State aid in the energy sector: An approach from the European case law.

How PreussenElektra affected adversely the evolution of Feed-in Tariffs

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A thesis submitted for the degree of

Master of Science (MSc) in Energy Law, Business, Regulation and Policy

February 2017
Thessaloniki – Greece
Declaration

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

February 2017
Thessaloniki - Greece
Abstract

This dissertation was written as a part of the Msc in Energy Law, Business, Regulation and Policy, at International Hellenic University and deals with the complex issue of state aid in the energy sector. More specifically, in recent years the need for measures to protect the environment, necessitated the intervention of the state in the energy sector variously. Special attention in order to meet the European Union its global requirements has been given to the production of electricity from renewable energy, for which the state aids are particularly important due to the large production costs. A whole legislative system have been configured by Member States around the support schemes for the generation of electricity from renewable energy sources, which at the same time attempt to keep up with the primary objective of the European Union, namely the integration of the common market. The FIT schemes are not only the most widespread national support schemes but also have been particularly addressed by the European Court mainly after 2001 and the landmark ruling of PreussenElektra. However, even after several years the European Court insists on maintaining the confusing results of PreussenElektra, forming a retrograde approach regarding the FIT schemes and other support mechanisms in conjunction with article 107 (1) TFEU. Comparing PreussenElektra with Vent de Colère, considered by the ECJ recently, will be given the answer to the fundamental question of whether and to what extent there were developments in the way that the case law approaches the FIT schemes in relation with art. 107(1) TFEU and why their design (based on PreussenElektra) deviated from the completion of the internal market. All that remains is to examine whether the new Guidelines could be the solution to the problems created by PreussenElektra.

I would like to thank my supervisor Pr.Dr. Antonis Metaxas who, with his specialized and academic knowledge in the field of Energy, as well as the EU Competition Law and EU State Aid Law, inspired me from the very first contact of his lectures to deal with the complex issue of state aid in the energy sector. I wish also to acknowledge my supervisor not only for his contribution and his guidance, but also for helping me to understand the significance of the critical thinking.

Keywords: renewable energy, green electricity, FIT-schemes, State Aid, Internal Market, New Guidelines.
Preface

I couldn’t imagine that the law of State Aid both hides great interest and different aspects for study. The recent developments in the energy sector mainly with the new European Guidelines, sparked my interest for further study on the issue. The aforementioned Guidelines has also been involved with the compatibility of state aid to the renewable energy and promoting the harmonization of national support schemes for the production of green power. Precisely for this reason I wanted to deal with the case law and its evolution on the subject of state aid in conjunction with the promotion of the production of electricity from renewable energy sources for the completion of my studies and the acquisition of the degree Msc in “Energy Law, Business, Regulation and Policy” from the International Hellenic University. I hope this thesis can be useful and to shed light into the complex issue of State Aid in the energy sector and specifically in the approach of the issue of FIT support schemes in relation with art.107 par.1 TFEU by the European Court of Justice.
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Introduction

The oil crisis during the 1970s and the major events that followed, coupled with the environmental pollution, created a favorable regime for the development of renewable energy resources. It is not a coincidence that now the generation of electricity from renewable energy constitutes a great part of the national policy of the most of the states\(^1\), because it is not only environmental friendly but also is the solution in the problems of energy security and global warming. However, the production of electricity from renewable energy sources is quite expensive compared with conventional energy sources\(^2\) and the public support for the green producers is important in order to be more competitive in the energy market. This intervention, in the field of Europe, usually bear the form of state aid and so must be compatible with the internal market as defined in Article 107(1) TFEU. Such a favorable system for green electricity applied in Germany\(^3\), which has created a FIT support scheme\(^4\) that has been declared by the Court as legitimate under the rules of state aid law. Although the ruling adopted in this case (PreussenElektra) was a milestone in the design of similar support schemes for the production of green electricity, has created several problems to be addressed in the following chapters.

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\(^4\)In this thesis the support scheme will be used extensively and refers to the support mechanism used for the promotion of electricity generated from renewable energy sources, as defined in Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and repealing Directive 2001/77/EC and 2003/30/EC. OJ L-140, art. 2.
CHAPTER I. The legal framework of the renewable energy in Europe

The legislation for the development of renewable energy\textsuperscript{5} was affiliated with the key objectives of the European Union and especially with this for the promotion of the sustainable development\textsuperscript{6}. One of the major examples is the article 11 of the Treaty on the Functioning of the European Union (TFEU or Treaty) [ex article 6 TEC], in which the need for the integration of environmental requirements in European policy, has as adjunct goal the increase of sustainable development. As far as the ex-article 174 TEC [now article 191 TFEU] is concerned, where only referred that ‘prudent and rational utilisation of natural resources’ was needed for the protection of the environment, no specific policy hadn’t been adopted on renewable energy in contrast to the Treaty of Lisbon, which in the art. 194 TFEU, integrated the policy of renewable energy\textsuperscript{7}:

“In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy network.”

1.1. The evolution of renewable energy legislation in Europe

The renewable energy legislation was deployed mainly by Green Papers and White Papers, in which mentioned either the EU energy policy in general or more specifically the purposes of the renewable energy policy. In 1995 the

\textsuperscript{5}The definition of renewable energy is set in the Directive 2009/28/EC (The Renewable Energy Directive).


