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Course of EU Substantive Law: Internal Market and Beyond

The EU transition to a Net-zero economy and the EU State Aid Regime: the state of art and future perspectives

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TABLE OF CONTENTS

INTRODUCTION

The climate emergency, and the need to reduce dependency on Russian energy, have exposed deficiencies in the European legislative system to combat the threat of the raise of temperatures.

The Commission's enactment of the European Green Deal represents the pivotal response to the urge to advance towards a full decarbonisation of the industry. However, decarbonising economic activities is not the only feature underlying the so-called Net-zero economy. The core principle characterising it can be found in the process of offsetting polluting emissions produced by deploying an equivalent quantity of sustainable solutions. The result of this is the creation of a fair balance, which would enable to keep under control the developing global heating.

It is fundamentally within this framework that this work finds its place. More specifically, this dissertation was born with the aim of analysing the European Commission's attitude in the State Aid regime in light of the new environmental targets in the European Green Deal. As a matter of fact, the need to adapt to the binding objectives of the European Climate Law has boosted a series of recent reforms in the old, as well as in new types of legal tools implemented. And this occurred in the first place with the impetus of Commission's communications in relation to State Aid control.

Our research question aims at assessing in which way public intervention could help achieving climate goals. Addressing this question requires consideration not only of the opportunities that State aid could enable to accomplish, but also the legal complexities it brings — especially for the Commission, in its duty to assess the compatibility of public subventions with the Internal market.

The EU has committed to the intermediate target of reducing greenhouse gas (GHG) emissions of 55% by 2030,[1] and to reach the climate neutrality by 2050. Undoubtedly, while these objectives appeared a practical way to shape EU legislation

[1] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal' COM (2019) 640 final.

towards a transition to renewable energy sources, they also raised the question on which type of actions the EU should implement to tackle these targets in the short term. Indeed, significant achievements necessitate gradual and concerted progress, but also perseverance.

We have to consider that the manufacturing, as well as the energy production, and distribution industries, together with transportation and storage sectors, account for more than half of the portion of all the GHG emissions[2] produced in the EU. Therefore, the EU firstly moved in the direction of the implementation of emissions reduction policies.

However, forcing industries to lower their emissions means setting constrains to their profits. As a matter of fact, complying with environmental standards entails money disbursement, which market operators are often unwilling to spend voluntarily.

And it is in this very context that the pro-active behaviour of governments becomes crucial to compensate this market failure.

Nevertheless, public financial contribution entails positive solutions but brings about as many complexities. Indeed, the public financing of private operators presents a high likelihood of distorting market conditions, as well as interfere with competition within the EU. Hence, it is duty of the European Union to strike a balance. In fact, the legal basis for European Union to step up extends from the environmental protection[3] to the establishment of competition rules for the functioning of the Internal market, together with the principles of security and efficiency of the energy market.[4] The power to act as "custodian" of these principles entails the creation of conditions to guarantee the preservation of the environment, while also making sure that the market will not suffer from it, in terms of competitiveness.

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[2] "In Q3 2024 the economic sectors contributing the most to the total greenhouse gas emissions were manufacturing (21.6%), electricity and gas supply (16.3%) and transportation and storage (16.1%)". Eurostat, 'Quarterly Greenhouse Gas Emissions in the EU - Statistics Explained records on air emissions account (AEA)' (Europa.eu February 2025) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_greenhouse_gas_emissions_in_the_EU#Source_data_for_tables_and_graphs> accessed 14 February 2025.

[3] Article 4(2)(a), Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

[4] Article 3(b) TFEU; Article 194 TFEU.

This work tries to emphasise to what extent legislative reforms in the field shaped predictability in the State aid regime — a fundamental factor to consider for Member States notifying aid measures to the Commission for approval. The key modifications occurred in the General Block Exemption Regulation (GBER), as well as in the Guidelines on State aid for environmental protection and energy (EEAG, CEEAG), for sure have expanded the eligibility of many more types of aid schemes enhancing environmentally friendly solutions. However, these reforms have also raised questions on the compatibility of State Aid measures with the principles that constitute the fundamentals of the EU competitive order and the Internal market as a whole.

Indeed, this research contributes to explore the ongoing debate on the possibility "to stretch" the State aid legal and policy framework, to guarantee the delivery of sustainable options in the industry. In particular, the methodology adopted involves the analysis of the legal force of the existing regulatory frameworks to determine the extent to which the Commission and the Member States are bound to it. And consequently, to what degree the scope of aid compatibility scrutiny can be adjusted to allow derogations in pursuit of environmental objectives.

A key role in this context has been played by the Commission's interpretative tool. As a result, a compelling emphasis will be placed on the specific interpretative power of the Commission, which is capable of easily reshape the State Aid regime through its Decisions on implemented national aid schemes. Particularly, the focus will be delved on cutting-edge interpretations given in the environmental and energetic sector of State Aid. Yet, we will see that, while the Commission holds significant discretionary power, it is still strictly subject to the European Court of Justice's oversight. Admittedly, case law has the enormous authority to forge the future of State Aid for environmental protection and energy, leading Member States to adapt to the compelling power of the European constraints.

From a future perspective, this analysis seeks to depict what type of the Commission's approaches will be suitable to achieve environmental objectives without undermining the established EU Internal market regime. The type of assumptions that will be drawn, nonetheless speculative, will be supported by a series of illustrative examples of State Aid Commission's decisions. These illustrations will demonstrate that

restrictive interpretations of State Aid criteria[5] have greater ability to determine the EU's likelihood of achieving the aforementioned environmental targets, as they encourage Member States to implement more financial schemes without the risk of incurring in sure prohibition. Conversely, a broader reading of the legal elements depicting State aid leads to include, within the meaning of prohibited State aid, more types of subventions, but in the meantime, it secures market integrity. However, limiting public funding options leads to the necessity to find alternative ways to combat environmental warnings.

With the intention to give a conceptual roadmap of this dissertation an explanatory overview of its structure will be reported below. However, a premise must be made.

Since the focus is directed on the Commission's approaches towards the conformity of public subventions with the Internal market, it was chosen to structure this work following the same structural phases of the Commission's State aid scrutiny. Namely, the ex-post control dedicated to the identification of the existence of State aid in the first chapter, and the compatibility assessment presented in the second chapter. Whereas the third chapter is related to the following phase of control scrutiny carried out by the Court of Justice on the Commission's decisions on State aid for environmental protection and energy.

As a result, the first chapter deals with the assessment of every single criterion characterising the definition of State aid, which will be read in conjunction with environmental objectives, through the use of practical illustrations of Commission's decisions. The methodology of analysis adopted in this work is centred on the impact that the environment safeguard has in the assessment of the fundamental criteria, shaping the definition of State aid. More specifically how the Commission tries to integrate market-based necessities, such as the safeguard of the competitive order, with the fostering of environmental sustainability.

Subsequently, the ex-ante control will be immediately illustrated in support of the fact that the Commission's control is also permeated in the designing phase of the actual aid measure. In this sense, the Commission ensures a higher quality of public policies interventions by changing the governance of EU State aid policies adapting them to the

[5] Article 107(1) TFEU.

current needs, especially in sectors where technological innovations play a crucial role, such as in the fostering of the industrial transition to renewables. In other words, making the State aid framework fit-for-purpose.

The second section of Chapter I has instead the purpose of describing the major changes occurred in the State aid for environmental protection and energy framework. It delineates the state of the art and the most advanced and up-to-date legal principles in the field of State aid for environmental protection and energy. Indeed, the aim is to highlight the main developments with a comparative methodology analysis with the previous related framework. This will allow to draw conclusions on possible future improvements in this area to boost decarbonisation, providing the basis "to stretch" the environmental State aid framework,[6] while also safeguarding the EU market prerogatives.

In the second chapter we will explore the core foundational principle affirmed in this dissertation, namely how State aid can represent a mean to foster climate goals.

For this purpose, the first part of this chapter will display a few illustrative examples that demonstrate this integration in aid schemes. Specifically, for the deployment of environmentally friendly technical instruments, such as Carbon capture and storage systems in conjunction with the carbon border adjustment mechanism (CBAM), or technologies related to waste management with the waste hierarchy principle. We will also analyse how the Commission orients its assessment when the scheme in question does not have ecological purposes, but its implementation still detains effects on the environment, namely the so-called non-environmental aid.

The study will continue with the analysis of the development of the latest relevant instruments of the 2023 Green Deal Industrial Plan and the Temporary Crisis and Transition Framework for State aid, which are the direct consequence of the implementation of the European Green Deal. The focal point will be on the administrative up-to-date improvements to prove the relevant impact that these upgrades will have for the acceleration of the European green transition, especially for the notifying Member States.

[6] See Chapter I, para 4.2 The de *facto* binding nature of the State Aid Environmental Guidelines".

As we mentioned, the last part of the second chapter will deal with the elements connoting the Commission's benchmarking compatibility assessment. The methodology applied in this specific analysis is the same adopted for the first phase of State aid detection exposed in the first chapter. Therefore, for every element taken into account in the scrutiny will be provided a selection of recent practical illustrations based on a Commission's decisions array. For the last element of the avoidance of undue negative effects on competition and trade there will be a compelling remark on the element of the *common interest*, a crucial criterion which will be the leading component of an important amendment of Article 108(1) TFEU that is in the process of being delivered by the European Parliament.

Conclusively, the chapter will end with a critical view on the dysfunctional aspects of the last step of the Commission's compatibility assessment — the weighing phase of negative and positive conditions — which still represent a grey area of the Commission's action in the State aid control.

Ultimately, the last chapter will develop a critical analysis of recent EU Courts case law on the matter of subventions in the energy field, which underwent through the Commission's scrutiny. Four CJEU's judgments will be object of our focus. The opening one and the last one relate to two landmark rulings[7] in the field of State aid in the energy sector. The first one that led to a change of interpretation of the public nature of resources involved, and the last case which proposes a different approach to environmental concerns in the Commission's State aid assessment. Admitttedly, this last judgment is expected to bring upheavals in the State aid control process.[8]

The second and the third cases[9] are two very recent preliminary rulings, concerning the interpretation of two relevant concepts in the State aid regime. Here the CJEU gives interesting, as well as contradictory insights in a way that seems to even depart from previous established case law.

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[7] Case C-405/16 P *Federal Republic of Germany v European Commission* [2019] ECR I-268; Case C-594/18 P *Republic of Austria v European Commission* [2020] ECR I-742.
[8] *Republic of Austria v European Commission*, para 100.
[9] Case C-588/22 *Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia SpA, Gestore dei Servizi Energetici SpA – GSE* [2024] ECR I-2905; Case C-11/22 *Est Wind Power OÜ v AS Elering* [2023] ECR I-765.

Few considerations will then be drawn especially in regard to the balanced relationship between the two EU institutions strictly involved in the State Aid control, the European Commission and the CJEU. Especially on the latter's lenient influence and the more rigorous approach of the Commission, firmly reliant on State aid rules.

All considered, the relevance of this case law will for sure shape the future of the constantly developing field of State aid law for the environmental protection and energy, mirroring the market implications that the growing environmental awarenesses will bring.

CHAPTER I - THE EUROPEAN COMMISSION APPROACH IN MONITORING STATE AIDS FOR ENVIRONMENT PROTECTION AND ENERGY

1. Introductive remarks: the current raise of environmental protection in the EU and the attentive weighing process of environmental State aid

The environmental and energy saving awarenesses are not new topics on the European legislator's table[10]. As a matter of fact, these objectives are taken into account in the European Union's legal framework as relevant part of its competences when shaping the Internal Market legal regime,[11] as well as in establishing competition rules.[12] Indeed the legal foundations set by the Treaty of the Functioning of the European Union represents a starting point but also a strong legal basis to grant to the EU the powers to place the environment as one of its compelling priorities in its action. Yet the endeavours in this matter are still not considered enough.

The "evergreen" debate on the necessity to support a cost-effective transition to climate neutrality has reached a landing point with the European Green Deal, with the ambition to balance the greenhouse emissions produced with the ones which will be removed by 2050.[13] However, the so-called "Net-zero economy" is undoubtedly a quite challenging objective to reach, thus, a step-by-step approach must be adopted. As enshrined in the 2024 Report delivered by the United Nation Environment Programme (UNEP)[14], if a pro-active approach in the mitigation policies or measures will not be adopted, the temperature increase will amount to 2.6-3.1°C by the end of the century.

It is now the time to draw conclusions on a juridical point of view on what could be the reason that is hindering the achievement of this goal, registering sloppiness, yet lengthiness in the process, and finding possible solutions in the matter.

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[10] Article 11, Article 191-193-194(2) TFEU.
[11] Article 4(2)(a), TFEU.
[12] Article 3(b), TFEU.
[13] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal'' COM (2019) 640 final.
[14] United Nations Environment Programme (UNEP) Emissions Gap Report 2024: No more hot air ... please! With a massive gap between rhetoric and reality, countries draft new climate commitments (24 October 2024) DEW/2672/NA <https://www.unep.org/resources/emissions-gap-report-2024> accessed 2 November 2024.

Market operators are naturally led to maximize profits, and most of the times environmental protection is not taken into account. This oversight is inevitably borne by the society's wellbeing. Admittedly, when it comes to businesses that are behind the energy production field, it is usually difficult to shift their production towards environmentally friendly solutions. However, State aid represents an effective way that could incentivise the market to orient economic activities in a way that could also integrate environment prerogatives.

In theory granting economical resources to undertakings to foster their energetic transition into renewable energy solutions could ideally represent one of the possible answers to the economic costs of the environmental crisis. The main problem with State subventions, though, is not just their limited availability but their very nature. They are a powerful tool, with both positive and yet, negative effects. As for the latter, it can be seen that, without a proper supervision, their roll-out could harm trade and competition, creating unfairness and disparities among operators, and preventing the most efficient allocation of resources.[15] Thus, an effective control must be carried out in order to deliver fast but also safe solutions to render the EU economy sustainable but most importantly, competitive. Indeed, as Margrethe Vestager stated in one of her speeches, during the conference on the Foreign Subsidies Regulation: «*State aid control is not to prevent subsidies, it is to make sure that when they are there, we still have fair competition, we have the transparency, we have the control of what is going on*». [16]

This first chapter will be divided into two subject areas, aiming firstly at giving a critical analysis of the European Commission's investigative and monitoring powers for what concerns environmental aid. Respectively, the ex-post and the ex-ante control will be the focal points of the first two sections. In particular, these two mechanisms will be examined considering the green and energetic concerns, and the role they play in the Commission's assessment duty. For the ex-post control, the topic will centre on the elements of paragraph 1 of Article 107 TFEU and on the exemptions of paragraph 3 of

[15] Quigley Conor, *European State Aid Law and Policy (and UK Subsidy Control)* (Bloomsbury Publishing 2022).

[16] Margrethe Vestager, 'Keynote of EVP Vestager for the Concurrences Conference on the Foreign Subsidies Regulation: "Foreign Subsidies - a Piece in the Geopolitical Puzzle"' (Conference on the Foreign Subsidies Regulation 6 March 2023) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_1503> accessed 25 September 2024.

the same article, by illustrating the jurisprudence and the State aid decisions surrounding them. In regard of the ex-ante control, the focus will be on the so-called *fitness check* carried out by the Commission. It must be clarified that the inverted order, in which the two types of control will be presented further in this chapter, is not arbitrary but serves the specific purpose of displaying the diverse weight the Commission's role holds in the State aid control.

Subsequently, the second subject area, covering the last two sections, will shift to a critical assessment of the two main legal tools involved in the State aid control regime, in particular to take a look on their latest amendments in the fields of environment protection and energy. Specifically, the General Block Exemption Regulation and the Guidelines on State aid for climate, environmental protection and energy. These last two parts specifically intend to raise awareness on the effective feasibility of these instruments in the achievement of the environmental objective of climate neutrality set in the European Green Deal.

1.1 Ex post control: the main elements of State aid detection

The ex-post control represents the scrutiny carried out by the European Commission to assess the legality of the Member States' subventions deployment, since State aid is generally deemed as prohibited *per se* in the European Union.[17]

Indeed, it enables to ensure discipline and compliance by Member States in the implementation of State aid measures,[18] through an investigation procedure. The latter could either lead to a "decision not to raise objections" – the most common epilogue for environmental aid – or to a conditional decision, where the measure is considered compatible only if implemented with the conditions established in the decision itself, or either, to a negative decision, which leads to the subsequent need for recovery of the aid.[19] However, rather than concentrating on the final decision adopted, our main focus will be directed at giving a critical view on the implications of the process of the Commission's

[17] TFEU.
[18] María Muñoz de Juan, 'Monitoring of State Aid: From Ex Ante to Ex Post Control' (2018) 17(4) European State Aid Law Quarterly 483.
[19] Francesco Mazzocchi "The Procedures before the Commission" in Alberto Santa Maria, *Competition and State Aid: An Analysis of the EU Practice* (Kluwer Law International 2015) 105.

assessment for the State aid in question. This outlook then, takes into consideration the main elements detected in the first paragraph of Article 107 TFEU for the specific assessment of State's investments that have an environmental-wise influence. Admittedly, it is exactly this very influence that will be crucial to enable the new dedicated State Aid Guidelines for the environment protection and energy,[20] enacted in 2022, to play a relevant role in the lawfulness evaluation by the Commission, namely the *compatibility* test. However, as anticipated, the latter can be considered only subsequential to the first step taken by the Commission, which is dedicated to assessing the existence of State aid.

The European Commission commitment at identifying the transfer of capitals, as deemed to be State aid, is a concern which comes from the need to create a harmonised environment among market operators. Exposing the existence of a prohibited direct or indirect[21] transfer of State resources, is far from being a simple task, as now many economic mechanisms may conceal the real nature of a money handover. Nevertheless, in its investigation process[22], the European Commission can always rely on four main elements[23] which, combined together, allow to detect State aid, as displayed exactly in article 107(1) of the Treaty on the functioning of European Union.[24] Respectively, a supporting measure granted by the State or through State resources; an economic advantage; the selective favour of a specific undertaking; and finally, a distortive or a potential distortive effect on competition and trade between Member States. [25]

However, when it comes to the objective of the safeguard of the environment as well as energy-related funds, especially if intertwined to the former scope of guaranteeing fair competition, a more complex procedure of identification arises. The complexity can be found in the existence of certain specific instruments,[26] used in the sector, the

[20] Commission, 'Communication on Guidelines on State aid for climate, environmental protection and energy' (2022) OJ C 80, (CEEAG).
[21] Commission, 'Notice 2016/2946 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (2016) OJ C 262, p. 1–50.
[22] Liza Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019).
[23] Leigh Hancher, Tom Ottervanger and Pieter J Slot, *EU State Aids* (6th edn., Sweet & Maxwell 2021) 851.
[24] TFEU.
[25] Commission Notice 2016/2946 on the notion of State aid.
[26] Philipp Werner and Vincent Verouden, *EU State Aid Control: Law and Economics* (Wolters Kluwer, Alphen Aan Den Rijn 2017), 665.

evaluation of which is challenging to assess within the boundaries of the four-fold structure[27].

What strikes evidently though, it is the absence of a binding regulatory framework[28] that could establish *per se* which type of environmental, or energy aid, could be considered as banned. The EU Commission approach predominantly relies on a benchmarking method[29], partially set by the European Court of Justice's (CJEU) case law and the standard framework prescribed in the TFEU which has led to shape a specific practice on the EU State aid control. This brought the European Commission to issue non-legally binding[30] documents, such as mainly Communications and Guidelines which serve as the foundation for many approaches towards the State aid assessment process. That is indeed the case for energy and environmental aid, where instead of a monitoring approach, based on detecting the abnormalities of non-compliant State aid to legislation, the Commission operates an evaluation[31]. Evaluating, in this case, means assessing if the scheme deployed by the Member State aims at achieving the objectives established by the EU in a specific sector, namely the environmental and energy one.

Since the EU has set demanding climate targets[32] to achieve through guidelines[33] and exemption regulations,[34] undertakings have started to submit their request for State's subsidies supporting the roll-out of new green technologies towards net-zero economy.[35]

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[27] Karel Bourgeois, Leigh Hancher, Daniel Irisarri Lolin "State Aid for Energy and Environmental Protection" in Hancher, Ottervanger, Slot, *EU State Aids* (n 23).
[28] Article 288, TFEU.
[29] See as an example: Commission, 'Decision on State Aid SA.63176 Belgium - Green energy certificates in Wallonia (2024) OJ C 3637. On the evaluation to assess the administrative cost and complexity of the present scheme with its environmental effects. See also: Commission, 'Decision on State Aid SA.63458 Germany - Aid for ancillary hydrogen refuelling facilities amending the Federal aid scheme for the acquisition of light and heavy commercial vehicles with alternative, climate-friendly propulsion systems' (2021), OJ C 521. On the appropriateness of state aid for low-carbon hydrogen as a instrument to support an economic activity in a manner that increases environmental protection.
[30] Morgan Eleanor Harris, 'The Evolving Functions of the Commission's Communications in Environmental Matters' (2023) 2 Il Diritto dell'Unione Europea 195. <https://www.dirittounioneeuropea.eu/Article/Archive/index_html?ida=266&idn=33&idi=-1&idu=-1> accessed 9 July 2024.
[31] Muñoz de Juan, EStAL (n 18).
[32] The European Green Deal.
[33] CEEAG.
[34] Commission, 'Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty C/2021/5336' OJ L 270 (GBER).
[35] See as an example: Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – SA.112546 C (2024) 1367. See also SA. 109170 C (2023) 906.

The detection of State aid, which occurs anteriorly, requires a transparent and efficient cooperation between the Commission and Member States. However, the scrutiny is differently carried out compared to the standard monitoring procedure, namely aimed at finding irregularities to assert the existence of a prohibited State aid.

The Commission's duty in evaluating State aid schemes granted by Member States to undertakings, pursuing guidelines to foster environmental protection and green energy, is strictly related to ascertaining the presence of four parameters.[36] The latter set the basis for the identification of State aid, independently from its compliance with the EU Internal market. Consequently, once the elements which depict the existence of a State's subvention are detected, the assessment will mainly focus on establishing if the aid in question is likely to comply with the scopes outlined by the Guidelines on State aid for climate, environmental protection and energy of 2022,[37] for instance: «[...] facilitate the development of economic activities in a manner that improves environmental protection, as well as activities in the energy sector that are governed by the Treaty [...]». Nonetheless the focus is mainly on the actual presence of what is deemed to be State's economic assistance and its consistency with the guidelines' scopes, it does not imply that the Commission is totally exempted from detecting an eventual distortive effect of competition and trade, which is still one of the elements that entails the concept of State aid. Yet, contrary to what is the usual fate of State aid in general,[38] when it comes to aid admitted on a framework relevantly affected by soft law like guidelines, incompatibility leaves space to conformity.[39]

1.1.1 A sincere cooperation as the backbone of State aid assessment

That being said, in the *ex-post control,* Member States are largely entrusted to collaborate and combine together their efforts with the Commission. This occurs with the purpose of guaranteeing the efficient, yet transparent way of scrutinising any grant-in-aid which is deemed to be included within a certain economic threshold,[40] bound to the

[36] See n 27.
[37] CEEAG 2022, p. 9.
[38] Quigley, *European State Aid Law and Policy*, 3 (n 15)
[39] Muñoz de Juan, EStAL (n 18) 173.
[40]CEEAG 2022, para 459 «If its State aid budget exceeds EUR 150 million in any given year or EUR 750 million over its total duration».

obligation of notification[41]. The notification tool is a requirement which arises only after the Member State, through a self-assessment, acknowledges that the extensive size, the novel features and the technological and regulatory changes of the measure are liable to bring a potential and "significant distortion of competition". [42] This doubtful wording allows for discretion in its interpretation, giving the Commission a wide interpretative power, but it also creates uncertainty for the notifying State. Notwithstanding, the Member State will be required to provide a draft evaluation plan[43] which will become part of the Commission ex-post assessment.[44]

An easy way for States to understand whether they shall compile the draft evaluation plan could be the "scoring system".[45] It is, by far, a peculiar example of a theorised type of assessment, which, by means of a certain score that results from an arithmetical formula, which eventually provides a red, yellow or green result – using the analogy of a traffic light colour scheme. The formula is filled in with the three elements mentioned before, namely, size, novelties and regulatory changes, which the subsidy in question might bring. The three possible outcomes relate to different obligations for Member States: if the result corresponds to red, it must undergo a full State aid assessment; if yellow, it is bound to an indefinite obligation; and if green it is exempt from the duty to assess. Admittedly, this type of theory allows to quantify numerically conceptual characteristics such as the technological modernisation of a measure, helping to objectively assess and compensate the inevitable discretion that the legal phrasing creates.

Apart from the mostly based monetary evaluation requested on behalf of the national government, the general assessment deployed by the Commission is mainly based on the counterfactual method. Its disposition aims at identifying the discrepancy between the situation where an undertaking receives aid, and the counterfactual scenario, in which firms with the same characteristics operate without aid. This can be possible

[41] Article 108(3), TFEU.
[42] Council, 'Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union' (2015) OJ L 248.
[43] CEEAG, para 459.
[44] ibid paras 455-463.
[45] For a detailed analysis of the scoring system see: Hans Friederiszick, Ela Gtowicka, Linda Gratz, Simone Lainenbirgerand Andreas Rosenfeld, 'Ex Post State Aid Evaluation in Environmental Aid' (2018) 17 European State Aid Law Quarterly 509.

only after an attentive gathering process of data, only if not confidential, and the involvement of stakeholders. Making the evaluation public, in fact, facilitates the replication of results for further studies, and Member States' contribution in this is of extreme relevance.[46] The results of this analysis will also be object of assessment, establishing whether the aid has a direct or indirect effect, and finally its proportionality and appropriateness. For this last level of scrutiny, the related public policy enters into play. The Commission will take it into consideration, and, in our case, it will determine if the energy and environmental protection purposes are being met through means of the specific framework set in place.[47] Some of these objectives will be inherent in the Commission's decisions on State aids which will be taken as illustrations throughout all this work, especially the reduction of CO_2 emissions of beneficiary firms, and additional capacity of renewable energy production, with the support and production share from Renewable Energy Sources (RES).

Regardless from econometric analysis carried out, our focus will mainly be on the legal basis of the Commission ex-post investigation which represents an in-depth examination part of the Commission's work. The cornerstone of this *de jure* assessment is represented by the Article 107(1) TFEU[48] which sets the perimetry, based on a four-fold paradigm, to check whether a certain economical transfer results as State aid. All the four criteria will be illustrated below.

1.1.2 State resources: a matter of imputability

The first criterion we are going to focus at is the *nature* or the *origin* of the transfer, which must necessarily be linked to State or State resources.[49] The analysis of this first element can be broken down into two features which usually must be assessed together,[50] namely *state resources* and *imputability.* The reason for this, can be found in the

[46] Commission, 'Staff Working Document "Common methodology for State aid evaluation"' (2014), SWD 179 final. <https://www.eumonitor.eu/9353000/1/j4nvhdfcs8bljza_j9vvik7m1c3gyxp/vjk5t611tgy1>accessed 12 July 2024

[47] CEEAG; Commission, 'Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty C/2021/5336' OJ L 270 (GBER).

[48] Article 107(1), TFEU.

[49] ibid.

[50] Commission Notice 2016/2946 on the notion of State aid (n 21), para. 39.

uncertainty shown throughout the years in the EU case law and, above all, the recent disagreement displayed between the Commission and the European Court of Justice[51]. While there is no doubt that when a subsidy is conceded by a public authority it will automatically be imputable to the State, however, not every advantage given by it can be referred as State aid,[52] and imputability, in this sense, plays a very crucial role. The Court has many times used the argument that passing on the burden of costs to bear to end-users, in order to compensate the costs needed for energy producers to shift to renewables, entails the exclusion of public resources, and this was also seen in *Netherlands v. Essent*.[53] Notwithstanding this case, the Court later recognised that the presence of an intermediate body appointed to administer and aggregating the financial resources, gathered from end-customers, represents a discrepancy that can overturn the final assessment of the existence of state resources as it could lead to a change of imputability, in particular towards the State. This result was displayed in particular in *Austria v. Commission*[54] where, in the specific situation, the State's influence was extremely evident as the levies on final customers were aimed at fulfilling a public interest objective, and the intermediate operator was bound to a very stringent control by public authorities.[55]

As it was highlighted by the CJEU in the *Iride case,*[56] it is mostly the extension of the intervention of a public authority that makes the difference in establishing the presence of state resources involved. Indeed, the presence of an imposition by law of purchasing a certain quota of electricity produced by renewable energy sources at a fixed price, does not imply any public commitment,[57] but as soon as this levying is managed or administered by a public intermediary,[58] or involves the creation of a fund to compensate the expenses on the energy suppliers, here the statal nature of economic resources comes into play.

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[51] Case C-405/16 P *Federal Republic of Germany v European Commission* ECLI:EU:C:2019:268.
[52] Case T-47/15 *Federal Republic of Germany v European Commission* ECLI:EU:T:2016:281.
[53] Joined Cases C-105/12 *Staat der Nederlanden v Essent NV*, Case C-106/12 *Staat der Nederlanden v Eneco Holding NV*, Case C-107/12 *Staat der Nederlanden v Delta NV* ECLI:EU:C:2013:677.
[54] Case T-251/11 *Republic of Austria v European Commission* ECLI:EU:T:2014:1060.
[55] Philipp Werner and Vincent Verouden, *EU State Aid Control: Law and Economics* (Wolters Kluwer, Alphen Aan Den Rijn 2017).
[56] Case T-25/07 *Iride S.pA. and Iride Energia S.p.A. v Commission* ECLI:EU:T:2009:33.
[57] Case C-379/98 *Preussen Elektra AG v Schhleswag* AG ECLI:EU:C:2001:160.
[58] *Iride S.p.A. and Iride Energia S.p.A. v Commission* (n 56).

Even though, not recognising the existence of State aid in a specific measure imposed by law, that confers an advantage to a specific category of energy producers, only for the fact that is supported by private subjects, could still be considered as a dangerous move, as that would lead to eluding Article 107(1). As a result, States could design specific loopholes to admit schemes where money transfers appear to happen formally between private individuals whereas, instead, they have the same impact of a State aid.[59] This was indeed the case for *Preussen Elektra*,[60] which was widely surpassed by a different approach[61] that the ECJ adopted, widening the concept of State resources as mentioned above. However, the previous trend seemed to be reinvigorated, even overturning what stated in *Netherlands v. Essent* with a landmark CJEU judgment on the German law establishing EEG in 2012.[62] Here is displayed the disagreement between the Commission and CJEU. Admittedly, the intermediate operator managing resources here was of private nature, however, while for the Commission the existence of a set of State's rules governing the resources' management already represents the signal of public intervention, thus, State resources, the CJEU toppled this statement denying their existence. Indeed, in this case, the Court based its reasoning on the fact that there was no State's obligation to place the surcharge for renewable energy sources on customers. This last case will be further analysed in Chapter III, with a focus on the Court reasoning, highlighting its departing nature from the previous Commission's point of view.

This leads us to conclude that the mere presence of a costs-transfer to final-users is not a direct symbol of state resources, yet, a public obligation imposed on an energy supplier to compensate those costs, is for sure sufficient for the CJEU to get cognisance of the presence of State resources.[63] It must be admitted that even finances from private sources falls into the concept of State resources under Article 107(1) as long as they are subject to the continuous supervision of the State.[64]

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[59] Hancher, Ottervanger, Slot (n 23) 862.
[60] *Preussen Elektra* (n 57).
[61] Case C-262/12 *Vent De Colère and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement* ECLI:EU:C:2013:851.
[62] *Erneuerbare-Energien-Gesetz* (Renewable energy sources act, amending its predecessor version of 2000) - EEG 2012).
[63] *Federal Republic of Germany v European Commission* (n 52).
[64] Phedon Nicolaides, 'State Resources, Control and Imputability - Lexxion' (Lexxion The Legal Publisher 13 February 2024) <https://www.lexxion.eu/en/stateaidpost/state-resources-control-and-imputability/> accessed 5 July 2024.

1.1.3 The advantage: a departure from *the* standard

The second criterion of our focus is the *economic advantage*, or simply, the concept of advantage. Nonetheless Article 107(1) TFEU does not explicitly mention the 'advantage' as one of the elements implied to assess the existence of State aid, it is of relevant importance to establish, together with the element of 'selectivity', the peculiar position which a specific undertaking gains after having received a State's economic assistance. Indeed, this component stresses on the lifted-up position that could be acquired after being subjected to the measure in question, compared to other comparable market operators which act in similar situations.[65] The latter could be represented either by a subvention or even a relief of a burden likewise, for instance a much more convenient tariff[66] and a tax reduction[67] or a compensation of costs. As a result, its analysis is mainly based on a comparison process, liable to detect any discrepancy clashing with the specific standards.[68] Either way, the common ground is constituted by the presence of an asymmetry. The main issue though, especially for the Commission and the ECJ, is to establish what is deemed to be *the* standard, or as the "normal market conditions"[69] for the specific case at stake.

A transfer of public resources does not signify that there has been an advantage in any case, but if the beneficiary's situation has evidently changed after it,[70] that could admittedly represent a signal which can lead to a deeper investigation. For this purpose, the Commission, as well as the Court, makes a wide use of the MEO test or 'market economy investor principle,[71] as to assess whether a private market operator of an equivalent dimension would have behaved in the same way as the State did issuing the measure. It is important to mention, however, that this test can be ran only if the State does not act within its public authority powers[72] but intervene in its 'private operator

[65] Commission notice 2016/2946 on the Notion of State aid, para 98.
[66] Case C-194/09 P *Alcoa Trasformazioni S.r.l. v European Commission* ECLI:EU:C:2011:497.
[67] Commission, 'Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council' (2011) OJ L 130.
[68] *Alcoa Trasformazioni S.r.l.*, (n 66).
[69] For an explanation of "normal market conditions" see Case T-228/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities* ECLI:EU:T:2003:57, para 268.
[70] Commission notice 2016/2946 on the notion of State aid, para 67.
[71] ibid para 74.
[72] ibid para 77.

capacity'. This assessment relies massively on the use of economic data, carrying out econometric analysis, arguably, the most common method used to estimate differences between beneficiaries prior and after obtaining the aid.[73] The latter can be deployed also on comparable types of contracts as for instance happened in the Commission investigation[74] on the Romanian energy company Hidroelectrica – state-owned for most of its part – where its contract was stipulated at a preferential electricity tariff. In the case under consideration the Commission relied on the use of the concept of *pari passu* transactions, namely transactions set as «if the terms and conditions were the same for public bodies and all the private investors involved».[75] Albeit so, it specified that to assess the applied tariff in question, the mere comparison among the energy prices that were set by other energy companies in the Romanian market at the time of the transactions was not a sufficient basis to assess Hidroelectrica's choice, yet, additional evidence was needed, such as behavioural approaches based on social and economic policies reasons, which are extraneous to commercial interests.[76]

It should be pointed out that, in some cases the concept of advantage does not raise issues, as its presence could be justified by the need to discharge services of general economic interest (SGEI). Nonetheless we find ourselves operating within the boundaries of Article 106(2) TFEU, the interrelation with Article 107(3) remains vivid.[77] This aspect is particularly relevant when assessing the advantage, considering that the assignment of the performance of a public services project to private undertakings can inevitably result in a privileged position. Therefore, the Court intervened in 2003 setting out the so-called *Altmark criteria*, which, if all complied, exclude the existence of an advantage.[78] It is worth noting though, that through the years the difficulty[79] of the alignment of all the

[73] Friederiszick, Gtowicka, Gratz, Lainenbirgerand, Rosenfeld, EStaL (n 45).
[74] Commission, 'Decision on State Aid SA.33475/2015 on tariff charged by Hidroelectrica of Romania S.C. Termoelectrica S.A.and S.C. Electrocentrale Deva S.A' (2015) OJ 275/2015.
[75] European Commission Directorate General for Competition, "The Market Economy Operator Test for Risk Finance Measures: Practical guidance for Member States", Document version: 26 January 2024.
[76] Commission, Decision SA.33475/2015, para 85.
[77] Daniele Gallo, *Public Services and EU Competition Law. The Social Market Economy in Action* (1st edn., Giappichelli Editore 2021), Ch.VI.
[78] Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415.
[79] Hancher, Ottervanger, Slot (n 23), 852.

Altmark requirements for tenders, especially for the fourth one, led to develop a diverse way to derogate from State aid rules concerning the energy sector's projects.

Undoubtedly, the CEEAG played a relevant role in this by introducing for the first time, since its previous version,[80] aid for the security of energy supply (4.8).[81] On one hand, if the positive assessment of a *pari passu* transactions as well as the use of tenders to identify the economic operator – carrying out a specific activity concerning energy supply –served as a presumption to exclude the existence of an advantage; on the other hand, if the support is granted under the basis of public policy reasons, the disposition of a procedure of public procurement does not automatically denote a presumption of exclusion of any advantage. And this leads us to a different system of derogation that existed, theoretically[82], but it has only been developed in the most recent times (CEEAG 2022): the necessity of ensuring energy supply as a general economic interest.[83]

For this purpose, it is worth to mention the investigation[84] carried out in 2019 by the Commission in the Lithuanian market in relation to an energy reserve service, needed to compensate the repeated failures of the interconnector between Lithuania and its exporting states. Herein, it found the existence of an advantage that could not obtain in the market, represented by a compensation granted only to the company Lietuvos Energija. In the scrutiny, the Commission relied extensively on the interlink between security of supply and the existence of a genuine SGEI.[85] As a matter of fact, Lithuania failed to give evidence of an actual problem of energy supply, thus, for the compatibility assessment of the aid it could not hold on to the then current environmental and energy guidelines (at that time EEAG 2014-2020).

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[80] Commission, 'Communication on the Guidelines on State aid for environmental protection and energy 2014-2020 (2014)' OJ C 200 (EEAG).
[81] CEEAG, para 325.
[82] Article 9 para.2, European Parliament and Council, 'Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC Statements made with regard to decommissioning and waste management activities' OJ L 176; European Parliament and Council, 'Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU' (recast)(2019) OJ L 158.
[83] Commission, 'Decision on State Aid SA. N 475/2003 Ireland -Public Service Obligation in respect of new electricity generation capacity for security of supply' (2004) OJ C 34.
[84] Commission, 'Decision on State Aid SA.44725 (2019/NN) Lithuania – on public service obligation (PSO) for security of electricity supply: strategic reserve; and complaint on Lithuanian electricity PSOs' (2019), OJ C 261/2019.
[85] ibid para 49.

The Commission's method to assess the presence of incompatible aid within the concern of subventions for securing energy supply within the meaning of the now revised CEEAG is always founded on an assessment under letter c) of Article 107(3) TFEU which relies on the «development of certain economic activities or of certain economic areas». In reference to public policies, concerning energy and environmental sectors, it is commonly established[86] to appoint to national discretion to determine which economic operator could guarantee the meeting of securing environmental protection as well as energy supply objectives.

The European Union Agency for the Cooperation of Energy Regulators reported[87] that Member States have started to face the unprecedented energy crisis due to the shortage of gas supplies from Russia, as well as unavailability of nuclear power, by implementing measures to foster security of supply, like capacity mechanisms and interpretability schemes. As an illustration of this matter, the Finnish electricity deficit every year is estimated to be of 4,300 MW, where nearly a third of it would have been imported from Russia, but this was not the case in 2022, following the Russian war of aggression against Ukraine. For this reason, Finland deployed a strategic reserve, namely a capacity mechanism[88] to ensure the achievement of the necessary level of resources but held outside the electricity market and only dispatched in specific circumstances.[89] The Commission did not raise any objection in its investigation,[90] considering the aid compatible, even if this measure did actually attribute an economic advantage on the successful bidders in the strategic reserve tenders. As a consequence all the undertakings in a comparable factual and legal situation were obliged to leave the market.[91] The grounds for this have to be detected in the letter c) of Article 107(3),[92] and again, given that the Commission interpreted the measure in light of the environmental and energy

[86] Articles 20 and 24, European Parliament and Council, 'Regulation (EU) 2019/943 on the internal market for electricity' (2019) OJ L158, p.54-124.
[87] European Union Agency for the Cooperation of Energy Regulators, 'Security of EU Electricity Supply 2023' (ACER 2023).
<https://acer.europa.eu/sites/default/files/documents/Publications/Security_of_EU_electricity_supply_2023.pdf>
[88] CEEAG, para 19.
[89] Regulation (EU) 2019/943.
[90] Commission, 'Decision on State Aid SA.55604 (2022/N) Finland - on Finnish strategic reserve' (2022) OJ C 439/2022.
[91] ibid para 106.
[92] Article 107(3)(c), TFEU.

guidelines[93], the "securing of electricity supply" represented an objective which rendered the aid compatible on the basis of section 4.8 of CEEAG.

In terms of detecting the advantage, another pattern has recently become popular linked to the environmental matters of eliminating carbon emission, namely the emission allowances, whose nature will be covered in the third chapter with the preliminary ruling of *ARERA v Fallimento Esperia S.p.A. and GSE S.p.A.* (C-558/22).[94]

For what interests us now, in terms of economic advantage derived from green certificates, aimed at incentivising production of energy from renewable resources through emissions trading, a peculiar situation was the Belgian one in 2018. The Commission assessed in its investigation[95] that Belgium set out two schemes supporting renewable energy and cogeneration in Flanders, based on CHP certificates scheme.[96] These certificates do not constitute a "right to pollute", but rather a proof of production of green energy[97] with an obligation of purchasing them at a minimum price. However, what happened in this case is that the government actually granted these certificates for free, creating a market that would not exist without the State intervention.[98] In fact, it allows the beneficiaries to trade them with other market operators setting a price. This concept creates an advantage to renewable energy producers, granted with CHP certificates to create new revenues for themselves.[99] All considered, the Commission did take cognisance of the existence of State aid in these measures. However, it considered them compatible, since the energy efficiency measures were based on renewables, which enabled them to be covered by the EEAG, granting compatibility on this matter.[100]

[93] CEEAG, section 4.8.
[94] Case C-558/22 *Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia S.p.A., Gestore dei Servizi Energetici S.p.A. – GSE* ECLI:EU:C:2024:209.
[95] Commission, 'Decision on State Aid SA.46013 (2017/N) Belgium - on Green electricity certificates and CHP certificates in Flander' (2018) OJ C 369/2018.
[96] Independent Authority of the Flemish Energy Market VREG, 'Support System: CHP Certificates' (VREG 20 December 2018) <https://www.vreg.be/en/support-system-chp-certificates> accessed 11 July 2024.
[97] SA.46013 (2017/N) Belgium (n 95), para 52.
[98] ibid para 57.
[99] ibid para 79.
[100] EEAG, Section 3.4.

1.1.4 Selectivity: an environmentally shaped concept

The third element of State aid detection we are going to cover is the selective favour of one undertaking, or just *selectivity.* As it was specified in the Commission notice on the notion of State aid,[101] which breaks down Article 107 TFEU and its interpretation, it distinguishes two ways to identify the selective element of a measure. Respectively, the ones that can be clear and discernible, the *de jure selectivity,* or the one hidden behind the legal comprehensive criteria of the measure usually lying in a factual background, the *de facto selectivity*. Illustrations of these, only apparently, theoretical concepts are found especially in cases dealing with environmental tax devices applied distinctionally among operators in similar situations.[102]

In fact, selectivity has a close interlinked bond with fiscal measures in general, which help us to depict perfectly its essence. To quote José Luis Buendía,[103] "nothing is certain but selectivity and taxes"[104]. For what concerns levies and State aid, the public support is deemed to be found in the actual set-up that the State itself shapes spreading the fiscal burden in a heterogeneous way, meaning that even in a comparable situation operators are not treated likewise. In other words a «departure from the normal application of the general tax framework».[105]

In the constantly changing State aid jurisprudence a three-step approach has been developed to detect the selective nature of a measure.[106] The first stage is the definition of a system of reference; secondly, the uncovering of a derogation from the latter; and, finally, an assessment of whether it could be justified by its nature or the inherent aid scheme structure. To give an exemplification on how the analysis of selectivity is carried

[101] Commission notice 2016/2946 on the notion of State aid.
[102] "The comparable factual and legal situation", for an explanation of the concept see Joined cases C-78/08, C-80/08 Paint Graphos and others ECLI:EU:C:2011:550, paragraph 61.
[103]José Luis Buendía is a member of the Legal Service of the European Commission since Octor 2022. He retired in March 2022 as head of the Guarrigues Brussels Office. He holds a Degree in Law and a Ph.D. in Law from the University of Zaragoza (Concurrences – Antitrust Publications & events).
[104] Wout De Cock, 'Economics of State Aid Control: Where Law and Economics Meet' (2018) 17 European State Aid Law Quarterly 565.
[105] Commission, 'Decision on State Aid SA.29064 (11/C, ex 11/NN) Ireland - Differentiated air travel tax rates implemented by Ireland' (2011) OJ C 306/10.
[106] See: Case T-399/11 *Banco Santander, SA and Santusa Holding, SL v European Commission* ECLI:EU:T:2018:787 and Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2018:784.

out, in 2011[107] the Commission was requested to assess an environmental-based tax imposed on air passenger transport by a Dutch legislative act,[108] which would have compensated for emissions and noise pollution. The peculiarity of this levy, that triggered the attention of the Commission, was indeed its discriminating way of involving only passengers departing from a Dutch airport, thus excluding transfer and transit passengers and cargo flights. The alleged State aid was to be presumed then on those airlines and airports which did not manage many of those categories. Since the law itself established the criteria of enforcement of the burden, the hypothetical selectivity was to be regarded as of *de jure* nature.

The first step taken was, admittedly, to review the referencing system adopted which in this scenario is identified in the taxation of air passenger transport. Once settled this aspect, the Commission proceeded to assess every single category not included in the levy system so that to further decipher if every one of them could have been included in the frame of reference established.[109] Firstly, the grouping of every other means of transport – except aviation – led the Commission to acknowledge that their regulative and legislative framework is far from being compared to the air travel, thus to justify the application of diverse tax systems; secondly, the category of cargo operations, which are undeniably included in a total different business and a dissimilar customer-base brings to place them in a non-comparable factual and legal situation; and finally, the category of transfer and transit passengers, that would depart from a Dutch airport, which the Commission advisedly parted to avoid the issue of double taxation[110] imposed by other states, nonetheless this category was comprising the main element of the referencing system (departure from a Dutch airport). In conclusion, the Commission was resolutive in justifying the Dutch tax system as not selective, as the other categories excluded did not belong to the same factual and legal background, namely the referencing system established.

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[107] Commission, 'Decision on State Aid SA.25254 (NN18/2009) – the Netherlands Air Transport - Exemption from air passenger tax' (2010) OJ L 186/2010.
[108] Article 36g to 36rg, *Wet belastingen op milieugrondslag* BWBR0007168/2009, (Dutch legislative act on environmentally based taxation).
[109] Commission, Decision on State Aid SA.25254 (n 107), paras 21-34.
[110] Decision on State Aid SA.29064 (11/C, ex 11/NN) Ireland, para 31 - Commission staff working document, 1.9.2005, SEC (2005) 1067, para 3.

The Article 107(1) TFEU refers to the selective nature of aid by the wording «favouring certain undertakings or the production of certain goods», which evidently entails the actual raised placement of certain economic operators compared to others. It is exactly this last concept which gives to selectivity a very similar nature to the previously examined concept of advantage, since they both rely on the existence of a reference system built between a single or a group of favoured undertakings and the multitude of other operators.

However, setting up this analogy in these terms results to be naïve and unscrupulous. There are indeed two arguments that can be put forward to state the different nature of the two elements of advantage and selectivity. In the first place, the different mean of comparison[111] and, secondarily, the absence of an automatic implication between advantage and selectivity. For what concerns the advantage we have already stated that the assessment takes into account the "normal market conditions" to establish it,[112] thus a general and volatile comparing device which mostly relies on the discretion of whose assessing. The same thing cannot be said for selectivity, where the referencing system is portrayed by "the comparable factual and legal situation"[113] in which other undertakings are located. As the General Court explained in case of *Banco Santander* of 2014 «it is for the Commission to prove that a measure creates differences between undertakings which, with regard to the objective pursued, are in a comparable factual and legal situation».[114]

For what concerns the second argument, instead, it is worth to mention that an advantaging measure can additionally take the form of an aid scheme, like the imposition of a tax on a specific group among comparable economic operators, leading to the existence of a "selective disadvantage",[115] favouring the rest of the operators, exempted by the taxation plan without there to be selectivity. It was commonly established in the

[111] José Luis Buendía Sierra, 'Finding Selectivity or the Art of Comparison Annotation on the Judgment of the Court of Justice of the European Union (First Chamber) of 8 September 2011 in Joined Cases C-78 to 80/08, Paint Graphos' (2018) 17 European State Aid Law Quarterly 85.
[112] See n 69.
[113] Commission Notice 2016/2946 on the notion of State aid.
[114] Case *Banco Santander v European Commission* (n 106), para 50.
[115] Case C-487/06 P *British aggregates Association v. Commission of the European Communities* ECLI:EU:C:2008:757.

MOL case that an individual aid can give rise to a presumption of selectivity[116], but with respect to aid scheme for groups we have to rely on a case-by-case analysis as the CJEU has never implied a consequential link between the existence of an advantage and selectivity.

