speed of the changes needed, and how to give incentives, through State aid measures, a rapid decarbonisation of, notably, the whole energy system. Industries in Europe need today more than ever an enabling state aid framework to be more energy-efficient, competitive, circular, and sustainable in order to deliver and invest in climate neutrality while operating in a free and fair-trade environment.

Likewise, the European Commission has elaborated a long-term vision for climate and energy policies in the 2018 Communication ‘A clean planet for all’⁹⁶, which makes clear that attaining the mid- and ambitious long-term goals set by the EU will necessitate ‘*a wholesale systematic transformation of Europe’s economies and societies*’, including in the ways in which we produce and consume energy.

State aids have an important role to play in enabling the deployment of existing eligible measures, but also in stimulate further innovation in low carbon technologies. In order to speed up the decarbonisation of the energy system, it will be necessary to both use existing technologies at large scale and to develop new ones. This dual need – for deployment of existing low carbonisation technologies and development of demonstration technologies - should be reflected in the new Guidelines⁹⁷.

The revision of the EEAG represents a unique opportunity to improve and update the current regime to reflect the latest EU regulatory and policy developments. The new

⁹⁵ Case C-431/14 P, *Hellenic Republic v European Commission*, para 71.

⁹⁶ European Commission Communication, ‘*A Clean Planet for All – A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*,’ COM (2018) 773 final, 28.11.2018.

⁹⁷ *STATE AID GUIDELINES FOR ENVIRONMENTAL PROTECTION AND ENERGY (EEAG), Review process, possible changes and opportunities*, Centre on Regulation in Europe (CERRE), Catherine Banet, September 2020.

EEAG, now presenting with new name that also incorporates the notion of Climate, i.e. Climate, Energy and Environmental State Aid Guidelines (CEEAG) will need to be extended in order to reflect all recent case law on existing surcharges related to the energy transition. This must carefully consider all future costs as a result of the path towards higher emission reduction targets for the 2030 and the 2050 climate neutrality objective. The increasing share of intermittent RES has caused the need for flexible capacity. For example, abiding by the recently adopted Electricity Market Design (EMD) Regulation and existing Guidelines, the Commission has allowed Member States to adopt capacity remuneration mechanisms (CRMs) to support such capacity.

In my view, the CEEAG must also provide long-term certainty on regulatory costs related to electricity consumption so that solutions such as long-term low carbon PPAs can become more attractive for energy producers guarding them with price stability. A key issue is that the current guidelines have a time span that is much shorter than a RES PPA or the payback period of investments. Therefore, the EEAG should include long-term guidance when it comes to regulated components to increase the effectiveness of the rules. This would clarify and improve legal certainty of existing legislation across Europe related to long-term competitive contracts such as PPAs and be a solution to help the market to take-off.

The principles embedded in EEAG regarding aid to renewables must be maintained and aid must be granted in a cost-effective manner still based on competitive bidding. This in turn would ensure the market integration of RES and a gradual phase-out of operating aid as grid-competitiveness is also gradually achieved. However, aid should not determine to overcompensation and must no longer be granted when it is not absolutely needed.

Alongside, a main argument raised here is whether the revised EEAG should both enable the use of the technologies that are available today (mature technologies) and to support the deployment of new technologies, are might be more promising but yet more pricy. For example, PV and onshore wind are considered mature technologies, and do not need a large amount of support, but the deployment rate in the energy mix could be significantly higher. One question is the extent to which this can be

incentivised under the revised EEAG while accounting for competition law requirements (potential market distortion due to the size of the market share).⁹⁸

Also, Covid-19 crisis shines a light on Europe's dependence on strategic raw materials from other regions. Europe should urgently reflect on how to reinforce its strategic autonomy in global value chains, preserve existing industrial assets and restoring the production in Europe instead of relying on carbon-intensive imports.⁹⁹

The question may arise as to the distinction between aid measures aimed at supporting the development of a new national industry within the energy and environment sectors (industrial policy), and aid measures aimed at addressing an energy concern or reducing the impact on the environment. In practice, many types of aid may combine industrial policy objectives and environmental/energy policy objectives. To avoid any abuse and possible distortion of competition by favouring national actors, EU secondary legislation and the EEAG can define a series of safeguards, such as the mandatory use of competitive bidding process for granting the aid or the mandatory opening of capacity mechanisms to cross-border participation.

Overall, the EEAG review is an opportunity to strike a balance between several EU policy objectives under the EU Green Deal, the new EU Industrial Ecosystems and Recovery Plan: to support European industry's decarbonisation, to protect its global competitiveness and to ensure a global level playing field while also further promoting a fair and open multilateral trade system in the context of recovering from the global health crisis and economic slowdown.¹⁰⁰

The EEAG should continue to be part of the compliance strategy with the EU climate and energy targets. This role should be restated as grounds for the revised EEAG in the Guidelines themselves as they will support their interpretation. In the present phase, the revised EEAG should be part of the instruments enabling compliance with the 2030 climate and energy targets and the 2050 climate neutrality goal. Because the EEAG play an important role in supporting Member States in their target compliance, it is recommended to closely link the revised EEAG to the 2030 targets and 2050 goal. In terms of assessment methodology, a similar approach as in the 2014 EEAG should be followed: if an aid measures has the purpose of meeting the 2030 targets,

⁹⁸ Ibid.

⁹⁹ European Aluminium, *Review EU State Aid Guidelines for Environmental protection and Energy post 2020 (EEAG)*, Position paper, 4 June 2020.

¹⁰⁰ Ibid.

the Commission should presume that, if all other conditions are met, the requirement of appropriateness of the aid is met¹⁰¹.

¹⁰¹ *STATE AID GUIDELINES FOR ENVIRONMENTAL PROTECTION AND ENERGY (EEAG), Review process, possible changes and opportunities*, Centre on Regulation in Europe (CERRE), Catherine Banet, September 2020.

9. GENERAL BLOCK EXEMPTION REGULATION (GBER)

9.1. FRAMEWORK

GBER has significantly extended EU Member States' ability to grant State aid without having to wait for the Commission's prior approval. The Regulation¹⁰² went into effect on 1 July 2014 and has been amended since once in 2017¹⁰³. As it is now established, pursuant to the general rule, EU Member States are not allowed to implement measures that qualify as State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) until those measures have been approved by the Commission. Member States are subject to a "standstill obligation", under which aid granted prior to the Commission's approval is illegal.