\textsuperscript{7}Consolidated version of the Treaty on the Functioning of the European Union - Article 194, Official Journal 115 , 09/05/2008 P. 0134 – 0134.
Commission published a White Paper titled\(^8\) ‘An Energy Policy for the European Union’, with the aim to promote the increase of renewable research and programs\(^9\) and the next year (1996) continued with a Green Paper on renewable energy, proposing the target of 12% use of renewable energy by 2010\(^10\) in the final consumption of energy in Europe\(^11\). This target, not only was endorsed in 1997 by the Council in its Resolution for renewable sources of energy\(^12\) but also outlined in the Commissions White Paper of 1997 titled: ‘Energy for the Future: Renewable Sources of Energy’\(^13\) and eventually adopted in the Directive 2001/77/EC for the promotion of electricity produced from renewable energy sources in the internal electricity market (Renewable Electricity Directive)\(^14\). For the first time, the Directive set indicative targets for each Member State in order to increase the share of renewable to 12% by 2010 for the final consumption of energy and created incentives for the promotion of national support schemes for the renewable energy. According to art. 4 of the Directive: ‘Without prejudice to article 107 and 108 TFEU [ex articles 87 and 88 of the Treaty] the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, on the basis that these contribute to the objectives set out in article 11 and 191 TFEU [ex articles 6 and 174 of the Treaty] and according to this adjustment was recognized the necessity for the development of renewable energy in the context of state, giving the freedom to the Member States to establish national support projects, which have to be compatible to the primary rules of the internal market, like the art. 107 TFEU, in order to exploit their own resources and especially their renewable energy sources.

\(^9\)Communication from the Commission - Energy for the future: renewable sources of energy - White Paper for a Community strategy and action plan. COM (95) 682 final.
\(^12\)Council Resolution of 27 June 1997 on renewable sources of energy (97/C 210/01).
1.2. The necessity of harmonization of national support schemes

As the climate change has started to affect significantly the global community and the dependence of the European Union by imports of natural gas was increased, the necessity for more stringent targets was obvious\textsuperscript{15}. The first Strategic EU Energy Review was adopted in 2007 by the Commission named: ‘An Energy Policy for Europe’\textsuperscript{16}. The progress however of the spread of renewable energy sources faced difficulties\textsuperscript{17}, so the European Commission in its review identified the problem: ‘The main reason for the failure to reach the agreed targets for renewable energy –besides the higher cost of renewable energy sources today compared to “traditional energy sources – is the lack of coherent and effective policy framework throughout the EU and a stable long term vision’\textsuperscript{18}. Following the findings of the European Commission, the need for harmonization of support schemes was necessary\textsuperscript{19}, according with its report in 2008. Finally in 2009 the new Directive was adopted by Commission changed the EU policy and characterized by innovations for the promotion of the renewable energy with legally binding targets, in comparison with the previous Directive, and guidance for cooperation between the Member States with the aim to give a solution to the problem of the harmonization. Firstly, established the target of 20% for the renewable by 2020\textsuperscript{20} and secondly in article 3 of the Directive it is stated that: ‘Member states shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory […]’ and this is means that Member States can adopted National Action Plans for their own renewable energy resources in order to succeed in their targets of the Directive\textsuperscript{21}. However, contradictory is the fact that, on the one hand was pointed out that while there is


a strong effort to promote the cooperation between the Member States in order to accomplish a compliance of their targets, as indicated in art. 6 & 7(1) of Directive\textsuperscript{22}, on the other hand according to art. 2, in which the definition for the support schemes provided: ‘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\textsuperscript{23}, the freedom of Member States to determine their national supports schemes was maintained and this practice creates concerns in relation to the EU single market, because once again the harmonization of the national support schemes was not in the focal point.

CHAPTER II. The notion of state aid

In the previous chapter, were analyzed the evolution of the legislative framework for the promotion and the development of renewable energy and in particular of RES-E support schemes. Continuing, it will be obvious how the case law of FIT support schemes in conjunction with the Directives, hinder the integration of the internal market, but first, the legislative framework of the national support schemes of the Member States for green electricity, should be compatible with the rules and the criteria of State Aid and so the concept of state aid is important to be analyzed in this next chapter.

2.1. The EU State aid law and the renewable energy

The creation of an internal market and its proper functioning is one of the main objectives of European Union. The definition of the internal market is


established in Article 26 (2): ‘The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured […],’ and this is why most of the sectors, between them and the energy sector, have liberalized. But except the idea of the creation of a single market there is a policy for the sustainable development, in which the financial support and the incentives for the renewable energy sources, comes into a conflict with the internal market. This contrast is more obvious in art 194 TFEU: ‘In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States […]’, in which on the one side there is the necessity not only for the preservation of the environment but also for its improvement and on the other side this effort have to be supported by the Member State with respect to the rules of the internal market. All the above are related with the support of green electricity, because the national support schemes for its promotion, most of the times may be the reason for the violation of the rules of state aid and hence the rules of the single market.

2.2. The criteria of article 107(1) TFEU.

Checking for the compatibility of State aids with the internal market of the European Union is very important because it aims to ensure that competition is not distorted by the interventions of the state. This is why the rules for state aid are significant and thus is one of the most essential pillars for the internal market: ‘State aid control has become an essential pillar of the Single Market, ensuring that companies are able to compete on equal terms independently of where they are located and providing safeguards against Member States engaging in mutual subsidy races at the expense of each other and of the general European interest. Such subsidy races would not only lead to a wasteful

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25 See supra note 7.
use of scarce resources, they would be to the detriment of the cohesion of the EU' according to the report for competition policy in 2010.