An interesting point matter to cover, which involves the combination of selectivity and environmental protection, was highlighted in the case *British Aggregates Association*.[117] The objective of environmental protection has in many cases represented the cornerstone of levies imposition's justification. However, the main issue persisting is whether policy purposes can legitimise selectivity. Indeed, a direct consequence of environmentally driven measures appear to be their discriminatory nature which would lead to the presence of State aid yet justified by the higher scope of safeguarding the environment.[118]

In the case at hand, the imposition of a levy (AGL)[119] solely on certain extracted virgin materials for aggregates used in construction, created confusion in the assessment of AGL's nature. The fact that the exploitation of substances obtained from waste products, or other processes, were not taxed, signified that the charge aimed at incentivising the recycle of materials and their efficient use. Be that as it may, the CJEU highlighted how this exact environmental scope, nonetheless legitimate, was wrongly used to justify the exclusion of the measure's selectivity by the General Court.[120] The main error in law committed by the GC was to set as referencing system the environmental impact respectively produced by the undertakings involved and the ones not involved by the burden, thus leading to consider as comparable operators the ones whose activity was deemed to generate the same extent of pollution. As a consequence, setting this argument as a basis, admittedly, it is simple to state that the measure involving only certain undertaking shall be deemed as selective, even if justified by its benefitting purpose. Nevertheless, this conclusion was overturned by the CJEU by interpreting the environmentally oriented objectives as only a ground to identify the inherent logic of the

[116] Case C-15/14 P *European Commission v MOL Magyar Olaj- és Gázipari Nyrt* ECLI:EU:C:2015:362.
[117] *British aggregates Association* (n 115).
[118] Article 191 TFEU; Article 37 of the Charter of Fundamental Rights of the European Union (2007/C 303/01).
[119] *The British Finance Act* (2001), amended by the Finance Act (2002), S.I. 2002/761, reg. 37(2)(c)
[120] *British aggregates Association* (n 115), para 92.

levy,[121] and not the benchmarking element to exclude selectivity. It must be admitted that the policy aim of a measure is irrelevant for its classification as State aid,[122] since it cannot be considered as a criterion to determine a referencing system, whose deviation makes, indeed, the measure selective.[123] Eventually, policies play for sure a role in interpreting the existence of State aid, yet, the case law seems to stress the need to avoid the mistake of using it as a way to justify the absence of state aid *a priori*.

After all, it is seen in the case law[124] that the Court does massively rely, for the justification of the selectivity of a measure, on the «nature or the overall structure of the scheme»[125] created, which completely put aside the existence of aid.[126] This particular aspect is especially depicted in two cases involving energy, but above all, environmental protection.

In the *Kernkraftwerke* case[127] concerning a preliminary ruling, the Court was requested to assess the legality of a specific levy on nuclear fuel imposed by a German law.[128] As a matter of fact, EU law[129] only admits taxation on electricity as an end product and not on the actual source to produce it, and by doing so it would have affected competition with other electricity producers. However, the Court seemed to rely on the fact that the tax that targeted only electricity producers from nuclear-based energy source, was aimed at compensating the environmental burden caused by the radioactive waste

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[121] ibid para 63.
[122] See, inter alia, Case C-241/94 *French Republic v Commission of the European Communities* ECLI:EU:C:1996:353, paragraph 21; Case C-342/96 *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:1999:210, paragraph 23; and Case C-75/97 *Kingdom of Belgium v Commission of the European Communities* ECLI:EU:C:1999:311, paragraph 25.
[123] Phedon Nicolaides, 'Selectivity and Tax Measures' (Lexxion - The Legal Publisher 16 November 2021) <https://www.lexxion.eu/en/stateaidpost/selectivity-and-tax-measures/> accessed 22 July 2024.
[124] See, inter alia, Case C-88/03 *Portuguese Republic v Commission of the European Communities* ECLI:EU:C:2006:511, para 54; Joined Cases C-106/09 P *European Commission and Kingdom of Spain* C-107/09 P *v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:2011:732, para 75; and Case T-308/00 *RENV Salzgitter v Commission* ECLI:EU:T:2013:30, para 116.
[125] Case C-159/01 *Kingdom of the Netherlands v Commission of the European Communities* ECLI:EU:C:2004:246, para 42.
[126] Case C-279/08 P *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:551, para 62.
[127] Case C-5/14 *Kernkraftwerke Lippe-Ems GmbH v. Hauptzollamt Osnabrück* ECLI:EU:C:2015:354.
[128] *Kernbrennstoffsteuergesetz* (Law on excise duty on nuclear fuel) of 8 December 2010 (BGB1. 2010 I, p. 1804) ('KernbrStG').
[129] Council, 'Directive 2008/118/EC concerning the general arrangements for excise duty' (2008) OJ L 9 and Council, 'Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' (2003) OJ L 283.

from the use of nuclear fuel in conjunction with the "polluter-pays principle".[130] Thus, the only undertakings affected by the measure would solely be those who produce such waste. It goes without saying that, only if that type of operator has the characteristics related to the main objective of the measure, then it is evident that other undertakings are excluded inherently, which leads to the absence of selectivity defensible by the nature of the actual structure of the fiscal imposition scheme.

Another valuable example can indeed be provided by a Dutch case,[131] which involved objectives of environmental protection in State aid. The General Court had to assess whether the scheme for nitrogen oxides, providing emission allowances to certain undertakings, was considered State aid as it excluded other operators subject to the same rules regarding NO_x.[132] The distribution of allowances was based on a quantitative criterion to indicate large undertakings instinctively considered to be producing significant emissions.[133] Relying on this referencing system the GC concluded that the subvention was not to be considered State aid, even though it established that the selectivity element was not addressed correctly by the Commission.

The CJEU, instead, considered it to amount to State aid, however, both the CJEU and the GC were positive in considering that the *objectivity* of the measure, nevertheless necessary, does not determine a sufficient element to consider selectivity in the distribution of allowances to all the undertakings with a thermal installation capacity greater than 20 MWth (the objective standard indicating the size of an undertaking). Thus, the criterion could not be linked to the inherence of the nature of the structure of the scheme to reduce industrial pollution, because it leaves out other comparable polluters.

Conversely, what the Court stressed the most to assess the element of selectivity was the actual *effects* that the measure *per se* produces, in this case in terms of polluting

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[130] *Kernkraftwerke* (n 127), para 78.
[131] *European Commission v Kingdom of the Netherlands* (n 126).
[132] "Nitrogen oxides (NOx)is a collective term used to refer to nitrogen monoxide (nitric oxide or NO) and nitrogen dioxide (NO2) which are sources are fossil fuels. The diatomic molecular nitrogen can create several different oxides, reacting with oxygens ions. NO2 is one of it and not only is an important cause of air pollution by itself, but also reacts in the atmosphere to form ozone (O3) and acid rain".
For more information about NOx see: Donald L Sparks, Balwant Singh and Matthew G Siebecker, Environmental Soil Chemistry (Academic Press 2023) 381–410.
<https://www.sciencedirect.com/science/article/abs/pii/B9780443140341000095> accessed 16 July 2024.
[133] *European Commission v Kingdom of the Netherlands* (n 126), para 75-78.

emissions.[134] Indeed, all undertakings shared the same target of reducing emissions, and in the light of that aim for the Commission, with an hustle analysis, considered all the beneficiaries of the measure in the same legal and factual situation.

The CJEU, once again, had reminded us that Article 107 TFEU does not allude to State interventions through their causes or aims, but outlines them in terms of their effects, irrespectively of the techniques used to calculate them. Thus, it is of necessary importance to assess the system of reference on these terms to establish if their design is arbitrary or biased, and in this way hindering the use of the above-mentioned three-step analysis. With this case, the Court has demonstrated to be steady in accepting an extensive notion of State aid, however this does not mean this general approach can be applied for any case. As Professor Nicolaides[135] writes: «*selectivity can also be the result of objective and rather reasonable distinctions between undertakings in similar situations».* [136] Indeed, it could be argued that the selectivity of a measure can also stem from an objective criterion which highlights differences among the beneficiaries of the measure.[137].

1.1.5 Distortive effects on competition and trade: the need for a balance with environmental objectives

Competition and trade may appear as two distinct areas of interest to analyse, but their intertwined consideration helps to evidently assess the presence of what it is presumed to be a distortion of the market, or a threat to distort, in Article 107 TFEU. However, the influence that the market could receive cannot be scrutinised without the compatibility test set by the Commission, which already falls out of the actual proof of the "existence area" of the aid to instead proceeding to enter in the evidence of the "lawfulness area".

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[134] ibid para 51.
[135] Professor Phedon Nicolaides is a Professor at Maastricht University. He held the Jan Tinbergen Chair for European Economics at the College of Europe from 2012 to 2018. He was educated in the United States, the Netherlands and the United Kingdom. He obtained a PhD in economics and a PhD in law.
[136] Phedon Nicolaides & Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever-Wider Scope' (2012) 11 European State Aid Law Quarterly 791.
[137] For further arguments on this line: Philipp Werner and Lucia Stoican, 'The NOx Case - Still Trying to Fit in a System · C-279/08 P · Annotation by Philipp Werner' (2018) 17 European State Aid Law Quarterly 101.

The market-distortive impact, that aid for energy and environment may have, is object of scrutiny by the Commission by leveraging on the third paragraph of Article 107, in particular focusing on letter b) or c), respectively for projects of common European interest and the development of certain economic activities or areas.[138] By that being said, we cannot forget that from 2014[139], a very relevant guidelines policy, repealed by their 2022[140] version, has been set as a mean of reference for State aid for climate, environmental protection and energy, and for this reason the compatibility assessment has increasingly shifted on the latter framework. This leaves the Commission to approach in a much more detailed manner to the question if the aid can result distortive, considering the climate targets and energy efficiency as pillars in the balancing method adopted.[141] Furthermore compatibility in this field is covered by the General Block Exemption Regulation (GBER)[142], considering the possible exemptions granted under it, however this specific topic will be covered further in this chapter.[143]

Granted that a competitive environment can only exist where various undertakings are deemed to trade in a liberalised market[144], the electricity sector represents the perfect illustration of the European Union's achievement in the creation of the concept of economic liberalisation but, most importantly, an Energy Union.[145] Even though the Commission is not requested to analyse in detail the actual market considered, it would still be necessary to establish that the undertaking, granted with the subsidy, does not operate in a condition of monopoly where it behaves as the exclusive provider of an energy source.[146]

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[138] Article 107(3) b); c), TFEU.
[139] EEAG.
[140] CEEAG.
[141] ibid.
[142] Commission, 'Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty' OJ L 187.
[143] See further in this Chapter, para 3. The GBER amendment after the enactment of the CEEAG 2022".
[144] Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Clean Energy for All European" COM (2016) 860 final.
[145] Guido Pepermans, 'European Energy Market Liberalization: Experiences and Challenges' (2018) 13 International Journal of Economic Policy Studies 3.
[146] Quigley, *European State Aid Law and Policy*, 105 (n 15).

The past case law[147] proved the correlation of effects between competition and trade. If the aid is able to strengthen the position of a certain operator in comparison with other ones acting at an intra-EU level, the trade is also inevitably impacted by the aid itself when other undertakings offer comparable services in other Member States.[148] For instance, in the preliminary ruling of *Essent Netwerk Noord v Aluminium Delfzijl*, which dealt with a liberalised background. For the Court it was sufficient that domestic electricity producers were in competition with electricity generating operators in other Member States to prove that trade was at the risk of being influenced by the aid granted.[149]

The specific sector worth of our attention for the purposes of this dissertation, is the energy infrastructure, in which the funds relating to its development and efficiency seem to be assessed by the Commission by tracing back directly to letter c) of Article 107, but it is not rare that it relied also to letter b). A premise, though, is certainly needed. In principle, public funding of the energy infrastructure field, including transmission, distribution and storage, is liable to have an influence in the trade between Member States, since an economic activity of large extent is being operated by market actors subjected to EU state aid rules.[150] This is the case when undertakings exploit infrastructures at an unusual[151] lower cost or obtain an economic benefit they would not receive under normal market conditions.[152] Hence, the Commission will carry out a twofold analysis of the aid, firstly checking its positive effects as to facilitate the development of an economic activity and its incentive impact; and, secondly, its negative effects on competition and trade, through the necessity, appropriateness and proportionality parameters of the aid. The second part of the analysis mentioned focuses on a comprehensive balance of the positive and negative effects, considering the threshold of "the common interest". The new Guidelines,[153] however, had a huge influence on this two-sided scrutiny by highlighting the link between the facilitation of the development of economic activities in general and

[147] See Case T-379/06 *Kaimer GmbH & Co. Holding KG and Others v European Commission* ECLI:EU:T:2011:110 and Case C-730/79 *Philip Morris Holland BV v Commission of the European Communities* ECLI:EU:C:1980:209.
[148] *Holding KG and Others v European Commission* (n 147).
[149]Case C-206/*06 Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV* ECLI:EU:C:2008:413.
[150] Commission Notice 2016/2946 on the notion of State aid, para 217.
[151] See n 69.
[152] ibid.
[153]EEAG, para 24.

activities focused on climate and environment, which are considered a mean to reach the former. In fact, in section 4.9.4 of the Guidelines it is pointed out that aid for energy infrastructure does not have undue distortive effects.

In order to delve thoroughly into the combination of the bilateral test and the new environmental and energy policy framework, it will be effective to regard the Croatian individual aid[154] approved in 2022 for grid-scale energy storage. Transition to climate neutrality as well as climate targets[155] represents the most prominent current challenge for Member States and this economic incentive was presented as the right measure to set Croatia on the right path towards their achievement. These exact objectives were considered as benchmark by the Commission in the scrutiny of the distortion of competition and trade.

Indeed, as positive effects, increasing the sustainability of an activity results in modernising the existing Croatian energy network by balancing services to TSOs[156] and foster competition in the Croatian market for balancing services. Additionally, the incentive effect is proved by the counterfactual scenario in which the investor would not undertake the material investment to settle the utility-scale batteries capacity.[157] Thus, this proves that environmental protection represents an arduous objective to reach without public support, however the latter had the effect, in this case, to shape investors behaviours.

The same goes for what concerns negative effects, the Commission relied on the counterfactual element for the parameter of necessity, stating that the market revenues would not have been sufficient for operators to engage in the project itself, since it was

[154] Commission, 'Decision on State Aid SA.64374 (2022/NN) Croatia - Individual aid to IE-Energy for grid-scale energy storage' (2022) OJ C 6560 final.
[155] European Parliament and Council, 'Regulation (EU) 2018/1999 of the on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council' (2018) OJ L 328.
[156] "Transmission System Operators (TSO) transmits electrical power from generation plants over the electrical grid, at the level of HV (high voltage), to regional or local electricity distribution operators. Transmission grids operate on a sub-national or national level". For more information about TSO see: Dimitrios-Sotirios Kourkoumpas and others, 'A Review of Key Environmental and Energy Performance Indicators for the Case of Renewable Energy Systems When Integrated with Storage Solutions' (2018) 231 Applied Energy 380.
[157] SA.64374 (n 154), para 76.

not even financed by end-users' tariffs. For this reason, it is considered to be a market failure,[158] which requires the 'funding gap', namely the net extra cost that serves to guarantee to Croatia of the penetration of renewable energy systems in its market. The absence of aid would, indeed, prevent to achieve a sufficient level of sustainability to reach the climate goals set up by the EU. The Commission after having reviewed the business projection and by relying on the "funding gap principle"[159] finally assessed that the appropriateness and proportionality of the aid resulted justified even with a limited risk of undue effects on competition and trade.[160]

Ultimately, after having investigated on the existence of the aid the Commission devoted the last part of the analysis to the balancing method between positive and negative effects. The measure had the aim of enlarging the market of electricity storage in Croatia directly connected to the transmission network in order to, not only, securing the energy supply to the country but also to accelerate the decarbonisation of energy sector by building stationary batteries and avoid waste of energy. In view of the fact that these objectives responded to the principle of common interest[161] of the EU, and their positive impact on the stability of the Croatian electricity grid outweighs the negative effects on competition and trade, the Commission approved the notified request.

Nevertheless, as pointed out also in the Guidelines, an important element that the Commission must bear in mind when assessing State aid with environmental purposes is the inherent long-term negative externality[162] it brings. It is very common in the scrutiny to focus the attention on short term investment, which even though are aimed at incentivising energy efficiency objectives, they may overlook the innovative and effective ways to achieve cleaner energy solutions for the longer term[163]. As a result, operators which bring out innovative and efficient technologies in the market could suffer from the selective monetary input released mainly to the least sustainable undertakings. Therefore,

[158] CEEAG, para 34.
[159] Ibid para 52.
[160] SA.64374 (n 154), para 124.
[161] CEEAG, section 3.2.
[162] Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law - Techniques of Regulating the Environment* (Cambridge University Press 2017) 120-149.
[163] CEEAG, para 65.

even climate-attentive State aid could determine – *de facto* – a relevant disturbance on the competitive market.

The Commission has also proven in the past that the mere fact of relying on policy guidelines for environmental protection does not inherently signify the actual lawfulness of what has deemed to be proved as State aid. As an illustration of this, in 2011 Austria[164] had been neglected in its attempt to prove the absence of aid in an exemption of tariff – namely feed-in tariffs – on energy suppliers to energy-intensive users, introduced with the Austrian Green electricity Act.[165] The latter established that energy-intensive business could ask their supplier not to provide them with green electricity, but only if their sustainable electricity spending was more than 0.5% of their net production value.

The mechanism was considered analogous to the rules on tax reductions for harmonised energy taxes set out in the Environmental Aid Guidelines.[166] Therefore, if considered harmonised under the Energy Tax Directive[167], they could be declared compatible without further analysis. Nonetheless, after having determined the existence of aid with an assessment of the State resources, advantage and selectivity parameters (denied by the Austrian government at first), the argument put in place to prove, at least, its compatibility with the Internal market, was the indirect effect on the environmental protection.

According to the reasoning given,[168] the exemption from the costs due for the supply of energy from sustainable resources would have represented the necessary precondition to ensure political support to raise the clearing price[169] needed to finance the production of renewable energy and incentivise energy-efficiency. However, the foretold

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[164] Commission, 'Decision on State Aid SA.26036 (C 24/2009) Austria - State aid for energy-intensive businesses under the Green Electricity Act in Austria' (2011) OJ L 235/2011.
[165] *Ökostromgesetz,* as amended in 2008 (Austrian Green Electricity Act, BGBl. I, 114/2008, 'the amended ÖSG'.
[166] Commission, 'Community guidelines on State aid for environmental protection' (2008) OJ C 82/01, paras 152-153.
[167] Council, 'Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' (2003) OJ L 283, p. 51–70.
[168] SA.26036 (n 164), para 122.
[169] For a definition of clearing price see market clearing": "The process of moving to a position where the quantity supplied is equal to the quantity demanded, or the assumption that economic forces always ensure the equality of supply and demand. The process of market clearing involves price adjustment until a market-clearing price is achieved". John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (Oxford University Press 2009).

measure settled by the national government was proven, instead, by the Commission, to lead to the inducement of energy-intensive users to consume more and more energy, since the price paid consequently decreases for each additional kilowatt-hour, if they consume above the threshold of 0.5%.[170] Even if presented as environmentally-oriented mechanism, the environmental protection objective necessary to justify the market and competition distortion of the assessed aid was demonstrated to be absent *de facto.*

To conclude on the last element of detection of State aid, it is significant to reaffirm that, despite the actual proof of its existence, confirmed by the first three components of its public nature, advantageousness and selectivity, the compatibility assessment seems to be the ultimate test to legally discharge a monetary support. As a matter of fact, the aid could result not to be prohibited *per se*, nevertheless, the check of its distortive effects remains a non-negligible cornerstone of the Commission investigation to clear its pathway.

1.2 A glance at the exceptions of 107(3) TFEU in the ex-post control and their integration with the State Aid Environmental Guidelines

With the purpose to better frame the assessment of State aid schemes implemented on the environmental and energy matters, it would be valuable to mention how the Commission, as well as Member States, properly make use of the exceptions to the general prohibition of State aid, set forth in paragraph 3 of Article 107 TFEU. The latter provides five different types of derogations from the general prohibition of State aid.[171] In the ex-post assessment, they are considered the benchmark for the *compatibility test*, which is inevitably affected by the policy instruments set out by the Commission itself. The peculiar combination between paragraph 3 of Article 107 TFEU and the State aid Environmental Guidelines will be the focus of this subparagraph.

However, considering the focus of this dissertation, peculiar attention will be given, in particular, to letter b) and letter c), which have been previously mentioned for the element of the advantage.[172] This choice is also taken by looking at the extensive

[170] SA.26036 (n 164), para 124.
[171] Article 107.1, TFEU.
[172] See Chapter I, para 1.1.3 The advantage: a departure from the standard".

use[173] the Commission makes of the mentioned clauses when establishing at last in its assessment, the lawfulness of the aid, or simply to justify its distortive effects on the market.

It also must be noted that, for what concerns these two exceptions, the implementation of the State Aid Environmental Guidelines, before with the EEAG and with the CEEAG afterwards, has been having an effect in their consideration for what concerns the Commission approval in the execution of energy projects. These policy instruments actually represented a valid tool in the Commission's compatibility assessment, namely the subsequent scrutiny which follows the evidence of the existence of State aid. In reality, this aspect only depicts a point in favour of all those aid schemes which do not exactly fall in the definition of «aid to promote the execution of an important project of common European interest» (IPCEI),[174] *or* «aid to facilitate the development of certain economic activities or of certain economic areas».[175]

Indeed, for what concerns an IPCEI, it goes without saying that many projects concerning the energy grid implementation of RES fall within this definition. Particularly, what has been registered through time for them is that the Commission operates an assessment based on specific criteria, which are the result of the recent IPCEI Communication.[176] As it will be discussed further in the chapter,[177] many of the non-binding instruments implemented by the EU, such as Communications indeed, keep their compulsory nature towards the Commission, which is bound to respect the criteria laid down in them to assess State-aid measures.[178] Thus, of course, leaves national governments with little margin of appreciation as they have to abide to the revised

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[173] See Commission, 'Decision on State Aid SA.56606 (2020/N) Austria joining the 2018 IPCEI Microelectronics' C (2021) 1876 final. - Commission, 'Decision on State Aid SA.64754 (2022/N) – Portugal - Important Project of Common European Interest on Hydrogen Industry (Hy2Use)' C (2022) 6847 final. – Commission, 'Decision on State Aid SA.55858 (2020/N) – France - Important Project of Common European Interest on European Battery Innovation (EuBatIn)' C (2021) 494 final; Commission, 'Decision on State Aid SA.105338 (2023/N) – Finland TCTF – RRF: Support for the development of renewable methane and renewable methanol production' C (2023) 7434 final; Commission, 'Decision on State Aid SA.105006 (2022/N) - Poland RRF - LOTOS Green H2 sp. z o.o for project Green H2' C (2023) 2553 final.
[174] Article 107(3)(b), TFEU.
[175] ibid (c) TFEU.
[176] Commission, 'Communication Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' (2021) OJ C 528 final.
[177] See Chapter I, para 4.2 The de *facto* binding nature of the State Aid Environmental Guidelines".
[178] Leigh Hancher and Francesco Maria Salerno in "Article 107(2) and Article 107(3) – The role of Guidelines" in Hancher, Ottervanger and Slot, *EU State Aids* (n 23).

standards set in the Communication. On the basis of these standards a project shall: contribute to EU objectives; overcome important market failures; involve at least 4 Member States, provide a way for Member States to participate; bring concrete positive spill-over effects helping the EU economy and society; involve important co-financing by the companies receiving the aid; and finally, avoid negative environmental impacts due to failure to comply with the principle of the "do not significant harm".[179]

Focusing on this last criterion, the "do no significant harm principle" is a new addition[180] to the standards to follow. The latter aims at including in the balance, with the negative effects on competition and trade, the positive effects on the environment to facilitate the EU's climate neutrality transition.[181] The Commission has expressed its recent consensus on this principle, especially for projects related to the implementation of aid schemes for batteries[182] or hydrogen technology.[183] As stressed by the Commission in the recent *Hy2Tech* decision,[184] the principle represents a crucial factor in the assessment of the project for it to fall in the definition of compatible aid for an IPCEI. It stated that when this element is not complied, it is raised the presumption that «sufficient positive effects are unlikely to outweigh their negative effects on competition and trade».

To put it in simple terms, the mere existence of a breach of the "no significant harm principle" already displays the inability to guarantee that the project could fall in the Article 107(3)(b) TFEU derogation as it creates an imbalance with the likely distortions on the market. It is clear that the Commission is more prone to limit an aid scheme, proposed by Member States, than to actually release it when it comes to environmental matters, and it does so by increasing the standards to respect for its compatibility.

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[179] IPCEI Communication 2021.
[180] Article 17, European Parliament and Council, 'Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088' (2020) OJ L 198.
[181]IPCEI Communication 2021, para 20.
[182] Commission, Decision on Important Project of Common European Interest (IPCEI) on Batteries (2022) SA.54793 Belgium; SA.54801 Germany; SA.54806 Italy; SA.54794 France; SA. 54796 Sweden; SA.54808 Poland; SA.54809 Finland (2019/N).
[183] Commission, 'Decision on IPCEI Hydrogen Technology – Hy2Tech (2023) SA.64625 - Austria; SA.64651 - Greece; SA.64642 - Belgium; SA.64644 - Italy; SA.64640 - Czechia; SA.64649 - Netherlands; SA.64633 - Denmark; SA.64626 - Poland; SA.64646 - Estonia; SA.64753 - Portugal; SA.64632 - Finland; SA.64635 - Slovakia; SA.64671 - France; SA.64624 - Spain SA.64647 - Germany (2022/N)' C(2019) 8823 final.
[184] ibid para 354.

Indeed, for the aid scheme granted for the development of sustainable and performing batteries in 2022, the national governments based their reasoning on the significant reduced CO2 footprint, by generating and supplying electricity from renewable energy, and introducing solvent free processes. Moreover, the environmental positive effects were enhanced by a reduction in the waste generated due to their design, meant for reparability and extended lifetime, allowing a second use through the raise of the degree of recyclability of the battery itself.[185] The Commission, eventually was convinced that the "do not significant harm" principle was respected by the elements put forward by the 7 Member States involved in the project in question.

The same goes for what concerned the recent *Hy2Tech* project[186] for the deployment of new, improved, and cost-optimised applications of the hydrogen value chain. Indeed, the objective of this project has been detected in the mitigation of the social impact of the transition to clean energy, which – according to the governments requesting the aid schemes – will be represented by the development of hydrogen technologies, as well as their storage, transportation and distribution.[187]

The Commission assessed that the renewable and low carbon technologies seem to represent an *essential step towards climate neutrality*, since they do not adversely impact on the pollution of air, water and land, and this was established by the verification of the engineering design processes the Commission had previously carried out.[188] In addition, Member States had proved that the projects will not be placed in protected areas, thus to limit contamination of water and marine resources. The *Hy2Tech* will be contributing also to the concept of circular economy, and protection and restoration of biodiversity, points highly addressed in the new Environmental Guidelines.[189] In a nutshell, the Commission concluded that the eligibility criteria to fall under the Article 107(3)(b) can only be guaranteed for IPCEIs if there is a proof-based alignment to the no harm principle as a last, but crucial, element which would influence the whole outcome of the State aid control scrutiny.

[185]Commission decision (n 182), para 247.
[186] Commission decisions (n 183).
[187] Commission decisions (n 183), para 9.
[188] ibid para 359.
[189] CEEAG, section 4.4.4 and 4.6.

All considered, however, the CJEU did not exactly state that the Commission must prohibit any State aid, simply for the fact that it has a harmful effect on the environment. The principle should be interpreted more as the requirement to prohibit *aid whose objective is inextricably linked to a contravention of EU environmental law.*[190] Admittedly, causing harm to the environment and contravening the EU environmental law are not the same thing to check, and currently the case law[191] seems still uncertain to have a clear side on this regard. What stems from this recent jurisprudence though, is actually a logic link from these two elements, namely that, to have a prohibition of the aid, the environmental harm must be the result of a contravention of EU environmental law.

Therefore, at the present time, the Court is of the opinion that if there is no extricable link, State aid cannot be prohibited, even if it causes harmful effects for the environment. And this is only because the aid effects do not distort the market. Thus, it seems like that, conversely to what the Commission is trying to achieve by including the "no significant harm" principle in the IPCEI's definition criteria, this action has been completely shattered by the CJEU, which is more prone to rely on a more market-oriented approach for what concerns energy-related aid.

For what concerns, instead, the derogation of Article 107(3)(c), namely «aid for the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*»,* the Commission was brought to shape, also in this case, specific standards to abide to in order for the aid to fall in the abovementioned definition. This is the result of the vague, yet broad concept of the development of economic activities enshrined in letter c). These criteria are clearly explicated in the recent Communication on Regional State aid,[192] respectively: contribution to a well-defined objective of common interest; the need for State intervention; appropriateness; incentive effect; proportionality of the aid; and last but not least, avoidance of undue negative effects on competition and trade.

[190] Phedon Nicolaides, 'Must the Commission Prohibit State Aid That Harms the Environment?' (2023) 22 European State Aid Law Quarterly 17.
[191] Case C-594/18 P *Republic of Austria v European Commission* ECLI:EU:C:2020:742, paras 43-45.
[192] Commission, 'Communication on Guidelines on regional State aid' 2021/C OJ C 153.

However, having listed them does not serve the purpose of analysing their application, which will be carried out later in this work in relation to the CEEAG,[193] but rather to show a compelling aspect which characterised the recent Commission decisions, involving the State Aid Environmental Guidelines.

For what interests us in this context, in the very recent years, the Commission shifted its approach by assessing the aid often focusing to the pursue of a certain sustainable objective, listed in the Guidelines. This element enables to detect *the development of a certain economic activity or area* and to actually make sure that a public subvention is justified through the notion of the derogation in letter c). In this way we basically witness to a smooth integration of the exception of letter c) with an environmental policy-based purpose, allowing a grant of aid, making it fall in the derogation of letter c).

An illustration of this can be regarded in the *ArcelorMittal France* decision where the Commission was asked to assess a hydrogen-based direct reduction technology, which could guarantee a lowering of emissions in the steel production sector, one of the biggest emitters of greenhouse gases.[194] This technology implements the use of hydrogen as renewable source, produced by electrolysis, namely splitting the molecules of hydrogen and oxygen from water (H2O) with the use of energy exuberance coming from renewable sources, thus achieving a total of 70% greenhouse emission savings.

The Commission took as a benchmarking parameter paragraph 23 of the CEEAG to assess if the activity in question is to be considered falling under Article 107(3)(c) TFEU. By this standard, it is requested to the Member State to provide evidence on the link between the reduction of negative effects on climate of the specific economic activity, and the promotion of the development of economic activities by enhancing their sustainability.[195] It was indeed recognised that the French government described the measure as a way to support production of steel from iron ore, through the use of renewable hydrogen instead of fossil fuels. This leads to contribute to the development of

[193] See Chapter II, para 5. A new consolidated compatibility assessment for State aid for environmental protection and energy in the CEEAG 2022".
[194] Commission, 'Decision on State Aid SA.104903 (2023/N) – France - Aid to ArcelorMittal France' C(2023) 5013 final, points 7-8.
[195] ibid para 114.

an environmentally friendly way to produce steel, benefitting also downstream sectors, like automotive, thus contributing to the developments of their correspondent market.[196]

We can see how smoothly, the CEEAG introduced a framework which connects the sustainable transition of an economic sector to the evidence of the development of the linked economic activity, in this case steel production. In this way, not only Member States are guided through mean of a clear policy in the deployment of legal aid schemes, but it guarantees that a policy-based instrument, instead of hindering State aid approval, actually incentivise Member States to align with its sustainable objectives to stay in the State aid legality zone.

As oppositive to this trend, in the past, when the objective of the aid would not be covered by the Guidelines, nevertheless environmentally driven, the Commission would adopt the criteria-based method for the derogation of Article 107(3)(c). Admittedly, this inevitable approach was lengthy as it had to provide evidence for every element to assess and to deliver a reasoning which would prove a common interest, the existence of appropriateness, incentive effect and so on. This different approach was particularly highlighted in the 2016 German decision for the aid for closure of lignite-fired power plants, which at the time was not considered covered in the State Aid Environmental Guidelines (EEAG).[197] The Commission then opted in evaluating the presence of an object of common interest to detect its compatibility directly with Article 107(3)(c). And indeed, it recognised the reduction of polluting emissions of 40% within 2020 in Germany as a shared objective in the EU.

Conversely, a shift of the Commission assessment's methodology in the context of closure of power plants using coal, can be provided by the 2023 German decision for the closure of two lignite-fired power plants RWE and LEAG.[198] The reason why this decision has been chosen as a model situation to point out, is because of the decisive approach showed by the Commission, which is specifically guided by the objective of the

[196] ibid para 115.
[197] Commission, 'Decision on State Aid SA.42536 - Germany - Closure of German lignite-fired power plants' C (2016) 3124.
[198] Commission, 'Decision on State Aid SA. 53625 (2021/C) – Germany - on the implemented by Germany for Lignite phase-out 'C (2023) 8551 final, para 219.

aid, «aid for closure of power plants using coal»,[199] now present in the in the paragraph 4.12 of the new Environmental Guidelines (CEEAG).

Indeed, the German authorities explained how the closure of lignite blocks had the purpose to cut CO2 emissions, and the aid would have served mainly to remunerate the foregone profits if they were allowed to continue operate on the electricity wholesale market.[200] Their opinion, though, was of excluding a compatibility assessment on the grounds that the measure was notified before the enter into force of the new Guidelines. Additionally, they insisted on the *serious disadvantages* of this type of scrutiny on their behalf, as the parameters of the necessity of the aid, appropriateness and incentive effects, would have been assessed following the rules set in the CEEAG.[201]

Thus, the German government was in favour of a direct scrutiny relying directly onto the 107(3)(c) criteria. However, the Commission stated[202] that, in this situation, relying on the grounds of the current case law,[203] the Commission shall apply the discipline present at the time of the decision and not the one set at time of the aid notification. Interestingly, even if the CEEAG are intended to be applied for aid awarded after January 2022,[204] it turned out that, in contrast to what the parties were alleging, the Commission still recognised that the measure was indented to be evaluated taking into consideration the new State Aid Environmental Guidelines parameters for the compatibility of the measure.

Nevertheless, even if the assessment was then carried out at the Commission's terms, the German government was still rewarded with an overall compatible evaluation of the aid, meaning that the Guidelines did not play a restrictive role in this case. It would be of remarkable interest to see whether they will actually be a limiting factor in the future of State aid control, as their nature seems to suggest, but for now the recent State aid decisions[205] seem to convey the opposite incentive effect.

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[199] CEEAG, section 4.12.
[200] Commission decision on State Aid SA.53625 (n 198), para 219.
[201] ibid para 139.
[202] ibid para 342.
[203] Case C-334/07 P *Commission v Freistaat Sachsen* ECLI:EU:C:2008:709, para 56.
[204] Commission, Decision on State Aid SA. 53625 (n 198), para 337.
[205] See: Commission, 'Decision on State Aid SA.103648 (2022/N) - Denmark - State aid measure to support the industrialization and upscaling of the production of PtX C (2023) 998 final – Commission, 'Decision

2. The Ex-ante control and the *fitness check*

This paragraph will delve mostly on the background of what entails an ex-ante monitoring for the specific sector of State aid for environmental protection and energy, namely the procedure behind what concerns the existing legal framework.

After having analysed in detail the elements which connote the work of the Commission in the ex-post monitoring, entailing the process of detecting and assessing compatibility of State aid with the Internal market, our focus can be addressed to what can be considered the prior comprehensive State aid identification structure. A clear definition of it will help to understand its role for the purpose of the paragraph's object of focus.

The ex-ante control is the Commission's supervision in the State aid framework implementation, aimed at checking its feasibility for Member States to unfold "legal State aid", without the necessity to carry out a formal investigation.[206]

This type of control places its roots in the existence of detailed State aid-control provisions. Indeed, its foundations are set firstly in the conditionalities enhanced in Article 107 TFEU to then spreading its efficacy in other pieces of legislation such as the General Block-exemption Regulation and the State Aid Environmental and energy policies. Their strength is represented by their level of coherence, detail and comprehensiveness, since Member States will benefit from them when notifying aid schemes[207] to the Commission for their monitoring, or even relying on the exempting tool, hence avoiding the mandatory Commission's investigation phase.

This could only be possible through means of the legislative process in conjunction with the decentralised system[208] created between Member States and the Commission. These two factors enable to simplify enormously the Commission assessing duty by furnishing Member States with legal tools to understand whether a subsidy could

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on State Aid SA.105006 (2022/N) - Poland RRF - LOTOS Green H2 sp. z o.o for project Green H2' C (2023) 2553 final.

[206] Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM)' COM 2012 0209 final.

[207] Article 108, TFEU.

[208] Francesco De Cecco, *The distinctive nature of State Law in State Aid and the European Economic Constitution* (Bloomsbury Publishing 2012) 44.

be considered compatible. It may be needless to say that the adoption of Regulations, such as the GBER[209] for instance, benefits not only Member States doubtful of compatibility but also the Commission, which can concentrate its limited resources to cases of more allegeable serious impact on competition.[210] Nevertheless, a decentralised system, to properly succeed, necessitates of a sincere[211] and effective cooperation, starting from the observance of State aid rules.

In 2014 Member States were invited by the Commission to present proposals for strengthening national system to guarantee better State aid compliance not solely by formal checks but also a pro-active assessment of national measures.[212] Moreover, the Commissioner in charge of competition policy, Margrethe Vestager, stressed the importance of evaluating the impact of large schemes since «*it will provide part of the groundwork for designing better State aid measures*».[213]

That being said, it is important to remind, however, that the Commission is the only authority which is granted of the final word, and the paramount guiding light when it comes to State aid ex ante conditionalities' compliance. As also Professor Nicolaides states[214]: «*Good procedures make good State aid*». The Commission guidance is the ultimate tool for Member States to prevent from granting aid which could infringe EU procedural and substantive rules. As an example of the plausibility of this statement, there is the evident contrast of percentages of incompatible notified measures and the non-notified ones, which is seemed to be related to the application of the notification tool.[215] Indeed, in 2015 it was reported that only 5% of the notified aid was found in breach of State aid rules, compared to the 50% of incompatible aid which was not notified.[216] The connection between the lack of notification and the non-compliance can be explained by

[209] General Block Exemption Regulation No 651/2014 (2014).
[210] María Muñoz de Juan, EStAL (n 18).
[211] Article 4, Treaty on European Union [2012] OJ C326/13 (TEU).
[212] European Commission, Press release - 18 December 2014, Brussels "State aid: Commission turns State aid modernization into actions and calls for better cooperation with Member States to boost growth". <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2783>
[213]European Commission, Press release - Daily News of 18 December 2014, Brussels "President Juncker appoints Dr Edmund Stoiber Special Adviser for Better Regulation; First Vice-President Timmermans announces reform of the Impact Assessment Board" https://ec.europa.eu/commission/presscorner/detail/en/MEX_14_2781
[214] Phedon Nicolaides, State Aid Uncovered - Critical Analysis of Developments in State Aid 2015 (The Legal Publisher Lexxion 2016) 289.
[215] Article 108, TFEU (n 5).
[216] Nicolaides, State Aid Uncovered (n 214).

the fact that Member States tend to invest much more time and resources in order to re-design their measure to comply with the rules when they acknowledge the duty to notify it.

The risk of failures is undeniably a factor which encourage to conformity, yet State's authorities are not left on their own in its attainment, the Commission regularly provides them with a *Best Practices Code*. The latest version dates back to 2018[217] with the main purpose of fostering compliance while leaving the Commission to focus its control on the cases which are more likely to distort the market. The Code facilitates the handling of State aid cases, by creating an effective network between national authorities and the Commission, which also allows the latter to gather market information. This can even lead to create measures which are unlikely to distort competition, without the need to formally notify the Commission.[218]

2.1 The so-called *fitness check* as a powerful evaluation tool

It is of significant importance to make sure that the specific framework set in motion constitutes a suitable approach towards the attainment of policy objectives. However, that requires an attentive supervision with the assistance of whom the policy sector may concern with the purpose of gathering and evaluating data to identify regulatory inconsistencies or overlaps. This concept is enucleated by the *fitness check* that brings together Member States and the Commission to combine their endeavours for climate neutrality without sacrificing other interests involved.

In 2019, as part of the State aid Modernisation (SAM)[219] program, the Commission implemented the Better Regulation Guidelines[220] to establish a common structure of approach to assess the effectiveness of the current State aid rules in light of the need to speed up the process of green transition. As a matter of fact, the aim is to

[217] Code of Best Practices for the conduct of State aid control procedures C/2018/4412 OJ C 253, 19.7.2018, p. 14–27.
[218] More information about the Best Practices Code on the European Commission Press release of 16 July, 2018 Brussels "State aid: Commission adopts Best Practices Code to streamline and speed up State aid control":
<https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4544>
[219] Communication on SAM (n 206).
[220] Commission Staff Working Document Better regulation guidelines SWD (2021) 305 final.

evaluate whether these rules still "fit for the purpose"[221] taking into account the European Green Deal[222] objectives, the specific objectives of the legal framework, and the current and future challenges, including the Clean Energy package, the long-term climate and energy strategy. This technique led to the current amendments made to the GBER, modifying thresholds, but most importantly to the new Guidelines on State aid for environmental protection and energy, both of them will be the focus of the next paragraphs of this Chapter.

Undoubtedly, the legal foundation of the *fitness check* is represented by the 'evaluation first principle', the key learning tool which guides the EU interventions which comprises the comparison between the actual performance of a legal framework and the initial expected results.[223] Indeed, its peculiarity could be detected in the fact that, instead of focusing on the assessment process, it actually goes beyond the factual background (the *what*), considering, instead, the extent (the *how much*), the cause of the alteration in question (the *why*) and, finally, the role of the EU intervention in the eventual changes reported.[224] In point of fact, this evidence-based assessment takes into account the "EU added value", namely effects not achieved by Member States for which the EU can take credit.

However, this is just one of the main criteria reviewed, which goes together with efficiency, effectiveness, coherency, proportionality and objectivity. Every single one of them will be then described as a questions-based form in a report. The *Retrospective evaluation support study on State aid rules for environmental protection and energy*[225] gives us the perfect illustration of the *fitness check* carried out by the Commission for what concerns the themes just mentioned, which analyses retroactively the use of the EEAG as a tool to regulate State aid for environmental protection and energy. For the

[221] European Commission, DG COMP (Unit 03), Fitness check of State aid rules Roadmap - Ref. Ares (2019) 727176: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2044-2012-State-aid-modernisation-package-railways-guidelines-and-short-term-export-credit-insurance-fitness-check_en>
[222] The European Green Deal.
[223] Article 318, TFEU.
[224] Better regulation guidelines 2021, Chapter III.
[225] Directorate-General for competition (European Commission), 'Retrospective evaluation support study on the EU Guidelines on State aid for environmental protection and energy applicable in 2014-2020 and the provisions applicable to aid for environmental protection and energy of the Commission Regulation' (EU) 651/2014 final report.

sake of an effective evaluation, the gathering of an extensive amount of data is of fundamental importance, even though it has been pointed out that it is usually the wide gap between the size and scope of diverse State aid schemes, put in place, which prevents from determining a direct interpretation of data.[226]

Be that as it may, for what concerns the methodology adopted to answer to study-questions in the evaluation, there cannot be identified the "one size fits all" method for every scheme. Especially for what entails environmental protection and energy, the different categories of schemes created, which all point towards the achievement of a common scope, have brought the Commission to rely on different evaluation methodologies. It is still possible, by analysing the Commission evaluating approach, to pinpoint a few prototypes of its *modus operandi*.

First of all, there is the "desk research" on public resources, which can be considered as the unavoidable initial step to gather public suitable available data, it is always carried out involving a number of State aid schemes put in place by national governments. The desk research may use the specific mean of survey questionnaires and telephone interviews with the granting authorities. However, it is not uncommon to rely also to publications by energy regulators. [227] Secondly, the other type of valuable tool used is the stakeholders' consultation, which is, nevertheless, poorly engaged. Indeed, the only two categories reported where the Commission benefit of this tool were related to State aid for waste management and financial instruments for energy efficiencies schemes.[228]

As mentioned before, the report in question deals mainly on the application of the EEAG and the GBER, especially in the relevant modifications relying on the bidding processes for renewable energy sources,[229] waste management[230] and financial instruments for energy efficiency in buildings.[231] This new implementation, has been reported to have saved most of the Commission's commitment in the ex-post assessment of State aid schemes. In fact, the percentage of measures which fell under the GBER, that

[226] ibid para 5.1.3.
[227] ibid "Description of study programmes on waste management and zero subsidy bids", para 4.2.
[228] ibid para 5.6.1 and 6.3.
[229] Article 43, GBER.
[230] ibid Article 47.
[231] ibid Article 39.

did not require any further assessment, passed from the slightly 30% of all the aid granted in 2008, to the 82% in 2017.[232]

To have an illustration of the work carried out in 2020 to evaluate the fallout of the energy policy-related framework on the factual basis application, it is worth mentioning the impact assessment for the implementation of the requirements of the Article 39 of the GBER in relation to the energy-efficiency schemes provided for efficiency projects in buildings.[233] The purpose of analysing the application of this provision is aimed solely at displaying the actual work of the Commission in shaping and adapting legislation to guarantee a secure compliance with State aid rules by States.

The provision underwent an amendment in 2021, and admittedly, a role in this change was played by this retrospective evaluation performed by the Commission. At the beginning the case study took into consideration 71 national State aid schemes[234] granted by 18 Member States until the half of 2019, together with the selection process of funds and financial intermediaries. This first phase which can be considered as an 'identification step', brought the Commission to identify these schemes based on a direct or indirect reference to Article 39, establishing whether they referred to its exact wording. Surprisingly, while 47 of them had a direct reference to the Article, 15 of them did not even contain any mention of State aid rules.

Nevertheless, the main pointed out question was to establish how many energy-efficiencies projects have been obtaining aid under these reported schemes, pursuant Article 39, and which kind of selection process was adopted for financial intermediaries. Therefore, the most effective way reputed to collect relevant data was the, already mentioned, stakeholder consultation conducted by means of surveys and interviews. However, since significant insufficient feedback was registered, it was more effective to opt for telephone interviews. The actual respondents were divided on their geographic location, dimension, and on how far they were from reaching their energy-efficiency target. There was a total of 17 respondents. What it was registered is that only one authority, the Greek one, granted aid relying to the GBER, the rest relied on other

[232] European Commission, Competition DG, State aid Policy and Strategy, State Aid Scoreboard 2018: Results, trends and observations regarding EU28 State Aid expenditure reports for 2017 (2019) COMP.A3.
[233] EEAG Evaluation– Final report (n 225).
[234] ibid "review of energy efficiencies schemes", para 6.3.1.

provisions. The reason why most of them decided to depart from the application of Article 39 of the GBER was mainly because of the lack of clarity and practicality of the provision. Arguably, it was the intricacy of the wording which rendered it not user-friendly for its implementation. However, this did not leave State authorities without any legal framework to follow since the GBER, in their view,[235] offered other clearer and practical provisions to rely to.

As it was pointed out, the wide length of the provision, instead of facilitating the process of translating into the execution of a State aid scheme, it only made impractical for States' authorities to attain their purposes. Actually, that led them to diverge onto another path, a different provision, which, however, does not generally mean that they are going to safely land in the field of compliance with State aid rules. The Commission took into account the results of the study, and that, eventually, led to an amendment[236] of the GBER. The purpose of this amendment was to provide an effective legal tool for Member States to shape State aid schemes, in a way that would not have triggered a deeper investigation by the Commission.

To conclude, it is possible to acknowledge by the State Aid Scoreboard of 2018 that on one hand the State Aid Modernisation (SAM) had an incisive impact on many sectors by fostering investments, job creation and economic growth and, at the same time, it allowed the Commission to focus more on cases of public subsidies more likely to distort competition, by shortening the duration of its assessment process. On the other hand, the SAM set the basis for higher quality public policies interventions, changing the governance of EU State aid policy.[237] Nevertheless, it is interesting to observe how the effect of SAM played a role on the GBER as well.

As reported in the State Aid Scoreboard of 2020, Member States have started to massively use the GBER, representing, only in 2019, the 95.5% of new State aid measures.[238] A wide discrepancy is very evident from the comparison between the very

[235] Retrospective evaluation support study (n 225), section 6.3.2.1 "Details on aid granted under Article 39 GBER", in specific for what concerns interviews with Referat EA6 – *Beihilfenkontrollpolitik Bundesministerium für Wirtschaft und Energie*, and with *Befektetési menedzse*.
[236] Article 39, GBER (2021).
[237] European Commission, DG Competition - Policy and Strategy - State aid case support and policy (2019) State aid scoreboard 2018, para 3 "Impact of State Aid Modernisation (SAM)".
[238] ibid (2021) State aid scoreboard 2020, para 4.1 "GBER up take is steady, but has not reached its full potential in terms of State aid expenditure".

few amount of block-exempted cases[239] implemented in the first year of the GBER Regulation enactment in 2014, compared to the almost doubled amount in 2019.[240] The reason of this effect has been allocated on the rapid Commission's case assessment process, due to the raising amount of GBER measures, which do not necessitate any decisions from the Commission before being implemented.[241]

All considered, such an upgrade of block exempted measures, fostered also by the EEAG, created the perfect launching base to speed up the green transition, too slow to achieve if the Commission would have been asked to assess every single scheme which aim to shift to renewables. However, from the fitness check outcome,[242] it was displayed that nonetheless the EEAG as well as the GBER have represented an effective synallagma, they were not «entirely suited to face the climate neutrality challenge, both in terms of scope and in terms of the compatibility conditions».[243] Thus, the need for modernisation to reach the EU's environmental goals and climate targets became preponderant and, for this purpose, the Commission launched a public consultation at the end of 2020[244] which then led to the revision of both the Guidelines and the Block-exemption Regulation. A critical analysis of their amendment will be covered in the two upcoming paragraphs.

