

# **Support Schemes for Policies of Energy Transition in the Light of EU State Aid Rules**

The Dispute on the Surcharge Reduction Scheme of the German Renewable Energy Sources Act and its Influence on the New Community Guidelines on State Aid for Environmental Protection and Energy 2014-2020

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**Abstract:** Technological development and the furtherance of EU environmental and energy objectives, have confronted the Commission with the difficult task of balancing public policy and competition concerns in the formulation of its State Aid rules. The Commission has engaged in a substantial overhaul of its framework on the justification of environmental and especially renewable energy aid schemes. Exemptions of aid measures that provide for reductions from charges for funding of renewable energies for energy intensive users have triggered a particularly difficult and interesting debate within the institution. The recent investigation into the German Renewable Energy Sources Act has produced interesting results, arguably the introduction of the Guidelines on Environmental Protection and Energy 2014-2020. This synthesis concludes that the EU Competition gatekeeper, the Commission, exercises considerable discretionary power but that the influence of national governments, in any case, should not be underestimated.

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## 1. Introduction

*"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 in Europe but on the global market."*

Sigmar Gabriel, German Minister of Economic Affairs and Energy, 2014<sup>1</sup>

The German Minister of Economy and Energy highlights the dilemma between the two faces of state aid policy. These two faces relate to avoiding unnecessary distortion of competition while simultaneously enforcing public policy goals, such as the promotion of energy generation from renewable sources. This paper picks up on this issue by critically analysing the European Commission's position on the 2012 reform of the German Renewable Energy Sources Act (hereafter referred to as 'EEG', the German acronym for Erneuerbare-Energien-Gesetz). The EEG implements the German government's policy to enhance and develop energy generation from renewable energy sources in order to slowly phase-out nuclear energy production.<sup>2</sup> Its original version first entered into force in 2000 and has been amended many times. In December 2012, its latest version came into effect and aligned existing national provisions on the promotion of the use of energy from renewable sources with the EU's Renewable Energy Directive.<sup>3</sup> The amended EEG Act of 2012 has recently been under scrutiny by the Commission, since its amendments were considered unnotified new aid. In December 2013, the Commission initiated a formal investigation procedure and criticized two main aspects. On the one hand, the Commission had 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 state aid rules. On the other hand, the Commission raised serious doubts as to the compatibility of reductions from charges for funding renewable energies for energy intensive undertakings (EIUs) with the internal market.

The following analysis is twofold. First, this paper specifically focuses on the issue of surcharge reductions, as it is contentious whether they indeed constitute aid pursuant to Article 107(1) TFEU. The contention stems from the fact that surcharge reductions as introduced by the EEG arguably do not comprise any state resources as in the case of tax exemptions. Therefore, this paper critically investigates whether reductions from charges for

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<sup>1</sup> Bundesministerium für Wirtschaft und Energie (2014)(c).

<sup>2</sup> Act on granting priority to renewable energy sources (Renewable Energy Sources Act – EEG).

<sup>3</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

the funding of renewable energies can be unambiguously classified as state aid. Second, this paper outlines the formal investigation process under the 2008 Guidelines on State Aid for Environmental Protection, evaluating the Commission's and the German government's position on the surcharge reduction for EIUs. At this point it should be noted that during the ongoing proceedings, a new version of the Guidelines was finalised, shortly after the German government and the Commission had found a compromise on a reform of the EEG which would be deemed compatible with the internal market. Strikingly, the Commission seems to have aligned its 2014 Guidelines with the contested provisions on surcharge reductions for EIUs as introduced by the EEG. Therefore, as a second research focus, this paper seeks to evaluate the EEG-case's influence on the new 2014 Guidelines.

Regarding the first research question, it will be concluded that the Commission broadens the interpretation of the notion state resources in its analysis under Article 107(1) TFEU for state aid. This finding is particularly relevant for European jurisprudence on the matter of state aid, as an additional dimension has been added to the concept of state resources. The analysis of the second research question allows for two conclusions concerning the guidelines. On the one hand, it is demonstrated that the Commission enjoys considerable discretionary powers in applying the guidelines especially where these are silent on certain issues. On the other hand, the Commission seems have given in in its drafting of the new 2014 Guidelines, acknowledging national policy interests. The paper proceeds as follows: At first, the EEG is introduced as well as the case before the Commission. Second, the theoretical framework of an assessment of an alleged state aid measure under Articles 107 and 108 TFEU is outlined. Third, the role and legal value of guidelines is demonstrated and the 2008 Guidelines on State Aid for Environmental Protection are introduced. Fourth, this is followed by an analysis of the Commission's preliminary review and formal investigation regarding the surcharge reduction for EIUs. Fifth, the new 2014 Guidelines' approach concerning surcharge reductions is evaluated highlighting the influence of the EEG on its content. A demonstration of current legislative state of the EEG-reform will wrap up this paper, leading to the concluding remarks.

## 2. Introduction to the Case Study

### 2.1. *The German Renewable Energy Sources Act*

The Renewable Energy Sources Act (hereafter referred to as ‘EEG’, the German acronym for Erneuerbare-Energien-Gesetz) implements the German government’s policy to enhance and develop energy generation from renewable energy sources in order to slowly phase-out nuclear energy production.<sup>4</sup> Its original version first entered into force in 2000 and has been subject to many reforms. In December 2012, its latest version came into effect and aligned existing national provisions on the promotion of the use of energy from renewable sources with the EU’s Renewable Energy Directive.<sup>5</sup> The EEG’s purpose is to facilitate the sustainable development of energy supply, particularly for the sake of climate and environmental protection, to reduce the costs of energy supply to the national economy and to promote the further development of technologies for the generation of electricity from renewable energy sources.<sup>6</sup> Moreover, the EEG aims at reaching minimum shares of energy from renewable energy sources in gross final energy consumption to 35% by 2020, to 50% by 2030 and ideally to 80% by no later than 2050.<sup>7</sup> Thereby, Germany commits to a much more stringent target than its mandatory national target of 18% by 2020 set by the EU’s Renewable Energy Directive.<sup>8</sup>

The EEG regulates the following measures for the promotion of renewable energy production: In order to guarantee grid access for green energy, the EEG insists on priority purchase and priority transmission of electricity generated from renewable energy sources.<sup>9</sup> Distribution system operators<sup>10</sup> are obliged to purchase electricity produced from renewable sources within their network area and to pay a fixed feed-in tariff and an additional market premium to green energy producers.<sup>11</sup> This special pricing scheme implies that green energy

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<sup>4</sup> Renewable Energy Sources Act (EEG).

<sup>5</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

<sup>6</sup> Renewable Energy Sources Act (EEG), Part 1 Section 1(1).

<sup>7</sup> Ibid, Part 1 Section 1(2).

<sup>8</sup> Directive 2009/28/EC, Article 3 in combination with part A of Annex I.

<sup>9</sup> Renewable Energy Sources Act (EEG), Part 2 Section 5-8.

<sup>10</sup> Directive 2009/73/EC concerning common rules for the internal market in natural gas defines ‘distribution system operator’ as “a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas and electricity”, (Article 2(6)).

<sup>11</sup> Renewable Energy Sources Act (EEG), Part 3 Section 16 and 33g.

is sold at a pre-set price per kilowatt-hour, which is usually above market price. Producers of renewable energy benefit from an additional fixed premium in order to be compensated for their cost-intensive energy production. At the same time, the premium aims at incentivizing investment in green-energy.

In addition, the EEG obliges transmission system operators<sup>12</sup> (TSOs) to purchase energy produced from renewable energy sources from the distribution system operators as well as connecting renewable electricity plants to the grid.<sup>13</sup> TSOs are obliged to compensate distribution system operators for the feed-in tariffs and the additional market premium they initially had to pay to green electricity producers. In addition, they are obliged to sell the electricity on the spot market. This may lead to financial challenges for TSOs, in case the price obtained at the spot market does not cover the costs paid to distribution system operators, including the fixed feed-in tariff and the premium. Moreover, the obligation to connect renewable energy plants to the grid involves extremely high costs, since electricity grids have to be extended. In sum, the purchasing obligation at a preferential pricing rate and the costs for grid connection constitute an excessive financial burden for TSOs. However, the EEG offers a solution to this problem. TSOs can require electricity suppliers, who buy the renewable energy on the spot market and who deliver electricity to final consumers, to pay a share of this burden by means of a charge. This charge is referred to as the *EEG-Umlage* (EEG-surcharge).<sup>14</sup> The share has to be proportionate to the supplier's quantity of electricity delivered to final consumers. In turn, energy suppliers have the right to pass on the surcharge to final energy consumers, by raising energy prices in accordance to the surcharge.

