JOURNAL FOR EUROPEAN ENVIRONMENTAL & PLANNING
LAW 11 (2014) 116-136
BRILL
NIJHOFF
JOURNAL FOR EUROPEAN ENVIRONMENTAL & PLANNING LAW
brill.com/jeep

Germany's Renewable Energy Law, State Aid and the Internal Market

An EU Perspective

Moritz von Unger
Atlas Environmental Law Advisory, Brussels
moritz.unger@googlemail.com

Abstract

Germany's Renewable Energy Law (EEG) has come under pressure. The European Commission announced in December 2013 that it would perform an investigation for violation of state aid rules. The EEG subsidizes the production of renewable energy and requires electricity consumers to pay an "EEG surcharge". The Commission is concerned that energy-intensive industries are largely exempt from paying the EEG surcharge and considers the privileges as illegal state aid. Germany disagrees arguing that they are a necessary means to balance the interest of the environment and those of industry burdened with high energy costs. Compromise is feasible, however, and negotiations are ongoing. Arguably more threatening is the legal prospect from *Ålands Vindkraft*, a case in which the Court will judge whether the restriction of feed-in-tariffs to domestic sources violates Article 34 TFEU. If the Court follows the opinion of General Advocate Bot, Germany may have to open the EEG subsidy scheme to renewable sources outside the country, surely leading German voters to question the legitimacy of the EEG altogether.

Keywords

Renewable energy – EU state aid – Erneuerbare-Energien-Gesetz – Energiewende – feed-in-tariffs – EEG surcharge – PreussenElektra – Ålands Vindkraft AB – freedom of goods

1 Germany's *Energiewende* and EU Law

After several more quiet years in the field of climate change regulation, and shortly before the end of the *Barroso* era, the European Commission is back in

 | DOI 10.1163/18760104-01102004

the mood for policymaking: In January 2014, the Commission published what it calls its 2030 climate and energy strategy, proposing an EU-wide target of 40% domestic reduction in greenhouse gas (GHG) emissions below 1990 levels, a 27% share in energy consumption for renewable energy, including a new governance framework for the preparation of energy plans at the Member States level and elements for a reform of the EU emissions trading scheme (EU ETS). In addition, already in December 2013, the Commission had opened an in-depth state aid investigation into the German Renewable Energy Law (*Erneuerbare-Energien-Gesetz, EEG*), the country's flagship legislation on national energy transformation ("*Energiewende*"). The simultaneity may have been a coincidence, but the Commission leaves little doubt about its intention to take control of the EU's low carbon transformation – through its climate and energy portfolios as well as through the use of a classic (conveniently less contentious) policy instrument: its state aid and competition law powers. Of the two events (the release of the Member State strategy and the *Energiewende* investigation), it is arguably the latter, which has had and will continue to have the greater impact. The 2030 strategy will need the approval of both the Council and the European Parliament and it proposes surprisingly few binding targets. The state aid investigations, by contrast, remain under the firm control of the Commission and, potentially, the European Court of Justice (ECJ), meaning their conclusion is binding and will shape the energy markets in Germany and beyond for years to come. This prospect has certainly made the German government jittery. Whatever the final outcome, it will doubtless have a bearing on the government's plans to reform the EEG as a whole and to set the recently stuttering *Energiewende* back on track.

The following article will present the Commission's preliminary findings on the compatibility of the EEG with the EU's state aid laws (2). It will then discuss the proceedings in the light of ECJ case law and Commission state aid practice before looking at the broader context of renewable energy support schemes and limitations under EU law and the free movement of goods in particular (3). It will then explore in a practical perspective the scope of options Germany has in terms of state aid (4). The analysis will conclude with a brief outlook for Member States' renewable energy subsidy schemes and their integration into a broader EU climate and energy policy (5).

2 The European Commission Examines the EEG

The EEG supports various stakeholders on several levels – renewable energy providers, transmission operators, utilities, and energy-intensive industries – but

it is the support provided to the last category, the energy-intensive industries, with which the Commission has taken issue.

The topic was first raised in a formal complaint submitted under Article 20 (2) of Regulation 659/99[1] by the *Bund der Energieverbraucher e.V.*, a German pressure group for consumer rights, which prompted the Commission to commence its examination procedures.

2.1 *Antecedent*

It should be noted that the antecedent to the EEG, the 1990 law on feeding electricity from renewable energy sources into the public grid (*Stromeinspeisungsgesetz*),[2] had been subject to state aid notification and (positive) review proceedings with the Commission. It laid down grid off-take guarantees for renewable energy producers – then a rare, exotic species – and set minimum prices. The Commission found that the law was in line with the energy policy aims of the Communities and that, *for the time being*, the market size was too small to have any repercussions on electricity prices. The law was eventually revised (in 1998) imposing a renewable energy cost-sharing scheme under which upstream network operators (distributors) were to reimburse energy suppliers for all costs (above a certain threshold) related to their offtake obligations towards renewable energy producers. The German government failed to make a state aid notification to the Commission on the matter. This was surprising given that the Commission had been growing uneasy about the impact of the *Stromeinspeisungsgesetz*, in particular with regard to the wind energy industry, which in the meantime had reached a considerable market size.[3] Yet, the 1998 revision coincided with a strategic realignment of policies at the EU level. The Amsterdam Treaty (1997) had enshrined environmental protection and sustainable development as new priorities for the Communities; the European Commission had issued its White Paper on renewable energy sources setting a Community-wide target; (1997) the "Cardiff Process" (1998) requested all Council formations to focus on environmental concerns; and works on the Directive on the promotion of electricity from renewable energy sources in the international electricity market[4] were ongoing. This led the

1 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L140/1.