In art. 107 (1) TFEU, enumerated the four criteria, which, when fulfilled jointly, render a State aid incompatible with the internal market. First of all, the rules that related with state aid control are laid down in articles 107-109 and in art. 107 (1) TFEU there is the definition of state aid:

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

Based on the above ruling someone can easily conclude that Article 107 (1) TFEU constitutes a negative condition for the arrangements of the Member States which grant national aid for certain purposes, such as for example the aid granted for the development of renewable energy sources. However, there are some exceptions in paragraphs 2 and 3 of Article 107 TFEU, which are applied in the second stage of the evaluation of the compatibility of State aid. More specifically, after being reviewed the compatibility of State aid on the basis of the four criteria that will be discussed further below, and stated in this case that the State aid is illegal, then evaluated whether it can be justified by the administration on the basis of the exceptions in paragraphs 2 and 3 of article 107.

The four criteria characterizing an aid as illegal must cumulatively be met and will be referred and comprehensively analyzed below:

2.2.1 Aid granted by State or through state resources

With regard to the first criterion of Article 107 (1) TFEU is meant to say that the interpretation is very wide and there were not few times that created confusion...
to the Courts. The wider concept of aid was found in the case *Banco Exterior de España* in 1994\(^{33}\) by the Court of First Instance:

‘*...the concept of aid is thus wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.*’

A few years later, and specifically in 2000, in the case *Landbroke Racing Ltd*,\(^ {34}\) the Court found that even the support to a firm by a local or regional authority may belong to the first criterion of Article 107 (1) TFEU and could be considered as unlawful State aid. A determinant role in this case played the fact that the local or regional communities are part of the state budget and therefore control largely the origin source of money\(^ {35}\), so it is no coincidence that many times the schemes for the support of renewable energy sources was illegally under this criterion. However station in the interpretation of state resources was the ruling of *PreussenElektra*, which is not only important for the law of state aid but also a milestone for renewable energy and the national support schemes.

2.2.2. Economic Advantage

As far as the second criterion is concerned, the economic advantage related with the condition, in which a recipient undertaking receives an economic advantage from the state, that will not receive in case of normal business\(^ {36}\). It is very interesting to see how the case law addresses the condition of economic advantage. First of all, an undertaking has to be the recipient of the advantage ‘*any natural or legal person, regardless of legal status and means by which it is financed, who carries out economic activities of certain regularity and duration and which could be done for remuneration*’\(^ {37}\). In Altmark case the ECJ put forward according to economic advantage: ‘*Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings […] or are to

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\(^{35}\)See supra note 27, p. 42


be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions [...] are regarded as aid. Although, in the same case, which is a landmark case for the sector of the Public Service Obligations, the economic advantage constitutes an exception in the services of general economic interest. Moreover, the economic advantage is absent when the intervention of the state has got a private character and for this reason it is important to be applied the private investor test by the Commission. So, if it is concluded, that the intervention of the state has the character of a private investor, the measure is not faced like an economic advantage.

2.2.3. Selectivity

According to the criterion of selectivity, the intervention of the state must benefit some undertakings or the production of certain goods more than others but if the measure is in general benefits all the undertakings of a Member State without distinction, then there is not illegality according to the state aid rules. Excluding the general measures of the State from the state aid rules of art. 107 (1) TFEU, there is a strong possibility to create uncertainty, as in the case of Adria Wien in 2001 with the tax exemption on electricity taxes for the producers but not the suppliers. In its ruling the ECJ recognized that a measure can be justified if it concerns a general scheme but in the case of Adria Wien Pipeline this exemption did not apply and the rules of state aid was taken place. Another case with environmental context is the case British Aggregates Association (2008), in which according to the ruling of European General Court, a measure with environmental objective is not sufficient to justify a selective measure applied by the State because the main purpose of the art. 107(1) TFEU is the effects of a measure and not the specific goal of the measure.

39See supra note 27, p.43.
40See supra note 36,p.2.
42See supra note 36,p.2.
43See supra note 36,p.2.
45See supra note 44,par.3.
2.2.4. Effect on trade and competition

Last but not least, is the analysis of the last two criteria, which are inseparable linked as a general rule. So, the main effect of an illegal aid is the effect on the trade and the distortion of the competition. In the Philip Morris case the ECJ held: ‘when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid’. The distortion of the competition is difficult to be proved, so it is sufficient to be shown if the measure actually threatens the distortion of competition. The last indication for state aid is that when this aid affects the trade between two or more Member States and this is what exactly the Commission must prove, regardless of the amount of the aid or the size of the recipient. So, when the beneficiary undertaking is a part of an existing and active market, where other member states and companies are brought into action, then the last criterion is met. Therefore in relation to the national support schemes for green electricity, these fall in the above case, because of the integration of the electricity market.

2.3. The exceptions of art.107 para. 2 & 3 TFEU

After the analysis of the four criteria set out above, we conclude that if these criteria are met cumulatively then the aid shall be deemed illegal according with the article 107 (1) TFEU. However, ‘the principle of incompatibility does not amount to a full scale-scale prohibition’ and this leads us precisely to the implementation of the second stage of the examination of state aid, which concerns the exceptions in paragraphs 2 and 3 of art.107 TFEU. The exceptions that referred to paragraph two are related with aid of social content, aid to compensate damage caused by natural disasters or exceptional occurrences, aid to compensate Germany for the economic disadvantage caused by the division of the country and they are compatible with the internal market besides the first evaluation as illegal. Furthermore, the same comes about with the provisions of article 107(3) TFEU and so the aid may be considered to be compatible with the internal market. As far as, the national support schemes for

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48 Case C-280/00 Altmark Trans Gmbh v. Nahverkehrsgellschaft Altmark Gmbh [2003] ECR I-1774., par. 78
49 See supra note 27, p.42.
the promotion of the renewable energy are concerned, the Commission with a broad discretion power\textsuperscript{52} publishes ‘communications’, ‘frameworks, and ‘guidelines’, in order to provide to Member States a specified approach according to main objectives. For the support of RES-E there are two instruments: ‘Community Guidelines on State Aid and Environmental Protection’ (Environmental Guidelines)\textsuperscript{53} and the ‘General Block Exemptions Regulation’ (GBER)\textsuperscript{54}. According to the Environmental Guidelines, there will be a further analysis in the last chapter, because it is important for the approximation of the questions raised in this thesis, but first in the next chapter.