The GBER establishes an exception from the approval requirement. If a measure that qualifies as State aid falls within the scope of the GBER (i.e., is included on the closed list enshrined in the GBER), does not exceed the notification thresholds established by the GBER and fulfills all the GBER's substantive criteria, no approval is required by the Commission and the measure is exempted from the notification requirement. For all other aid, Member States need to wait for the Commission's approval before they implement the measure.

The GBER has, for the aid measures to which these regulations apply, reduced the administrative burden for public authorities and companies benefiting from aid. The EC claims that about 3/4 of all new State aid measures and about 2/3 of the total amount of aid granted is exempted under the revised GBER. More aid measures can therefore be implemented without a lengthy notification procedure, meaning companies will get immediate access to aid. The most important points of the scope of the GBER are the exemptions for certain categories of infrastructure, i.e. broadband, local, research, sports, for innovation and for audiovisual works and culture, and of course, **energy**.

It is, nevertheless, important to note the following points:

¹⁰² COMMISSION 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014R0651-20170710>.

¹⁰³ https://ec.europa.eu/competition/state_aid/legislation/block.html

- A measure may be in line with the general scope of the GBER, but the notification thresholds may still not be in line with the State aid rules, meaning the aid may not be covered by the GBER. The substantive requirements of the GBER also have to be fulfilled for the aid to be authorised.
- Although the scope of the GBER has been extended to this of past version, stricter substantive compatibility criteria have also been introduced. For example, aid directed at regional development may, in the future, be granted to large companies in more developed (but still disadvantaged) regions only for investments into new activities. State aid for investments into the extension of existing activities will no longer be allowed.
- The Commission has introduced new transparency requirements. While the revised GBER allows EU Member States to grant more aid without prior approval by the Commission, Member States will have to make public the granting of aid if the amount exceeds €500,000. As a consequence, even if a measure fulfils the conditions of the GBER and is therefore exempted from the notification requirement, it will still have to be made publicly known that the company received aid above the threshold. Furthermore, the EC will have to be informed directly about aid granted to certain projects.
- While the GBER exempts from the notification requirement measures that qualify as State aid, the Commission is not precluded from assessing whether or not a measure fulfils the substantive compatibility criteria of the GBER following a complaint, or even on its own initiative.

State aid measures not automatically exempted from prior notification by the GBER are not necessarily incompatible with the State aid rules. They simply have to be notified to the Commission, which then determines whether or not they are in line with the State aid rules under the existing guidelines and frameworks. It is likely that the Commission will have a closer look at such cases in the future, as the overall number of cases to be handled by the Commission will drop significantly following the enlarged scope of the GBER.

9.2. ENERGY TAXATION & GBER

Energy tax benefits and incentives are pervasive in the tax systems of EU Member States. All of those tax concessions, apart from a few singular or minor national tax regimes, are covered by the harmonized system of the EU Energy Tax Directive. The majority of the energy tax relief measures authorized under the Energy Tax Directive and adopted by individual Member States will qualify as State aid within the meaning of Article 107 (1) TFEU. New tax relief measures would therefore have to be notified under the procedure of Article 108 (3) TFEU, unless they are covered by the GBER and thereby benefit from a waiver of the notification requirement and from automatic approval as compatible with the common market. Prior to the adoption of the GBER in 2014, tax reductions under the ETD were assessed under the EEAG.

Article 6 (5) and 44 GBER provide for a special regime regarding relief measures within the ambit of the Energy Tax Directive. Effectively, only two substantive requirements need to be fulfilled by such energy tax relief measures in order to qualify for the simplified GBER procedure. The tax benefit must respect the relevant minimum level of taxation set by the Energy Tax Directive, and its beneficiaries must not be selected on the basis of opaque or arbitrary criteria.

Considering the potential of energy tax incentives seeking to enhance environmental protection or the international competitiveness of certain business sectors, in particular, for grave distortions of competition in the common market, thresholds and a cap of benefits should be required also for energy tax relief measures, contrary to the current, more generous GBER regime¹⁰⁴.

9.3. PROLONGATION OF GBER

As mentioned already in previous chapter concerning the de minimis Regulation, I mentioned that the EC adopted a new Regulation¹⁰⁵ that prolongs both the General Block Exemption Regulation (GBER) and the de minimis Regulation **until the end of**

¹⁰⁴ Englisch, Joachim, Energy Tax Incentives and the GBER Regime (October 11, 2016). Villar Ezcurra (ed): State aids, Taxation and the Energy Sector, Thomson Reuters-Aranzadi, 2017.

¹⁰⁵ COMMISSION REGULATION (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments
https://ec.europa.eu/competition/state_aid/what_is_new/prolongation_gber_deminimis_en.pdf

2023. This was because in order to provide predictability and legal certainty, whilst preparing for a possible future update of the State aid rules in the context of the ongoing “fitness check” exercise and of the ongoing evaluation and future review of certain sets of State aid rules set out in the recent European Green Deal and European Industrial Strategy Communications, the EC decided¹⁰⁶ to prolong the validity of certain State aid rules, which were due to expire by the end of 2020.

At the same time, the EC also launched on 11 May 2020 the consultation for the revision of GBER under the name "Targeted review of the General Block Exemption Regulation (GBER/State aid): extended scope for national funds to be combined with certain Union programmes"¹⁰⁷. The objective of this revision is to ensure that national and EU funds can be combined seamlessly under the new Multiannual Financial Framework without undermining competition in the internal market, in 3 areas among which RD&I in Horizon Europe.

¹⁰⁶ https://ec.europa.eu/commission/presscorner/detail/el/ip_20_1247

¹⁰⁷ https://ec.europa.eu/competition-policy/public-consultations/2020-gber_en

10. AID TOWARDS RES SUPPORT

10.1. GENERAL REMARKS

Studies among at least 11 independent research groups have found that transitioning to 100% renewable energy in one or all energy sectors, while keeping the electricity and/or heat grids stable at a reasonable cost, is possible¹⁰⁸. Among these studies that find that 100% renewable energy is cost effective, many have been of limited use to policy makers because they considered only private cost and not social cost, did not compare business-as-usual with wind-water-solar (WWS) energy, and considered only cost per unit energy and not the aggregate (summed) cost over all end-use energy used¹⁰⁹.

The EEAG are still relevant in terms of there being environmental protection and energy saving goals to be achieved. The question if the market failures the EEAG were intended to target still exist needs to be answered. As established, the different environmental and energy goals are not all connected to the same market failure, so the aid measures have to be looked at individually. Within the scope of this thesis, we will only examine the aid to energy from renewable sources.