2 Law of 7 December 1990, BGBl 2633.

3 Cf. the letter of Commissioner van Miert to the German government, dated 25 October 1996, referenced by GA Jacobs in his opinion of 13 March 2001 (Case C-379/98 – PreussenElektra, nicht), http://www.biicl.org/files/1830_c-379-98.pdf.

4 Adopted in 2001 as Directive 2001/77/EC setting a 21% contribution target for renewable energy to electricity generation.

Commission to inform the Federal Government of Germany that it did not expect to immediately make a formal decision on the 1998 law.

No sooner had the revised law been adopted, however, when a network operator, *PreussenElektra*, challenged its validity, claiming that the cost reimbursement obligation it had towards the local energy supplier, *Schleswag*, was contrary to the directly applicable state aid provisions under the European Treaties. *Schleswag*'s offtake obligations had indeed risen from about 3 m EUR to some 55 m EUR over the period between 1991 and 1998, due to a rise in wind energy sold from less than 1% to 15% of the total.

The *Landgericht Kiel* referred the matter to the ECJ asking, *inter alia*, whether rules on payment and compensation such as those established by the *Stromeinspeisungsgesetz* (in its 1998 form) represented state aid in the meaning of Article 92 (1) EC Treaty (now Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU)). The ECJ gave its judgment in 2001. In its fairly brief decision, it applied its well-established state aid test, asking first whether the issue had at its core an economic advantage conferred – it found it had – and secondly, whether the advantage in question had been granted "directly or indirectly through State aid resources". Arguing that the financial burden caused by the advantage in question was one "between [private electricity supply undertakings] and other private undertakings"[5] without "[involving] any direct or indirect transfer of State resources",[6] it concluded that the test was negative and that the case at issue did not involve state aid in the meaning of Article 92 (1) EC Treaty (now 107 (1) TFEU).

2.2 *The EEG and the 2012 Reform*

At the time of the judgment in *PreussenElektra*, Germany had revised its legislative framework once more. In early 2000 it had adopted the *Renewable Energy Sources (EEG) Act*, which built on the offtake and compensation mechanism established by the *Stromeinspeisungsgesetz*, but went beyond that law. It established new compensation rules on the basis of pre-set feed-in-tariffs; it removed previously set capacity ceilings; it replaced the regional cost-sharing arrangement by a nation-wide scheme linking the offtake costs with a harmonized EEG-surcharge system for energy consumers; and it drew up a surcharge exemption catalogue for a range of (mostly energy-intensive) industries and reduced rates for those electricity suppliers, which source 50% of their electricity portfolio from domestic renewable electricity ("green electricity privilege"). In this case, the German government had made a state aid notification

5 Case C-379/98 PreussenElektra AG v Schleswag AG, paragraph 60.

6 *Ibidem*, paragraph 59.

to the Commission, and following the ruling in *PreussenElektra* the Commission found that the EEG did not constitute any aid.[7]

The 2012 reform introduced renewable energy targets (35% share in gross electricity production by 2020; 50% by 2030); a system of mostly optional market and flexibility premiums to set incentives to regulate renewable energy production according to market needs; network fee exemptions for grid energy storage facilities; slightly adjusted figures for the calculation of feed-in-tariffs for different energy types; and, notably, a significant lowering of the thresholds for energy intensive industries to benefit from the EEG surcharge exemptions (with certain phase-in-tariff details). While the previous rules had set a minimum consumption of 10 gigawatt-hours (GWhs) in any given year, the new rules would require only a tenth of this amount (1 GWh), and the cost ratio (electricity costs in relation to gross value added) went down from at least 15% to 14%.

As a consequence, the number of firms falling into the scope of the surcharge exemption has risen sharply, from 570 enterprises in 2010 (with 771 installations/electricity delivery points) to 2,098 (with 2,779 installations/electricity delivery points) in 2014.[8] The total in exempt electricity consumption is now 107,101 GWh (roughly a fifth of Germany's net consumption). Sector coverage is broad, ranging from chemical industries and pet food, to milk and candy producers.

The exemptions are valuable to the companies in question. The EEG surcharge per kilowatt-hour (kWh) has surpassed 6 cents in 2013 and continues to rise. Current annual savings are in the range of 2.4 billion EUR –excluding the indirect benefits from decreasing lower wholesale prices at electricity spot markets due, to a significant extent, to the rise in renewable energy supply. The growing surcharge reflects the large energy transformations under way. Between the introduction of the EEG in 2000 and its reform 12 years later, the German renewable energy market saw an unprecedented boom. When General Advocate *Jacobs* in *PreussenElektra* contemplated whether the meager 1% share in electricity production merited a *de-minimis*-exception from the rules on the free movement of goods,[9] the situation in 2012 could no longer hide the

7 European Commission, Aid No 27/2000, decision of 22 May 2002, Official Journal C 164/5 of 10 July 2002.

8 Federal Office of Economics and Export Control (BAFA), http://www.bafa.de/bafa/de/energie/besondere_ausgleichsregelung_eeg/publikationen/statistische_auswertungen/index.html.

9 Opinion of General Advocate Jacobs, delivered on 26 October 2000, C-379/98: *PreussenElektra*, paragraph 204.

fact that renewables had assumed in the meantime a game-changing role in the market. 22.9% of gross electricity consumption came from renewable sources, and that year's investments in renewable energy stood at 19.5 billion EUR (down from 23.2 billion EUR in 2011).[10]

2.3 *EEG 2012 State Aid Proceedings*

To justify the opening of in-depth proceedings,[11] the European Commission referred to various changes to the EEG made by the 2012 reform. These references concerned the EEG-surcharge functioning, the distinction between final consumers who have to pay the EEG-surcharge and "privileged" consumers who benefit from a capped surcharge, as well as the revised role of the supervisory agency, the Federal Network Agency (*Bundesnetzagentur*, BNetzA).[12] The Commission concluded, however, not that as the alterations made are not detachable from the rest of the scheme, the entire EEG architecture would have to come under scrutiny.