CHAPTER III. Feed-in tariffs and the approach of the European case law

Continuing, before the analysis of the case law about the FIT support schemes and their compatibility with the State Aid rules, will be referred nominally the different categories of national support schemes and will be given the definition of the most important instrument which is the feed-in tariffs.

3.1. The definition of FIT support schemes

As mentioned, neither the Directive 2001 nor Directive 2009 clearly outlined what support measures have to be taken in each Member for the promotion of renewable energy sources (see in chapter one the reference of art. 2 of the RED 2009). So, the Member States have to select the instruments for RES-E promotion which are\textsuperscript{55}: Feed-in tariff (FIT), Feed-in premium system (Premium), Quota obligation, Investment grants, Tax incentives or exemptions, Fiscal incentives. Feed-in tariffs is one of the most important support mechanism (23

\textsuperscript{52}See supra note 27, p.46.
\textsuperscript{53}Community Guidelines on state aid for environmental protection, OJ 2008 C-82/01.
\textsuperscript{54}Commission Regulation (EC) NO 800/2008 of 6 august 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption regulation). OJ 2008 L-214.
Member States use FIT schemes\textsuperscript{56} for the promotion of the renewable energy and its definition is: ‘FIT schemes are regulated prices for RES-E fed into the grid, set by law for a certain period of time, and typically set higher than the achievable market prices’\textsuperscript{57} and the purpose of the scheme is to ensure a profit for the RES-E producers. Let’s move on the analysis of PreussenElektra, one of the most important decisions dealt with a FIT plan and a landmark case of their design by public authorities, not only for FIT schemes but also for other support schemes for green electricity. It is important to be said that emphasis will be given to the analysis of two important decisions concerning FIT projects, like the analysis of PreussenElektra in comparison with the more recent case Vent de Colère, with the purpose to become apparent whether the case law developed according to the FIT schemes in relation with art.107(1)TFEU but there are and other important cases which based on PreussenElektra that can’t be analyzed in the context of this thesis.

3.2. PreussenElektra case

First of all, as far as the background of the case, this related with a German FIT law which purposed to promote the RES-E production in Germany. According to the above law the distribution undertakings were obliged to purchase RES-E which produced in their area at minimum prices and by this way provided a compensation mechanism\textsuperscript{58}. The dispute is between PreussenElektra which is a conventional electricity producer and a Transmission System Operator (TSO) and Schleswag which as a DSO, obliged to purchase electricity from renewable energy at minimum prices. As regards this minimum price, its calculation based on the average nationwide sales price for electricity but differentiated for RES because of the technology used by the producers and so the price paid by DSO for RES was higher than its real economic value. The dispute was created because PreussenElektra besides the fact that as TSO obliged to pay the additional costs to the Schleswag, according to a hardship clause contained to the FIT scheme, refused to fulfill this requirement. It is significant to be mentioned that PreussenElektra had got the majority of shareholding in

\textsuperscript{58}Case 379/98 PreussenElektra par. 6-7, 9.
Schleswag and the remaining part was under control by municipal authorities. Examining this dispute, the primary issue raised, was if the purchasing obligation and the compensation mechanism was an illegal state aid according to the art.107 (1) TFEU. Another subject was the compatibility of this law with the principle of the free movement of goods art. 34 TFEU that will be not analyzed in this dissertation but its junction with the subject is important for the formulation of the conclusions.

According to the ECJ the measure was not transferred an economic advantage to the RES producers, “since it guarantees them, with no risk, higher profits than they would make in its absence”. Furthermore, the question if the measure distorted competition and affected the trade between Member-States, wasn’t examined by the ECJ. So, the criterion of the art. 107 (1) TFEU “granted by a Member State or through State resources”, will be the fundamental question that have to be answered in relation with this dispute and hence the constitutive issue of the notion of state aid. The ECJ, firstly, issued that according with its case law only the advantages that granted directly or indirectly through State resources are regarded as aid and at the same time rejected the argument in which “aid granted through State resources” related with measures that financed through public funds and “aid granted by a Member State”, related with all the other measures that not be financed through state resources. The ECJ stated that the above distinction did not:

[S]ignify 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.

This statement extensively referred to other cases like Sloman Neptun, Van Tigelle, Ecotrade and Piaggion. The Commission and PreussenElektra held that in instant case the measure obliged the competitors to transfer money

60See supra note 58, par. 54.
61Ag’s opinion in PreussenElektra case, par.112.
62See supra note 58, par. 58.
63See supra note 58, par.57.
directly to the RES producers.\textsuperscript{65} The Commission concentrated to the cases \textit{Ecotrade} and \textit{Piaggion} and to other data in order to classify the German FIT scheme as an illegal aid, stated that the German State didn’t make the difference if the measure will be financed by public or private undertakings and this is a problem because the German public authorities hold the majority of the capital of the plurality of the firms that activated both as conventional electricity producers and TSOs as well as DSOs. The considerations of the ECJ about this argument will be seen below.