## 2.2. *Special rules on the EEG-surcharge*

The EEG-surcharge has had severe consequences for final energy consumers, as latest figures of energy prices indicate. In 2013, the EEG-surcharge amounted to 5.28 eurocent per kilowatt-hour, around 40% higher than in 2012.<sup>15</sup> Accordingly, private energy consumers had to pay additional 5.28 eurocent per kilowatt-hour which corresponded to an increase in energy

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<sup>12</sup> Directive 2009/73/EC concerning common rules for the internal market in natural gas defines 'transmission system operator' as "a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas and electricity", (Article 2(4)).

<sup>13</sup> Renewable Energy Sources Act (EEG), Part 2 Section 5.

<sup>14</sup> Ibid, Part 4 Section 37(2).

<sup>15</sup> Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (2013), p.10.

prices of more than 10% compared to 2012.<sup>16</sup> In 2014, the EEG-surcharge is estimated to increase to 6.24 eurocent per kilowatt-hour, since the amount of the price difference in the price obtained at the spot market and the price to be paid based on the fixed feed-in tariff and the premium is expected to increase to 20 billion increase to 20 billion euros price difference. Consequently, an average private household with an average annual energy consumption of 3500 kilowatt-hours is expected to pay 250 euros of EEG surcharge on top of the regular energy price (VAT included).<sup>17</sup>

In particular, the EEG-surcharge has had severe repercussions for small and medium sized enterprises (SMEs) and energy-intensive undertakings (EIUs). Especially EIUs such as in the steel and aluminium industry and in the chemicals sector face an excessive financial burden due to the EEG-surcharge. The EEG-Act of 2012 has introduced special rules for those industry sectors. For certain EIUs and as well as for rail operators, the EEG allows the surcharge to be capped.<sup>18</sup> This limitation aims at reducing electricity costs for these enterprises, thereby maintaining their international and intermodal competitiveness. The EEG-surcharge can be limited to 10% if an undertaking consumes at least one gigawatt-hour and to 1% at a consumption rate between 10 and 100 gigawatt-hours.<sup>19</sup> Where EIUs consume more than 100 gigawatt-hours and where their energy costs represent more than 20% of gross added value, the EEG-surcharge will be limited to 0.05 eurocent per kilowatt-hour for the undertakings' whole electricity consumption.<sup>20</sup> For 2014, 2098 undertakings were classified as energy-intensive and will thus benefit from the EEG-surcharge reduction. This corresponds to a preferential treatment of a current-amount of about 18% of the annual electricity consumption in Germany. In total, the beneficiaries of the rebates provision will save around 5.1 billion euros of additional electricity costs.<sup>21</sup> In fact, EIUs admitted to preferential treatment only pay 0.3% of the total EEG surcharge that is reallocated to final energy consumers.<sup>22</sup>

As a result of the cap, the EEG-surcharge increases substantially for other consumers. In fact, the surcharge of 5.1 billion euros saved by EIUs is reallocated to private households, public institutions, agriculture, trade and commerce and those industries that are not exempted from the surcharge.<sup>23</sup> This has raised concerns among consumer and various business

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<sup>16</sup> Bund der Energieverbraucher e.V. (2014).

<sup>17</sup> Handelsblatt (2013)(a).

<sup>18</sup> Renewable Energy Sources Act (EEG), Part 4 Section 41.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Handelsblatt (2014).

<sup>22</sup> Wirtschaftswoche (2012).

<sup>23</sup> Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (2013), p. 2.



associations. Consumer groups were angered that some firms were being spared the cost of Germany's transition to renewable energy at the expense of households. In particular, the German Association of Energy Consumers filed a complaint with the European Commission, arguing that the Renewable Energy Act and in particular the cap on the EEG-surcharge in favour of energy-intensive users might be incompatible with EU state aid rules.<sup>24</sup> The following section briefly outlines the European Commission's position on the EEG's provisions which are claimed to be incompatible with state aid rules.

### *2.3. Critical aspects of the EEG-Act 2012 from a state aid point of view*

Following a complaint by the German Association of Energy Consumers in December 2013, the European Commission found that two aspects of the EEG-Act might not be in line with EU state aid rules. On the one hand, the Commission had doubts whether the public support given to producers of renewable energy in the form of feed-in tariffs and market premiums constitutes state aid which might be incompatible with EU state aid rules.<sup>25</sup> However, after preliminary investigation, the Commission came to the conclusion that the special pricing schemes are in line with the Commission's 2008 Guidelines on state aid for environmental protection.<sup>26</sup> For the purpose of this paper, it is not necessary to scrutinize the Commission's conclusion, since this paper primarily focuses on the Commission's critique on the EEG-surcharge reduction.

On the other hand, the Commission considered the amendments to the surcharge reduction provisions as introduced by the EEG 2012 version as unlawful new aid, since they had not formerly been notified pursuant to Article 108(3) TFEU.<sup>27</sup> Specifically, the Commission asserts that the surcharge reduction for energy intensive users might be indirectly financed from state resources and therefore constitutes state aid.<sup>28</sup> At this point, it should already be noted that the German government disagreed with the Commission's criticism on the amendments on the surcharge scheme. In particular, the German government reiterated that the EEG-surcharge reductions are not publicly financed, since the surcharge is administered by independent private undertakings.<sup>29</sup> Section 5 of this paper elaborates on the conflictive positions of the Commission and the German government and assesses whether the EEG-

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<sup>24</sup> Official Commission Statement, C-37/07, 2014.

<sup>25</sup> Ibid.

<sup>26</sup> European Commission, IP/13/1283.

<sup>27</sup> Ibid.

<sup>28</sup> Official Commission Statement, C-37/07, 2014.

<sup>29</sup> Ibid, Point (113).

surcharge reduction indeed constitutes state aid and whether can it be exempted under Articles 107(3b) and (c) TFEU in combination with the 2008 Community guidelines on state aid for environmental protection.

### **3. Theoretical legal framework: Assessing alleged state aid under Article 107 TFEU**

In order to assess whether the reduction of the EEG-surcharge for EIUs is a matter of state aid, it is essential to first explain the legal framework on how the Commission generally establishes whether an alleged state aid measure constitutes state aid in the meaning of Article 107 TFEU and whether it is compatible with the internal market. Article 107 TFEU lays down substantive rules on the notion of state aid and specifies under which circumstances state aid is declared compatible or incompatible with the internal market. Article 108 TFEU stipulates the procedural steps which need to be followed by Member States and the Commission in order for Article 107 TFEU to be applied.

#### *3.1. Procedural aspects concerning existing and new aid pursuant to Article 108 TFEU*

As previously indicated, the Commission is of the opinion that the newly introduced provision in the EEG to reduce the EEG-surcharge for EIUs constitutes a measure which introduces new aid and thus should have been previously notified to the Commission. It is important to understand that Article 108 TFEU differentiates between new and existing aid. Existing aid is considered to be aid that predates the entering into force of the Treaty as well as aid which has formally been authorized by the Commission and has thus been declared compatible with the internal market.<sup>30</sup> New aid, on the contrary, is aid which is not ‘existing’ aid but which is planned to be newly introduced by the state.<sup>31</sup> For the sake of this paper, it is particularly relevant to realize that alterations to already existing aid are classified as new aid.<sup>32</sup> In other words, as soon as a Member State alters an existing aid scheme, existing aid loses its status as being compatible with the internal market.<sup>33</sup>

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<sup>30</sup> Council Regulation (EC) No 659/99 laying down detailed rules for the application of Article 93 of the EC Treaty (today Article 108 TFEU), Article 1(b).

<sup>31</sup> Ibid, Article 1(c).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, Article 17. Note: Article 4 Regulation 794/2004 is the only exception to this rule. It states that modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility

According to Article 108(3) TFEU, Member States have the obligation to notify any plans on the introduction of new aid to the Commission sufficiently in advance and to provide the Commission with all the necessary information, in order for it to be able to assess the new aid's compatibility with the internal market.<sup>34</sup> This means that any alternations to existing aid will also have to be newly notified to the Commission. It should be noted that a new aid measure must not be put into effect until the Commission has taken a final decision on its compatibility with the internal market.<sup>35</sup>

In case a Member State has introduced a new aid scheme without previously notifying the Commission or while the investigation procedure on its compatibility was still ongoing, the aid is considered unlawful. However, being unlawful does not automatically imply that the aid is also considered illegal, meaning incompatible. It will only be declared illegal aid if the Commission finds that it is incompatible with the internal market pursuant to the substantive assessment under Article 107 TFEU.<sup>36</sup>

Each notification of alleged new state aid or any hints thereof by third parties triggers a preliminary examination by the Commission in which it assesses whether the measure does in fact constitute aid which might be incompatible with the internal market and thus falls in the scope of Article 107 TFEU. Only if the Commission finds that the alleged new state aid constitutes indeed state aid and only if the Commission has serious doubts about the aid's compatibility with the internal market, it will initiate a formal investigation procedure under Article 108(2) TFEU.<sup>37</sup> The Member State concerned will be informed by the Commission and can submit comments within one month.<sup>38</sup> In case a Member State disagrees with the Commission's doubts, the Commission in turn has one month to react to its contentions. After the formal investigation procedure, the Commission can come to different final decisions. It may find that because of modifications undertaken by the Member State throughout the investigation period, the measure does no longer qualify as aid in the meaning of Article 107 TFEU, or that the serious doubts concerning the aid's compatibility with the internal market have been removed.<sup>39</sup> Nevertheless, the Commission may add certain conditions and obligations to such a positive decision which must be fulfilled by the Member State to ensure

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of the aid measure with the common market as well as an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.