The Commission assessed two levels of support and their identification as state aid in the meaning of 107 (1) TFEU: (i) the advantage for renewable energy producers, and (ii) the EEG-surcharge exemption for the energy-intensive industries as well as the reduced rates for certain suppliers (green electricity privileges). On both levels, it notes that the EEG creates advantages. "Producers of RES electricity [...] are advantaged because, through the feed-in-tariffs and premiums, they obtain more than what they would obtain on the market."[13] The energy-intensive industries, for their part, are advantaged "because the EEG-surcharge that can be required from them is capped."[14]

The critical question, just as in *PreussenElektra*, is whether the advantages are granted *directly or indirectly through State resources*. The Commission answered the question in the affirmative and found that the findings from *PreussenElektra* were not transferrable to the EEG in its current form: The benefits for both the renewable energy producers as well as the energy-intensive

10 Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, Future Growth in Renewable Energy in 2012, http://www.erneuerbare-energien.de/en/topics/data-service/renewable-energy-in-figures/further-growth-in-renewable-energy-in-2012/.

11 European Commission, State aid SA.33955 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, C(2013) 4424final (18 December 2013), http://ec.europa.eu/competition/state_aid/cases/251153/251153_1501210_14_2.pdf.

12 European Commission, footnote 11, paragraph 150.

13 *Ibidem*, paragraph 76.

14 *Ibidem*, paragraph 77.

industries and certain suppliers are, the Commission argues, in essence between the State and beneficiaries, not (as in *PreussenElektra*) between (private) undertakings and beneficiaries. Even though the relevant funds and payment reductions are directly transferred between non-State actors, the State "can control, direct and influence the administration of the funds at stake".[15]

The EEG surcharge system operations rely essentially on: the network operators, which purchase the renewable energy produced into the network; the central transmission system operators ("TSOs"), which compensate the network operators for the purchase on the basis of the feed-in-tariffs and which, in turn, impose the EEG surcharge on the electricity suppliers for each kWh they deliver to end users; and the BNetzA, which monitors the operations of the TSOs. It is the latter two, the Commission argues, the TSOs – of which Germany's grid has four – and the BNetzA – with its "extensive" monitoring and relevant enforcement powers regarding fines and surcharge level setting – which "have been entrusted [by the German State] with specific tasks that correspond to the administration of the EEG-surcharge".[16] This level of control as well as the fact that – different from the scheme discussed by the Court in *PreussenElektra*, where the network operators had to purchase renewable energy from their own financial resources – the financial resources to fund the renewable energy purchases come from the EEG-surcharge, not from private sources of the TSOs, render the EEG-surcharge a State resource in the meaning of Article 107 (1) TFEU.

The case law the Commission based its preliminary findings on includes *Steinike*,[17] which concerned the installation of a dedicated fund by the German government for the promotion of agricultural and forestry products financed from undertakings from the respective sectors. In this case, the Court saw the fund contributions as representing state aid. In particular though, the Court relied on *Essent*,[18] a case concerning the installation of a scheme under which Dutch electricity network operators would collect price surcharges from offtakers and pass them on to a joint subsidiary of the four Dutch electricity generators to compensate the latter for so-called "stranded costs". The Court found in *Essent* – the case having been decided seven years after *PreussenElektra* – that the surcharge in question was a "unilaterally imposed" charge by the State, that unlike in *PreussenElektra* the undertakings in *Essent* were "appointed by

15 European Commission, footnote 11, paragraph 137.

16 *Ibidem*, paragraph 118.

17 ECJ, C-76/78 *Steinike & Weinlig v Germany* [1977] ECR 595.

18 ECJ, C-206/06 *Essent* [2008] ECR I-5497.

the State to manage a State resource" and, thus, that "it is of little account that the financial charge is not levied by the State".

2.4 *State Aid Justification*

On this basis, the Commission concludes that the EEG 2012 relies on State resources for both levels of financial support the producers of renewable energy as well as the beneficiaries of EEG-surcharge exemption and reductions, respectively. Both measures are also *selective* as they favor only certain undertakings (renewable energy producers and energy-intensive undertakings), and they affect the trade between Member States and are therefore liable to *distort inter-state competition.*[19] The positive requirements for the definition of state aid in the meaning of Article 107 (1) are therefore met.

The question, then, is whether there are any grounds for justification in line with the provisions of Article 107 (2) or (3) TFEU. Practical guidance for the implementation of these state aid justification provisions is provided by purposefully developed instructions such as the Community Guidelines on State Aid for Environmental Protection (EAG).[20] In applying the EAG to the subsidy to renewable energy producers and to the beneficiaries of the green electricity privilege, the Commission confirms its compatibility (under "aid for renewable energy sources", points 101 et seqq.), and it detects no sign of overcompensation.