Continuing, according to the ECJ the purchase obligation didn’t involve any direct or indirect transfer of state resources to the producers of electricity from renewable energy. Therefore, there is no transfer of state resources in the case of the allotment of the financing burden derived from the purchase obligation for the Distribution System Operator and allocated between them and other private firms\textsuperscript{66}, so the Court concluded that: “the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings” was not characterized as an illegal state aid. This, however, generating high interest is that the Court, did not forward to the analysis, whether the support plan conveys resources and whether these resources come from state resources\textsuperscript{67}. In this case the fixed minimum price compared with the lower market value, indeed transferred resources (giving to the electricity producers of renewable energy an advantage in comparison with the producers of fossil fuels), but it isn’t determined by the Court whether those resources constitute actually state resource or not\textsuperscript{68}. But the view of the AG in this case was\textsuperscript{69}:

\ldots\textit{No public authority enjoys at any moment any rights with regard to those sums. In fact they never leave the private sphere.}

This statement was the reply on the Commission’s argument that the support scheme helps the conversion of the private resources to state resources\textsuperscript{70}. More specifically, according to the above argument the payment of the TSO’s to the DSO’s without a quid pro quo, creates parafiscal charges (which are used to finance the aid measures). This argument can be compared with the effects of the taxation system, where the resources derived from the private sector

\textsuperscript{65}See supra note 61, par. 149.

\textsuperscript{66}See supra note 58, par. 59-61.

\textsuperscript{67}See supra note 58, par. 59 and Ag’s opinion par.112, 115,116,121,125.


\textsuperscript{69}AG’s opinion in PreussenElektra case, par.166.

\textsuperscript{70}See supra note 69, par.163.
entrusted for a public interest purpose and undoubtedly was the most powerful argument for the characterization of the measure as state aid\textsuperscript{71}. The main component is if the state exercised control to the resources according to the AG’s view, but the resources in this scheme canalized to a public interest purpose without the intervention of the state except the adoption of the legislation. So, the ECJ (in par. 56), continuing, failed to examine whether the measure financed wholly or partially by the state, giving an indulgent approach about the RES-E scheme of the case. But the foundation of AG on this case gives a contradictory explanation in which initially the fact that two of the eight undertakings that participating in the scheme are controlled by the state, cannot justify that the state finance the undertakings which are subject to aid\textsuperscript{72}. Besides, the fact that in the instant case there are not involved publicly owned undertakings, doesn’t prove that the FIT scheme partially financed from the state\textsuperscript{73}. As concluded, the AG’s foundation indicates that the ECJ with this lenient approach created an uncertainty in the design of FIT schemes.

Last but not least, the ECJ examines two more arguments for classifying the scheme as state aid\textsuperscript{74}. According to the first argument, the scheme because of the compensation and purchase obligation affected not only the undertakings but also the state with a loss in the tax revenue\textsuperscript{75}. Under the second argument, the art. 107-108 TFEU in order to be effective have to interpret the state aid so as to comprise measures which have coequal effect and to this purpose the Commission invoked the art. 101 TFEU. About this argument, which read in conjunction with article 4[3] para. 2 & 3 TEU, the ECJ referred that the art. 101 TFEU related only with the conduct of the undertakings and not with the measures decided by the Member States and the art. 4 [3] shouldn’t be used in this case because it doesn't fall within the art. 107 TFEU\textsuperscript{76}.

The ECJ, in the light of the above considerations concluded that the FIT scheme with the compensation and purchase obligation that conclude, couldn’t be characterized as state aid.

3.2.1. The assessment of the judgment

\textsuperscript{71}See supra note 69, same paragraph.
\textsuperscript{72}See supra note 69, par. 175-177.
\textsuperscript{73}Case 379/98 PreussenElektra par. 60.
\textsuperscript{74}See supra note 69, par. 185-189.
\textsuperscript{75}Case 379/98 PreussenElektra par. 62.
\textsuperscript{76}See supra note 75, par. 64-66.
Before proceeding with the analysis of the subsequent decision and the comparison between the two decisions it is necessary to be referred some basic conclusions of the judgment. In case of PreussenElektra the ECJ omitted to analyze whether the transferred resources constitute state aid and concluded that as far as the state or the public authorities are not involved in the managing of the advantages and the economic burden between the private undertakings, then the support scheme is not amount to state aid. In this way the judgment besides this omission, neglected to deal with the broader meaning of the art. 107 (1) TFEU like the case of the control of the state in private funds\textsuperscript{77} and so this approach was easy to create a legal uncertainty in the designation of FIT schemes.

3.3. Vent de Colère case

As far as the background of the case is concerned, on December 2013 the European Court of Justice have concerned with the case Vent de Colère. According to this decision the Court followed the opinion of the Advocate General and eventually found that the production of electricity from wind installations incorporating an intervention of the State and can be classed as state aid according to Article 107 TFEU\textsuperscript{78}. Attention mainly was given to the first indication of Article 107 (1) TFEU, i.e. if the support plan of the French State and its intervention were an unlawful State aid, besides the considerations of France that the scheme was based on this of PreussenElektra and therefore it doesn’t meet the first criterion of Article 107 (1)TFEU\textsuperscript{79}. The ECJ therefore once again judged the case on the basis of the ruling of PreussenElektra and focused on the economic impact that measures had.