The target for the share of renewable energy was increased to be aligned with more ambitious reduction of greenhouse gas emissions as well as technological improvements, including costs reductions for investments in renewable energy. The purpose of this target is to encourage development of technologies for the production of renewable energy as well as providing certainty for investors¹¹⁰. The problem with renewable energy targets as well as legislative acts to support achievement of renewable energy targets is that they may not always result in the most efficient market outcome. Already back in 2009 it was established by Jacobson and Delucchi¹¹¹ that transitioning the world's all-purpose energy to 100% WWS energy by 2030 could be technically and economically feasible, but for social and political reasons, a complete transition by 2030 was unlikely and could take up to a couple of

¹⁰⁸ Impacts of Green New Deal Energy Plans on Grid Stability, Costs, Jobs, Health, and Climate in 143 Countries, Mark Z. Jacobson, etc., *One Earth* Vol.1, Issue 4, page 449–463, December 20, 2019.

¹⁰⁹ Ibid.

¹¹⁰ 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 para 7.

¹¹¹ Jacobson, M.Z., and Delucchi, M.A., A path to sustainable energy by 2030. *Scientific American*, November 2009 <https://www.scientificamerican.com/article/a-path-to-sustainable-energy-by-2030>.

decades longer. Subsequent roadmaps¹¹² proposed an 80% transition by 2030 and a 100% transition by no later than 2050.

In order to contribute to the underlying legislative acts such as the Renewable Energy Directive, State aid could be appropriate. The EEAG were drafted with the assumption that established renewables would be grid-competitive sometime between 2020 and 2030 therefore, in order for aid not to become more distortive than necessary subsidies and exemptions from balancing responsibilities should be phased out in a degressive way¹¹³. In order to keep the aid proportional, meaning reduced to the minimum, aid is to be awarded through market instruments such as auctioning or competitive bidding processes. The emissions trading scheme and environmental taxes attempt to internalize the costs of greenhouse gas emission but this remains difficult and therefore aid for renewable energy is an attempt at remedying this market failure¹¹⁴.

The Renewable Energy Directive was recast through Directive 2018/2001 (REDII) with the aim of establishing a common European framework for the promotion of energy from renewable sources and establishes the relevant rules for renewable energy support schemes. The rules set out for support schemes in REDII are similar to the EEAG's approach with a focus on market-based instruments, while avoiding unnecessary distortion of electricity markets. With renewable energy becoming grid competitive there are two interests that clash, namely the phasing out of subsidies for renewable energy to ensure a minimum distortion of competition and addressing the residual market-failure of negative externalities.

10.2. RES SUPPORT SCHEMES

The concept of RES support schemes is given by the secondary EU law, Directive 2018/2001/EU, article 2 (5), which defines the concept and includes an indicative list of such schemes. Specifically, **the concept of support scheme** “... means any instrument, scheme or mechanism applied by a Member State, or a group of

¹¹² https://ec.europa.eu/clima/policies/strategies/2030_en and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy Roadmap 2050 ,COM2011/0885 final.

¹¹³ EEAG par. 108.

¹¹⁴ Zacharias Lilja Jensen, Who Should Pay for Pollution? The Relationship between the European Green Deal, State Aid for Environmental Protection, and the Polluter Pays Principle, 2021.

Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased, including but not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and sliding or fixed premium payments;”

Member States therefore implement support schemes to serve national and European energy policy and to comply with EU targets on RES promotion. In 2018, the new RES Directive introduced a different RES promotion system. It set a new target, according to which the share of energy from RES should reach at least 32% by 2030. This target is still binding, but this time at an EU and not at a national level. In other words, the goal now concerns the EU as a whole and does not translate into clear and binding national goals. This does not mean, however, that Member States no longer have obligations. The EU target will be achieved by the contribution of all Member States. It is, however, up to the Member State to decide on the level of this contribution towards the common target.

In their efforts to achieve the much-needed promotion of RES, Member States are implementing support schemes. However, as it is already clear based on the above, the selection, drafting and implementation of support schemes is done at national level and the Member States enjoy a great deal of power during this procedure. The EU legal order has limited power to intervene in the choices of each national legislature and the authorities of the Member States. However, RES support schemes must be compatible with EU primary law. Therefore, and in the absence of secondary law, control of support schemes by the EU legal system, albeit to a limited extent, is achieved mainly through State aid rules. RES support schemes are concerned with promoting activities related to environmental protection, combating climate change and ensuring energy security. Therefore, it is usually the case that the EC tends to rule in favor of their compatibility with the internal market.

The latest case law is expected to be crucial for the control of RES support schemes under state aid law. If the EC follows the new case law, it will apply the criterion of state resources in a less strict way and will perceive less evidence as public resources

than it has in the past. The new case-law therefore weakens the Commission in the sense that non-State aid schemes fall outside its control. Contrary to state aid case law which weakens the role of the Commission, the new EU RES legislation strengthens its role by setting rules for the design of support schemes and giving the Commission powers to monitor compliance to them.

In particular, according to article 4 par. 2 of the Directive 2018/2001/EU on RES *“Support schemes for electricity from renewable sources shall provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability”*. In addition, according to par.3 of the same article *“Support schemes for electricity from renewable sources shall be designed so as to maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues”*.

In the last few years, an increasing number of EU Member States have introduced competitive auction schemes for power coming from renewable energy sources. This development enables tendering large PV capacities at once and fosters competition that reduces costs. Ensuring equality of opportunity encourages a larger number of potential investors to participate in such auctions and, thus, increases competition. This has resulted in a series of successful auction calls in terms of both allocated power capacities and prices that encourage the procurement of successive calls.

From a global perspective, the cost of power generated by RES has decreased rapidly over the last decade. **Prices in EU concerning RES costs have decreased by 15.4% during 2020** and reached a minimum in mid-October 2020, but then took an upward direction as a combination of the sustained COVID-19 crisis, challenges in the module transportation and supply chain, and last but not least increased demand. It was then when IEA expressed concerns that the COVID pandemic could lead to a decline in investments in the RES sector.

At the same time, the allocation of additional RES capacity in the existing power grid will require a bundle of measures ranging from investments in transmission and

distribution networks, national and regional interconnections, demand and supply side management to centralised and decentralised storage systems.

There is also a recurring concern about the availability of land for the required RES capacity. It is crucial to highlight that energy goals and spatial planning for RES need to coexist. In the case of RES, the failure to activate the tools for successfully locating productive units was detrimental both for the configuration of a secure investment framework, as well as for a convincing response to expanding local reactions¹¹⁵.