<sup>34</sup> Council Regulation No 659/99, Article 2.

<sup>35</sup> Ibid, Article 3.

<sup>36</sup> Case C-301/87 *France v Commission*.

<sup>37</sup> Council Regulation No 659/99, Article 4(4).

<sup>38</sup> Ibid, Article 6.

<sup>39</sup> Ibid, Article 7(2)(3).

compliance with the decision in future.<sup>40</sup> If the Commission concludes that the notified aid is incompatible with the Treaty, the aid must not be realized.<sup>41</sup> Such a decision shall be taken within a period of 18 months.<sup>42</sup>

Concerning existing aid, Article 108(1) TFEU requires the Commission to review existing aid systems constantly in order to ensure that it remains compatible with the internal market. Additionally, Member States are obliged to submit annual reports on all existing aid schemes.<sup>43</sup> Where the Commission considers that an existing aid scheme is not or no longer compatible with the internal market, it should inform the Member State concerned of its preliminary review and give the Member State concerned the opportunity to submit its comment within a period of one month.<sup>44</sup> Where the Commission finds that existing aid is no longer compatible with the Treaty, it must first propose appropriate measures such as substantial amendments to the aid scheme or the complete abolition of the aid scheme and give the respective Member State the opportunity to react<sup>45</sup>. If the Member State does not accept the appropriate measures but the Commission still considers these measures necessary, the Commission starts the formal investigation procedure under Article 108(2) TFEU as it does with new aid.<sup>46</sup>

### 3.2. Substantive test of alleged new aid under Article 107(1) TFEU

The conditions for identifying state aid which is deemed to be incompatible with the internal market are set out in Article 107(1) TFEU. In order to establish whether an alleged measure constitutes state aid which is incompatible with the internal market, the Commission assesses whether the following criteria are fulfilled:

- (1) The aid measure must be granted to an undertaking fulfilling the *Höfner* criteria. In *Höfner*, the CJEU defined an undertaking as “any entity that engages in economic activity for the purpose of remuneration, regardless of its legal status and the way it is financed”.<sup>47</sup> According to *Ambulanz Glöckner*, any activity consisting in offering goods and services on a given market is considered an economic activity.<sup>48</sup>

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<sup>40</sup> Ibid, Article 7(4).

<sup>41</sup> Ibid, Article 7(5).

<sup>42</sup> Ibid, Article 7(6).

<sup>43</sup> Ibid, Article 21(1).

<sup>44</sup> Ibid, Article 17.

<sup>45</sup> Ibid, Article 18.

<sup>46</sup> Ibid, Article 19(2).

<sup>47</sup> Case C-41/90 *Höfner*.

<sup>48</sup> Case C-475/99 *Ambulanz Glöckner*.

- (2) The aid measure must entail an artificial economic advantage to undertakings. The application of this criterion requires a complex economic evaluation. The Commission examines whether the undertaking would be in the same position under normal market conditions.<sup>49</sup> To identify whether the aid is artificial, the market investor principle is applied. It determines whether the state invests in an undertaking similarly to how a private investor would act and whether the state grants the undertaking more favourable terms which it could not have obtained on the market at similar conditions, thus putting it into a more advantageous position.
- (3) The measure must be selective. Only if the aid measure favours certain undertakings of one sector, or the production of certain goods, it can be considered aid. Horizontal measures applying throughout the whole economy do not fall under the notion of state aid.
- (4) The Commission looks at the measure's effect on intra-community trade and whether the measure distorts or threatens to distort competition. For this, the Commission examines whether the beneficiary of the state aid is in a favourable competitive position after it had received the aid as compared to its situation before the aid was granted. In addition, the Commission investigates whether the state aid will lead to market foreclosure for competitors.<sup>50</sup> If the alleged aid is higher than the *de minimis* threshold and likely to lead to market foreclosure for competitors, the aid measure is deemed to have an effect on intra-community trade.<sup>51</sup>
- (5) Very importantly, in particular for the sake of this paper, the Commission investigates whether the measure is imputable to the state and involves state resources. The Court has clarified that it is irrelevant whether aid is granted directly by state authorities or indirectly by public or private bodies that are established or appointed by the state to administer the aid.<sup>52</sup>

Where an alleged state aid measure fulfils these assessment criteria, the measure falls in the scope of Article 107 TFEU and is declared incompatible with the internal market pursuant to paragraph one. However, in certain circumstances, state aid which falls in the scope of Article 107(1) TFEU can be declared to be compatible with the internal market, as the following section will show.

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<sup>49</sup> Official Commission Statement, C-37/07, 2014, Point (79).

<sup>50</sup> According to the *de minimis* rule, a measure does not constitute state aid in the meaning of Article 107(1) TFEU if the financial scope of the measure does not surpass the *de minimis* threshold of 200,000 euros in not more than three consecutive years. Compare Regulation 1998/2006, Article 2(2).

<sup>51</sup> Official Commission Statement, C-37/07, 2014, Point (188).

<sup>52</sup> Case 78/76, *Steinike & Weinlig*; Case 290/83, *Commission v. France (aid to farmers)*.

### *3.3. Substantive test under Article 107(3) TFEU: Facultative Exemptions*

The principle of incompatibility of state aid with the internal market is not absolute. Article 107(2) and (3) TFEU name several exceptions under which state aid can still be compatible with the internal market. Article 107(2) TFEU lists automatic exemptions such as for aid having a social character or aid to make good the damage caused by natural disasters.<sup>53</sup> Here, the Commission does not have the discretionary power to assess whether the aid can be exempted or not. In fact, as soon as aid falls under the scope of this paragraph, it is automatically exempted from the notification criterion, hence deemed to be compatible with the internal market.

Article 107(3) TFEU, in contrast, comprises facultative exemptions grounds under which a state aid measure may be considered to be compatible with the internal market. However, the Commission enjoys a large discretion in deciding whether the exemption is applicable. The most relevant exemption grounds in light of the German EEG are listed in paragraph 3 (b) and (c). Paragraph b deals with 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.” Combatting climate change could be considered such an important project of European interest. However, it still does not automatically justify any measure conducted in the framework of environmental policy, but still requires a precise assessment as to the measures’ proportionality. Paragraph c exempts “aid to facilitate the development of certain economic activities of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary the common interest” from being considered incompatible with the internal market.

When assessing whether a state aid measure qualifies for these exemptions grounds, the Commission applies the so-called balancing test. In doing so it balances the necessity and the proportionality of the aid measure in achieving a Union objective against the distortion of competition it entails.<sup>54</sup> The different approaches to different categories of aid and the actual criteria used in this assessment are published in documents based on Article 107(3) TFEU in the form of regulations, communications, notices, frameworks and guidelines. In the case of the German EEG, the Commission assessed the possibility for the reduction of EEG-surcharges to be exempted from being declared as incompatible with the internal market, in

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<sup>53</sup> Compare Article 107(3) TFEU paragraphs (a) and (b). Paragraph (c) deals with aid granted to certain areas of the Federal Republic of Germany affected by the division of Germany.

<sup>54</sup> State Aid Manual of Procedures Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU, Revision 10/07/2013, Section 1.3. (11).

the light of the Commission's Guidelines on State Aid for Environmental Protection and Energy from 2008.<sup>55</sup> The following section will specify the role of guidelines in EU state aid rules and introduce the Guidelines on State Aid for Environmental Protection and Energy.

#### **4. Guidelines as enforcement tools of Commission state aid policy**

##### *4.1. The role and legal value of guidelines*

In order to address the question of how a justification under Article 107(3)(c) TFEU would differ under the 2008 and 2014 Guidelines, a theoretical recap of the role of Commission guidelines should be provided. The Commission is the prime decision-maker and policy-shaper in the field of state aid.<sup>56</sup> Through the medium of guidelines the Commission codifies its general practice with regard to aid measures. Such practice is intended to increase transparency and predictability of the Union's state aid policy.<sup>57</sup>

The Commission's power to adopt guidelines can be derived from the discretionary power conferred on the Commission by Articles 107 and 108 TFEU. Other than that, no source of primary or secondary legislation is to be found which expressly confers such powers.<sup>58</sup> The mandate to issue guidelines for state aid purposes was confirmed by the CJEU in *CIRFS*, provided that the content of these did not contradict the Treaty rules and principles therein.<sup>59</sup> The Commission may lay down such guidelines in order for the institution itself to have a set of rules according to which it exercises its discretionary powers, provided that the Treaty rules are complied with.<sup>60</sup>

The substantive content of the guidelines is not subject to judicial review by the CJEU, as Article 263 TFEU mandates, but merely to the procedural assessment by the court, i.e. whether procedural rules have been complied with, the facts have been correct, and that the Commission is not guilty of a manifest error of assessment or a misuse of powers.<sup>61</sup>

Guidelines, which have been adopted by the Commission are not legally binding per se, however they transform into enforceable legal provisions through the principle of equal treatment, the protection of legitimate expectations and the principle of administrative

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<sup>55</sup> Ibid.