3. The GBER amendment after the enactment of the CEEAG 2022

Abiding in the same vein as the previous paragraph, it is now of significant relevance to deal with the Block-exemption Regulation (GBER) and its exonerating nature for what concerns environmental aid. The analysis will delve firstly on pointing

[239] EUR 0.012 million in 2014 (Source: State aid scoreboard 2020, section 4.1.2)
[240] EUR 0.82 million in 2019(Source: State aid scoreboard 2020, section 4.1.2).
[241] European Commission, DG Competition - Policy and Strategy - State aid case support and policy (2021) State aid scoreboard 2020, section 4.1.3 "Has the SAM enabled faster decisions?".
[242] European Commission, Commission Staff Working Document 'Fitness Check of Eu Supervisory Reporting Requirements' (2019) SWD 403 final.
[243] European Commission – Competition Policy - EEAG Public consultation - Factual summary of contributions on State aid for environmental protection and energy – Revised guidelines (2021). <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12616-State-aid-for-environmental-protection-and-energy-revised-guidelines/public-consultation_en> accessed 28 September 2024
[244] European Commission – Competition Policy - EEAG Public consultation - Revision of the Energy and Environmental Aid Guidelines (EEAG) (2021) <https://competition-policy.ec.europa.eu/public-consultations/2020-eeag_en#objective-of-the-consultation> accessed 28 September 2024

out the general features which define the nature of the GBER, related to its role in fostering environmental protection, to then focus on its 2023 latest version and, finally displaying some considerations on its future implementation.

It must be admitted that its revision, which dates back to June 2023, assigns to the green transition the role of driving wheel towards a change in what it seems to be a lengthy process for the assessment of compatibility of State aid. The driving force, which allowed a green reformation of the GBER, is certainly inherent in the ambitious European Green Deal's objectives to achieve climate neutrality.[245] However, the necessity of a revision responded also to the need of aligning to the CEEAG, namely the Guidelines on State aid for energy and environmental protection of 2022, which substituted the old 2014-2020 version of the Guidelines.

The GBER, however, has always been considered complementary to the State Aid Environmental Guidelines, and this can also be demonstrated by their different nature, entailing the direct applicability by national administrations and judiciaries of the Regulation, and the sole Commission's application for the Guidelines.[246] Thus, it is perceptible in their distinct implications the relevance of the concept of "sincere cooperation"[247] in the application of the GBER. Admittedly, national jurisdictions are fully trusted in their *evaluation* process for environmental State aid, setting aside, instead, what is deemed to be considered the Commission's *monitoring* process, of which we discussed extensively in the first part of this chapter.[248]

The relevance of the implementation of the GBER for what concerns environmental aid became a thing only in 2008 when it was issued the first general version of the Regulation, which contained a series of sectorial exemptions from the obligation to notify State aid.[249] The novelty was indeed represented by the introduction of a selection of measures that would have improved the engagement of the EU, but most of all, of the Member States, in dealing with the climate change. These measures would have

[245] The European Green Deal.
[246] Van De Casteele "General Block Exemption Regulation" in Hancher, Ottervanger, Slot (n 23).
[247] Article 4, TEU.
[248] See Chapter I, para 1.1 Ex post control: the main elements of State aid detection".
[249] Commission, 'Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (2008) OJ L 214, p. 3–47.

enabled MSs to avoid the notification tool for the approval of aid aimed at favouring environmental protection. For this reason, the cornerstone of this new package of provisions was the peculiar positive effect that those measures would have entailed to achieve.[250]

As already mentioned, the element which characterises the most this set of rules, is for sure the dispensation from the requirement of notification,[251] which is considered an obligation set out in Article 108 TFEU, with the use of a "thresholds system". Especially for what concerns the environmental aid, throughout the years, the limits for the granting of green subsidies have been enormously increasing. As an exemplification of this, the 2023 GBER doubled the notification threshold for decarbonisation measures in Article 36 of the GBER, reaching the amount of EUR 30 million per undertaking per investment project.[252] Another objective, which inspired the Block-exemption Regulation was creating a framework which could be directly invoked by citizens and undertakings in domestic courts, therefore its structure, as well as its wording, should have been built in order to provide an user-friendly device,[253] aiming at improving its readability.

Nevertheless, this regulatory layout finds at its foundation a balance or, precisely, an ex-ante assessment between the positive effects represented by the environmental safety provided and its encompassing negative distortive effects on market and competition. The underlying presumption of a balance has to be as strong as to avoid the need for the Commission to assess every single measure that still complies with the conditions requested in the specific regulatory provision.[254]

However, the reason why the GBER sets out the power shift of implementation of State aid measures to MSs, may be found in the fact that in recent years there has been a focus on the prevention of unequal treatment among operators in the same State, and that led every single MS to handle disparities in the most appropriate way. At the same time, on the environmental matters, the EEAG did not represent a sufficient tool to handle the

[250] Krystina Deiberova, Harold Nyssens, 'The New General Block Exemption Regulation (GBER): What Changed?' (2009) 8 European State Aid Law Quarterly 12.
[251] GBER, para 6.
[252] ibid Article 36.
[253] Commission, Consultation document, State aid action plan – "Less and better targeted state aid: a roadmap for state aid reform 2005-2009" SEC(2005) 795 COM/2005/0107 final.
[254] Deiberova, Nyssens, EStAL (n 250).

preservation of the environment since it left too much national discretion, setting forth too general concepts and wide limits to respect. A clear picture of this is displayed by the general maximum limit of 80% relief from environmental tax for governments to establish, irrespective of actual positive effect on the environment set forth by the EEAG.[255]

In a nutshell, the Block Exemption Regulation represents a way to create a balancing system in advance, so that the benchmarking between market distortion and environmental protection has already been made when issuing the specific conditions which a provision requires to grant aid. The important thing is that all the relevant conditions are met, at least a presumption can be formed on the matter. Nevertheless, the notification tool remains the rule for all the other cases outside of the GBER. The reasoning for this still lays on the bottom line that the ex-ante test might not be sufficient, given the risk that the equilibrium between environmental benefits and distortions of the market is uncertain for specific situations.[256]

This leads us to a very sensitive, almost weak, point of the GBER, highlighted by critical environmentally oriented analysis carried out on the Regulation.[257] The conditions to guarantee that the aid results compatible with the general framework set by Article 107 TFEU, are often left very broad, leading to inevitably allow Member States to grant it not always in the name of decarbonisation as the main priority.[258] The Commission did not remain blind in front of this necessity and in 2023 issued a new consolidated form of the Regulation. The update consisted of two main changes: the introduction of new types of aid with different objectives and, most importantly, the raise of the notification thresholds, and new specified conditions for the already recognised types of aid.[259]

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[255] Jerónimo Maillo, 'Balancing Environmental Protection, Competitiveness and Competition: A Critical Assessment of the GBER and the EEAG' (2017) 16 European State Aid Law Quarterly 4.
[256] Deiberova, Nyssens, EStAL (n 250).
[257] ClientEarth, 'Revision of the State Aid Guidelines for Environmental Protection and Energy and Exemption Rules, "Making the EEAG and GBER Fit for Europe's Carbon Neutrality"' (2021) <https://www.clientearth.org/media/w01ikefa/clientearth-reply-to-the-consultation-on-revision-of-eeag-07-01-2020.pdf>.
[258] The European Green Deal.
[259] Commission, 'Regulation (EU) 2023/1315 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty' (2023) C 4278 OJ L 167.

Our attention will mainly be projected to Section 7 devoted to *Aids for Environmental Protection*, with the scope of understanding whether the changes made will help to enhance the carbon neutrality objective or, simply, nature preservation.

3.1 New and renovated types of aid in the GBER

In the list of new additions, the *Article 36b* on clean mobility represents a certainly relevant one, which makes sure that governments can supply investment for clean and zero-emission vehicles, this includes acquisition or leasing, together with investments for refuelling and recharging infrastructure. The costs which will be carried out have to be established by quantifying them through a comparison method to costs for a vehicle of the same category complying with the standards already in force in the EU. A competitive bidding process will then be used to allocate in an objective, clear, transparent and discriminatory way the resources guaranteed.[260]

Another new provision which has been implemented is *Article 43* for what concerns operating aid for promoting energy from renewables in the renewable energy communities,[261] a concept which was absent in the previous 2021 version. It deals, mainly, with the generation, storage and consumption to heat generation and gas production technologies up to 1 MW. The aid can be granted through means of feed-in premium tariff or a contract for difference.[262]

Turning back to the category of renewable energy communities, it is important to bear in mind that the EU, by taking cognisance of their specific status. Indeed, it has recognised them protection under EU Law[263] providing them with the same rights and obligations, as well as freedom of contract, applied to other electricity undertakings, also

[260] Article 36b, GBER (2023).
[261] European Parliament and Council, 'Directive (EU) 2019/944 of the on common rules for the internal market for electricity and amending Directive 2012/27/EU' (2019) OJ L 158, p. 125-159
[262] ClientEarth, 'Briefing on the GBER May 2023 "the General Block Exemption Regulation. A Revised State Aid Tool to Encourage the Green Transition?' (2023) <https://www.clientearth.org/media/xmhcr2y2/clientearth-legal-briefing-on-the-general-block-exemption-regulation-2023.pdf>.
[263] Directive (EU) 2019/944, para 44.

to citizens, in a way which enables them to operate at the same level field, without distortive effects.[264]

Furthermore, the GBER extended the coverage of *Article 45* to the remediation and rehabilitation of natural habitats, ecosystems and biodiversity, also to the implementation of nature-based solutions in a way to mitigate with the climate change. The whole provision's structure changed from one more related to the economic liability to a more focused one on guiding States to act in a targeted manner, depending on the type of environmental damage of non-natural origin.[265]

In the same vein, with respect to waste recycling, even though the *Article 47* already existed in the previous GBER, there has been an expansion of its scope, which introduced the concept of circular economy. Meanwhile in the past the focus was principally aimed at structuring aid schemes for the disposal of waste but also re-utilisation, however, still in very broad and general terms. In the current version, instead, the focal point is delineated by the circular economy model which is founded on the reduction of the use of primary materials shifting to the efficient use of resources. Moreover, it is highlighted how relevant is that the aid, covered by the provision in question, shall not incentivise waste generation. Yet, the real departure from the former provision is considered the total exclusion of waste disposal and recovery, which will not be covered, admittedly, as a deterrent to waste production which could hinder the carbon neutrality.[266]

The opposition to fossil fuels, which seems to be the key element inspiring the regulatory framework of environmental aid of the GBER, is also displayed in regard of the cogeneration. It is true that CHP (combined heat and power)[267] paves the way towards the phase out of fossil fuels in the energy system, by taking advantage of the heat produced, otherwise dissipated, namely geothermal energy.[268] Nevertheless, the power from which the heat is generated could still be fired by fossil fuel-based resources. Thus,

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[264] ibid para 46.
[265] Article 45, GBER.
[266] ibid Article 47.
[267] See n 95.
[268] Huan Ma and others, 'Cogeneration Transition for Energy System Decarbonization: From Basic to Flexible and Complementary Multi-Energy Sources' (2023) 187 Renewable and Sustainable Energy Reviews.

the *Article 41* on high-efficiency cogeneration, categorically rules out the chance that the concerned investment aid could be exempted from the notification requirement when the cogeneration installations depend on non-renewable fuelled sources.[269]

Besides, the same regulatory treatment applies for what concerns aid for energy efficiency measures in buildings[270] and, as highlighted by paragraph 5(b) of *Article 46*, the aid for the upgrade of heating and cooling distribution networks. Indeed, if the latter is generated by fossil fuels it shall be admitted only if it responds to the conditions laid down, which deal mainly with a shift to renewables.[271]

It may be necessary to clarify that when a specific type of aid, displayed in the previous version of the GBER, is eliminated by the current version, it does necessarily signify its total prohibition. Actually, that only represents a complexity in the balance between different objectives of environmental matters and the distortion of competition and the market that might occur, thus those types of aid are left to the Commission to assess. Therefore, it will be avoided that national governments might incur in a violation in the granting of aid of peculiar nature.

Another significant category of aid is recognised by the GBER in the use of renewable hydrogen, meaning hydrogen produced through the electrolysis of water. Namely the latter is produced by separating H2O molecules using excess power from wind turbines, for instance, thus becoming a resource without any use of fossil fuels. In particular, the grant of aid without the notification obligation is admitted for its production from electricity or for machinery use and its implication in transportation,[272] but more importantly its addition in the refuelling process for clean mobility.[273] In any case, the major modification which seems to move forward to more sustainable options, is for sure the distinction that the GBER now operates between clean hydrogen, which does not imply any use of fossil fuels and low-carbon hydrogen. In fact, hydrogen's production can be observed from two angles, it can either foster the phase out of fossil fuels, but also not immediately decarbonise economy by replacing traditional

[269] Article 4, para 4a, GBER.
[270] ibid Article 38a.
[271] ibid Article 46, para 5.
[272] ibid Article 36.
[273] ibid Article 48.

resources.[274] This dissimilarity connotes the 2023 version, departing incisively from the past.[275] As it is enshrined in letter b) of paragraph 130, the definition of 'energy infrastructure' distinguishes two categories of renewable and low carbon gases, which deserve also a diverse normative treatment considering their dissimilar impact on the environment.[276] For instance, for aid granted for its production, or recharging and refuelling infrastructure, can solely be exempted from the notification requirement if they involve hydrogen produced in a sustainable way.

Finally, for what concerns novelties, a supplement has been added in *Article 44,* namely aid in the form of tax reductions. The addition witnessed in this article is represented by the specific criteria indicated in paragraph 3 to deploy tax reductive measures, which contributed to aim for a reduction of the Member States' margin of appreciation.

The provision has been having many implications though the recent years, since it incentivises the phase out of fossil fuels, especially for energy-intensive users, awarding them with feed-in tariffs.[277] The perfect illustration of the large-scale involvement of tax reductions is confirmed by the 2023 State aid Scoreboard.[278] It is indeed evident from the report that among all the instruments used to endow subventions for environmental protection, the block-exempted measures identified in the year 2022, were all shaped in the form of tax advantage. Thus, in the total State aid expenditure for environmental protection projects under *Article 44,* amounted to EUR 14.98 billion out of EUR 19.76 billion spent for environmental aid.[279] And it is by taking into consideration this result that the Commission took cognisance of the importance of having a more structured provision, thus amending and reshaping Article 44 in the new version of the Regulation.

Indeed, as we mentioned before, in the application of the GBER, Member States are mainly left to carry out an ex-ante test of the measure to establish if a certain situation

[274] Dalius Tarvydas, 'The Role of Hydrogen in Energy Decarbonisation Scenarios - Views on 2030 and 2050' - JRC131299 Technical Report', Publications Office of the European Union, Luxembourg (2022). <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC131299/JRC131299_01.pdf> accessed 5 October 2024
[275] ibid Article 42.
[276] ibid Article 36(2); Article 42(3); Article 43(2)(b).
[277] See n 165.
[278] European Commission, DG Competition - Policy and Strategy - State aid case support and policy (2024) State aid scoreboard 2023.
[279] ibid 'A closer look at aid for environmental protection, renewables and energy savings', section 8.2.

of tax reduction or exemption could be considered covered by *Article 44*. Having said that, the very general design that the past provision had, led governments to consequently enjoy a wide margin of appreciation. However, too much freedom left to Member States does not always have the result of orienting their action towards the policy-related objectives set by the Commission.[280] The current provision, instead of referring to the general category of 'environmental taxes', actually deploys a set of 6 objective criteria in paragraph 3,[281] which allows to set boundaries on the types of levies' rebates covered by the GBER and aims at admitting them mostly when they promote the use of clean energy.

Furthermore, a greater limitation to MSs discretion is represented by *Article 44a*, by which the only undertakings that are not be able to pursue their economic activities without the reduction are granted with it. And ultimately, the reduction shall enable a higher level of environmental protection.[282]

3.2 The raise of financial thresholds

Lastly, the second big change the GBER went through relates to the increase of thresholds of the notification requirement. The financial limits for the different types of categories of aid are calculated in order not to exceed the benefit from the block exemption[283] and cannot go further, otherwise the Member State would be bound to notify to the Commission the aid for its mandatory assessment.[284] The categories which have been affected are, for instance, the categories of aid included in *Article 36* which revolves around add-on components for equipment to make them more environmentally-friendly, equipment for transporting hydrogen, or even carbon capture and transport, which doubled to reach the limit of EUR 30 million.

The same goes for the aid for district heating and cooling or simply for renewable energy, where for every energy infrastructure the increase has been from EUR 50 million to EUR 70 million. Undoubtedly, the reason for raising the financial threshold is to be appointed to the necessity to accelerate the net-zero carbon emission transition by

[280] Maillo, EStAL (n 255).
[281] Article 44(3), GBER.
[282] ibid Article 44a(2).
[283] ClientEarth (n 262).
[284] Article 107, TFEU.

enlarging the number of measures to implement without the Commission's scrutiny, which would be detrimental for a fast green shift.[285]

3.3 Possible future implications of the new GBER

In conclusion, it is actually complicated to establish whether the new amendment of the GBER will bring results on the table for what concerns decarbonisation. One thing is for certain, this level of awareness on the implementation of rules fostering green transition has never been reached before. The updates are many, and for sure they keep in mind the target, for instance with the introduction of the concept of circular economy, clean mobility and safeguard of biodiversity. Indeed, we have to consider that enlarging the objectives of aid categories in the GBER, as well as raising thresholds for notification obligation, will accelerate the process of green transition since the Commission does not have to assess every single aid measure.

Nevertheless, the main point that may be raised is whether the GBER expansion, in terms of aid categorisation and thresholds, could actually incentivise the 2030 and 2050 Green Deal goals[286] towards net-zero economy. The shift is, unfortunately, not directly subsequent. We have to bear in mind that the GBER as well as the State Aid Environmental Guidelines still provide funds for certain type of energy sources which still partially rely on fossil fuels, such as low-carbon hydrogen or the cogeneration method.[287]

Admittedly, the very wide degree of discretion left to MSs could also be added as another issue to consider. Member States, even though bound to follow EU directions, are still left to evaluate their own energy subventions to undertakings under the GBER. And, with the insufficient prospect to rely solely on clean energy for their sustenance, they struggle to abide to green targets. Thus, it requires much more effort to eliminate fossil

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[285] ClientEarth (n 262).
[286] Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people" (2020) COM 562 final.
[287] Magdalena Porzeżyńska, 'Green Light for a Green Aid? between Challenges and Opportunities Resulting from the European Green Deal for EU State Aid Law' (2024) 1 CERIDAP - Rivista Interdisciplinare sul Diritto delle Amministrazioni Pubbliche 238. https://ceridap.eu/a-green-light-for-a-green-aid-between-challenges-and-opportunities-resulting-from-the-european-green-deal-for-eu-state-aid-law/?lng=en> accessed 6 October 2024.

fuels. Not even to mention the energy resources cut-off occurred after the breakout of the Russian-Ukrainian conflict, which made it much more difficult to depend on domestic resources. Anyhow, renewable sources are not subdued to the same geopolitical risks or supply impediments as fossil fuels, but they are for sure more costly to obtain.[288]

Be that as it may, the ex-post examination by the Commission seems the right tool to orient the MSs' action towards higher standards of environmental protection, yet a compromise must be reached, since it is a solution which will inevitably slower the green transition.

Summing up, an enlargement of the scopes of the GBER to new areas or the increase of thresholds does not necessarily mean decarbonisation. Therefore, the question whether the GBER amendment is really helping to foster the objective of carbon neutrality cannot be answered properly in a positive manner.

4. CEEAG: a comparison with the previous EEAG 2014-2020

As already noted in the previous paragraph, the State aid framework targeted at protecting the environment underwent through a revision, which led also to the CEEAG enactment, namely the Guidelines on State aid for energy and environmental protection of 2022, which replaced the old 2014-2020 version of the Guidelines, the EEAG.

Their revision appeared to be inevitable, especially considering the estimated relative data on the emissions reduction, which was reported to be far from the objectives set by the European Green Deal, counting only the 23% cut-off of polluting discharges.[289] Therefore, it means that if this results stay steady without any modifications whatsoever in the regulated framework, by 2050 the decrease predicted will only amount to 61% of the original target to achieve.[290]

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[288] Paravee Maneejuk, Nuttaphong Kaewtathip and Woraphon Yamaka, 'The Influence of the Ukraine-Russia Conflict on Renewable and Fossil Energy Price Cycles' (2024) 129 Energy Economics 107218 <https://www.sciencedirect.com/science/article/pii/S0140988323007168> accessed 5 October 2024.

[289] Commission, 'EU greenhouse gas emissions down 23% since 1990, still implementation will have to be further accelerated to reach current 2030 targets', (Climate Action, News, 31 October 2019). https://ec.europa.eu/clima/news/eu-greenhouse-gas -emissions-down_en accessed 7 October 2024

[290] Steven Verschuur and Cecilia Sbrolli, 'The European Green Deal and State Aid': (2020) 19 European State Aid Law Quarterly 284.

In this paragraph the main focal point will be portrayed by the highlighting of the most evident changes between the two versions and the concomitant reasoning, with a final digression on the Guidelines' legal nature.

An in-depth analysis of the CEEAG and its application, instead, will be carried out in Chapter II of this work.

4.1 A boost towards decarbonisation

It is worth mentioning that Guidelines on State aid for environmental protection are not a brand-new tool. From its former version in 2008,[291] the EEAG differentiated mainly on its macroscopic impact in terms of aid expenditures. From 2014, year in which the EEAG entered into force, there has been a surge of notified environmental State aid measures accounting to nearly 310%[292] compared to the previous year. A contribution in this was undoubtedly played by the already-mentioned SAM,[293] creating user-friendly tools for Member States in the deployment of State aid schemes in a race towards an environmental adaptation of national economies. Nevertheless, despite the reported positive effect that characterised the period after the introduction of the EEAG, surprisingly, a negative peak has conversely been reported in 2022 with a decrease of almost 50%[294] in respect of the time frame where the EEAG was still in force, and despite the increased implementation of environmental-oriented targets.

However, the reason could be found indeed in the restraints that have been set out in the new Guidelines in order to reach the carbon neutrality in time,[295] which, even though it made it easier for Member States to enable the approval of State aid schemes, procedurally, it made it difficult to create sustainable net-zero solutions. Indeed, among the variations made, one is the conversion to the use of clean sources of energy, admitting

[291] Commission, 'Community guidelines on State aid for environmental protection (2008) OJ C 82/1.
[292] from EUR 8.46 billion in 2013 to EUR 34.51 billion in 2014 (Source: State Aid Scoreboard 2023).
[293] See Chapter I, para 3. The GBER amendment after the enactment of the CEEAG 2022".
[294] State Aid Scoreboard 2023.
[295] The European Green Deal.

only technologies which reduce emissions and that limit the inevitable production of negative externalities, namely only those which are "futureproof".[296]

An illustration of this is the total absence of the CCS method, as known as carbon capture and storage. This change is oriented to the phase out of fossil fuels as well, in the sense of a ban of the promotion of technologies which still imply the involvement of CO_2 emissions. Indeed, it was demonstrated that while in the short term the CCS could represent a way to guarantee a coverage to the harmful effects of emissions in the atmosphere, in the long term it affects the environment because of the energy used for the operation of the whole procedure. Admittedly, the energy used by plants which apply the CCS method increases of 60% compared to other energy facilities, thus causing an "upstream" environmental issue.[297] Moreover, the leakage in the surroundings of not only carbon, but also other gases from combustion, which could occur during the procedure, represents an additional damage to the ecosystem.[298]

Another example in this line is displayed by the new part dedicated to aid aiming at guaranteeing the closure of power plants using coal, peat or oil shale and of mining operations relating to the aforementioned substances. This is indeed, the first time that such type of aid is recognised, since in the past subsidies compensating the early shutdown of activities exploiting coal or other similar sources were subject to an ad-hoc assessment by the Commission which would lead to uncertainties in the matter.

That was the situation pictured, for instance, in the Dutch case of *Vattenfall NV*[299] where the lack of legal certainty for what concerned the award of compensation costs for the closure of a coal-fired plant, and its alleged State aid nature, led to a controversy between the Commission and the CJEU. The ambiguity lied precisely in the presence of State aid, allowed by the Commission whose investigation led to assess the legality of the

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[296] European Commission, Competition policy – 'Explanatory note accompanying the proposal for the revision of the Guidelines on State aid for environmental protection and energy 2014-2020' (2023). <https://competition-policy.ec.europa.eu/document/download/79b840c7-1c73-49b7-a6f9-f52bcb9596a5_en?filename=CEEAG_Explanatory_Note_EN.pdf> accessed October 11 2024

[297] Edward S Rubin and others, 'The Outlook for Improved Carbon Capture Technology' (2012) 38 Progress in Energy and Combustion Science 630. https://www.sciencedirect.com/science/article/pii/S0360128512000184 accessed 11 October 2024

[298] Maria Luís Fernandes, 'Carbon Capture and Storage: Dos and Don'ts' (META EEB European Environmental Bureau 31 January 2024) https://meta.eeb.org/2024/01/31/carbon-capture-and-storage-dos-and-donts/ accessed 11 October 2024.

[299] Case C-40/23 P *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2024:492.

subsidy but without admitting a compensation.[300] This result was later dismissed by the General Court[301] since the Commission did not exactly establish the presence of State aid beforehand, even assessing its lawfulness, thus exceeding its competence.

The last word, attributed to the CJEU[302] has then clarified that even though the Commission's powers are not laid down in Article 107 TFEU, it is mandatory to establish first the classification of the measure as State aid, as a necessary precondition, and only afterwards, it will be enabled to assess that the subvention falls within the general exception provided in paragraph 3 of the same article (IPCEI). Avowedly, we can assume that if the CEEAG were in force at the time of the assessment in 2020, the Commission could have concentrated its efforts in scrutinising the existence of a State aid than solely focusing on its legitimacy, since the elements to establish it would have been set clearly in paragraph 4.12 of the CEEAG. Therefore, it could have avoided to interpret the broad terms of Article 107(3) that led to this equivocality of this saga among EU institutions. This remains just an assumption, but hopefully in the future the CEEAG provision on the aid for closure of fossil fuel-based plants will be easily assessed without any obstacles.

4.1.2 The main amendments occurred in the EEAG

After these first remarks, it is possible to state that the revision of the EEAG could be divided into two fragments. The first one is represented by the extension of the scopes, which could be directly linked to the deployment of new technologies that allow new sustainable strategies. The subsequent part of the change is in the rules set out for the assessment of State aid, which enhance much more the safeguards for the avoidance of harmful environmental compromises, and unduly effects on competition and on the market.[303]

New scientific developments brought consider the fact that the EEAG was indeed still relying too much on fossil-fuels sources. This is because it allowed support for CCS or fossil fuels based capacity mechanisms, including cogeneration and aid for waste

[300] Commission, 'Decision on State Aid SA.54537 (2020/NN) The Netherlands - Prohibition of coal for the production of electricity in the Netherlands' (2020) OJ C 220.
[301] Case T-469/20 *Netherlands v Commission* ECLI:EU:T:2022:713.
[302] Case C-40/23 (n299).
[303] Explanatory note (n 296).

management,[304] which was basically substituted with aid supporting solutions aiming at a circular economy model.[305] Also the Fitness check, previously carried out, proved that the EEAG didn't provide a boundary to prevent that fossil fuels would be involved either for what concerns the two pillars of security of supply and energy infrastructure. Many of the new sectors where aid is admitted are reported also in the new amended and complementary GBER[306] like the improvement of environmental and energy performance of buildings,[307] clean mobility,[308] aid for the environmental damage and rehabilitation of habitats with nature-based solutions for climate change.[309] Nevertheless, the similarity with the GBER begins to fade as soon as we concentrate on the second fragment of the revision. The phase out of fossil fuels is considered as a general rule in the CEEAG, and their involvement is automatically a reason to exclude aid and invalidate the existence of a possible positive condition which a specific energetic sector could imply. Meanwhile, the GBER exploits this positive condition as a reason to validate the admission of State aid, still admitting, even if in lower quantities, gas emitting technologies.[310]

The second part of the revision, indeed, can be considered as a "shelter" when the balancing assessment of the State aid has to take place. This stronger approach compared to the EEAG, secures the critical consideration of the negative effects a measure will bring to the table, entailing its necessity, appropriateness, proportionality and transparency, which will be weighed with the positive ones, entailing, instead, incentive effects and the absence of breaches of EU provisions. However, the negative and the positive conditions will be part of a thorough analysis in the Chapter II of this work.

[304] EEAG (n 69), respectively section 3.6; section 3.4; section 3.6.
[305] EEAG, section 4.4.
[306] See Chapter I, para 3. The GBER amendment after the enactment of the CEEAG 2022".
[307] CEEAG, section 4.2.
[308] ibid section 4.3.
[309] ibid section 4.6.
[310] Explanatory note (n 296).

4.2 The *de facto* binding nature of the State Aid Environmental Guidelines

Finally, it would be relevant to give a slight portrait of the legal nature of the Guidelines for State aid for environmental protection and energy, which, admittedly, is partially connected to the new characteristics the new version displays.

The extensive use throughout the years of soft law instruments has represented a way to supplement the gap between the application of binding principles and the upgrade of secondary legislation, especially in regard of the environmental aspects, awareness of which is constantly shifting. Remarkably, for what concerns the environmental State aid Guidelines, one of their scopes[311] is to enhance the amendment of directives and regulations through the link with the binding General Block-exemption Regulation, but more generally-speaking, giving concretisation to the application of the exceptions of Article 107(3)(c) TFEU. However, that is not the only purpose they hold in their peculiar nature of soft law instrument, they mainly contribute to orient the Commission's action in the assessment of the legality of State aid and most importantly they influence the creation of domestic behaviours.[312]

Nonetheless, the question about the divide between legal force and legal effect of these type of guidelines arises spontaneously. It is widely understood that soft law is considered a non-binding instrument of a "quasi-legislative"[313] process,[314] being part of the so-called better regulation, and it enables to reach European integration together with the traditional legislative acts.[315] In particular, guidelines are relevant when a policy

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[311] Catherine Banet, 'Legal Status and Legal Effects of the Commission's State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020)' (2020) 19 European State Aid Law Quarterly 172.

[312] Paul Daly, 'How Binding Are Binding Guidelines? An Analytical Framework' (2023) 66 Wiley Periodicals LLC 211.
<https://onlinelibrary.wiley.com/doi/full/10.1111/capa.12519> accessed 12 October 2024.

[313] The definition of the term "quasi-legislative" was for the first time introduced by Robert Megarry in 'Administrative Quasi-Legislation' (1944) 60 Law Quarterly Review 125, for further information see: Colin Turpin, 'Reviewed Work: Quasi-Legislation: Recent Developments in Secondary Legislation by Gabriele Ganz Review' (1988) 47 The Cambridge Law Journal 318.

[314] Article 288, TFEU.

[315] Directorate-General Internal Policies Policy Department C Citizens Rights and Constitutional Affairs, Better Regulation and the Improvement of EU Regulatory Environment Institutional and Legal Implications of the Use of "Soft Law" Instruments – Background Note (March 2007).
https://www.europarl.europa.eu/RegData/etudes/note/join/2007/378290/IPOL-JURI_NT(2007)378290_EN.pdf accessed on 11 October 2024

implementation requires the involvement of expertise, given the sensitivity of the matter,[316] such as Environmental protection and energy.

Yet, if this instrument provides a strong basis for the Commission to establish an infringement of Member States that do not abide to it, with a negative decision, its actual legal effects seem to be stronger than its legal force.[317] Anyhow, even if their questionable binding force still represents an unknown factor, the fresh theory set out by Professor Daly[318] could represent the starting point to untangle the complex nature of this tool. This analytical approach[319] takes into account three criteria to establish the actual binding nature of guidelines, and, admittedly, it is exactly with the shift from the EEAG to CEEAG that we can appreciate much more the presence of few of these elements, meaning that with the latest version of the environmental guidelines, the binding force has only become stronger. The first element is a detail-oriented approach, secondarily, the use of imperative language and, finally, the involvement of direct effects on third parties.

In regard of the first criterion related to precision, what indeed catches the eye of any observer of the new Guidelines when compared in parallel to the former version, is their new technical approach of considering targets for every sector which is likely to discharge emissions. For instance, compared to the EEAG, the CEEAG deploys a methodology which considers, in a comprehensive manner, not only the positive effects which the measure will bring to environmental protection, but also the negative externalities covered in a detailed way, enabling a precise analysis of it. In fact, while for every category in the EEAG negative effects of the aid to a specific sector are dismissed in a general way with the sole focus on the elements which detect the measure, the newest guidelines conversely outline the need to assess "the negative condition", namely «the undue effect on trading conditions to an extent contrary to the common interest»,[320] dedicating, for every sector, a part on «minimisation of distortions on competition and

[316] Commission, 'Communication on the collection and use of expertise by the Commission: principles and guidelines - "Improving the knowledge base for better policies"' (2002) COM 0713 final.
[317] Banet, EStAL (n 311).
[318] Full Professor and University Research Chair in Administrative Law & Governance, University of Ottawa.
[319] Daly, Wiley Periodicals LLC (n 312).
[320] CEEAG, section 3.2.

trade».[321] The CEEAG provide us with elements to scrutinise the existence of, not only negative externalities on the environment, but considering the possible impact of the aid on the market, assessing, depending on the case, the necessity, appropriateness and proportionality of the aid as part of the assessment of the so-called negative condition.

Another element aiming at conveying the detail-oriented approach is the wording to define the boundaries of the aid for district heating and cooling. Being one of the few categories considered in both of the versions, we can appreciate much more the enormous words variations. While on the EEAG, States are left to identify "a variety of indicators in quantifiable terms",[322] paragraph 389 of the CEEAG provides, instead, a detailed list of all the possible implications of the aid such as renewable energy, waste heat or highly efficient cogeneration comprising thermal storage solutions.

Moreover, Member States are oriented in the consideration of negative externalities with precise instructions on their action to consider aid eligible under the CEEAG and provide an effective individualisation of the harm caused by emissions. Indeed, MSs are requested to demonstrate the effectiveness of the measures by estimating environmental benefits through the calculation of tonnes of CO_2 reduction,[323] or that the measure represents an appropriate policy instrument by identifying the net emissions reduction from the activity.[324] The calculation of eligible costs is also carried out with the specific technique of the counterfactual element consideration in relation to environmental costs, and if the method is not applicable for lack of data, a percentage of cost ceiling is established (40 %) considered it to be equal to the costs necessary to compensate, without exceeding, the effective environmental costs.[325]

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[321] CEEAG, section 3.2.1; 4.1.3 on reduction and removal of greenhouse gas emissions including through support for renewable energy and energy efficiency; 4.2.4 for the improvement of the energy and environmental performance of buildings; 4.3.1.4 on clean mobility; 4.3.2.3 for the deployment of recharging or refuelling infrastructure; 4.4.4 for resource efficiency and for supporting the transition towards a circular economy; 4.5.4 for the prevention or the reduction of pollution other than from greenhouse gases; 4.7.1.3 in the form of reductions in environmental taxes and parafiscal levies; 4.8.4 for the security of electricity supply; 4.9.3 for energy infrastructure; 4.11.3 the form of reductions from electricity levies for energy-intensive users.
[322] EEAG, para 141.
[323] CEEAG, para 211 (Aid for the acquisition and leasing of clean vehicles and clean mobile service equipment and for the retrofitting of vehicles and mobile service equipment).
[324] CEEAG, para 115.
[325] Explanatory note (n 296).

In regard to the third element of the Daly's analytical framework, namely the effects on third parties, it is widely understood that Member States are not bound by the guidelines, thus they are not directly affected by them. Yet, there remains an indirect link which could lead them to, conversely, abide to them when designing domestic measure if they do not want to end up being part of an infringement procedure, and the order to recover illegal State aid.[326] Therefore, if the Commission detects, within its investigating powers, a violation of Article 107 TFEU through the lack of alignment with the environmental Guidelines, it is forced to enact a negative decision towards the national authority notifying the public aid. It is by the fact that Guidelines remains binding solely for the Commission's action that the Member States could, thus, be considered *de facto* bound by the Guidelines, even though, *de iure,* there cannot be recognised any obligation to be so. This particular aspect will be highlighted in Chapter III in the analysis of the case *Est Wind Power v AS Elering* (C-11/22 P), specifically in paragraph 4.1.3 The legal basis to interpret the concept of "start of works" as enshrined in the EEAG

Finally, if this reasoning could be commonly accepted, that would represent the ultimate foothold to force all Member States towards an accelerated transition to a net-zero economy. Thus, there would not be the need create interpretations of broad legislative provisions, such as Article 11 TFEU or Article 37 of the Charter, on the integration of environmental protection principles, aiming at creating a fictitious violation in the concept of reliance to fossil fuels.[327]

5. Some Conclusive Remarks.

From the analysis carried out on in this chapter it can be possible to sum up that the aid for environment protection and the aid in the energy field is currently experiencing a phase of extensive discharge. This results not only from the need to accomplish the EU Green Deal's objective of climate neutrality but mostly on the reshape of the legal regime under which falls this type of aid. The Commission has now departed from the pure and simple benchmarking method, since the current framework most of the times dispense from an actual assessment of the aid effects on competition and trade.

[326] Banet, EStAL (n 311).
[327] ClientEarth (n 257), para 1.1 "Transform the EEAG into true instruments of environmental protection".

For instance, the shift from a legislative reliance to a more policy-based foundation of conditionalities, which enables to easily adapt the European State-aid regime to the current climate urgencies, and to guarantee a wide margin of manoeuvre for Member States. And this phenomenon was particularly highlighted by the diverse approach the Commission adopted in State aid decisions taken from 2014, year in which the EEAG entered in force, approach only reaffirmed from 2022 and on.

We have seen that this trend was not only enhanced by the introduction of non-binding instruments but also regulative ones, such as the GBER.[328] The main issue, though, is that the more the State-aid control framework will continue to undergo to a process of "deregulation" the more the Commission will lose its enforcement powers. We cannot forget that Guidelines are not mandatory for Member States, thus, the lack of alignment to them will not result in an infringement of EU law.

Nevertheless, it remains that in practice they can only be considered as a *given* to Member States rather than a way to oppose to their margin of action, and an example of this can for sure be detected in the on-going raising of the thresholds for the notification obligation of aid and the enlargement of aid categories in the new State Aid Environmental Guidelines.[329] The question, however, is whether national governments can be trusted in their own assessment when left to act more freely for a common good. It must be borne in mind, though, that for environmental matters the robust enforcement of a competition policy rather than being an obstacle to the green transition, actually enhances the achievement of this purpose.[330]

Avowedly, Article 107 TFEU will remain the pinnacle of the State aid control regime, whether the Member State will be able to justify the grant of a public subvention, under policy-based objectives or conditionalities, or not. Indeed, the Commission can still highly rely on it as the backbone of its investigation and monitoring action. Yet, it is

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[328] See Chapter I, para 3. The GBER amendment after the enactment of the CEEAG 2022".
[329] See Chapter I, para 3.2 The raise of financial thresholds".
[330] As it was highlighted by the Executive Vice-President Vestager for A Europe Fit for the Digital Age and Competition, European Commission 2014-2019, Margrethe Vestager, 'Competition Policy Contributing to the European Green Deal' (Conference on competition policy contributing to the European Green Deal 4 February 2021), see Alexandra Badea and others, 'Competition Policy in Support of Europe's Green Ambition' (2021) 2021-01 Competition policy brief.
https://op.europa.eu/en/publication-detail/-/publication/aed46e8a-5cbb-11ec-91ac-01aa75ed71a1/
accessed 7 November 2024.

inevitable to affirm that for what concerns environment protection and the energy field the provision highly risks of being deprived of its legal power in practice, even if not formally.

CHAPTER II - EU STATE AID AS A TOOL FOR THE PROTECTION OF THE ENVIRONMENT: THE EUROPEAN GREEN DEAL

1. Introductory remarks: The European Green Deal and its objectives

The climate emergency was declared by the European Parliament back in November 2019,[331] heading to recognise that the economic growth in the Internal market is being threatened by climate issues like never before. If in the past environmental protection provisions represented a sufficient instrument to deal with the situation and improve a sustainable development approach, at the present time the link between economic growth and the integration of environmental requirements has become compelling.

For this reason, the EU commitment in integrating these two fields was highlighted by the following request to the European Commission to craft instruments to translate these worries into a proper action, by setting a limiting target for greenhouse gas emissions in order to restrain the raise of temperatures to below 1.5° Celsius.[332] The EU Parliament did, in fact, urged: «the Commission to fully assess the climate and environmental impact of all relevant legislative and budgetary proposals, and ensure that they are all fully aligned with the objective of limiting global warming to under 1,5 ° C, and that they are not contributing to biodiversity loss».[333]

As it was already anticipated in the first chapter, the Commission's response was arguably quick as it presented the so-called "European Green Deal".[334] The latter represented a policy-oriented set-up to primarily incentivise the achievement of a double target, an intermediate one by 2030 for the reduction of greenhouse emissions, and a second one to reach climate neutrality in the EU by 2050. Even if we can argue that the

[331] European Parliament, 'Resolution on the climate and environment emergency' (2019) (2930(RSP)) OJ C 232.
[332] European Parliament, 'Resolution on the 2018 UN Climate Change Conference in Katowice, Poland' (COP24) (2018/2598(RSP)) OJ C 345; United Nations Framework Convention on Climate Change (UNFCCC),'The Paris Agreement to the United Nations Framework Convention on Climate Change', (12 December 2015), T.I.A.S. No. 16-1104.
[333] EU Parliament Resolution (2019), point C.2 (n 331).
[334] Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal' COM (2019) 640 final.

Green Deal set its legal basis in the article 192 TFEU[335] however, being a non-binding nature Commission's Communication, it required a binding instrument for its actual application. Indeed, it was then followed up by the European Climate Law[336]. Namely, a Regulation approved by the plenary assembly of the European Parliament on 24 June 2021. As a result, the target of reducing greenhouse gas emissions of 55% by 2030, compared to 1990 values, could become a binding objective through a legal tool in order ensure commitment in the achievement of climate neutrality by 2050. Indeed, this Regulation has the merit of having transformed what was previously a mere programmatic target into an obligation for Member States to be bound to.

It goes without saying, that it is expected that the achievement of the targets will also bring benefits to businesses operating in other sectors, for instance in terms of increased jobs in the renewable energy sector, or in integrated solutions for the energy efficiency of buildings. In addition, in 2023 a set of other Regulations, called 'Fit for 55',[337] was approved with a view to reaching the aforementioned target of 55%. It includes 13 legislative reforms, and 6 climate and energy legislations, in particular for strategic sectors such as industry, transport, agriculture, with the new proposal of "nature credits"[338], and finally, construction for waste management.

Admittedly, other rules have been enacted to redefine the Emission Trading System (ETS)[339], known as "carbon pricing",[340] to also include sectors which are

[335] Article 192, TFEU.
[336] European Parliament and Council, 'Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')' (2021) OJ L 24.
[337] Commission, 'Communication to the European Parliament, the Council, the European Economical Social Committee and the Committee of regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality' COM(2021) OJ 550 final.
[338] «It is time to reward those who serve our planet», Ursula Von der Leyen, 'Keynote Speech by President von Der Leyen at the DLD Nature Conference' (DLD Nature Conference 13 September 2024) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_24_4668> accessed 10 December 2024.
[339] European Parliament and Council, 'Directive (EU) 2023/959 of the amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system' (2023) OJ L 130.
[340] As it was highlighted by the President Ursula Von der Leyen von der Leyen after the summit of EU leaders in Brussels on April 2021:« The European Commission plans to propose an emissions trading system for the buildings and road transport sectors, with compensation to shield low-income communities from the costs […] The idea is to have, complimentary, the introduction of an own, separate emission trading system at a very low scale at the beginning. Immediately coupled with a clear social compensation structure", Ursula von der Leyen, 'Speech by President von Der Leyen at the Global Leaders Summit

considered polluting, such as road, maritime and air transport, by promoting the use of sustainable fuels. Another framework[341] imposed a carbon cost on goods imported by carbon-intensive industries outside the EU to establish relocation to countries whose climate regulations are not as strict as the EU imposed standards. Additionally, it was supplemented a new Regulation on supporting carbon removal in the agricultural sector, for sustainable land use,[342] and another one to incentivise the increase of filling stations for goods and passenger vehicles using alternative fuels.[343]

As part of the European Green Deal in 2020, the European Commission presented an investment plan aimed at attracting significant public and private investment over the next decade. In particular, the investment plan should steer the economy of certain geographical areas of Europe, which are more dependent on coal and fossil fuels, towards a transition to a sustainable economy for regions and communities.[344]

The Parliament and the Council believe[345] that the pursue of these objectives can be achieved through a funding policy to support companies and institutions that promote the use of environmentally friendly resources and tools. Moreover, one of the objectives will be to avoid funding projects that only appear to be environmentally friendly, but in reality, are not really sustainable, the so-called "green-washing projects". [346] With these tools, the ultimate goal of the European Green Deal is the construction of a gradual transition from a system of unsustainable economic activities to one reliant to sustainable ones.

Hosted by U.S President Joe Biden on the Occasion of Earth Day' (Global Leaders Summit 22 April 2021) https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1882.

[341] European Parliament and Council, 'Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism' (2023) OJ L 130 (CBAM).

[342] European Parliament and Council, 'Regulation (EU) 2024/1991 on nature restoration and amending Regulation (EU) 2022/869' (2024) OJ L 1991.

[343] European Parliament and the Council, 'Regulation (EU) 2023/1804 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU' (2023) OJ L 234.

[344] Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable Europe Investment Plan European Green Deal Investment Plan' COM(2020) 21 final.

[345] European Parliament and Council, 'Proposal for a Regulation establishing a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EU) No 1293/2013' COM(2018) 385 final.

[346] European Parliament and Council, 'Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088' OJ L 198.

In this chapter, our analysis will be deemed to provide an overview of the instruments set in place by the European Union, but more specifically, with the contribution of the Commission, to tackle the environmental protection in the area of State aid. In particular, our attention will delve towards the combination of the environmental protection requirements and State aid control, which has never been so close as now, especially because of the climate emergency. Indeed, the integration between environmental policy objectives into the Commission's policy on aid controls is something not to be overlooked, in particular with a view to promote sustainable development.

This second chapter will indeed guide through different types of measures implemented in this regard, with practical up-to-date examples of aid schemes, recently approved by the Commission, with a direct environmental protection goal. In particular, paragraph 0 will depict the recent scenario of implementation for new environmentally friendly technologies through the use of public and private law instruments and their implications in State aid control. Such as the legislative framework for the principle of waste hierarchy or the involvement of Carbon Contracts for difference.

Furthermore, the focus will delve into the particularly intricated issue of considering environmental requirements in aid subventions which do not directly have an environmentally oriented scope. In this regard, in paragraph 0 we will mainly try to find the legal basis of the Commission's approach proposing the deployment of the Italian capacity mechanism and the related case law formed as an example on the matter.

The analysis will then cover some of the most relevant aspects related to State aid in the Green Deal Industrial Plan,[347] focusing on the administrative and effective modifications in relation to the Temporary Crisis and Transition framework (TCTF).[348] The scope of this section is to highlight the practical outcomes from the recent modification of the TCTF in terms of the efforts towards the green transition acceleration, especially in relation to State aid.

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[347] Commission, 'Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions A Green Deal Industrial Plan for the Net-Zero Age' COM(2023) 62 final.

[348] Commission, 'Communication Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03 C(2023)1711' OJ C 101.

The other half of this chapter will then bring the reader to analyse the elements characterising the Commission's compatibility assessment of State aid in the upgraded 2022 Environmental guidelines (CEEAG). The inquiry will be arranged with a pragmatic view of the single criteria by suggesting recent examples of State aid approvals as illustrations of their use in the field.

The last part of this section is dedicated to future upgrades of the compatibility assessment, with an emphasis on the impact of the proposed amendment of Article 108(1) TFEU for the introduction of the concept of the Union's common interest in the last phase of the Commission's compatibility assessment.[349] In conclusion a critical view on the benchmarking mechanism of the compatibility assessment will be exposed, with a possible getaway to solve the issue of the uncertainty displayed in this matter.