Arguing for the further and rapid deployment of low carbon technologies at a larger scale than today, may raise issues of local acceptance. In many countries, including Greece local opposition to new production or infrastructure projects, and of course RES, has been a major barrier. It is not the purpose of the EEAG or any other RES legislation to address local acceptance issues, and this concern should in principle be addressed during the permitting procedure and public consultations on environmental/strategic impact assessments. Concerning wind parks, the EC has already announced the adoption of a strategy for offshore renewable energy – focusing on offshore wind - by the end of 2020¹¹⁶, hoping to solve the concern of both land capacity required for RES and local opposition.

The lack of public awareness about the benefits of renewable energy and misconceptions relating to the associated installment and operating costs has contributed to the reluctance of individual and corporate investors and consumers of energy to make this shift¹¹⁷. Hence, awareness of different aspects of RES technologies and their use should be at the forefront of all energy policies to encourage investment in RE for a cleaner future.

¹¹⁵ Μ. Βελεγράκης, *Το Δίκαιο της ενέργειας ως πεδίο σύγκλισης Περιβάλλοντος και Ανάπτυξης: Οι συνταγματικές διαστάσεις*, σε: ΔιΔικ 2/2021, Εκδόσεις Σάκκουλας, σ. 219-229.

¹¹⁶ ‘Adjusted Commisison Work Programme 2020’, Communication from the European Commission, COM(2020)440 final, 27.05.2020.

¹¹⁷ *Incentives and strategies for financing the renewable energy transition: A review*, Sikandar Abdul Qadir, HessahAl-Motairi, FurqanTahir and LuluwahAl-Fagih, published in Energy Reports Volume 7, November 2021, Pages 3590-3606.

10.3. GREEK SUPPORT SCHEME FOR RENEWABLE ELECTRICITY AND COGENERATION

It is common knowledge that the Greek electricity market is in urgent need of increased energy security and reliability in terms of production capacity and infrastructure. The main reasons behind frequent disruptions in the electricity supply in Greece are the failure to strengthen the transmission system and the insufficient power of the produced energy.

The current Greek support scheme is based on two mechanisms: 1) The payment of surcharge – premium to RES producers, in addition to the price set at wholesale market (Feed-in Premium – FIP) and 2) Tenders, as explained below.

In 2016, the Commission approved the Greek support scheme¹¹⁸. This scheme regime¹¹⁹ provided for state support either through a feed-in tariff or through a price premium in line with the EEA Guidelines 2014-2020. Support with a feed-in tariff will be limited to small installations and installations on non-interconnected islands. Installations with a capacity above 500 kilowatt (KW) will, over a period of 20 to 25 years, receive a premium on top of the market price of electricity. The current support scheme for RES projects in Greece was introduced by virtue of Law 4414/2016 (RES Support Law)¹²⁰ in alignment with the EEAG 2014-2020. Same law envisages the reform and implementation of new measures which transform the RES area status quo and align it to the European axis, while concurrently safeguard future investments.

More specifically, the new RES Support Law, in an effort to reduce the final cost of electricity, provides for the support of RES electricity plants on the basis of operating aid in the form of a **sliding feed in premium** added to the compensation received from the participation in the electricity market in order to reach a reference tariff, which for the applicable PV and WP categories is secured through the successful participation in competitive tenders. The EC approved the above framework and on this basis RAE organizes the tenders in accordance with the provisions of Article 7 of

¹¹⁸ Commission Press Release IP-16-3707 (16 November 2016): State aid: Commission approves Greek support scheme for renewable electricity and cogeneration.

¹¹⁹ SA.44666 New RES and CHP support scheme in Greece

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_44666

¹²⁰ Published on the Greek Official Government Gazette A149/9.8.2016.

the RES Support Law which along with the provided thereto secondary legislation (i.e. Ministerial Decisions) set out the tendering process. At the latest RAE tender, that took place on May 2021, 126 projects with a total capacity of 1,090 MW participated, with an auctioned capacity of 350 MW. As a result of the consecutive reduction of the bidding process since 2018, which are expected to be further increased in 2021, the selling prices of the electricity generated by PVs and Wind parks progressively converge with the market prices. On this point the weighted average was $\approx 37,60\text{€}/\text{MWh}$ ¹²¹ (approximately 30% lower than the starting price) and the lowest price that a project locked was at 32.97 €/MWh.

According to the information¹²² by the Greek Ministry of Environment & Energy, the latter has already requested from the EC that the tender procedures for RES projects will be extended until 2024. There will be six (6) joint tenders for WP and PVs, with a quota per technology and an auctioned capacity of 350 MW in each of them. That is, a total of 2.1 GW of new units will be available in the tenders, which will lock fixed reference prices for a period of 20 years. According to the newly announced scheme, in each auction there will be a quota of 30% per technology. Also, there will be a reserve of auctioned capacity of 1 GW for a special category of projects (i.e. small PVs up to 1 MW, units in until recently saturated areas or even for tenders of large WP with a power of more than 250 MW).

For this reason, it is of high importance the Article 20 of Law 4643/2019, according to which the RES producers may opt to be exempted by the current support scheme (and the subsequent obligation to participate in tenders) and solely participate in the wholesale market directly or through a RES aggregator. **By virtue of Article 21 of the aforementioned law, RES stations over 250 MW, as well as RES station clusters with common interconnection point with the system and an aggregate capacity of over 250 MW may optionally be exempted from tenders in accordance with the provisions of the Guidelines on State aid for environmental protection and energy 2014-2020.**

¹²¹ https://www.rae.gr/wp-content/uploads/2021/05/%CE%91%CE%A0%CE%9F%CE%A6%CE%91%CE%A3%CE%97-%CE%A1%CE%91%CE%95_461-2021_9%CE%93%CE%9E%CE%9E%CE%99%CE%94%CE%9E-%CE%9B%CE%9A%CE%9C.pdf

¹²² <https://energypress.gr/news/epektasi-ton-diagonismon-ape-me-21-gigavat-arhes-toy-2021-tha-vgoy-n-kai-350-megavat-apo>

The eligible projects are specified by virtue of a Ministerial decision which also determines the minimum supporting documents and information to be concluded in the application file for requesting the granting of aid the relevant assessment criteria, indicatively the licensing maturity, the RES technologies combination of each project, the corporate or shareholding structure of the applicant, the possible alternatives for the interconnection to the electricity grid and the timetable for the implementation of the project.

