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EU Guidelines on Environmental and Energy Aid for 2014–2020 and its Impact on the National Promotion Schemes for Renewable Energy

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Abstract

The development and promotion of renewable energies same as the promotion of conventional energy – in Germany and in other Member States of the European Union – are often in tension with the objectives of the European Union to create a common internal electricity market and to reduce restrictions of competition.

Concerning the granting of State aids, the following abstract shall give an overview of the European legal framework as well as the notification procedure before the European Commission and offers a brief insight into the impact of European guidelines on energy promotion schemes, e.g. in Germany and in the United Kingdom.

Keywords:	Renewable and conventional energy, National promotion schemes, State aids, Impact of European Guidelines

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1. The European understanding of a measure as State aid and the general notification requirement

Aiming at the before mentioned European goal to create a common internal electricity market on the one hand and to reduce restrictions of competition on the other hand, the European Union created State aid rules, as part of the European competition law, which intend to protect competition within the internal market from any distortion.

The principles on State aids, laid down in Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) are designed to resolve or reduce such frictions arising between actions of the Member States and the European internal market.

Following to the definition of State aid in Article 107 TFEU, "*…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*". This broad description of the term State aid offered by Article 107 TFEU gives a comprehensive understanding of the general prohibition of State aids. This as a consequence leads to the fact that supportive State measures generally are subject to the revision of the European Commission and the general notification requirement.

In order to execute the general prohibition of State aids, the Commission has the exclusive authorization and duty to initiate a State aid procedure for every public measure, which supports certain undertakings or the production of certain goods. In this respect the commission has to approve every measure which is qualified as State aid as compatible or incompatible with the TFEU. The Member State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision. In case of incompatibility the Commission can request a full refund.

Following to that the broad understanding of the term „State aid“ and the qualification of a State measure as State aid is key to the applicability of the State aid provisions and the formal procedure before the European Commission.

2. Exemptions from the general notification requirement

Since the consequences of the qualification of a measure as State aid is a formal procedure before the Commission, which causes a remarkable uncertainty for the Member State and its economy concerning a feared refund, there are exemptions made in the European law to the general notification requirement.

Under Article 109 TFEU the council may determine categories of aid that are exempted from the general notification requirement. In accordance to Article 108(4) TFEU the Commission may adopt regulations relating to those categories.

The Commission therefore adopted "*Regulation EU No. 1407/2013 in December 2013 on the application of Articles 107 and 108 of the TREATY on the Functioning of the European Union to de minimis aid*". The council hereby decided that de minimis aid could constitute such category and de minimis aid is deemed not to meet all criteria laid down in Article 107 TFEU and therefore is not subject to the notification procedure.

Secondly the Commission adopted the so called "*General Block Exemption Regulation EU No. 651/2014*". in June 2014 This regulation is declaring certain categories of aid as compatible with the internal market. By the new regulation, the scope of exemptions has been extended from prior notification of State aid. One of the exempted aids were aids for environmental protection, which the Commission decided were less likely to lead to undue distortions of competition in the Single Market.

3. State aid in the energy sector

Especially when the General Block Exemption Regulation is not applicable, other regulations and communications of the Commission are applicable in execution of Article 107(3) TFEU.

For the purpose of interpreting the exception of Article 107(3) lit. c) TFEU, the Commission adopted the *„Guidelines on State aid for environmental protection and energy 2014-2020“* in July 2014 and thereby changed the promotion of renewable energy in Europe.

In some Member States the power generation with Renewable energy sources is supported with fixed Feed-in tariffs what encouraged the growth of renewables in the energy mix and led to market distortions because renewable installations have generated electricity irrespective of an actual demand. In order to make renewable energy production react more to market signals the new guidelines aim to better integrate renewable energy into the internal electricity market, limiting its support. Feed-in tariffs therefore are progressively replaced by competitive bidding processes that shall increase cost effectiveness and limit distortions of competition. As consequence, Member States as Germany start implementing competitive bidding procedures for a certain share of their capacity of renewables. Moreover, from 2016 on, electricity producers need to sell their electricity on the market and be subject to the market reactions same as other energy sources are. Member States are also obliged to use as support instruments market premiums – as top-up on the market price – or certificates.

Under the European Guidelines on State aids in the energy sector, the support for energy intensive sectors such as manufacturing of chemicals, paper, ceramics or metals is still provided for them, because they are heavy intensive users of electricity and should not have disadvantages against competitors from outside the European Union, where electricity prices are lower. In order to preserve the competitiveness of these sectors and activities, the new guidelines still allow granting them reductions in the charges levied to support renewable energies, even if the requirements have been modified.

4. Impact of European Regulations on the German Renewable Energy Act

The European legislation and the European Commission both gain of importance and of influence on the national promotion schemes in the energy sector.