<sup>56</sup> Craig & de Búrca (20119), p. 1085.

<sup>57</sup> Quigley (2009), p. 183.

<sup>58</sup> Hofman (2006), p. 194.

<sup>59</sup> Case C-313/90 *CIRFS v Commission*, at paras. 34-36.

<sup>60</sup> Case T-214/95 *Vlaamse Gewest v Commission*, para. 79.

<sup>61</sup> Case T-266/94 *Skibsværftsforeningen and others v. Commission*, para. 170.

transparency. We can observe both internal and external effects of such guidelines. The internal effects relate to the way in which the Commission exercises its discretion with regard to aid measures. The internal approach of the Commission has an immediate external effect, i.e. Member State institutions and also undertakings get a grasp of how the Commission assesses such cases. The information effect of guidelines is therefore significant and has a considerable steering influence on Member State subsidy policy, or at least should have.<sup>62</sup>

The abovementioned traits of Commission guidelines set the scene for the further analysis of the EEG-surcharge reduction for EIUs. What should be borne in mind is that they depict the assessment eventually applied by the Commission and therefore serve as orientation for MS in making state aid policy choices and that there is possible retroactive application if the circumstances so allow.

#### *4.2. Introduction to the 2008 Guidelines on State Aid for Environmental Protection*

The need for specific rules on aid for state aid for environmental protection and energy especially with regard to renewable energy has become evident during the last decade. Horizontal aid measures had gained in popularity and have resulted in an ever-growing share that has been spent on the protection of the environment and energy. The State aid scoreboard of autumn 2008 depicted that an increase in horizontal aid measures had occurred and was widely due to an increase in subsidization of national energy consumption, especially for energy intensive industries.<sup>63</sup> By 2011 then, environmental and energy aid amounted to a total of 23.4 % of the total aid that was granted to industry and services.<sup>64</sup> Such a trend can be explained by policy targets such as the Europe 2020 Strategy mentioned above and the intended increase of renewable energy sources in final energy consumption toward 20% by 2020.<sup>65</sup> It is therefore due to overall policy strategies such as the current Europe 2020 strategy and an ever-increasing use of horizontal aid schemes, that specific rules for state aid for environmental protection and energy are necessary. Therefore the Commission has periodically adopted guidelines on environmental and energy aid. The ones that are currently in force are the 2008 Community Guidelines on State Aid for Environmental Protection (hereafter referred to as ‘the 2008 Guidelines’). This set will however soon be superseded as the successor set of guidelines has been adopted very recently on 9 April 2014. The

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<sup>62</sup> Hofman (2006), pp. 195-196.

<sup>63</sup> State Aid Scoreboard Autumn 2008, p. 30.

<sup>64</sup> State Aid Scoreboard 2012, p. 19.

<sup>65</sup> COM (2010) 2020, p. 11.



Guidelines for State aid for environmental protection and energy 2014-2020 are to formally enter into force on 1 July 2014. In order to answer the question how assessments for justification under Article 107(3)(c) TFEU and the guidelines are conducted and in which way they differ, first the regime currently still in force will be scrutinized.<sup>66</sup>

The underlying objectives of the 2008 Guidelines is of course the reconciliation of the two faces of EU state aid, i.e. the pursuance of legitimate public policy objectives and the ensuing distortion of competition.<sup>67</sup> The Guidelines therefore set out to increase the level of environmental protection and combating the negative effects of state aid regimes that lead to allocative inefficiencies and distributional concerns for instance. Allocative inefficiencies relate to the instance in which inefficient market participants are subsidized and therefore can maintain their place in the market when normal competition would actually drive these players off the market. Distributional concerns relate to the way in which welfare in Europe is distributed as state aid interferes with the natural distribution of such.<sup>68</sup> These aspects need to be taken into account when formulating national state aid policy and therefore Commission guidelines exist.

Justifications of aid for environmental protection will be based on Article 107(3)(c) TFEU.<sup>69</sup> For practical reasons and conciseness, details of the 2008 Guidelines will be limited to those aspects that concern aid for renewable energy sources.<sup>70</sup> An assessment under the 2008 Guidelines is based on a balancing test to see whether an aid regime is justified under Article 107(3)(c) TFEU. The test consists of three steps, i.e. whether the measure pursues an objective of common interest, whether it addresses properly the objective of common interest and whether the negative consequences are outweighed by the positive effects.<sup>71</sup>

The main issue here is that states may use state aid as a positive incentive to achieve higher levels of environmental protection. The aid must aim at encouraging the beneficiaries to change their behaviour and to make investments which improve environmental protection. Since these investments mostly also provide economic benefits to these undertakings, it must be examined whether the aid is really needed and whether the undertaking would not have made the investment had it not benefited from the aid measure. Thus, the aid at stake must be proportional and have a clear incentive effect. This is only guaranteed if the same result could

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<sup>66</sup> Guidelines on state aid for environmental protection and energy 2014-2020, Point (247).

<sup>67</sup> 2008 Community Guidelines on State Aid for Environmental Protection, Points (10)-(11).

<sup>68</sup> Friederiszick (2007), pp. 632-633.

<sup>69</sup> 2008 Community Guidelines on State Aid for Environmental Protection, Point (12).

<sup>70</sup> The 2008 Community Guidelines on State Aid for Environmental Protection define renewable energies as energy coming from non-fossil energy sources such as wind, solar, geothermal, wave, tidal etc.; cf. Point (70)(5).

<sup>71</sup> 2008 Community Guidelines on State Aid for Environmental Protection, Point (16).

not be achieved without aid or with less aid. Therefore, the aid amount must not exceed the minimum needed to achieve the pursued environmental protection.

A sole assessment on the basis of the balancing test is not sufficient however and additional scrutiny needs to be applied. The guidelines therefore identify twelve different measures that may be justified under Article 107(3)(c) TFEU that relate to environmental protection and energy aid and for which the balancing test will vary in one way or the other. These measures are enumerated in Points (43) through (57) and relate to, amongst others, aid for environmental studies, aid for energy saving, aid in the form of reductions of or exemptions from environmental taxes, and of course aid for energy from renewable sources.<sup>72</sup> The 2008 Guidelines therefore constitute a framework that reflected the aid measures that MS would resort to six years ago. Technological innovation and changes in EU policy strategy however demand that these measures be updated and adapted to current and future trends.

## **5. Analysis I: Assessing the Commission's position on the surcharge reduction for EIUs**

As mentioned in section 2, the first version of the EEG was introduced in 2000 and approved by the Commission as a measure not involving state aid. The Commission has examined the EEG-Act 2012 during a preliminary investigation which was triggered by numerous complaints received from consumers (e.g. 'Bund der Energieverbraucher', engl.: Association of Energy Consumers) and competitors. The complainants claimed that the amended EEG, in particular the surcharge favouring energy intensive users, constitutes unlawful aid which is incompatible with the internal market.<sup>73</sup> The Commission in turn issued views as to the compatibility of the measure by sending its preliminary views to the German government and inviting it to submit comments. After an evaluation of the comments submitted by Germany, on February 7 2014, the Commission decided to start a formal investigation procedure on the EEG, especially on the surcharge reduction for EIUs.<sup>74</sup> This section takes a closer look at the arguments put forward by the Commission and the German government during the preliminary assessment phase, leading to the Commission's decision to initiate a formal investigation procedure. In the preliminary assessment phase, the surcharge reductions granted to EIUs was examined under Article 107(1) & (3) TFEU and the 2008 Guidelines on

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<sup>72</sup> Ibid., Points (39)-(42).

<sup>73</sup> Official Commission Statement on the EEG-Case, 2014, C-37/07.

<sup>74</sup> Ibid., Summary.

State Aid for Environmental Protection.<sup>75</sup> Therefore, the following part first critically assesses how the state aid criteria of Article 107(1) TFEU were applied to the surcharge reduction for EIUs and second whether the balancing test under Article 107(3) TFEU and the 2008 Guidelines was effectively employed.