For the subsidy to the energy-intensive industry, the Commission refers to the arguments presented by Germany that (i) the respective undertakings are not exempt from the EEG-surcharge but rather cover substantial parts of it; and (ii) that the granted reduction would ensure "sustainable growth by maintaining the international competitiveness of the manufacturing industry and avoiding that they relocate out of Germany". The measure, thus, would represent a "project of common European interest" (in the meaning of Article 107 (3b)) because it combines the promotion of renewable energy while maintaining the competitiveness of European industry, and is therefore an "objective of common interest" (in the meaning of Article 107 (3c)) because it protects both the environment and a competitive economy.[21] The Commission points out that according to established EAG rules (cf. point 147 EAG) a project of common European interest needs to be specific and clearly defined by the Member State invoking this argument. It must contribute in a "concrete, exemplary and identifiable manner to the Community interest", the aid must be necessary to

19 European Commission, footnote 11, paragraphs 76, 79 and 80.

20 Notices from European Union Institutions and Bodies, 2008/C 82/01.

21 European Commission, footnote 11, paragraphs 204 et seq.

respond to a high level of risk, and the common European interest must be demonstrated in practical terms. It concludes that Germany has failed to present sufficient evidence on the matter. It also finds that the EEG targets the development of renewable energy in Germany alone, not the EU as a whole, which puts the character as a "European" interest in doubt. The aid in question, furthermore, raises concerns in that it does not incentivize the production of renewable energy as such, but serves motives that lie beyond that objective.[22]

In terms of the discretionary exception of Article 107 (3c), the Commission states its doubts as regards Germany's argument that the EEG-surcharge reduction could be viewed as contributing to an objective of common interest such as environmental protection. It notes that the alleged need for lower renewable energy charges in order to avoid international relocation of industries could problematize the determination to reduce greenhouse gas emissions altogether.[23] Without elaborating further on this point, the Commission makes reference, *inter alia*, to revision of the EAG that is under way (*for more on this, see the article by Erik Gawel and Sebastian Strunz in this issue*).

The Commission raises further doubts when turning to the question of whether the measure meets the requirements of appropriateness, necessity, and incentive effect, assuming the objective of achieving a common interest were to be served. In terms of necessity, the Commission notes that the list of beneficiaries for which the German government claims the risk of international relocation and "carbon leakage" is not identical with the sector-specific list,[24] drawn up by the Commission under the European Emissions Trading Scheme (EU ETS), and that the German government uses different criteria, without demonstrating that these criteria would adequately capture the risk of international relocation. For the purpose of the upcoming examinations, the Commission requests the German government to submit "for each of the sectors that benefit from the reduced EEG-surcharge... information [on] general market description...[,] figures per sector indicating what portion of their gross added value the [renewable energy] surcharge would represent if paid in full [and] trade intensities with third countries (outside the EU) and any other indicators able to demonstrate the (in)ability of firms to pass on costs to customers..."[25]

22 *Ibidem*, paragraph 212.

23 *Ibidem*, paragraph 225.

24 See for the latest list Commission Decision 2014/9/EU of 18 December 2013 amending Decisions 2010/2/EU and 2011/278/EU as regards the sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, OJ L9/9 (14 January 2014).

25 European Commission, footnote 11, paragraph 236.

Regarding proportionality, the Commission refers to the need to demonstrate "that the same change in behavior [i.e., the prevention of industry relocation] cannot be obtained with less aid", which Germany, it concludes, has so far failed to do. Finally, the Commission wonders whether the aid is not targeted at improving the competitiveness of German industries in relation to competitors in other Member States, it being understood that each Member State has its renewable energy targets inscribed under the Renewable Energy Directive 2009/28/EC.

Based on the above, the Commission sees the need for an in-depth examination into whether the EEG-surcharge exemptions or reductions are unlawful state aid.

2.5 *Green Electricity Privilege*

The Commission does not view the green electricity privilege for electricity suppliers (§ 39 EEG) as state aid. However, it views the provision as problematic in another respect, and the Commission has the authority to assess the compatibility of any state aid measure with the internal market as a whole (Article 108 TFEU). The articles 30 and 110 TFEU prohibit the establishment of a tax system, which discriminates against imports from other Member States or any form of protection of competing domestic products. A national support scheme for renewable energy such as § 39 EEG, which finances itself through a parafiscal levy on electricity consumption, is understood by the Commission as a tax system in the meaning of articles 30, 110 TFEU. Germany, the Commission argues, grants a better tax rate to offtakers of renewable energy, provided the energy source comes from within Germany and, thus, discriminates through its tax regime against renewable energy products from other Member States.

2.6 *Upcoming Examination*

The Commission's findings – a violation of Article 107 TFEU (state aid) and 108 TFEU (state aid notification procedure) for the EEG-surcharge exemption or reduction for energy-intensive industries and a violation of Articles 30, 110 TFEU (discriminatory taxes) for the green electricity privilege – are preliminary. While noting that the opening of the formal investigation "does not prejudge the outcome",[26] the Commission has requested Germany to provide additional information on the criteria used and the proportionality of providing the surcharge exemption and reductions, respectively, to industries, and to respond to the preliminary findings presented. It has also invited third parties to comment on the various points raised in the matter.

26 *Ibidem*, section 4 (conclusion).

Apparently as a result of intense lobbying, the Commission has refrained from imposing preliminary measures. Under law it is given the discretion, pending formal investigation procedures, to issue an injunction to suspend any aid payments and, under certain conditions, to request provisional repayment of aid payments made in the past.[27] Any such injunction would affect the years as of 2012 only, but the repercussions would still be substantial for the undertakings concerned. The German industry and the German government are consequently relieved that the Commission is willing to await the outcome of its investigation, before adopting any suspension and repayment decision.

