



INTERNATIONAL  
HELLENIC  
UNIVERSITY

**"State Aid within the Energy Sector. The Environmental and Energy  
Guidelines 2014-2020. State Aid cases in the German Energy Market  
and in the Greek Energy Market"**

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## **DEDICATION**

To my sons *George* and *Steven*, each equally my pride and joy.

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## ABSTRACT

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University. This thesis introduces European State aid Law and its impact in the Energy Sector, emphasizing on State aid cases within the German and the Greek Energy Market. The main purpose of the dissertation is to convince that even when State aid is characterized as unlawful and prohibited under primary law at a first glance, looking at its effects more deeply, it might be finally declared as compatible with the internal market because of its favorable effects! State aid granted in the energy sector, can undeniably have a positive effect on environmental protection, climate change, energy sustainability, but it can also aim to strengthen and ensure the competitiveness of industries, being granted in the form of reductions for intensive electricity users.

Initially, a brief analysis of the fundamental provision Article 107 TFEU is given. Then the novel Environmental and Energy State aid Guidelines 2014-2020 are introduced, explaining in which way they support achieving the targets of the “Europe 2020 Strategy” and which are the innovative support schemes for the Energy Markets that are introduced for the first time. Emphasize is given on State aid cases within the German and the Greek Energy Sector which have concerned the European Commission and the European Courts until today. The analysis of the *German EEG-Act Cases* and the *Greek Aluminium Cases*, has the purpose to adhere on the way State aid law is applied in practice and how the Commission accomplishes examination of the lawfulness and the compatibility within the internal market of State aid in the energy sector.

**Keywords:** State aid, Europe 2020 Strategy, Environmental and Energy State aid Guidelines 2014-2020, German Energy Market, Greek Energy Market

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## INTRODUCTION

The EU internal energy market is essential, both to ensure secure energy at affordable prices and to fight climate change. In some very specific cases public intervention in the form of subsidies might be necessary to attain public policy objectives. These subsidies have to be granted under very strict conditions, in order to secure that they will not be assessed as State aid which causes distortions in the competition and which is incompatible with the internal market<sup>1</sup>. In 2012, State aid statistics were published which concluded that the most subsidized horizontal objectives were environmental protection, including energy saving, which received EUR. 14.4 billion of aid. It is obvious that nowadays governments are increasingly paying attention to the harm environmental protection from environmental degradation and the risks from dependency on imported fossil fuels such oil and gas<sup>2</sup>.

In order to accept State aid measures as compatible with the internal market, European Primary and Secondary Legislation has to be applied. Additionally, the European Commission has to assess the lawfulness of State aid for environmental protection and energy under the new Guidelines 2014-2020. State aid which distorts competition has to be considered as unlawful and therefore it is prohibited. But coming to the support schemes which are usually used by Member States for the energy markets it is not so clear what finally can be considered as unlawful aid! This happens because in many cases a State aid might be unlawful at a first glance but looking at its effects more deeply it might be compatible because of its positive effect on environmental protection, climate change and energy sustainability. “The Europe 2020 Strategy” triggers additionally urges the Member States to intervene by granting support schemes to the Energy Sector in order to reach the desideratum. Binding targets for the climate change and the energy sustainability have been implemented by “The climate and energy package”<sup>3</sup>, but also a “A policy Framework for climate and energy in the period from 2020 to 2030 ” was set by the European Commission in order to clarify which

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<sup>1</sup> IP/13/1021 Commission, Press Release. Brussels, 5 November 2013 EU. Commission: Guidance for state intervention in electricity.

<sup>2</sup> Ph. Nicolaides, State aid Uncovered, Critical Analysis of Developments in State aid, Lexion 2014, pp. 256

<sup>3</sup> Decision No 406/2009/EC of April 2009 (OJ L 140, 5.6.2009, pp.136) and Directive 2009/28/EC of April 2009 (OJ L 140, 5.6.2009, pp. 16)



energy and climate objectives are to be met by the Member States until 2030<sup>4</sup>. The Commission has set the target of adopting a Best Practices Code and Simplified Procedure to accelerate State aid decisions<sup>5, 6</sup>.

How did State intervention in the form of State aid measures affect the Greek and the German Energy Market until today? Was it in a positive and fair manner exclusively? Or did some support schemes eventually frustrate the markets? How do the act of the State Aid modernization (SAM) and the Guidelines 2014-2020 influence the Greek and the German Energy market ?

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<sup>4</sup> (2014/C 200/01) Energy and Environmental State aid Guidelines 2014-2020 (EEAG), Introduction (4)

<sup>5</sup> European Commission MEMO/09/208, Brussels, 29th April 2009.

<sup>6</sup> In the context of a modernized system of State aid rules, to contribute both to the implementation of the Europe 2020 strategy for growth and to budgetary consolidation, the Procedural Regulation (EC) No 659/1999 which laid down detailed rules for the procedure of State aid was recently amended by the Regulation 2015/1589, of 13 July 2015 which lays down detailed rules for the application of Article 108 TFEU. This new Procedural Regulation targets on the one hand to reach maximum of transparency and legal predictability and on the other hand to accelerate the procedure for the State aid measures which do not fall under the exceptions (GBER and De minimis) and have therefore to be notified by the Member States to the Commission.

## **CHAPTER 1**

### **The legal foundation of State aid in the European Energy Sector**

#### **1. The fundamental provision of the Treaty**

The integral base of the State aid can be found in the primary European Law under Article 107 TFEU. This Article is the pillar of the State aid as it prohibits the granting of State aid by Member States when this ultimately has the effect of distortion of competition in the European markets. But does this Article categorically disqualify and preclude any granting of State aid in general? Article 107 TFEU “is based on the objective to reduce State aid, and in particular to distinguish between 'good' State aid justified by environmental disaster, social, and economic disparity reasons, and 'bad' State aid, which distorts competition and EU trade without having any redeeming virtues”<sup>7</sup>. In this sense the European Commission, which has the “Examination Monopoly”, has to decide first if the granted aid falls under article 107(1) TFEU and therefore if it constitutes prohibited unlawful State aid<sup>8</sup>. But the second step for the Commission is to examine if that prohibited State aid falls under any of the exceptions, under Secondary law<sup>9</sup> or under Article 107 (2) and (3) TFEU, in order to finally justify

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<sup>7</sup> K. Talus, EU Energy Law and policy. A critical Account.(Oxford University Press, 1<sup>st</sup> Edition, 2013),pp.139

<sup>8</sup> Article 108 (3) TFEU requires that the Commission is informed of any plans to grant or alter aid; thus the starting point is that any aid which meets the description set down in the Article 107(1) TFEU must be notified to the Commission. Aid approved by way of block exemption (including the GBER), the EEAG and the *de minimis* aid is deemed not to meet the Article 107(1) conditions and the notification requirement does not apply. The Commission has a period of two months after notification to raise objections. The Commission has the right to proceed to the formal investigation procedure under Article 108(2)TFEU and therefore to exceed the time period of the two months. During the above procedure the Member State is bound by the *Stand Still obligation* and therefore granting of the aid is forbidden. Where the Commission adopts a negative decision in respect of unlawful aid it is required in principle to order recovery of the aid from the beneficiary, together with interest. The Commission’s decision may be challenged before the General Court, with appeal lying to the Court of Justice. {J. Maurici QC, H. Sargent, “State aid in planning and compulsory purchase order cases”, *Journal of Planning & Environment Law* 2015, West Law} It is remarkable that despite the notification obligation it happens very often that the European Commission considers a State aid measure finally as lawful, despite the fact that it was granted before the notification {C(2013) 6702 final, State aid. SA.35164 (2013/NN) – Greece – Compressor Station in Nea Messimvria, Par. 77}.

<sup>9</sup> *The General Block Exemption Regulation 651/2014 ("GBER")* focuses especially on Environmental and Energy State aid. It is worth to notice that the European Union has emphasized on this types of State Aid during the act of the State Aid modernization (SAM). Therefore the revised version of the GBER, which entered into force on 1 July 2014 covers all the categories of Article 107(3) (c)TFEU. Especially "aid for environmental protection" which fulfills the Articles 107(1) criteria is exempted from the prior notification and approval procedure by the GBER."Environmental protection" is defined in the Article 2(101) GBER as: "any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary’s own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy."It is remarkable that in particular for the Energy Sector the GBER includes very crucial provisions which

an accept the State aid as compatible with the internal market<sup>10</sup>. In all respects, it is crucial to make clear that Article 107(1) TFEU does not distinguish between the measures of State intervention concerned by reference to their legal nature, the causes or their aims, but defines them in relation to their effects<sup>11</sup>. Article 107 (1) TFEU comprises four cumulative conditions<sup>12</sup>. These four conditions have been detailed and clarified many times by the European Commission, the Court of Justice of the European Union (hereinafter “CJEU”) and the General Court (GC) until today.

*State aid under Article 107 (1) TFEU is present where:*

*-Aid is Granted by the State or Through State Resources.* The text of Article 107(1) TFEU appears to suggest that the advantage must be either granted by the State (but not necessarily involve State resources) or through State resources. As it is has been determined by the CJEU, in order for a measure to be considered as a State aid, it must be granted to the undertaking through State resources or resources of any public law entity (which constitute likewise State resources), directly or indirectly, and it must be imputable to the State. In any case, it seems that in order for this condition to be fulfilled, there has to be transfer of a resource from the State to the beneficiary<sup>13</sup>. But this transfer of sources is not always so clear! It is noteworthy that this criterion has posed many questions in the last decades and has caused difficulties in several cases which had to be surpassed by the European Commission and the CJEU. In the case of

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establish the compatibility of investment aid for several very important and innovative energy investments. Article 40 GBER “investment aid for high-efficiency cogeneration”.The Articles 41 -42 GBER disclose the goal of “the Europe 2020 Strategy”, encouraging and promoting investments in energy and operation aid for electricity from Renewable Energy sources. *The De minimis criteria Regulation 1407/2013* entered into force on the 1 January 2014 and applies until the 31 December 2020. Pursuant to Article 3 De minimis aid of up to €200,000 may be granted to a single undertaking over any period of three fiscal years. Such aid is deemed not to meet all the criteria in the Article 107(1) TFEU and therefore it has to be considered as compatible with the internal market State aid .In addition to the De minimis Regulation the *Commission Regulation 360/2012* of April 25, 2012 applies, which addresses the application of the Articles 107 and 108 TFEU to de minimis aid granted to undertakings providing "services of general economic interest" ("SGEI"). Pursuant to Article .2 of the de minimis aid Regulation for SGEI aid up to €500,000 over any period of three fiscal years which is granted to a single undertaking providing SGEI is deemed not to meet all the criteria of the TFEU art.107(1) which means that it is considered as compatible.The GBER and the De minimis Regulation have achieved decisive simplification of the State aid procedure and constitute the first step towards the objective of the Commission to fasten the State aid control procedures. {European Commission MEMO/09/208, Brussels, 29th April 2009}

10 H. Schroeter, T. Jakob, R. Klots,W. Mederer, *Europaisches Wettbewerbsrecht* (NomosKommentar, zweite Auflage, 2014). A. Kliemann “Vorschriften uber staatliche Beihilfen-Art. 107-109 AEUV”.pp.2033

11 C173/73, *Italy v Commission*,1974 .

12 Faul and Nikpay. *The EU Law of competition.* (Oxford University Press, 1<sup>st</sup> Edition, 2014).pp.192

13 IBID, see reference 7. pp.141

*PreussenElektra* it was held that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable electricity sources at fixed minimum prices, *Feed-in tariffs* did not involve any direct or indirect transfer of state resources to undertakings which produced that type of electricity<sup>14, 15</sup>. But it was established in the *Essent case*<sup>16</sup> that if the company on which the State imposed the purchase obligation was instead State-owned this would mean that the resources used in the *PreussenElektra* case would have been resources belonging to and controlled by a fully State-owned company, and therefore the granting would be imputable to the State. It has been established under the case law in the *Doux Elevage case*<sup>17</sup> that it is not necessary, in order to find under 107(1) TFEU State aid, to have transfer of State resources for the advantage granted to the beneficiary. Additionally, it has been repeatedly accepted under case law that the resources can constitute State resources even if they are only under the control of the State<sup>18</sup>. Finally, it has been accepted in the case of *Italy v Commission* that even if the State aid measure was imposed by State legislation and was managed and apportioned in accordance with the provisions of the legislation, this implies the transfer of State resources even if they are administered by institutions distinct from the public authorities<sup>19</sup>.