### *5.1. The surcharge reduction for EIUs in light of state aid criteria under Article 107(1)*

In this section the Commission's approach to the surcharge reduction in light of the five state aid criteria under Article 107(1) TFEU is outlined. Since the criteria are cumulative, all of them are briefly applied to the EEG surcharge reduction, whereas special light is shed on the most controversial issue: whether state resources are involved (this assessment follows the substantive test under Article 107(1) as introduced in Section 3.3.).

Involvement of undertakings according to Höfner: The EEG-surcharge reduction is clearly aimed at independent economic entities, active in energy intensive sectors that consume a high amount of energy in their production process.<sup>76</sup>

Artificial advantage for EIUs: EIUs are in an advantaged position because the EEG-surcharge, they are subject to, is reduced by law. Hence, they are relieved from a financial duty they would normally have to carry out. The EEG explicitly prohibits TSOs and electricity providers to compensate their extra costs for funding renewable energies by charging EIUs with the full surcharge. In contrast, regular energy users and smaller producers do not enjoy the same benefit.<sup>77</sup> In fact, aid granted to undertakings by law is artificial by nature because it is not provided for on the market. A private investor could simply not act in the same way.<sup>78</sup>

Selectivity: Selectivity is easily established because only energy intensive undertakings/users (EIUs) in the manufacturing sector benefit from the measure.<sup>79</sup> More precisely, the reduction differs according to the amount of energy consumed by an undertaking. As mentioned in

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<sup>75</sup> European Commission, 2014, IP/13/1283.

<sup>76</sup> According to C-475/99 *Ambulanz Glöckner*, para. 19, the concept of an undertaking covers any entity engaged in an economic activity. Any activity consisting in offering goods and services on a given market is an economic activity.

<sup>77</sup> Official Commission Statement on the EEG-Case, 2014, C-37/07, Point (78).

<sup>78</sup> Craig & de Búrca (2011), pp. 1089-1090.

<sup>79</sup> Official Commission Statement on the EEG-Case, C-37/07, 2014, Point (78).

Section 1 above, a certain percentage of the surcharge is reduced only for undertakings consuming at least one gigawatt-hour of energy. The reduction is then increased if an undertaking surpasses a certain threshold of gigawatt-hours. All other energy users, not meeting the threshold, must pay the full surcharge.

Impact on EU trade/competition: The measure's beneficiaries are active in a sector in which intensive trade, across different Member States, is taking place. It concerns mainly producers of steel, aluminium, paper and chemicals who sell their goods to other companies processing their products all over Europe.<sup>80</sup> Thus, the measure has an impact on intra-community-trade and may therefore distort competition.

Imputability of the measure to the state and involvement of state resources: While the four criteria listed above could be assessed quite unambiguously, hinting at the fact that the EEG-surcharge reduction indeed constitutes state aid in the meaning of Article 107(1) TFEU, the question of state resources was discussed more intensively by the Commission and the German Government. In fact, the government opposed the Commission's views rather distinctively.

For the Commission the EEG surcharge evidently presents a measure imputable to the state because it was codified by the German legislator. In its official statement on the EEG case, the Commission highlighted that state resources are involved in form of a surcharge when the financial means and the institution in charge are controlled by the state.<sup>81</sup> The Commission underpins this position with settled case law referring to cases such as *Vent de Colère*, *Steinike and Weiling* and *Essent*.<sup>82</sup> These cases established that subsidies financed through para-fiscal levies, monitored and distributed according to the rules of the law in force, but not coming from state administered institutions directly, can still be considered state resources. Thus, a public authority's impact on determining the respective measures and modalities, concerning a financial transaction, is decisive and not the financial resources' origin. Taking these assumptions and applying them to the EEG, the Commission identified that the EEG surcharge can be considered a state resource, as the TSOs are not independent in administering the financial flows of the surcharge. As evidence the Commission referred to the fact that TSOs have to collect the EEG-surcharge from electricity suppliers and have to

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<sup>80</sup> Ibid., Point (79).

<sup>81</sup> Official Commission Statement, C-37/07, 2014, Point (83).

<sup>82</sup> Cf. C-262/12 *Vent de Colère*, C-78/76 *Steinike & Weiling v. Germany*, C-173/73 *Commission v. Italy*, C-206/06 *Essent*.

keep all financial flows associated with the EEG-surcharge in separate accounts. The Commission highlighted that the state in turn has established clear rules specifying the use and destination of the surcharge, especially if the TSOs collect more surcharges than needed.<sup>83</sup> Consequently, in the Commission's view, the EEG-surcharge reduction indirectly involves state resources and thus fulfils the remaining requirement for it to be classified as state aid in the meaning of Article 107(1) TFEU.

However, the German government countered the Commission's position relying on *Preussen-Elektra*, a case in which the CJEU ruled that electricity feed-in tariffs, administered by private operators, couldn't be considered state resources.<sup>84</sup> According to the German government the situation in Germany does not differ to the one in *Preussen-Elektra* because the financial flows of the EEG-surcharge are administered by independent private organisations, the TSOs. It is argued that the surcharge at no point in time passes through a state controlled entity. In fact, contrary to the situation in *Essent*<sup>85</sup>, Germany believes that the EEG Act does not oblige an individual undertaking to control the financial flows of the surcharge. Instead, the Act simply assigns different administrative tasks to several undertakings. Therefore, the state is not able to exercise extensive control. The German government emphasized that TSOs are even free to determine the surcharge's exact amount. Moreover, possible surpluses produced from collecting the surcharge are not transferred to the government's budget, but used to decrease the surcharge amount in the next year. Consequently, according to the German government, no state resources (stemming directly from the state's budget) are involved in the EEG-surcharge.<sup>86</sup>

Indeed, it can be questioned why the Commission applies the notion of state resources so extensively even though no clear link to the state budget can be recognized. The Commission seems to take advantage of its dominant position in EU competition law matters to exert more control on Member States. The EEG-case arguably confirms a general trend to widen the application of Article 107(1) TFEU. Building on cases such as *Commission v. France*<sup>87</sup>, *Steinike and Weinling*, *Essent* and *Vent de Colère*, there seems to be a tendency in EU state aid law that more and more measures meet the criteria of state resources being involved although the state budget is not even touched upon. One reason for this could be that the Commission intentionally wants to shift the compatibility analysis of state aid cases to the remit of Article 107(3) TFEU because it enjoys more discretion there in applying the

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<sup>83</sup> Official Commission Statement, C-37/07, 2014, Point (79).

<sup>84</sup>C-379/98 *Preussen Elektra AG/ Schleswag AG*.

<sup>85</sup>C-206/06 *Essent*.

<sup>86</sup>Official Commission Statement, C-37/07, 2014, Section 1. (Procedure).

<sup>87</sup>C-290/83, *Commission v. France* (aid to farmers).

balancing test. Therefore, the EEG may be seen as another case which clarifies the notion of state resources as a requirement to qualify as state aid, yet, it adds another dimension to the EU jurisprudence in this field.

### *5.2. The surcharge reductions for EIUs in light of Article 107(3) and the 2008 Guidelines on State Aid for Environmental Protection*

In this part the Commission's assessment of the reduction surcharge under Article 107(3) TFEU and especially under the 2008 Guidelines is examined. It shows that the Commission enjoys a large discretion and dominant position in applying guidelines. This becomes apparent when looking at several issues that have arisen during the preliminary assessment phase of the measure.

First, the Commission's dominant position becomes apparent when looking at Germany's attempt to justify the EEG surcharge reduction under Article 107(3)(b) TFEU as a measure promoting "the execution of an important project of common European interest or to remedy serious disturbances in the economy of a Member State". The German government argued that since environmental protection and combating climate change belong to the EU's core goals, the EEG, which aims at introducing more renewable energies, clearly contributes to a project of common European interest. According to the German government, relieving EIUs from too high surcharges prevents them from relocating abroad. This in turn reduces carbon leakage and strengthens the competitiveness of the European industrial sector as a whole.<sup>88</sup>

The Commission countered this argumentation in a rather straight-forward manner, referring to Point (147) of the 2008 Guidelines which states that the respective Member State must show sufficient proof that the respective project plays a prominent role in enhancing the EU's environmental policy and follows a concrete objective. According to the Commission, the German state did not provide the Commission with enough evidence of its concrete goals. Therefore the EEG could not be taken into account under Article 107(3)(b) TFEU. In fact, for the Commission, the German Renewable Energy Act is a national policy limited to national goals enhancing the introduction of renewable energies in Germany and thus cannot be regarded as clearly contributing to a project of community interest.<sup>89</sup>

At this point, it could be argued that the German government has acted rather naively since it should have been aware of the fact that exemptions under Article 107(3)(b) TFEU are

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<sup>88</sup> Official Commission Statement on the EEG-Case, C-37/07, 2014, Point (204).