1.1 State aid as a technical mean to reach climate goals

As it was interpreted by the CJEU, [350] Article 11 of the Treaty on the functioning of European Union read in conjunction with Article 191, enshrines «the obligation of integration of the environment protection into the definition and implementation of the European Union's policy and activities».[351] And this can be referred particularly to the EU competences, such as competition,[352] where the Commission must involve the environmental protection requirement to shape State Aid legal framework. Therefore, integrating Article 11 TFEU into State aid control under Article 107(3)(c), shall be considered a burden on the Commission's side to guarantee the observance of the European legal order.[353] The aforementioned case law seems clear when declaring that if

[349] Case C-594/18 P *Republic of Austria v European Commission* ECLI:EU:C:2020:742.
[350] ibid para 100. The case deals with the appeal made by Austria challenging a Commission's decision authorising the deployment of aid for the construction and development of a nuclear power plant in the UK, pursuant Article 107(3)(c). The Austrian government reasoning upheld that the decision was contrary to the EU's "common interest" and fundamental principles of EU environmental law, since the promotion of nuclear energy is not considered falling within this objectives. The Court instead, rejected this claim relying on the atual Commission's observance of the conditions enshrined by Article 107(3)(c), and by doing so it also took account of the precautionary and "polluter pays" principles in the weighing of negative and positive conditions of the compatibility assessment. The case created solid case law from which it stems the relevant bond between environmental protection and state aid.
[351] Joined cases C-626/15 and 659/16 *Commission v Council* ECLI:EU:C:2018:925.
[352] Robert Schütze, 'Competition Law' in *European Union Law* (3rd edn, OUP 2021).
[353]Vasiliki Karageorgou, 'Implementation and Potential for Mainstreaming the Environmental Integration Principle in EU Law: Normative Content and Functions Also in Light of New Developments, such as the European Green Deal' (2023) 8 European Papers 159

a violation of the European environmental law principles is found, this will automatically lead to declare the aid incompatible with the Internal market without any further assessment.

In the European legal regime State aid has originally been crafted as an instrument to preserve the functioning of the internal market,[354] whereas the preservation, protection and improvement of the environment is considered as an objective pursued by the European Union through means of policy instruments.[355] Admittedly, the two concepts have successfully been integrated, in order to provide an effective manner to reach environmental goals. As it has already been stressed, the European Green Deal presents the interlinked bond between these two concepts, providing guidance to use States' subventions to give impulse to the achievement of higher environmental standards. Indeed, in the related Commission's Communication this concept was highlighted by declaring: « It will require massive public investment and increased efforts to direct private capital towards climate and environmental action, while avoiding lock-in into unsustainable practices».[356]

However, in terms of implementation of the Green Deal's objectives, the State Aid Environmental Guidelines play a highly important complementary role, as the EU has also the need to preserve the Internal market prerogatives. As a matter of fact, the Green Deal urges their revision by 2021 to reflect its purposes.[357] Through the years, since their first appearance[358] in this policy area they fostered the integration between State subventions control and the promotion of environmental benefits from the EU.

Thus, the real contribution of State Aid control in this field stems from the introduction in the Commission compatibility assessment of an environmental awareness, by setting as a compatibility requirement a higher level of environmental protection

<https://www.europeanpapers.eu/fr/system/files/pdf_version/EP_eJ_2023_1_6_SS1_1_Vasiliki_Karageorgou_00645.pdf> accessed 15 December 2024.

[354] Article 107-109, TFEU.

[355] Article 194, TFEU.

[356] Introduction "Turning an urgent challenge into a unique opportunity", in the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal' (COM(2019) 640 final).

[357] ibid para 2.2.2. "Greening national budgets and sending the right price signals".

[358] Commission, 'Community guidelines on State aid for environmental protection' (1994) (94/C 72/03) OJ C 072.

compared to the already-established standards.[359] Nevertheless, it must be borne in mind that the mere environmental benefit is not a sufficient requirement for the aid to be approved. It might seem useless to say, but national governments, when proposing an aid scheme, do not have to simply depict the possible positive effects on the environment, they rather are compelled to prove a degree of environmental protection consistent with the increased values established by the Green Deal.

To put it in simple terms, if different proposed measures equally provide effective ways to achieve an objective, only those with the lowest environmental footprint –in terms of negative externalities – would be eligible.[360] Thus, what provides the actual success in the approval in the Commission's scrutiny by setting an equal standard in respect of the effectiveness of a measure, is the magnitude of harmful impact it can have on the nature as a whole.

The peculiarity of this approach stems from the translation of an apparently ecological scope to a market-based standard to follow. Namely, what happens it is literally a consolidation of a technique to read a socially oriented objective in economic terms, in order to be systematically assessed together with the other requirements in the compatibility with the Internal market.

All considered, if the Commission wants to avoid any infringement procedure, it is then bound to Article 11 TFEU when assessing State aid, taking into account environmental and climate impact. More particularly, monitoring the achievement of the environmental standards set by the current policy framework lastly enacted, in our case the Framework for Climate and Energy Policy 2030,[361] and, as already mentioned, the Green Deal.

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[359] Marta Villar Ezcurra, 'EU State aid and Energy Policies as an Instrument of Environmental Protection: current stage and new trend' (2014) 13(4) European State Aid Law Quarterly 665.
[360] Vittoria Musardo 'Green Deal and Incentive Effect: What is Truly Environmental Aid?' (2021) 20(2) European State Aid Law Quarterly.
[361] Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Framework for Climate and Energy Policy 2020-2030" COM(2014) 15 final.

2. Environment protection: aid measures deployed to enhance a shift towards green objectives

The improvement of the quality of the environment is not a new challenge for the European Union. Many years passed since the first time[362] it set the first ambitious targets to preserve nature conditions from pollutant factors, focusing on specific sectors such as water, air quality and waste, as also mentioned in the first paragraph. However, it was only from 2008[363] that a holistic and comprehensive approach was adopted by the EU, with the so-called 20-20-20 package, aiming for a reduction of the 20 % of greenhouse gases and an improvement of renewables, as well as energy efficiency of the same percentage compared to 1990 levels. This was not the last endeavour that EU set up before the European Green Deal, yet it was the first framework that resembled the approach established in the Green Deal enabling the improvement of environmental and climate conditions, as well as in terms of the timeframes within which this ecological transition must have taken place.

Therefore, considered this previous record of the EU involvement in the betterment of the environmental conditions, in this respect the Green Deal could admittedly be considered set in terms of continuity but with an important innovational aspect. Indeed, the novelty of the Communication on the European Green Deal[364] is envisaged in the necessity for the transition to a net zero economy thus, a need to abide to the goal of 'zero pollution' by the year 2050. Namely, the environment shall be free from toxic substances, emissions will be reduced to levels that are no longer harmful to human beings, and ecosystems will be restored to natural values. A sustainable transition which aims not only to be fostered in the European continent but will tackle it also from a global point of view.

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[362] Council of the European Communities and representatives of the Governments of the Member States meeting in the Council, 'Declaration on the programme of action of the European Communities on the environment' (1973) OJ C 112; European Parliament and Council, 'Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources'(2018) OJ L 328; European Parliament and Council, 'Directive 2002/91/EC on the energy performance of buildings' (2002) OJ L 1; Council, 'Directive 96/62/EC on ambient air quality assessment and management' (1996) OJ L 296; Council, 'Directive 91/271/EEC concerning urban waste-water treatment' (1991) OJ L 135; European Parliament and Council, 'Directive 94/62/EC on packaging and packaging waste' (1994) OJ L 365; European Parliament and Council, 'Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants (2001) OJ L 309.

[363] EU Climate and Energy Package (2008)

[364] The European Green Deal' (COM(2019) 640 final).

Admittedly, the consequence of setting very stringent EU environmental standards can have the effect of transferring the issue of nature contamination from a place to another.[365] For instance, the new Regulation[366] establishing a carbon border adjustment mechanism (CBAM) which aims at hindering the possible carbon leakage by leveraging on a price imposition on carbon emissions in certain imported products. As a result, this could lead to affect also economies of countries outside the EU, indirectly orienting them to adjust to the European standards if they want to keep their economical bonds with the EU.[367]

The EU has set specific targets, already with the Eighth Environment Action Programme[368] for reducing the level of pollution aligning with those established in the 2030 Agenda for Sustainable Development, issued by the United Nations.[369] The endeavours are not only aimed at regulating the use of fossil fuels, yet, also the use of other resources that produce greenhouse gas emissions, providing for measures to improve environment conditions, protecting it from other equally obvious, and equally harmful, sources of pollution. This includes, for instance, measures to improve the quality of the air,[370] or the ones deployed to eliminate pollution of the seas and bodies of water in general, [371] to minimise the use and release of substances of concern, pollution from plastic and microplastic waste, and targets on the excessive use in food of excess fertilisers, hazardous pesticides and substances causing antimicrobial resistance.[372]

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[365] Guendalina Catti De Gasperi 'Making State Aid Control "Greener": The EU Emission Trading System and its Compatibility with Article 107 TFEU' (2010) 9(4) European State Aid Law Quarterly 785.
[366] Regulation (EU) 2023/956 (CBAM) (See n 341).
[367] See for example the case of Morocco in Policy Brief – 'Navigating the CBAM Transitional Period: Understanding the Latest Developments and Enhancing Preparedness' By Rim Berahab PB - 29/23 July 2023
< https://www.policycenter.ma/sites/default/files/2023-07/PB_29_23%20%28Rim%20Berahab%29.pdf> accessed 5 December 2024.
[368] Decision (EU) 2022/591 of the European Parliament and of the Council on a General Union Environment Action Programme to 2030 (2022) OJ L 114.
[369] Goal 12 (12.c) "Ensure sustainable consumption and production patterns", T United Nations General Assembly, 'Resolution 70/1 Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 – <sustainabledevelopment.un.org>.
[370] See for an illustration: European Parliament and Council, 'Proposal for a Directive on ambient air quality and cleaner air for Europe' COM (2022) 542 final; European Parliament and Council, 'Directive 2008/50/EC on ambient air quality and cleaner air for Europe' (2008) OJ L 152.
[371] Commission, 'Communication to the European Parliament, the Council, the European Social Committee and the Committee of Regions, Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil'' COM (2021) 400 final.
[372] Commission, 'Regulation (EU) 2023/2055 amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles' (2023) C 6419 OJ L 238.

It is true that for some time now the European Union has set itself the goal of achieving important sustainability achievements in the area of energy and climate change, nevertheless, the implementation of directives is not always reconciled with the objective of making the market more efficient. And for this reason, State aid can be an appropriate instrument to help achieve both objectives. When it comes to State subventions for environmental safeguard, the main purpose is to produce a higher level of protection compared to what could be achieved without the aid itself.[373] From the *Europe 2020* strategy[374] the EU has started to aim for sustainable growth, in order to facilitate a transition to an economy that is both competitive, low-carbon and resource-efficient. As a result, the incentives towards the use of energy from renewable sources were the cornerstone of this idea, which is considered to allow a significant reduction of CO_2. However, it must be recognised that this can only be achieved through significant investments in energy networks.[375]

On this line, the cooperative role of Member States is considered crucial for the achievement of these objectives. National governments wishing to grant aid for the environment or energy, financed or co-financed by EU structural and investment funds, must notify[376] to the Commission the objective pursued, and the results aimed at achieving the objective, taking particular care and precision in explaining the project. In particular, states will have to demonstrate that the proposed aid is likely to increase levels of environmental protection, using certain indicators, such as technologies for reducing pollution from greenhouse gases or other pollutants, forecasts of greater pollution reductions compared to what would be possible without the proposed aid.[377] In such cases, State intervention can contribute to a more efficient functioning of markets. Indeed, under certain conditions, State aid can intervene to correct market failures, contributing to the

[373]Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020) OJ C 200, paras 49-52

[374] Commission, 'Communication Europe 2020: A strategy for smart, sustainable and inclusive growth' COM (2010) 2020 final.

[375] Commission, 'Communication "A Roadmap for moving to a competitive low-carbon economy in 2050"' COM (2011) 112 final.

[376] Article 108, TFEU.

[377] Simone Lünenbürger, Clemens Holtmann and Juliette Delarue 'Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State Aid' (2020) 19(4) European State Aid Law Quarterly.

achievement of the common objective to a degree that the market alone cannot efficiently reach.

2.1 Subsidising the implementation of environmentally friendly technologies and the duty of quantifying their impact on the environment

According to some recent forecasts,[378] it is estimated that, in the period between 2020 and 2030, the already established renewable energy sources will guarantee to feed the grid at competitive prices. The achievement of this result will mean that subsidies and exemptions from balancing responsibilities will have to be phased out, as their further maintenance could lead to imbalances in the system. The current state of technology has made it possible to identify different types of energy source production that at the same time meet market needs and the need to reduce, and gradually eliminate, negative impacts on the environment, such as uncontrolled exploitation of soil and water, harmful emissions into the air and water, and so on. The EU policy has been moving in this direction for some time now, which can steer the direction of the markets through the instrument of State aid.

Taking as an illustration the hydropower production, the Commission's attention turns to the twofold impact that such production may cause. On the one hand, a positive impact in terms of reduced greenhouse gas emissions and, on the other hand, a possible negative impact on water systems and biodiversity. As it was displayed also in the 2016 Italian notified scheme[379] for support to electricity from renewable sources with the aim to adjust to the EEAG's targets, the Italian authorities had to demonstrate the quantity of CO_2 savings the scheme would have allowed and further stressing the non-financial viability of the project under normal market conditions. Yet, the Commission pointed out the necessity for the national authorities to give proof of the maintenance of the quality objectives of the water body in order to guarantee aid eligibility.[380] Therefore, for the

[378] Sebastian Busch and others, 'Economic and Financial Affairs the Development of Renewable Energy in the Electricity Market' (2023) 187 Publications Office of the European Union, 2023 <https://economy-finance.ec.europa.eu/system/files/2023-06/dp187_en_energy%20markets.pdf> accessed 5 December 2024.
[379] Commission, 'Decision on State Aid SA.43756 (2015/N) – Italy Support to electricity from renewable sources in Italy' C(2016)2726 final.
[380] ibid para 65.

grant-in-aid for hydropower production the Member State must be able to certify the compliance with the specific Directive[381] in particular Article 4(7), which lays down the criteria for the eligibility of new modifications to water bodies. The conformity to the aforementioned legal provision addresses the State's approach when deploying schemes involving environmental implications, so that the analysis of the negative impact can be guided with a specific pathway of requirements.

In regards to energy production from biomass combustion, which remains the main source of renewable energy in the EU,[382] there is no doubt that it requires relatively little investment for the construction of plants, or for the adaptation of existing ones. Even so, it entails high operating costs, unlike most other renewable energy sources. Elevated operating costs may preclude the ability to operate a biomass-fuelled plant, even after plant depreciation, as variable operating costs may be higher than revenues, and this is dictated by the market price.

In fact, it should not be forgotten that a biomass-fuelled plant could also use fossil fuels, instead of biomass indeed, where it is economically more advantageous and could influence market operators to follow this less environmentally oriented direction. In this sense, State aid could be used to steer existing plants towards the use of biomass, making a wide difference in the energy companies' behaviour. Indeed, it has been demonstrated a direct correlation between the growing number of subsidies for solid biomass and the increased quantity of biomass use for electricity generation. This support brought to foster renewables consumption, as well as a surprising use of forest biomass.[383] Nevertheless, biomass energy production still highly relies on fossil fuels, we do not have to overlook that wood burning, for instance, has a big impact on air pollution rates. And for this reason, the Commission, when assessing aids for energy production, which strongly bear greenhouse emissions' costs, must take into account the external costs brought, attributing

[381] European Parliament and Council, 'Directive 2000/60/EC establishing a framework for Community action in the field of water policy' (2000) OJ L 327.
[382] 59% of the renewable energy consumption in 2021 was biomass, for further information see: European Commission: Directorate-General for Energy, Union bioenergy sustainability report – Study to support reporting under Article 35 of Regulation (EU) 2018/1999 – Final report, Publications Office of the European Union, 2024, https://data.europa.eu/doi/10.2833/527508.
[383] Linde Zuidema, 'State Aid for Solid Biomass: The Case for Improved Scrutiny' (2020) 13 EUI Working Papers <https://cadmus.eui.eu/bitstream/handle/1814/68737/LAW202013rev1.pdf?sequence=5> accessed 5 December 2024.

them certain weight in the compatibility scrutiny. Not considering them to their full extent, means to hinder the chance of more environmentally friendly renewables to come into play, namely cleaner options.[384]

2.1.1 The application of the principle of waste hierarchy

Other types of State aid in the current field can take the form of measures to improve energy efficiency, such as district heating and cogeneration plants. Their use of waste as fuel, also exploiting waste heat, already contributes to environmental protection, provided that they respect the principle of the waste hierarchy. [385]

In order to demonstrate the contribution of the aid to the increase of the level of environmental protection, Member States may use a number of indicators, in particular the amount of energy saved as a result of reduced, and thus improved energy performance, and increased energy productivity, or the efficiency savings achieved as a result of reduced energy consumption and reduced fossil fuel use.

The *waste hierarchy* constitutes a priority order for what concerns waste prevention and management in its legislation and policy. Its graphic representation forms «an inverted pyramid with the most preferred options at the upper end and disposal at the bottom as the last-resort solution to managing waste».[386] As a result, this principle represents the basis for the so-called circular economy, which is one of the targets established also by the CEEAG.[387] As a matter of fact, through the use of waste as fuel, including waste heat, State aid can contribute to environmental protection, provided it respects certain principles. First and foremost, the waste hierarchy, which outlines the priorities, among the various treatment methods, depending on the qualification of the waste, and according to the distinction between hazardous and non-hazardous waste.

In line with the concept of efficiency savings, when in 2019 Bulgaria had the necessity to reduce the amount of landfill waste, it notified to the Commission a support

[384] ibid.
[385] European Parliament and Council, 'Directive 2008/98/EC on waste and repealing certain Directives' (2008) OJ L 312.
[386] ibid.
[387] See CEEAG section 4.4.4 "for resource efficiency and for supporting the transition towards a circular economy".

measure[388] for the construction of a high-efficient waste-to-energy combined heat and power. The subvention would have had the effect of reducing approximately 17.000 tonnes of CO_2 emissions per year, but most importantly improving waste treatment in the Sofia region, which involves the RDF method, namely refuse-derived fuel, combustible taken from industrial sites that cannot be used for recycling but just incinerated.[389] The Bulgarian authorities actually proposed three options, but only one, the combustion in specially designed RDF combined heat and power plant, was in line with the principle of waste hierarchy, as it favours waste recovery over its disposal.[390] The latter was indeed an option in the request, in particular the landfilling of RDF. Thus, the Commission did not raised objections, since it was possible to demonstrate that the burning of waste to produce energy would have been deployed in compliance with Article 4(1) of the Directive[391] enshrining the waste hierarchy principle, and by doing so, aligning with the Environmental Guidelines (EEAG at that time).[392]

2.1.2 The implications of State subventions in CCS systems

Another category of State aid is foreseen for initiatives enabling CO_2 capture and storage (CCS). As recognised by Directive on the geological storage of carbon dioxide[393] and the Commission Communication on the future of carbon capture and storage in Europe,[394] CO_2 CCS systems are technologies that can contribute to limiting and mitigating the progression of climate change. In the transition to a low-carbon economy,

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[388] Commission, 'Decision on State aid SA.54042 (2019/N) Bulgaria- Sofia waste-to-energy project/ cogeneration unit with recovery of energy from RDF' C(2019) 8528 final.
[389] For more information on RDF see: Junaid Tahir, Rafiq Ahmad and Pablo Martinez, 'A Critical Review of Sustainable Refuse-Derived Fuel Production in Waste Processing Facility' (2024) 24 Energy Conversion and Management:
<https://www.sciencedirect.com/science/article/pii/S259017452400165X#s0125> accessed 5 December 2024.
[390] SA.54042 (n 388), para 48.
[391] See n 385.
[392] Commission, 'Communication on Guidelines on State aid for environmental protection and energy 2014-2020' (2014) OJ C 200 (EEAG), para 140.
[393] European Parliament and Council, 'Directive 2009/31/EC on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC of the European Parliament and of the Council and Regulation (EC) No 1013/2006 of the European Parliament and of the Council' (2009) OJ L 140.
[394] Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Future of Carbon Capture and Storage in Europe' COM(2013) 180 final.

this type of technology represents the perfect approach to converge the demand for fossil fuels and the need to reduce greenhouse gas emissions.

Consequently, aid can be provided to support power plants, equipped with the full value chain for capture, transport and storage of the CO_2 emitted by them or directly present in the ambient air. However, it should be emphasised that aid for CO_2 capture and storage projects do not include aid for CO_2-emitting installations in the form of industrial plants or power stations, but only projects enabling CO_2 capture and storage. Generally, the compatibility assessment of this kind of aid inherently includes an increase of environmental protection, directly falling in the in Section 3 of the CEEAG for reduction or removal of greenhouse gas emissions.[395]

A modern energy infrastructure is crucial for the realisation of an integrated energy market, enabling the Union to achieve its goals of optimising energy supply in the context of climate improvement. Where market operators are not able to improve the necessary infrastructure, State aid can be supportive to overcome market limitations and improve infrastructure needs, within the EU.

An instrument, which can make a difference in the energy-intensive sector guaranteeing a shift towards climate-friendly solutions is the CCfD or Carbon Contracts for Difference. The latter involve an agreement between the seller and the buyer to set a strike price for a certain product, in this case an industrial technology contributing to carbon avoidance in a specific timeframe. The difference of the strike price compared to the market price will be compensated by one of the contractual parties whether it will be lower or higher than the market one.[396]

One might wonder how this can lead to an actual environmental benefit. For this purpose, the case related to the State aid scheme for Carbon Capture and Storage in Denmark[397] can depict the actual advantages in terms of green technologies applied. In

[395] Commission, 'Communication on Guidelines on State aid for climate, environmental protection and energy' (2022) OJ C 80, (CEEAG), section 3.
[396] Heiner von Lüpke and others, 'Carbon Contracts for Difference as an Instrument for Strengthening Climate Cooperation between Industrialized and Emerging Economies' (2022) 12 Deutsches Institut für Wirtschaftsforschung (DIW), Berlin, Weekly Report https://www.econstor.eu/bitstream/10419/265833/1/1819761134.pdf.
[397] Commission, 'Decision on State Aid SA.102777 (2022/N) – Denmark State aid scheme for Carbon Capture and Storage in Denmark' C(2023) 202 final.

2023 the Danish government notified the aid scheme concerning subsidies to be paid per tonne of CO_2, which would have guaranteed a CCS installation for industries for cement, aluminium, steel, paper, and be able to capture the inherently greenhouse emissions produced. Indeed, market operators raised their need for State aid as a precondition to be able to make an investment in an advanced technology, otherwise impossible to be deployed. As a result, this would have enabled to reduce 4-9 million tonnes of CO_2 by 2030,[398] thus providing a basis for reaching the climate neutrality imposed by the Danish Climate Act by 2050.[399] At the same time, it could have compensated for the market failure registered.

In this way the State only had to compensate for additional costs related to the implementation of the process of capture and storage technology. However, since the price imposed by Emission Trading System (ETS)[400] is sensitive to fluctuations, also aid might be affected, leading to overcompensation if there is an automatic adjustment system to carbon pricing as well.

Thus, to make sure that the Commission would have approved the subsidy, national authorities demonstrated that eventual higher carbon costs over the market price would have been borne by the market operators, and not compensated by the aid scheme itself. This could ensure that any market distortion could be avoided using the CCfD mechanism, furthermore it guarantees that climate-friendly technologies can compete with traditional ones.[401]

2.1.3 Aid for the relocation aiming at a greater environmental protection

Finally, State aid could also take the form of incentives or tax relief for the relocation of companies. The main purpose of this instrument is to reduce negative externalities on the environment occurring through relocating the most polluting

[398] ibid para 7.
[399] LOV (Danish Climate Act) no. 965 af (2020) < https://www.retsinformation.dk/eli/lta/2020/965>.
[400] The Emission Trading System (ETS) is a way incentivise market operators to lower their emissions through this system as the selling of allowances is more convenient than to pay the cost to lowering emissions where the environmental outcome is still guaranteed by the overall emission cap. Namely a way to set a price for carbon emissions. For more information on ETS see: Damien Meadows, Mette Quinn, and Beatriz Yordi "The EU Emission Trading System" in Jos Delbeke, *Delivering a Climate Neutral Europe* (Taylor & Francis 2024).
[401] Point 90, CEEAG.

companies to areas where such pollution would have a less harmful effect, with benefits in terms of reduced external costs. The aid can therefore be justified if the reasons for the relocation are environmental but should be avoided if the relocation takes place for any other reason, mainly the company's turnover requirements. In this respect, investment aid for the relocation of undertakings to new sites is considered compatible with the Internal market if certain conditions are met, such as the reasoning for relocation, exclusively motivated by requirements of environmental protection or prevention; an administrative or legal decision by a competent public authority to authorise the relocating undertaking; and finally, the compliance with the strictest environmental standards applicable in the region of destination.[402]

This could be the case for the relocation scheme[403] for peak-load nitrogen deposition granted to Dutch farmers willing to continue their business, but hindered by the high costs that displacement of their farms would have entailed. In 2023, it was raised the issue of reducing the nitrogen deposit caused by livestock in certain areas of the Netherlands falling within the context of the protected areas detected by the European Habitats Directive.[404] The farmers were imposed to either stop their economic activity or relocate it in a different area, inside the Netherlands or in another Member State, not interested by the Directive.

In its assessment the Commission, took into account the compliance of the reasoning for the relocation with the requirements set out in the Guidelines for State aid in the agricultural and forestry sectors and in rural areas, which, being due to environmental reasons, was considered in line with the dedicated section to aid for relocation. Nevertheless, it was stressed that for the displacement to fall within the meaning of compatible State aid in the aforementioned Guidelines, there must be proved an actual increase of the environmental performance of the rural settlement, implying not solely a replacement of an existing building facility with an up-to-date one, yet a relevant change in the technology involved.[405]

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[402]Commission, 'Communication on Guidelines for State aid in the agricultural and forestry sectors and in rural areas' (2022) OJ C 485, section 1.3.2.
[403] Commission, 'Decision on State Aid SA.111058 (2024/N) - Netherlands Relocation scheme for peak-load nitrogen deposition' C(2024) 5059 final.
[404] Council, 'Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (1992) OJ L 206.
[405] Commission, 'Decision on State Aid SA.111058 (2024/N) Relocation scheme for peak-load nitrogen deposition C(2024) 5059 final, paras 119-120.

Indeed, the Dutch authorities displayed that the 65% of the costs for the investments were aimed at modernisation in relation to buildings present at the time of submission on the site.[406] Therefore, the Commission scrutinised the effective modernisation on an environmental point of view for the relocating facilities, considering that the mere displacement in a different area was not the only element to assess.

3. The issue of the environmental requirements: between an individual and a holistic consideration of them in the aid assessment (non-environmental aid)

Hitherto, we have been dealing with environmental State aid, thus requiring a Commission's scrutiny on the existence of beneficial effects on the environment as a compelling element to provide compatibility for.

However, an integrated approach for the achievement of the EU environmental targets should require a comprehensive consideration of those objectives. This means not only considering the latter when assessing aid directly aiming at incentivising the green transition, yet also when effects on the environment represents mere negative externalities of subventions granted for all other purposes, such as, for instance, ensuring security of energy supply.

Nevertheless, the issue here is to understand whether the "beneficial effects on the environment" obligation can also be imposed on the assessment of subsidies which do not inherently have the purpose of improving environmental conditions, namely "non-environmental aid". Indeed, one thing is the aid to enhance environmental conditions, and another one is the aid which must abide to environmental standards but does not directly aim at the achievement of benefits for the environment. Hence, in other words, it is of relevant importance to establish whether there is a legal ground to achieve the purpose of granting an environmental assessment for non-environmental aid.

It is a relatively new awareness the one dealing with the necessity to consider environmental protection objective in the "non-environmental aid". Indeed, it results as a mandatory requirement in order to attain a measure approval, requesting to alternatively lower the carbon emissions or to cause "less harm" to the environment. The focus for this scrutiny is necessarily part of the "environmental" assessment, namely aid aimed at

[406] ibid para 46.

finding more sustainable solutions in terms of the farsighted objectives deployed in the Green Deal to take as new standards. However, in light of these new parameters it is of relevant importance to also implement the requirements set for non-environmental aid", and for this term we refer to measures which are not strictly related to the environmental protection, yet they present a close link with it, due to the indirect impact they can entail.[407]

As it was also expressed by the Commission in 2001[408]: « [...] competition policy and environmental policy are not mutually antagonistic, but the requirements of environmental protection need to be integrated into the definition and implementation of competition policy, in particular so as to promote sustainable development». Thus, its view on the matter is that environmental policy objectives must also be integrated into the Commission's policy on aid control.

At the present time, in the current framework, a certain environmental standard to be considered in the compatibility assessment does not exist when the aid does not pursue an environmental objective, and it is not *per se* so. The Commission has shown its avoidant behaviour in exercising wide margin of appreciation for what concerns national measures with European environmental standards.[409] Nevertheless, as highlighted by the recent case law,[410] the Commission could be obliged to consider it, finding the legal basis for this directly from the combination of Article 11 TFEU and Article 194 TFEU. Yet, it remains the fact that Member States are not obliged to consider environmental matters when the aid requested is not environmental *per se*, thus, we cannot really speak about a binding approach in this sense, only the Commission could actually steer the situation if it will start to align its assessment on this pathway.

As a matter of fact, imposing an increased level of environmental protection in the State Aid Policy framework, thus also on the aid for other sectors, would guarantee a disproportionate burden that applicants must conform to for the approval of aid measures.

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[407] Musardo, EStAL (n 360).
[408] Commission, 'Community guidelines on State aid for environmental protection' (2001) OJ C 37.
[409] ClientEarth, Legal analysis on 'A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law' (2020) <https://www.clientearth.org/media/c45naoms/2020-09-30-a-state-aid-framework-for-a-green-recovery-coll-en.pdf> accessed on 7 December 2024.
[410] Case C626/15 *Commission v Council* ECLI:EU:C:2018:925.

Therefore, they will not be asked to go over the 'standard practice', but solely adjusting to a requirement settle for any State aid request.[411]

As mentioned above, this phenomenon is especially highlighted in sectors which are not directly environmentally driven but have an inherent link with climate issues, and aid measures whose mainly objective is non-environmental. Ideally, an environmental impact study requirement when notifying the aid would be a solution to leverage all types of aid, so that any measure would be treated equally. Nevertheless, this would mean adding another burden on Member States when notifying an aid measure.

3.1 Fulfilling environmental requirements through adaptation of non-environmental aid: the case of the Italian Capacity Mechanism

A sector where aid measures are notified but they do not directly aim at achieving environmental benefits is the one relying to capacity mechanisms and generation adequacy,[412] which, nonetheless, are systematically constructed to aim at an objective of common interest. The objective of guaranteeing adequacy in the energy generation and the need to foster climate transition are two targets separately considered by the Commission yet interlinked in their assessment.

This was specifically highlighted by the General Court in case *Tirreno Power S.p.A. v Commission*.[413] In the judgment in question, Italian authorities believed that the Commission in its decision[414] erred when assessing the measure in the scrutiny of the adequacy objective, considering it as substituted by the environmentally driven purpose of decreasing CO_2 emissions. However, the Court demonstrated that the former objective «stayed intact, nevertheless integrated by the latter sustainable target». Thus, it proved that the Commission's approach is actually tending to take into consideration the environmental awareness and blend it with the objective of common interest pursued in capacity mechanisms and generation adequacy subventions, that is the sufficient energy supply for the grid.

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[411] Musardo, EStAL (n 360).
[412] European Parliament and Council, 'Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU' (recast) (2019) OJ L 158.
[413] Case T-793/19 *Tirreno Power S.p.A. v Commission* ECLI:EU:T:2022:504, para 87.
[414] Commission, 'Decision on State Aid SA.42011 (2017/N) – Italy – Italian Capacity Mechanism' C(2018) 617 final.

A modern energy infrastructure is indeed essential to implement an integrated energy market, which enables the Union to achieve its goals of optimising energy supply, within the framework of climate improvement. Where market players are not able to upgrade the necessary infrastructure, State aid can help to overcome, within the EU, market limitations, and improve infrastructure needs. As the share of renewable energy sources increases, electricity production in many Member States is moving from a relatively stable and continuous supply system to a system with more variable sources on a smaller scale. The transition poses new challenges for ensuring the adequacy of generation capacity. [415] Consequently, some Member States are considering introducing measures to ensure the adequacy of generation capacity, usually by granting producers the economic support needed.

The nature and causes of generation capacity adequacy problems, and therefore the need for State support, need to be analysed and quantified in terms of insufficient capacity to cope with peak loads or seasonal consumption, or peak demand, if the wholesale market fails to balance supply and demand in the short term. As their purpose is to evenly ensure a response to electricity needs, a capacity mechanism roll-out shall also be deployed taking into account the negative impact on the objective of phasing out environmentally harmful subsidies. And even if Member States are not bound to carry out an environmental impact assessment when requesting aid in this sector, the Commission still emphasised in the State Aid Environmental Guidelines[416] that the objective of the generation adequacy mechanism still shall not contradict the objective of phasing out fossil fuels.[417]

In the aforementioned case *Tirreno Power S.p.A. v Commission* [418], the General Court analysed the aid scheme for the Italian capacity mechanism[419] notified between 2017 and 2018, and its subsequent upgraded and environmentally driven version of 2019.[420] Taking a step back, we have to consider that Italy reported a relatively low level of concentration on the generation side, leading to an issue concerning the lack of security

[415] M Kozlova and I Overland, 'Combining Capacity Mechanisms and Renewable Energy Support: A Review of the International Experience' (2021) 155 Renewable and Sustainable Energy Reviews 111878.
[416] CEEAG.
[417] CEEAG (para 326); Section 3.2.3.1, EEAG (para 43), section 4.8.2.
[418] Case T-793/19 *Tirreno Power S.p.A. v Commission* (n 413).
[419] SA.42011 (n 414).
[420] Commission, 'Decision on State Aid SA.53821 (2019/N) – Italy Modification of the Italian capacity mechanism' C(2019) 4509 final.

of supply. The reason for this situation was found in the fact that a deficiency of incentives by the electricity wholesale market was hindering investors' action. In fact, they were not expecting future revenues to cover fixed costs to remunerate them, and in addition an asymmetry of information was detected among the various market players. Both of these reasons generated a market failure.[421]

The overall scrutiny of the aid set in place was not found in contrast with the State Aid relevant framework,[422] however the Commission raised the need for the Italian government to demonstrate that the mechanism was not involving conventional generation based on fossil fuels, like coal and oil. Thus, the Italian authorities should have primarily redirected the achievement of generation adequacy towards alternative ways, without these negative environmental impacts.[423] However, intermittent renewables are not always sufficient to provide an adequate supply to the grid and might need flexible back-up capacity. Surrogated paths could be the facilitation of demand side management and the increase of interconnection capacity, which could pave the way for decarbonisation while at the same time maintaining security of supply. After stating this, the Commission, though, did not request the national authorities to provide an environmental impact assessment, trusting the technical environmental constrains already set up in Italy for thermoelectric units.[424] It is true that the safety of energy availability in the Italian market is considered the predominant objective in this case, however an effective analysis should also consider the climate-friendly perspectives as binding for the Member State when requesting aid.[425]

We acknowledged from this situation, but also from other approved measures for generation adequacy[426] for other applicant Member States, that the Commission's test tends to focus much more on the trading distortions and overlook what are deemed to be environmental standards, forgetting that for an effective pursuit of the scopes of the Green

[421] ibid para 14.
[422] Article 107(3)(c); EEAG.
[423] SA.42011, para 133.
[424] ibid para 61.
[425] ibid para 137.
[426]See Commission decisions on State Aid SA.46100 (2017/N) – Poland – Planned Polish capacity mechanism C(2018) 601 final; SA.44464 (2017/N) – Ireland Irish Capacity Mechanism C(2017)7789 final; SA.44465 (2017/N) – United Kingdom – Northern Irish Capacity Mechanism C(2017) 7794 final; SA.39621 (ex 2015/NN) C(2016) 7086 final.

Deal, also non-environmental aid should be evaluated bearing in mind environmental considerations.[427]

Surprisingly, though, Italy submitted a modified version[428] of the same aid measure a year after (2019), but this time setting a CO_2 limit for installations participating to the mechanism. The boost towards this direction was given by the need to comply with the new Electricity Regulation[429], later adopted by the Commission. With this new limit as a requirement, only a generation capacity complying with the requirement of 550 g of CO_2 per kWh can participate to the mechanism, and in this way incentivising renewables installations and self-consumption,[430] in line with Italy's plan to phase out coal-fired generation by 2025.

Indeed, with this new modified version of the measure, the Commission considered that the CO_2 requirement established, not only lowered the operators' participation in the scheme, but also guaranteed access to small electricity producers in the capacity market, decreasing in this way the market power detained by the already existing operators.[431] Thus, this was sufficient for the Commission to ensure that very limited negative effects on competition and trade were about to be released, considering the new scheme compatible. Overall, the changes did not affect the considerations made, before the related amendments, for its earlier 2018 decision.

However, later on, the Italian electricity producer Tirreno Power, questioned exactly this last part of the decision. In particular, it believed that the Commission misjudged the consideration of the objective of the common interest of security of energy supply altering its nature by only assessing the compatibility with Article 107(3)(c) of the CO_2 requirement to participate. An alleged lack of motivation and an insufficient evaluation of the modified version of the proposed scheme in 2019 led the applicant to assume a diversion of market purposes by the Commission. The issue was represented by

[427] Musardo, EStAL (n 360).
[428] SA.53821 (2019/N) (n 420).
[429] Article 22(4)(b), European Parliament and Council, 'Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action' (2018) OJ L 328: «from 1 July 2025 at the latest, generation capacity that started commercial production before [date of entry into force of this Regulation] and that emits more than 550 g of CO2 of fossil fuel origin per kWh of electricity and more than 350 kg CO2 of fossil fuel origin on average per year per installed kWe shall not be committed or receive payments or commitments for future payments under a capacity mechanism».
[430] SA.53821 (2019/N), para 71.
[431] ibid para 142.

this presumed substitution of the "security of energy supply objective" with the environmental protection aim, as was also anticipated at the beginning of this paragraph.

As a result, the applicant insisted that this sloppy assessment was admittedly the cause for many carbon-based electricity producers to remain in the market, thus completely dismissing the environmental purposes initially considered for the scheme itself. Nevertheless, the General Court in this point seems firm in demonstrating[432] that the Commission did not err when assessing the new scheme, as its action was mainly deemed at integrating the environmentally driven energy transition purpose with the objective of the adequacy of energy supply pursuant Article 194 TFEU. Admittedly, a shift towards renewables and a detachment from the carbon fossil reliant operators could inevitably have an impact on the assurance of energy supply, and this explains the need to interpret this objective of common interest in the modified way proposed with the CO_2 limit requirement. For this reason, the Court totally rejected this point raised by the applicant and eventually considered that on this matter the compatibility of the modified measure was preserved. For the purpose of this paragraph, we are not going to analyse the other arguments raised, however the final judgment of the Court was indeed towards an overall compatibility of the scheme in question, thus the Commission assessment was considered sound and well founded.

Finally, we can state that it is true that when assessing directly State aid measures with non-primarily environmental objectives the Commission does not impose environmental requirements, however it does so indirectly if it imposes on Member States the compliance with EU environmentally driven legislation (such as the aforementioned Regulation[433]). Admittedly, this indirect approach is effective when certain sectors are predetermined by law as influenced by environmental protection issues, defined in a certain number of figures. In other terms, it seems like the Commission wants to dispense itself from using discretion, applying the principle of typicality in State aid control when it comes to non-environmental aid.

[432] Case T-793/19 *Tirreno Power S.p.A. v Commission* (n 413), para 82-92.
[433] See n 429.

4. Environmental protection in terms of industrialisation: the Green Deal Industrial Plan (2023)

The Commission, with the aim of achieving its ambitious environmental goals, has launched in 2023 a European Green Deal Industrial Plan[434] (GDIP), whose main task is to combine environmental protection with maintaining, and where possible, increasing industrial production and energy supplies necessary for the needs of EU citizens and businesses.

The GDIP has set a number of objectives, such as the encouragement of the decarbonisation of heavy industry, and the resolution of the problems which are currently slowing down the development of the clean energy sector, specifically the lack of adequate technical skills, and trained workers. In this area, the GDIP could be validly used to create markets for clean materials, open up carbon storage capacities, and develop the skills needed for the development of the clean energy value chain. Subsequently, it aims at increasing public awareness of the need for the rapid deployment of clean technologies at local or regional level. On a third basis, the GDIP intends to strengthen European unity, by both preventing fragmentation of the internal market and by creating a favourable environment for green innovation and clean technology value chain development across the EU. And the final scope of giving impulse to global cooperation, by making every effort to attract international partners. Indeed, raising international partners' aspirations for sustainable development would increase the EU's credibility as a responsible partner in the environmental field.[435]

However, without further EU action to counterbalance the uneven national resources and mobilisation of private capital, the GDIP risks increasing economic divergence between Member States, but also missing the opportunity to incentivise countries lagging behind EU decarbonisation targets to benefit from the current global push for green investments. In any case, new funding should be accompanied by strong

[434] A Green Deal Industrial Plan for the Net-Zero Age (n 347).
[435] Aleksandra Waliszewska, Waliszews and Manon Dufour, 'How to Make the Best of the Green Deal Industrial Plan Pragmatic Recommendations for Policy Makers ' (E3G Think Tank May 2023) <https://www.e3g.org/wp-content/uploads/E3G-Briefing-How-to-make-the-best-of-the-Green-Deal-Industrial-Plan.pdf> accessed 18 December 2024.

environmental requirements to ensure alignment with the goal of achieving climate neutrality.[436]

4.1 The five axes of the State aid control in the Green Deal Industrial Plan

Having said that, these new parameters to foster the shift to a net-zero economy are profoundly dependent on an upheaval of what concerns the State aid in general. Indeed, we have analysed in detail in the first chapter the changes brought by the Environmental State Aid Guidelines (CEEAG) and the new General Block Exemption Regulation (GBER), which partially contributed to shape the GDIP itself as a direct product of them. We will now concentrate our focus on some of the most up-to-date improvements made in terms of the bureaucracy involved, and shorter timeframes for the granting of authorisations, believing that this apparently small upgrades will have an effective resonance in order to speed up the process of the European green transition.

In particular, the so-called "five axes" for State aid that the GDIP sets in place are meant to loosen up the stiffness of the current State aid control, having regard to the current climate crisis but also necessity of flexibility due to the need to make EU self-sufficient on energetic terms after the Russian aggression to Ukraine.[437]

This paragraph will mainly cover the first four of the axes, since the last one was already analysed in the first chapter, in the section dealing with the raise of financial threshold in the GBER.[438]

The two main purposes of this modifying configuration could be summed up in two concepts: simplifying and speeding up procedures for the approval of State aid schemes by the Commission. Until the end 2025, through an extension period of the Temporary Crisis and Transition Framework for State Aid (TCTF),[439] the Commission

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[436] Chiara Canestrini, 'The Green Deal Industrial Plan' (Florence School of Regulation20 March 2024) <https://fsr.eui.eu/the-green-deal-industrial-plan/> accessed 18 December 2024.

[437] Commission, 'Communication Temporary Crisis and Transition Framework (TCTF) for State Aid measures to support the economy following the aggression against Ukraine by Russia' 2023/C 101/03 OJ C 101.

[438] See Chapter I, para 3.2 The raise of financial thresholds".

[439] TCTF (n 437), section 2.5.1 (accelerating the rollout of renewable energy and for energy storage; section 2.5.2 (Operating aid for accelerating the rollout of renewable energy and for energy storage); section 2.6 (Aid for the decarbonisation of industrial production processes through electrification and/or the use of renewable and electricity-based hydrogen fulfilling certain conditions and for energy efficiency measures); section 2.8 (Aid for accelerated investments in sectors strategic for the transition towards a net-zero economy).

intends to provide a set of technical tools to implement the procedures for the approval of State aid in specific strategic sectors which foster decarbonisation and the transition towards a net-zero economy, such as renewables and energy storage. These technical instruments consist of 'easier procedures', 'simplified calculations' and 'accelerated approvals'.[440] We are going to cover them through an analysis of the aforementioned "axes" through a combined reading of the GDIP and the TCTF together.

Starting from the first instrument of 'easier procedures', the first axis deals with the "simplification of aid for renewable energy deployments", aiming at accelerating the roll-out of renewables. It firstly extends the types of renewable technology where aid shall be granted, including hydrogen, biofuels, bioliquids, biogas and biomass fuels, where at least 75 % of their content comes from a directly connected renewable fuels production facility, on an annual basis.[441] Secondly, if certain technology are less mature than others the requirement of an open bidding process is not requested, since for them a tender would not be completely effective. The reason is that the most part of the total selection criteria used for ranking bids is determined in terms of aid per unit of environmental protection, thus EUR per tonne of CO_2 reduced.[442]

The second axis, titled "simplification of aid for decarbonising industrial processes" displays clearly the aim of simplifying calculations. The first element characterising the aid amount calculation is indeed a standardised percentage based on a case experience, for what concerns hydrogen or hydrogen-derived fuels or energy efficiency improvement. In particular, the aid intensity must not exceed 60 % of the eligible costs, whereas for electrification projects it must not exceed 30 % of the eligible costs.[443] Another addition is the establishment of a 'flexible aid ceiling', based on a per Member State basis. Indeed, the GDIP must aim to strengthen European unity, not increase its divergences. In order to avoid a two-speed decarbonisation, a level playing field shall be created in the area of green innovation, seeking to rebalance the differences among Member States' power, as well as their administrative capacity and their ability to attract private investment. With the purpose of calculating the aid ceiling, the granting authority may rely on estimations to verify on an ex-post basis the actual data to meet the

[440]Green Deal Industrial Plan, section 2.2.1.
[441] TCTF, para 77(a).
[442] ibid para 77(f).
[443] ibid para 81(p).

eligibility criteria.[444] In this way, it would be easier to shape the aid amount based on the different needs exposed by every other applicant Member State, aligning a fit-for-purpose aid and considering the existence of less wealthy conditions of the countries in the EU.

On the same line for simplified calculations, there is the third axis dealing with the "enhancing of support schemes of strategic net-zero technologies". The peculiarity here is the use of a comparative approach to calculate the amount for every other project similar to the ones already deployed by competitors outside the EU borders. Admittedly, if a subsidy for an equivalent project is granted for a higher value, this method will enable to ensure proportionality between aid measures with identical features.

And to conclude, the fourth axis, whose features stems from the need to 'accelerate subsidies approvals', in particular for "targeted aid for major new production projects in the net-zero value chain". The latter kinds of aid concern in particular to the production of equipment such as batteries, solar panels, wind turbines, heat-pumps, electrolysers, and equipment for carbon capture usage and storage,[445] thus considered aiming towards a net-zero economy. Therefore, the Commission decided to untangle issues relating approval of aid by unravelling certain procedural requirement to improve the time period needed for the Commission's approval, lowering the median time to 19 days. Another important aspect to considera for an-ante modulation of the subvention, for instance, is considering the assisted location, or the necessity of relocating an investment.[446]

4.1.1 The practical advantages of the axes for applicant Member States

The use of these technical tools was directly leapt at the chance by Member States, which started to notify the Commission with new projects under the TCTF. Specifically, the disrupted trade flows and supply chains that led to exceptionally large and unexpected price increases, especially in natural gas and electricity, brought countries like Germany, Poland, Portugal to request for urgent measures to help reducing dependency on fossil fuels and to speed up a shift towards renewables.

[444] ibid para 76.
[445] ibid para 85.
[446] Green Deal Industrial Plan, para 4.

The notified measure of Slovenia in 2023,[447] for instance, was found compatible with Article 107(3)(c). It included investments for renewable energy production such as solar, wind power and geothermal biomass, hydropower, geothermal and biogas, reaching the capacity of 600 MW and 550 MWh for energy storage. The ground that allowed the approval relied on the new aid ceilings confirmed in the TCTF. In fact, the overall aid would not have represented over than 45 % of investment costs of the project, thus in compliance with paragraph 77 of the TCTF.[448] The national authorities then demonstrated that due to the exceptional economic circumstances, the beneficiaries would have continued their activities with no changes without the measure, if there was not for the need to comply with the Union law. Thus, considering the counterfactual scenario, the economic activity supported by it would not have taken place, proving the incentive effect, as well as the necessity for the measure.[449] Admittedly, the Commission did not go in depth in the identification of the elements of incentive effect and necessity, since the factual context of the crisis was sufficient to approve the measures, given that it was in line with estimated values requested by the TCTF. After all, the purpose of this framework is exactly to simplify and accelerate the aid control procedures.

To conclude, after this focus on a specific case of application of the new instruments implemented by the Green Deal Industrial Plan, it is surely noticeable the efforts of the Commission to create an extensible temporary framework. Indeed, to effectively tackle current emergencies, such as the climate crisis and the incumbent issue of the energetic deficit related to the Russia-Ukraine conflict, the EU was left with no choice but to extend the general limits established in the EU State aid control framework.[450] It is not a new Commission's practice the one in question, as it has been recurring at least since the financial and economic crisis of 2008.[451] Nevertheless, one might wonder to what extent the approach of stretching the boundaries set in Article 107 TFEU will guarantee compliance in terms of distortions of the trading conditions as well as competition. Having to abide to instruments such as the TCTF, means that the

[447] Commission, 'Decision on State Aid SA.106613 (2023/N) – Slovenia TCTF: Investment aid for accelerating the introduction of energy from renewable sources, storage and heat from renewable sources' C(2024) 6666 final.
[448] ibid para 49(h).
[449] ibid para 49(d).
[450] 107 TFEU.
[451] Commission, 'Communication— Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis '(2009) OJ C 83.