To begin with, the measure concerns a French FIT scheme in which there is a purchase obligation of renewable energy produced by wind power at prices higher than the price of the market for electricity. The DSO’s are the undertakings (that connected with the wind power installations) which are charged with this obligation. There are similarities with PreussenElektra but in this case the calculation of the price is made not by the law but from the French Minister for Economy and Minister for Energy in collaboration with French


\textsuperscript{78}Opinion of the Advocate General Jaaskiner on 11 July 2013.

Energy Regulator and the Higher Council of Energy\textsuperscript{80}. The mechanism provided to the distributors the opportunity to be compensated for the above additional costs, derived from the purchase obligation, was named Caisse des Depots “CDC” (a public group of general interest) and the compensation obligation passed to the final consumers (in the case of non-compliance there is an administrative penalty\textsuperscript{81}).

The main legal question here is if the offsetting mechanism i.e. the procedure for the financing compensation to the distributors for the additional costs which are obliged to pay in higher price for the purchasing of electricity produced by wind\textsuperscript{82}, is legal according to the art.107 (1)TFEU. The national court having found that there are met the three of the four conditions\textsuperscript{83} for the characterization of the scheme as State aid\textsuperscript{84} and subsequently requested preliminary to the ECJ to examine if the aid granted by the State or through state resources. The latter Court identified that when a measure is assignable to the State and be granted indirectly or directly through state resources\textsuperscript{85} is state aid and the above offset was clearly amounted to the first criterion. More specifically, the offsetting mechanism was attributable to the State because was established by law (Law 2000-108). Continuing the funds for the compensation for the DSO’s was collected by the final consumers, which are obliged to pay for this offsetting mechanisms because of the administrative retributions, trusted to the CDC as an intermediary. Moreover, there was the possibility for the purchasing obligation to be covered by the State if the collected charges was inadequate to cover the additional costs. So, it should be noted that when a private or public body found from the state to manage the granted aid then the aid is illegal (this criterion analyzed and in the case Italy v Commission\textsuperscript{86}). Moreover, the ECJ concluded that the management of the charges from the CDC was the main reason to characterize the CDC as an intermediary which was under the state control.

Therefore, the ECJ distinguished the above case from the PreussenElektra, where pointed that the private undertakings weren’t under the control of the

\textsuperscript{80}See supra note 79, p. 254.
\textsuperscript{81}See supra note 79, p.254.
\textsuperscript{82}The obligation to purchase the energy produced using windpower was established by law No 2000-108 (Articles 5 and 10).
\textsuperscript{83}Case C 216/12 Vent de Colère, par. 9, 15.
\textsuperscript{84}Decision No 124852 of 15 May 2012.
\textsuperscript{85}See supra note 83, par.16.
\textsuperscript{86}Case 173/73 Italy v Commission, par.16.
state and the purchase obligation was accomplished via their own state resources and hence the ECJ illustrated the issues that didn’t analyze namely the funds in PreussenElektra couldn’t be regarded as state resources because they were not under state control. So, the ECJ validates the PreussenElektra in this case but according with the AG’s point of view there are and other means that could be used in order to distinguish the above cases. The primary factor distinguishing the Vent de Colère from the mechanism examined by the Court in PreussenElektra,

“is that the burden of financing the obligation to purchase electricity from wind power at a price higher than the market price applies to all consumers of electricity in France, irrespective of whether they purchase green energy or not, knowing that, in the liberalised electricity market, the achievement of which is one of the primary objectives of the Union, exists competition between the producers and the suppliers of energy. While conceding that, physically, electricity from different sources is mixed together in the distribution network, I note that, with regard to the mechanism in issue in the main proceedings, it is impossible for the suppliers to differentiate, for tariff purposes, between the different categories of consumers, and that it is impossible for consumers to opt for or against purchasing renewable energy.”

There are some comments that arising from the abovementioned opinion. Firstly, that the AG concentrated on a different policy reason that is far from the question if the funds are amount to state resources and secondly the fact that the consumers didn’t have the opportunity to choose if they want to purchase renewable energy or not, is a financial burden with additional costs equivalent to state aid.

3.3.1. The assessment of the judgment

As regards the results obtained after the analysis of the above case, is obvious that the European Court of Justice didn’t made any step forward because it only had declared that any intervention of the State which is not identical to the PreussenElektra is an illegal state aid and upheld once again the ruling of PreussenElektra, enhancing the favorable regime was set up from this. However

87 AG’s opinion in Case Vent de Colère par. 50-51
89 See supra note 88, p. 258.
the decision of the Court was not particularly surprising as the RES-E support scheme was a flagrant violation of the French State, because it didn’t notify the support plan on the Commission, relying on the favorable but unclear yet scheme drawn up by PreussenElektra.