-*An economic advantage granted to the beneficiary.* The word “advantage” is not directly mentioned in Article 107 (1) TFEU, but reference is made to it indirectly in the form of “any aid...in any form”. The substantiation of the “economic advantage” precondition can be fulfilled even with measures that do not directly grant a benefit but

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14 C 379/98, *PreussenElektra AG v Schleswig AG, in the presence of Windpark Reuïenkøge III GmbH and Land Schleswig-Holstein*, 2001}. par.57 and 58. The CJEU decided that the distinction made in Article 107 (1) TFEU between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.

15 Opinion of Advocate General Jacobs in Case C379/98 *PreussenElektra*, delivered on 26 October 2000, par.114

16 C-206/06, *Essent Netwerk Nord and Others*, {2008}, par.66-69. In this case, the Belgian government fined Essent Belgium for failure to comply with Belgian legislation requiring electricity suppliers to purchase a certain amount of green energy from Belgian suppliers. Differently from the *PreussenElektra* in this case the Court found that certain amounts under the scheme had their origin on a state resource and this appeared to be so because the charge was imposed by law and the proceeds were administered in accordance with law.

17 C-677/11 *Doux Elevage* p.34 and Case T-139-09 *France v Commission* par.36

18 C-677/11 *Doux Elevage*, paragraph 34, Case *France v Commission*, par. 36

19 C-173/73 *Italy v Commission*, par.16. "As the funds in question are financed through compulsory contributions imposed by State legislation and as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 92, even if they are administered by institutions distinct from the public authorities."

indirectly reduce an economic burden that a specific undertaking would normally have to bear from *its budget*<sup>20, 21, 22</sup>. The advantage can take any form according to the wording of Article 107(1) TFEU. It can be a positive economic benefit or a negative advantage taking the form of relief from an economic burden. State Aid can take the form of a direct subsidization, direct grants, guaranties, loans, interest subsidies, accumulated reserves, debt write-offs, provision of risk capital, sales of real estate at below market price<sup>23</sup>.

But a reasonable and interesting question comes up in relation to the element of the “economic advantage”. What happens in the cases where the State acts like a private investor? The answer can be found in the *Private investor principle*<sup>24</sup>. If the State acts like a private undertaking, investing under normal market conditions then its intervention cannot be qualified as State aid under Article 107 (1) TFEU (*Market economy investor Principle*). This *Principle* is often used by the European Commission<sup>25</sup> in order to assess a State aid measure. The question applying this principle is if a private investor would under the same financial market conditions and the same terms, act exactly as the State which decided to invest by granting the State aid<sup>26 27</sup>.

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20 C (2013) 6702 final. State aid SA.35164 (2013/NN) – Greece – Compressor Station in Nea Messimvria, par.35-36

21 P. Nicolaidis, A. Metaxas., Asymmetric Tax Measures and EU State Aid Law The “Special Solidarity Levy” on Greek Producers of Electricity from Renewable Energy Sources, EStAL 1|2014, pp. 56

22 C-308/10, GIL Insurance Ltd and others v Commissioners of Customs and Excise. par.69 “The concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (see, inter alia, Case C-310/99 Italy v Commission [2002] ECR I-2289, paragraph 51).

23 Ibid, see reference 12, T. Maxian Rusche, C. Micheau, H. Piffaut, and K. Van de Castele “The notion of State aid”, pp.1934

24 C-290/07 P Commission Vs Scott {2010}, par.68. “..the Commission must apply *the private investor test*, to determine whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed..”

25 European Commission Decision (C(2015)1942 final) of 25 March 2015 in Case SA.38101(Aluminium S.A), par.43. “The Commission therefore concludes that though a prudent *private investor in the market, before a similar situation* to that of the complainant in this case would proceed to arbitration similar to that at issue here, which lays down clear and objective parameters which had to be followed by the experts during the Arbitration proceedings fixing the invoice. It considers that the conduct of the arbitration agreement was consistent with the behavior of an informed private market investor and therefore, in line with market conditions and therefore Aluminium did not receive any economic advantage within the meaning of Article 107 paragraph 1 of the TFEU, as erroneously claimed by the complainant.”

26 T-228/99 and T-233/99, Court of the First Instance, Westdeutsche Landesbank Girozentrale and Land Nordrhein- Westfalen Vs European Commission, par. 246.

27 Ibid, see reference 7, pp. 2071

*-Selectivity.* In order to determine whether a measure is selective, that measure has to be granted to only few undertakings and not to all of the relevant sector, which are actually in the same legal situation as the undertaking favored. In order to fulfill this element, we have to clarify if we can identify a specific undertaking or category of undertakings to which the advantage has been granted and to examine whether there is an advantage to some undertakings over others<sup>28</sup>. In this sense, as a matter of fact it is necessary to connect the two conditions, “the economic advantage of the beneficiary” to “the selectivity”, as it is obvious that a measure can be interpreted as selective only if it grants an economic advantage to a specific undertaking of a sector while the undertakings which are in a comparable factual and legal situation, do not profit in the same manner<sup>29</sup>. The assessment of the selectivity of a measure becomes very complicated in cases where the advantage is a “negative” one and has the form of a tax measure<sup>30</sup>.

*-Distortion of competition and affecting trade between Member States.* For the assessment of the criterion of distortion of competition, the Commission is not required to show that the aid has an actual effect on competition in practice. It is sufficient to establish that the aid in question is of such a kind to threaten to distort competition and to affect trade between Member States. If it is clear that an economic advantage was granted to the beneficiary, then there is a distortion of competition and it is quite irrelevant if the beneficiary is a small undertaking or if the amount of the selective advantage is relatively limited<sup>31 32</sup>.

28 A. Metaxas., Textbook EU State Aid Law, International Hellenic University, LLM 2014-2015 pp. 5

29 C-403/10, Mediaset SPA vs Commission, par. 62: “In accordance with the case-law cited in paragraph 36 of the present judgment, in order to determine whether a measure is selective, it is appropriate to examine whether that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable factual and legal situation. Accordingly, contrary to what is claimed by Mediaset, the conditions relating to the selectivity of a State aid measure and the creation of an economic advantage for a recipient are not entirely independent of each other. A measure may be considered to be selective only if it is likely to create such an advantage for one recipient while not doing so for other persons whose situation is comparable to that of the recipient.

30 H.Schroeter, T. Jakob, R. Klots, W. Mederer, Europaisches Wettbewerbsrecht (NomosKomentar,zweite Auflage 2014). A. Kliemann “Vorschriften uber staatliche Beihilfen-Art. 107-109 AEUV”. Tax selectivity is divided into *material selectivity* were the measures are favouring types of undertakings, economic sectors, or activities and *regional selectivity* were the measures are regionally selective as they are created to apply in a given geographical zone -a region of a Member State.

31 T-303/05, Acea Electrabel Vs European Commission, {2009},p. II-137,par 48.

32 T-214/95, Het Vlaamse Gevest Vs Commission ,par. 46 :“Where a public authority favours an undertaking operating in a sector which is characterized by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article 92(1) of the Treaty applies to

## 2. Compatibility of State aid under Article 107 TFEU

Even if the previously mentioned elements of Article 107 (1) TFEU are fulfilled by a State aid, it might be declared exceptionally as compatible with the internal market under the basis of Article 107(2), (3) TFEU<sup>33</sup>. Especially, in cases of aid for energy and the environment, Article 107(3)(c) TFEU applies, which could be in a successful manner characterized as the “*catch all provision*”<sup>34, 35</sup>. In order to apply the exception of Article 107(3)c TFEU, the Commission has to assess: 1) if “the aid measure pursues an objective of common interest”<sup>36</sup>, 2) if there is need for the State intervention, 3) if the measure is the appropriate instrument<sup>37</sup>, 4) if the aid measure demonstrates an incentive effect <sup>38</sup>, 5) if it is proportionate, and finally, 6) if there might be a distortion of competition and trade resulting from the State aid for the envisaged measures<sup>39</sup>.

From the 1<sup>st</sup> July 2014, for the Energy and Environmental State Aid the Commission has to interpret Article 107(3)(c)TFEU under the Common Assessment Principles of the Guidelines 2014<sup>40</sup> which will be analyzed further down in the next Chapter of this paper.

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any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States.

33 J. Maurici QC, H. Sargent, “State aid in planning and compulsory purchase order cases”, Journal of Planning & Environment Law 2015, West Law.

34 T. Lubbig, M. Fuchs, The German Renewable Energy Act (EEG) -Unlawful State Aid? ENLR 2/2014, Lexxion. pp.128

35 Commission Decision in case SA.35255 Aid to PSE Operator S.A. for the construction of Stanisławów power station and among other energy infrastructure cases: Commission Decisions in cases N 594/2009 Terminal in Świnoujście, Poland; SA.29870 (N 660/2009) Aid to PGNiG for underground gas storage, Poland; SA.34235 (2012/N) Gas pipeline Rembelszczyzna – Gustorzyn (phase III) Gas pipelines in Poland; SA 33823 (2012/N) Electricity cable Aland – Finland (mainland); SA.31953 (2011/N) Construction of a LNG

36 C(2013) 9041 final. State aid SA.36870 (2013/N) – Greece Metering system for transmission system users, par.20-21. C(2013) 6702 final. State aid SA.35164 (2013/NN) – Greece – Compressor Station in Nea Messimvria, par.45-51

37 IBID, see reference 36, par. 22.

38 C(2013) 6702 final. State aid SA.35164 (2013/NN) – Greece – Compressor Station in Nea Messimvria, par.60-62.

39 C(2013) 6700 final. Brussels, 16.10.2013. State aid SA.35165 (2013/NN) – Greece, State aid SA.35977 (2012/N) – Greece Upgrade of the Liquefied Natural Gas (LNG) Terminal in Revithoussa, par.61- 69

40 Which came to revise the Environmental Guidelines 2008 (2008/C 82/01).

## CHAPTER . 2

### **The Energy and Environmental State aid Guidelines 2014-2020 (EEAG)**

#### **1. Generally**

Emphasizing on Environmental and Energy State aid, the Commission decided to issue and adopt additionally to the Secondary law instruments the Energy and Environmental State aid Guidelines 2014-2020 (EEAG). This new set of Guidelines applied from the 1<sup>st</sup> July 2014 and came to revise “the Environmental Guidelines 2008”, as part of the Commission’s State aid modernization agenda<sup>41</sup>. Under the umbrella of the above agenda and on account of “the Europe 2020 Strategy” several headline targets<sup>42</sup> have been set, including the climate change and energy sustainability. The main goal of the “the Europe 2020 Strategy” is: “to achieve the best conditions for smart, sustainable and inclusive growth; where “smart” stands for developing an economy based on knowledge and innovation, “sustainable” for promoting a more resource-efficient, greener and more competitive economy and “growth” for fostering a high-employment economy delivering economic, social and territorial cohesion”<sup>43</sup>. On 22<sup>nd</sup> January 2014 the Commission proposed that the energy and climate objectives be met by 2030 in a Communication “A policy framework for climate and energy in the period from 2020 to 2030”, emphasizing on the reduction in greenhouse gas emissions by 40% relative to the 1990 level, an EU-wide binding target for renewable energy of at least 27%, renewed ambitions for energy efficiency policies, a new governance system and a set of new indicators to ensure a competitive and secure energy system<sup>44</sup>.