Commission will not only have to limit its discretion but also allowing an exception to fit in the conditions already analysed[452] in the TFEU. However, we cannot forget the case-by-case approach established for State aid granted under exceptional circumstances [453] will always rescue the chance of overlapping the safety constrains imposed.[454]

5. A new consolidated compatibility assessment for State aid for environmental protection and energy in the CEEAG 2022

As it was previously stressed in the first chapter, the European Commission, with Communication n. 80 of 2022, published in the Official Journal of the European Union on the 18th of February, a new framework for State aid for climate, environment and energy the so-called Guidelines on State aid for climate, environmental protection and energy intended to amend, and to a large extent to go beyond, what had been set out in the previous Communication no. 200 of 2014.

On its State of Intent, it provides the scope and premises of this policy document. The role and the relevance of Article 107 of the TFEU is again reaffirmed, establishing the principle of the prohibition of State aid, in order to prevent such aid from distorting competition in the internal market, and affecting trade between Member States. But also, reiterating, in combination, the reinforcement of the climate ambitions enshrining from the European Green deal Communication.

However, in a way as expanding the meaning stemming from paragraph 3 letter c of the same Article 107, the Commission specifies that, it may consider State aid compatible with the internal market through a balancing method which takes in consideration diverse elements and conditions that will provide a compatibility scrutiny of what has already been determined as State aid.[455]

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[452] 107(3)(c) TFEU.
[453] TCTF, para 99; Article 108(2) TFEU.
[454] Dzhuliia Lypalo, 'Bend It until It Breaks: Flexibility of Temporary Crisis Framework in the Context of the Russian Invasion of Ukraine' (2023) eulawlive.com Eu Law Live - Competition Corner <https://eulawlive-com.eu1.proxy.openathens.net/competition-corner/bend-it-until-it-breaks-flexibility-of-temporary-crisis-framework-in-the-context-of-the-russian-invasion-of-ukraine-by-dzhuliia-lypalo/> accessed 18 December 2024.
[455] See Chapter I, para 1.1 Ex post control: the main elements of State aid detection", for the Commission's approach in the previous step of monitoring state subventions in analysing their nature, whether they could be deemed as State aid.

More specifically, this benchmarking phase involves the analysis of two conditions: a positive one, namely, the facilitation of the development of certain economic activities within the Union provided by the aid itself; and a negative condition, that is intended as the lack of adverse effects on the trading conditions to an extent contrary to the common interest. It will be for the Commission, on a case-by-case basis, to assess whether the aid notified by the Member States shall be considered in compliance with the two conditions mentioned.[456]

Therefore, in this section we are going to analyse the elements contained in the two benchmarking conditions, with regard to the first one, namely the positive one, according to the applying Member State must firstly demonstrate that aid must facilitate an economic activity identifying its positive effects on society and its relevance for Union policies. Secondly, they have to grant proof of the so-called incentive effect, providing an attentive assessment compared to the counterfactual element. And to conclude with the positive condition, the national authority must provide that no rule of Union law is violated.[457]

Concerning instead the negative condition, the evidence will be conveyed at giving proof of the necessity of the State intervention, the appropriateness of the aid compared to the objective pursued and the proportionality of the aid itself, guaranteeing its limitation to the minimum necessary to achieve the scope.[458] Secondarily, the transparency of the procedure and the purpose must be verified, and thirdly all measures must be taken to prevent any adverse effects, such as undue influence on competition and trade. As a final step, the Commission will carry out a final a balancing action, weighting on the one hand the elements of the positive condition and on the other the elements of the negative condition.[459]

The peculiarity of these criteria, conventionally used in the Environmental and Energy State aid Guidelines, is that their applicability is extended also for other categories

[456] CEEAG, section 3.
[457] ibid para 22(a), i, ii, iii.
[458] ibid para 22(b), i. ii, iii.
[459] ibid para 22(b), i.

of aid, however they are modulated in extension or adjustment based on the different circumstances that surrounds the aid type.[460]

The focus of the subsequent and final section is to give an overview on how these elements are considered by the Commission in its compatibly assessment, mostly relying on specific cases which will expose the Commission's approach in this sense. After their analysis, a critical view on the final benchmarking method will be provided. We are going to expose the issues stemming from the Commission's methodology and suggesting a possible getaway to actually guaranteeing a practical application of what is deemed to be the formal weighing of positive and negative conditions of the State aid object of review.

5.1 Positive conditions: facilitating the development of an economic activity

If a Member State intends to grant aid to a well-identified economic sector, when notifying the Commission, it will first of all have to identify and carefully describe the economic activities targeted by the aid and the ways in which it is intended to act. From the point of view of environmental and climate protection, Member States will have to carefully identify economic aid aimed at reducing or eliminating the negative impact of certain production in this area, for example by highlighting climate change mitigation, or at a more efficient functioning of the internal energy market.

The Commission must firstly consider the meaning of the concept of "the development of an economic activity". Thus, on the one hand, State aid can facilitate the development of the activities in question, increasing their environmental sustainability not only in the immediate future, but also from a farsighted perspective considering the years yet to come, and on the other hand, it can foster the development of the so-called 'green economy', through the creation of new economic activities, and new services.[461]

For this reason, compelling is for States to also describe whether, and how, the aid will contribute to the achievement of the objectives of the Union's climate, environment and energy policies, highlighting the benefits they expect as a result of the aid to be granted.

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[460] EEAG; Commission, 'Communication— Framework for State aid for research and development and innovation' (2014) OJ C 198; Commission, 'Communication on Guidelines on regional State aid for 2014-2020' (2013)OJ C 209.

[461] Conor Quigley, "Commission Policy on State Aid for Environmental Protection" in *European State Aid Law and Policy* (and UK Subsidy Control) (Bloomsbury Publishing 2022).

5.1.1 The incentive effect and the presumption of its existence

The most important element, which the applicants are urged to prove, is the second criterion of the so-called 'incentive effect'.[462] The necessity for it to be ascertained is represented by the univocal link between the aid and the behaviour activated in the beneficiaries, a mechanism which directs the recipient undertaking towards the stated environmental objective. The fundamental nature of this criterion is also emphasised by what Nicolaides stated: "If the aid cannot change the behaviour of the recipient, it means that it is unnecessary".[463] This effect occurs, for example, when the undertaking receiving the aid changes its business policy towards more environmentally friendly objectives or different productions, or simply by using innovative production methods which, in the absence of that aid, it would not have undertaken or used, or otherwise carried out in a smaller or different form.[464] The Commission will carefully assess the various applications made by companies to the relevant national authorities, scrutinising whether that economic activity would have started anyway, even in the absence of any form of aid.

Indeed, in the decision referring to aid given to an operator of the container port of Piraeus[465]exposed the situation in which the application for economic aid is made after the start of the activity for which aid is intended. Therefore, it was demonstrated that the aid was unlikely to be favourably guaranteeing the operation since it is presumed that the undertaking would have borne the costs in any case. Admittedly, State aid can never compensate for the entrepreneurial risk, which every entrepreneur is bound to face, neither can it be aimed at supporting the entrepreneurial costs, which the applicant undertaking would have faced in any event in order to carry out its activity. Hence, the evidence of this is enhanced by the analysis of a counterfactual scenario[466] where either the beneficiaries would rather not develop the project at all, thus reporting an NPV[467]

[462] CEEAG, section 3.1.2.
[463] Phedon Nicolaides, 'Incentive Effect of State Aid: Necessity & Counterfactual' 22(2) (2023) European State Aid Law Quarterly.
[464] For instance, the need for businesses to upgrade their technology to meet new and stricter environmental standards, see: Case C- 470/20 *Veejaam & Espo* ECLI:EU:C:2022:981 for the upgrade of turbines in the production of hydroelectricity.
[465] Commission, 'Decision (EU) 2015/1827 of 23 March 2015 on State aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited (notified under document' C(2015) 66) OJ L 269.
[466] CEEAG, para 28.
[467] "Net present value".

equal to zero, or either if the calculation of monetary amount destined would not have met the costs needed to meet the objective of the aid measure.[468]

Nevertheless, it is considered to be a form of presumption of the incentive effects when certain supplementary components are detected by the Commission. The latter has in fact identified three groups of situations in which an incentive effect can be deemed to exist.[469]

Firstly, the situation where the incentive effect is present where the aid is granted in an automatic way, on the basis of objective and non-discriminatory criteria, without the Member State having any discretionary power as to the granting of the aid, and where the aid has entered into force before the subsidised project has started. On this line the Commission's decision[470] in 2023 to approve aid notified by the Czechian authorities exposes this exact situation. In particular, having regard to the necessity to reduce greenhouse gas emissions, Czechia disposed a plan to guarantee energy savings as well as energy efficiency obligations for buildings, namely decarbonisations of heat supply. But, to reach the environmental EU objectives, Czechia raised the need for a subsidy for the development of a high efficiency cogeneration system (CHP – combined heat and power) to exploit thermal energy to produce electricity.[471] Focusing on the incentive effect analysis given by the authorities, a likely counterfactual situation helped to easily demonstrate the incentivising effect of the aid in question. The beneficiaries, being mainly industrial enterprises needed a much higher quantity of heat to guarantee supply of electricity, thus, their direct choice was to invest on a natural gas boiler, deemed as the most efficient energy supplier in terms of kWh, considered as the cheaper option on the market.[472] Affordable, yet, deprived of the environmental benefits that a CHP could guarantee. This counterfactual scenario was the result of a gathering of data and studies through public consultations of the market operators in the field, hence providing the element of objectivity as well as no-discrimination. Additionally, sufficiently detailed the forms and conditions of the support was given by national legal bases, thus excluding any

[468] ibid para 48.
[469] ibid para 31.
[470] Commission, 'Decision on State Aid SA.108368 (2023/N) – Czechia Support for electricity from high-efficiency combined heat and power generation' C(2024) 3387 final.
[471] ibid para 5.
[472] ibid para 49.

statal margin of appreciation.[473] In this way the Commission was convinced of the existence of the element of the incentive effect, provided the proof of objectivity, non-discrimination or discretion of the State, together with the lack of prior start of works of the project itself.

The second group of situations where incentive effect could be considered as present relates to where the Member State has published the notice of the introduction of the aid measure, making it subject to the approval of the Commission, in accordance with Article 108(3) of the Treaty.[474] It is essential, however, that the communication in question takes place in a form that is likely to reach the majority of users and undertakings concerned, for instance on a website or other social channels, and that it is expressed in a clear and comprehensible form, both on how to access the measure and on the eligibility requirements for applications. In this regard, the Member State, when notifying the State aid to the Commission, will have to provide proof of the content of the communication made, and proof of a wide coverage in terms of the extent of users reached, for example by means of a link to the website on which it was published, or proof of its accessibility to the public.

As an illustration of this, we could take as an example the recent State aid decision for the construction of the Hydrogen Core Network in Germany.[475] The latter Member State wanted to take part to the operation to extend the creation of a long-distance transport pipeline for hydrogen, providing in this way a green source of energy for energy intensive users, as a part of an infrastructure connecting other Member States involved. Indeed, the national authorities exposed the difficulty in financing this project, due to the uncertainty of the hydrogen market, hindering the engagement of potential stakeholders.[476] For this reason, Germany displayed the model of the project was exposed through a public call, published on the FNB Gas website.[477] This methodology could have helped in identifying the potential operators involved,[478] also containing the legal and the technical criteria for its deployment, such as the submission of a report form with a map

[473] ibid para 85.
[474] Article 108(3), TFEU.
[475] Commission, 'Decision on State Aid SA.113565 (2024/N) -- Germany Aid for the construction of the Hydrogen Core Network in Germany C(2024) 4366 final.
[476] ibid para 7.
[477] The platform used by the Association of Transmission System Operators: https://fnb-gas.de/en/
[478] SA.113565 (2024/N), para 33.

of the pipeline route, and additionally the business plan. The evaluation plan as well was made available with a quantitative and qualitative analysis, providing indicators to measure the degree of the achievement of the objective.[479] In this way the Commission concluded that the beneficiaries of the measure, being informed through a call of interest mechanism, could participate with the submission of a joint application. Furthermore, the general public had access to the website without restrictions or a prior user registration. Considering this an appropriate way to reach interested market operators through a large extent and granting them the chance to participate, the incentive effect was deemed to be verified.[480]

A third group or presumption is identified instead in the case of aid granted in favour of already existing companies, which carry out a production already qualified as environmentally friendly. In such cases, the incentive effect can be identified in the deployment of the production activity according to environmentally friendly models in preference to alternative models that are cheaper but less environmentally effective. Here, it seems evident the will of the Commission to set aside the criterion of the "start of works" to instead give space to the preponderant objective of the environment protection. However, this particular criterion will be object of a more thorough analysis which will be covered in the third chapter of this work, taking, as a point of reference, a case study on the *Est Wind Power v Commission* judgement.[481]

5.1.2 Incentive effect "beyond Union's standards": the case of the Italian aid scheme in maritime transport

As a general rule, the Commission considers that aid granted to cover the costs which would guarantee compliance with Union standards will not be considered as aid having an incentive effect. The latter can only be achieved in those aid measures which enable an undertaking to reach higher environmental standards than those currently required by Union standards.[482] Namely, only if the environmental principles aimed at being implemented by the measure are "beyond Union standards", the incentive effect would be detected.

[479] ibid section 2.10.
[480] ibid para 120.
[481] Case C-11/22 P *Est Wind Power v Commission* ECLI:EU:C:2023:765.
[482] CEEAG, para 32.

An example that would help explaining this concept is the Italian aid scheme notified in 2022,[483] which took two years for the Commission to assess for lack of clarifying information of the Italian government, and finally decided in June 2024. The measure in question dealt with a sector which contributes to a quarter of the total greenhouse gas emissions in the EU, transport.[484] In particular, maritime transport was included in the Emission Trading System (ETS)[485] as a pragmatic way to foster the decarbonisation which consists in monetising environmental effects, in order to quantify them and incentivise nature preservation.[486] The national authorities explained that this scheme aims at reducing emissions and pollution in port areas, when ships are at berth, by incentivising the deployment of shore-side electricity, using electricity from the grid to limit the use of polluting generators on board.[487]

However, only by reducing costs that shipowners have to bear for purchasing shore-side electricity the latter will be prone to shift to this other energy supply mode, otherwise they would rather generate electricity on board as it is less expensive than opting for the shore-side one.[488] Admittedly, in paragraph 46 of the decision, the Italian government seem to acknowledge that the EU has already set in place the EU emission trading system to incentivise a change in the behaviour of shipowners, however, it argues that this technical tool is not sufficient to reach that scope, at least in the short term. A modification of their choice in not to be expected when the most pollutant source of energy will always represent the most convenient one even with the implementation of ETS, which do not have an incisive effect in the short run.

As a result, in a counterfactual scenario, without aid, the shipowners will still not opt for the shore-side electricity, given that the mitigation cost provided by the ETS for self-generating electricity is not sufficient to trigger a change in their attitude.[489] Therefore, the Commission assesses that the current EU standardised system of ETS is certainly overtaken by the measure notified by the Italian authority, as it will enable a higher environmental protection than the conventional one provided by the ETS. Indeed,

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[483] Commission, 'Decision on State Aid SA.105117 (2022/N) – Italy Aid scheme for the use of shore-side electricity in the form of a reduction in general system charges for ship operators' C(2024) 3934 final.
[484] European Green Deal.
[485] See n 400.
[486] Directive (EU) 2023/959 (n 339).
[487] SA.105117, para 8
[488] ibid paras 41-42.
[489] ibid para 115.

the scheme presented will enable a change in the beneficiaries' choice on the reliance on the power generated by the different type of more or less environmentally driven sources. And provided that, the aid measure has the feature of going "beyond Union standards", in this case represented by the ETS mechanism, we can conclude that the incentive effect is efficiently demonstrated.

5.1.3 No violation of European provisions

Finally, when examining the positive condition, according to which aid must facilitate the development of an economic activity, it must be ascertained that no EU standard or provision is violated. This condition is easy to be identified where the proposed State aid, or the activity that is to be supported, or even the form of support and financing that is to be implemented, constitutes a violation of one of the provisions of EU law.

As a result, the aid may not be granted, on the grounds of its manifest incompatibility with the internal market or the principles on which the latter is based. Such a case might be found, for instance, where the aid measure is made conditional on the recipient's obligation to purchase products or raw materials of national origin. Indeed, a typical scenario is indeed the presence of a violation related principle of non-discrimination or either one of the fundamental pillars of the European Union, such as freedom to provide services and freedom of establishment.[490] For instance, an hypothetical situation would be the one applying different tax rates based on the origin of the energy source, for instance biogas, as it was highlighted by the Swedish government in the decision for prolongation and modification of biogas scheme.[491] As a matter of fact, there would either be a clear breach of the principle of free competition and a distortion of the internal market. Such an infringement of a rule of EU law renders the aid measure inadmissible.[492]

[490] Article 49-52 TFEU and Article 56-62 TFEU.
[491] Commission, 'Decision on the aid schemes SA.56908 (2023/C) (ex 2020/N) – Prolongation and modification of biogas scheme for motor fuel in Sweden and SA.56125 (2023/C) (ex 2020/N) – Prolongation and modification of scheme SA.49893 (2018/N) - Tax exemption for non-food-based biogas and bio-propane in heat generation implemented by Sweden' (C/2024/1921)
[492] CEEAG, section 3.1.3.

5.2 Negative conditions: refraining from unduly affecting trading conditions contrary to the common interest

Concerning the second condition, namely the negative one, the Member State and the Commission are obliged to comply with the general principle that State aid must not unduly distort trading conditions to an extent contrary to the common interest by minimising distortions of competition.[493] First, it must be verified whether the proposed aid requires state intervention, and to what extent. In this case, public intervention must be subjected to specific requirements, specifically it must be appropriate to the purpose and proportionate, to put in simple terms, the subvention must be limited to the minimum necessary to achieve the intended objective.

5.2.1 Necessity of a State intervention: the negative and positive externalities

In most cases, in fact, in a competitive market, economic operators tend to produce efficient results on their own in terms of development of economic activities, prices, productivity and use of resources. A state intervention can only take place in the presence of a failure of the competitive market system, in order to contribute to a development of an economic activity to the extent that the market alone cannot achieve a satisfactory result. However, as it was also specified in the Hinkley point C case,[494] a market failure does not represent a requirement essential to assess the aid's compatibility, though, a relevant factor to declare its incompatibility. The Member State will have to identify, within the market, those sectors and production and trade patterns that hinder the achievement of a sufficient level of environmental protection or efficient functioning of the internal energy market, or slow down virtuous processes that have already begun.

In this regard, a number of elements were identified in the CEEAG, which can distinguish the existence of a market failure and help in this way to guarantee an assessment of the element of necessity in the overall compatibility scrutiny.

In the first place, there is the detection of negative externalities. Generally, a business acts primarily in pursuit of a profit motive. Whereas, when the company equips itself with devices, or work systems, that lead to greater respect for the environment,

[493] CEEAG, section 3.2.
[494] Case C-594/18 *Republic of Austria v European Commission* (Hinkley Point C case) ECLI:EU:C:2020:742, para 66-67.

mainly in the form of less polluting emissions, this virtuous process entails costs that affect the company's revenues. This results in complying with the imposed parameters, but at the same time bearing the entire cost of the pollution produced.

For this reason, companies are often not sufficiently motivated to reduce the level of pollution they produce, or to take individual measures to protect the environment. In this case, the 'cost' of production, in terms of environmental pollution, is passed on by the company to the community.[495] Thus, the so-called 'negative externalities' can be identified in the unwillingness of companies to take account of the pollution produced, both when choosing a particular technology and when setting the level of production.[496] Nevertheless, the EU provides environmental economic instruments aiming at tackling this problem by internalising negative externalities by integrating them into the decision-making process,[497] thus bringing the environment into the boardroom. And State aid could be considered indeed a blend between a market-based instrument and a policy tool orienting a market operator. All considered, it is still important to remind that State aid shall never function as a tool to "relieve the polluter from the costs of its pollution".[498]

In the second place, there are positive externalities, these can occur in the case of investments in the search for stable and innovative production systems, in the respect of the environment, in the search for innovative technologies in the field of renewable energies, or with measures relating to energy infrastructure or to the security of supply of energy sources, which benefit several Member States or a larger number of consumers. A field where positive externalities are produced is the one relating to Research and Development (R&D),[499] indeed when a business invests in this sector it contributes to the increase of knowledge about the technology implemented by enterprises, as well as improving their environmental impact. Yet, by virtue of the benefits stemming from these investments enable to spread their effects to other companies which did not contribute to

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[495] Karel Bourgeois, Leigh Hancher, Daniel Irisarri Lolin "State Aid for Energy and Environmental Protection" in Leigh Hancher, Tom Ottervanger and Pieter J Slot, *EU State Aids* (6th edn., Sweet & Maxwell 2021) 888.

[496] Jorge E Viñuales, "Regulating Negative Externalities" in Viñuales Jorge E, *The International Law of Energy* (Cambridge University Press 2022).

[497] Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law - Techniques of Regulating the Environment* (Cambridge University Press 2017) 120.

[498] Alexander Winterstein and Bente Tranholm Schwarz, 'Helping Combat Climate Change; New State Aid Guidelines for Environmental Protection (2008) Concurrences – Antitrust' (2008) 2 Concurrences – Antitrust Publications & events Competition Policy Newsletter 14.

[499] Commission, 'Communication Framework for State aid for research and development and innovation' (2022) OJ C 414.

them, besides the one whose investments is coming from. The impact could influence the society as a whole, similarly to what occurs for negative externalities but of course with different effects. In these areas, companies may be slowed down in making appropriate investments, where part of the benefits of the investment do not return to the investing company, in the form of a profit, but part of it benefits other market players.[500]

On a third basis, we have the phenomenon of information asymmetry, which has been observed in markets where not all operators have access to the same information. In this case, the difference between the information available to one part of the market, to the detriment of another part, could constitute a limitation in the risk assessment of a project. Asymmetrical information certainly creates an advantage in favour of the market operator that is given access to a certain type of data, creating a state of uncertainty in the party that is precluded from doing so. In the case of investments in the environmental sector, where risks and uncertainties tend to be higher compared to other sectors, as the results are often evident on a long-term basis, asymmetry of information may push disadvantaged operators towards the search for short-term solutions. Admittedly, the latter are considered less compliant with the environmental objectives, and the situation may be aggravated by the financing conditions of the investments.

This was the case for Italy[501] in its energy market for what concerned generation, transmission and storage capacity, leading to create lack of coordination among investors for renewables. Coordination which would have allowed to facilitate the introduction of renewable energy sources generation. However, the Italian authorities stressed that the development of storage systems on market terms could not be achieved a short timeframe and in a feasible way with environmental objectives, mainly due to the high costs of the investments.[502] Furthermore, this specific situation allows us to cover also the fourth and last element characterising market failure: difficulties of coordination between operators. We can say that in situations where revenues appear uncertain, especially because of the high risk borne by businesses involved when certain environmental standards are

[500] Alessio Terzi, Monika Sherwood and Atar Singh, 'European Industrial Policy for the Green and Digital Revolution' (2023) 50 Science & public policy 842.
<https://academic.oup.com/spp/article/50/5/842/7192958> accessed 10 December 2024.
[501] Commission, 'Decision on State Aid SA.104106 (2023/N) – Italy Support for the development of a centralised electricity storage system in Italy' C(2023) 9226 final.
[502] ibid para 9

requested to be met. And in the aforementioned Italian case[503] the imposed targets stemmed from the "Piano Nazionale Energia e Clima" (PNIEC), [504] which were mostly reflecting the European environmental objectives. Coordination difficulties in this case occurred for the unpredictability of the results of collaboration and network effects, or relating to the costs of the bidding process and their allocation. Such difficulties may arise when market operators with different, or even divergent, interests do not sufficiently coordinate their efforts, slowing down or jeopardising the success of the project.

As already mentioned, the EU already adopts appropriate policies in overcoming market failures, such as mandatory EU environmental standards, supply obligations,[505] sectoral regulations[506], pricing mechanisms,[507] carbon taxes such as the EU Emission Trading System (ETS). [508]

We must not forget, though, that State aid can only qualify as an additional measure compared to those listed above, and therefore could only be implemented in the presence of residual market failures, like unsolved situations despite other policies and measures.[509] However, since State aid is precisely to be considered as a residual measure, the Commission is deemed to assess in general terms whether the proposed aid scheme could reinforce these policies and measures already taken or whether, conversely, it could weaken or totally hinder the effectiveness of other policies, aimed at addressing the same market failures.[510] For this reason, the Member State in question will have to abide to an evidence-proofed project to the Commission, demonstrating that the specific project shall not be deployed without aid. And, at the same time, it shall prove that not even the market, or other types of EU measures could guarantee its direct implementation.

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[503] SA.104106 (n 501)
[504] "Piano nazionale integrato per l'energia e il clima" (2019) - Ministero dello Sviluppo Economico Ministero dell'Ambiente e della Tutela del Territorio e del Mare Ministero delle Infrastrutture e dei Trasporti (Italian National integrated plan for energy and climate transposing Regulation (EU) 2018/1999) https://www.mimit.gov.it/images/stories/documenti/PNIEC_finale_17012020.pdf
[505] European Parliament and Council, 'Directive (EU) 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859' (2024) OJ L 1760.
[506] See 499.
[507] See n 366 (CBAM).
[508] See n 400.
[509] Commission, 'Decision on State Aid SA.34947 (2013/C) (ex 2013/N) — UK — for the Hinkley Point C New Nuclear Power Station — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union' OJ C 69.
[510] P Heidhues and R Nitsche, 'Comments on State Aid Reform – Some Implications of an Effects based Approach' (2006) 5 European State Aid Law Quarterly 12.

5.2.2 The appropriate measure: between the principle of *energy efficiency first* and the competitiveness of bidding procedures

As noted above, when assessing the negative conditions for granting State aid, the focus will always focus on "not unduly distort market conditions to an extent contrary to the common interest". This assessment will have to focus on the appropriateness of the measure, its proportionality, its transparency, its purpose and the procedure adopted.

For what concerns the element of appropriateness of the measure, the purpose of the assessment is to see whether the proposed aid is not only suitable for achieving the objective, but whether there is no other policy instrument, or aid measure, which would be capable of achieving the same results, in a less distortive manner.[511] In the area of environmental protection and efficient energy supply, Member States are already equipped with suitable instruments, such as market-based tools based on increased financing of public infrastructure, and general fiscal measures that respect the principle *'energy efficiency first.'*[512]

For instance, in the context of a future electricity generation adequacy problem that Belgium will be facing in 2025,[513] because of the phase-out of all nuclear capacity over the period 2022-2025, the Belgian authorities were divided in addressing the issue with either a capacity remuneration system or a strategic reserve.[514] The measure could have been deployed only if it was demonstrated its capability to ensure sufficient capacity for the production of electricity, and that such production meets the expected demand of electricity. The Commission proceeded with the assessment of the most appropriate mechanism to ensure security of supply. As a basis of its assessment, the 2019 Adequacy

[511] CEEAG, section 3.2.1.2.
[512] According to this principle, in energy planning, policy and investment decisions, Member States plan to give utmost consideration to alternative energy efficiency measures, in terms of cost and savings in energy end-use, demand-side management initiatives, and increased efficiency in energy conversion, transmission and distribution; See Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on governance of the Energy Union and climate action amending Directives (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (2018) OJ L 328.
[513] Commission, 'Decision (2021) on State Aid SA.54915 - 2020/C (ex 2019/N) Belgium – Capacity remuneration mechanism' C(2021) 6431 final.
[514] ibid para 235.

and Flexibility Study[515] was used, and in line with the national authorities' opinion, the Commission concluded that the capacity mechanism would have better responded to the current issue than a strategic reserve. Even if the latter would have served to meet peak demand during wintertime, when the market fails to do so. However, it would not have solved the investment problem identified for new plants. In contrast, market-wide capacity mechanisms can foster investment to address longer-term adequacy concerns.[516]

The conventional way for the national authority to prove appropriateness to the Commission is by giving evidence of sufficiently competitive bidding procedures. [517] Competitiveness, which is not often guaranteed since the urgency of decarbonisation could level the requirements needed to participate, suppressing them to ensure the major operators' adhesion. Non-binding measures, such as environmental labelling, and the spread of information on environmentally friendly technologies, can also play an important role in achieving a higher level of environmental protection.[518] In particular, in the transport sector, the use of environmental label to express, for instance, the shift from the use of carbon fossil fuelled solutions to green alternatives in local public means of transport could play a relevant role to incentivise customers to opt for the second alternative. However, environmental labelling as a "soft measure" was also considered by the Commission, in particular in the German aid scheme on retrofitting diesel buses, not sufficient to create necessary incentive for the bus operators to grant additional resources for retrofitting buses.[519] Thus, the appropriateness of the measure in question was demonstrated through the discard of this solution. But in any case, the Member State must always prove that the structure and the content of the aid measure are appropriate to achieve the objective.

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[515] As part of the European Resource Adequacy Assessment (ERAA), required on a EU scale, ENTSO-E is an annual assessment of the risks to EU security of electricity supply for up to 10 years ahead: https://www.acer.europa.eu/electricity/security-of-supply/european-resource-adequacy-assessment; in the specific case taken in consideration:
https://www.elia.be/-/media/project/elia/elia-site/company/publication/studies-and-reports/studies/13082019adequacy-and-flexibility-study_en.pdf.

[516] SA.54915, paras 376-377.

[517] Commission, 'Decision on State Aid SA.102388 (2022/N) – Slovakia – State aid scheme for the decarbonisation of industry financed by the Modernisation Fund' C(2022) 7250 final.

[518] «The use of environmental labelling and product information can also be a way to enable end-users of products to make informed purchasing decisions, thereby increasing demand for environmentally friendly products. Truthful and good quality environmental labelling can be a valuable tool to guide and shape (consumer) behaviour in favour of more environmentally friendly purchasing choices».

[519] Commission, 'Decision on State Aid SA.55209 (2019/N) – Germany Scheme for retrofitting diesel buses in local public transport (amendment) (ex SA.51450 (2019/N))' C(2019) 7510 final.

5.2.3 Proportionality in the context of competitive tenders and the *zero subsidy bids*

Moving on to the requirement of proportionality of the measure, it can be considered that for it to be fulfilled the amount of aid must be limited to the minimum necessary to achieve the subsidised project.[520] Where the aid corresponds to the net extra costs necessary to achieve the objective of the measure, it is considered proportionate. When the Guidelines refers to net extra costs, as also defined as 'funding gap', they refer to the difference between the revenues and economic costs to carry out the project and those of the alternative scenario, that the aid recipient would have carried out anyway, even in the absence of aid.[521]

However, in some cases, the possibility for a Member State to provide for a 'zero subsidy bid' might arise, if market revenues are expected to increase over time, or because despite the fact that no direct subsidy is provided, operators receive concessions or other benefits, or price support. This mechanism is currently being massively used for what concerns aid on in the offshore wind energy sources sector.[522] In these cases, though, Member States will have to explain how proportionality is ensured, since the provision could still restrict the competitive process and undermine proportionality, even if they are set at zero.

The German government, for instance launched in 2017 a tender for offshore wind projects and most of the winning applicants were requesting to participate through 'the zero subsidy' condition. This system was considered particularly efficient so that the recent tenders in this field are being design in a way to solely guarantee no subsidy bids.[523] Their beneficial effect can be detected in the minimisations of costs for the government and maximisation of the social welfare. However, we must acknowledge that the German government, in order for this mechanism to work, left the applicants to craft contracts with different length, in this way they could compensate the expenditure for the

[520] CEEAG, section 3.2.1.3.
[521] ibid para 48.
[522] Offshore windfarms implemented in different Member States through the zero-subsidy bids: Commission, ' Decision on State Aid SA.45461 (2016/N) – Germany EEG 2017 – Reform of the Renewable Energy Law' C(2016) 8789 final; SA.57610 (2020/N) – Germany – Modified offshore wind support C(2021) 1949 final; SA.51306 (2018/N) – Belgium Individual aid to three offshore windfarm projects (Mermaid, Seastar and Northwester2)' C(2018) 6358 final; SA.45974 (2017/N) – Denmark Support to Kriegers Flak offshore wind farm' C(2017) 2079 final.
[523] Offshore Wind Energy Act (WindSeeG 2017) – as part of Erneuerbare-Energien-Gesetz 2017 <https://www.bmwk.de/Redaktion/EN/Downloads/renewable-energy-sources-act-2017.pdf?__blob=publicationFile&v=1>.

investment with the specific timeframe needed to recover the costs involved for the project.[524] Hence, the length may vary on the different type of project implemented, leaving space for flexibility of this specific requirement in the tender procedure.

An assessment of net additional costs is not deemed necessary in cases where aid amounts are determined by means of a competitive bidding procedure. In this case, in fact, it will be the tender procedure itself to guarantee a reliable amount of the minimum aid needed. However, the tender must meet certain conditions to provide such reliance, like competitiveness, openness, transparency, by publishing it sufficiently in advance of the deadline for the submission of applications, and non-discrimination, based on objective criteria defined in advance. The compliance between State aid Framework and Public procurement law[525] is inevitable, the lack of observance of the specific requirements could lead to benefit a market operator over another one, distorting competition and leading to infringe not only the State aid regime but also public procurement provisions, creating a direct link between the two frameworks.[526] Thus, criteria must be in accordance with the objective of the measure and such as to minimise the risk of strategic bidding, ensuring effective competition.

Nevertheless, there also might occur the situation in which the aid is not provided through means of a competitive bidding procedure. As a result, the net additional costs will have to be assessed by comparing the expected cost-effectiveness of the situation in which the measure is granted, with the counterfactual scenario of not granting it at all.[527] It will then be up to the Commission to assess the likelihood of the counterfactual scenario envisaged, compared to the factual situation that would occur. Indeed, in a counterfactual scenario the beneficiary might not carry out any economic activity, or make any investment, or continue its activity without making any change.

[524] Thomas Greve and Marta Rocha, 'Policy and Theoretical Implications of the Zero-Subsidy Bids in the German Offshore Wind Tenders' (2020) 41 The Energy Journal <https://www.jstor.org/stable/26937331> accessed 14 December 2024.
[525] European Parliament and Council, 'Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC' (2014) OJ L 94.
[526] For a reference of this matter see: Commission, 'Decision on State Aid SA.47650 (2017/FC) – Germany State aid to public procurement platform Cosinex' C(2024) 1850 final.
[527] CEEAG, para 5.

5.2.4 Ensuring Transparency

Finally, the Member State must pursue the objective of transparency of the procedure of the aid measure. In this respect, this requirement aims at guaranteeing that the Member State will expose the relevant characteristics of the measure, by publishing on the specific platform, specific information requested by the Commission through the so-called *Transparency Award Module,*[528] or on an alternative website at a national basis. This requirement is to be performed within 6 months of the granting date and must remain available for at least 10 years from the aforementioned date. In particular, this information must be comprehensive of the complete text of the approved aid scheme and its implementing provisions, as to depict the form of its deployment and additional details, only if the aid exceeds EUR 100. 000 and it is considered as individual or ad-hoc aid.[529]

5.2.5 Avoidance of undue negative effects on competition and trade: a focus on the element of the *common interest*

It is important to clarify that, when the Commission is deemed to assess whether the aid negatively affects competition and trade, the already scrutinised compliance with the requirements of necessity, appropriateness, proportionality and transparency, will not have the effect of denying the existence of a possible negative impact on trade or a competition distortion. Thus, a separated phase of assessment must be carried out, as the subvention might unduly strengthen the beneficiaries' position. However, it is specifically emphasised by the Commission that the cumulation of those elements has the effects of minimising negative effects.[530] And especially when it comes to aid granted for environmental improvement, if the subsidy's content is based on favouring environmentally friendly products and technologies to the detriment of more polluting alternatives, an undue distortion of competition is often excluded, as the aid directly fills

[528] «The purpose of the transparency requirements is to promote accountability of granting authorities and to reduce uncertainties on the market for state aid by allowing citizens and companies to access easily relevant information about awarded aid, such as name of the beneficiary, amount, location, sector and objective», available at: https://webgate.ec.europa.eu/competition/transparency/public?lang=en

[529] CEEAG, section 3.2.1.4.

[530], Commission, 'Decision on State Aid SA.103720 (2023/N) – The Netherlands Aid for the demonstration of an innovative electrolyser – Djewels' C(2024) 5292 final, para 109; Commission, 'Decision on State Aid SA.113565 (2024/N) – Germany Aid for the construction of the Hydrogen Core Network in Germany C(2024) 4366 final, para 126.

the gap that the internal market has failed to compensate. Therefore, the Commission will only assess the distortive effects taking into consideration the position of competitors who also operate in compliance with environmental law, but for whom the aid was not granted, setting in this way a common basis for a comparison.[531]

State aid in the environmental field shall aim at incentivising innovation and technological improvements in the field of energy efficiency, for instance. Thus, the grant of aid should be provided to less efficient producers to update their businesses, which could guarantee a benefit for the environment, by adopting less pollutant solutions, or either to the most efficient and innovative producers, as a reward for their climate friendly behaviour. For this reason, the Commission must watch out to avoid that, by approving such schemes, it could create inefficient barriers to the entry of more efficient or innovative potential competitors, hindering the adoption of cleaner technologies.[532]

Furthermore, another type of distortion could arise whether, to protect economic activities in one region of the internal market with financial aid, it may have the distortive effect of shifting activities or investments from one region to another, totally disregarding the net environmental impact. In these cases, the Commission will examine whether aid to achieve environmental and energy objectives leads to a mere displacement of activity,[533] without improving the existing environmental quality level, since it could risk having such an effect. In the latter case, the Commission will obviously proceed to request the adjustment of the measure in order for it to be feasible to the improvement of its standards.[534]

In this context, another element which orient the Commission's action is also the "common interest", which could define the boundaries of the assessment. The latter represents a criterion to bear in mind when assessing "the facilitation of the development of an economic activity", but not a mandatory objective for the economic activity to be achieved. In fact, Article 107(3)(c) does not request so, thus the common interest could be considered as a presumption of aid itself if it eases the development of the activity. Arguably, we could subsequently affirm that if an economic activity does not support the possibility to reach a common interest, the Commission cannot prohibit it, or it could, but

[531] CEEAG, para 3.2.2.
[532] CEEAG, para 67.
[533] See n 403.
[534] CEEAG, para 69.

only if it proves a distortion of competition or trade. This is because not aiming towards a common interest is a whole different concept than hindering it.[535]

Nevertheless, the *common interest* of the EU, being considered as a European objective, shared by majority the of Member States, could be detected in the environmental targets established at an EU level, thus if the latter is underlying in the aid measure, then the undue distortion could be excluded. It is important to remember, though, that the Commission is still forced to ascertain that the environmentally oriented measures aimed at supporting the achievement of the aforementioned Green Deal climate targets, otherwise the assumption that a distortion could be excluded fails to have significance.[536]

In regard to the objectives pursued by the EU, it might be interesting to mention that the European Parliament has recently adopted a resolution[537] to amend the wording of Article 108 TFEU in a way that could actually introduce as a new requirement, the effective "observance of the Union's objectives set out in Article 3 TEU[538]". This could undeniably have an impact in the compatibility assessment, as the Commission would be deemed to ascertain the compatibility of an aid measure using the Union's objectives as a parameter of assessment, in particular for what concerns the evaluation of the distortive effects of the aid in the internal market.[539] As already mentioned before, the Union interests are relevant in the balancing test solely when an aid measure directly violates a rule of EU law, thus it does not entail an actual part of the benchmarking.[540] However with this new reform of Article 108(1), the objectives pursued by the EU could be raised as substantive parameter of legality"[541] of State aid. And especially for what concerns environmental protection, Article 3(3) TEU, enshrining the aim of maintaining «high level of protection and improvement of the quality of the environment», could produce the effect of prohibiting public subventions for the mere reason of being too harmful on the environment. And this merely as a result of the fact that the aforementioned objective

[535] Phedon Nicolaides, 'Shedding Light into the "Black Box" of State Aid': (2021) 20 European State Aid Law Quarterly 550.
[536] CEEAG, para 65.
[537] European Parliament, 'Resolution on proposals of the European Parliament for the amendment of the Treaties' (2023) (2022/2051(INL)), Texts adopted P9 TA (2023)0427 and A9-0337/2023 (Resolution).
[538] Article 3, TEU.
[539] Giuseppe Fransoni and Daniele Gallo, 'The European Parliament's Proposed Reform of Article 108(1): A Leap in the Dark?' (2024) 3 European State Aid Law Quarterly.
[540] Case C-594/18 P (n 494).
[541] ibid.

would become a mandatory parameter with the reform, regardless of the minimal distortive effect of the measure.[542] However, all of this is a hypothetical assumption since the amendment is still in the process of being implemented, thus its actual effects could also vary since, we must not forget that, the CEEAG will still have the power to shape the Commission's balancing test when there are environmental implications in State aid control.

Be that as it may, it must be admitted that in the current state of facts the Commission tries to achieve this result through the implementation of the so-called principle of the "*do no significant harm*".[543] As a matter of fact, the latter serves the purpose of involving negative externalities on the environment in combination with the negative effects on competition and trade, as way to combine economic negatives with environmental negatives, and in this way ensuring in the assessment a way to include green implications. In this way the Commission is able to weigh the climate impact in the last phase of the compatibility assessment the "weighing up the positive and negative effects of the aid". To be applied, indeed, it requires that all the other compatibility requirements are positively assessed and measures aiming at the decarbonisation can offset distortions to competition, by virtue of their positive effects.[544] Therefore, this principle is what could actually make the difference in presence of distortions.

5.2.6 The last step of the compatibility assessment: the loophole stemming from the process of weighing positive and negative conditions

Ultimately, the Commission will proceed with the last step of the compatibility analysis, aimed at carrying out a benchmarking process. The two balancing elements are represented by, on one hand, the negative effects of the aid measure, and on the other, its positive impacts. The first element considers the undue harm on competition and trading conditions of the subvention, together with the negative externalities, but only if the latter are liable to affect the common interest pursued. Instead, the second benchmark is the

[542] ibid.
[543] Article 3, EU Regulation No. 2020/852.
[544] See as an example of the implementation of the principle of "no significant harm" in Commission, 'Decision on State Aid SA.113739 (2024/NN) – RRF - Romania: State aid scheme to support capacity for the production of renewable hydrogen (reintroduction of scheme SA.102003)' C(2024) 4654 final, para 130.

positive effect, on an economical point of view, but especially bestowed to the environment.[545]

When the CEEAG refer to the process of "weighing positive effects of the aid against the negative effects on competition and trade" it only provides us with a broad and general way by which the Commission will try to guarantee a fair balance. Namely, the positive effects must outweigh negative ones. Hence, to have this situation, either the negative effects must be sufficiently small or either simply surpassed by the positive ones.[546] Nonetheless, the extent of the effects from which they could be considered sufficient to provide either a negative or a positive result, in terms of compatibility, is uncertain, in the sense that no threshold is indicated to actually not consider negative effects 'sufficiently smaller'. Indeed, the Commission never really exposed in great detail what is actually occurring when it carries out the compatibility assessment. To the point that even Nicolaides referred to this process as the "black box" of State aid.[547]

Hitherto, we analysed all the elements which characterise the compatibility assessment, and the same thing does the Commission for every decision entailing an aid measure, as we can also observe in every State aid decision we took in consideration in this work. Yet, what it is inevitably noticeable is that no real evidence of the weighing process is provided, as well as no reference to the methodology to weigh the corresponding effects of each element can be detected. Thus, even if the Commission compellingly requests the element of transparency for proposals of State subventions, the same cannot be said for the very last step of compatibility assessment.

From a societal point of view[548] but also in terms of judicial guarantees,[549] everyone should be able to comprehend the Commission's discretionary *modus operandi* when it comes to understanding the reasoning behind a certain decision. Indeed, in the case of an error committed by the Commission in the assessment, beneficiaries or

[545] CEEAG, section 3.3.
[546] Commission, 'Decision (EU) 2015/658 (2014) on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142)' OJ L 109, para 495.
[547] Nicolaides, (2021) 20 EStaL 550 (n 535).
[548] Delia Ferri, State Aid Law in a Social Market Economy (Routledge 2019).
[549] Leo Flynn and Hans Gillmans 'Judicial Protection' in Leigh Hancher, Tom Ottervanger and Pieter J Slot, *EU State Aids* (6th edn., Sweet & Maxwell 2021) 1122.

whoever is directly or indirectly affected by the decision should be able to bring forward their complains before the CJEU.[550]

It is in fact not coherent carrying out a detailed analysis of every single criterion if no value or weight is attributed in the final stage of benchmarking.[551] It might appear quite sloppy if the Commission would prohibit State aid, with positive effect, just for the simple reason that negative effects are too extensive.[552]

Arguably, as it also occurs for Member States when notifying the aid measure, they are guided relying on a sort of arithmetical formula,[553] the so-called "scoring system" which will have to be filled in by attributing a certain numerical value to each element characterising the project. The result obtained will quantify the decision to take and this result will tell Member States whether to notify the measure to the Commission. On the same line, the Commission could implement the same system by attributing a certain value to every requirement assessed for the compatibility scrutiny, which will then fill in a formula. This methodology could help to understand its reasoning in prohibiting or approving a certain aid scheme. Hence, quantifying numerically each criterion could guarantee not only transparency towards the public, but also guaranteeing that the weighing has being carried out in an objective and correct manner, avoiding any arbitrary discretion by the Commission.

6. Conclusive remarks

The European Union attaches particular importance to the State aid discipline, considering it as a valid and fundamental instrument for the protection of the environment and for the achievement of the ambitious goals that have been set in combination with these targets, we have seen that the current State aid framework plays a key role in guiding Member States' policies towards an ecological transition and conscious choices for both improving environmental conditions and for achieving the goal of sustainability and security in the supply of energy sources.

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[550] Article 263 TFEU.
[551] Nicolaides, (2021) 20 EStaL 550 (n 535)
[552] ibid.
[553] See Chapter I, para 1.1.1 A sincere cooperation as the backbone of State aid assessment"; the scoring system: Hans Friederiszick, Ela Gtowicka, Linda Gratz, Simone Lainenbirgerand Andreas Rosenfeld, 'Ex Post State Aid Evaluation in Environmental Aid' (2018) 17 European State Aid Law Quarterly 509.

In the State aid decisions under examination in this chapter, the analysis was mainly delved at verifying how the purpose of environmental protection is guaranteed in the context of the achievement of a net zero economy. At the same time, in terms of safeguarding the competition, all of these decisions seem to be oriented on a path deemed at measuring and yet, limiting the extent of effects on the market by the Commission, instead of being directly prohibited. Indeed, the presence of subventions recognised as falling within the definition of State aid is constant in all of them. This is mainly the result of the need to guarantee a shift in market operators' behaviour towards the stringent Green Deal's targets, therefore actions are necessitated, even if this means put the normal trade conditions in constrains.

It is true that competition and trade are inevitably affected. However, this does not mean that the market conditions are always at stake, but that it is important to enable the Commission's action to make sure that the detrimental effects on competition and trade are not so far extended as to completely shut other operators' initiative to act freely on the market only because of the fostering of green transition. We can consider that a smooth integration of the environmental objectives in the safeguarding action for competition of the EU is established, however in some cases, especially in these times of crisis, an overlook of the competition and trade conditions might occur as it was also raised in the previously mentioned Italian case *Tirreno Power S.p.A. v Commission*.[554] Especially for measures which cannot guarantee a fair competition when innovative green operators enter in the market at the detriment for the already existing ones. As a result, the environmental objectives take the lead in the Commission's scrutiny, interfering also in the assessment of the negative effects on competition and trade. It is indeed in this balance of interests that the Commission could be recognised as an essential institutional guarantor.

On this line, a particularly delicate task has indeed been reserved for the Commission itself, with its compatibility assessment process directed to avoid possible negative effects of the aid measures on competition and trade conditions, and in any case try to find a fair balance between inevitable disparities that might arise in the market, and

[554] See Chapter II, para 3.1 Fulfilling environmental requirements through adaptation of non-environmental aid: the case of the Italian Capacity Mechanism" (paras 44-49, *Tirreno S.p.a. v Commission*).

the positive effects of the planned aid on the supported economic activities. Nevertheless, we have seen that the positive effects, related to the contribution to the protection of the environment, are usually accompanied by "moderate" and inevitable negative effects. Hence, Commission's role is established to 'solely' guarantee that the latter do not offset the positive ones, but that does not mean that this compensation will definitively eliminate the negatives.

On 27 November 2024, when presenting the new College of Commissioners, and in particular for the new "Clean, Just and Competitive Transition" portfolio, the President of the European Commission has stated that the Green Deal as well as the EU's net-zero climate plan will continue to be a *cornerstone* of the EU's growth strategy while being complemented by new priorities like security and competitiveness.[555] Thus, the attention attributed to the green transition in strict combination with competition is still a key part of the new Commission's mandate until 2029. However, the question whether the achievement of the 2030 and the 2050 targets on climate neutrality should actually be considered reachable, with all the environmentally driven tools that are set out in the State aid control, remains open. Indeed, we have to consider that experts are convinced that the achievement of these objectives still rely on the practical efforts put by Member States in them.