3 The EEG in an EU Law Context

Germany is not the only country the European Commission has scrutinized in the past for renewable energy policies and their compliance with the EU state aid rules. For the UK, the Netherlands, Slovenia, Denmark, and Ireland the Commission considered the respective measures as state aid but found them compatible with Article 107 (2) and (3) TFEU; for the Belgium example, the Commission found "in principle" no incident of state aid.[28]

3.1 *The Precedents*

The country examples, which come closest to the German EEG, have been the *Decree on Renewable Energy supply of Luxembourg*[29] and the *Austrian Green Electricity Law* (*Ökostrom-Gesetz*).[30] In both examples, similar to the German mechanism, electricity consumers paid for the feed-in-tariffs granted to renewable energy suppliers through a surcharge, with certain industries being exempt from this surcharge. In Luxembourg, the government has put in place a compensation fund for energy suppliers to balance out the respective obligations concerning renewable energy purchases. In Austria, a state-appointed clearinghouse, organized as a joint stock company under private law, manages and controls the surcharge and the financial flows.

---

27 Case C-75/97 Belgium v Commission (n 91); Regulation (EC) No 659/99, Article 11 (1) and (2).

28 For an overview and the quote see European Commission, The support of electricity from renewable energy sources, Commission Staff Working Document, SEC(2008) 57 of 23 January 2008, Annex IV.

29 For further reference see Commission Decision of 28 January 2009, C 43/02 (ex NN 75/01).

30 For further reference see Commission Decision of 8 March 2011, C 24/2009 (ex N 446/2008) and the final assessment in Commission Decision SA.33384 (2011/N) – Austria, C(2012) 565 final.

In the Luxembourg case, the Commission found that the creation of a dedicated fund by the government brought the financial resources, which originated in end-user surcharges, under the direct control of the state, which causes them to qualify as state resources in the meaning of Article 107 (1) TFEU. The Commission held in its decision on the Austrian model that the creation of the clearing house (even if privately held), the direct financial compensation flows and the level of control the state assumes over the surcharge mechanism argued all confirmed that the model involved state aid. In its conclusion it relied heavily on a discussion of the leading decisions *PreussenElektra* and *Essent*.

Both cases were eventually resolved. Austria removed the surcharge exemptions for energy-intensive industries altogether, while Luxembourg made a number of amendments to its legislation to address various concerns raised by the Commission. In the end, the Commission found that while the structure of the country's feed-in-tariff system still amounted to state aid, both the subsidies to renewable energy producers and the privileges for energy-intensive industries were justified under Article 107 (3). For the latter, the Commission was eventually satisfied with the *proviso* that undertakings requesting surcharge exemptions would need to commit to binding energy efficiency targets on the basis of energy efficiency audits; failure to comply with these targets would result in renewable energy purchase obligations.

3.2 *German Defenses*

There can be little doubt that if the EEG 2012 falls into the scope of state aid, the current application of industry exemptions is too wide for justification. The lowering of the threshold from 10 GWh electricity consumption to 1 GWh seems arbitrary, and the German government has so far failed to make a convincing case that there is a concrete and genuine risk of industry relocation. In fact, the all-sector-open privilege – the surcharge exemption/reduction being granted on the basis of electricity purchase size and production cost ratio – seems to undermine the methodology applied elsewhere to account for risks of industry relocation ("carbon leakage"). Notably, the European Commission, in its EU ETS Guidelines, uses a sector-specific approach. The production cost approach Germany applies under the EEG, by contrast, seems to be less concerned with the risk of relocation than with a general wish from the government to largely exempt vast segments of the country's economy from the ecologic costs its renewable energy policy comes with. The case for the German surcharge exemption/reduction mechanism is further weakened by the fact that the undertakings concerned profit from the mechanism on two levels: first because they pay no rates or reduced ones; and second because electricity prices have

dropped considerably in recent years, with the understanding that much of this drop is due to the very availability of renewable energy at the electricity markets. Finally, applying the reasoning behind the Luxembourgish case, one could take issue with the fact that Germany strikes a rather soft stance on energy efficiency efforts from privileged undertakings. Unlike the Luxembourg example, German enterprises applying for EEG exemptions/reductions need not commit to any energy efficiency targets. They need only to show that they have "ascertained and assessed energy consumption and the potential for energy savings and this process has been certified" (§ 42 (1) sec (2) EEG). For undertakings consuming less than 10 GWh there is no assessment obligation at all.

The Commission has signaled that it is willing to accept certain privileges to certain economic sectors and may formulate guidance on the matter through an update of the EAG (*see the article by Erik Gawel and Sebastian Strunz in this issue*). Yet, it seems fair to expect that the Commission will still question the proportionality of the privileges enshrined in the EEG 2012.

3.3 *Challenging the state aid Qualification?*

The question, however, is whether the Commission is correct in its state aid assessment in the first place and whether the Court, if it ever comes to that, will follow its judgment. *PreussenElektra* has set an important precedent, and the case law the Commission presents to support its claim may not prove especially resilient. In its opening decision, the Commission puts great emphasis on what it sees as the limited scope of *PreussenElektra*. The *Stromeinspeisungsgesetz* did "not involve a public or private body established or appointed to administer the aid"; it was characterized by a "multitude of bilateral relationships between renewable electricity generators and electricity suppliers"; and the mechanism functioned "without any body administering the stream of payments and the financial flows".[31] Yet, the feed-in-*cum*-EEG-surcharge system of the EEG remains a structure with a "multitude of bilateral relationships" between renewable energy producers and network operators. In this way, the EEG does not create and appoint a designated "body administering the stream of payments". It does set particular rules for particular stakeholders – network operators and TSOs – but so did the *Stromeinspeisungsgesetz* and so do many laws, which regulate economic relations. The Dutch legislator, in *Essent*, had nominated a particular firm, which was to exclusively manage a certain amount of funds in order to cover costs from a number of activities ("stranded costs"), in accordance with the instructions from the responsible Minister, who furthermore was in charge of

31 All quotes in European Commission, footnote 11, paragraph 93.

designating excess funds for various related expenditures. Discussing at length the meaning of state resources in his *PreussenElektra* opinion, General Advocate Jacobs concluded that, "state resources within the meaning of Article 92 (1) of the Treaty [now Article 107 (1) TFEU] are therefore only resources which are *at the disposal* of public authorities".[32] One may argue that as the TSOs are not public authorities and the BNetzA does not have the funds in question at its disposal, this threshold is not met for the EEG 2012.