3.4. The observations arising

As mentioned above, the decision of PreussenElektra created a dogmatic issue on the law of state aid, which subsequently proved to be insufficient and uncertain as far as the state intervention in the design of national support mechanisms for renewable energy sources, is concerned. Besides the ambiguity of the above ruling, the Court after a decade and a host of cases struggles to patronize its effects and this is proven and in case Vent de Colère90, because these two jurisdictions are compiled. First of all it is important to remember that a support scheme should be assessed in detail and case-by-case whether eventually it is an unlawful State aid or not, but theoretically, there are some limits emerged from PreussenElektra for the adoption of a FIT scheme in order to be legal and not fulfill the conditions of Article 107(1) TFEU, which also are vague. Combining the purchase obligation and the minimum prices with the ability to pass on the cost to the final consumers but not in the way the French state did, it is feasible for the FIT plan to escape from the prohibition of art. 107(1) TFEU and hence to be considered as lawful (this occasion will be analyzed below [footnote 96]). This practice cannot be applied and have been abandoned the last few years, because most of the Member States are organizing the compensation mechanism of their support schemes91, as this is a difficult process for a private undertaking to manage these resources without the order and the intervention of the state. In the case of Vent de Colère, this was exactly happened when the established by the State entity functioned as an intermediary, managed the additional costs and this was clearly constituted state aid, even if it didn’t based directly on state resources. As mentioned above, an intermediary was designated in order to congregate and manage the additional costs, but in this situation (even if the intermediary was not a public body but anyone actor) the main purpose here is that when an actor designated for the administration of the funds of the scheme by law or a

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public/governmental decision, then the design is amount to state aid, since it will be considered that the state possibly exercise control on the resources. At the same time, the occasion in which an offset mechanism constituted by market operators, with the aim to administer these resources voluntarily is extremely difficult to be done and so, it is important to be said that these instructions are misleading for the Member States besides the fact that it was happen in the case of PreussenElektra. Therefore, the conclusion is that the French State seeking to imitate the support mechanism for renewable energy sources, considering that meet the conditions presented in the case of PreussenElektra, herded in flagrant violation of Article 107 (1) TFEU.

The persistence of the ECJ in a regressive approach about the FIT schemes, in relation with the freedom of Member States about the selection of their national RES-E support scheme, created a lot of problems in the integration of the single market and the harmonization of the FIT schemes and the other support schemes in general with a common framework. But how the ruling of PreussenElektra comes into conflict with the common framework of national support schemes and hence the integration of the single market and its proper operation? The first observation related with the creation of a partial overlaying of the national regulations for the formation of their support schemes by the rules of state aid. It is easy to be noticed that initially appears to be a classification between the State interventions in the designation of a FIT support scheme and on the one hand is the system of PreussenElektra which if adopted by a Member State for the accretion of a FIT scheme will avoid the state aid control, and on the other hand are the cases like Vent de Colère with other similar cases (like the Essent, yet the new German law for the renewable energy, EEG 2012), in which the issue of the existence of an intermediary designed by a Member State for the management of the flow of the money

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92Case C 216/12 Vent de Colère.
93See supra note 88, p.258.
94See supra note 90, pp. 1-2.
98C-206/06 - Essent Netwerk Noord and Others
99The General Court confirms that the German law on renewable energy of 2012 (the EEG 2012) involved State aid, General Court of the European Union PRESS RELEASE No 49/16 Luxembourg, 10 May 2016.
constitutes an illegal state aid and are undergone in the state aid control. But as has been advocated above the ruling of PreussenElektra, besides the absence of an intermediary, accompanied by a legal uncertainty and a lot of omissions, so this is why most of the Member States that have followed this ruling believed that they didn’t grant State Aid and didn’t notify their national support schemes to the Commission (like the Italy, Poland, Greece\textsuperscript{100}), in order to be controlled whether they constitute state aid or not. So, the main problem as far as the first observation is concerned, is that the application of FIT schemes without prior notification to the Commission because they designated in relation to the ruling of PreussenElektra and considered as legal, are responsible for the distortions of the internal market, disrupting its proper operation. Furthermore, the second observation related with the problems derived from the existing legislation concerning the support of renewable energy (there is an analysis in the first chapter of this thesis) in conjunction with PreussenElektra. As is apparent from both RES Directives 2001/77/EC and 2009/28/EC, these are aimed at strengthening the RES-E growth at national level, where the Member States organize their own support scheme on the basis of their diversity (it is “vital that member States can control the effect and the costs of the national support schemes according to their different potentials”, as pointed in the Recital 25 of the Directive 2009/28/EC). In the same Directive achieving the objective to promote cross-border trade is simply a long-term goal, which also proves that it strives only for the success of the support schemes at national level and cross-border trade and cooperation between the Member States come in second place\textsuperscript{101}. But the problem does not stop here, as the same way adopted also and in superior rules such as the Article 194 para. 2 TFEU, where introduced the three basic energy rights of Member States “a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).”\textsuperscript{102} All the above enhanced the state discretion\textsuperscript{103} in the process of the selection of the national support schemes which already, because of their different categories, created problems in the harmonization of the national regulatory systems for the RES-E promotion. Furthermore, in the

\textsuperscript{100}See supra note 96, pp. 116-118.
\textsuperscript{102}Consolidated version of the Treaty on the Functioning of the European Union, Article 194 ,Official Journal 115 , 09/05/2008 P. 0134 - 0134
\textsuperscript{103}Forowich Magdalena (2011), State Discretion as a paradox of EU evolution, EUI Working Papers, Max Weber Programme, European University Institute, pp. 1-4.
enhancement of state discretion, contributes and the PreussenElektra with its “limp” limits and its omissions according to the main issue of “through state resources”, because it doesn’t offer a clear indication for the correct design of a FIT scheme and this is why most of the Member States create support schemes that are different between them and mainly illegal according to art.107(1) TFEU, something that didn’t happen if they based not in their decision practice(state discretion) for the creation of a legal framework of a FIT scheme but in a common framework for the FIT schemes in order to be lawful. As a result, the state discretion which enhanced not only by the freedom given the Member States from the Directives to choose their own support scheme, but also from the lenient approach of the PreussenElektra, create difficulties in the context of the internal market. Lastly a third observation is that the national support schemes for the renewable energy related also with the art. 34-36 TFEU about the free movement of goods, a basic principle which disregards not only in PreussenElektra (“it must first be borne in mind that, according to the case-law of the Court, Article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”, “It should be noted that that policy is also designed to protect the health and life of humans, animals and plants”104) but also in the last judgments of ECJ which invoked the PreussenElektra like the Alands Vindkraft105 and Essent106, where once again overemphasized the national character of the support schemes.