The new Energy and Environmental State Aid Guidelines apply to State aid for environmental protection or energy objectives which can be considered as compatible under Article 107(3)(b) or (c) TFEU and they are binding for the European Commission. On the one hand, the general objective of environmental aid under the EEAG is to

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41 IBID J. Maurici QC, H. Sargent, “State aid in planning and compulsory purchase order cases”, *Journal of Planning & Environment Law 2015, West Law*

42 Energy and Environmental State aid Guidelines 2014-2020 (EEAG), Introduction (3): “...To that end, a number of headline targets have been set, including targets for climate change and energy sustainability: (i) a 20 % reduction in Union greenhouse gas emissions when compared to 1990 levels; (ii) raising the share of Union energy consumption produced from renewable resources to 20 %; and (iii) a 20 % improvement in the EU’s energy-efficiency compared to 1990 levels. The first two of these nationally binding targets were implemented by ‘The climate and energy package’.

43 COM(2010) 2020 final. “EUROPE 2020 A strategy for smart, sustainable and inclusive growth” ,Brussels, 3.3.2010.

44 IBID, see reference 42, introduction (4)



increase the level of environmental protection compared to the level that would be achieved in the absence of the aid. The primary objective of the environmental aid is undoubtedly the creation of a low-carbon economy which welcomes alternative and more environmental friendly energy sources like the renewable ones. On the other hand, the primary objective of the aid in the energy sector is to ensure a competitive sustainable and secure energy system in a well-functioning Union energy market. Energy aid under the EEAG is committed to supporting the priorities of the energy strategy of the European Union which focuses on achieving an energy efficient Europe, building a truly pan-European integrated energy market, empowering consumers and achieving the highest level of safety and security, extending Europe's leadership in energy technology and innovation and strengthening the external dimension of the EU energy market<sup>45</sup>. However, in relation to the scope of the EEAG, which is defined in EEAG section 1.1, it is remarkable that for the first time the scope of the Guidelines includes aid in the Energy sector and not only Environmental State aid as it was the case in the Environmental Guidelines 2008.

Under the Primary State Aid law, Article 108 (3) TFEU puts the obligation of notification to the Commission for any aid scheme which is to be granted or altered. On the contrary, State aid which falls under the scope of the GBER and the EEAG does not have to be notified under the Article 108 (3) TFEU except if the aid exceeds the notification thresholds under section 2 (20) of the EEAG and it is not granted on the basis of a competitive bidding process<sup>46</sup>. The fact that environmental and energy aid does not have to be notified if it falls under the Scope of the EEAG, fulfills one of the objectives of the Guidelines which is the provision of faster decisions, in order finally to encourage Environmental and Energy aid measures<sup>47</sup>.

## **2. The Common Assessment Principles under the EEAG**

The Commission has to apply the Common Assessment Principles in order to consider State aid for environmental protection and energy objectives as compatible with the internal market under Article 107(3) b, c TFEU. These principles were

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<sup>45</sup> Com (2010) 639 final Energy 2020 Communication, par. 5

<sup>46</sup> P. Nicolaides, State aid Uncovered, Critical Analysis of Developments in State aid, Lexion 2014, pp. 258: "Although the EEG do not express it in the same terms, all aid does not fall within the scope of the environmental provisions of the General Block Exemption Regulation must be notified..."

<sup>47</sup> IBID, see reference 42, introduction (11b)

identified by the Commission in the Communication on State aid modernization of the 8<sup>th</sup> May 2012<sup>48</sup> and afterwards they were incorporated in the EEAG in Section 3.1. Applying the above principles, the Commission has to consider a State aid measure compatible with the internal market only if it satisfies each of the following criteria:

-The State aid measure has to effect *contribution to a well-defined objective of common interest* in accordance with Article 107(3) of the TFEU <sup>49</sup>.

-There has to be *need for State intervention* meaning that in each case, that aid has to be granted by a Member State only if it will bring about a material improvement that the market alone cannot deliver. This criterion has been analyzed under Section 3.2.2 EEAG in order to define what can be finally interpreted as a market failure by a Member State and in which cases of market failure the State intervention is necessary. Within this context, under the EEAG, once a market failure has been identified by a Member State, before proceeding to intervention in the form of granting an aid scheme in order to improve the market failure, it is necessary to exhaust any other policies or measures which are given in order to improve. Only in this case will the Commission consider that aid is needed and that it will effectively target the market failure, without effecting distortion of trade and competition.

- The State aid measure has to be in every case the *appropriate* one, intending that the proposed aid measure is an appropriate policy instrument to address the objective of common interest<sup>50</sup>. It is clearly stated in the EEAG in Section 3.2.3 that if the positive contribution to the common objective of a State aid can be achieved through a less distortive measure, aid cannot be considered as compatible. Therefore, a Member State has to demonstrate to the Commission in every case of Environmental and Energy State aid why the direct granting of aid is the most appropriate comparable to other measures which could be chosen like repayable advantages, tax credits, forms of aid that are based on financial (debt, equity) instruments.

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48 Com(2012)209 final. Brussels, 8.5.2012, “State Aid Modernisation (SAM)”.

49 C (2015) 2580 final Brussels, 16.04.2015. State aid cases SA.39723, SA.39724, SA.39725, SA.39726, SA.39731, SA.39732, SA.39733, SA.39735, SA.39738, SA.39739, SA.39741, SA.39742 (2014/N); SA.39722, SA.39727, SA.39728, SA.39729, SA.39730, SA.39734, SA.39736, SA.39740 (2015/NN): Support to 20 large offshore wind farms under the EEG Act 2014 (Germany). Par.53

50 C(2015) 2356 final. Brussels, 7.4.2015.State Aid SA.39399 (2015/N) – The Netherlands Modification of SDE+ scheme. Par. “(40) As stated in EEAG point 115, the Commission presumes the existence of a residual market failure which can render State aid necessary to encourage investments in renewable energy.(41) The Netherlands has explained that without the aid it will not meet its EU 2020 target to supply at least 14% of energy from renewable sources in 2020. In 2012 the share of energy from renewable sources in the gross final consumption of energy in the Netherlands was only 4.5%, so significant investment is still required. This in turn requires additional funding because current and projected energy prices in the Netherlands are not sufficient to support investment in renewable energy”.

-The aid measure has to demonstrate *incentive effect*, as it has to change the behavior of the undertaking concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner<sup>51</sup>. Specifically, for the environmental aid and the energy aid the behavior of the beneficiary has to contribute to the increasing of the environmental protection or to the improvement of the functioning of a secure, affordable and sustainable energy market. In any case the aid must not cover the costs of an activity that the recipient would anyhow incur. Additionally, under the EEAG it is forbidden to Member States to grant aid which compensates an undertaking for the normal business risk of an economic activity. In accord with the Commission Environmental and Energy aid has an incentive effect even if the aid is granted in order to adapt the Union standards of environmental protection and the energy sector, or even when the aid motivates an investment which will contribute positively to the environmental and energy objective, even if it exceeds in a positive manner the Union Standards. Moreover, as the aid does not have to cover costs for an activity which the beneficiary would anyhow incur, aid for energy efficiency of large enterprises and the energy audits is found not to demonstrate incentive effect, because it would be de facto a compensation for energy audit required by the Energy-efficiency Directive<sup>52</sup>.

- The aid has to be *proportional*. Therefore, it is crucial that the Commission pays attention to the amount of aid which has to be limited *to the minimum needed* to incentivise the investment which will achieve environmental protection or the energy objective aimed for<sup>53</sup>. Either it is the case of an aid measure, which has to be individually assessed or not, the amount of aid must be less than the eligible costs. The eligible costs are the net extra investment costs in tangible or in intangible assets which

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51 C(2013) 4424 final, Brussels, 18.12.2013. State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users. Par.186: “As the operating aid reduces the difference between the market price and the production costs for RES electricity, *undertakings may operate a plant which they otherwise could not operate economically*. The Commission considers that due to the operating aid the aid recipient will change its behaviour so that the level of environmental protection is increased. On this basis and taking into account the information provided by Germany, the Commission considers that the aid will only be granted in cases where it is necessary and will provide an incentive effect (chapter 3.2 of the EAG).

52 Energy Efficiency Directive 2012/27/EU

53 C(2015) 2356 final. Brussels, 7.4.2015. State Aid SA.39399 (2015/N) – The Netherlands Modification of SDE+ scheme. Par. (49) According to point 69 of the EEAG, environmental aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection objective aimed for.(50) Point 109 of the EEAG explains that in the Commission’s view market instruments, such as auctioning or competitive bidding processes to select beneficiaries of aid to renewable sources should normally ensure that subsidies are reduced to a minimum.

are directly linked to the achievement of the common objective<sup>54</sup>. In order to set limits in a clear manner, in relation to the maximum amount of environmental and energy State aid, the Commission decided to include in ANNEX 1 the aid intensities, ensuring in this way predictability for Member States and investors.

- *Undue negative effects* on competition and trade between Member States caused by the aid measure, have to be avoided, so that the overall balance of the measure is positive<sup>55</sup>. The Commission has to keep distortions of competition and trade to a minimum, focusing on the questions: Is the given measure well targeted to the market failure it aims to address? Is it proportionate and limited to the extra investment costs? And finally was the selection process conducted in a transparent, non-discriminatory and open manner, so that other competitors were not unfairly excluded? Once the above questions have been examined the risk that an aid will unduly distort competition is more limited<sup>56</sup>.

-*The maximum of transparency* has to be achieved for the granted aid. The Commission, economic operators, and the public, have to be enabled and granted easy access to all relevant acts and to pertinent information about the aid awarded there under<sup>57</sup>. The Member States are obliged to ensure the publication of the necessary information on a State aid website at a national or a regional level<sup>58</sup>.

### **3.The Key Features of the EEAG in relation to the Energy Sector**

The Key Features of the EEAG in relation to the Energy Sector are: The State aid to electricity from renewable energy (The Feed in-premium and the \ Competitive bidding process), State aid in the form of reductions in funding support for electricity from renewable sources (for energy intensive sectors), State aid to energy infrastructure.

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<sup>54</sup> C(2013) 4424 final. Brussels, 18.12.2013. State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users. Par.197 “The German authorities have provide calculations and robust studies showing that the aid is proportionate in the sense that it is limited to the difference between market price and production costs and does not lead to overcompensation (see also calculation shown under section 2.2.2).”

<sup>55</sup> Ibid,C (2015) 2580 final Brussels, 16.04.2015. State aid cases for Support to 20 large offshore wind farms under the EEG Act 2014 (Germany), par. 75-79 “The Balancing Test”.

<sup>56</sup> EEAG, Section 3.2.6.2

<sup>57</sup> EEAG, Section 3.1 (27)

<sup>58</sup> C (2015) 2356 final. Brussels, 7.4.2015.State Aid SA.39399 (2015/N) – The Netherlands Modification of SDE+ scheme, par.81-82

## I. State aid to electricity from renewable energy

In order to support the targets of climate change and energy sustainability<sup>59</sup>, as they are set in “the European 2020 Strategy”, the Guidelines 2014 include the conditions for investment and operating aid to energy from renewable sources<sup>60</sup>. Under the EEAG operating aid to energy from renewable energy sources can be considered as compatible with the internal market, from the 1<sup>st</sup> January 2016 and hereafter, under strict conditions. Namely, the new aid has to be granted as *a premium* in addition to the market price whereby the generators sell its electricity directly in the market. The beneficiaries are subject to standard balancing responsibilities, unless no liquid intraday markets exist. Finally, measures have to be put in place to ensure that generators have no incentive to generate electricity under negative prices<sup>61</sup>. From the 1<sup>st</sup> January 2017 and hereinafter aid for at least 5% of the planned new electricity capacity from renewable energy sources should be granted in *a competitive bidding process* on the basis of clear, transparent and non-discriminatory criteria. Only under exceptional circumstances will the Member States be able to grant operating aid to generators producing electricity from renewable sources without a competitive bidding process. Such case could be given if the Member State demonstrates that the number of the projects or the sites which are eligible to the aid are very limited, or that a competitive bidding process would lead to higher support levels or that it would result in low project realization rates. However, one case of aid where the competitive bidding process is not needed, is when the installation which will be subsidized has an installation capacity of less than 1 MW.