The EC then found the Greek support scheme for RES electricity and high efficiency cogeneration to be in line with EU state aid rules. The scheme aimed to help Greece reduce its CO₂ emissions, in line with EU energy and climate goals, without unduly distorting competition. Before the assessment, Greece had within the same year notified plans to support electricity from RES energy sources and high efficiency cogeneration. The EC found that the Greek scheme was capable to promote the integration of such electricity into the market, in line with the EC's Guidelines. In addition, it concluded that the scheme was likely to increase the proportion of green electricity and reduce pollution, while limiting distortions of competition due to the state support.

Support with a feed-in tariff was limited to small installations and installations on non-interconnected islands, as already said. On the other side, installations with a capacity above 500KW would over a period of 20 to 25 years receive a premium on top of the market price of electricity. Greece has demonstrated that the aid had been limited in line with the Guidelines. This would minimize potential distortions of competition created by the public funding. Under the Guidelines, as of 1/1/2017, aid to larger installations had to be granted through competitive tenders to ensure that energy is produced at minimal cost for taxpayers. Greece had to organize a pilot tender for PV energy and had committed to use competitive bidding processes for all aid granted to large installations as of 2017 and on. The scheme was financed in total through the RES support levy in force in Greece. In order to avoid any discrimination against foreign RES energy producers resulting from the financing mechanism, as of 2017 Greece has taken up to partially open up the RES support scheme to foreign producers, as well.

Law 4414/2016 providing initially for the provision of aid through sliding premium onto the market price and then for competitive tenders is in principle a positive step towards RES penetration to the market and gradually towards reduction or even elimination of the need for granting aid. The mechanism of tenders encourages price transparency and respectively reduces distortions as well as that it strengthens competition. On the other side, tenders seem to unintentionally promote mature technologies against the new emerging ones, that are usually linked to increased business risk and revenue uncertainty, and as a result difficulties in the development of RES are being arisen, which can eventually lead to higher energy prices and therefore higher costs for consumers.

Despite the objections that have been expressed from time to time, the available data so far reveal that all tenders taken place in Greece were successful enough, as there has been a significant reduction in prices. We already highlighted the average price that was scored at the latest RAE tender on May 2021, that is at 37,60€/MWh. However, taking into account that the electricity market is still under transition, developments are definitely expected on the effectiveness of tenders.

Again, the possible lack of available land for the required RES capacity could be a great barrier for the further RES deployment. In Greece, the special framework for the location of RES was drafted back in 2008 including provisions and special directions for the location of the different forms of RES in Greek territory, but is already considered obsolete. In the intervening period up to date, technology has evolved by leaps and bounds, new scientific data have emerged, while the policy for decarbonisation of the power generation has been significantly enhanced, thus accelerating growth of RES facilities. The need for transitioning to a spatial planning system of greater maturity and vision that will actively interact with development planning and promote public interest is recognized¹²³. It shall be noted that according to article 24 par. 2 of the Greek Constitution, the spatial restructuring of the country falls into the Government's authority.

A typical example is the strong opposition of Greek residents against the creation of wind farms, a problem that is constantly growing as the areas available for RES are

¹²³ Research paper for Nikos Poulantzas Institute, *Ανανεώσιμες Πηγές Ενέργειας και Χωροταξικός Σχεδιασμός*, Bee Green, 2021.

significantly reduced. Thus, there are often tensions with the local communities, who usually are against RES, as they claim the same space for the development of other activities, mainly in favour of tourism promotion and exploitation, or of course for the protection of the natural environment and the landscape. The solution would be an updated arrangement of space and the creation of relevant legislation that provides for the creation of offshore wind farms and floating PVs.

10.4. CAPACITY MECHANISMS (CM)

10.4.1. CAPACITY MECHANISMS & RES

The DG Comp is more interested than ever in the energy field, since Member States, on the one hand, are concerned about security of energy supply and on the other hand, they are trying to develop RES in order to achieve their RES and EU Green Deal goals. Back in 2016, the Commissioner Margrethe Vestager stated that EU consumers and businesses will not have to deal with black outs and that capacity mechanisms can help reduce such risk. At the same time, however, consumers should not overpay for electricity and competition should not be undermined¹²⁴.

These goals combined with growing participation of RES in energy production, due to the variability of their character, in addition to the viability problems of conventional power plants, have contributed to Member States being concerned for the adequacy of their supply in specific time periods of high demand or low productivity¹²⁵.

Strengthening capacity mechanisms providers, however, carries the risk that competition distortion will be caused in the electricity market, and of nonetheless, constitutes in principle State aid. These distortions can, however, be addressed through proper planning and ensuring healthy competition conditions within the same capacity mechanism. Capacity mechanisms should be open to potential capacity providers of all kinds in a competitive process for price setting, as well as cross-border participation. Again, in this case, the internal conflict between the effort to

¹²⁴ European consumers and companies should not have to face black-outs, and capacity mechanisms can help to reduce this risk. At the same time, consumers should not overpay for electricity and competition should not be undermined, http://europa.eu/rapid/press-release_IP-16-1372_en.htm

¹²⁵ REPORT FROM THE COMMISSION Final Report of the Sector Inquiry on Capacity Mechanisms [EUR-Lex - 52016SC0385 - EN - EUR-Lex \(europa.eu\)](http://eur-lex.europa.eu/eur-lex-content/document/?uri=CELEX:52016SC0385-EN)

ensure sufficient energy and the creation of a single market maintaining healthy competition is clear.

The EC seems to favour market reforms and alternatives that are capable of ensuring security of supply and possibly making capacity mechanisms gradually unnecessary, stating at the same time that capacity mechanisms should not replace energy transition reforms.

10.4.2. CAPACITY MECHANISMS IN GREECE

The EC has approved, under EU State aid rules and in particular under EEAG, the prolongation for a limited period of two Greek measures, a flexibility mechanism and an interruptibility scheme, to support the transition to the new electricity market design. Under the flexibility mechanism, which was initially approved by the Commission on 30 July 2018¹²⁶, flexible power capacity providers such as gas-fired power plants, flexible hydro plants and demand response operators can obtain a payment for being available to generate electricity or, in the case of demand response operators, for being ready to reduce their electricity consumption. This flexibility in power capacity will allow the Greek transmission system operator (TSO) to cope with the variability in electricity production and consumption. Under the interruptibility scheme, which was initially approved by the Commission on 07 February 2018¹²⁷, Greece compensates large energy consumers for agreeing to be voluntarily disconnected from the network when security of electricity supply is at risk, as happened for example during the gas crisis in the cold winter of December 2016/January 2017. Greece notified to the Commission its intention to prolong the flexibility mechanism until March 2021¹²⁸, and the interruptibility scheme until September 2021¹²⁹. The Commission assessed the two measures under the Guidelines on State aid for environmental protection and energy 2014-2020. The Commission found that the prolongation of the two measures is necessary for a limited period of

¹²⁶ SA.50152 New Greek transitory flexibility mechanism

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_50152

¹²⁷ SA.48780 Prolongation of the Greek interruptibility scheme

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48780

¹²⁸ SA.56102 Second prolongation of the Transitory Flexibility Remuneration Mechanism (TFRM)

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_56102

¹²⁹ SA.56103 Second prolongation of the interruptibility scheme

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_56103

time, in view of the on-going reforms in the Greek electricity market. It also found that the aid is proportionate because the remuneration of beneficiaries is fixed through a competitive auction, and thus avoids overcompensation. On this basis, the Commission approved the measures under EU State aid rules.