For now, the German government maintains its position – and has brought an action against the European Commission before the ECJ to avoid legal consequences of the opening decision from becoming effective – that it considers the EEG 2012 not to represent state aid. Legal commentators (in Germany) mostly appear to agree with the assessment, even though the respective assessments mainly concerned the pre-2012 revision EEG.[33] Early reactions to the Commission's opening decision, however, also indicate support.[34]

3.4 *Switching Venue: State aid and the Free Movement of Goods*

More challenges are yet to come for the EEG. For one thing, the European Commission also views the green electricity privilege as non-compliant with

32 Opinion of General Advocate Jacobs, delivered on 26 October 2000, C-379/98: *PreussenEletra*, paragraph 165 (italics in the original).

33 Posser/Altenschmidt, in Frenz/Müggenborg, EEG, 2010, Vor §§ 40–44, Rz. 21; Müller in Altrock/Oschmann/Theobald, EEG, 2. Auflage, 2008, § 16, Rz. 21; Sensfuß et al., Vorbereitung und Erstellung des Erfahrungsberichtes 2011 gemäß § 65 EEG (Auftragsarbeit des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit, S. 262; vorsichtiger Ekardt/Steffenhagen, EEG-Ausgleichsmechanismus, stromintensive Unternehmen und das Europarecht, JbUTR 2011, 319ff. (351f.: „Insgesamt ist nach alledem festzuhalten, dass gute Argumente bestehen, den Tatbestand einer Beihilfe zu verneinen..."). Explicitly with respect to the EEG 2012: Schlacke/Kröger, Europarechtliche Fragen deutscher Förderinstrumente für Erneuerbare Energien, accessible at http://www.erneuerbare-energien.de/fileadmin/Daten_EE/Dokumente__PDFs_/Abschlussbericht_BMU_Europarechtliche_Fragen.pdf; Schlacke/Kröger, Die Privilegierung stromintensiver Unternehmen im EEG – eine unionsrechtliche Bewertung der besonderen Ausgleichsregelung (§§ 40ff. EEG), NVwZ 2013, 313; Grabmayr/Stehle/Pause/Müller, Das Beihilfeverfahren der EG-Kommission zum Erneuerbare-Energien-Gesetz 2012, Stiftung Umweltenergierecht 2014, at http://www.stiftung-umweltenergierecht.de/fileadmin/pdf_aushaenge/Aktuelles/SUER_Hintergrundpapier_zum_EEG-Beihilfeverfahren_2014-03-03v1.pdf.

34 Ismer/Karch, Das EEG im Konflikt mit dem Unionsrecht: Die Begünstigung der stromintensiven Industrie als unzulässige Beihilfe, ZUR 2013, 526Wolf, Die Förderung erneuerbarer Energien durch die Mitgliedstaaten der EU aus der Sicht des europäischen Beihilfenrechts und der Grundfreiheiten, Zbornig radova Pravnog fakulteta u Splitu, god. 51, 1–2014, pp. 165.

EU law. While this may turn out to be of little practical relevance – the German government has indicated that it plans to drop this privilege – the reasoning behind the Commission's preliminary findings on this matter should alarm the German government. The European Commission takes issue with the fact that the EEG may unduly discriminate against imported renewable energy products.

This argument may ultimately prove an important weapon against the subsidy scheme for German renewable energy producers as a whole. The EEG grants offtake guarantees and feed-in-tariffs to renewable energy producers situated within German borders. This arguably makes the EEG a measure having effect equivalent to a quantitative restriction on imports, in the meaning of Article 34 TFEU. Electricity is recognized as a "good" for the purpose of the provisions on the free movement of goods. The ECJ confirmed the character of a measure having equivalent effect for the renewable energy subsidy under the *Stromeinspeisungsgesetz*. It held, however, that it "is useful for protecting the environment insofar as it contributes to the reduction in emissions of greenhouse gases which are among the main causes of climate change which the European Community and its Member States have pledged to combat".[35] Referring to the great importance environmental protection is given at Treaty level and with a view that, on the one hand, the electricity markets among Member States are not yet liberalized and, on the other hand, the nature of electricity distribution in general making it "difficult to determine its origin and in particular the source",[36] the Court found the restriction to be justified.