Additionally to the more traditional form of aid, the operational one, the EEAG introduces the aid measure in the form of *green certificates*<sup>62</sup>. These certificates can be granted by the Member State to the renewable energy producer, who will benefit indirectly because there will be guaranteed demand for his energy, at a price above the market price for conventional power. It is obvious that the price of this kind of certificates can not be fixed in advance, as it has to be linked to the market supply and demand.

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<sup>59</sup> Which are also supported by the Renewable Energy Directive (RED) 2009/28/EC

<sup>60</sup> EEAG, 1.3(5): ‘renewable energy sources’ means the following renewable non-fossil energy sources: wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases

<sup>61</sup> EEAG, 3.3.2.1(124)

<sup>62</sup> EEAG, 3.3.2.4

## **II. State aid in the form of reductions for energy intensive sectors**

Under the EEAG, for the first time, reductions of levies for the funding of RES are established in order to support the competitiveness of the EU industries. The main reason of this reduction is to encourage and promote competitiveness of the European industry over the international industries where the bill of electricity amounts less, as this type of RES support levies are not charged<sup>63</sup>.

Costs of financing renewable energy support are recovered from energy consumers in principal. The European Union decided that some targeted reductions in these costs have to be granted in the form of aid to intensive electricity users. This aid can be granted in the form of reduction to limited market sectors, which are exposed to a risk of their competitive position due to the funding of energy from renewable sources as a function of their electro intensity and their exposure to international trade. In the list of Annex 3 and 5 of the EEAG, all the sectors which can be considered as eligible and are entitled to be granted this aid are listed. In order to avoid discrimination between electricity users and limitation of public acceptance for the support of energy from the renewable energy sources, the eligible sectors are limited under the EEAG. In addition, the Commission has the obligation to apply the rules *sensu stricto* and with the maximum of transparency, during the choice of the beneficiary and the assessment of this type of aid.

## **III. State aid to energy infrastructure**

In order for the Member State to meet the climate and the energy goals set by the European Union, many investments have to be made so that modern energy infrastructures will be available, ensuring security of supply and enabling the integration of renewable sources of energy. But, as a matter of fact, as many of the market operators of the Member States are not financially in the position to deliver the necessary innovative infrastructure, State aid has to be granted so that the market failure can be overcome<sup>64</sup>.

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<sup>63</sup> IP/14/400, State aid: Commission adopts new rules on public support for environmental protection and energy EUROPEAN COMMISSION PRESS RELEASE Brussels, 9 April 2014.

<sup>64</sup> EEAG 3.8

## CHAPTER. 3

### **The new EEAG 2014-2020 and the impact in the German and the Greek Energy Sector**

#### **1. The German Energy Sector. European Commission Vs German EEG-Act**

##### ***I. Generally***

The Renewable Energy Directive (RES Directive)<sup>65</sup>, which was implemented in 2009, promoted the renewable sources of energy, by setting targets of achieving a 20 per cent share of renewable energy in the final energy consumption. As a matter of fact, Member States were forced to implement the RES Directive. Each one of the Member States had to address the existing national market failure, by choosing the most matching support schemes out of the ones which were defined under the RES Directive<sup>66</sup>. The Member States were obliged by the European Union to formulate a national strategy in order to finally reach the 2020 targets which were set by the European Union envisaging the climate change and the energy sustainability<sup>67</sup>.

Germany conceived the successful legal instrument “*Erneuerbare Energien Gesetz*”(EEG) in 2000, which was the German Renewable Energy Act. The main goal of this Act was to promote and therefore support the Green electricity. The EEG Act of 2000 was revised several times in order to become more developed<sup>68</sup>. Amendments were made in 2004, 2009, 2012 and in 2014.

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<sup>65</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>66</sup> RES Directive, Article 2 (k): ‘support scheme’ means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments;

<sup>67</sup> R. Callaerts, State Aid for the Production of Electricity from Renewable Energy Resources, European Energy and Environmental Law Review, February 2015.

<sup>68</sup> The EEG Act 2000, entered into force in 1 April 2000. The Commission assessed its compatibility with the European State aid Law. The Commission came to the final decision on the 22<sup>th</sup> of the May 2000 (OJ C 164, 10.7.2002, p.5), that the German Renewable Energy Act did not involve State aid.

## II. The assessment of the Compatibility under State Aid law of the EEG-Act 2012

The most crucial revision of the EEG-Act was made with the amendments of 2012. The amended Act contained many new features that were not present in the EEG-Act 2000 and which had been highly questioned as whether they constituted unlawful State aid or not, as they were innovative schemes!

Namely, financial support was granted to the producers of RES electricity and electricity from mining gas. The measures set out in the EEG-Act 2012 were granted in the form of *Feed-in tariffs*<sup>69</sup>, *market premiums*<sup>70</sup> and *flexibility premiums*. These measures were combined with an *horizontal equalization mechanism*<sup>71</sup>, and the result of this system was that finally a “*EEG surcharge*”<sup>72</sup> was imposed to the final electricity consumers. This surcharge was determined on a yearly basis by the German TSOs<sup>73</sup>. The German Federal Network Agency<sup>74</sup> was responsible for the monitoring of the above mechanism. Moreover, in the EEG Act 2012 a reduction of the above surcharge was set out, “*the EEG Surcharge*”, in favor of the German electricity suppliers which benefited from the “*Green power Privilege*”<sup>75</sup>. Finally, the EEG Act 2012 has set out the “*Cap on the EEG surcharge*” for energy intensive users (EIUs)<sup>76</sup>.

69 With *Feed-in tariff* the network operators of the German energy market were obliged to purchase electricity produced within their network area from renewable energy sources and from mining gas, at a purchased price fixed by law.

70 *Market premiums*. The Res producers had the right to sell their electricity directly on the market, for which the network operators-Distribution System operators (DSO) were obliged to pay a market premium above the market price.

71 Part 4, Section 36 EEG Act 2012. The cost of the feed-in tariff and the market premium was passed on to the German Transmission System Operator's (TSOs). They were obliged to purchase RES electricity from the DSOs and to compensate the DSOs fully for the feed-in tariff's or the market premium.

72 Part 4, Section 37 EEG Act 2012. The German TSOs had the obligation to sell electricity on the spot market and in the case that the market price was not sufficient to cover the financial burden imposed on them by the obligation to pay the feed-in tariff's and the market premium to the Green producers, they had to demand from electricity suppliers a payment proportional to the the respective quantity of electricity delivered to their final consumers. This was the so called “*EEG surcharge*”. This surcharge was determined under the discretion of the TSOs yearly.

73 Part 4, Section 37(2) EEG Act 2012

74 Bundesnetzagentur (BNetsA)

75 Part 4, Section 39 EEG Act 2012. The EEG surcharge decreased for electricity suppliers in a given calendar year by 2.0 cents per kilowatt hour. The Res electricity they delivered had to fulfill three conditions: 1) the RES electricity had to be bought directly from the national RES electricity producers, 2) at least 50% of the electricity the suppliers delivered to the end consumers had to be RES electricity or electricity from mining gas and 3) at least 20 % of the electricity had to come from wind or solar.

76 Part 4, Section 40-41 EEG Act 2012. The Cap on the EEG surcharge for EIUS was granted only under the conditions that: 1) The EIUs had to be active in the manufacturing sector, 2) they had to have an electricity consumption of at least 1 Gwh and 3) their electricity costs amount had to be at least 14% of their gross added value.



On the 18<sup>th</sup> of December 2013<sup>77</sup>, the European Commission decided to initiate the procedure of Article 108(2) TFEU, in respect of the support to electricity produced from RES and mining gas under the EEG Act 2012 and the EEG-surcharge for EIUs.

Germany didn't notify to the Commission the amended EEG 2012 before setting it in to force, despite the fact that it was obliged to. The Commission alleged under the formal proceedings that the EEG-Act 2012 constituted new unlawful aid as of the 1<sup>st</sup> January 2012. The Commission claimed that the “green power privilege” and the reduced EEG surcharge for EIUs, constituted prohibited State aid measures under Article 107(1) TFEU.

*Article 107(1) TFEU and the new features of the EEG Act 2012*

Did the new features grant *a selective advantage and did they have an impact on competition and trade* in the internal market? The Commission assessed that the EEG surcharge constituted a selective advantage for the RES electricity producers, because it was only in favour of them and through the Feed-in tariffs and the premiums, they obtained more than what they would obtain on the market. The Commission assessed additionally that the “green power privilege” constituted a selective advantage because it granted a reduced EEG surcharge for the electricity suppliers (and indirectly RES electricity producers)<sup>78</sup>. Finally, the Commission decided that a selective advantage was given to the EIUs in the manufacturing sector, because only undertakings from the manufacturing sector (selectivity) were relieved from a burden that they would normally have to bear. As far as the distortion on the competition and the trade in the internal market was concerned, the electricity market was liberalized and electricity producers were engaged in trade between Member States and also the EIUs were active in sectors in which trade among Member States took place<sup>79</sup>. Finally, the Commission assessed that the above advantages were imputable to the State because the measures

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77 C(2013) 4424final. Brussels,18.12.2013.State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users.

78 IP/13/1283,Brussels, 18 December 2013 The "green electricity privilege" (§39 of the EEG-Act) could possibly result in discriminatory taxation. The reduced EEG-surcharge is available to suppliers only if 50% of the electricity portfolio is sourced from domestic renewable electricity produced in plants that are not already more than 20 years in operation. This seems to discriminate between domestic and imported electricity from renewable sources produced in similar plants. In the formal investigation, the Commission will examine in more detail whether the discrimination would exist only in so far as the imported electricity has not already benefitted from support in the country of origin.

79 C(2013) 4424final. Brussels,18.12.2013.State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users, par.75-80

were established by law and the grant of the reduction of the surcharge was entitled by the Federal Office for Economic Affairs and Export Control (BAFA).

The most difficult task for the Commission was to examine if the in question support measures involved *State resources*! What did the Commission decide for the EEG-Act 12 and specifically for the equalization mechanism which was established and which granted to the TSOs the right to impose the surcharge? The TSOs were in this case not State owned companies<sup>80, 81</sup>. Despite this fact the TSOs were strictly monitored by the State in their administration of the EEG-surcharge. As far as the transfer of the resources is concerned, it has been established under the case law that it is not necessary in order to find under 107(1) TFEU State aid, to have transfer of State resources for the advantage granted to the beneficiary<sup>82</sup>. The resources could at no moment be the property of the State! Additionally, it has been accepted many times under case law that the resources can constitute State resources even if they are merely under the control of the State<sup>83</sup>. Additionally, the fact that the surcharges were imposed by State legislation and were managed and apportioned in accordance with the provisions of the legislation implies the transfer of State resources and State imputability<sup>84</sup>.

On this basis the Commission stated that the State has established detailed rules governing the use and the destination of the EEG surcharge and therefore the State was granted extensive control to monitor the financial flows. Coming to the preliminary conclusion, the Commission decided that the TSOs are not free to establish the surcharge but on the contrary they are strictly monitored by the State and in this sense they were designated to administer the EEG surcharge, the revenues of which finally have constituted State resources.

About the reduction of the surcharge for EIU, the Commission decided that it was a fact that the prospective beneficiaries of the reduction had to apply for the

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80 C379/98, PreussenElektra AG v Schleswig AG, in the presence of Windpark III GmbH and Land Schleswig-Holstein, {2001}. par.57 and 58.

81 C-206/06, Essent Network Nord and Others, {2008}, par.66-69.

82 C-677/11Doux Elevage p.34 and Case T-139-09 France v Commission, par.36

83 C-677/11Doux Elevage, paragraph 34, Case France v Commission, par. 36

84 C-173/73 Italy v Commission, par.16. "As the funds in question are financed through compulsory contributions imposed by State legislation and as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 92, even if they are administered by institutions distinct from the public authorities."

granting to the BAFA, which verified the request on its discretion. In this means, its was obvious that indirectly the State had the control of choosing to whom the reduction will be finally granted! In the same manner, the “green power privilege” reduction was granted to the suppliers after their request to the BNetzA, which means that the State monitored once again the granting on its discretion.