11. THE EU GREEN DEAL

11.1. THE CONTEXT OF THE EU GREEN DEAL

Climate change and environmental degradation are an existential threat to Europe and the world. To overcome these challenges, Europe needs a new growth strategy that transforms the EU into a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases.

The "green" identity of the new European Commission - in addition to the urgent need for an effective and structured response to climate change - is also required for reasons of political expediency and balance. In this context, issues of environmental protection, climate change and sustainability are (inevitably) at the heart of the new European policy. The EU Green Deal covers almost all European policies in all sectors, such as transport, energy, rural development, industrial and construction, even plastics. The EC itself acknowledges that achieving such a total restructuring of the economy in order to achieve the (green) ecological transition costs € 260 billion to achieve the envisaged objectives, requires constant monitoring and readiness for possible additional measures, while comprehensive recreating the existing geopolitical framework (e.g. international trade and security)¹³⁰.

The European Green Deal communication was published by the Commission in December 2019, highlighting the need to achieve climate neutrality in Europe by 2050¹³¹. The energy sector stands out because it represents 80% of the EU's greenhouse gas emissions, making it pivotal for decarbonisation¹³². The European Green Deal aims to put the European Union on a pathway to reach at least 55% of GHG reduction by 2030, and requires bold action to accelerate the decarbonisation of our energy supply. The new ambition to increase this level to at least 55% through a European Climate Law¹³³ implies that the clean energy legislation just adopted will

¹³⁰ Κλεονίκη Πουϊκλή, *Ευρωπαϊκή Πράσινη Συμφωνία (European Green Deal): Μια πρώτη ανάγνωση μια πρώτη αξιολόγηση*, Περιβάλλον&Δίκαιο 1/2020, σελ. 81-87, ΤΝΠ Qualex.

¹³¹ Commission, 'The European Green Deal' (Communication) COM (2019) 640 Final.

¹³² EC - European Commission, A Clean Planet for all - A European long-term strategic vision for a prosperous, modern, competitive and climate neutral economy. https://ec.europa.eu/knowledge4policy/node/33097_de, 2018a (accessed 20 February 2020).

¹³³ EC - European Commission, Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM/2020/80 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588581905912&uri=CELEX:52020PC0080>,

need to be significantly strengthened. The demand for clean power production could increase even more than anticipated if a tipping point for accelerated electrification were to be reached. The consequence is that proven technologies like wind and solar PVs will have to bridge the gap.

The “Green Deal” represents the EU's new growth strategy that aims to transform the EU into a competitive economy, where economic growth is decoupled from resource use.¹³⁴ In order to deliver the European Green Deal there is a need to rethink policies for clean energy. This goes to the core of the European Green Deal, the European Commission’s flagship initiative announced by President Von der Leyen as a “*European man on the moon moment*”¹³⁵, which seeks a radical transformation of the EU’s economic model into a “*modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use*”¹³⁶. The European Green Deal will, in particular, require unprecedented cuts to greenhouse gas emissions within Europe, in line with the Paris Agreement. The appendix to the EU Green Deal includes 50 actions to be implemented within 2019- 2021 in the form of regulations or directives related to climate, energy, circular economy, transportation, agriculture, financial services, biodiversity and waste management. It also includes action for updating existing applicable legislations. This implies stepping up policy actions to support both renewable energy and energy efficiency, two domains in which the body of EU law has recently changed. These changes raise the question of stakeholder support for more ambitious policies.

The main shortcoming of the EC proposal for "Climate Law" is the absence of strict and specific targets for reducing GHG emissions by 2030, a point which has been the subject of controversy between Member States, as well as the non-establishment of intermediate landmark targets from 2030 to 2050. On the other hand, forecast for the adjustment of climate targets every 5 years based on new scientific data, as well as the adoption of future climate legislation by majority vote are among the positives of the proposal.

¹³⁴ The context of the EU Green Deal <https://www.pwc.com/gr/en/advisory/risk-assurance/sustainability-climate-change/eu-green-deal.html>

¹³⁵ Commission Communication, “The European Green Deal”, COM(2019)640, at p. 1.

¹³⁶ Kingston, Suzanne, State Aid and the European Green Deal: The Implications of Case C-594/18 P Austria v Commission (Hinkley Point C) (March 2021). European Law Review, UCD Paper No. 6/2021.

Table 7: Overview of 10 most raised aspects in public Twitter communication with regard to Green Deal¹³⁷.

Issue	Incidence	Share of total (%)
Climate Law	20,916	10.56
Jobs	1,811	0.91
Growth	764	0.39
Social	740	0.37
Just Transition Fund	688	0.35
Finance	628	0.32
Innovation	546	0.28
Infrastructure	436	0.22
Decarbonisation	428	0.22
Research	412	0.21

According to the paper by Marc Ringel, Nils Bruch and Michèle Knodt on what matters the most for stakeholders within the framework of the European Green Deal¹³⁸, all core stakeholders seem to support common binding national targets concerning the energy efficiency field. In the same field, the solution of coordination via the NECPS received low rating in comparison to the support for binding targets¹³⁹. This might be interpreted as limited trust in the hard soft governance that came with the Clean Energy Package and shown already in earlier stakeholder feedback¹⁴⁰. The same result is mirrored in the renewable energy field, where stakeholders also rate binding national targets as extremely important¹⁴¹. This might be explained by the fact that stakeholders feel more secured and protected when the EC lands additional legislative proposals when the national efforts are not ambitious enough. Especially hybrid stakeholders, combining industry, Think Tanks and NGO actors, can take a strong role for consensus building. The core group of investors seems to argue strongly for a framework of national targets in both policy fields. This suggests that

¹³⁷ Source: *Is clean energy contested? Exploring which issues matter to stakeholders in the European Green Deal*, Marc Ringel, Nils Bruch and Michèle Knodt, published in *Energy Research & Social Science*, Volume 77, July 2021, 102083.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ M. Knodt, M. Ringel, R. Müller, ‘Harder’ soft governance in the European Energy Union, *J. Environ. Policy Plann.* 2 (1) (2020) 1–14.