In his opinion on *PreussenElectra*, General Advocate Jacobs had raised doubts on this particular matter. While deploring that the Court had not been fully informed of the impact of cross-border trade and whether imports of electricity are possible and whether electricity from renewable energy sources can be distinguished from other sources, he shared his "tentative" view on the issue: Provided that renewable energy can be imported into Germany, the EEG privilege of domestic sources is a measure having equivalent effect to a quantitative restriction (Article 34 TFEU). Such restriction may be justified on the ground that it is meant to achieve "imperative requirements" recognized by Community law. Environmental protection is one of the imperative requirements, which may thus limit the scope of Article 34 TFEU. However, any such measure needs to stand the proportionality test. Having identified that the imperative requirement in question is climate change mitigation, GA Jacobs notes that he "cannot see why electricity from renewable sources produced in

35 ECJ C-379/98 ECR 2001 I-02099, Decision of 13 March 2011, paragraph 73 (italics added).

36 *Ibidem*, paragraph 79.

another Member State would not contribute to the reduction of [greenhouse] gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany".[37]

Since the arguments in *PreussenElektra*, the Renewable Energy Directive 2009/28/EC has been adopted, which promotes the generation of renewable energy and imposes renewable energy targets for Member States. Article 3 (3) foresees that Member States may apply "support schemes" to reach their targets. It also lays down that "[without] prejudice to Article 87 and 88 of the Treaty [now Article 107 and 108 TFEU], Member States shall have the right to decide... to which extent they support energy from renewable sources which is produced in a different Member State". This provision points to the possibility for Member States to restrict any support schemes to domestic renewable energy sources. However, in January 2014 General Advocate Yves Bot issued his opinion in *Ålands Vindkraft AB v Energimyndigheten*,[38] arguing that the "principle of territorial restriction" of national subsidy schemes, as enshrined in the Directive, contradicts Article 34 TFEU, and is thus to be declared null and void by the Court.

He notes that since the Court's decision in *PreussenElektra* there have been a number of legal developments, which have changed the overall situation considerably and which justify a reconsideration of the question at hand. The General Advocate makes reference in particular to the adoption of Directive 2009/72[39] concerning common rules for the internal market in electricity, which has established the basis for the full liberalization of the internal market in electricity, and of Directive 2001/77[40] on the promotion of electricity produced from renewable energy sources in the internal electricity market, which makes it possible to guarantee proof of source for renewable energy sources across borders. Both legal acts and, indeed, Directive 2009/28 itself, which aims at the conclusion of cross-country cooperation agreements, serve the objective laid down in Article 191 (1) TFEU to pursue the "prudent and rational utilization of natural resources" by creating an EU-wide market for electricity generation and distribution and by transcending the previously largely isolated technical and regulatory systems of Member States. Against this backdrop, the General Advocate concludes that the argument that the continuation of renewable energy support schemes, which are confined to national borders, would serve the purpose of environmental protection is not convincing and cannot justify a restriction of Article 34 TFEU.

37 *Ibidem*, paragraph 236.

38 ECJ C-573/12, Opinion of GA Yves Bot of 28 January 2014.

39 OJ L 211/55 of 14 August 2009.

40 OJ L 283/33 of 27 October 2001.

A number of Member States, including Germany, and the Commission had intervened in the proceedings in support for the discretion of Member States to install territorial restrictions for their renewable energy support schemes, basing this in part on the Member States' right to "determine the conditions for exploiting its energy sources, [their] choice between different energy sources and the general structure of [their] energy supply" (Article 194 (2) TFEU). It is not clear whether the Court will follow the opinion of the General Advocate, but if it does, the EEG will come under further pressure.

4 Options for Compromise

In its response to the opening decision, Germany rejected outright the Commission's view.[41] It stated once more that it sees the specific regime for energy-intensive industries as not representing "an economic advantage, but a compensation for higher costs incurred by the EEG, with the aim to safeguard the international competitiveness of the energy-intensive industries". Furthermore, the costs of the EEG are not lifted, but only reduced. Even if the regime were to be seen as state aid, it would be justified on the grounds that it would serve the "European interest" of environment and climate protection in tune with sustainable European industry growth.

The German government stresses nonetheless, in its response as well as in its public statements, that it is preparing a reform of the current rules and that it has engaged for that purpose in an "intensive and very constructive dialogue" with the Commission. This aside, the German government acknowledges with satisfaction that the Commission regards the supply schemes (feed-in-tariffs and premium models) as conforming to European law.

The path to a new EEG reform seems thorny, however. The German government appears set to throw out the green electricity privilege, but for the rest it has made it clear that the EEG should stay, including privileges for energy-intensive industries. In a statement on "key elements of a revised Renewable Energy Act" of January 2014, the government expresses its commitment to "systematically and persistently continue its effort of developing an energy system that will dispense with nuclear energy and increasingly rely on renewable

41 The response is not public, but the German Ministry of Economy published a summary, accessible at http://www.bmwi.de/BMWi/Redaktion/PDF/I/informationen-zur-stellungnahme-deutschlands-im-hauptpr_C3_BCfverfahren-der-eu-kommission-zum-eeg,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

energies".[42] While indicating that the government will be more cost-sensitive to renewable energy capacity increases in the future and will be determining future support levels "by way of bidding procedures", it insists that the costs will be shared "appropriately" among all users of electricity "in a way that does not endanger the international competitiveness of electricity-intensive industries". Yet, it intends to "limit the scope of application for the special equalization scheme for electricity-intensive enterprises that compete internationally", and it indicates that it is "reviewing the privileges for these industries especially on the basis of objective criteria in line with European legislation". It also mentions that, "the companies benefitting from the privileges should in future make an adequate contribution to the costs". However, the statement lacks all details what the limitation in scope and the criteria applied could look like and what levels of costs could constitute an "adequate contribution". A substantial alignment between the positions of the Commission and the German government is not in sight. For the Commission's view, it is worth looking at the draft guidelines on environmental and energy aid 2014–2020,[43] where it states that the risk of industry relocation ("carbon leakage") must involve a relocation outside the EU, as opposed to between Member States, and that concrete risk indicators, such as the level of cross-EU border trade in the sector concerned, are encountered. Altogether, this seems a steep task for Germany.