The Commission came to the preliminary conclusion that the EEG-Act 2012 entailed State aid in favour of producers of RES electricity and electricity from mining gas and that the reduced EEG surcharge entailed State aid for EIU<sup>85</sup>. Germany had the stand still obligation and therefore it was not allowed to apply the measures, before the Commission came to a Decision .

*Was there finally a justification for the unlawful State aid measures of the EEG Act 2012?*

The unlawful State aid features of the EEG-Act 2012 could be justified as compatible applying Article 107(3)c TFEU and the Guidelines on the State aid for environmental protection 2008 (EAG)<sup>86</sup>.

The Feed-in tariffs, the market premiums and the flexibility premiums as support schemes for RES electricity producer's were found by the Commission to be compatible according to Article 107(3)(c) TFEU in the light of the EAG 2008, as they were calculated by the German authorities in accordance with the methodology presented under the EAG 2008 <sup>87</sup> and they did not lead to overcompensation of the RES electricity producers.

By contrast, the Commission had concerns that two aspects of the EEG-Act 2012 were not in line with EU State aid rules. Namely, *the surcharge reduction for energy intensive companies* appeared to be financed from a state resource. The reduction was available only to undertakings of the manufacturing sector having a consumption of at least 1 GWh/a and with electricity costs representing 14% of their gross added value. The reductions seemed to give the beneficiaries a selective advantage that was likely to distort competition within the EU internal market. The

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<sup>85</sup> C(2013) 4424final. Brussels, 18.12.2013.State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users, par.148

<sup>86</sup> The EEAG 2014-2020 where until than not completed, but only a Draft was published by the Commission on the 18 December 2013.

<sup>87</sup> Point 109 of the EAG 2008.

EAG 2008 did not foresee the possibility of such reductions. At the same time, the Commission considered that under certain conditions, reductions on the financing of renewable electricity could be justified for energy-intensive users in order to prevent carbon leakage. The Commission insisted on a thorough examination procedure to clarify whether the reductions for energy-intensive companies could be justified and whether they were proportionate and do not unduly distort competition.

As far as the support scheme of the "*green electricity privilege*" (§39 of the EEG-Act) is concerned, the Commission decided that it could possibly result in discriminatory taxation. The reduced EEG-surcharge was available to suppliers only if 50% of the electricity portfolio was sourced from domestic renewable electricity produced in plants that were not already more than 20 years in operation. This seemed to discriminate between domestic and imported electricity from renewable sources produced in similar plants. The Commission decided to examine in the formal investigation, in more detail whether the discrimination would exist only in so far as the imported electricity has not already benefited from support in the country of origin.

The Commission came to the decision that the support schemes facilitated the development of certain economic activities and that the reduction of the EEG surcharge served to protect the international competitiveness of EUIs, as the energy costs constitute for the manufacturing sector a significant operating cost. It was noted that if the EEG Act would not establish the reduction for the EUIs, the ambiguous Climate Change Strategy of Germany would finally lead to the financial difficulties of the manufacturing sector. Third parties were invited by the Commission to present their view, raising the question whether the reduced EEG-surcharge could be viewed as contributing to an objective of common interest, meaning environmental protection, by enabling Germany to secure financing means for its support to the production of renewable energy and the reaching of the EU targets of reduction in greenhouse gas emissions<sup>88</sup>. The Commission invited Germany to submit for each of the sectors that benefited from the reduction additional information<sup>89</sup> and Germany was requested to demonstrate that the same results could not be obtained with less aid. The Commission

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<sup>88</sup> C(2013)4424final.Brussels,18.12.2013.State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users, par.226

<sup>89</sup> IBID,see reference 88, par. 236

doubted that improving the competitiveness via the reduction for the German EIUs would not distort competition in the internal market<sup>90</sup>.

*The EEAG 2014-2020 came exactly on time in order to save the EEG-Act 2012!*

On the 1<sup>st</sup> of July 2014 the new EEAG 2014-2020 came into force. As it was analyzed above, one of the key features of the new Guidelines was the State aid in the form of reductions in funding support for electricity from renewable sources (for energy intensive sectors), under Section 3.7.2. This form of State aid was for the first time included in the new Guidelines!

On the 25<sup>th</sup> of November 2014 the Commission issued its final decision with respect to the EEG-Act 2012<sup>91</sup>. The Commission stated that Germany had not notified the support schemes as it was obliged to and therefore they constituted unnotified State aid. The Commission declared that the support to renewable energy production under the EEG-Act 2012 was in line with the EAG 2008, because it did not lead to overcompensation, as it was limited to grant aid equal to compensate the extra costs of RES production that exceeded the market price for electricity.

The remarkable point of the final decision was in relation to the support scheme of the reduction for EIUs! The Commission decided in favour of the compatibility of the scheme under the novel EEAG 2014-2020, as it was included in the new Guidelines! But tricky *retroactivity issues* came up! The new Guidelines contain retro-activity provisions<sup>92</sup>. They apply also to non-notified reductions granted before the 1<sup>st</sup> July of 2014, when they came into force. This obviously had a positive and a negative effect on the EEG-Act 2012! The Commission approved the adjustment plan proposed by Germany for the reduction on the EEG-Surcharge applied in 2013-2014 on

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<sup>90</sup> T-134/14 Germany v Commission. Court Proceedings were initiated in front of the General Court against the final Decision of the Commission 18-12-13. Additionally many third parties joined the procedure. Joined cases: T172/14 Stahlwerk Bous v Commission, T-173/14 Weser Wind v Commission, T174/14 Georgsmarienhütte v Commission, T178/14 Friedrich Wilhelms-Hütte Eisenguss v Commission, T-183/14 Schmiedag v Commission.

<sup>91</sup> C(2014) 8786 final. Brussels, 25.11.2014. State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users.

<sup>92</sup> EEAG 2014-2020 par.193-249-249. Therefore all Member States were required by the Commission to submit an adjustment plan to progressively bring non-notified reductions in line with the criteria of the EEAG 2014-2020. The goal of this action was to ensure a smooth transition for the companies concerned.

the basis of the novel EEAG. The outcome was that on the one hand, the support scheme rescued aid granted to EUIs in the years 2013 and 2014, but on the other hand, the retroactive examination of the already granted aid schemes disclosed some cases where the actual reduction granted to the EUIs exceeded the levels set under the adjustment plan. This additional reduction involved, of course, an inappropriate economic advantage granted to some EUIs incompatible aid with the internal market as it led to distortion of the competition. The Commission ordered Germany to recover the incompatible granted aid to EUIs with interest beard<sup>93</sup>.

This decision of the Commission<sup>94</sup> has been challenged in front of the European Court of Justice. Germany claims<sup>95</sup> that the Court has to annul the Commission's decision relying on three pleas: “manifest errors of assessment in the evaluation of the facts”<sup>96</sup>, “no ‘favouring’ through the special compensation scheme”<sup>97</sup> and “no granting of the alleged favouring by the State or through State resources”<sup>98</sup>. The case is still pending.

Conclusively, the EEG-Act 2012, might have been challenged by the Commission, but it can not be refused that it constituted “*a step in the right direction as it acknowledges the need for exemptions from charges if a RES funding mechanism threatens the competitiveness of an undertaking on which the relevant RES charge is levied*”<sup>99</sup>. The EEG-Act 2012 established an important Strategy for the promotion of RES electricity, by setting out important and innovative supporting schemes, the most important of which was the EEG-surcharge reduction, which undoubtedly constituted

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<sup>93</sup> According to Chapter V of the Commission Regulation 794/2004

<sup>94</sup> C(2014) 8786 final. Brussels, 25.11.2014. State Aid SA.33995– Germany Support for renewable electricity and reduced EEG surcharge for energy intensive users.

<sup>95</sup> T-47/15, Federal Republic of Germany Vs European Commission. The resume will be available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-47/15>

<sup>96</sup> Germany claims that the European Commission misunderstood the underlying facts, namely the functioning of the Law for the priority of renewable energy sources, in particular the financial flows system under that law. In addition, the Commission misunderstood the role ‘of the State’ as legislator and as body with responsibility for supervisory authorities and incorrectly deduced a situation of control therefrom No ‘favouring’ through the special compensation scheme

<sup>97</sup> Germany claims that the European Commission erred in law in applying Article 107(1) TFEU by accepting, contrary to the case-law of the Court of Justice, that energy-intensive users had been favoured.

<sup>98</sup> Germany claims that the European Commission also erred in law in applying Article 107(1) TFEU in this respect when it accepted that public authorities had control over the assets of the various private companies participating in the regime of the Law on the priority of renewable energy sources.

<sup>99</sup> T. Lubbig, M. Fuchs, The German Renewable Energy Act (EEG) -Unlawful State Aid? ENLR 2/2014, Lexxion, pp.122.

an inspiration for the EU and was therefore included in the EEAG 2014-2020, after two years, for the first time.

### **III. The assessment of the Compatibility with the State Aid law of the EEG-Act 2014**

The EEG-Act was again revised in 2014. In April 2014, Germany notified the amendments in order to achieve the needed legal predictability before taking the EEG-Act 2014 into force. The Commission found that the new EEG-Act was compatible with the European State aid Law<sup>100</sup>. The Commission applied the Common Assessment Principles of the EEAG 2014-2020 in order to assess if the State aid measures of the EEG-Act 2014 constituted State aid for environmental protection and energy objectives compatible with the internal market under Article 107(3)c TFEU. The Commission declared the EEG-Act 2014 as compatible and decided not to raise objections.<sup>101</sup>

Conclusively, the EEG-Act 2014 provides support for the production of electricity from renewable energy sources and from mining gas. It also reduces the financial burden on energy-intensive users and certain auto-generators by reducing their level of payment of the EEG-surcharge. Finally, the EEG-Act 2014 provides that the aid will be progressively allocated through tenders which will gradually be opened to operators located in other Member States<sup>102</sup>. The Commission's statement was clear, the EEG Act 2014 will be successful in furthering EU environmental and energy objectives without unduly distorting competition in the Single Market. Someone would dare to say that the German Renewable Energy Sources Act could be a model for the promotion of renewable energies worldwide.

### **IV. Is the list of the benefiting industries in the EEAG 2014-2020 exclusive?**

In the EEAG 2014-2020 the surcharge reductions are granted depending on the sector in which the EIU concerned is active<sup>103</sup> and the energy consumption and the electricity intensity of the production concerned. As it has been already addressed

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100 C(2014)5081final.Brussels,23.07.2014.State Aid SA.38632– Germany EEG 2014 Reform of the Renewable Energy Law.

101 IBID,see reference 100, par.341 after. The Conclusion.

102 IP/14/867 Commission, Press Release. Brussels,23 July 2014.State aid: Commission approves German renewable energy law EEG 2014.

103 EEAG 2014-2020 , Annex 3 and Annex 5.

above, the list of Annex 3 and 5 of the EEAG 2014-2020 contain the sectors listed which can be considered as eligible and are entitled to be granted State aid in the form of reductions in funding support for electricity from renewable sources. The eligible sectors are limited under the EEAG and the Commission has the obligation to apply the rules *sensu stricto* and with the maximum of transparency, during the choice of the beneficiary and the assessment of this type of aid.

Annex 3 and 5 have caused concerns to some industry Sectors in Germany, which were finally ruled out of the list with the prospective beneficiaries of the reduction. In the case *Milchindustrie-Verband eV and Deutscher Raiffeisenverband eV vs the European Commission* an application was filed on the 19<sup>th</sup> of September 2014 in front of the general Court, claiming that the Court had to Annul the defendant's Communication 2014/C 200/01 of 28 June 2014 on the Guidelines on State aid for environmental protection and energy 2014-2020, in so far as the processing industry (NACE 10.51) is not mentioned in Annex 3 although it satisfies the criteria set out in Section 3.7.2 of the Guidelines 2014-2020<sup>104</sup>.