Since the European Commission declared several provisions in the German Renewable Energy Act 2012 as State aid, the German Renewable Energy Act 2012 has been subject to the State aid procedure before the European Commission. The whole promotion system for renewables, in particular the green electricity privilege and the special equalization scheme for electricity-intensive enterprises have been supervised by the Commission. Since the Member State concerned with a State aid procedure shall not put its proposed measures into effect until the procedure has resulted in a final decision, the German State had to fear a recovery process for all the aids granted. The European Commission meanwhile declared the German Renewable Energy Act 2012 as incompatible with European Law and now being deciding about the amount of aid to be refund.

As second consequence of the declaration that the German Renewable Energy Act 2012 is incompatible with European law, was that Germany was obliged to quickly modify its national promotion scheme for renewable energy. In order to prevent the future support of renewable energy in Germany from any complications, the German Federal Ministry of Economics drafted the new Renewable Energy Act 2014 in close consultation with the European Commission to design it fully in accordance with the new guidelines. The alterations made in the new German Renewable Energy Act 2014 are mainly the abolishment of the green energy privileges, mandatory direct marketing of energy, the alignments of the special equalization scheme for electricity-intensive enterprises and the introduction of the EEG-levy for self-generated electricity, too.

5. Impact of European Regulations on energy promotion in the United Kingdom

Under the EU Treaty, all Member States are free to determine their energy mix, so the United Kingdom, unlike Germany, decided to promote nuclear energy.

The UK will need about 60 GW of new electricity generation capacity due to the closure of existing nuclear and coal power plants. The new Hinkley Point C nuclear power station will produce 3.3 GW representing 7% of UK electricity generation. The power station will require a depth financing of GBP 17 billion.

The UK planned to establish a price support system, the so called "contract for difference", which should guarantee stable revenues for the operator of Hinkley Point C for a period of 35 years. The operator should also benefit from a State guarantee covering any debt, which the operator will seek to obtain on financial markets.

If member states decide to fund projects in certain areas such as the promotion of nuclear power plants, they have to notify the Commission of such intention, who will then case-by-case assess its compatibility with the Treaty. Public interventions in favour of companies can be considered free of state aid within the meaning of EU rules when they are made on terms that a private operator would have accepted under market conditions. If this so-called market economy investor principle is not respected, the supportive measure is regarded as State aid within the meaning of EU rules (article 107 TFEU) because it confers an economic advantage on the beneficiary that its competitors do not have. The Commission then proceeds to assess whether such aid can be found compatible with the EU rules.

Against this background the promotion of the nuclear power plant Hinkley Point C was involved in a State aid procedure and the United Kingdom had to agree to significantly modify the terms of the project financing following the in-depth investigation of the Commission.

In order to minimise distortive effects of the support measures, the UK authorities agreed to the following modifications. With respect to the State guarantee, the Commission found that the guarantee fee was too low for a project with such risk profile, so the fee was significantly raised. Due to this, the subsidy is reduced by more than GBP 1 billion. In addition, the gains generated by the project will be shared with the UK consumers. As soon as the operator´s over-all-profits exceed the rate estimated at the time of decision, any gain will be shared with the public entity granting the public support. Moreover, the decision defines a second, higher threshold above which the public entity will obtain more than half of the gains. This gain-share mechanism will remain in place not only for the 35-year support duration as initially envisaged, but upon request of the Commission for the entire lifetime of the power plant, namely 60 years.

6. Comparison of the German and the British promotion scheme

The German efforts to promote and develop renewable energy on the one hand and the English efforts to promote and develop conventional energy on the other hand were both subject to the revision of the European Commission. The German promotion scheme supports renewable energies with a legally guaranteed fixed feed-in tariff under the rules of the German Energy Act. The nuclear power generation in the UK, at least in the individual case of Hinkley Point C, is supported by a contractual price support, which guarantees stable revenues and a secure State guarantee for debts needed to realize the power plant. Besides these structural differences of the two promotion measures, both were found incompatible with European law, so the European Commission asked the Member States to modify the promotion, so it will remain balanced to the object pursued, avoiding any undue distortions of competition in the Single Market as shown above.

Both examples show clearly the impact of the before mentioned comprehensive understanding of State aid. The European Commission has a strong influence on the national promotion schemes and is authorized to severely modify the member states' political and economic decisions in the energy sector.

7. Conclusion

Considering that European State aid rules are (only) made to resolve and reduce frictions arising between the objective of the Member State to develop and to promote energy and the objective of the European Union to create a common internal electricity market, it is somehow doubtable whether a free energy market is still existing in Europe or not, due to the comprehensive understanding of State aid.