¹⁴¹ *Is clean energy contested? Exploring which issues matter to stakeholders in the European Green Deal*, Marc Ringel, Nils Bruch and Michèle Knodt, published in *Energy Research & Social Science*, Volume 77, July 2021, 102083.

on a general level, stakeholders are hesitant about the harder soft governance that was a characteristic for the framework of the Clean Energy Package and would prefer more binding governance.

The Green Deal and the COVID-19 recovery and resilience facility offer a unique opportunity to accelerate this development and streamline European and national efforts. A realization of the Green Deal has far-reaching consequences for the EU industrial sector. It will have a direct impact on those European regions where coal and lignite are still mined (including Greece) and used in thermal power plants. Coal mining is still a significant economic activity but its phase out is crucial to achieve the GHG emission reduction targets. Achieving a climate-neutral and cyclical European economy requires the full activation and assistance of the industrial sector, which – despite the progress made – remains too linear and dependent on mining, trade and the conversion of raw materials into products, which end up as waste or pollutant emissions¹⁴².

11.2. THE GREEN DEAL & STATE AID CONTROL

An interesting debate has recently emerged regarding the need (or not) of modifying competition policy rules in order to support the energy and climate agenda. This debate encompasses all areas of competition policy: antitrust, mergers, and state aid control (see the conference that the DG-Comp recently organized around this issue). Among these areas, state aid control stands out given that most of the Green Deal investments will involve State Aid...from energy efficiency investments to sustainable mobility, to name just two. Likewise, 37% of the recovery fund will be devoted to green investments. Should state aid control be disconnected from environmental policies, or should we rather exploit the synergies between the two policies?

In my view, State Aid control must play a fundamental role in the energy transition. Reform of the EU State aid rules forms a central plank of the European Green Deal, and the Commission has committed to revising its Guidelines on State aid for environmental protection and energy “*in light of the policy objectives of the European*

¹⁴² Κλεονίκη Πουϊκλή, *Ευρωπαϊκή Πράσινη Συμφωνία (European Green Deal): Μια πρώτη ανάγνωση μια πρώτη αξιολόγηση*, Περιβάλλον&Δίκαιο 1/2020, σελ. 81-87, ΤΝΠ Qualex.

*Green Deal and [to] support a cost effective and socially inclusive transition to climate neutrality by 2050*¹⁴³. The revised EEAG should, and de facto will, be part of the European strategy for a green recovery, in close relation to the implementation of the European Green Deal. Indeed, it will be an important tool and frame not only for the EC but also for the Member States in that respect. However, the amendment of the GBER in the light of the European Green Deal, which was originally scheduled for adoption during the second half of 2021, has now been postponed until the end of 2023 due to the prolongation of the GBER, bringing additional uncertainty to the process¹⁴⁴. By granting State aids within the energy and environmental sectors, Member States can support companies, innovation and jobs creation in Europe and therefore contribute to both the decarbonisation of the energy system, and to the economic recovery, placing emphasis on sustainable growth areas. The amount of public funds that are going to be allocated for sustainability purposes is very significant, larger than ever before in European history. So it is crucial that we get this right, making sure that the aid does not distort competition and trade and also ensuring – let me stress this – that we make the most out of the public investments. Public funds are limited and therefore costly. Allocating them to the wrong activities or giving them away in the form of firms’ rents would entail high opportunity costs.

One of the main elements of the Green Deal is the Green Deal Investment Plan which aims to provide at least 1 trillion EUR of private and public sustainable investments over the upcoming decade¹⁴⁵. State aid will play a part in this investment plan and the revision of the guidelines should provide a clear, fully updated, and fit-for-purpose enabling framework for public authorities to reach the objectives of the Green Deal¹⁴⁶. The Green Deal, in conclusion, places an emphasis on the fact that state aid will play an important role in achieving climate neutrality.

The best way to make sure that the funds will be used as efficiently as possible is to rely on competitive mechanisms for allocating those funds, whenever possible. The merits of competition are well known. Through competition, producers are pushed to

¹⁴³ Commission Communication on the European Green Deal Investment Plan COM(2020)21, at p. 12.

¹⁴⁴ “*State aid: Commission prolongs EU State aid rules and adopts targeted adjustments to mitigate impact of coronavirus outbreak*”, European Commission, Press Release IP/20/1247, 02.07.2020.

¹⁴⁵ Commission, ‘*Sustainable Europe Investment Plan European Green Deal Investment Plan*’ (Communication) COM(2020) 21 final at p. 1.

¹⁴⁶ *Ibid* at p. 12.

innovate in order to reduce those costs and to pass on their lower costs to consumers through lower prices. For this purpose, State Aid rules can be very effective, as we have seen in the past. The 2014 Energy and Environmental Aid Guidelines (EEAG) required the use of competitive tenders as the default approach for allocating renewable energy support. The experience with renewables' tenders has been very positive – among other successful stories, a recent new auction taken place in Spain resulted in prices of 25€/MWh for solar and wind installations, well below the current wholesale electricity prices. This has been a major achievement of state aid rules, which can also prove very useful as we move along the energy transition. But when we write down the rulebook – and the EEAG is currently being revised – it is important that we get it right because we otherwise run the risk of making the energy transition inefficiently expensive. State aid control can be a powerful rulebook as long as the rules are appropriate.

Beyond the role of state aid in promoting the use of competitive mechanisms, let me also add that I wish State Aid could come with some sort of green conditionality, in line with the green conditionality embodied in the Recovery and Resilience Facility. I find it contradictory that on the one hand Europe is setting ambitious environmental goals, and on the one hand, it allows member states to provide aid that contravenes these goals. The rationale of state aid control is to stop member states from granting aid that would lead to inefficiencies such as distortions to competition or to trade. Damaging the environment is another major inefficiency that should also be added to the list, I believe. The no-harm principle should be part of state aid control. The European Court of Justice's decision in *Hinckley Point C* has weakened this case, but I would like the Commission, if possible, to rely on the provisions of the Treaty on environmental protection to ensure that no State Aid damages the environment. And if State Aid is not deemed appropriate for this purpose, legislators should do their part of the job. This would be another powerful channel through which state aid control could greatly contribute to the Green Deal as well as to the recovery.¹⁴⁷

¹⁴⁷ Publication by Natalia Fabra – Climate Strategic Initiative on <https://climate.uc3m.es/2021/02/16/green-deal-recovery-state-control/>

11.3. THE GREEN DEAL & THE (C)EEAG

The EC has proposed a review of the compatibility criteria for environmental protection, suggesting that it should be widened to promote the green transition while effectively controlling distortions of trade and competition. The EC proposed organizing the rules around broader policy objectives, such as environmental protection, climate neutrality, security of supply, reduced risk of carbon leakage, and other Green Deal objectives.