As was also demonstrated by the case studies of the "Green Deal barometer" which emphasised the regional differences among different Member States in the commitments towards climate neutrality, only industrialised countries have major priorities for decarbonisation. Two similar barriers detected to implement the Green Deal are respectively consistency in political commitments by the national governments and a lack of consensus. Admittedly: «73% of respondent experts identified 'insufficient commitment by Member States governments' as the trickiest barrier to overcome if the ambitions of the European Green Deal are to be realised». [556] Thus, if Member States do not actually take advantage of the administrative tools set in place by the European Union

[555] Ursula von der Leyen, 'Speech by President von Der Leyen at the European Parliament Plenary on the New College of Commissioners and Its Programme' (27 November 2024) <https://enlargement.ec.europa.eu/news/speech-president-von-der-leyen-european-parliament-plenary-new-college-commissioners-and-its-2024-11-27_en>.

[556] IEEP (Institute for European Environmental Policy), '"European Green Deal Barometer 2023' (2023). (18 June 2023) https://ieep.eu/publications/european-green-deal-barometer-2023/ accessed on 20 December 2024.

to grant subsidies in the Green Deal Industrial Plan, it is difficult to forecast an actual change of trend. Arguably, one of the reasons hindering Member States' action is probably their difficulty either to prove or craft an aid measure with an incentive effect which could overlap the Union's standards.

However, the combination between the environmental awareness and economic growth summed up in the State aid for environmental protection is a recurrent idea that is currently being put forward by the EU Commission if we consider the competitiveness strategy for Europe in the latest Mario Draghi's report. [557] Indeed, the latter highlights the importance of a well-coordinated transition to climate neutrality, ensuring that decarbonisation supports economic growth, emphasising the need for a combination of the two objectives.

Surely, as we have also seen, a great push could be enacted by implementing environmental requirements also in the so-called non-environmental aid, proving a holistic consideration of the aforementioned standards whenever the aid is deemed to have a remote impact on the environment. If the Commission would be considering this as mandatory approach for any subvention assessed, a probable result would be a major attention by Member States when notifying aid. As it also stems from the Treaty on the functioning of European Union, ensuring environmental protection still remains one of the most compelling objectives of the European Union, hence there is the legal basis to do so.

Moreover, another relevant implementation towards this objective could be represented by the new proposed amendment of Article 108(1) TFEU by the European Parliament. As we have seen, this will have the effect of providing the legal ground for a mandatory examination of the environmental protection principle enshrined in Article 3(3) TEU, as a Union's "common interest", in the final compatibility assessment.

As for now, the enactment of the Green Deal Industrial Plan in combination with the last Temporary Crisis and Transition Framework represents in practice the most updated tool for Member States to be oriented towards a rapid achievement of the environmental targets.

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[557] Mario Draghi, 'The Future of European Competitiveness, a Competitiveness Strategy for Europe' (2024).https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf accessed 20 December 2024.

Finally, another point which could be raised to develop a broader involvement of Member States in this sense is about a clarification of the last step of the Commission's compatibility assessment. In fact, if the Commission would publicly display to the public its inherent methodology of benchmarking. Beneficiaries would be much comforted in notifying aid measures, being assured they would be granted of an evidence basis to appeal in case of aid rejection.

CHAPTER III - STATE AID REGIME AND GREEN TRANSITION: RECENT APPROACHES OF EU COURTS

1. The Commission's assessment of State Aid compatibility towards Green objectives under the lens of the EU Courts: a preliminary background

Hitherto it has been presented a structured examination of the current framework for the establishment of a sustainable energetic and environmentally friendly transition in the State aid regime, through the relevant Commission's decisions on the implementation of public economic subventions. Nevertheless, from the delivery of the new Environmental State Aid Guidelines (EEAG and CEEAG), the evident trend was the general positive approach towards the measures proposed by Member States, with very scarce case law on the actual incompatibility of the proposed aid schemes.

The reason for this might be found in what we have already anticipated in the first chapter, namely that States are much more prone to abide to the rules when they are actively notifying the support measures, making sure that no mistake will be committed in the proposals to the Commission.[558] Another reasoning could be found in the extension of the aid categories involved in the Guidelines as well as in the GBER, allowing less restrictions in the delivery of new measures towards the safeguard of the climate. An important role in this has been played by the raise of financial thresholds, as well as in the use of legal instruments like contracts for difference or feed-in-tariffs, which led to unavoidably incentivise the flow of economic incentives from Member States.

Contrary to the current trend of approval towards State aid measure proposals to foster the green transition, in this last chapter we are going to analyse four disputable cases in which the Commission raised issues on the compatibility to Article 107 TFEU of different types of aid schemes deployed to enhance their efforts to convert their energetic economies to renewables. The objective here is to display how these controversies were solved by the CJEU and which kind of approach it showed towards State aid with a specific environmental implication, engaging, in the meantime, endeavours in the

[558] When Member States notify the aid measures to Commission for its assessment, it is undoubtedly in the MSs' interest to abide to the rules of the State aid framework, in order to avoid incurring in the opening of an investigation procedure, or worse, being fined. Phedon Nicolaides, State Aid Uncovered - Critical Analysis of Developments in State Aid 2015 (The Legal Publisher Lexxion 2016) 289.

safeguard of the harmony of the EU Internal market. These recent case law aims at giving a specific interpretation of the elements that will help in the future to ascertain the presence of State aid even in context in which the environmental objective could eventually blur the vision of the European guardian of the Treaties, the Commission. However, as it will be revealed further, especially for what concerns preliminary rulings raised by domestic courts, the CJEU seems to even depart from conventional approaches adopted by the Commission in the identification of the fundamental elements which characterised State aid.[559] As a result, it can be seen that in the State aid regime there is a very delicate balancing relationship between these two institutions which could, metaphorically, be seen as two entities passing each other the baton to regulate Member States' attitudes. Admittedly, the contrasting views[560] that each of these institutions can develop could be symptom of a lack of coordination, but above all, cohesion in the European Union, leading it to detrimental effects.

In this third chapter, four different recent rulings will be presented and critically analysed to expose the CJEU's approach towards elements which characterise the assessment of public subventions. Both the phases related to the identification of State aid, with the concept of State resources in a scheme related to renewable energy sources, and the phase of compatibility with the Internal market, with the concept of the incentive effect and the "start of work" criterion, will be part of our examination. At the same time, two different financial instruments will be object of evaluation. In particular *feed-in-tariffs* and the *green certificate.* Specifically, for the former, to evaluate its compatibility with the market, after being scrutinised by the Commission, and for the latter, whether its nature could be deemed as State aid.

The timeline of the cases covered goes from 2019 to 2024, thus we are going to evaluate the CJEU attitude towards certain aid schemes related to the energy sector deployed in the last 6 years, thus basically coinciding with a single mandate of the European Commission. This aspect will be taken into account in the conclusive

[559] Case C-588/22 *Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A.* – GSE ECLI:EU:C:2024:209.
[560] Case C-405/16 P *Federal Republic of Germany v European Commission* ECLI:EU:C:2019:268.

considerations drawn at the end of the chapter in relation to the consistency of the jurisprudence as well as its conformity to the Commission's practice.

First of all, *Germany v Commission,*[561] a case that in 2019 paved the way for a legal incentive for the exploitation of renewable energy sources in a way that could, on one hand level the inherent disparities between fossil fuels and renewables, and on the other one, ensure that energy producers would consider sustainable sources as their first choice. The CJEU finally demonstrated, as opposed to the Commission's, and the General Court's stance, that the financial tool of the feed-in tariffs is excluded from being considered State aid, due to the lack of the relevant criterion of public resources.

Secondarily, *ARERA v Fallimento Esperia S.p.A. and GSE S.p.A.*[562], an interesting preliminary ruling of 2024, made by the Italian *Consiglio di Stato*, which pertains the need to establish the very nature of the so-called *green certificates.* The peculiarity of this ruling is in particular shown by the CJEU's lenient attitude towards well-established precepts of State aid control which leave scholars surprised. At the same time, though, it appears to be the need to communicate the will of change in the system by the European judge, hoping to also influence the Commission to follow this lead.

In the third place, we will uncover the definition of "start of works" inherent in the concept of the incentive effect of State aid. The latter represented object of a question of another preliminary ruling, *Est Wind Power v Commission*,[563] where in 2022 the CJEU dealt with the interpretation of a specific part of State aid Guidelines for the environmental protection and energy (EEAG). The necessity to identify the commencement of work represented conditionality to benefit the support measure implemented by Estonia to foster the utilisation of renewable energy, notably wind-generated energy.

Finally, we will conclude with the analysis of the striking landmark judgment *of Hinkley Point C* [564] of 2020, which has been object of study by many experts, as the Court has finally opened the chance for a change for what concerns State aid control by actively

[561] ibid.
[562] *Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559).
[563] Case C-11/22 *Est Wind Power OÜ v AS Elering* ECLI:EU:C:2023:765.
[564] Case C-594/18 P *Republic of Austria v European Commission* ECLI:EU:C:2020:742.

involving the pursuit of policy objectives in relation to environmental protection in the final assessment of the Commission. The fact that the case concerned the thorny as well divisive topic of the promotion of the use of nuclear-based energy, pursued by a national aid scheme, allowed the Court to face directly a matter that had never the chance to discuss. Consequently, the judgment set a legitimate basis for a future compromise between State aid regime and the topic of implementing sustainable conditions for the environment.

The selected order for presenting the various rulings is primarily structured to firstly expose the implications of the mentioned financial tools of feed-in tariffs and green certificates. And secondly to display the CJEU and the Commission's attitudes towards the analysis of the elements attaining to the nature of the criteria compounding the State aid, as object of their scrutiny. The case of Hinkley Point C will be treated as last since the principles expressed in it by the CJEU contain a recurrent idea expressed throughout the different chapters of this work and furthermore it represents symbolically the completion of it. At the same time, the ruling *per se* constituted a landmark point that sets up the basis for a new beginning for the European State aid regime in connection with the energy and environmental protection field.

2. Transition support and the issue of State resources: the compensation scheme in *Germany v Commission* (C-405/16 P)

The case *Germany v Commission* of 2019 was already mentioned in the first chapter,[565] in relation to the analysis delved on the nature of resources and their imputability. In this third chapter we are going to focus our attention to the saga which involved the controversial transition support established by Germany pursuant the German Renewable Energy Act of 2012 (EEG),[566] in particular to emphasise the surprising approach adopted by the CJEU, which totally overturned the shared General Court as well as the Commission's standing point on the German support.

[565] See Chapter I, para 1.1.2 State resources: a matter of imputability".
[566] *Erneuerbare-Energien-Gesetz* (EEG) (German renewable energy sources act 2012), amending its predecessor version of 2000.

This saga lasted from 2013 until 2019 and the mentioned German Law, fostering renewable solutions for the production of energy with the so-called *green electricity privilege*,[567] was just the starting point from which the issues were generated.

2.1 Background and description of the measure implemented

A brief portrayal of the measure will help to clearly depict the problems raised by the Commission that eventually led it to consider the mechanism to constitute State aid within the meaning of Article 107 TFEU, delivering a series of provisions to be respected to ensure compatibility.[568]

To put it in simple terms, the EEG Law requires distribution system operators (DSO) to purchase electricity from producers of renewable energy sources (RES), however, the prices are specifically established by the aforementioned legislation, which does not correspond to the one set by the market, but it is inflated by the so-called feed-in-tariff.[569] The latter represents a kind of premium for the RES producers, which are incentivised to deploy energy supplies from renewables. However, since feed-in-tariffs are higher than the market price, the Commission considered it an advantageous treatment towards RES. After having acquired energy supplies, the DSOs distribute them to the transmission system operators (TSOs), namely organisms of private nature but entrusted with the public service obligation[570] of delivering sources to electricity suppliers. Most importantly, though, they bear the duty of compensating the financial burden borne by the DSOs. In this way feed-in-tariffs and premiums are carried by the TSO, yet, what eventually happens is that they will request to electricity suppliers to share the burden. From the text of the EEG Act, even if it is not explicit, it reports that end-users will found reported in their bill the so-called "EEG-surcharge", borne by suppliers and passed on to customers, aimed at compensating the feed-in-tariff applied at the beginning of the supply chain.[571] This passage it is of fundamental importance for the analysis developed by the

[567] Commission, 'Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (notified under document C(2014)' 8786 OJ L 250, para 2.2 "The green electricity privilege".
[568] ibid Articles 1-9.
[569] ibid paras 6-13.
[570] ibid para 112.
[571] ibid para 56, "Comments from Germany on the opening decision and on Third party comments".

CJEU in the assessment of one of the prerequisites to detect the existence of State aid, namely the public nature of resources.

The EEG surcharge itself is not considered an incompatible statal support, yet the effective issue that the Commission detected in the EEG Law of 2012 was indeed this decreased amount of the EEG surcharge granted for all the energy intensive users (EIU), only if they would have fulfilled certain "green conditions", namely the deployment of at least 50% of EEG electricity (renewable sources) and the 20% of energy coming from wind and solar sources. This reduction was indeed referred as the "*green privilege*".[572]

As a matter of fact, the Commission found the element of selectivity in the evidence that it only benefitted producers of *EEG energy* and certain EIUs, specifically in the manufacturing sector, which are placed in advantageous position compared to the other energy market operators. Moreover, for the Commission, the EEG surcharge was classifiable as State resources.[573]

2.1.1 The colliding opinions between the Commission and the General Court opposing the Court of Justice

The arguments of the Commission on the matter of State intervention were based on one hand their comparable nature to a tax, and on the other, they were administered by a TSO, namely a body appointed on a State's concession. These entities entrusted with the management of the implementation of those mechanisms do not freely act on their own behalf, but as managers of an aid, granted through State funds.[574] Indeed, as also stressed in previous case law,[575] an obligation to purchase energy, already represents itself as State aid even without the existence of a specific money transfer.[576] As we stressed through all the passages of this work, the presence of a State subvention is not considered

[572] ibid para 15(a) and (b).
[573] ibid paras 123-38, para 7.1.3.4 "The finding of State control in general".
[574] Daniel Vasbeck, 'State Aid, the Criterion of State Resources and Renewable Energy Support Mechanisms: Fresh Wind from Luxembourg in EEG 2012 European Papers' (2019) 4 European Papers - A Journal on Law and Integration.
<https://www.europeanpapers.eu/en/europeanforum/state-aid-the-criterion-of-state-resources-and-renewable-energy-support-mechanisms#_ftn37> accessed 20 January 2025.
[575] Case C-262/12 *Vent De Colère and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement* ECLI:EU:C:2013:851.
[576] ibid para 19.

itself prohibited as long as the Commission manages to prove in its compatibility assessment, that the market as well as competition are not or slightly affected by the measure. However, this is not the case here, because as we will see in the CJEU's reasoning it is exactly in the nature of the surcharge that it will be proved the lack of this State aid's criterion, which, being part of its core, will logically exclude the presence of a State's subvention.

Notwithstanding this last point, the Commission eventually scrutinised that the advantages on the recipient of the green privilege were «liable to distort competition and to affect trade, given that the beneficiaries operate in sectors where markets have been liberalised».[577] Indeed, for the GC it was sufficient to demonstrate that the advantages derived directly from a public policy to consider them as State aid, but the CJEU notes that the mere causal link between the nature of the provision establishing the mechanism and the advantageous position of beneficiaries is not a sufficient element for there to be aid. It was decisive, instead, the evidence of the direct or indirect award of state resources, corroboration that the General Court overlooked and dismissed without an attentive analysis.[578] Furthermore, the German Government failed to formally notify the Commission of the aid measure to be adopted, and for that omission alone, the measure was inadmissible.

The German government considered that the Commission erred in its assessment especially for what concerned the evaluation of the facts, as well as an error in determining the advantage and its link to state resources, allegedly involved. All these elements were the reason for Germany to bring the decision before the General Court[579] for its scrutiny. The latter only confirmed the view of the Commission, dismissing as unfounded the reasoning brought forward by the Federal Republic of Germany. Eventually, the concerned Member State did not renounce to accept the judgment delivered, as it would have meant completely abolishing the EEG Law, thus this brings us to the case under our focus, *Germany v Commission* (C-405/16 P).

[577] SA.33995 (2013/C) (ex 2013/NN) (n 567), para 139.
[578] C-405/16 P *Germany v Commission* (n 561), para 63.
[579] Case T-47/15 *Federal Republic of Germany v European Commission* ECLI:EU:T:2016:281.

2.2 The scrutiny of the Court of Justice

The appeal before the CJEU brought to unexpectedly depart from the GC and the Commission's position, leading to the annulment of the aforementioned decision SA.2015/1585, where it had wrongly found that the reductions of the EEG surcharge involved State aid. Indeed, on 28 March 2019 the CJEU delivered a judgment[580] which upheld the appeal lodged by the Member State in question, against the judgment of the General Court of 2016.[581]

From the judgment in question, it can be seen that the Court found that the EEG, supporting producers of electricity generated from renewable energy sources, and gas from extraction, as well as supporting energy-intensive users, could not be qualified as state aid, as state resources were not considered involved. The German law indeed aimed at ensuring a higher price for EEG electricity producers than the market price, entailing the particular obligation to all grid operators to purchase EEG electricity at the established tariffs. Nevertheless, all these additional costs borne by the energy generators (DSOs and TSOs), were just the result of a legal obligation, they could still be compensated via the mechanism of the EEG surcharge. The latter gave them the right to demand that the energy suppliers would pay the difference, in proportion to the quantities sold. And, as for those suppliers, they had the option, but not the obligation, to pass on the EEG surcharge to final consumers, and this is a fundamental passage to bear in mind.

2.2.1 The divisive element of State resources: the question on the role of intermediaries

In this regard, in order for certain advantages to qualify as State aid within the meaning of Article 107(1) TFEU, they must, on the one hand, be granted directly or indirectly through State resources and, on the other hand, be imputable to the State.

The cornerstone of this appeal is represented by the demystification on the use of the concept of state resources, one of the four fundamental elements established in Article 107(1) TFEU to identify State aid, which in this case was totally dismissed in the analysis

[580] C-405/16 P Germany v Commission (n 561).
[581] T-47/15 Germany v Commission (n 579).

and linked to broad and general concepts.[582] The CJEU mainly focused its ruling on the assessment of the mentioned element as the lack of it would have been sufficient to drop the alleged existence of State aid. In actual fact, the Court detected an error of law in the assessment, finding that the measures introduced by the 2012 EEG law did not involve State resources, as the GC based its reasoning on an analogy with previous case law,[583] which actually had substantial differences with the case in question.

From the judgment of our focus, it can be seen that the Court found that the EEG Law, supporting producers of electricity generated from renewable energy sources, and gas from extraction, as well as supporting energy-intensive users, could not be qualified as State aid, as State resources were not considered involved. The German law indeed aimed at ensuring a higher price for EEG electricity producers compared to the market price, entailing the particular obligation to all grid operators to purchase EEG electricity at the established tariffs. Nevertheless, all these additional costs the energy generators (DSOs and TSOs) were forced to bear were just the result of a legal obligation, they could still be compensated via the mechanism of the EEG surcharge. The latter gave them the right to demand that the energy suppliers would pay the difference, in proportion to the quantities sold. And, as for those suppliers, they had the option, but not the obligation, to pass on the EEG surcharge to final consumers, and this is a fundamental passage to bear in mind.[584]

The examination took into consideration the very nature of the TSO in this specific situation, because for the CJEU was exactly this point that needed a thorough assessment for it to understand the presence of a fundamental element to detect State aid, namely State resources. For the CJEU the mistake made by the GC, when analysing the measure, was in consideration of the causal nexus between the legal obligation of establishing the mechanism and the imputability to the State.[585] Indeed, for the GC the fact that the

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[582] ibid para 125, for instance, considering sufficient for there to be public resources, solely for the assimilation to a levy of the EEG surcharge, compensated by customers in the form of a tax established by a policy set by the State.
[583] Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl B*V ECLI:EU:C:2008:413; Case C-379/98 *Preussen Elektra AG v Schhleswag AG* ECLI:EU:C:2001:160; Case C-329/15 *ENEA S.A. v Prezes Urzędu Regulacji Energetyki* ECLI:EU:C:2017:671; Case C-262/12 *Vent De Colère and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement* ECLI:EU:C:2013:851.
[584] See n 602.
[585] Para 24-28, C-405/16 P *Germany v Commission*.

German legislation of the EEG Act deployed the whole mechanism already meant that the resources used were of statal nature, being the latter a public policy. This was the result of the interpretation of Article 107(1) TFEU requesting that the support shall be «directly or indirectly granted through State resources and be attributable to the State» for it to be considered State aid. Thus, since the surcharge was established through the EEG Law by the German government, for the GC it exactly fell within the meaning of this concept.

But as already anticipated in the first chapter, one thing is considering imputability to the State and another is the concept of "State resources".[586] Additionally to enhance this conclusion the GC used the argument of considering the TSOs as intermediaries not acting on their will, but strictly controlled by the State, thus creating a bridge between the government administration and the resources.[587] However, also here, one thing is administering, and another is supervising the execution of the mechanism. Indeed, in this case the latter situation was the one that was specifically detected by the CJEU.

The mere executive role of the TSOs helped in leaving aside the argument that the TSOs could be considered as a public body administering State resources which would have led to attribute the role of public resources to the EEG surcharge, on the basis of a previous judgment, *Vent de Colère*.[588] In the latter, the Court demonstrated that funds fed by compulsory contributions imposed by the legislation of the Member State, and managed and distributed in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU, even if they are managed by entities separated from the public authority.

The TSO is, however, nothing but a body of private nature, separated from public authorities, and established to control the execution of the mechanism itself, which does not directly mean that the State can freely dispose of them.[589] The public control exercised on TSOs was another relevant factor that brought the GC to the attribution of State resources to the funds administered by these intermediary bodies.[590] Their main task is to

[586] See Chapter I, para 1.1.2 State resources: a matter of imputability".
[587] Case T-47/15 *Germany v Commission*.
[588] *Vent De Colère* (n 583).
[589] Para 76, T-47/15 *Germany v Commission*.
[590] ibid para 105-110.

ensure the correct implementation of the EEG 2012, by managing its execution and without a direct effect on the administration of the funds constituted by the EEG surcharge, thus without passing through the State budget.[591] This brings us to depart from the case law of *Vent de Colère* case, since, an important element regarding the intermediary in this mentioned case is missing in the situation in question. That is to say, not only it should be considered the nature of the body itself, being different from an independent authority, but also the object of the specific task for which is entrusted, which are deployed not with the sole purpose of administration of the funds, but for the accomplishment of the objectives of the EEG Law.[592]

In other words, to establish the existence of the requirement of public control, it is requested to assess that the possible presence of intermediaries is actually intended to manage the public subsidy and not merely to control the correct application of a regulatory framework. This in-depth analysis is necessitated, otherwise MSs could justify a disguised circumvention of Article 107(1) TFEU.[593] For instance, with the use of intermediaries to manage the State resources intended to subsidise certain undertakings or productions, granting an extension of the State's regulatory power. In this respect, in fact, the judgment of CJEU subjected to critical scrutiny the decision of the General Court, which had limited itself to considering that the State, although exercising a dominant influence over the funds generated by the surcharge, it is not endowed with a dispositive power over those funds. This means that it does not have the power to decide on a different destination from the one provided by the EEG 2012, neither it is able to exercise public control over the funds themselves, generated by the surcharge.[594]

The departure from the *Vent de Colere* ruling is also enshrined by the CJEU in the diverse approach the State has towards the obligation to purchase at a higher price, compensated by the EEG surcharge, passed on consumers. In this previous case, France was imposed by law to cover for any possible incapability to remunerate the energy purchasing by undertakings, establishing a link between an advantage on market

[591] C-405/16 P *Germany v Commission*, para 81,
[592] ibid para 83-85.
[593] Ibid paras 48-56.
[594] Theodoros G. Iliopoulos, 'State Resources Doctrine Rebooted - Case C-405/16 P Federal Republic of Germany v European Commission (EEG) - Annotation by Theodoros Iliopoulos' (2019) 18 European State Aid Law Quarterly 555.

operators and a potential reduction in State revenue.[595] On the contrary, in the case in question there is no obligation for Germany to shield against lack of reimbursement from end users, therefore no advantage could be detected.[596]

Nonetheless, as it was demonstrated in the symbolic judgment in terms of incentive scheme for energy from renewable sources of *PreussenElektra AG v Schhleswag AG*,[597] the CJEU ruled that the advantage resulting from a public intervention, and the fact that such advantageous effect is procured to the beneficiaries by involving public resources, is a decisive point. Admittedly, the second condition must be separately analysed and demonstrated, as an autonomous requirement (the statal origin), of the resources as laid down in Article 107(1) TFEU.

As it was anticipated in the first chapter, in *PreussenElektra* there was a measure settled through an obligation imposed on electricity companies to purchase energy from renewable sources at fixed minimum prices, which was very similar to what we see in the ruling of our focus. Likewise, in this situation indeed the Commission had previously emphasised a restrictive argument according to which what mattered was the use of the resources, and the effects that this use determines.[598] The Commission was indeed supporting the main objective of the safeguard of the market and the competition system from distorting interventions of State origin. In this sense, it was considered that the measure constituted State aid, insofar as it introduced an imposition, by the public authorities, of an obligation to transfer private resources, such as to constitute a circumvention of the prohibition of State aid. But as we mentioned, also in this case the Court dismissed the Commission decision, annulling it.

2.2.2 The deceitful consideration of the EEG surcharge as a levy

Another point that was dismissed by the CJEU was the alleged nature of "tax" of the surcharge,[599] that, since it was eventually passed on end users, it would have been

[595] *Vent De Colère* (n 583), para 26.
[596] C-405/16 P *Germany v Commission*, para 84.
[597] *Preussen Elektra* (n 583), para 58.
[598] Commission, 'Decision of 1999/194 on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997 (notified under document number C(1998) 2476)' (1998) OJ L 060.
[599] C-405/16 P *Germany v Commission*, para 36.

technically considered as a levy on the consumers. It is true that not only it helps to compensate the surcharge, but it also refers directly to the consideration of it as a State resource as it is then pocketed by the State itself as fiscal imposition. As it was also stated in previous case law,[600] a price supplement on electricity, unilaterally charged on end-users is to be assimilated to a levy. And the same thing occurs in the case in question, as there is a final transfer of a financial burden.

Nevertheless, an analogy[601] with this specific case law cannot be constructed for this last hand-over of the EEG mechanism. As a point of fact, the CJEU highlighted that an imposition requires the element of compulsoriness on consumers, a criterion not requested by the EEG Law, deeming the levying as a mere possibility.[602] The pass-on transfer is indeed not requested by law, the bond between the energy suppliers and the consumers is also of private nature, therefore the State has no access to those funds and cannot exercise any influence on the price-setting of energy suppliers.[603] Indeed, it is still recognised the benefit upon the market operators, bearing the weight of the surcharge, of the choice to pass this surcharge on to their customers. Choice mostly influenced on the market trend. Therefore, it must be concluded that the support scheme is paid through private resources.[604]

In the end, from the point of view of its effects, the 2012 EEG Act did not impose an obligation to pass on the EEG surcharge to end-users, so that the EEG surcharge cannot be regarded as a tax affecting energy consumption. Moreover, from the point of view of the procedure laid down, it did not appear at all that the State had the power to dispose of the funds generated by the EEG surcharge, neither that it could exercise public control over the entities entrusted with the management of those funds. In this respect, in fact, the judgment of the CJEU subjects to critical scrutiny the decision of the General Court, which had limited itself to considering that the State, although exercising a dominant influence over the funds generated by the surcharge, is still not endowed with a dispositive power over them. This means that it does not have the power to decide on a different

[600] *Essent Netwerk Noord BV* (n 583), para 66.
[601] Case T-47/15 *Germany v Commission*, para 40.
[602] Case C-405/16 P *Germany v Commission*, para 70.
[603] ibid para 41.
[604] Karel Bourgeois, Leigh Hancher, Daniel Irisarri Lolin "State Aid for Energy and Environmental Protection" in Leigh Hancher, Tom Ottervanger and Pieter J Slot, *EU State Aids* (6th edn., Sweet & Maxwell 2021) 866-867.

destination from the one provided by the EEG 2012, neither it is able to exercise public control over the funds themselves, generated by the surcharge.

For all these reasons, the Court annulled the decision taken by the European Commission, which had not correctly ascertained that the advantages provided by the EEG 2012 did indeed involve state resources, and therefore constituted state aid.

2.3 Conclusive considerations on *Germany v Commission*

In summary, the contrast between the GC and the CJEU in the consideration of the concept of State resources could be expressed individually in two opposing views of the same idea, with an extensive approach of the GC against a restrictive one of the CJEU. Respectively, by enlarging the meaning of State resources, what we obtain is a more limiting space for Member States to act in economic terms to grant aid. Instead, by restricting the aforementioned concept the direct result is an expansion of the State's power to create financial measures towards private undertakings.

It is evident that the Commission's will — shared with the General Court's one — is to make sure that no violation would be committed and a way to do so is by limiting the MS's space of action in the State aid regime. Besides it is its main task to guarantee the respect of the Treaties and, particularly, of Article 107 TFEU.[605]

From the point of view of Member States, this new approach that the CJEU unveiled, could be the beginning of an ease towards feed-in tariff mechanisms in the energy field, as a way to incentivise the deployment of RES. Less constrains for this tool in the State aid regime means enabling governments to adopt these systems in a way that would not activate the need for an obligated path towards a mandatory assessment by the Commission.[606] In conclusion, now that the CJEU held this construction of feed-in tariffs do not represent State aid, a very efficient way to foster the shift to renewables from fossil fuel-based source of energy could be found in this financial tool.

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[605] Christoph Arhold, 'A More Restrictive Approach to "State Resources"? The ECJ Annuls the Commission's Decision on the German Law on Renewable Energy (EEG 2012) | White & Case LLP' (Whitecase.com 9 April 2019) <https://www.whitecase.com/insight-alert/more-restrictive-approach-state-resources-ecj-annuls-commissions-decision-german-law> accessed 20 January 2025.
[606] Vasbeck, (2019) 4 European Papers - A Journal on Law and Integration (n 574).

For the purpose of giving a last update on the situation displayed it must be added that eventually, the German government decided to modify the EEG Act in 2023 with the so-called "Easter Package",[607] after a previous modification in 2021[608] which was again exposed to the Commission's scrutiny, but this time without any inconvenience in terms of distorting effects on the market.[609] After all, Germany decided to even remove the tariff from the consumers' bill only in 2022. As a result, it relieved customers of an amount of at least 200 euros every year, and now a State's fund will compensate for the surcharge.[610] We have indeed to consider that the mere possibility to impose the tariff on end users was still a conspicuous burden on them. In spite of these last events, the judgement in question still remains a firm point of reference for future cases involving tariffs in the renewable energy field, providing basis to enlarge possibilities for Member States to develop a green transition plan without stumbling upon prohibited State aid.

Nevertheless, in terms of environmental impact, the last amendment of 2023 seems to present a crucial step to lead Germany towards climate neutrality, indeed at least 80% of the gross energy consumption will be covered by renewables.[611] And apart from the renewable energy sources infrastructure already setup in the previous version of th law, it will foster support for green hydrogen power generation, and conditions for energy-intensive users will be simplified under a special equalisation scheme.[612]

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[607] "*Erneuerbare Energien Gesetz*" (Renewable Energy Sources Act, amending EEG 2021) – 'EEG 2023;
[608] *Gesetz zur Änderung des Erneuerbare-Energien-Gesetzes und weiterer energierechtlicher Vorschriften* (Law amending the Renewable Energy Sources Act and other energy law provisions (EEG2021-EG))
[609] Commission decision on State Aid SA.57779 (2020/N) – Germany EEG 2021C(2021) 2960 final; Commission decision State Aid on SA.64376 (2021/N) – Germany – EEG 2021 amendments on State Aid SA.63414 (2021/N) – Germany – Post-support aid to small manure installations C(2021) 9329 final; State Aid SA.102303 (2022/N) – Germany – EEG 2021 amendments: Easter Package 2022 – Early Bird Measures State Aid SA.103086 (2022/N) – Germany – EEG 2021 amendments: Additional round of solar PV tenders in 2022 C(2022) 6946 final.
[610] The Federal German Government (official website), 'Elimination of EEG Levy Relieves Electricity Consumers | Federal Government' (Website of the Federal Government | Bundesregierung 27 April 2022) https://www.bundesregierung.de/breg-en/federal-government/renewable-energy-sources-act-levy-abolished-2011854accessed 23 January 2025.
[611] The German Federal Government (official website), 'Development of Renewable Energies | Federal Government' (Website of the Federal Government | Bundesregierung 23 December 2022) <https://www.bundesregierung.de/breg-en/news/amendment-of-the-renewables-act-2060448> accessed 23 January 2025.
[612] Federal German Ministry for Economic Affairs and Climate Action, 'Overview of the Easter Package' (Überblickspapier Osterpaket 6 April 2022) https://www.bmwk.de/Redaktion/EN/Downloads/Energy/0406_ueberblickspapier_osterpaket_en.pdf?__blob=publicationFile&v=5accessed 23 January 2025.

In the end, this case brought to conclude that the CJEU's approach towards selective advantages that might occur in the energy sector with all the financial measures that are implemented, such as feed-in-tariffs, has recently been opening to recognition of compatibility with State aid regime. Therefore, on a future perspective, Member States will have the chance to follow the same path as Germany since the European judge has shown consensus in this respect. This will enable the fostering of environmental protection while also keeping under control distortions that might occur on the market and among energy market operators.

3. Green certificates in *ARERA v Fallimento Esperia S.p.A. and GSE S.p.A.* (C-558/22)

We have discussed about the specific financial tool of the feed-in-tariffs introduced by the German government to enhance its efforts towards a more environmentally driven solutions in the energetic field, while also ensuring that no alteration of the trading conditions will occur.

Another emblematic tool, that embodies analogically the concept of the achievement of a net-zero economy, is the so-called *green certificate*. The idea underlying green certificates is to encourage undertakings to invest in renewable energy projects, with a market-based mechanism that enables them to opt for sustainable solutions, without having to produce renewable energy themselves, but still contributing to reach established climate targets.[613] This represents the necessary intermediate step to achieve the sole reliability on renewables. Along this line, green certificates allow to quantify the environmental value of the production of energy from renewable sources, and indeed they are used to officially report the amount of 'green energy' which has been used by an undertaking.[614] The peculiarity of this instrument is its capacity of being traded by market operators as a form of guarantee that their percentage of reliability on sustainable sources

[613] Leigh Hancher, Adrien de Hauteclocque and Francesco Maria Salerno, "Compatibility of RES: A Legal and Economic Approach" in *State Aid and the Energy Sector* (1st edn., Oxford; Hart Publishing, an imprint of Bloomsbury Publishing 2020) 126.

[614] European Environmental Agency (EEA), 'Green Certificate (Electricity) — European Environment Agency EEA Glossary' (www.eea.europa.eu) <https://www.eea.europa.eu/help/glossary/eea-glossary/green-certificate-electricity> accessed 25 January 2025.

will always be object of control at a EU level.[615] Differently from feed-in tariffs, which are considered a price-based support, green certificates rely on a quota system where market operators are obliged to ensure that a certain part of their energy exploitation is previously established.[616]

Having said that, these instruments do not represent State aid *per se*, however it is both in their trading and in their free character in distribution from national governments, that the necessity to assess their compatibility with the market arise. The issue lies in the fact that States grant them for free, with the purpose of increasing the share of renewable energy generation, but with the side effect that they involve public resources and consequently alter the market conditions among other operators that did not receive the same "privilege".[617] In the past, the Commission showed an opposing view towards the existence of State resources for green certificates,[618] in the sense of considering them merely as a system with the sole purpose to display the quantity of energy produced from RES.[619] The fact that they involve State aid should not be considered problematic when the national authority, deploying them, is able to demonstrate its compatibility with the Internal market, especially when their distribution is linked to an aid scheme. Nevertheless, it is not an easy task, considering the undue effects they could create when they are dispatched free of charges, as we have seen in chapter 1[620] for the Belgian aid measure of 2018 on green certificates in Flanders.[621]

For this reason, it is important to analyse every single element of the structure of the measure related to the green certificate to ensure that no undue effect among market

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[615] European Parliament and Council, 'Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources' (recast) (2018) OJ L 328.
[616] Philipp Werner and Vincent Verouden, "Energy and environmental aid — State aid to support renewable electricity generation" (para 2.3.1) in *EU State Aid Control: Law and Economics* (Wolters Kluwer, Alphen Aan Den Rijn 2017).
[617] Phedon Nicolaides, 'Green Energy Certificates' (Lexxion - State Aid Uncovered by Phedon Nicolaides 2 July 2024)
<https://www.lexxion.eu/en/stateaidpost/green-energy-certificates/> accessed 25 January 2025.
[618] State aid No N 504/2000 – United Kingdom Renewables Obligation and Capital Grants for Renewable Technologies C(2001)3267 final.
[619] Michał Bałdowski, 'Controversies Concerning the Interpretation of State Resources as a Prerequisite of State Aid: An Illustration Using the Example of Polish Green Certificates and the Auction System' (2017) 7 Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza 269.
[620] See Chapter 1, para 1.1.3 The advantage: a departure from the standard".
[621] Commission decision on State Aid SA.46013 (2017/N) Belgium - on Green electricity certificates and CHP certificates in Flanders (2018), OJ C 369/2018.

operators, caused by a selective advantage, has occurred because of the Member State's intervention through the certificate.

3.1 The procedural and legal outline of the Italian preliminary ruling

An illustration of a deconstruction carried out by the CJEU of the elements of State aid related to green certificates can be detected in the recent preliminary ruling *(ARERA) v Fallimento Esperia S.p.A.*[622] issued on 7 March 2024.

It must be admitted that the CJEU ruled in a way that seems to depart from previous Commission's approaches in some parts of the assessment of the aid scheme. It indeed left some doubts whether this behaviour could represent a shift of the Court's point of view, or a mere oversight occurred in the perception of the factual elements of the particular situation. These specific parts will be highlighted in our analysis.

In this ruling the Italian Council of State raised questions related to the interpretation of specific provisions of the TFEU[623] and relatively to a Directive on the promotion of the use of energy from renewable sources,[624] which was in force at the time when the related Italian aid scheme was enforced.[625] The domestic case[626] from which the preliminary ruling arose concerned the dispute between the Italian Regulatory Authority for Energy, Network and Environment (ARERA) and an insolvent company, Fallimento Esperia S.p.A. and Gestore dei Servizi Energetici (GSE).

In particular, Esperia S.p.A. was a company importing electricity in Italy to resell it on the Italian energy market, and the GSE is a national transmission network operator which is in charge to buy or sell rights in relation of RES production, in case of production fluctuation or insufficient supply.

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[622] ARERA v Fallimento Esperia S.p.A., Gestore dei Servizi Energetici S.p.A. – GSE (n 559).
[623] Article 18, 20, 30, 34,110,107,108, TFEU.
[624] European Parliament and Council, Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance) (2009) OJ L 140, now amended by Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast) (2018) OJ L 328.
[625] Legislative Decree of the Republic of Italy No 79/1999 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity, of 16 March 1999 (Decreto legislativo 16 marzo 1999, n.79– Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica).
[626] Cons. Stato, sez. IV, 3 settembre 2019, n. 6078. (Italian Council of State, fourth section, no. 6078/2019).

In 2016 the mentioned authority (ARERA) did impose a financial penalty on Fallimento Esperia for not having fulfilled the obligation of purchasing certificates which would have declared the sustainable origin of the electricity imported in the year 2010. This brought the undertaking to challenge the fine issued before the Italian Regional Administrative court, whose judgment – which also declared Esperia's insolvency – was then appealed by both of the parties, challenging the legal basis for the penalty, but also its excessive amount. However, in order to assess the legitimacy of the financial penalty, the Italian Council of State questioned the compatibility with EU law of the imposition of purchasing green certificates stemming from an Italian aid scheme,[627] supporting the use of renewables and implementing the European Directive 96/92/EC.

Those certificates, as established by the Directive, had the purpose of giving evidence of the energetic sources origin, with the purpose of increasing transparency of the customer's choice between electricity coming respectively from renewable and non-renewable sources and the facilitation of cross-border support.[628] But as it was also emphasised, «guarantees of origin do not [automatically] confer the right to benefit from national support schemes».[629] The Italian scheme, implemented in 1999, and supplemented by a new Decree in 2003,[630] provided for the gratuitous distribution of green certificates attesting the proportion of green electricity produced by Italian undertakings.

The Decree also established an imposition for all the producers and importers of energy to provide to the national electricity network a quota of electricity deriving from renewables. This could be ensured by demonstrating the sustainable nature of the energy imported, or buying green electricity or green certificates from national producers, if they do not fulfil the obligation to display the sustainable origin of the energy.[631] The

[627] Legislative Decree No 79/1999 (n 625).
[628] European Parliament and Council, 'Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market' (2001) OJ L 283, para 10; European Parliament and Council, 'Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC' (2009) OJ L 140, para 25.
[629] Directive 2009/28/EC, para 56.
[630] Legislative Decree of the Republic of Italy No 387/2003 on the implementation of Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market (Decreto legislativo 29 dicembre 2003, n. 387 — Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità).
[631] Article 11, Legislative Decree No 79/1999.

integration of the national legislation in 2003, instead, established a supervision activity by a transmission network operator (GSE), to ensure the observance of the relevant quota established, and the notification of failures to comply to the competent national authority (ARERA).[632] Moreover, it must be added that national authorities can distribute green certificates for free to producers of green electricity relatively to the quota they cover, granting them also the chance to sell the latter to other producers which are compelled to the supply of a specific amount of green energy, thus, obliged to purchase green certificates of origin.

3.2 The uncertain compatible nature of the Italian scheme imposing the purchase of green certificates

The doubts on the compatibility of the schemes imposing the purchase of green certificates, previously described, was raised in relation of different provisions of EU law. The uncertainties were raised on two different bases. The first one concerning the fact that imposing the obligation of buying green certificates when importing energy from other Member States could be conflicting in terms of selectivity,[633] since the measure was not applied to all producers of electricity. And the second one, in terms of freedom of movement of goods since the provision resembled either a custom duty or a measure equivalent to a quantitative restriction on imports.[634] Indeed, what stemmed from the measure it was that the obligation of purchase was deemed to be afflicting only importers of green electricity and not also national producers of the same good.

We are going to analyse these uncertainties addressed by the CJEU, considering them in the division proposed in two blocks. One related to the nature of State aid regime by breaking down the elements composing it, and the other block for the provisions in relation to the free movement of goods.

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[632] Article 4, Legislative Decree No. 387/2003.
[633] Article 107 and 108 TFEU, in light of the element of selectivity, creating effects incompatible with the Internal market; Article 18 and Article 110 TFEU in light of the possible unequal treatment established to operators in the electricity sector feeding the national energy grid.
[634] Article 30 and 34 TFEU, in light of the possible existence of a measure resembling a custom duty imposed between MSs or a restrictive measure equivalent to a quantitative restriction; Directive 2009/28 since it is presumed that the measure threatens the creation of an intra-Community trade for green electricity.

First of all, the Court starts to take cognisance of the main elements of the scheme in light of the four criteria enshrined in Article 107(1) to detect whether a certain measure could be deemed to be State aid. This task, as we saw, is inherently attributed to the Commission's role, however the Court can act as a guide for the purpose of identifying State aid under EU law, thus not in the sense of assessing its compatibility.[635] The European judge recalls then the need to firstly identify the presence of a State intervention — also in the sense of involvement of state resources— subsequently as a third element, its liability to affect trade between Member States by conferring a selective advantage on beneficiaries, and fourthly, creating a distortion or threatening to distort competition.

3.2.1 Between a State intervention and State resources

In regard to what concerns the first element, namely State interventions and the presence of State resources, the reasoning gave by the Court left disorientation. It is undoubtedly true that no State's intervention could be detected in the legal obligation of purchasing green certificates. Indeed, the latter is imposed on those undertakings who do not produce green electricity or import conventional sources-based electricity, which will be obliged to buy from green electricity market producers. We can conclude that, although green certificates retain an economic value, their transfer occurs between two private market operators, without involving any type of public assets.[636]

However, the Court seems not to take into consideration the fact that the State, by granting them for free to green electricity producers, who meet the quota requested, and then allowing their commercialisation to other operators, is in practice creating a new market. As a matter of fact, in this way producers of renewable energy benefit from the advantage of the revenue they obtain in selling green certificates, which were distributed to them for free. This same conclusion is not new information if we consider that the Commission proved this result in a very similar case[637] mentioned previously on Belgian aid schemes supporting renewable energy and cogeneration, based on CHP certificates.

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[635] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559), para 60; Case C-179/20 *Fondul Proprietatea v Guvernul României, SC Complexul Energetic Hunedoara SA and SC Complexul Energetic Oltenia SA* ECLI:EU:C:2022:58, paras 83-84.
[636] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559), para 74.
[637] SA.46013 (2018), OJ C 369/2018, para 79 (n 621). In this case the Flemish authorities were granting for free certificates to RES producers and CHP certificates to high-efficiency CHP. In this way they were

Therefore, it is precisely their tradeable nature that constitutes the pivotal aspect, which could already suggest the presence of State intervention, albeit indirect.[638] Nevertheless, the Court then manage to reach the same conclusion identifying the existence of State resources, by relying on another point present in the national legislation.[639] In fact, as mentioned before, there is still the requirement by which GSE intervenes in the purchase of green certificates when they result being excessive in number. The GSE, being an entity controlled by the Ministry of Economic Affairs, prevents a surplus of certificates in this way, but does so using public resources to buy them — namely, employing funds gathered through the revenue of a tariff paid by consumers.[640] Therefore, the Court concludes that this purchase by GSE constitutes an allocation of State resources, as the distribution of green certificates initially occurs free of charge.

3.2.2 The impact on trade and competition among Italian electricity producers

As for the impact on trade and competition, the Court reiterates an established principle in the case law,[641] stating that the mere potential of the aid scheme to affect trade and competition is sufficient for identifying its impact on the two of them. And indeed, in the case in question, an alteration of the competitive environment occurs among national producers and importers of electricity.

This situation is created by the fact that some electricity producers are exempted from the obligation of purchase of green certificates and others are not, particularly those who do not respect the quota of green electricity requested to be produced, having either the choice of buying certificates or green electricity. Effects on trade can be observed in the situation of the importers, who were not dispensed from the obligation, for the exact

creating a market for such producers to sell the certificates. «The RES producers and the high-efficiency CHP receive an advantage, as they get certificates for free and are able to sell them on the certificates market obtaining additional revenues».

[638] Phedon Nicolaides, 'The EU Court of Justice Conflates Objective Justification with Policy Objective in the Context of Public Support of Green Electricity (Fallimento Esperia S.p.A. ; Gestore Dei Servizi Energetici S.p.A. – GSE) 117968' [2024] Concurrences e-Competitions News Issues | Antitrust Caselaws e-Bulletin <https://www.concurrences.com/en/bulletin/news-issues/march-2024/the-eu-court-of-justice-conflates-objective-justification-with-policy-objective> accessed 18 January 2025.

[639] Article 11(3) of the Legislative Decree No 79/1999.

[640] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559), para 75-79.

[641] *Fondul Proprietatea* (n 635), para 100.

same reason just mentioned for energy producers, that is not reaching the green quota requested.[642]

3.2.3 The debatable logic behind the Court's justification of selectivity

For the element of selectivity, the Court also demonstrated a peculiar approach which has also been object of criticism by experts of the field.[643]

The CJEU firstly identified the legal basis for the detection of the selective element, specifically the reference framework which enables to find the market operators in the energy field involved on different levels, namely the production, marketing and consumption of electricity in Italy. In this case the objective of "creating and ensuring the functioning of a competitive electricity market" represents a common ground to identify that both importers and producers of green electricity and non-renewable energy. In fact, they are in the same legal and factual comparable situation, since they equally contribute to offer and sale the same good in the Italian electricity market. [644] Therefore, the differentiation created in relation to the obligation of purchase of green certificates represents a selective measure.

The Court, however, managed to justify the selective nature of the measure by shaping a specific causal nexus. Specifically, it relied on the fact that in the current context a market failure can be identified in the necessity to promote the use of energy from renewable resources — an objective that "could not be achieved without the implementation of an aid scheme" in Italy. The issue subject to criticism lies precisely in this assertion, as the Court appears to assume that State subsidies are the only means of compensating for a market failure.[645] Admittedly, there is no obstacle to State intervention to address the market failure at issue, however, such intervention is not the sole necessary path to follow to balance this scenario.

The same reasoning was applied to the need to guarantee environmental protection as an essential objective to be pursued. This specific scope cannot be considered as a

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[642] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559), para 64-66.
[643] Nicolaides, (n 638).
[644] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE*, para 90.
[645] Nicolaides, "The reference system in the case of support for green electricity" (n 638).

factor that ensures a comparable situation among all the operators in the electricity market.