<sup>89</sup> Ibid., Points (205)-(212).

hard to prove and must be substantiated with precise information.<sup>90</sup> The Commission fulfilled its responsibility as prime competition authority and denied the Member State's request to exempt the surcharge reduction based on incomplete information. Nevertheless, theoretically, it could be imagined that a measure furthering the production of renewable energies can be exempted as a measure supporting a project of community interest. Effective policies on renewable energies noticeably contribute to the EU's 2020 common climate goals and should be encouraged by the EU. If the respective Member State is aware of the fact that the Commission applies a very narrow interpretation and is well prepared to provide enough information, it does not seem impossible to justify a state aid measure in the framework of environmental protection under Article 107(3)(b) TFEU.

Second, the Commission makes use of its discretionary powers by closely sticking to what is provided in the guidelines when assessing certain measures under Article 107(3) TFEU. In fact, the Commission seems to disregard measures which are not covered by the guidelines more or less automatically. In the preliminary assessment phase the German government also argued that the EEG surcharge reduction could be exempted under Article 107(3)(c) TFEU.<sup>91</sup> This paragraph covers aid measures "facilitating the development of certain economic activities or areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest." The Commission is generally willing to declare aid measures compatible with the internal market based on Article 107(3)(c) TFEU if they are necessary and proportionate and if the positive effects outweigh the negative effects on the common market, in other words if the balancing test's result is satisfactory.<sup>92</sup>

As a starting point, the German government maintained that financial exemptions are sometimes necessary for Member States, in order to be able to realize their ambitious climate protection policies.<sup>93</sup> According to the German interpretation, such exemptions seemed to be covered by Chapter 4 of the 2008 Guidelines. Point (57) allows for exemptions from environmental taxes for certain sectors and undertakings, to target negative externalities and to create more incentives for companies to improve environmental protection. However, the Commission opposed this argument by referring to the fact that the EEG-surcharge is no tax but rather a levy adding up to the electricity bill. Therefore, according to the Commission

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<sup>90</sup> Craig & de Búrca, 2011, pp. 1095 et seq.

<sup>91</sup> Official Commission Statement on the EEG-Case, C-37/07, 2014, Point (191).

<sup>92</sup> Ibid., Point (212).

<sup>93</sup> Ibid., Point (219).

position, Chapter 4 of the 2008 Guidelines cannot be used to justify the measure.<sup>94</sup> In fact, the 2008 Guidelines do not include any provisions that acknowledge reductions or reliefs from certain charges other than taxes, which are seen as a state aid measure necessary to pursue the common goal of combating climate change. When drafting the 2008 Guidelines, the Commission apparently did not take exemptions from charges other than taxes as possible state aid measures in the field of environmental protection into account.

Remarkably, as shown above (Section 5.1.) in its assessment of state resources under Article 107(1) TFEU, the Commission applied a rather wide interpretation of the notion of state resources, including para-fiscal surcharges administered by private entities which are not directly linked to the state budget. However, in its assessment under Article 107(3) TFEU, it only took tax exemptions, thus exemptions related to the state budget, into account as potentially being compatible with the internal market. Apparently, there is no chance for surcharges to be justified under the 2008 Guidelines even though in some cases they might be reasonable as part of a wider policy to support renewable energies. Thus, it looks like the Commission wanted to push the measure through the criteria of state aid under Article 107(1) TFEU by applying a wide scope of interpretation, while it did not consider an exemption of more exotic tax-alike charges, narrowing its scope of interpretation again.

Third, the Commission's discretion becomes apparent in the way it applied the balancing test to the surcharge reduction on EIUs under the 2008 Guidelines. Whereas it seemingly properly elaborated on the measure's necessity and proportionality countering the German government's argumentation, it neither investigated the existence of a market failure nor an incentive effect. In fact, it did not comment on these factors in its statement because they appear not to be applicable to surcharge reductions for EIUs.

With regards to the measure's necessity, the German government explained its special support for EIUs highlighting that EIUs are constantly exposed to international price competition and not able to transfer increased electricity prices onto their customers without losing important market shares. Indeed, German EIUs are confronted with rather high electricity prices compared to the European average.<sup>95</sup> Therefore, a reduction in the EEG-surcharge seems to be the only possible instrument for the German government to pursue its

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<sup>94</sup> Ibid., Point (220).

<sup>95</sup>When comparing electricity costs in Germany with those in other EU-countries and third countries, German costs are among the highest (after Denmark, Germany has the highest electricity prices in the EU); the German electricity price lies currently at 29,2€ per KW/h, Eurostat (2014)(b).



climate policy goals without risking the relocation of important economic players - the EIUs - and the loss of thousands of jobs as a consequence thereof.<sup>96</sup>

Relying on settled case law<sup>97</sup> the Commission doubted that state aid measures aiming at reducing cost differences between Member States to improve the competitive position of national undertakings and to prevent their relocation, can be considered a measure necessary to pursue a common EU interest. According to the Commission, the measure rather distorts competition because it wants to protect German EIUs from other EU/EEA competitors. This could lead to a subsidy race among the different EU-Member States.<sup>98</sup> Moreover, it cannot be proven whether EIUs would really relocate abroad if they had to pay a higher surcharge amount.

Concerning the measure's proportionality, the Commission brought forward that less intensive aid would probably have been enough to achieve the desired result, since a number, as high as 2098, companies benefit from the surcharge reduction which corresponds to a preferential treatment of 18% of the annual electricity consumption in Germany.. The steel industry alone has received a reduction of 1.2 billion euros from 2010 until 2013.<sup>99</sup> Together the EIUs only contribute 1.6 billion euros to a total of 20.4 billion for funding renewable energies.<sup>100</sup> <sup>101</sup> Small and medium sized enterprises as well as private consumers in turn have to pay the full amount of the surcharge, thus compensate for the reductions granted to EIUs. Therefore, the Commission concluded that the measure primarily aims at improving German EIUs' competitiveness, leading to a distortion of competition being disproportionate to the aim pursued.<sup>102</sup> Although this argumentation by the Commission was quite convincing as it showed that the surcharge reduction might be too imbalanced, the Commission should have elaborated on the question whether the measure corrects a possible market failure or creates an incentive effect. However, instead, it remained silent on these issues. This reveals that the balancing test appears not to be the most suitable method for assessing measures such as surcharge reductions for EIUs. In turn, this supports the assumption that also the 2008 Guidelines did not offer the most optimal framework for assessing surcharge reductions.

To sum up, when assessing the EEG-surcharge reduction under the 2008 Guidelines it became apparent that their drafters did not take exemptions from charges other than taxes as

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<sup>96</sup>Handelsblatt (2012).

<sup>97</sup>C-86/89 *Commission v. Italy*; 173/73 *Commission v. Italy*; C-36/A/2006 *Thyssen Krupp*.

<sup>98</sup>Official Commission Statement on the EEG-case, 2014, C-37-07, Point (230).

<sup>99</sup>Handelsblatt (2013)(b).

<sup>100</sup>Official Commission Statement on the EEG-case, 2014, C-37-07, Point (217).

<sup>101</sup> At this point, an analysis on macro-economic data would be desirable to reveal the exact economic implications, however this would fall outside the scope of this paper.

<sup>102</sup>Ibid.

possible state aid measures in the field of environmental protection into account. Moreover, the applicability of the balancing test to exemptions on special charges seems only limited. Especially, the issue of market failures and incentive effects cannot be addressed properly since they are not intended for such measures. Therefore, under the 2008 Guidelines, the Commission assessed the EEG-surcharge, without clear provisions on surcharge reductions in place. During its preliminary investigation the Commission was confronted with that problem several times. The Commission acknowledged that more certainty on the matter is needed in future.<sup>103</sup>

## **6. Analysis II: The EEG-case's influence on the new 2014 Guidelines**

### *6.1. Introduction to the 2014 Guidelines*

Empirical evidence and EU environmental and energy policy strategies have depicted a need for an update of the 2008 Guidelines. Adaption was inevitable as major parts of public expenditure were spent in the area of renewable energy sources for instance, which are not appropriately addressed by the current scope of the 2008 Guidelines. Therefore the Commission, after three successive rounds of public consultations, adopted on 9 April 2014 the Guidelines on state aid for environmental protection and energy 2014-2020 (hereafter referred to as 'the 2014 Guidelines').<sup>104</sup> By 2020, the EU wants to achieve a 20% share of Union renewable energy consumption, a number that is to be further increased in the years to come.<sup>105</sup> Such ambitious targets require a change in state aid policy direction, conciliating once again the two faces of state aid, pursuance of public policy objectives and prevention of the distortion of competition. The Commission seems to have successfully aligned these two policy concerns through the 2014 Guidelines, however it seems as if the EEG's provisions and the German government have had a substantial influence on the formulation of these. The key changes that are included in the 2014 Guidelines relate to market based mechanisms to support renewable energies, e.g. through competitive bidding processes for the allocation of subsidies, replacement of feed-in tariffs by feed-in premiums, promotion of competitiveness of the European industry which may suffer due to funding of renewable energy support,

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<sup>103</sup>Ibid, 4. Schlussfolgerungen (Conclusions).