It is remarkable that the Court alleged that the existence of the EEAG do not prevent a Member State to notify to the Commission new Aid which will grant a relief to a sector which is not included in Annex 3, either because they assess, in consultation with the industries concerned, that the specific sector fulfills the criteria in order to be added in the list in the annex or because it believes that these conditions can not lawfully be determined by the Commission<sup>105</sup>. The Commission might finally come to a decision<sup>106</sup> after applying the EEAG, finding that the proposed relief constitutes aid incompatible with the internal market. However, this decision would be likely to cause direct legal effects for the undertakings to which reduction would be granted. These

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104 T-670/14, *Milchindustrie-Verband eV and Deutscher Raiffeisenverband eV v European Commission*. Par. 13, The applicants seek the annulment of the contested Guidelines, as their sector is not included in Annex 3, while showing intensity and trade intensity electricity more than 10%. The applicants point out that Annex 3 is exhaustive and that its content should be faithfully transposed into German law. Therefore, the sectors listed in Annex 3 includes, according to the applicants, in List 1 of Annex 4 of the *Erneuerbare-Energien-Gesetz* (German Law on renewable energy sources) of 21 July 2014 (BGBl. 2014 I, p. 1066 hereinafter: EEG 2014), concerning the areas which may qualify for relief. Entities listed in Annex 5 areas, including the milk-industry, includes, according to the applicants, List 2 of Annex 4 of the EEG 2014, and Article 64 of the Act provides for companies belonging to these sectors stricter conditions for granting relief. Consequently, according to the applicants, only a few milk-industries meet these strict conditions qualifying relief, which seriously threatens international competitiveness and the existence of approximately 80% of German Milk industries.

105 *IBID*, see reference 104 par. 30.

106 Under Article 7, paragraph 5 of Regulation No 659/1999



industries could, like any Member State concerned, challenge the validity of the adopted Commission decision before the Court and, in particular, claim that the specific sector should have been included in Annex 3.

Conclusively, the Court finally rejected the claim of the above industries as inadmissible, because the Federal Republic of Germany was not obliged either legally or de facto to adapt its legislation on concessions in order to make it compatible with the contested Guidelines and, secondly, that the legal situation of the represented companies is not directly affected by the non-inclusion of the sector in Annex 3<sup>107</sup>. Nevertheless, it is important to remark that this case did give to the industries not included in the Annex 3 and 5 of the EEAG a very important tread in order to assert the reduction in funding support for electricity from renewable sources (for energy intensive sectors), under Section 3.7.2 in front of the Commission.

## **2. The Greek Energy Sector and the EEAG 2014-2020**

### **I. Generally**

Up to this day the Greek Government has not achieved to implement the new revised plan for the promotion and support of RES electricity adapted to the new EEAG 2014-2020. The process of adopting the new EEAG 2014-2020 in the Greek Electricity market, has been significantly delayed. It is undoubtedly a fact, that the Greek Strategy for granting State aid in order to promote the production of Electricity from Renewable resources has been disappointingly unsuccessful until today!

In May 2010, the Greek Parliament adopted the legislation on Renewable energy sources with the Law No.3851/2010, FEK 85 A, 4-6-2010 which partially transported the RES Directive 2009/28/EC. Additionally, the Law No. 3851/2010 was amended by Article 39 of Law No.4062/2012, which came in force as of the 30<sup>th</sup> March 2012. This amendment led to the full transport of the RES Directive into the Greek National Legislation. Greece chose to promote renewable energy sources, attracting investors with Feed-in tariffs<sup>108</sup>, which was one of the incentives provided by the RES Directive. This support scheme came to reduce the risk of the investments for the Renewable electricity producers, fixing the price of which the electricity producers would sell the

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<sup>107</sup> T-670/14, Milchindustrie-Verband eV and Deutscher Raiffeisenverband eV v European Commission. Par. 46

<sup>108</sup> T. Panagos, Handbook for Energy Law, International Hellenic University 2015.

electricity produced<sup>109</sup>. As a matter of fact, this support scheme made producing of electricity from renewable sources and especially of “Photo-voltaic systems”<sup>110</sup> and “Wind farms” much more attractive even for investors which were in most cases not coordinated Businesses but inexperienced individuals who were highly attracted by the high Feed-in tariffs. It is remarkable that Greece managed to have the highest Feed-in tariff for electricity produced by photo-voltaic systems in Europe in 2012. The result was a huge deficit of the Special RES account<sup>111</sup>. The Government decided to apply several types of measures<sup>112</sup> in order to ensure that the payment mechanism for RES will survive. Great instability in the Greek Electricity Market was caused because of the wrong Strategy for the Promotion of RES in Greece<sup>113</sup>.

## **II. The Feed-in tariffs in the Greek energy market**

RES producers were attracted by the Greek Government in a wrong way as the State support scheme was granted in the form of Feed-in tariffs, which were not unlawful as such, but they were granted in a completely wrong manner, which finally had as a result the collapse of the Greek RES promoting Strategy and the distortion of

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109 RES electricity has been sold to the Transmission Operator (Public Power Cooperation S.A Hellas (PPC) which is “the dominant player ” in the Greek Electricity Market) to which grid they were connected after receiving the License issued by the Regulatory Authority for Energy (RAE).many cases which felled under “the Photo-voltaic Systems License exception” and the “Wind farms exception”, producers had not to pass the License process in front of the RAE. The Licensing process for electricity producers from renewable sources in Greece under the Law No. 3468/2006 was complicated and time demanding,therefore it was revised in order to promote RES in the electricity markets. Amendments were done with the Law No. 3851/2010 and the Law. No 4001/2011.The exception of the Production license rules were applied for the photo-voltaic systems 1 MW and for Wind farms of up to 100KW.

110 A bonus of up to 10% was provided in the Feed in tariff, for the photo-voltaic systems based on the clause of Local Content Requirement for Photo-voltaic plants,using equipment originating from the European Union. The Pricing of electric energy produced by RES stations was calculated on the provisions of Law No. 3851/2010.

111 The Feed-in tariffs had to be paid to RES producers which had a signed power purchase agreement, which would be fully refunded to the Greek Transmission System Operator (TSO) and the PPC through a special account managed by the TSO. This account was intended to fully cover the cost difference between the more expensive RES feed-in tariff paid to RES producers and the system marginal floating price paid to the TSO. But one thing that was taking wrongly for granted, was the fact that the receivables of the special account had to equal the total RES costs that LAGIE had to pay to all Greek RES producers for the total amount of energy generated by their RES at the feed-in tariff which was vested under their power purchase agreement.

112 The “solidarity tax levies” were imposed in a selective manner to RES producers for the years 2012 – 2014.This tax levies have been highly debated as they were imposed to RES producers in a Selective manner, as electricity producers from fossil fuels were exempted of this tax measure which automatically gave them an competitive edge. It is obvious that this measure came to reset the balance which had been lost in the Greek Electricity market because of the granting of the State aid in the form of high Feed in tariffs to the RES producers the past years. One of the aims of the Solidarity tax levy was to support the deficit of the Special Account.

113 The Greek Parliament adopted in November 2012 the Law No 4093/2012 and in May 2013 Law No 4152/2013, which introduced retroactive measures additionally to the reduction of the feed in tariffs

competition. Despite the fact that the balance of the Electricity market was affected by the high Feed-in tariffs, it has never been examined by the European Commission as unlawful State Aid. But why? It is clear that under the existing case law, Feed in tariffs do not constitute prohibited State aid under Article 107 (1) TFEU. But what happens with very high Feed-in tariffs as the one of the Greek photo-voltaic systems? Even if it were accepted that the high Feed-in tariffs granted a selective advantage to the Greek-RES producers causing distortion of competition, it finally could be justified under the “catch all provision”, Article 107 (3) TFEU and the EAG 2008 as the measure of the Feed-in-tariffs was included in the EAG. Although, in the case of individual examination of the Greek Feed-in tariffs granted until 2013, there still remains an open question: What if the high Feed-in tariffs, which have undoubtedly caused distortion in the Greek Energy Market, had been examined as an overcompensation scheme? Would then unlawful State aid be involved? In any case, the result of the Feed-in tariffs in Greece was not conducive for the Greek Energy Market.

### **III. Criticism**

Conclusively, Greece has pledged to the EU that by 2020 renewable electricity will reach at least 40%. Under the obligations arising from the third Memorandum, the new mechanism should be finalized very soon and be compatible with EEAG 2014-2020 issued by the European Commission. The new model will replace the current framework, which is based on Feed-in tariffs. Greece has to implement the Feed-in premiums and the competitive binding process in order to grant compatible and lawful support to the RES electricity producers. Over the past years, this mechanism, though correct in philosophy, caused major problems due to poor implementation, which led to the accumulation of significant deficits in the Special Account of LAGIE on the compensation of RES, as has been addressed above. Without any doubt, Greece has to make a new start in its RES electricity market. The EEAG 2014-2020 remain Soft Law and are therefore surely not binding for the Member States! Hence, given the fact that the Commission is bound to apply these Guidelines in the examination process of every aid measure granted in order to declare it as compatible or not, it is surely a clever choice for Greece to implement the Guidelines in its system as soon as possible!

## **CHAPTER. 4**

### **State aid under Article 107(1) TFEU and the Greek industries**

#### **1. The Greek Industries as intensive electricity consumers**

While the European Union has demanding plans and targets in favour of the environment and renewable energy sources, which have to be reached by each Member State, the Greek Energy Market still struggles with structural and inner problems in relation to electricity and its tariffs.

The Greek State controls 51% of the country's electricity company Public Power Corporation S.A. , which is DEI S.A<sup>114</sup>. DEI S.A enjoys the status of monopoly in the Greek electricity market and is therefore the dominant player. This monopoly makes the intensive electricity users totally dependent on it, as the intensive users do not have any other options to turn to in the Greek Energy Market. Although the liberalisation of the Greek electricity market started in 2001, it has had no results until today. DEI S.A, having a total monopoly in generation, transmission and distribution, sets the tariffs unilaterally for all kind of customers, including the industrial sector and the energy-intensive companies, which have no alternatives for electricity supply. The monopoly of DEI S.A has caused many problems to the Greek industries! One of the most crucial disputes which illustrates exactly how the competitiveness of the Greek Industries are affected by the Greek dominant player, is the dispute between DEI S.A and Aluminium S.A.

#### **2. The Aluminium S.A Cases**

##### **I. Aluminium S.A Vs European Commission and DEI S.A**

Aluminium of Greece was established in 1960 and was a large company active in the production of aluminium as raw material. In July 2007, the Aluminium of Greece was split in two companies Aluminium S.A and Endesa Hellas. The company

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<sup>114</sup> PPC has a competitive advantage, as it enjoys preferential access and has special mining rights to lignite (98% of the total active reserves owned by the state), a strategic natural resource in Greece used for electricity generation. Greece is the second largest lignite producer in Europe and fifth in the world. It also exploits all major hydro plants in Greece.

Aluminium S.A has taken over the aluminium production and the company Endessa Hellas is active in the electricity production.

In July 2008, the Commission received complaints that Aluminium S.A had received illegal State aid. Namely, the complaints alleged that preferential electricity tariffs were granted to Aluminium S.A by the Greek state-owned DEI S.A<sup>115</sup> which constituted unlawful State aid under 107(1)TFEU. Looking back in time, Aluminium had signed since 1960 an agreement with DEI S.A, under which it purchased electricity at preferential tariffs. This agreement would expire in March 2006, provided that one of the contracting parties would give due notice two years in advance before expiration. In February 2004, DEI S.A sent a notice to Aluminium S.A and it consequently terminated applying the preferential tariffs since the end of March 2006. Aluminium S.A challenged before the Greek National Courts the termination of the preferential tariffs. Additionally, it asked for interim measures in front of the Greek Courts the Athens Single-bench Court of First Instance, and in January 2007 it gained the preferential tariffs again. Before this court's decision, from March 2006 until January 2007, the company was charged electricity by DEI S.A at normal market prices. DEI S.A appealed the above interim measure and in March 2008 the interim measure granted in January 2007 was annulled by the Athens Multi-bench Court of First Instance. The second decision did not impose any recovery of amounts resulting from the lower electricity pricing that was extended by the first court's decision. In June 2008, a new agreement was signed between DEI S.A and Aluminium, imposing same pricing as for any other industrial customer, valid from March 2008.