At a minimum, the Commission is likely to insist that Germany reduce the list of beneficiaries and for the beneficiaries to assume a larger surcharge share than what they take at the moment. It may also request that Germany switch to a sector- or market perspective rather than an all sector-energy use and cost-ratio approach. In this respect, it would seem sensible to harmonize the list of beneficiaries with the carbon leakage list established in the EU ETS framework (but arguably may go beyond that list for sectors that fall outside the scope of the EU ETS). Finally, if the example of Luxembourg is any guidance, the obligation for benefitting industries to improve their energy efficiency performance may play a role in the negotiations between the Commission and Germany.

While difficult in substance, the direction for the negotiations seems straightforward and compromise feasible, all the more since each side seems eager to find a solution without involving the Court of Justice. The Court, after

42 German Ministry of Environment, accessible at http://www.bmwi.de/English/Redaktion/Pdf/eeg-reform-eckpunkte-english,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf.

43 European Commission, accessible at http://ec.europa.eu/competition/consultations/2013_state_aid_environment/draft_guidelines_en.pdf.

all, could abandon the *laissez-faire* approach taken in *PreussenElektra* just as it could threaten the "case law"[44] the Commission has been building up in the field over the past decade. Germany, in particular, wishes clarity as soon as possible in order not to put its EEG reform – planned for the first half of 2014 – at risk. At the time of writing, the Commission appeared to have offered a number of concessions, including its consent to a wide range of sectors that may benefit from reduced EEG rates in exchange for a higher rate profile.[45]

Uncertainty, however, flows from *Ålands Vindkraft AB*. If the domestic restriction to renewable energy support systems were to be found in violation of Article 34 TFEU, then the EEG may face its biggest challenge yet – as the share of renewables (and the EEU surcharge) in Germany's energy mix might rise dramatically due to the integration of cross-border sources leading German voters to question the legitimacy of the EEG altogether.

5 Conclusion and Prospects

The state aid proceedings against Germany and its renewable energy law highlights a conflict between the EU's prerogative over competition policy on the one hand, and the Member States' authority to design their energy policies on the other. The ECJ has contained the issue in the past, when it restrained the Community ambit and approved Germany's first feed-in-tariff scheme (*Stromeinspeisungsgesetz*). That was at a time, however, when the renewable sector was small and in economic terms almost negligible. Its size today makes it a multi-billion EUR market in Germany alone, and the Court, if invoked to rule on the matter, may follow the restrictive line the Commission professes to take, confirming the state aid nature of Germany's EEG 2012 and denying the generous privileges the law bestows on the German industry. It is possible, however, that the Commission and Germany may settle the issue without the help of the ECJ. A compromise seems viable along the lines of (i) a reduction in scope of beneficiaries, (ii) an increase of the reduced rates in line with the common responsibility to share the surcharge costs, (iii) an improved

44 Cf. in this context the draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU, where the Commission refers to its reasoning in the opening decision on Austria's feed-in-tariff rules as representing precedent. The draft Commission Notice has been published for consultation purposes in January 2014, http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.

45 Frankfurter Allgemeine Zeitung, 18 March 2014, page 15, making reference to a new EAG draft version.

methodology to identify beneficiaries, and possibly (iv) the strengthening of incentives to improve energy efficiency output for privileged enterprises.

Whether the matter is settled between Brussels and Berlin or not, it points to another conflict aside from the one between state aid and competition and energy policy. This conflict stems from the arena of climate and energy policy itself and touches upon competence and authority within the EU institutions and Member States. The EU has established, and largely controls, the flagship instrument of the bloc's climate policy, the EU ETS, and it is forcefully pushing to complete the internal energy market and to guarantee its openness, while encouraging cross-border cooperation.[46] And yet the development of renewable energy capacity falls within the competence of national governments, each of which jealously watches over its national strategies and policy instruments.

Supporters of generous subsidies for renewable energy have pointed out that the price incentives from the EU ETS would always be too low to switch to a range of useful types of renewables and that both regimes are complementary. This may well be the case. It does not necessarily follow, however, that both regimes be treated as isolated and that the EU ETS should not account for the incremental growth in renewables as a consequence of those subsidies. The EEG indeed has long been criticized for its lack of harmonization with the mitigation targets of the EU ETS.[47] It is also questionable whether the development of the renewable energy market should necessarily be confined to national borders leaving each Member State to set in action its own domestic subsidy rules. In the long run, this could undermine opportunities in economies of scale, pan-European grid-improvement, and, as it happens, the vagaries of geography: If there is little wind in Germany, solar supply from Spain may come in handy. It also leaves unanswered the question of whether the payment of feed-in-tariffs can legitimately be linked to the nationality of the source rather than its effect on electricity supply. The cooperation mechanism[48] Sweden and Norway have developed in response – not least to the

46 European Commission, Communication, Making the international energy market work, COM(2012) 663; European Commission, Communication, Delivering the internal electricity market and making the most of public intervention, COM(2013) 7243.

47 Most recently Expert Commission on Research and Innovation, Study 2014, p. 52: "The EEG does not lead to more climate protection, it simply makes it more expensive." (translation by the author), which prompted the German government to issue a statement that the critique was not "comprehensible", see http://www.bmwi.de/DE/Themen/energie,did=626882.html.

48 For the context see Commission Staff Working Paper, European Commission guidance for the design of renewables support schemes, SWD(2013) 439final.

Renewable Energy Directive or the pilot project[49] for EU-wide electricity trades ("day ahead market coupling") – point in the direction of enhanced EU market integration. If they maintain their isolation, Europe's national feed-in-tariff systems may find themselves in an anachronistic spot sooner than anyone expects.

49 See http://ec.europa.eu/energy/gas_electricity/internal_market_en.htm.