<sup>104</sup> Press Release: Commission adopts new rules on public support for environmental protection and energy, Brussels, 9 April 2014.

<sup>105</sup> Cf. COM (2010) 2020 final of 3.3.2010.

especially in electro-intensive sectors, support of the cross-border energy infrastructure and combatting the risks of insufficient electricity generation capacity.<sup>106</sup>

The particular focus on amending renewable energy support is due to the consolidation of the renewable energy sector. Furthering public subsidies in this sector would in the long run lead to market distortions.<sup>107</sup> Renewable energy already amounted for 14% of the entire market share in the EU-28 in 2012 and has therefore reached a threshold that no longer justifies public subsidization and encourages a release into the free market.<sup>108</sup> Funding of renewable energy sources through charges imposed on electricity-consumers make up an increasing proportion of individual consumers' and industries' electricity bill. In order to reduce energy costs in the long run, *some* support may be provided for electro-intensive sectors of industry, e.g. manufacturers of chemicals, paper, ceramics, or metals, in order not to unnecessarily burden consumers who effectively bear the costs of such industry discounts for energy. Next to this sectoral approach on burden reductions, Member States may under the 2014 Guidelines grant reductions to individual undertakings if certain requirements are met.<sup>109</sup>

Further, the scope of the 2014 Guidelines has been broadened and now covers fourteen different series of measures, having introduced four completely new ones and deleting two of the old series which could have been declared compatible with Article 107(3)(c) TFEU under the 2008 Guidelines. Among the four new measures covered are the reductions from funding support for electricity from renewable sources, of course, but also the measures on aid for energy infrastructure or aid for CO<sub>2</sub> capture, transport and storage.<sup>110</sup>

The Guidelines on state aid for environmental protection and energy 2014-2020 therefore effectively constitute an attempt by the Commission to adapt EU state aid rules to current market developments and national subsidization trends for the protection of the environment and energy, particularly in the field of renewable energies and reductions on charges levied for EIUs for funding of such energy. Already the title depicts this very intention, as it implies a move away from a sole focus on the environment to a twofold emphasis on areas that are of particular concern for the EU to meet its climate and energy targets.

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<sup>106</sup> Energy and Environmental State Aid Guidelines – Frequently asked questions, Brussels, 9 April 2014.

<sup>107</sup> Ibid.

<sup>108</sup> For current figures on the share of renewable energies cf. Eurostat (2014)(a).

<sup>109</sup> Energy and Environmental State Aid Guidelines – Frequently asked questions, Brussels, 9 April 2014.

<sup>110</sup> Guidelines on state aid for environmental protection and energy 2014-2020, Point (18).

## *6.2. Evaluation of the 2014 Guidelines on State Aid for Environmental Protection and Energy*

As outlined above, the 2008 Guidelines did not constitute an appropriate framework on the basis of which the EEG could have been properly judged. A situation for aid in the form of reductions from charges levied to support funding of renewable energy was simply not provided for and in theory would therefore not have constituted aid compatible with the internal market. Therefore, the 2014 Guidelines have been amended in order to provide a sustainable framework having adapted to the market in renewable energies, which has emerged over the last couple of years. The following section will evaluate the provisions of the 2014 Guidelines, which seem to share some common origin with the provisions of the EEG and possibly have been influenced by the EEG.

As under the 2008 Guidelines, the 2014 Guidelines provide for conditions under which state aid for energy may be justified under Article 107(3)(c) TFEU.<sup>111</sup> The initial draft even sought to provide for an additional possible justification under Article 107(3)(b) TFEU however this approach has not been included in the final adoption.<sup>112</sup> To recall the quarrel between the Commission and the German Government over the justifiability of the surcharge reduction, Germany, in a supporting argument, had argued for justification of the contested scheme under Article 107(3)(b) TFEU, i.e. the individual exemption providing for aid to promote the execution of an important project of common European interest (compare Section 2.4. and Section 5). The fact that justification under Article 107(3)(b) TFEU was contemplated in the consultations preceding the final draft of the 2014 Guidelines may be an indicator that the German Government has lobbied for an inclusion of a further justification apart from Article 107(3)(c) TFEU.

An assessment of compatibility of aid under the 2014 Guidelines is generally based on common assessment principles, which are comparable to the balancing test, adhered to under the 2008 Guidelines.<sup>113</sup> In general, the application of the common assessment principles should lead to a conclusion, which clearly depicts whether the positive effects of the aid measure outweigh the negative consequences.<sup>114</sup> The Commission therefore looks at seven distinct criteria, i.e. contribution to a well-defined objective of common interest, the need for state intervention, appropriateness of the measure, incentive effect, proportionality, positive

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<sup>111</sup> *Ibid.*, Point (10).

<sup>112</sup> Cf. Paper of the Services of DG Competition containing draft Guidelines on environmental and energy aid for 2014-2020, at Point (9).

<sup>113</sup> Guidelines on state aid for environmental protection and energy 2014-2020, Point (12).

<sup>114</sup> *Ibid.*, Point (26).

effects outweighing the negative ones and transparency.<sup>115</sup> If one recalls the analysis in Section 3, these common assessment principles largely encompass the same criteria as the balancing test under the 2008 Guidelines with the addition of a transparency criterion.

If a closer look is had at these common assessment principles, doubts may be raised as to how reductions in charges for funding of renewable energy sources may be justified by these. Especially the requirement of incentive effect seems to be impossible to prove because, in what way is there a behavioural change among the beneficiaries of the charge reductions?<sup>116</sup> Neither is a market failure that would justify the need for state intervention clearly identifiable.<sup>117</sup> The Commission has acknowledged these shortcomings and provided therefore that reductions of charges for funding support of renewable energy sources be dealt with under an exclusive section and a separate test, apart from the common assessment principles, of the 2014 Guidelines.<sup>118</sup> The relevant assessment principles for these kinds of aid schemes will be outlined in the following analysis.

Generally, the recovery of charges for the funding of renewable energy should not discriminate between consumers of energy. The Commission however acknowledges Member State action that seeks to shelter undertakings from being exposed to significant competitive disadvantages and to further public acceptance of support schemes of renewable energy. Therefore the Commission chose to apply a special set of conditions when assessing state aid that compensates for the financing of support to energy from renewable sources.<sup>119</sup>

In total, there are four distinct requirements that need to be fulfilled. They are enumerated in Points (185) through (191) of the 2014 Guidelines. The first requirement mandates that it must be proven that higher costs only ensued to the beneficiary of aid due to the support through funding of renewable energy. Secondly, such aid should be limited to sectors whose competitive position is threatened if they had to support funding for renewable energy. The scope of coverage is limited to the types of sectors defined in Annex 3 of the 2014 Guidelines, which however provides an extensive list.<sup>120</sup> The third requirement spells out that the choice of beneficiaries should be based on objective, non-discriminatory, and transparent criteria, and that aid should be equally distributed among all competitors within

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<sup>115</sup> Ibid., Point (27).

<sup>116</sup> Cf. Guidelines on state aid for environmental protection and energy 2014-2020 in Point (48); An incentive effect is said to occur when the aid induces a behavioral change with the beneficiary to engage in increasing environmental protection or improving the functioning of the energy market.

<sup>117</sup> Cf. The analysis of the balancing test in Chapter 4.

<sup>118</sup> Guidelines on state aid for environmental protection and energy 2014-2020, Point (182).

<sup>119</sup> Ibid., Points (183)-(184).

<sup>120</sup> Ibid., Points (185)-(186).

the same sector.<sup>121</sup> The last requirement pertains to proportionality. An aid scheme will be considered proportional if a beneficiary assumes at least 15% of the costs without reduction. The Commission however acknowledges that 15% may be unbearable for certain undertakings in which case Member States could lower the share borne by undertakings to 4% of their gross value added (GVA).<sup>122</sup> The share, which undertakings bear, may also be lowered where the undertaking has an electro-intensity<sup>123</sup> of min. 20%, in which case the share may be lowered to 0.5% of the gross value added.<sup>124</sup>

The Commission has further provided for some additional leeway regarding these aid schemes. Member States can choose to include *individual* undertakings (not under the formal scope of Annex 3) in such an aid schemes. The electro-intensity of such undertakings must amount for a min. of 20% and it must belong to a sector whose trade intensity amounts for min. 4%.<sup>125</sup> Also a transitional period is provided for which urges Member States to comply with the aforementioned criteria at the latest by 1 January 2019 provided they are phased in via an adjustment plan, providing progressive adjustment to the allowed aid levels.<sup>126</sup>

If one compares the EEG now with the 2014 Guidelines, a number of observations can be made. Germany, in its dispute with the Commission, has proven that the higher costs for the energy-intensive undertakings ensued due to the support through funding of renewable energy sources. If one recalls the severe financial consequences the EEG-surcharge had for German industry, this argument seems to have been incorporated in the test for compatibility of surcharge reductions. The second requirement, that the surcharge reduction should be limited to those sectors set out in Annex 3 of the 2014 Guidelines from the outset appears to cover most of those German undertakings that currently benefit from surcharge reductions. Technically, the EEG's surcharge-reduction applies to an unlimited number of undertakings, but de facto the majority would fall under the scope of what is now enumerated in Annex 3. Here, again the EEG's influence is arguably visible. The third requirement, that the choice of beneficiaries should be based on objective, non-discriminatory, and transparent criteria, and that aid should be equally distributed among all competitors within the same sector also shares basic commonalities with the EEG. The EEG's qualifications are based on certain

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<sup>121</sup> Ibid., Point (188).