It is true what Court stated: «the need to take that objective into account does not justify the exclusion of selective measure»,[646] but at the same time it cannot represent the element which equalise the situation of multiple different operators. This is because the objective pursued by the national authority implementing the measure should not be taken into account to identify the reference framework, also the Court emphasised this specific aspect in its own case law.[647] In conclusion, the element of selectivity was identified, but also compensated by a justification, which still represent one of the three element characterising the selectivity test of the measure.[648]

3.2.4 The advantageous position of green electricity producers.

Finally, the Court assessed the element of the advantage, which in combination with selectivity, allows to distinguish the market operators in the Italian electricity market to benefit of a privileged position compared to the others in a comparable situation. In particular, considering the system created by the attribution of green certificates, all the producers of sustainable electricity are considered enjoying an advantageous position. This is because they are exempted from the obligation of buying green certificates, and furthermore they receive them at no cost. According to the aforementioned national legislation, not only, they are allowed to sell their own certificates — granted them freely for fulfilling their "green quotas" — they can also sell their clean electricity to those energy operators, who are compelled to buy it, since the latter mostly or solely produce from non-renewable sources.[649]

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[646] Case C-279/08 P *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:551, para 75.
[647] Case C-487/06 P *British aggregates Association v. Commission of the European Communities* ECLI:EU:C:2008:757, para 92. In this case the environmental objective pursued by the measure was incentivising the recycle of materials and their efficient use, and the question was whether policy purposes can legitimise selectivity. Indeed, the ECJ highlighted how this exact environmental scope, nonetheless legitimate, was wrongly used to justify the exclusion of the measure's selectivity by the General Court.
[648] See Chapter I, para 1.1.4 Selectivity: an environmentally shaped concept".
[649] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE*, para 63.

3.3 The compatibility with the provisions on the freedom of movement

With respect to the second block, relating to the EU provisions on the free movement of goods, the Court divided the analysis in what concerned Article 28 and 30 TFEU, thus for the presumption of the existence of custom duties, and Article 34 on the assumption of the existence of quantitative restrictions on imports. The questions addressed were whether the system of green certificates could represent themselves a form of prohibited barriers for the free movement of goods, in this case the free electricity trading.

We have seen that the national Decree[650] established the obligation to display the renewable origin of the electricity also for importers of electricity. The purpose of this duty is merely to address the necessity to foster the exploitation of renewables, as previously mentioned, hence, it does not respond to the usual aim of custom duties, which instead is to be found in the reason of merely crossing a national border.[651] Therefore, it must be concluded that green certificates cannot be traced back to custom duties or charges having an equivalent effect, and the reason it is in the very purpose of their establishment.

Another point scrutinised by the Court is connected to the possible obstacle that the measure of green certificates is supposed to create, especially for imports, conflicting in this way with Article 34 TFEU. The obligation established to guarantee the sustainable origin of the source of energy to importers is liable to represent an actual trading restriction prohibited by EU law only imposed on non-renewable electricity operators.[652]

Nevertheless, the Court recalls that on the ground of Article 36 TFEU such cases could find their foundation in the specific "overriding requirements", such as protection of health, life of humans, animals and plants. In this way the CJEU still managed to justify the barrier created by green certificates through means of the necessity to attain the promotion of renewable energy sources to preserve the environment.[653] This obligation was designed specifically to ease the sale of green energy produced, and, hence, guarantee

[650] Legislative Decree No 79/1999.
[651] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE*, para 99.
[652] Article 34 TFEU.
[653] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE*, para 112.

that a certain percentage of electricity produced in the Italian market comes from renewables.

In the field of the fundamental freedoms of movement, we see that the environmental objective can indeed play a relevant role, compared to the field of State aid, where instead the assessment considerations are mostly market based. The only element that remains to ascertain in these terms is whether the measure appear to be proportional to the objective to pursue, and the Court finds that in this situation this might be the case. Admittedly, the measure is able to incentivise the mentioned environmental objective, in relation to the overriding requirements of Article 36 TFEU. Moreover, the Italian government did overstep its margin of appreciation when implementing it.[654] Indeed, Member States are granted with a perimeter of discretion, useful to shape the proposed schemes based on their needs.[655]

It is important to bear in mind a major difference entailed by the situations involving respectively the Freedoms of Movement provisions and the State aid framework. Indeed, for the latter the CJEU maintains certain degree of discretion when considering the economic rationale in their assessment, but for what concerns free movements, the market-based elements also leave space to non-economic interests.[656] The consideration of non-financial elements is fundamental as also expressly established in the case law on free movement. It indeed excludes that any economic reason may be able to justify obstacles to free movement.[657] Thus, it is undeniable that the CJEU exercises a diverse approach towards the two different framework.

As last point, the effectiveness of the scheme in relation to the sustainable objective mentioned, objective also enhanced at European level, is guaranteed through the penalty set in the national legislation. However, the Court stresses that it is task of the domestic judge to assess the proportionality of the financial penalty for the effective attainment of the scope pursued.[658]

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[654] ibid para 116.
[655] ibid para 118.
[656] Francesco De Cecco, *The distinctive nature of State Law in State Aid and the European Economic Constitution* (Bloomsbury Publishing 2012) 50.
[657] Case 7/61 *Commission v Italian Republic* ECLI:EU:C:1961:317.
[658] ibid para 121.

3.4 Rundown of the Court's findings and conclusive considerations

To put it briefly, the CJEU here was requested to establish the compliance of the Italian legislation[659] on the promotion of the use of energy from renewable sources, with the European framework on State aid (Article 107 and 108 TFEU), and the freedom of movement of goods (Article 28, 30, 34 TFEU). The conclusions of the CJEU are that Articles 28, 30 TFEU must be interpreted as not precluding a national measure which, obliges importers of electricity from another Member State, who do not prove that that electricity is produced from renewable sources — by presenting guarantees of origin — to purchase from domestic producers either green certificates or green electricity and all the implications they bear.[660]

Article 34 TFEU and Directives 2001/77 EC and 2009/28 EC must be interpreted as meaning that they do not preclude such a national measure if it is established that it does not go beyond what is necessary to achieve the objective of increasing the production of green electricity.

And finally, Articles 107 TFEU and 108 TFEU must be interpreted as meaning that they do not preclude such a national measure, provided that the difference in treatment between domestic producers of green electricity and importers of electricity, who do not have a guarantee of origin, is justified by the nature and the structure of the reference system of which it forms part.

The interpretation carried out by the Court, takes account of Directive 2009/28/EC as amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, which have the same purpose of fostering the exploitation of the use of energy from renewable sources, and it does so by allowing Member States to implement their own measures. Yet, the fact that those EU Directives do not regulate the energetic objectives pursued on an interrelation level among MSs, leaves uncertainty in terms of extension of the effects of aid schemes implemented by the individual MS importing energy from over their own

[659] Legislative decree no. 79/1999 and legislative decree no. 387/2003.
[660] The green certificates have to display the proportion of the quantity of electricity which they import and, moreover, it is established the imposition of a penalty in the event of failure to comply with that obligation. Whereas domestic producers of green electricity are not subject to such a purchase obligation.

borders.[661] This lack of harmonisation, also highlighted by the Court,[662] leads to the necessity to assess on a case-by-case basis the compatibility of aid schemes with the European framework, and related provisions, they might contravene.

The CJEU, referred on the basis of a preliminary ruling, must limit its own analysis only on the existence of State aid and conformity with the principles of the freedoms of movement but not overstepping in the area of State aid compatibility assessment which only relies on the Commission powers.

Although we have detected that some parts of the judgment did not align in terms of correspondence to the case law and the usual Commission's approach, we have to consider that this scheme will still have to pass through the filters of the Commission benchmarking process. Therefore, even if the Court seems to display a wide-open approach towards the aid scheme implemented, the Commission will most probably execute the power to restrict it with its "narrow-meshed filter", considering its recurrent restrictive approach. However, this is just speculation since a decision on this matter has not been delivered yet.

4. The incentive effect and the concept of "start of works" in *Est Wind Power v AS Elering* (C-11/22 P)

In the case we are going to analyse the Guidelines on State aid for environmental protection and energy (EEAG 2014-2020) have been object of a compelling interpretation for what concerns the incentive effect for the support deployed for renewable resources. Specifically, this case uncovered an interesting approach in the identification of the projects entitled to receive aid, which aim at stretching the stiffness of the incentivising element normally requested for the approval of State aid.

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[661] Guillaume Dezobry and Sophie Lafarge, 'Green Electricity: The Court of Justice of the European Union Rules That a National Support Scheme for the Production of Green Electricity Requiring Electricity Importers to Purchase Green Certificates Is Compatible with EU Law (Fallimento Esperia S.p.A.; Gestore Dei Servizi Energetici S.p.A. – GSE)' (2024) 2 Concurrences 160 <https://www.concurrences.com/en/review/issues/no-2-2024/chroniques/support-scheme-for-the-production-of-green-electricity-the-court-of-justice-of> accessed 19 January 2025.

[662] *ARERA v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A*. – GSE, para 119.

For what concerns the preliminary ruling of *Est Wind Power v Elering AS* delivered on 12 October 2023 it was raised for the first time the issue of determining the actual width of the criterion of the "start of work" which could be considered as a constructive condition for the general concept of the incentive effect. The latter has been part of our analysis in the second chapter, especially in the section relating to the description of the Commission's compatibility assessment, in relation with the "positive condition" of the benchmarking test carried out.[663]

The essence of the incentive effect of a statal subvention is indeed represented by its capacity to shift the behaviour of the beneficiary in a way that it would not have chosen without the aid, occurring when an increase of better environmental standards is necessitated.[664] We have seen that this is mostly the case for the use of renewable sources, which represent a costly but also an environmentally effective way to orient towards a net zero economy. However, the proof of this turn of action necessitates a counterfactual scenario, in which the market operator does not initiate spontaneously a certain activity, and it is in this moment that the concept of the "start of work" comes into play.

Admittedly, from putting endeavours towards the accomplishment of a project stems the idea of the actual presence of its feasibility and resources to accomplish it even without aid. Yet, where the works started before the application for the aid, it cannot be considered compatible with the Internal market, because logically, the incentive effect cannot be detected.[665] As a matter of fact, the case law seems to generally affirm that the proof for an incentive effect, requests that aid will not be granted subsequently the beginning of work or the start of a project.[666] It must be admitted that, even though cases where the start of a project did not hinder the grant of aid are not impossible to find, they are usually supported by a related justifying interpretation of the Commission.[667]

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[663] See Chapter II, para 5.1.1 The incentive effect and the presumption of its existence".
[664] Phedon Nicolaides, 'The Incentive Effect of State Aid: Its Meaning, Measurement, Pitfalls and Application' (2009) 32 World Competition.
[665] Commission, 'Communication on Guidelines on State aid for environmental protection and energy 2014-2020' (2014) OJ C 200 (EEAG), para 50; Article 6, Commission 'Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty' (2014) OJ L 187.
[666] Case T-162/06 *Kronoply GmbH & Co. KG v Commission of the European Communities* ECLI:EU:T:2009:2, para 80.
[667] For an example see: Commission, 'Decision on the State aid C 33/08 (ex N 732/07) to Volvo Aero Corporation for R & D, which Sweden intends to implement' (2009) OJ L 30.

However, it is important to mention, that the CJEU has demonstrated with its recent case law,[668] that a peculiarity of this criterion could be seen in the EEAG, for what concerns aid for renewable energy sources. The "start of works" could even be considered as a condition for a beneficiary to be granted with aid, but always within the limit of a specific interpretation given by the Commission.

We also noticed throughout this work, that when it comes to the environment safeguard, a stretch of the rigid mechanism to scrutinise State aid occurs, invoking peculiar interpretations to make sure that Member States' support, enhancing environmental conditions, could easily be deployed. It is evident that the more broadly this concept will be interpreted, the more restrictive it will be to recognise the existence of an incentive effect and, consequently, more difficult to balance any undue effect on competition inherent in the aid. According to this, the Guidelines on State aid for the Environment allow the grant of aid for even installations that started before 1 January 2017, which had at least received a confirmation of the support before that date.[669] Therefore, the beneficiaries that want to be assisted with support shall all demonstrate this condition. This will ensure them to be considered falling within the meaning of "existing producers", whose request for aid had already been accepted by the competent national authority by the date of 31 December 2016.

The legal justification of this requirement was interpreted by the Commission as an expression of the principle of "legitimate expectation",[670] in the sense that, the energy producers who have already met the conditions to to request aid expect to fall within the eligibility criteria for the support. This concept must be borne in mind because it will be of extreme importance for the case we are going to analyse, since it will enable the Court to draw important conclusions on the matter.

In this case an undertaking could start even before the approval of aid but solely if it had previously applied for it. However, of relevant importance was the certainties given by the authorities to prove that the project would not have been deployed without aid.

[668] Est Wind Power v AS Elering (n 563).

[669] Recital 49 and footnote 66, EEAG.

[670] Commission, 'Decision on State Aid SA.47354 (2017/NN) – Estonia Amendments to Estonian RES and CHP support scheme' C(2017) 8456 final.

Having established these conditions, the problem lies in assessing *who* can be considered an "existing producer" and *what* type of actions can be considered enough to be considered covered in the definition of "start of works".

4.1 The factual background: between the EEAG and the Estonian law

These questions were addressed to the CJEU in the abovementioned preliminary ruling by an Estonian administrative court[671] concerning the interpretation of a specific part of the EEAG Guidelines,[672] specifically the concept of the "start of work" in paragraph 19(44) and footnote 66.[673] The case from which the preliminary question arose regarded the litigation between Est Wind power Osaühing (EPW)**,** an undertaking incorporated under Estonian law, and Elering AS, a transmission system operator. In particular the latter, in response to the request for aid from EWP, denied its compliance with the definition of "existing producer" within the date of 31 December 2016, as enshrined in the requirements of the national law for the deployment of aid.[674]

EWP was requesting support for the installation of a wind farm of 28 turbines that, on the ground of the EEAG, would have fallen within the concept of aid for the support for electricity produced from renewable sources. However, allowing EWP to benefit the grants for the project was strictly conditioned to the status of the related investment project, that needed to correspond to the meaning of "start of works" for the incentive effect requested by the referred Guidelines, to which also the national legislation was referring.

From the facts exposed we know that already in 2004 EWP had stipulated a contract with Elering AS with the aim of installing the wind farm. Later in 2008, it started

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[671] *Tallinna Halduskohus* (Administrative Court of Tallin).
[672] See n 665.
[673] Para 19(44) of the 2014 Guidelines contains the following definition:
«"start of works" means either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works. For take-overs, "start of works" means the moment of acquiring the assets directly linked to the acquired establishment».
[674] *Elektrituruseadus* (Estonian law on the electricity market) of 11 February 2003 (RT I 2003, 25, 153), para 59.

to install wind measurement masts, and this element will be crucial for the Court to assess the condition of "start of works".

Nevertheless, it must be said that when applying for permit for the related construction in 2016, the Ministry of Defense refused, and of the same stance was also the Municipal Council. As a result, in 2020 EWP requested an assessment for the compliance of the project to Elering, to have access for aid on the basis of the national law, which enshrined the requirements to be part of an existing aid scheme[675] for electricity producers of renewable energy. As we mentioned, its negative response in 2021 was actually the origin of the dispute.

4.1.2 The two opposing views on the status of work of Est Wind Power

In fact, both of the parties had different opinions on whether the actions taken by EWP for the construction of the wind farm could be assimilated in the concepts enucleated in the Estonian law, which takes up on the text of the EEAG, respectively, "the start of construction works" or "the entering into commitment that makes the investment project irreversible". According to EWP, the installation of wind masts was already to be considered falling within the meaning of "start of construction works", and not just mere "preparatory works", considered the investment made.

Indeed, Elering recognised the irreversibility of the specific installation of wind masts, but not sufficient to state that the project would be likely to be completed, since its costs were not that significant compared to the total investment to be carried out.[676] This point, indeed, will avowedly be taken up by the Court in the end to conclude on the exclusion of EWP from the chance to request for State aid.

4.1.3 The legal basis to interpret the concept of "start of works" as enshrined in the EEAG

Thus, to interpret the broad concepts in the text of the Guidelines, the CJEU was called to rule upon the meaning of paragraph 19(44). Specifically, whether it was to be

[675] SA.47354 (2017/NN) (n 670).
[676] *Est Wind Power v AS Elering* (n 563), para 18-21.

interpreted as meaning that the concept of "start of works" covered the commencement of all construction works connected with an investment project — whatever that work may be — or only the commencement of construction work relating to the installation of the investment project, enabling the production of renewable energy.[677]

Firstly, the Court considered necessary to frame the legal space of action in order to ensure clarity for the national authority required to assess the request for aid of EWP. The CJEU indeed stressed the principle of the non-bindingness of the Guidelines on Member States, as being mandatory only on the Commission.[678] However, the same cannot be said for the decisions of the latter, which instead are compulsory on MSs. In practice, the Commission establishes imperative provisions that national governments must respect, thereby ensuring the compulsory enforcement of principles contained in a non-binding instrument like the Guidelines. The Court indeed used in its reasoning the interpretation of the Guidelines given in the 2017 Decision of the Commission on Estonian RES and CHP support scheme,[679] which expressed the aforementioned principle of "legitimate expectation". In other words, the Court clarified that, through the interpreting tool of the Commission given in the decision, the concept of "start of works" expressed in the Guidelines would have acquired a binding nature on the Member State.[680]

4.1.4 The procedure followed by the CJEU for the interpretation of the specific situation of Est Wind Power

On these terms, it is true that the Guidelines excluded from the elements relating to the concept of "start of works", the obtainment of permits as expressed in the sentence, which were considered just as conditions for "preparatory works". «Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works».[681] This part did not need a specific interpretation to be understood even though, the national court still proceeded to request

[677] This was the first out of the eight questions that were addressed to the CJEU in the preliminary ruling. It could be considered the most relevant part of the ruling in terms of our analysis; it enucleates the meaning of the concept of "start of works" since it allowed in the ruling in question to understand if the project in question could fall within its words.
[678] See Chapter I, para 4.2 The de *facto* binding nature of the State Aid Environmental Guidelines".
[679] State Aid SA.47354 (2017/NN) (n 670), paras 42-43.
[680] *Est Wind Power v AS Elering* (n 563), para 37.
[681] EEAG, para 19(44).

whether a State's authorisation was still intended as a prerequisite of the "start of works" in the Guidelines.[682] Indeed, EPW still needed to receive proper authorisation from the national authorities. At the same time the aforementioned Decision interpreted the absence of a permit as an expression of the lack of likelihood for the completion of the project, needed to prove the element of the irreversibility of the activity.[683] According to the Court, the state of development of the project necessitated an in-depth economic analysis by the national authorities to assess the prospect of achievement of the project.[684] Indeed, the assessment of mere formal aspects was not considered sufficient to prove the concept in question, needing instead a case-by-case basis observation.

It was clear with these premises that, according to the Court, paragraph 19(44) of the 2014 Guidelines had to be read in conjunction with recital 42 of the 2017 Commission's Decision. In this way, the concept of "start of works" included, on the one hand, the commencement of construction work, relating to the installation of an investment project, which enables the production of renewable energy; and, on the other hand, any other operation which, having regard to its nature and costs, brings the investment projects to such a stage of development that completion of the project is very likely.[685]

On the same line, the CJEU clarified the two concepts of the 'right to use of the land' and the 'state authorisation for constructing the project', which, for the Guidelines were not considered as elements representing "the start of works". Although, read in conjunction with the Decision, the Commission stated that having bought the land and having obtained a State's permit, on the basis of the national law provisions, were, nevertheless necessarily implied conditions for the start of works.[686] These are indeed elements which, added to the start of construction of the work, corroborate the so-called legitimate expectation towards the completion.

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[682] *Est Wind Power v AS Elering*, para 27(7): this was the seventh question of the preliminary ruling: "Must the EU rules on State aid, in particular the concept of "start of works" in paragraph 19(44) of the [2014 Guidelines], be interpreted as meaning that the existence of a right to use the land held by the energy producer and the existence of [the necessary] state authorisation for implementing the investment project are essential conditions for the start of works?".
[683] SA.47354 (2017/NN) (n 670), paras 42-43.
[684] ibid para 60.
[685] *Est Wind Power v AS Elering* (n 563), para 57.
[686] EEAG, para 19(44).

It must be considered that the operation of wind measurement masts is not considered falling in the meaning of just "preparatory works", which are considered as a previous stage of the "start of works". In theory, that operation could be covered by the concept of "start of works", since the Guidelines do not expressly mention the nature of the construction works or the commitments to make the investment irreversible or the threshold to be considered as such.[687] Nevertheless, by applying the interpretation of the Commission in combination with the Guidelines, the state of development reached by the installation of the wind measurement masts should present a specific requirement for it to fall into the definition. This requirement is represented by the significance of the operation, in terms of costs, to be compared to the whole project, such as to guarantee a sufficient chance to reach the realisation of the project.

It is true that this commitment has been set before 1 January 2017, but through the analysis reported by the TSO it is evident that the investment made for that specific activity represents only a small amount of the total costs of the investment projects.[688] The Court stated indeed, at the end, that only the start of building of wind turbines, producing renewable energy, or an irreversible commitment towards these turbines would have allowed the recognition of the same situation of the so-called "existing producer", fulfilling the requirements in the Guidelines as interpreted.[689]

To sum up, once an undertaking had proven its commitment in the development of the project in a way that indicated a high chance of completion, the Estonian government would have granted State aid pursuant to the Guidelines on the State aid for environmental protection (EEAG). The latter even provided a facilitated way to ease the procedure by allowing support by loosening up the rigidity of the concept of incentive effect with a specific meaning of the element of "start of works". It required though a status of irreversibility, which, read in combination with the concept of "legitimate expectation", expressed by the Commission, leads to give evidence of a 'state of development of the work with a high chance to be completed'.

[687] Para 48, *Est Wind Power v AS Elering* (n 563).
[688] ibid para 58.
[689] ibid para 70.

In the case in question though, the necessity of a specific national authorities' assessment of the EWP's works, the consequential absence of a necessary State's authorisation for the support requested, together with the insignificant acts put in place within the date 1 January 2017, led to exclude the existence of the condition of "start of works".

4.2 Conclusive considerations on *Est Wind Point v AS Elering*

Ultimately, it must be said that this is not the first time the Court was requested to deal with the interpretation of the EEAG Guidelines for what concerned the incentive effect *Veejaam v Espo* [690] is a valid illustration in this sense. A very surprising conclusion was enshrined in this judgment, in particular that the «Guidelines had to be interpreted as not precluding national legislation establishing renewable energy support scheme to allow an applicant for and to the obtainment of that aid even if the application was submitted after work had started on the project concerned».[691]

This undoubtedly reflects the Court's lenient attitude towards the criterion of "start of works" when it comes to the environmental protection. It almost seems as if the incentive effect is no longer required in this specific field. However, that is merely an illusion since it must still be demonstrated through other criteria anyways, like it occurred with the concept of "irreversibility" in *Est Wind Power* case. Nevertheless, it remains controversial that the EEAG permits applications for aid prior the start of works in an explicit way, while also allowing different interpretations that do not strictly demand the absence of a prior "start of work".[692]

All considered, the judgment of Est Wind Power constitutes a milestone in the field of State aid for environmental protection and energy, in so far as it establishes the starting point from which it is possible to identify the commencement of work on a project intended to benefit from State aid. This identification, as we have seen, is not merely formal, but requires an in-depth analysis to contribute to the distinction between projects that will be eligible for State aid, and those that will not.

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[690] Case C-470/20 *AS Veejaam, OÜ Espo v AS Elering* ECLI:EU:C:2022:981.
[691] ibid para 33.
[692] Phedon Nicolaides, 'Incentive Effect of State Aid': (2023) 22 European State Aid Law Quarterly 132.

5. The paradigm shift presented in the Hinkley Point C case (C-594/18 P)

In the second chapter,[693] we referred to the necessity to consider environmental protection as a requirement in the State aid regime, but more compellingly, in the compatibility assessment carried out by the Commission. Indeed, for the former we concluded that it is an actual binding requisite include for the EU when implementing its policy and activities.[694] However, for the latter, the process towards an achievement of an obligation for the Commission to take into account in its benchmarking method for compatibility — between positive and negative conditions of the aid — is still on going. At the present time, there is no enforcement for the Commission to consider the environmental protection in its assessment, as Article 107(3) TFEU does not request such a scrutiny. This does not mean, though, that the Commission is totally exempted from enforcing the Green Deal objectives in the State evaluation.[695]

This realisation was introduced for the first time in 2020 when the ruling for the case *Republic of Austria v European Commission* [696] was delivered. The CJEU had to face the matter directly, in relation to the assessment of aid approved for the construction of a nuclear power plant in UK, before the Brexit.[697]

It is true that this case represented not only a valuable precedent in terms of implementation of nuclear-based type of energy sources in the EU but more importantly served as a reminder to the European legislator to address a deficiency that could become a significant obstacle to the acceleration of the process towards climate neutrality. Another interesting contribution of this ruling is also represented in the ascertainment of

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[693] See Chapter II, para 1.1 State aid as a technical mean to reach climate goals" and para 5.2.5 Avoidance of undue negative effects on competition and trade: a focus on the element of the common *interest*".
[694] Article 191 TFEU, « the obligation of integration of the environment protection into the definition and implementation of the European Union's policy and activities». It can be considered the legal basis to guarantee the integration of Article 11 TFEU into State aid control under Article 107(3)(c), as also referred in Vasiliki Karageorgou, 'Implementation and Potential for Mainstreaming the Environmental Integration Principle in EU Law: Normative Content and Functions Also in Light of New Developments, such as the European Green Deal' (2023) 8 European Papers 159.
[695] ClientEarth, 'The Hinkley Point C Ruling Why and How the Commission Must Implement the Green Deal in State Aid Rules' (ClientEarth 2021).
<https://www.clientearth.org/media/fscj42jf/clientearth-legal-note-on-the-hinkley-point-c-ruling_provisional-version-26-03-2021.pdf> accessed 31 January 2025.
[696] Case C-594/18 P *Republic of Austria v European Commission* (n 564).
[697] Commission, 'Decision on the aid measure on State Aid SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for Support to the Hinkley Point C Nuclear Power Station' C(2014) 7142 final cor.

the relationship between the Euratom Treaty and the Treaty on the Functioning of European Union, specifically significant to give clarity in the context of State aid for nuclear energy, since there is no reference of State aid regime in the Euratom Treaty. For the purpose of emphasising these specific aspects we are going to analyse the relevant passages of the aforementioned judgment.

5.1 The factual background of the ruling: the Austrian disapproval towards aid for nuclear-based energy

For what concerns the factual background from which the issue arose, it is necessary to move to the year 2013 when the UK and Northern Ireland notified three aid measures to the Commission. This financial support would have ensured the successful creation of a new nuclear power station, named Hinckley Point C, alongside two other existing nuclear power plants, named Hinkley Point A and Hinkley Point B.

As a matter of fact, those measures respectively provided for a contract for difference between the two beneficiaries - respectively, a generation company (NNBG) and a subsidiary of EDF Energy plc - an agreement between UK's secretary of State for Energy and Climate Change and NNBG's investors, and finally a credit guarantee by the UK for the bonds issued by NNBG. The first measure aimed at guaranteeing the steadiness of electricity prices, the second one ensured compensatory payments for investors in case of a possible early shutdown of Hinkley Point C, and the last one had the purpose of securing a punctual payment of interests of debts.[698]

After initiating an investigation, the Commission granted its permission for the subventions mentioned without raising any doubts. All the measures were found to be compatible with the internal market under Article 107(3)(c) TFEU, thus the Commission issued its decision of approval. [699] It was exactly the latter to give rise to the Republic of Austria disappointment, expressed in the action brought before the General Court, seeking the annulment of the contested decision.[700] The claim that was dismissed in its entirety by the General Court on 12 July 2018, and this result subsequently led the

[698] Case C-594/18 P *Republic of Austria v European Commission* (n 564), paras 2-3.
[699] ibid.
[700] Case T-356/15 *Republic of Austria v European Commission* ECLI:EU:T:2018:439.

applicant to appeal before the CJEU, bringing the latter to pronounce the ruling of our focus on 22 September 2020. Particularly, the applicant requested the annulment of the GC's judgment and the Commission's decision, articulating its appeal in ten grounds.

For the purpose of our analysis only some grounds of appeal have been selected, the reason must be detected in terms of pertinence with the subject matter of this work but also in their minor relevance. The analysis will be referring simultaneously to the passages of both of the judgments given respectively by the GC and the CJEU. Admittedly, the aim is to expose the positions of the Republic of Austria, and the Commission analysed through both of the two Courts' point of view.

5.1.1 The promotion of nuclear energy as an objective of common interest and its related implications

The fear of the Austrian government, also supported by the Grand Dutchy of Luxembourg, was the plausible creation of a precedent for the Member States supporting nuclear energy as a relevant source to cover the electricity supply demand. From this, it stems the long-standing dispute between MS in favour of the use of nuclear power plants, for the production of electricity, and those against, where both sides claim to be acting in the interests of environmental protection. And a reflection of this is indeed in the fact that when enacting the Guidelines for State aid for Environmental protection and energy, the Commission specifically highlighted the need for a case-by-case basis assessment for nuclear support.[701]

This consideration, is indeed one of the arguments put forward by Austria to exclude the existence of an objective of common interest in the promotion of a nuclear power plant, which was instead supported by the Commission.[702] In fact, the Austrian government sustained that for it to be considered an objective of common interest it is necessary to look at the majority of the MSs' legitimate interest for this type of energy sources. Indeed, opposed to their early enthusiasm, most of the countries in the EU demonstrated subsequent scepticism.[703] The GC clarified that objectives of common

[701] Pamela M Barnes and Ian Barnes, *The Politics of Nuclear Energy in the European Union: Framing the Discourse: Actors, Positions and Dynamics* (Barbara Budrich Publishers 2018).
[702] SA.34947, para 374; Case T-356/15*Republic of Austria v European Commission*, paras 79-128.
[703] Case T-356/15 *Republic of Austria v European Commission*, para 80.

interest as considered by the Commission cannot be limited to those shared by majorities, but their analysis should be reliant, instead, on the balance stuck between the advantages and the disadvantages that the aid measures could bring to MSs and the preclusion of adverse trading conditions.[704]

On the same line, the CJEU elucidated[705] on the specific point of the objective of common interest, since the applicant considered that the GC erred in law when defining it. Assuredly, the Court remarked that the compatibility assessment requested in Article 107(3)(c) TFEU requires a positive condition of facilitation of development of certain economic activity and a negative condition of avoidance of trading conditions which could be adversely affected to an extent contrary to the common interest. Therefore, it is evident that the compatibility assessment is not conditional on an objective of common interest, which it appears to be present only on negative terms, thus not as an element to rely as a dependency, but more as a limitation. As a consequence, there is no positive obligation for the Commission to detect an objective of common interest to declare the conformity of the aid. This brought to declare as unfounded the applicant's first part of the first ground of appeal.

At the same time this specific conclusion, would also lead to state that the Commission is not bound to assert that the aid guarantees «a high level of protection and improvement of the quality of the environment» as one of the objectives of common interests of the EU,[706] but this is to be considered erroneous. And this brings us to another part of the first ground of appeal.[707]

In particular, the Austrian government raised the other issue that the GC, by not considering objectives of common interest in the compatibility test, has also avoided to take into account the principle of the protection of the environment. Actually, the Euratom Treaty does not refer to the principle of sustainability, the precautionary principle or the 'polluter pays' principle for the deployment of nuclear-based technologies. It only establishes the task of the EU to facilitate investment for the development of nuclear

[704] Ibid para 87.
[705] Case C-594/18 *P Republic of Austria v European Commission*, paras 19-20 and 26.
[706] Article 3, Treaty on European Union [2012] OJ C326/13 (TEU).
[707] Case C-594/18 P *Republic of Austria v European Commission*, paras 34-51.

energy within the Community.[708] Yet, that does not mean that there is a formal preclusion for not considering environmental protection in the policies implemented by the EU, as also enshrined in Article 194(1) TFEU.

Admittedly, the CJEU recognised that the GC wrongly rejected the argument of the Republic of Austria that the protection of the environment could preclude the edification of a nuclear power plant. Nevertheless, it must be borne in mind that the decision of the Commission responds to the objective of guaranteeing energy supply, as one of the fundamental scopes of EU policy in the energetic field,[709] as well as the principle which recognise the right of MSs to determine their own mix of energy sources of exploitation,[710] both enshrined in Article 194(2) TFEU. By these conclusions, since the option of promoting nuclear energy does not contravene with the TFEU, it cannot be stated that this objective is in contrast with EU environmental law, also covered by the TFEU. Accordingly, since the choice of nuclear energy belongs to the Member States, according to the mentioned provision of the TFEU, it follows that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty are not incompatible with each other. Consequently, State aid for the construction of a nuclear power plant is not contrary to the principles of environmental protection, precaution, sustainability and the 'polluter pays' principle.

It was in this part of the reasoning that the CJEU expressed a principle which represents a paradigm shift towards a more thorough consideration of environmental implications in the State aid regime, in fact it stated: «If [the Commission] finds an infringement of those rules [of EU law on the environment], it is obliged to declare the aid incompatible with the Internal market without any other form of examination» [711] In other words, the CJEU takes cognisance of the fact that there is an only way to actually include the environmental issues in the assessment, but it is only by reading the principle of environmental protection in terms of a violation of a provision of European law, thus in negative terms and not in the light of a positive enforcement, considered as an invasion

[708] Article 2(c), Treaty establishing the European Atomic Energy Community OJ C 327 (EURATOM).
[709] Article 194(1)(b) TFEU.
[710] ibid para 2.
[711] Case C-594/18 P *Republic of Austria v European Commission*, paras 44, 45 and para 100.

of the State aid regime. We are going to emphasise this concept further, specifically in the part concerning the proportionality of the measure.[712]

5.1.2 Clarifications on the relationship between the Euratom Treaty and the Treaty on the functioning of the European Union

Even if the GC has erred in law[713] in dismissing the Austria's argument on the consideration of the environment in the Commission's scrutiny for the aid measure in question, it is still proved that the objectives pursued by the Euratom Treaty are in line with the Treaty on the functioning of European Union. Therefore, the CJEU concluded that no conflict could be found between Euratom Treaty and EU environmental law.

This last reasoning was achievable given the clarification the CJEU gave for relationship between the Euratom Treaty and the Treaty on the functioning of the European Union. For what concerned the chance to deploy State aid for the promotion of nuclear energy by supporting the construction of a related power plant, the Republic of Austria held that the GC had wrongly deduced this scope from Article 2(c) of the Euratom Treaty provision. Indeed, the latter only provided for just 'basic installation' and the broad phrase of 'development of nuclear energy', thus without mentioning the "establishment of a new power plant". In this way, for the Republic of Austria the GC made a selective interpretation of Article 2(c), since that provision does not refer to the creation of new nuclear energy production capacity. Furthermore, the Euratom Treaty does not provide a basis for State aid in the nuclear energy field, since it does not mention any rule concerning State subventions.

The CJEU managed to justify the Commission choice, shared by the GC, by relying on a principle of the relationship between sources of law. It explained that, by being the Euratom Treaty and the TFEU of the same legal force,[714] and being the former a sectoral framework, the TFEU can compensate the missing provisions on the matter of State aid regime in the sector. As a matter of fact, the Euratom Treaty does not contain rules on State aid, hence Article 107 TFEU can apply in this area. Indeed, the TFEU has

[712] ibid para 100, (See n 724 and 725).
[713] Case T-356/15 *Republic of Austria v European Commission*, para 517.
[714] Case C-594/18 P *Republic of Austria v European Commission*, para 32.

much broader objectives and confers on the Union extensive powers in numerous areas and sectors. In this respect, the rules of the TFEU may apply in the field of nuclear energy, where the Euratom Treaty does not contain, instead, specific rules.

And to even strengthen this rationale, the CJEU referred to the point 11 of Annex II, read in conjunction with Article 2(c)of the Euratom Treaty, in which it enables the facilitation of the investment for the new installations, meaning that the creation of new nuclear energy generating capacity is still covered by the Euratom Treaty and also its financing.[715]In this way, leading to reject the argument of Austria about assumption of the selective interpretation carried out by the General Court.

5.1.3 The question on the need for an examination of the market failure

Another point of the ruling in question worth of being mentioned is the third part of second ground of appeal,[716] where it was raised the necessity by the Austrian government of examining the market failure in the compatibility assessment in order to eliminate the so-called negative externalities that the market *per se* cannot compensate.

As we previously mentioned in the second chapter of this work,[717] detecting a market failure in the assessment of the State aid is part of the scrutiny of the negative condition in the weighing process. However, Article 107(3)(c) does not make any reference of this. In fact, its identification is solely part of the Commission's practice. Exactly for this reason, the choice of carrying out such an examination is only on the Commission which, depending on the specific situation, may repute necessary to establish the necessity to detect it to corroborate arguments for its compatibility with the Internal market. Yet this does not directly connote the dependency of the compatibility assessment on the existence of a market failure.

[715] ibid para 33.
[716] ibid paras 66-68.
[717] See Chapter II para 5.2.1 Necessity of a State intervention: the negative and positive externalities".

5.1.4 The three-fold examination of proportionality: a focus on the environmental implication

Last but not least ground of appeal, which, for the purpose of our analysis is considered of relevant importance is the one concerning the issue raised in regard of the *proportionality* of the measure on three different sides. To explain in easy terms their analysis, we are going to refer to them with three simple concepts.

The first one is about proportionality of the measure in relation to the objectives of the measure aid at issue, which for the applicant were considered too compressed in the analysis of the GC.[718] The second concept, instead, relates to proportionality of the measure in terms of media coverage of the precedent not taken into account, according to the Republic of Austria.[719] And lastly, the proportionality in the Commission's weighing process, which did not count in concerns of environment protection.[720]

Starting from the first one, the applicant argued that the GC restrictively focused its examination of the Commission's approach solely in consideration of the public interest objective of "creating a new nuclear energy generating capacity" instead of the extensive consideration of the "electricity needs in the UK". This specific disagreement was solved by the CJEU in the sense of interpreting the GC technique by exploring in detail the former objective of public interest pursued as a mean to implement the energy policy established in the UK.[721]

In fact, on one hand the United Kingdom was aiming at maintaining the security of supply, since the threat of compensating the gap in energy generating capacity was becoming real for the shutdown of existing carbon-based power stations. On the other hand, the government was guaranteeing the right to define its own combination of energy sources to be reliant to.[722] Therefore, the Court concluded that by giving direct application to a set of energy policy measures, the aid was actually being assessed by taking into consideration the scopes followed by the national policy, which took account of the big

[718] Case C-594/18 P *Republic of Austria v European Commission*, para 72-81.
[719] ibid paras 82-86.
[720] ibid paras 94-103.
[721] ibid para 77.
[722] Article 194(2) TFEU guarantees the chance for every Member State to set the conditions for energy resources exploitation and choose between different energy sources and the general structure of its energy supply, without the European Parliament or the Council to interfere with their decision.

picture related to electricity supplies demand — mentioned by the applicant — and not solely the need for the creation of new nuclear energy capacity.

For what concerns the second aspect raised on proportionality, the Court easily dismissed it on the ground that that the applicant based its argument on a mere speculation.[723] The latter was rooted on the fact that the Commission, by approving such a measure, was not considering its extensive impact in the future. It actually assumed that by enabling that type of aid for nuclear-based energy sources was actually creating a powerful precedent to enable other Member States to follow the same path of UK. However, the sole assessment of its distortions of competition and adverse effects on trade was the only, and sufficient, task to request to the Commission. Thus, the applicant's argument was considered unfounded.

The last concern about the proportionality of the measure was revolved around the consideration of the lack of the environmental protection in the compatibility assessment of the aid with the Internal market. This is one of the focal points we also took into consideration previously in this work,[724] namely whether there could be considered an obligation for the Commission to include the environmental protection in its final weighing stage between positive and negative conditions for the State aid conformity.

In this sense, it must be said that in the ruling under examination the CJEU made it clear that considering the negative effects on the environment as part of the compatibility assessment would be a mistake that lies in a wrong interpretation of Article 107(3)(c). It must be recalled that, integrating the environment protection in the shaping process of the EU policies is an actual duty of the European legislator.[725] Nevertheless, the State aid control requested on the basis of Article 107 TFEU is merely based on market terms. In other words, the scrutiny carried out by the Commission in the benchmarking of the positive and negative conditions of the aid measure is deemed to find on one hand, the facilitation of an economic activity, and on the other, the avoidance of undue effects on competition and on the market. Thus, the analysis deployed for both the conditions takes into account economic elements related to the market, and not to the extent of

[723] Case C-594/18 P *Republic of Austria v European Commission*, para 85.
[724] See Chapter II, para 5.2.5 Avoidance of undue negative effects on competition and trade: a focus on the element of the common *interest*".
[725] Article 194 TFEU read in combination with Article 11 TFEU.

negative effects which the measure could entail towards the implementation of the principle of protection of the environment.[726]

The only viable path for the Commission to check this contrast, could only be on the ground of an infringement of a provision EU law committed by the measure in the assessment of the negative conditions, where the specific provision is related to EU environmental law, since, as it was demonstrated, it is applicable also to the nuclear sector. For this reason, the error in law perpetrated by the GC, and assumed by the applicant, in which it disregarded to exercise a scrutiny of the proportionality of the measure to the extent that the Commission did not consider the negative impacts of the measures on the environment, is to be considered unfounded.

5.2 Rundown of the Court's findings and conclusive considerations on the future impact of Hinkley Point C

In a nutshell, in this judgment on the fundamental question whether State aid for the construction of a nuclear power plant, can be subject to approval by the Commission under Article 107(3)(c) TFEU, the CJEU clarified a number of issues of great importance for the application of State aid rules.

Firstly, it addressed the relationship between the Euratom Treaty and the Treaty on the Functioning of the European Union, for the purposes of applying State aid control to Member States' choices regarding nuclear energy. In the second place, the prerequisites for the compatibility assessment of State aid under Article 107(3)(c) TFEU, indicating that the verification of the pursuit of an objective of common European interest and the existence of a market failure are not necessary conditions for a positive assessment by the Commission. Furthermore, it also clarified the more general issue of the relationship between State aid regime and the European environmental rules and principles. Therefore, the Commission was not mistaken in finding that the measures in question enabled NNBG to engage in the construction of Hinkley Point C and that, without them, the creation of new nuclear power generation capacity could not have taken place. In the end, the Court found that all those measures were capable of facilitating the development of an economic

[726] Case C-594/18 P *Republic of Austria v European Commission*, para 99.

activity and did not adversely affect trading conditions to an extent contrary to the common interest.

The Hinkley Point C ruling represents a paradigm shift for its uniqueness, in terms of new awarenesses that the CJEU formulated. In the first place, the ruling opens the doors to view that the aid does not have to respond to a common objective of European interest to be deemed as compatible with the Internal market. The implications of the nuclear sector for sure helped to consolidate this new perception, since the MSs' opinions on its exploitation in the energy market seem to be widely divided, and surely not representative of univocal interest. Even though, the Court was firm in departing from the assumption that a common interest is to be found in the concept of a shared view by majorities on specific topics. The aid does not have pursue a European common interest objective to be considered compatible, as long as it does not contravene principles enshrined in the Treaties, the compatibility of the aid is not considered under threat. Thus, even if Member States demonstrate the pursue of a "well defined objective of common interest" this does not necessarily mean compatibility with the Internal market, as the last word is always left to the Commission, which still enjoys a wide margin of power when assessing it.[727] The problem is then when broader policy objectives, such as the ones protecting the environment, come into play, which indeed requires a more thorough analysis that does not leave space for mere opinions. [728]

And it is exactly in the balancing of negative and positive conditions test, carried out by the Commission, that such considerations might have resonance, since Article 107(3)(c) regime leaves no margin for them. In fact, the Court sent a specific message by stating that «If [the Commission] finds an infringement of those rules [of EU law on the environment], it is obliged to declare the aid incompatible with the Internal market without any other form of examination». Therefore, for the first time the CJEU displayed its conscious realisation that there is an actual obligation for the Commission to

[727] Suzanne Kingstone, 'State Aid and the European Green Deal: The Implications of Case C-594/18 P Austria v Commission (Hinkley Point C) ' (2021) No. 6/2021 University College Dublin UCD Working Papers in Law, Criminology & Socio-Legal Studies.
[728] Leigh Hancher, 'Energy & State Aid: An Overview of EU and National Case Law' [2023] Concurrences Antitrust Publications & Events e-Competitions Antitrust Case Laws e-Bulletin <https://www.concurrences.com/en/bulletin/special-issues/energy-state-aid/energy-state-aid-an-overview-of-eu-and-national-case-law> accessed 31 January 2025.

encompass environmental protection in the State aid regime, but only in terms of violation of EU law.

This judgment surely helped to shape the current framework for State aid involving energy and environmental protection and give legitimate basis for future changes, especially for clearance for what concerns the Commission's compatibility assessment. Indeed, the only current way for the Commission to consider the environmental protection implications would be reading environmental concerns in market terms, as a form of "economisation" of the policy objectives, translating them into market-based scopes.[729]

As we saw,[730] the European legislator did not stand by inactively to this warning from the Court. Indeed, it put in action the process for an amendment of Article 108(1) TFEU that would enable to positively include as an essential part in the Commission's compatibility scrutiny, the betterment of the environment, as a policy objective.[731]

6. The CJEU case law and possible future perspectives on EU State aid for environmental protection and energy

The selection of the case law just analysed had the purpose to not only highlight the most recent steps put forward by the European judge, but also to give evidence of the complexness of the lapels that a minimum non-compliant aspect of an aid scheme could bring out.

We saw indeed, the intricacy that could entail the assessment of the public nature of a surcharge, a feed-in tariff, imposed through a national legislation,[732] and the significant difference that can make the proof of the exclusion of a single element constituting State aid. Another impactful aspect was seen in the power of preliminary

[729] Kingstone, (n 727).
[730] See Chapter II, para 5.2.5 Avoidance of undue negative effects on competition and trade: a focus on the element of the common *interest*".
[731] Giuseppe Fransoni and Daniele Gallo, 'The European Parliament's Proposed Reform of Article 108(1): A Leap in the Dark?' (2024) 3 European State Aid Law Quarterly. See also Irene Agnolucci, 'Quo Vadis Aiuti Di Stato: Un'analisi Del Regime Giuridico Alla Luce Dei Quadri Temporanei E Delle Proposte Di Modifica' (2024) 3/2024 Quaderni AISDUE <https://www.aisdue.eu/irene-agnolucci-quo-vadis-aiuti-di-stato-unanalisi-del-regime-giuridico-alla-luce-dei-quadri-temporanei-e-delle-proposte-di-modifica/> accessed 1 February 2025.
[732] *Federal Republic of Germany v European Commission* (n 560).

rulings where the judge's extensive power has the ability to establish new logic to assess the existence of a justified selectivity of aid.[733] Furthermore, the substantial consequences arising from the different interpretation of the wording of an established policy, leading to deny a major investment on renewables, solely based on a proposed different reading of a phrase.[734]And finally, the impressive power of the Court to shape the future of State aid regime for the environment protection and energy by extending the interpretation of Article 107(3)(c) to also ensure the consideration of non-market based elements in the assessment of aid.[735]

The assessment that the CJEU has completed in the different cases analysed proposes a perception on relatively new elements such as feed-in tariffs and green certificates, thus it must be considered that no previous comparable jurisprudence on their nature can be taken into account. However, on the analysed concept of State resources we have instead a wide range of similar illustrations.[736] From this previous case law it is possible to state that the Court departed on a certain extent from it, mainly relying on the fact that the intermediary body in question managing resources presented slightly different characteristics. In rulings such as *Essent* or the *Iride* case[737] the Court gives instead a wide interpretation of a State intervention thus enabling the specific element assessed to be included in the definition of State resources. Differently, in the case law examined like in *Germany v Commission* or even *ARERA v Fallimento Esperia* this criterion is interpreted in a very narrow manner such as to precluding the existence of State intervention. By doing so the Court also detached from the Commission established practice, in particular for the case concerning green certificates since on the concept of "state resources" the CJEU totally disregarded the Commission's view on the matter, previously established in the analysis of a Belgian scheme concerning green certificates. Although while for the case of *Germany v Commission* the absence of public intervention led the CJEU to totally exclude State aid, in *ARERA v Fallimento Esperia* it brough the Court to

[733] *Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia SpA, Gestore dei Servizi Energetici S.p.A. – GSE* (n 559).
[734] *Est Wind Power v AS Elering* (n 563).
[735] *Republic of Austria v European Commission* (n 564).
[736] See n 583.
[737] Case T-25/07 *Iride S.p.A. and Iride Energia S.p.A. v Commission* ECLI:EU:T:2009:33.

focus thoroughly on its distortive effects, which remains a positive approach overall, still reliant on the fundamental principle to avoid any undue distortions on the market.

All considered, we can see from this specific case law that the CJEU appears to be more flexible and permissive, but always to a certain degree, compared to its past approach. At the same time, it seems to also take the distance from the Commission's approach, as it tends to extensively interpret State aid criteria and to throw in the definition of State aid many more measures.

Furthermore, apart from one previous case[738] on the concept of "start of work", the Court never really dealt with this aspect before, which only presented ambiguity from the enactment of the EEAG, since it reported a derogative provision in terms of the incentive effect. It can be said that the CJEU in the specific case of *Est Wind Power*, remained consistent with the previous delivered judgment, namely ensuring a lenient interpretation that would not hinder the deployment of the aid. However, we have to consider that this previous case (*Veejaam v Espo*) was delivered just the preceding year, thus it is still covered by the concerned timeline of our analysis (2019-2024). In this case the Court seems to also conform to the Commission's point of view by relying to its principle of "legitimate expectation" on this matter, and by doing so it has also abided to the guidelines' provisions for the specific element of the "incentive effect".