In January 2010, the Commission opened in-depth examination and decided to initiate procedure laid down in Article 108 (2) TFEU<sup>116</sup>. The Commission considered that it had to assess as possible prohibited State aid under Article 107(1)TFEU in favour of Aluminium (and before Aluminium of Greece): “the price difference between the privileged price charged by DEI S.A to Aluminium of Greece until July 2007 (and Aluminium SA as the successor after July 2007) and the normal industrial price

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<sup>115</sup> Additionally, complaints alleged that the Public state-owned Gas Corporation (PPG) paid the construction of a gas pipeline belonging to Aluminium of Greece. This measure will be not further analyzed in this paper.

<sup>116</sup> D(2009) 10584 Final. Brussels, 27.1.2010 State aid C 2/2010 (ex NN62/2009) – Alleged state aid to Aluminium of Greece S.A.- Greece Decision to initiate the formal investigation procedure

charged during the same period of time to all other industrial customers, had to be assessed”<sup>117</sup>.

*Was it Unlawful aid under Article 107 (1) TFEU?* The preferential pricing of the electricity granted to Aluminium S.A was assessed by the Commission under the conditions of Article 107(1) TFEU.

*First*, the Commission accepted that the preferential price granted in January 2007 to Aluminium S.A, involved State resources and was imputable to the State. The prolongation of the privilege was granted by the National Courts (with the interim measure in January 2007), which constituted a judicial authority and therefore a state authority! On the other hand, DEI S.A which provided the electricity for a preferential price was a 51% state owned company! Therefore, the state resources criterion was fulfilled. There could be no doubt that State resources were involved as the DEI S.A was de facto a State owned company. But as far as the fact that the prolongation of the privilege was granted by the Courts as a State authority is concerned, this is an argument which raises many questions. Did the Courts really grant with the interim measure a new State aid? Or did they just revive the previous situation, in this means the “1960 agreement” between Aluminium S.A and DEI S.A?

*Secondly*, the Commission sustained the fact that DEI S.A refused to prolong the 1960 agreement, provided a good indication that the prolongation of the agreement provided an advantage to Aluminium S.A which was the beneficiary, since the preferential price did not reflect the market price.

*Thirdly*, the privileged pricing was applied only to Aluminium of Greece until July 2007 and Aluminium SA after that. Thus, the criterion of selectivity is indeed fulfilled.

*Fourth*, the Commission argued that the privileged pricing was applied to Aluminium S.A which was an undertaking active in a sector whose products are widely traded

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<sup>117</sup> IBID, see reference 115, par. 25-26. “The establishment privileges were granted to the company by the establishment agreement of 1960 and its amendments of 1966, 1969 and 1980, therefore before Greece's accession to the European Economic Community in 1981. The Commission further notes that the privileges were not amended in any regard since Greece's accession and that they did expire duly in March 2006 or even before. (26) Therefore, the Commission considers that, to the extent that they constituted State aid, the establishment privileges referred to in the present subsection constituted existing aid in the sense of article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty”.

among Member States. Thus, the criterion of distortion of competition and affectation of trade between Member States was held as fulfilled.

The Commission considered that the measure of privileged electricity pricing constituted State aid in favour of Aluminium of Greece and Aluminium S.A in the meaning of Article 107(1) TFEU. The Commission assessed after that the compatibility with the internal market of the measure under Article 107(2),(3) TFEU and Secondary law, but finally non justification was found and the Commission reached the decision that the preferential pricing in favour of Aluminium S.A constituted unlawful and incompatible State aid under Article 107(1) TFEU.

*The final decision of the the Commission: New aid-Recovery of €17.4 million plus interest!*

With the final decision the Commission concluded, in July 2011<sup>118</sup> that the preferential electricity tariffs granted in 2007-2008 by DEI S.A to Aluminium SA constituted NEW unlawful and incompatible State aid<sup>119</sup>! The Commission ordered Greece to recover the aid calculated around €17.4 million plus interest.

The extension of the existing aid (Agreement 1960 Aluminium-DEI) had been defined by the Commission as New aid<sup>120</sup>. Greece and Aluminium S.A alleged during the examination process that for the period between the two court decisions (January 2007-March 2008) the preferential pricing consisted existing aid and not new aid and therefore it could not be assessed under the EU State Aid law<sup>121</sup>. It was a fact that the National Court's decision of January 2007 did not amend the original agreement but

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118 C (2011) 4916 final. Brussels, 13.7.2011 ON THE STATE AID No C 2/2010 (ex NN 62/2009)Implemented by Greece in favour of Aluminium of Greece SA.

119 The Commission came to the conclusion that the tariff paid by Aluminion of Greece and Aluminon S.A was lower than the standard tariff paid by other large industrial consumers. Greece did not submit any convincing arguments permitting to conclude that this preferential tariff was a market tariff . The lower pricing resulted in reduced revenue for DEI which was a company controlled by the State, therefore State resources were involved. The privileged tariff was applied in a selective manner as only Aluminium was granted this type of privilege. The beneficiary was active in sectors whose products are widely traded among Member States and therefore the State aid caused distortion of competition and affectation of trade between Member States. Therefore it constituted unlawful aid!!!

120 C-121/10 Commission v Council, par.58.The fact that that scheme is simply an extension of the schemes which expired on 31 December 2009,assuming that be proved, is not decisive because the extension of an existing aid scheme creates a new aid which is distinct from the scheme which was extended (Case C-138/09 Todaro Nunziatina & C. [2010] ECR I-4561, paragraphs 46 and 47).

121 Existing aid in the sense of article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

only extended the existing aid. The Commission answered that under the case law it was clear that “the extension of an existing aid constitutes a new aid and must be notified”<sup>122</sup>. The Commission added that this was also the case when a terminated existing aid was reactivated. After this decision, one reaches the conclusion that apparently the Athens Multi-bench Court of First Instance had to notify to the Commission the interim measure granted as new State aid under Article 108(3) TFEU, despite the fact that it granted the privilege for a limited duration and not as a final judgment would<sup>123</sup>!

*The annulment procedure before the General Court: A success story for Aluminium S.A!*

The Aluminium S.A brought an appeal<sup>124</sup> before the General Court on 6 October 2011 against the final decision of the Commission<sup>125</sup>. On the 8<sup>th</sup> October of 2014, the General Court annulled the Commission's final decision<sup>126</sup>, on the ground that although the case law has established that an amendment of an existing aid measure constitutes

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<sup>122</sup> C-70/72, Commission v Germany [1973] ECR 813, para 14 and judgement in C-197/99 P, Belgium v Commission [2003] ECR I-8461, par. 109

<sup>123</sup> M. Munoz de Juan and M/ Kekelekis, “Case T-542/11, Aluminium v European Commission”. EStAL 2/2015, Lexxion.pp.282

<sup>124</sup> T-542/11, Aluminium AE Vs European Commission supported by Dimosia Epicheirisi Ilektrismou AE (DEI). Aluminium put forward the following grounds for annulment: “Infringement of Article 1 of Regulation No 659/1999, and infringement of the rules concerning the allocation of competence between the Commission and the national courts and the right to judicial protection. The Commission clearly erred in its assessment of the facts, took account of factors that were clearly erroneous and made clear errors of law in classifying the supposed aid as 'new'. The measure at issue was adopted under precisely the same regime as the supposed existing aid and the reasoning given for the Commission's view is defective; Infringement of Article 107(1) TFEU inasmuch as the Commission erred in finding there to be an advantage, did not apply the private investor test and did not examine whether there are objective commercial grounds justifying the contractual tariff of 1960; Infringement of Article 107(1) TFEU inasmuch as the Commission erred in finding that the aid is selective, notwithstanding the obligation of the DEI (Dimosia Epikhirisi Ilektrismou (Public Power Corporation)) to set in a similar manner the tariffs of similar categories of undertakings and in a different manner those of different categories to the extent that they are different; Infringement of Article 107(1) TFEU inasmuch as the Commission erred in finding that trade between Member States is distorted and affected, although the applicant does not obtain any advantage compared with the other aluminium undertakings because of the uniformity of aluminium's characteristics and because of the exchange-set price; Incorrect methodology in calculating the amount of the supposed advantage; Infringement of the duty to state reasons; Infringement of the principle of the protection of legitimate expectations on account of the Commission's previous position that the DEI's contractual tariff with the applicant did not constitute unlawful State aid, and of the applicant's rights of defence”.

<sup>125</sup> C (2011) 4916 final. Brussels, 13.7.2011 ON THE STATE AID No C 2/2010 (ex NN 62/2009) Implemented by Greece in favour of Aluminium of Greece SA.

<sup>126</sup> T-542/11 the Judgment 8 October 2014 Aluminium AE Vs European Commission supported by Dimosia Epicheirisi Ilektrismou AE (DEI)



new aid<sup>127</sup>, it has also been established under case law that the alteration on an existing aid has to affect the substance of the initial scheme in order to constitute new aid<sup>128</sup>. The General Court concluded that the decision of the Athens Multi-bench Court of First Instance which ordered the interim measure of prolongation of the preferential pricing had not modified the “agreement of 1960”, consequently the order did not constitute new aid and therefore unlawful aid. But the dispute between DEI S.A and Aluminium had surely not come to an end!

## **II. The Arbitration between DEI S.A and Aluminium S.A and Article 107(1)TFEU**

The discrepancy between the Greek PPC, DEI S.A and Aluminium S.A in relation to the preferential fixing of the tariffs for electricity supply became perdurable<sup>129</sup>. There was need of a rapid and definitive settlement of the dispute, in order to eliminate the reasons for prolonging the ongoing uncertainty, accumulation of unreal debts from calculation methods<sup>130</sup> that did not meet an agreement or the law. Aluminium S.A was convinced that DEI S.A had to grant a preferential tariff calculated specifically for its industry which was by far the largest electricity consumer in Greece as its consumption exceeds 5% of the total power consumption in Greece and

127C-111/10 Commission Vs Council par. 58. C121/10 Commission V Council par. 59 Joined cases T-127/99, T-29/99 and T-148/99 Judgment of 6 March 2002 in Diputacion Foral de Alava and Others v Commission. Par.175

128 C-138/09 judgment in Todaro Nunziatina & C., par. 46 and 47

129 In the course of the negotiations between DEI and Aluminium, on 4 August 2010, the two parties signed a "Framework Agreement", concerning the electricity tariff as well as the settlement of the outstanding debts of Aluminium amounting to around EUR 107 million. However, the "Supply and Settlement Agreement" dated 5 October 2010, which would have laid down in detail the contractual relationship between the two parties with the aim of implementing the Framework Agreement, Aluminium is by far the largest electricity consumer in Greece (its consumption exceeds 5% of the total power consumption in Greece and corresponds to 40% of the total consumption of high voltage consumers) and has an almost constant consumption throughout the whole year. This settlement foresaw a write-off of EUR 25 million by the complainant and the payment of the remainder (ca EUR 82 million) through the immediate payment of EUR 20 million and the payment of the balance through monthly instalments bearing interest at the rate of 1-month EURIBOR plus 1%. The Agreement, was never signed. As such, the dispute concerning the contractual relationship and the applicable tariff remained unresolved.