CHAPTER IV. Is there any solution?

In the last chapter there will be an analysis of the new Guidelines in order to be concluded if they could be considered as the solution in the above problem of legal uncertainty according to RES-E FIT schemes, created by PreussenElektra.

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104Case PreussenElektra, par. 76-79
105C-573/12 - Alands Vindkraft.
106C-206/06 - Essent Netwerk Noord and Others.
4.1. The new Guidelines as a proposed solution

On May 2012, the European Commission adopted a Communication in State Aid modernization and announced an inclusive reform program concerning State aid control where attempting for the first time to provide guidance on all aspects concerning the interpretation of Article 107(1) TFEU.107 The most fundamental change was the modernization of the guidelines, relating to the art. 107 para. (3) TFEU, which had in common the identical approach of the complex issue of the assessment of the compatibility with the internal market.108 The new guidelines for the environmental and energy state aid are the main issue of this chapter. First of all, the notion of aid interpreted mainly by the European Commission, when listing the types of aid that may be deemed to be compatible with internal market and this is why enjoys of a wide discretion.109 European Commission with its soft law, was trying hardly to offer guidance according to the compatibility of state aids with the internal market. The previous guidelines of 2001 and 2008 considered the compatibility of State aid with the internal market pursuant to the exceptions of paragraph 3(c) of Article 107 TFEU and there were two steps of evaluation: firstly the granted aid had to be well defined in order to be subject to the common interest and secondly included the criteria of a RES-E support scheme that considered as an operating aid.110 Unlike with the previous EAG of 2008 which are not sufficiently clear and primarily was quite elastic as to the compatibility of support schemes with the internal market, the new Guidelines for the term 2014-2020 bring more strict criteria on the compatibility of State aids which granted in the energy and environmental sectors and set out the conditions under which State aid in the field of energy can be declared compatible with the EU internal market on the basis of Article 107(3) TFEU.111 The main core of the above guidelines are the limits designated for the organization of the national support schemes, the

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108 See supra 107, pp. 8-9.
112 See EAG 2008, point 20.
113 See surpa note 111, p23.
common principles that the Commission will apply in the assessment of the granted aids and the enhancement of art. 108 TFEU because all support schemes for the energy sector must to be notified to the Commission for approval\textsuperscript{114}. Continuing, another important issue is that from the 1st January of this year (2016) the aids will be given as premium in addition to the price market and this is a crucial issue because the feed-in tariffs will be replaced by the feed-in premiums and phased out and only the small installations will continue to be supported by feed-in tariffs\textsuperscript{115}. Moreover, after the transitional phase that lasts until the end of this year, from the 1\textsuperscript{st} January of 2017 all aids have to be granted through a bidding process and this is means that the FIP mechanism will be required for that purpose\textsuperscript{116}. There are also exceptions from this proceeding that are related mainly with the small installations and a lot of details about the national support schemes that will be not further analyzed in this section. So, the new Guidelines not only identify the weaknesses of the earlier Guidelines\textsuperscript{117} and case law (arising by PreussenElektra) around the FIT projects but also restrict their application and strengthens the harmonization of the support schemes (positive integration) limited by territorial restrictions put forward by the Directives and the art. 194 (2) TFEU, trying to promote certainty and better guidance for the future promotion of green electricity with respect to the primary rules of the state aid. In conclusion the Member States will have an increased responsibility for the orderly operation of the internal market and for maintaining the conditions of a healthy competition, as well there will be more control with the prior notification.

Conclusions

In conclusion, the ruling of PreussenElektra about the German FIT scheme is the incentive to ascertain that there is legal uncertainty and no cohesion in the configuration of national RES-E schemes not only among the different categories of support schemes but also within the same category of the FIT schemes. But the deceptive concept of “through state recourses” which wasn’t analyzed in PreussenElektra continues to create a lot of problems. It is not surprising that until the last years, most of the states based on this judgment keep on designing FIT’s without notifying them to the European Commission,

\textsuperscript{114}See supra note 107, p. 20.
\textsuperscript{115}See EEAG 2014-2020, point 124.
\textsuperscript{116}See supra note 115, point 126.
\textsuperscript{117}See EEAG 2014-2020 Consultation Paper, point 57.
perpetuating the result and the directions of a decision which is not now in line with the stage of the development of the European energy market. Therefore, although to a certain extent the approach of the case law of the ECJ could be justified from the immaturity of the market in the field of renewable energy and from the efforts of the European Union to promote its growth, this favorable regime has to be moderated, because it is inconsistent with the primary objective of the Union, i.e. the common and harmonized market. So, the new guidelines have established a legal framework which defining the criteria of the compatibility of an aid constraining the state discretion and overstating the meaning of the internal market, noting once again that the promotion of renewable energy in order to stop the climate change can’t disregard the main purposes of the European Union.
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Abbreviations

ECJ  European Court of Justice
EC   European Commission
DSO  Distribution System Operator
FIT  Feed-in Tariff
RED  Renewable Energy Directive
RES-E Electricity produced from renewable energy sources
RES  Renewable energy sources
TSO  Transmission System Operator
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