<sup>122</sup> Annex 4(1) of the 2014 Guidelines provides: Value added at factor cost can be calculated from turnover, plus capitalized production, plus other operating income, plus or minus changes in stocks, minus purchases of goods and services, minus other taxes on products that are linked to turnover but not deductible, minus duties and taxes linked to production.

<sup>123</sup> Cf. Annex 4 (3) of the 2014 Guidelines: electro-intensity of an undertaking shall be defined as the undertaking's energy costs divided by the undertaking's gross value added.

<sup>124</sup> Guidelines on state aid for environmental protection and energy 2014-2020, Point (190).

<sup>125</sup> Ibid., Point (187) & Annex 4.

<sup>126</sup> Ibid. Points (194)-(201).

thresholds for surcharge reductions, which are neither subjective, discriminatory nor opaque. Numbers should normally be the most objective criteria. To recall the current version of the EEG, reduction of the surcharge may be made to 10% if an undertaking consumes at least one gigawatt-hour<sup>127</sup> and to 1% where the consumption rate is between 10 and 100 gigawatt-hours.<sup>128</sup> Where EIUs consume more than 100 gigawatt-hours and where these energy costs represent more than 20% of gross value added, the EEG-surcharge will be limited to 0.05 eurocent per kilowatt-hour for the undertakings' whole electricity consumption.<sup>129</sup> The proportionality requirement of the 2014 Guidelines requires a beneficiary in principle to assume at least 15% of the surcharge without reduction. Section 41(3) EEG allows the surcharge to be limited to 10% of the normal surcharge. Germany therefore allows for a reduction which is 5% lower than the one provided for at EU level. Of course, the threshold percentage for the assumption of costs without reduction under the EEG is lower than the Commission requires it to be. However it is arguably incontestable that the two thresholds at German and EU level are intentionally very closely aligned.

For the reasons set out above, the EEG's surcharge-reduction for EIUs bears substantial similarities to the regime on reductions in funding support for electricity from renewable sources of the 2014 Guidelines. The fact that the *ratione personae* under the two regimes are largely the same and since the thresholds seem to be closely aligned, an influence of the EEG on the 2014 Guidelines cannot logically be denied. The possibility to include individual undertakings not covered by the 2014 Guidelines' *ratione personae* and the possibility to progressively adjust to the thresholds for eligibility of surcharge reductions until January 2019 has important implications. These two aspects depict that stakeholders who represent the interest of EIUs have engaged in a considerable lobbying effort and seemingly succeeded.

### *6.3 The aftermath of the EEG-reform*

Finally, a few words should be devoted to the aftermath of the EEG-case. On 8 April 2014, the Commission and the German government found a compromise, whereby Germany conceded to reform the current EEG, in order to bring it in line with the new 2014 Guidelines

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<sup>127</sup> Section 41 (3) 1. a) EEG.

<sup>128</sup> Section 41 (3) 1. b) EEG.

<sup>129</sup> Section 41 (3) 2. EEG.

on State Aid for Environmental Protection and Energy.<sup>130</sup> The reform process is still ongoing and carried out in close dialogue with the Commission. On 7 May 2014, the German cabinet introduced its amendments to the provisions on EEG-surcharge reductions and notified the modifications to the Commission. The Commission currently scrutinises the new aid scheme in the light of the new guidelines. Simultaneously, the draft reform proposal is currently being discussed in the German Bundestag which is eligible to table amendments. However, it is not expected that substantial amendments to the draft will be adopted, since this might render the EEG-reform again incompatible with EU state aid rules. The EEG-reform is expected to enter into force on 1 August 2014.<sup>131</sup> However, the Commission conceded that the newly introduced restrictive requirements for the surcharge reductions would only have to be implemented by January 2019.<sup>132</sup>

In order to comply with EU state aid rules, the EEG-reform will introduce changes concerning surcharge reductions for EIUs. According to the draft, around 400 EIUs will most probably no longer be eligible to a full reduction of the surcharge payments. However, they will nevertheless enjoy a preferential treatment, since the EEG-reform proposes that they will only have to pay 20% of the surcharge.<sup>133</sup> In fact, most EIUs which have benefitted from the surcharge reductions will not have to worry about their privileged position. While until now, approximately 2100 undertakings profited from the exceptional rule, in the future this number will be reduced to around 1600 only.<sup>134</sup> The German Minister of Economic Affairs and Energy Sigmar Gabriel however stresses that the German industry will continue to bear a substantial burden of Germany's energy transition policy. He expects that in the future, EIUs will still have to pay around 7.4 billion euros of the EEG-surcharge, which is almost equally as much as private energy consumers will have to bear.<sup>135</sup> Moreover, it is interesting to point out that the Commission seems to refrain from the EIUs' obligation to recover the aid they unlawfully benefitted from the surcharge reductions.<sup>136</sup>

Last but not least, it should be realized that the EEG-case has had consequences for any reform processes on the German policy on renewable energies. The current reform process as well as any future developments will be subject to much closer review under

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<sup>130</sup> Bundesministerium für Wirtschaft und Energie (2014)(a).

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Bundesministerium für Wirtschaft und Energie (2014)(b).

<sup>134</sup> Ibid.

<sup>135</sup> Die Welt (2014).

<sup>136</sup> Euractiv (2014).



European state aid law provisions. Stakeholders that try to influence the EEG-reform will have to very closely assess which consequences their influence will bring about.

## 7. Conclusion

The EEG's surcharge reduction scheme for EIUs has perfectly outlined the ambiguity between the two faces of state aid, namely, the legitimate pursuance of public policy objectives, and the necessity to avoid unnecessary distortions of competition.

The analysis as to whether a surcharge reduction as introduced by the EEG for EIUs can unambiguously be classified as state aid under Article 107(1) TFEU has revealed two important observations. First, the broad interpretation of the notion of state resources, which has effectively added a further dimension to the jurisprudence established under *PreussenElektra* and *Vente de Colère*, depicts that the Commission will not hesitate in exercising the discretionary powers that it has been accredited with via Articles 107 and 108 TFEU in state aid matters. Now, as even more measures seem to fall in the broadened scope of Article 107(1) TFEU, the Commission's function as the gatekeeper of effective competition within the internal market is reinforced and consequently the exercise of its discretionary powers.

In the application of its Guidelines, it has been shown that the Commission enjoys considerable powers of interpretation, especially where the framework is silent on contentious matters. The adoption of the 2014 Guidelines and the evaluation thereof have however produced insights which seem to be contrary to the general assumption that the Commission is the prime policy-maker in the field of state aid. The new regime, on the basis of which surcharge reductions for EIUs will be judged as of 1 July 2014, shares significant commonalities with the EEG-surcharge reduction in this sector. There is only little room for doubt that the German Government has had considerable influence on the formulation of the 2014 Guidelines, as they so closely reflect the EEG. In particular because the types of undertakings that are eligible to benefit from surcharge reductions and the thresholds for proportionality are so closely aligned. Where the Commission's guidelines resemble the German legislation on the issue to such an extent, the lobbying power and eventual influence, the German Government has had, cannot be underestimated, and possibly compromises the Commission's supremacy in the formulation of EU state aid policy.

In any case the development paving the way to the possibility to exempt aid schemes for reductions from charges for funding renewable energies for EIUs under Article 107(3)(c)

TFEU illuminates the difficulty of on the one hand pursuing the objective of strengthening the renewable energies sector and on the other to preserve the competitiveness of EIUs and avoid their relocation. In addition to that, these concerns need to be balanced with the necessity to avoid undue distortions of competition. The 2014 Guidelines codify this balancing attempt, however it appears that the German Government has emerged as the winner in this situation.

Concluding, the authors want to acknowledge that this paper's analyses were subject to a legal and political research focus only. Certainly, an analysis from an economic perspective would have been desirable which might have contributed additional findings and might have brought about divergent enlightening emphases. Moreover, due to the limited scope of this paper, the authors could not investigate the driving factors that influenced the respective Commission's positions in an all-embracing manner. The authors encourage interested parties to dwell on these limitations.

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