There are proposals by the Commission on how state aid could be kept more aligned with the Green Deal and these are, tendering and broadening. While a competitive bidding process usually ensures that the environmental or energy objective is achieved at the lowest cost, there are more factors to consider for energy and environmental aid. Broadening of schemes to direct competitors, various related industrial sectors and other areas of the economy could ensure that the objective is achieved with minimal cost. However, this could have a similar effect to competitive bidding processes in that it simply restricts the State aid almost exclusively to traditional market players¹⁴⁸. The revised EEAG should therefore require tendering when it is appropriate and ensure that it does not create more market barriers for newer and potentially cleaner technology¹⁴⁹.

¹⁴⁸ ClientEarth, 'Revision of the State Aid Guidelines for Environmental Protection and Energy Exemption rules' January 8, 2021 at p. 31.

¹⁴⁹ Zacharias Lilja Jensen, *Who Should Pay for Pollution? The Relationship between the European Green Deal, State Aid for Environmental Protection, and the Polluter Pays Principle*, 2021.

12. FINAL CONSIDERATIONS

State aid rules constitute an essential part of EU regulation concerning energy. They set positive and negative boundaries for Member States to intervene in the energy market's structure and performance, by allowing the granting (or prohibiting it) of some state benefit to a particular undertaking to address a market failure and advance energy market policies and objectives within the rules imposed by the primary and secondary EU law. In practical terms, the amount of state aid granted to energy is the second largest among the approved aid in the EU; these funds are being used to facilitate the energy transition and pursue the complete decarbonisation of energy markets in Europe, along with the adaptation to the European Green Deal objectives, setting RES deployment and energy efficiency schemes at the forefront.

While State aid can be a useful effective tool in contributing to common interest objectives it is essential to control it in a way that keeps the internal market competitive. State aid without control has the possibility of doing more harm than good by preventing the market from rewarding the most efficient and innovative producers. This could lead to a situation where, in the case of environmental and energy aid, cleaner technologies and more efficient or innovative competitors are unable to enter the market. As Commissioner Neelie Kroes has explained back in 2008, from the viewpoint of the DG Comp, the tool bringing long-term results in tackling a crisis is *not* state aid, but the restarting of competitive and healthy markets, as early as possible after any disruption or failure.

Sustainable RES come with several other advantages, such as offering alternatives, thereby diversifying energy resources and helping to achieve energy security. Additionally, RES can provide easy access to energy, contribute to social and economic development and, most importantly, mitigate climate change and reduce its associated environmental and health impacts. In any case, the fact that RES still need support schemes and subsequently the fact that RES are not capable of competing fully on their own, at least at this stage, the conventional energy sources, reveals some market failures. However, given the situation, it is only appropriate to harmonize these support schemes at EU level, since only then distortion of competition and infringements of relevant provisions of the TFEU would be avoided.

The latest case law is expected to be crucial for the control of RES support schemes under state aid law. If the EC follows the new case law, it will apply the criterion of state resources in a less strict way and will perceive less evidence as public resources than it has in the past. In view of the consequences of case law and legislative developments, it is reasonable to expect a change in the way the EU legal order intervenes in national RES support schemes. Until now, and in the absence of secondary EU law provisions on support schemes, the EC relied on State aid law to judge the appropriateness and expected effectiveness of the national schemes for RES promotion. However, to the extent that there are now specialized legal provisions, and to the extent that Article 107 (1) TFEU is now interpreted in a way that recognizes and accepts a wider range of discretion to the Member States, the control of support schemes can now be based on secondary EU law. Of course we still have to wait on what the proposal for the first European Climate Law will bring to the table, and how these provisions are going to be interpreted and implemented.

I feel the need to highlight that state aid is not the only measure that can ensure the deployment of RES: Investment aid can be a more viable option that offers certainty to investors. The lack of public awareness about the benefits of RES and misconceptions relating to the associated installment and operating costs has contributed to the reluctance of both investors and consumers of energy to make this shift. Hence, awareness of different aspects of RES technologies and their use should be at the forefront of all energy policies to encourage investment in RE for a cleaner future. Supplementary to this cause is the development of spatial planning destined for RES, which is of significant importance in order to solve both concerns about the lack of available land capacity required for RES projects as well as local opposition issues.

Contrary to how it is sometimes presented, the Green Deal is not here to impose extra restrictions on carbon-intensive activities, but instead meant to be a pillar of the EU economic growth and modernisation strategy. The Green Deal priorities are inextricably linked to other key environmental policy instruments, such as the goals of the United Nations 2030 Agenda for Sustainable Development, but also the planning and implementation of the upcoming 8th Environmental Action Plan. It becomes clear that there are overlapping and/or interdependent, related and/or identical objectives,

which must be combined in a functional and efficient way in terms of their funding, cooperation between stakeholders monitoring, reporting and reporting procedures.

Although the EU Green Deal has the "green" color in its title, this does not automatically mean that a drastic shift towards a more environmentally conscious European policy has taken place. The Green Deal is a new economic development strategy, which aspires to respond more effectively to critical and urgent environmental issues, as well as the extremely ominous prospect of not achieving climate change goals and sustainability by utilizing scientific data on the state of the environment and new technological possibilities. Unfortunately, it is not clear on what tools the required coordination of policies and legislative initiatives will be achieved in more than one sector altogether (indicatively, rural development, trade, public health, transport, biodiversity, climate). However, I can only hope that this deal will be the starting point for substantial progress on individual issues.

Lastly, the success of the above deal is inextricably linked to the adoption of the 2021-2027 budget, on the basis of which it will become clear to what extent (sufficient) funds will be channeled to achieve the deal's objectives, as well as to the role that will be called upon to play in restarting the EU economy following the global health crisis caused by COVID-19. And as it is well established by now, where there is funding, there is always the need for (state) aid control.

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