130 Decision 346/2012 RAE. Case Complain Nr.I-153367/16.03.12 Aluminium S.A Vs DEI S.A. Par. 52. The defendant (DEI), in contravention of the decisions of RAE 692/2011 and 798/2011 did not provide the requesting personalized invoice, but a invoice which essentially terms structure, financial result, charges etc., is the tariff of A-150 which has never concerned Aluminium and the LARKO due to the particular characteristics of these industries. The defendant's argument was that the price of 40.7EUR / MWh is the lowest possible value that could be offered A 150+ 10%, as for every electricity intensive user.

The Decision 346/2012 RAE which had set an interim tariff for the electricity supplied to Aluminium for the time until the dispute between those two parties concerning the tariff was settled, obliged it to supply electricity to Aluminium below market prices and, thereby, to grant State aid to Aluminium. DEI sent a complaint to the European Commission and claimed that unlawful State aid was granted by the Greek State to Aluminium with the above Decision. Finally, as the Arbitration Decision fully and retroactively replaced the interim tariff set by RAE, the Commission considered that the complaint in SA.34991 had become without object.

corresponds to 40% of the total consumption of high voltage consumers<sup>131</sup>. The parts decided to accept arbitration under the auspices of the Greek Regulatory Authority for Energy<sup>132</sup>. This took place in accordance with the basic principles on power supply tariffs approved by the European Commission, taking into account the underlying cost of DEI S.A, and the consumption profile of Aluminium S.A.

The Arbitral Tribunal appointed by the DEI S.A and Aluminium S.A rendered the Arbitration Award Nr.1/2013 ("Award"). The Award had set the tariff which DEI S.A had to apply supplying electricity to Aluminium for the period 1 July 2010 until 31 December 2013. The tariff price had been ultimately determined by the Award to 36,6Euro/MWhour (40,7 Euro if obligatory charges of 4,11 Euro were included).

As a matter of fact, the Arbitration Award was not to the liking of DEI S.A, which decided to file a complaint to the European Commission on the 23<sup>th</sup> December of 2013, claiming that it was forced by the Award to provide electricity to Aluminium S.A at below-cost levels, which constituted prohibited State aid under Article 107 (1) TFEU. When the final arbitration Award was rendered, DEI S.A claimed to the Commission that even the decision to submit the dispute to arbitration by itself conferred an advantage for Aluminium! DEI S.A alleged that the preferential tariff provided by the Award, offered an unfair and selective advantage over other industries which threatened to distort competition and affect trade. Expressly, DEI S.A affirmed in its complaint that the Award was a binding measure of the Greek State-according to Greek law, therefore it constituted a support scheme imputable to the State. Moreover, DEI S.A argued, in a nearly provocative manner, that the tariff set by the Award involves State resources

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<sup>131</sup> C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06).(2010/460/EC)Commission Decision of 19 November 2009. State aid measures implemented by Italy for Alcoa Trasformazioni. Par.150 “The Commission recalls that the method followed in *Alumix* addressed a very specific situation. In *Alumix*, the tariff was allowed by ENEL, the then fully State-owned monopoly, in an electricity market which had yet to be liberalised (66). In that situation, the Commission had to ascertain whether ENEL was selling at an artificially low price or behaving like a rational market economy operator. Given the monopoly over electricity generation and supply held by ENEL, there was no competitive market price to which the Commission could refer to assess the existence of an advantage. Therefore, the Commission devised a method to identify the lowest theoretical market price at which a rational supplier would be prepared to sell to its ‘best customer’ (largest consumer with flat consumption profiles) in the specific circumstances of market in Sardinia and Veneto: a rational supplier would seek to cover at least its marginal production costs (baseload price), plus a fraction of its fixed costs.”

<sup>132</sup> Article 37 of the Greek Law No. 4001/11. This Article provides that a permanent arbitration shall be organised by RAE, in front of which disputes arising in the energy sector could be resolved, upon agreement by the parties involved in a written arbitration agreement.

since it concerned the supply of electricity below the market price by a State-owned company-itself<sup>133</sup>!

It is remarkable that DEI S.A decided to claim against the Award which was rendered, despite the fact that the arbitration agreement was signed in a consensual manner by both parties<sup>134</sup>. DEI S.A was not forced to sign the arbitration agreement. It was crystal clear that obviously Arbitration constituted the best choice for DEI S.A because the Greek litigation would be a very time-resuming choice granting a permanent decision after many years! Conclusively, as DEI S.A is the dominant player in the Greek electricity market and Aluminium S.A would not have the alternative choice of another electricity supplier, it would not be possible for DEI S.A to stop the supplying of electricity until the Greek Courts would render a perpetual decision as this would be an abuse of its dominant position<sup>135</sup>. Therefore DEI S.A decided that Arbitration would be the most rapid procedure (6 months) in order to render a decision<sup>136</sup> and it signed the agreement to arbitration on the condition that Aluminium S.A would make an immediate payment of a part of its outstanding debt and that it would pay its monthly electricity invoices.

*The final decision of the European Commission -The second success story for Aluminion!*

On the 25<sup>th</sup> of March 2015 the Commission came to its final decision about the claims of DEI S.A in relation to the Arbitral Award<sup>137</sup>. The Commission examined first if the decision to submit the dispute to arbitration granted in any manner an advantage

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<sup>133</sup> The 51% of Greek PPC,DEI shares are owned by the Greek State.

<sup>134</sup> The Arbitral Tribunal consisted of experts in the field and its members were agreed upon by the parties. While the arbitration was set in the context of the permanent arbitration of RAE under Article 37 of Law 4001/2011, under the applicable regulations the arbitration is organised by RAE only in procedural terms, as regards the required secretarial support. Thus, RAE did not have any influence on the Arbitral Tribunal itself.

<sup>135</sup> Article 102 TFEU and/or Article 2 of the Greek Competition Act (Law 3959/2011, as amended)

<sup>136</sup> Aluminium filed complaints to RAE, who ordered DEI to desist from terminating the supply of electricity. In decision 15/2013 of 31 January 2013, the latest of a series of decisions on that matter, RAE stated that the complainant could not terminate the electricity supply to Aluminium as long as the dispute was subject to arbitration. In addition, after the Arbitration Decision and following negotiations on the applicable tariff for the period after 31 December 2013, Aluminium filed a complaint to the Hellenic Competition Authority alleging that the complainant had abused its dominant position by seeking to charge an excessive tariff and threatening to terminate Aluminium's electricity supply should said tariff not be paid, thereby abusing Aluminium's alleged dependence upon the complainant.

<sup>137</sup> C(2015)1942 final. Brussels,25.3.2015. SA.38101 (2015/NN) (ex 2013/CP) – Greece Alleged State aid to Aluminion S.A. in the form of electricity tariffs below cost following Arbitration Decision.

to Aluminium S.A. Applying *the market economy vendor principle*<sup>138</sup>, the Commission considered it apropos to assess whether a prudent private market operator<sup>139</sup>, in a position similar to DEI S.A would have entered into such an arbitration agreement, establishing similar parameters to be taken into account by the Arbitration Tribunal with a view to updating and adapting the pricing terms included in the Supply and Settlement Agreement of 5 October 2010 for a certain period and resulting in the Arbitration Decision which in turn requires DEI S.A to apply such pricing terms during that period. The comparison between DEI S.A and a hypothetical private operator's conduct had to be made on the basis of available information and foreseeable developments at the time when the relevant arbitration agreement was signed by the parties<sup>140</sup>. The Commission came to a clear decision that “the arbitration decision, stating *ex ante* objective parameters for determining the invoice in a way that would be acceptable to a prudent private market investor, ensured that no advantage was granted to Aluminium”, therefore there was no need for further examination under Article 107(1)TFEU. The final decision of the Commission was momentous since it did not only reject the claim of DEI and declare that the Award did not constitute prohibited State aid under Article 107(1) TFEU, but it additionally made a very crucial remark: “*the net tariff of 36.6 EUR/MWh that was finally determined by the Arbitration Decision is still higher than the average smelter power tariff in Europe, which in 2013 was reported to be 41 USD/MWh, equivalent to 30.87 EUR/MWh at 2013 exchange rates*”<sup>141</sup>.

138 This principal is an expression of the more general market economy operator principle ("MEOP").Applying that principle, it must be assessed whether a prudent private market operator, placed in a similar situation as the complainant, would have acted in the same way as the complainant did. If this is the case, then the complainant's counterpart cannot be said to have obtained an economic advantage which was not available under normal market conditions. The comparison between the complainant's and a hypothetical private operator's conduct must be made on the basis of available information and foreseeable developments at the time when the relevant decision was made, here the decision to enter into the arbitration agreement advantage on Aluminium as alleged by the complainant.

139 C-290/07 P Commission Vs Scott, par.68 “First of all, as was observed by the Advocate General in points 138 and 139 of his Opinion, in order to determine whether the sale of land by the public authorities to a private individual constitutes State aid, the Commission must apply the private investor test, to determine whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires the Commission to make a complex economic assessment (see, to that effect, Case C-56/93 *Belgium v Commission* [1996] ECR-I 723, paragraphs 10 and 11, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I- 4035, paragraphs 38 and 39)”.

140 T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale Vs Commission*,par.246

141 T-352/15 *DEI S.A Vs Commission*. The above decision has been brought before the General Courts by DEI, claiming that the decision has to be annulled, the result is pending.The application of DEI relies on six pleas in law. The first plea in law is a claim of an infringement of an essential procedural requirement, in that the contested act does not satisfy the procedural requirements which are necessary for the adoption of such a decision.The second plea in law is a claim of absence of a sufficient statement of

The Commission decided to utter in its decision the problem of the Greek industries which are intensive electricity users! The European Commission did not hesitate to characterize the offered “preferential” price by DEI S.A for the most intensive user Aluminium S.A as the *higher than the average smelter power tariff in Europe!* Coming to a conclusion, it is clear that Greece has to take initiatives, which will be compatible under the EU State aid Law, in order to help the Greek industries to reduce energy costs and remain competitive in the European Market! Otherwise under the price and cost elements that are exhibited by the dominant player DEI S.A and additional charges on the price per kWh, as the ETMEAR no intensive industry can survive and remain competitive within the Greek territory.

## **Conclusion**

It is clear that State aid in the energy sector can undoubtedly have multidimensional positive effects, but only if it is applied in the right manner and according to the law. State aid-support schemes can fortify the environmental protection, the climate change, energy sustainability and the competitiveness of industries as intensive electricity users, without causing distortion of the competition within the internal Energy market. But State intervention in the form of State aid measures, can be successful, without causing distortion of competition, only if it constitutes a part of an organized and precise Energy policy of a Member State.

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reasons, contradiction and breach of the obligation to examine all relevant matters of fact and law with respect to the finding that the Arbitration Agreement set ‘*clear and objective parameters*’ which ‘*limited the discretion of the arbitrators*’ and had as a ‘*logical consequence*’ the finally determined electricity tariff. The third plea in law is a claim of a manifest error of law in the interpretation and application of the principle of the prudent private investor and of Article 107(1) and Article 108(2) TFEU, as concerns the finding that the electricity tariff determined by the decision of the Arbitration Tribunal is ‘*the logical consequence of properly defined parameters in the Arbitration Agreement*’. The fourth plea in law is a claim of a manifest error of law in the interpretation and application of Articles 107 and 108 TFEU with respect to the finding that the Commission did not have to engage in complex economic assessments and a manifest error of law and a manifest error of assessment of the factual circumstances in so far as the Commission failed to examine crucial issues with respect to finding whether or not there was State Aid. The fifth plea in law is a claim of a manifest error of law in the application of Article 107(1) and Article 108(2) TFEU, and a manifest error of assessment of the factual circumstances as concerns the application of the test of the prudent private market economy operator. The sixth plea in law is a claim of a manifest error of law in the interpretation and application of Article 107(1) TFEU, infringement of the obligation to state sufficient reasons and a manifest error of assessment of the factual circumstances as regards the decision by the Commission not to further investigate the complaint made by DEI in 2012 pursuant to Article 108(2) TFEU, on the basis of the finding that that complaint ‘*has become without object*’ following the delivery of Decision 1/2013 of the Arbitration Tribunal. The result is pending see at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-352/15>

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