Overall, as we have previously noted, and as we also tried to expose from the different analysis of the case law, the CJEU and the Commission try to balance their role in the State aid regime. An alignment of their actions is seen at times,[739] but it is also necessary to put emphasis on the fact that their attitudes can also be oriented in two different directions.

One thing is for certain, both of them need to rely on the fundamental principles enshrined in the European Treaties. For the Commission, another relevant limitation is represented by the mentioned Guidelines on State aid for environmental protection and energy which, as was also pointed out by the Court in *Est Wind Power*, which represents a binding instrument to refer to when it interprets State aid criteria. We have to consider that the Commission has been granted the compelling role of

[738] AS Veejaam, OÜ Espo v AS Elering (690).
[739] Est Wind Power v AS Elering (n 563).

"Guardian of the Treaties", thus we can expect the Commission to interpret the definition of State aid in a broad way in order to ensure the preservation of competition and trade from undue distortions, fundamental principles of the TFEU. This is because with an expansive view of what for instance means "state resources", the scheme can already be targeted as State aid and can be exposed to a compatibility assessment. Opposingly, to refer to what stated previously, if the Court interprets narrowly the concept of State intervention it goes without saying that it will be difficult to detect State aid and scrutinise it. This sums up what occurred in the German case in regard to the so-called EEG-surcharge.

It is possible to conclude that in the case law under our analysis it is evident the attitude of the CJEU in applying a methodology which tends to restrict the meaning given to the single criterion related to the definition of State aid. In this way it prevents a possible detection of State aid and avoids the possibility to prohibit it. However, this approach can have its positive sides. Indeed, if a measure does not seem to clearly fall in the State aid definition but it brings an evident distortion on the market, the Court will mostly focus on the analysis of this aspect, and eventually determine its prohibited nature based on Article 107 TFEU.

The Commission instead seems to be firm in using an expansive interpreting tool, in the sense of reading State aid criteria in a broad way. This has the effect of making a variety notified of measures fall directly under its scrutiny of measures with the main scope of assessing their compatibility.

We have overly emphasised throughout this work the need to compromise the need to balance the market conditions as well as the criteria for a competitive system, among market operators with the need to foster the acceleration of the transition to a net-zero economy. Indeed, in this last chapter we put an emphasis on the need to attribute a certain weight on the environmental protection principles,[740] especially in the assessment of the conditions of the aid by the Commission. However, until now

[740] Precautionary principle in Commission, 'Communication on the precautionary principle' COM(2000)0001 final; the "polluter pays' principle" in European Parliament and Council, 'Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage'(2004) OJ L 143.

this awareness has taken long time to be established, since it was mainly on the CJEU's hands, not only to take cognisance of this need, but mostly to confirm it.

As we said, the Commission is most of the times reluctant to open for the approval of State aid, since the need to keep an eye to the competitive equilibrium established in the Internal market is mostly its responsibility. Therefore, it cannot afford any oversights, because Member States are always ready to profit from them. For instance, with the reasoning of implementing environmentally driven schemes they could justify wide imbalances in the market of a certain good, such as electricity in *ARERA v Fallimento Esperia*. Indeed, the expanding the chances of approval of State aid in times of emergencies, such as the climate one, can be a double-edged sword, and this has been clearly depicted in the efforts of the Commission to hinder any possible harm to the competitive market in its relevant decisions.

Nevertheless, the principle conveyed in the *Hinkley Point C* judgment will not be overlooked, but it will be the starting warning for the Commission to adapt to new awarenesses also in the State aid control, especially in the context of its discretionary powers in the State aid compatibility test.

CONCLUSIONS

The main idea underlying all the considerations drawn in this work is reflected in the need to strike a balance between the two concepts of competitiveness and sustainability. The European Union through the compelling role of the European Commission oversees the conformed deployment of domestic measures of State aid, making sure that the scope for which the aid is unfolded does not interfere with the competitive balance constructed in the EU Internal market.

With the aim of wrapping up the findings of this dissertation, we have seen that in order to ensure an equilibrium between the two aforementioned interests the Commission exercises a reasoned integration of the environmental concerns in the assessment of the distortive effects that an aid measure can exert on competition and trade.

It may be useless to say but the fundamental principle enshrined in Article 107(1) TFEU, that holds the entire State aid regime, is built in a negative form, exactly to emphasise that in general terms State aid is actually prohibited in the EU. Notwithstanding, in this work we emphasised the opposing attitude of approving aid schemes enabling the development of economic activities which enhance a transition towards the exploitation of renewables or that have lower environmental impact in general. Indeed, we have seen that the field of environmental aid paves its way in a derogative area, which does not refer to a general "deregulation", but it pertains to a rigid and stringent framework to abide to.

Therefore, in this sector the Commission's action is not directly oriented in totally banning national aid measures, but it provides Member States a chance to deploy them, only if certain conditions are satisfied. Conditions that will be scrutinised only in the subsequent stage of compatibility assessment. For this reason, it is important to understand that the pivotal part of the Commission's controlling action on State aid for the environment and energy is to be detected in the measurement of the negative impact that the subvention induces on the market as well as on competition. From the Commission's side it actually becomes a matter of both limiting and weighing the extent to which the aid effects are distortive, more than identifying the existence of State aid.

This was indeed displayed by the Commission's decisions on State aid and case law analysed throughout this work, where the efforts were indeed all aimed at balancing the two conditions brought by the aid in question. Specifically, the positive effect of facilitating the development of certain economic activities or of certain economic areas, and the negative effect of not adversely affecting trading conditions to an extent contrary to the common interest

This means that the EU has arrived at the conclusion that to enable a shift of the market operators' behaviour towards the Net-zero economy objectives, the need to foster the financing for the utilisation of renewables in the industries must not be hampered. And this comes with the need of setting aside the general prohibiting principle to, instead, give space to derogations. However, the main responsibility to bear becomes ensuring that the national aid placement does not leave the Internal market at stake in a way that could hinder the chance for all interested undertakings to equally participate to the market in competitive terms.

In this context the environment protection only represents a common denominator to consider in the assessment and cannot really be considered as an exclusive criterion of the State aid control. It was explicitly shown that sustainability only configures a background where market-oriented elements and considerations are evaluated by the Commission, such as the incentive effect, necessity, proportionality, appropriateness, all criteria that are read in an economical key.

Nevertheless, especially in the case law analysed in the third chapter, it was also displayed that the CJEU as well as the Commission are capable of stretching the stiff framework imposed, in light of environmental implications. This occurs from the interpretations of State aid elements both developed in the identification and the compatibility assessment stages. Indeed, when Member States manage to demonstrate their conformity to the Guidelines on State aid for environmental protection and energy there may occur an oversight dictated by the respect of rules mainly deemed at focusing on the ecological side than on the market one. Yet, the Commission can always offset this oversight with the consideration of the negative conditions presented by the aid scheme in question in the compatibility assessment.

It must be borne in mind, though, that it is not possible to predict how the Commission's action in this context will be oriented since, as it was many times stressed in this dissertation,[741] the step of the compatibility assessment with the Internal market still represents a "sealed vault". The lack of a regulative framework of the weighing process of positive and negative conditions of the aid exposes uncertainty and unpredictability on the Commission's side. The relevance of this regulative flaw is represented in the ambiguity in which Member States are left, wondering whether the structure of their implemented measures could be considered compatible with the EU State aid regime, exposing them to more chances of investigations or penalties. This also brings to remind that the Commission is not directly bound to consider environmental protection in the compatibility assessment, as it does not represent a market-based element of the weighing process.

But, as it was highlighted especially in chapter 3 for what concerns Hinkley point C case,[742] the CJEU has recently acknowledged this defect in the system, requesting the Commission to include in its assessment also environmental concerns. Indeed, a proposed amendment from the European Parliament, concerning the wording modification of Article 108(1), is already intervening towards this matter. The latter is supposed to be the basis to positively integrate also objectives of EU common interests – thus, also environmental protection – in the Commission's compatibility assessment, hence not as a mere negative condition as enshrined in the current wording of Article 107(3)(c) TFEU: «where such aid does not adversely affect trading conditions to an extent contrary to the common interest».

However, the lack of predictability on this matter is anyway being compensated by the many modifications underlined in the CEEAG guidelines and in the new amended GBER, emphasised in the first chapter.[743] They brought much more transparency and foreseeability on the table, given the supplementary types of environmental subventions

[741] See Chapter II, para 5.2.6 The last step of the compatibility assessment: the loophole stemming from the process of weighing positive and negative conditions".
[742] See Chapter III, para 5.2 Rundown of the Court's findings and conclusive considerations on the future impact of Hinkley Point C".
[743] See Chapter I, para 3. The GBER amendment after the enactment of the CEEAG 2022"; and para 4. CEEAG: a comparison with the previous EEAG 2014-2020".

provided, such as for instance the new aid for closure of lignite-fired power plants, not present in the previous EEAG version.

These explicit provisions, concerning new kinds of environmental aid, are supposed to specifically guide Member States through the legal complexities in determining the aid schemes characteristics in conformity with the legal State aid framework. Moreover, with the CEEAG now for every type of aid, it is provided a guidance in how the elements of incentive effect, proportionality, appropriateness, necessity and the avoidance of the undue effects on competition and trade, are to be interpreted, considering also the scope of the aid deployed. This aspect for sure determined a step towards more predictability.

Furthermore, in this context, an element of cohesion for MSs will be the *simplification* of the State aid legal framework, as it was mentioned in the recent State aid scoreboard of 2020 in the first chapter.[744] This simplifying intervention has proved to be particularly efficient, as it brought to double the notified aid schemes in 2019 to the Commission falling within the GBER's provisions, compared to the year of its enactment in 2014. This was the result of the amendment the GBER underwent, which by simplifying the wording of its legal text or its structure, enabled to provide MSs an effective tool for the implementation of State aid, raising more its demand. However, it should be pointed out that using simple terms to clarify the meaning of a legal document do not refer to the process of deregulation, but simply to grant a feasible way that involves Member States in the fostering of green investments.

Having framed the intricacies on the matter of State aid for environmental protection and energy, it is essential to reflect on the future of this field, as the climate urgencies are more incumbent than ever.

The complicated challenges that the Commission is forced to face when requested to scrutinise aid brings to assume that in the forthcoming years future reforms will be directed at clarifying the content of the fundamental elements of State aid, mentioned in Article 107(1) TFEU. In particular, from the case law assessed we can conclude that the elements of selectivity, or the meaning of State resources will have to be elucidated in

[744] See Chapter I, para 2.1 The so-called fitness *check* as a powerful evaluation tool".

conjunction with environmental implications, in a way that the Commission will not hesitate to deliver a verdict on their interpretation. While a case-by-case approach will still continue to be necessary, the establishment of specific rules on this matter would be beneficial in reducing the existing confusion at a national level.

It was displayed in this work that, from restrictive interpretations of the fundamental criteria constituting State aid, it follows less chance of the EU in detecting State aid, and more possibility of allocating subventions is assumed to increase. Opposingly, broader and market-based interpretations preserve from undue distortions on the market and on competition.

Nevertheless, more than on the State aid identification phase, this work emphasises the relevance of the compatibility assessment for what concerns State aid for environmental protection and energy. However, what occurs in the benchmarking process of the compatibility assessment of the Commission is still ambiguous, and this was emphasised by scholars but also in the jurisprudence, and a reform seems to be necessitated in the field. Therefore, it is expected that the European legislator will intervene with a possible modification focused on Article 107(3)(c) TFEU.

A plausible amendment that could guarantee feasibility in terms of predictability for Member States could be represented by establishing in advance a certain weight to allocate, also in numerical terms, to the positive and negative conditions of aid for the compatibility assessment. This would guarantee a common understanding on the actual *value* that the Commission attributes to the single elements forming parts of the aforementioned conditions to be benchmarked. Especially in this field, we have seen how important it is to determine to what degree a distortive effect on trade of an aid measure is extended, since the magnitude of the distortion will be the crucial element defining its prohibition. Therefore, future efforts by the European Commission should aim at establishing a more standardised approach in the compatibility assessment to ensure more transparency and predictability of its next moves.

Another point to be raised in terms of future perspective is actually a necessary consequence of the development of industrial technologies. Indeed, it would be beneficial for the acceleration for the clean transition for the EU to implement new instruments, like new guidelines or updating the General Block Exemption Regulation, once again to

ensure that subsidies will foster the application of innovative ways to ensure that renewable energetic solutions will find their place in a market that is financially unable to deploy them. [745]

In reality we already have information on one important step that the new Commission is about to make that will be of extreme importance in relation to environmental aid. It is indeed expected the implementation of the so-called *Clean Industrial Deal* in the first semester of 2025. From the Commission decision[746] on the matter of 7 January 2025 we can already acknowledge the undoubted endeavour towards an acceleration of the EU competitive transition to a net-zero economy in respect of the 2050 target. The Commission is planning to set up a Project Group of Commissioners with different portfolios, which will be managing the path to speed up the decarbonisation of EU industry while strengthening its competitiveness.[747] The focus will be oriented in ensuring strategic investment and taxation to address the need to assimilate clean technologies in the European industry. Therefore, the balance between competitiveness and sustainability remains the backbone of these innovative framework.

From this it can be assumed that the path the European Union is taking is actually the one of continuity, which is also reflected in the maintenance of the same presidency of the previous mandate. It is indeed emphasised the need to maintain reliance on the European Green Deal and its targets, however with the need to implement a new State aid framework on the matter.[748] Thus, we still can expect for sure a strengthening of the State aid rules in terms of regulating the financing of sectors which have been subjected to debatable arguments on the actual impact on the environment, such as hydrogen. As a matter of fact, it is expected that the new Clean Industrial Deal will allow «governments to pay up to 50% of investments in equipment or machinery using hydrogen and 35% for equipment to produce renewable energy».[749]

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[745] Xhoi Zajmi, 'Revolutionary "Clean Industrial Deal" Needed for a Sustainable and Competitive Europe' (Euractiv 8 January 2025) <https://www.euractiv.com/section/eet/news/revolutionary-clean-industrial-deal-needed-for-a-sustainable-and-competitive-europe/> accessed 18 February 2025.
[746] Decision of the President of the European Commission of 7 January 2025 on the establishment of a Commissioners' Project Group on the Clean Industrial Deal P(2025) 2.
[747] ibid Article 1(2).
[748] ibid.
[749] Aude van Den Hove, 'Looser State Aid Rules Aim to Stoke Clean Tech Demand' (POLITICO 17 February 2025) <https://www.politico.eu/article/clean-industrial-deal-state-aid-rules-stoke-demand-private-investment-cleantech-manufacturing-teresa-ribera/> accessed 18 February 2025.

On the eve of the release of the Clean Industrial Deal it is still important to acknowledge that the field of State aid for the environmental protection and energy is undoubtedly interlaced with political implications, thus all these evaluations on future perspectives on this field still contain a certain degree of uncertainty.

It is indisputable, though, that the European Union remains resilient in its efforts to meet the established environmental targets. But more importantly, it pursues these objectives while decisively reinforcing competitiveness.

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BIBLIOGRAPHY

BOOKS, MONOGRAPHS, COLLECTIVE WORKS

BACON K QC, *European Union Law of State Aid* (Oxford University Press 2017)

BARNES PM AND BARNES I, *The Politics of Nuclear Energy in the European Union: Framing the Discourse: Actors, Positions and Dynamics* (Barbara Budrich Publishers 2018)

BUONFRATE A AND URICCHIO A, *Trattato Breve Di Diritto Dello Sviluppo Sostenibile* (Milano: Wolters Kluwer 2023)

CASTILLO F AND GIPPINI FOURNIER E, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar Publishing 2017)

CHALMERS D, DAVIES G AND MONTI G, *European Union Law* (Cambridge University Press 2019)

CRAIG P AND DE BÚRCA G, *EU Law: Text, Cases, and Materials* (7th edn., Oxford University Press 2020)

DE CECCO F, *State Aid and the European Economic Constitution* (Bloomsbury Publishing 2012)

DELBEKE J, *Delivering a Climate Neutral Europe* (Taylor & Francis 2024)

FERRI D, *State Aid Law in a Social Market Economy* (Routledge 2019)

GALLO D, *Public Services and EU Competition Law. The Social Market Economy in Action* (1st edn., Giappichelli Editore 2021)

HANCHER L, DE HAUTECLOCQUE A AND SALERNO F M, *State Aid and the Energy Sector* (1st edn., Oxford ; Hart Publishing, an imprint of Bloomsbury Publishing 2020)

HANCHER L, OTTERVANGER T AND SLOT PJ, *EU State Aids* (6th edn., Sweet & Maxwell 2021)

JORGE J, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond* (Oxford University Press 2015)

KINGSTON S, HEYVAERT V AND ČAVOŠKI A, *European Environmental Law - Techniques of Regulating the Environment* (Cambridge University Press 2017)

LOVDAHL GORMSEN L, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019)

NICOLAIDES P, *State Aid Uncovered - Critical Analysis of Developments in State Aid 2015* (Berlin: The Legal Publisher Lexxion 2016)

QUIGLEY C, *European State Aid Law and Policy (and UK Subsidy Control)* (Bloomsbury Publishing 2022)

SANTA MARIA A., *Competition and State Aid: An Analysis of the EU Practice* (Kluwer Law International 2015)

SCHUTZE R, *European Union Law.* (Oxford Univ Press 2021)

SPARKS DL, SINGH B AND SIEBECKER MG, *Environmental Soil Chemistry* (Academic Press 2023)

VALAGUZZA S AND MARK ALAN HUGHES, *Interdisciplinary Approaches to Climate Change for Sustainable Growth* (Springer Nature 2022)

VIÑUALES J E, *The International Law of Energy* (Cambridge University Press 2022)

WERNER P AND VEROUDEN V, *EU State Aid Control: Law and Economics* (Wolters Kluwer, Alphen Aan Den Rijn 2017)

ARTICLES AND ESSAYS

AGNOLUCCI I, 'Quo Vadis Aiuti Di Stato: Un'analisi del Regime Giuridico alla luce dei Quadri Temporanei e delle proposte di modifica', (2024) 3/2024, Quaderni AISDUE

BALDOWSKI M, ‘Controversies Concerning the Interpretation of State Resources as a Prerequisite of State Aid: An Illustration Using the Example of Polish Green Certificates and the Auction System’, (2017) 7 Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza 269

BANET C, ‘Legal Status and Legal Effects of the Commission’s State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020)’ (2020) 19 European State Aid Law Quarterly 172

CATTI DE GASPERI G, ‘Making State Aid Control “Greener”: The EU Emissions Trading System and Its Compatibility with Article 107 TFEU’ (2010) 9 European State Aid Law Quarterly 785

CHITI E, ‘Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process’ (2022) 59 Common Market Law Review 19

DALY P, ‘How Binding Are Binding Guidelines? An Analytical Framework’ (2023) 66 Wiley Periodicals LLC 211

DE COCK W, ‘Economics of State Aid Control: Where Law and Economics Meet’ (2018) 17 European State Aid Law Quarterly 565

DE JUAN MM, ‘Monitoring of State Aid: From Ex Ante to Ex Post Control’ (2018) 17(4) European State Aid Law Quarterly 483

DEIBEROVA K AND NYSSENS H, ‘The New General Block Exemption Regulation (GBER): What Changed?’ (2009) 8 European State Aid Law Quarterly 12

DIMITRIOS-SOTIRIOS KOURKOUMPAS AND OTHERS, ‘A Review of Key Environmental and Energy Performance Indicators for the Case of Renewable Energy Systems When Integrated with Storage Solutions’ (2018) 231 Applied Energy 380.

FRANSONI G AND GALLO D, ‘The European Parliament’s Proposed Reform of Article 108(1): A Leap in the Dark?’ (2024) 3 European State Aid Law Quarterly

FRIEDERISZICK H, GTOWICKA E, GRATZ L, LAINENBIRGERAND S, ROSENFELD A, 'Ex Post State Aid Evaluation in Environmental Aid' (2018) 17 European State Aid Law Quarterly 509

GREVE T AND ROCHA M, 'Policy and Theoretical Implications of the Zero-Subsidy Bids in the German Offshore Wind Tenders' (2020) 41 The Energy Journal

GUPTA A, 'EU State Aid Rules and the European Green Deal: Will Their Stars Align?' (2023) 48 Air and Space Law

HANCHER L AND DE HAUTECLOCQUE A, 'Strategic Autonomy, REPowerEU and the Internal Energy Market: Untying the Gordian Knot' (2024) 61 Common Market Law Review

HARRIS ME, 'The Evolving Functions of the Commission's Communications in Environmental Matters' (2023) 2 Il Diritto dell'Unione Europea 195

HEIDHUES P AND NITSCHE R, 'Comments on State Aid Reform – Some Implications of an Effectsbased Approach' (2006) 5 European State Aid Law Quarterly 12

ILIOPOULOS T, 'Dilemmas on the Way to a New Renewable Energy Directive' (2018) 27 European Energy and Environmental Law Review 210

KARAGEORGOU V, 'Implementation and Potential for Mainstreaming the Environmental Integration Principle in EU Law: Normative Content and Functions Also in Light of New Developments, such as the European Green Deal' (2023) 8 European Papers

KOURKOUMPAS, DIMITRIOS-SOTIRIOS, BENEKOS G, NIKOLOPOULOS N AND OTHERS, 'A Review of Key Environmental and Energy Performance Indicators for the Case of Renewable Energy Systems When Integrated with Storage Solutions' (2018) Elsevier 231 Applied Energy 380

KOZLOVA M AND OVERLAND I, 'Combining Capacity Mechanisms and Renewable Energy Support: A Review of the International Experience' (2021) Elsevier 155 Renewable and Sustainable Energy Reviews 111878

KOZLOVA M, HUHTA K AND LOHRMANN A, 'The Interface between Support Schemes for Renewable Energy and Security of Supply: Reviewing Capacity Mechanisms and Support Schemes for Renewable Energy in Europe' (2023) Elsevier 181 Energy Policy 113707

LÜNENBÜRGER S, HOLTMANN C AND DELARUE J, 'Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State Aid' (2020) 19 European State Aid Law Quarterly 418

LYPALO D, 'Bend It until It Breaks: Flexibility of Temporary Crisis Framework in the Context of the Russian Invasion of Ukraine' (2023) Eu Law Live - Competition Corner (eulawlive.com)

MA H AND OTHERS, 'Cogeneration Transition for Energy System Decarbonization: From Basic to Flexible and Complementary Multi-Energy Sources' (2023) 187 Renewable and Sustainable Energy Reviews

MACZKOVICS C, 'How Flexible Should State Aid Control Be in Times of Crisis?' (2020) 19 European State Aid Law Quarterly 271

MAILLO J, 'Balancing Environmental Protection, Competitiveness and Competition: A Critical Assessment of the GBER and the EEAG' (2017) 16 European State Aid Law

MANEEJUK P, KAEWTATHIP N AND YAMAKA W, 'The Influence of the Ukraine-Russia Conflict on Renewable and Fossil Energy Price Cycles' (2024) Elsevier 129 Energy Economics

MEGARRY R, 'Administrative Quasi-Legislation' (1944) 60 Law Quarterly Review

NICOLAIDES P AND RUSU IE, 'The Concept of Selectivity: An Ever-Wider Scope' (2012) 11 European State Aid Law Quarterly 791

NICOLAIDES P, 'Incentive Effect of State Aid: Necessity & Counterfactual': (2023) 22 European State Aid Law Quarterly 132

NICOLAIDES P, ‘Must the Commission Prohibit State Aid That Harms the Environment?’ (2023) 22 European State Aid Law Quarterly 17

NICOLAIDES P, ‘Shedding Light into the “Black Box” of State Aid’: (2021) 20 European State Aid Law Quarterly 550

NICOLAIDES P, ‘The Incentive Effect of State Aid: Its Meaning, Measurement, Pitfalls and Application’ (2009) 32 World Competition 579

PENTTINEN S-L, ‘Batteries and the Low-Carbon Energy Transition: Circularity and Secondary Supply Approach Highlighted in the EU’s Policy Discourse’ (2021) 30 European Energy and Environmental Law Review 229

PEPERMANS G, ‘European Energy Market Liberalization: Experiences and Challenges’ (2018) 13 International Journal of Economic Policy Studies 3

PIERNAS LÓPEZ JJ, ‘The Transformation of EU State Aid Law … and Its Discontents’ (2023) 60 Common Market Law Review 1623

PORZEŻYŃSKA M, ‘ Green Light for a Green Aid? between Challenges and Opportunities Resulting from the European Green Deal for EU State Aid Law’ (2024) 1 CERIDAP - Rivista Interdisciplinare sul Diritto delle Amministrazioni Pubbliche 238

RAF CALLAERTS, ‘State Aid for the Production of Electricity from Renewable Energy Resources’ (2015) 24 European Environmental Law Review 17

RUBIN S AND OTHERS, ‘The Outlook for Improved Carbon Capture Technology’ (2012) 38 Progress in Energy and Combustion Science 630

RUUD VAN DRUENEN, ZWAAN P AND MASTENBROEK E, ‘Getting State Aid Approved by the European Commission: Explaining the Duration of Preliminary Investigations in the State Aid Notification Procedure’ (2021) 60 Journal of Common Market Studies 545

SCHATZ F AND ULRICH S, ‘State Aid for Environmental Protection - the Commission’s New Guidelines and the New General Block Exemption Regulation’ (2009) 6(2) Journal for European environmental & planning law 141

SIERRA JLB, ‘Finding Selectivity or the Art of Comparison Annotation on the Judgment of the Court of Justice of the European Union (First Chamber) of 8 September 2011 in Joined Cases C-78 to 80/08, Paint Graphos’ (2018) 17 European State Aid Law Quarterly 85

SIKORA A, ‘Applicability of the EU State Aid and Environmental Rules in the Nuclear Energy Sector · Case C-594/18 P Republic of Austria v Commission (“Hinkley Point”)· Annotation by Alicja Sikora’ (2020) 19 European State Aid Law Quarterly 515

TAHIR J, AHMAD R AND MARTINEZ P, ‘A Critical Review of Sustainable Refuse-Derived Fuel Production in Waste Processing Facility’ (2024) 24 Energy Conversion and Management

TERZI A, SHERWOOD M AND SINGH A, ‘European Industrial Policy for the Green and Digital Revolution’ (2023) 50 Science & public policy 842

TURPIN C, ‘Reviewed Work: Quasi-Legislation: Recent Developments in Secondary Legislation by Gabriele Ganz Review’ (1988) 47 The Cambridge Law Journal 318

VASBECK D, ‘State Aid, the Criterion of State Resources and Renewable Energy Support Mechanisms: Fresh Wind from Luxembourg in EEG 2012 European Papers’ (2019) 4 European Papers - A Journal on Law and Integration

VERSCHUUR S AND SBROLLI C, ‘The European Green Deal and State Aid’: (2020) 19 European State Aid Law Quarterly 284

VILLAR EZCURRA M, ‘EU State Aid and Energy Policies as an Instrument of Environmental Protection: Current Stage and New Trends’ (2014) 13 European state aid law quarterly 665

WERNER P AND STOICAN L, 'The NOx Case - Still Trying to Fit in a System · C-279/08 P · Annotation by Philipp Werner' (2018) 17 European State Aid Law Quarterly 101

OTHER USEFUL SOURCES

BLACK J, NIGAR HASHIMZADE AND MYLES G, *A Dictionary of Economics* (Oxford University Press 2009)

OTHER ARTICLES

DEZOBRY G AND LAFARGE S, 'Green Electricity: The Court of Justice of the European Union Rules That a National Support Scheme for the Production of Green Electricity Requiring Electricity Importers to Purchase Green Certificates Is Compatible with EU Law (Fallimento Esperia SpA; Gestore Dei Servizi Energetici SpA – GSE)' (2024) 2 Concurrences 160

HANCHER L, 'Energy & State Aid: An Overview of EU and National Case Law' (2023) Concurrences Antitrust Publications & Events e-Competitions Antitrust Case Laws e-Bulletin

KINGSTONE S, 'State Aid and the European Green Deal: The Implications of Case C-594/18 P Austria v Commission (Hinkley Point C) ' (2021) No. 6/2021 University College Dublin UCD Working Papers in Law, Criminology & Socio-Legal Studies

NICOLAIDES P, 'The EU Court of Justice Conflates Objective Justification with Policy Objective in the Context of Public Support of Green Electricity (Fallimento Esperia SpA ; Gestore Dei Servizi Energetici SpA – GSE)' (2024) Concurrences e-Competitions News Issues | Antitrust Caselaws e-Bulletin

WINTERSTEIN A AND TRANHOLM SCHWARZ B, 'Helping Combat Climate Change; New State Aid Guidelines for Environmental Protection (2008) Concurrences – Antitrust' (2008) 2 Concurrences – Antitrust Publications & events Competition Policy Newsletter 14

SPEECHES

Vestager M, 'Competition Policy Contributing to the European Green Deal' (Conference on competition policy contributing to the European Green Deal 4 February 2021) https://ec.europa.eu/newsroom/comp/items/701738

Vestager M, 'Keynote of EVP Vestager for the Concurrences Conference on the Foreign Subsidies Regulation: "Foreign Subsidies - a Piece in the Geopolitical Puzzle"' (Conference on the Foreign Subsidies Regulation 6 March 2023) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_1503 accessed 25 September 2024

von der Leyen U, 'Keynote Speech by President von Der Leyen at the DLD Nature Conference' (DLD Nature Conference 13 September 2024) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_24_4668

von der Leyen U, 'Speech by President von Der Leyen at the European Parliament Plenary on the New College of Commissioners and Its Programme' (27 November 2024) https://enlargement.ec.europa.eu/news/speech-president-von-der-leyen-european-parliament-plenary-new-college-commissioners-and-its-2024-11-27_en

von der Leyen U, 'Speech by President von Der Leyen at the Global Leaders Summit Hosted by U.S President Joe Biden on the Occasion of Earth Day' (Global Leaders Summit 22 April 2021) https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1882

OTHER STUDIES

Busch S and others, 'Economic and Financial Affairs the Development of Renewable Energy in the Electricity Market' (2023) 187 Publications Office of the European Union, 2023

ClientEarth, 'Legal Analysis on "a State Aid Framework for a Green Recovery: Mainstreaming Climate Protection in EU State Aid Law' (2020)

ClientEarth, ‘Revision of the State Aid Guidelines for Environmental Protection and Energy and Exemption Rules, “Making the EEAG and GBER Fit for Europe’s Carbon Neutrality’ (2021)

ClientEarth, ‘The Hinkley Point C Ruling Why and How the Commission Must Implement the Green Deal in State Aid Rules’ (2021)

Institute for European Environmental Policy (IEEP), ‘European Green Deal Barometer 2023’ 2023

Rim Berahab PB, Policy Brief – ‘Navigating the CBAM Transitional Period: Understanding the Latest Developments and Enhancing Preparedness’ - 29/23 July 2023

von Lüpke H and others, ‘Carbon Contracts for Difference as an Instrument for Strengthening Climate Cooperation between Industrialized and Emerging Economies’ (2022) 12 Deutsches Institut für Wirtschaftsforschung (DIW), Berlin, Weekly Report

Waliszews AW and Dufour M, ‘How to Make the Best of the Green Deal Industrial Plan Pragmatic Recommendations for Policy Makers’ (*E3G Think Tank*May 2023)

Zuidema L, ‘State Aid for Solid Biomass: The Case for Improved Scrutiny’ (2020) 13 EUI

ClientEarth, ‘Briefing on the GBER May 2023 “the General Block Exemption Regulation. A Revised State Aid Tool to Encourage the Green Transition?’ (2023)

EUROPEAN OFFICIAL STUDIES

EUROPEAN COMMISSION - Competition policy – Explanatory note accompanying the proposal for the revision of the Guidelines on State aid for environmental protection and energy 2014-2020 (2023)

EUROPEAN COMMISSION – DIRECTORATE-GENERAL FOR COMPETITION, ‘Competition Policy in Support of Europe’s Green Ambition’, Competition

policy brief 2021-01, in European Commission: Directorate-General for Competition, ‘The use of COVID-19 related state aid measures by EU Member States’, (2021) European Commission

EUROPEAN COMMISSION Tarvydas D, ‘The role of hydrogen in energy decarbonisation scenarios – JRC131299 Views on 2030 and 2050’, Publications Office of the European Union, Luxembourg, 2022

EUROPEAN COMMISSION, DG COMPETITION - Policy and Strategy - State aid case support and policy (2019) State aid scoreboard 2018

EUROPEAN COMMISSION, DG COMPETITION - Policy and Strategy - State aid case support and policy (2021) State aid scoreboard 2020

EUROPEAN COMMISSION, DG COMPETITION - POLICY AND STRATEGY - State aid case support and policy (2024) State aid scoreboard 2023

EUROPEAN COMMISSION, DG COMPETITION (UNIT 03), Fitness check of State aid rules Roadmap - Ref. Ares (2019) 727176

EUROPEAN COMMISSION, DG COMPETITION, ‘Retrospective evaluation support study on the EU Guidelines on State aid for environmental protection and energy applicable in 2014-2020 and the provisions applicable to aid for environmental protection and energy of the Commission Regulation’ (EU) 651/2014 final report

EUROPEAN COMMISSION, DG COMPETITION, ‘The Market Economy Operator Test for Risk Finance Measures: Practical guidance for Member States’ Document version: 26 January 2024

EUROPEAN COMMISSION, DG COMPETITION, State aid Policy and Strategy, State Aid Scoreboard 2018: Results, trends and observations regarding EU28 State Aid expenditure reports for 2017 (2019) COMP.A3

EUROPEAN COMMISSION, DG ENERGY - Union bioenergy sustainability report – Study to support reporting under Article 35 of Regulation (EU) 2018/1999 – Final report, Publications Office of the European Union, 2024

EUROPEAN COMMISSION, Draghi M, 'The Future of European Competitiveness, a Competitiveness Strategy for Europe' (2024)

EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS (ACER), 'Security of EU Electricity Supply 2023' (ACER October 2023)

EUROSTAT, 'Quarterly Greenhouse Gas Emissions in the EU - Statistics Explained' (*Europa.eu* February 2025)

NEWSPAPER ARTICLES

van Den Hove A, 'Looser State Aid Rules Aim to Stoke Clean Tech Demand' (*POLITICO* 17 February 2025) https://www.politico.eu/article/clean-industrial-deal-state-aid-rules-stoke-demand-private-investment-cleantech-manufacturing-teresa-ribera/

Zajmi X, 'Revolutionary "Clean Industrial Deal" Needed for a Sustainable and Competitive Europe' (*Euractiv* 8 January 2025) https://www.euractiv.com/section/eet/news/revolutionary-clean-industrial-deal-needed-for-a-sustainable-and-competitive-europe/

OFFICIAL ACTS AND LEGISLATION

EU OFFICIAL ACTS AND LEGISLATION[750]

Commission, 'Community guidelines on State aid for environmental protection' (94/C 72/03) (1994) OJ C 072

Commission, 'Community guidelines on State aid for environmental protection' (2001) OJ C 37

Commission, 'Communication 'Guidelines on State aid for environmental protection and energy 2014-2020' (2014) *OJ C 200, (EEAG)*

Commission, 'Code of Best Practices for the conduct of State aid control procedures' C/2018/4412 OJ C 253, p. 14–27

Commission, 'Communication "A Roadmap for moving to a competitive low-carbon economy in 2050"' COM (2011) 112 final

Commission, 'Communication Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' (2021) OJ C 528 final

Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Clean Energy for All European"' COM (2016) 860 final

Commission, 'Communication from the Temporary Crisis and Transition Framework (TCTF) for State Aid measures to support the economy following the aggression against Ukraine by Russia' 2023/C 101/03 OJ C 101

Commission, 'Communication from the to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

[750] Except for the Treaty on the Functioning of the European Union (TFEU), Treaty on European Union (TUE) and the Charter of Fundamental Rights of the European Union (CDFEU).

Sustainable Europe Investment Plan European Green Deal Investment Plan' COM(2020) 21 final

Commission, 'Communication on Framework for State aid for research and development and innovation' (2022) OJ C 414

Commission, 'Communication on Guidelines on State aid for climate, environmental protection and energy' (2022) OJ C 80, (CEEAG)

Commission, 'Communication on Guidelines on State aid for environmental protection and energy 2014-2020 (2014) OJ C 200 (EEAG)

Commission, 'Communication on Guidelines for State aid in the agricultural and forestry sectors and in rural areas' (2022) OJ C 485

Commission, 'Communication on Guidelines on regional State aid for 2014-2020' (2013) OJ C 209

Commission, 'Communication on Guidelines on regional State aid' 2021/C OJ C 153

Commission, 'Communication on the collection and use of expertise by the Commission: principles and guidelines - "Improving the knowledge base for better policies"' (2002) COM 0713 final

Commission, 'Communication on the precautionary principle' COM(2000)0001 final

Commission, 'Communication Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03 C(2023)1711' OJ C 101

Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM)' COM 2012 0209 final

Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Stepping up

Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people’’ (2020) COM 562 final

Commission, ‘Communication to the European Parliament, the Council, the European Economical Social Committee and the Committee of Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality’ COM(2021) OJ 550 final

Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A Framework for Climate and Energy Policy 2020-2030’’ COM(2014) 15 final

Commission, ‘Communication to the European Parliament, the Council, the European Social Committee and the Committee of Regions, Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil' COM (2021) 400 final

Commission, ‘Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ‘The European Green Deal’’ COM (2019) 640 final.

Commission, ‘Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions A Green Deal Industrial Plan for the Net-Zero Age’ COM(2023) 62 final

Commission, ‘Communication— Framework for State aid for research and development and innovation’ (2014) OJ C 198

Commission, ‘Communication— Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’ (2009) OJ C 83

Commission, ‘Communication, Europe 2020: A strategy for smart, sustainable and inclusive growth’ COM (2010) 2020 final

Commission, ‘Community guidelines on State aid for environmental protection’ (2008) OJ C 82/1

Commission, ‘Consultation document, State aid action plan – “Less and better targeted state aid: a roadmap for state aid reform 2005-2009”’ SEC(2005) 795 COM/2005/0107 final

Commission, ‘Decision on the aid schemes SA.56908 (2023/C) (ex 2020/N) – Prolongation and modification of biogas scheme for motor fuel in Sweden and SA.56125 (2023/C) (ex 2020/N) – Prolongation and modification of scheme SA.49893 (2018/N) - Tax exemption for non-food-based biogas and bio-propane in heat generation implemented by Sweden’ (2024) (C/2024/1921)

Commission, ‘Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (notified under document C(2014)’ 8786 OJ L 250

Commission, ‘Decision (EU) 2015/1827 of 23 March 2015 on State aid SA 28876 (12/C) (ex CP 202/09) implemented by Greece for Piraeus Container Terminal SA & Cosco Pacific Limited (notified under document’ C(2015) 66) OJ L 269

Commission, ‘Decision (EU) 2015/658 (2014) on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station’ (notified under document C(2014) 7142) OJ L 109

Commission, ‘Decision 1999/194 on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997 (notified under document number C(1998) 2476)’ C(1998) OJ L 060

Commission, ‘Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council’ (2011) OJ L 130

Commission, ‘Decision on Important Project of Common European Interest (IPCEI) on Batteries (2022) SA.54793 Belgium; SA.54801 Germany; SA.54806 Italy; SA.54794 France; SA. 54796 Sweden; SA.54808 Poland; SA.54809 Finland (2019/N)’ C(2019) 8823 final

Commission, ‘Decision on IPCEI Hydrogen Technology – Hy2Tech (2023) SA.64625 - Austria; SA.64651 - Greece; SA.64642 - Belgium; SA.64644 - Italy; SA.64640 - Czechia; SA.64649 - Netherlands; SA.64633 - Denmark; SA.64626 - Poland; SA.64646 - Estonia; SA.64753 - Portugal; SA.64632 - Finland; SA.64635 - Slovakia; SA.64671 - France; SA.64624 - Spain SA.64647 - Germany (2022/N)’ C(2022) 5158 final

Commission, ‘Decision on SA.104106 (2023/N) – Italy Support for the development of a centralised electricity storage system in Italy’ C(2023) 9226 final

Commission, ‘Decision on SA.105117 (2022/N) – Italy Aid scheme for the use of shore-side electricity in the form of a reduction in general system charges for ship operators’ C(2024) 3934 final

Commission, ‘Decision on SA.113739 (2024/NN) – RRF - Romania: State aid scheme to support capacity for the production of renewable hydrogen’ C(2024) 4654 final

Commission, ‘Decision on SA.42011 (2017/N) – Italy – Italian Capacity Mechanism’ C(2018) 617 final

Commission, ‘Decision on SA.53821 (2019/N) – Italy – Modification of the Italian capacity mechanism’ C(2019) 4509 final

Commission, ‘Decision on State Aid SA.46100 (2017/N) – Poland – Planned Polish capacity mechanism’ C(2018) 601 final

Commission, ‘Decision on State Aid on SA.64376 (2021/N) – Germany – EEG 2021 amendments on State Aid SA.63414 (2021/N) – Germany – Post-support aid to small manure installations’ C(2021) 9329 final

Commission, ‘Decision on State Aid SA. 53625 (2021/C) - Germany - on the implemented by Germany for Lignite phase-out’ C (2023) 8551 final

Commission, ‘Decision on State aid SA. N 475/2003 – Ireland – Public Service Obligation in respect of new electricity generation capacity for security of supply’ (2004) OJ C 34

Commission, ‘Decision on State Aid SA.102303 (2022/N) – Germany – EEG 2021 amendments: Easter Package 2022 – Early Bird Measures State Aid SA.103086 (2022/N) – Germany – EEG 2021 amendments: Additional round of solar PV tenders’ 2022 C(2022) 6946 final

Commission, ‘Decision on State Aid SA.102388 (2022/N) – Slovakia – State aid scheme for the decarbonisation of industry financed by the Modernisation Fund’ C(2022) 7250 final

Commission, ‘Decision on State Aid SA.102777 (2022/N) – Denmark – State aid scheme for Carbon Capture and Storage in Denmark’ C(2023) 202 final

Commission, ‘Decision on State Aid SA.103648 (2022/N) – Denmark – State aid measure to support the industrialization and upscaling of the production of PtX’ C (2023) 998 final

Commission, ‘Decision on State Aid SA.103720 (2023/N) – The Netherlands – Aid for the demonstration of an innovative electrolyser – Djewels’ C(2024) 5292 final

Commission, ‘Decision on State Aid SA.104903 (2023/N) – France - Aid to ArcelorMittal France’ C(2023) 5013 final

Commission, ‘Decision on State Aid SA.106613 (2023/N) – Slovenia – TCTF: Investment aid for accelerating the introduction of energy from renewable sources, storage and heat from renewable sources’ C(2024) 6666 final

Commission, ‘Decision on State Aid SA.108368 (2023/N) – Czechia – Support for electricity from high-efficiency combined heat and power generation’ C(2024) 3387 final

Commission, ‘Decision on State Aid SA.109170 (2023/N) – Austria – TCTF Scheme for accelerated investments in sectors strategic for the transition towards a net-zero economy’ C(2023) 7527 final

Commission, ‘Decision on State Aid SA.111058 (2024/N) - Netherlands – Relocation scheme for peak-load nitrogen deposition’ C(2024) 5059 final

Commission, ‘Decision on State Aid SA.112546 (2023/N) – Italy RRF - TCTF: Interventions to support investments in strategic sectors for the transition towards a net zero emissions economy’ C(2024) 1637 final

Commission, ‘Decision on State Aid SA.113565 (2024/N) – Germany – Aid for the construction of the Hydrogen Core Network in Germany’ C(2024) 4366 final

Commission, ‘Decision on State Aid SA.25254 (NN18/2009) – the Netherlands – Air Transport - Exemption from air passenger tax’ (2010) OJ L 186/2010

Commission, ‘Decision on State Aid SA.26036 (C 24/2009) – Austria – State aid for energy-intensive businesses under the Green Electricity Act in Austria’ (2011) OJ L 235/2011

Commission, ‘Decision on State Aid SA.29064 (11/C, ex 11/NN) – Ireland – Differentiated air travel tax rates implemented by Ireland’ (2011) OJ C 306/10

Commission, ‘Decision on State Aid SA.33475/2015 on tariff charged by Hidroelectrica of Romania S.C. Termoelectrica S.A.and S.C. Electrocentrale Deva S.A.’ (2015) OJ 275/2015

Commission, ‘Decision on State Aid SA.34947 (2013/C) (ex 2013/N) — UK — for the Hinkley Point C New Nuclear Power Station — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union’ OJ C 69

Commission, ‘Decision on State Aid SA.39621 (ex 2015/NN)- France – French country-wide capacity mechanism’ C(2016) 7086 final

Commission, ‘Decision on State Aid SA.42536 - Germany - Closure of German lignite-fired power plants’ C (2016) 3124

Commission, ‘Decision on State Aid SA.43756 (2015/N) – Italy – Support to electricity from renewable sources in Italy’ C(2016)2726 final

Commission, ‘Decision on State Aid SA.44464 (2017/N) – Ireland – Irish Capacity Mechanism C(2017)7789 final; SA.44465 (2017/N) – United Kingdom – Northern Irish Capacity Mechanism’ C(2017) 7794 final

Commission, ‘Decision on State Aid SA.44725 (2019/NN) – Lithuania – on public service obligation (PSO) for security of electricity supply: strategic reserve; and complaint on Lithuanian electricity PSOs’ (2019), OJ C 261/2019

Commission, ‘Decision on State Aid SA.45461 (2016/N) – Germany EEG 2017 – Reform of the Renewable Energy Law’ C(2016) 8789 final

Commission, ‘Decision on State Aid SA.45974 (2017/N) – Denmark – Support to Kriegers Flak offshore wind farm’ C(2017) 2079 final

Commission, ‘Decision on State Aid SA.46013 (2017/N) – Belgium – on Green electricity certificates and CHP certificates in Flanders’ (2018), OJ C 369/2018

Commission, ‘Decision on State Aid SA.47354 (2017/NN) – Estonia – Amendments to Estonian RES and CHP support scheme’ C(2017) 8456 final

Commission, ‘Decision on State Aid SA.47650 (2017/FC) – Germany– State aid to public procurement platform Cosinex C(2024) 1850 final

Commission, ‘Decision on State Aid SA.51306 (2018/N) – Belgium – Individual aid to three offshore windfarm projects (Mermaid, Seastar and Northwester2)’ C(2018) 6358 final

Commission, ‘Decision on State Aid SA.54042 (2019/N) – Bulgaria- Sofia waste-to-energy project/ cogeneration unit with recovery of energy from RDF’ C(2019) 8528 final

Commission, ‘Decision on State Aid SA.54537 (2020/NN) – The Netherlands – Prohibition of coal for the production of electricity in the Netherlands’ (2020), OJ C 220

Commission, ‘Decision on State Aid SA.54915 - 2020/C (ex 2019/N) – Belgium – Capacity remuneration mechanism’ C(2021) 6431 final

Commission, ‘Decision on State Aid SA.55209 (2019/N) – Germany – Scheme for retrofitting diesel buses in local public transport (amendment) (ex-SA.51450 (2019/N))’ C(2019) 7510 final

Commission, ‘Decision on State Aid SA.55604 (2022/N) – Finland - on Finnish strategic reserve’ (2022), OJ C 439/2022

Commission, ‘Decision on State Aid SA.56606 (2020/N) – Austria – joining the 2018 IPCEI Microelectronics’ C (2021) 1876 final

Commission, ‘Decision on State Aid SA.57779 (2020/N) – Germany – EEG’ 2021C(2021) 2960 final

Commission, ‘Decision on State Aid SA.63176 – Belgium - Green energy certificates in Wallonia’ (2024), OJ C 3637

Commission, ‘Decision on State Aid SA.63458– Germany - Aid for ancillary hydrogen refuelling facilities amending the Federal aid scheme for the acquisition of light and heavy commercial vehicles with alternative, climate-friendly propulsion systems’ (2021), OJ C 521

Commission, ‘Decision on State Aid SA.64374 (2022/NN) – Croatia - Individual aid to IE-Energy for grid-scale energy storage’ (2022), OJ C 6560 final

Commission, ‘Decision on State Aid State Aid SA.113565 (2024/N) – Germany – Aid for the construction of the Hydrogen Core Network in Germany’ C(2024) 4366 final

Commission, ‘Decision on State Aid State Aid SA.57610 (2020/N) – Germany – Modified offshore wind support C(2021) 1949 final

Commission, ‘Decision on the State aid C 33/08 (ex N 732/07) to Volvo Aero Corporation for R & D, which Sweden intends to implement’ (2009) OJ L 301

Commission, ‘Decision SA.105338 (2023/N) – Finland TCTF – RRF: Support for the development of renewable methane and renewable methanol production’ C (2023) 7434 final

Commission, ‘Decision on State Aid SA.55858 (2020/N) – France – Important Project of Common European Interest on European Battery Innovation (EuBatIn)’ C (2021) 494 final

Commission, ‘Decision on State Aid SA.64754 (2022/N) – Portugal - Important Project of Common European Interest on Hydrogen Industry (Hy2Use)’ C (2022) 6847 final

Commission, ‘Decision on State Aid SA.105006 (2022/N) - Poland RRF - LOTOS Green H2 sp. z o.o for project Green H2’ C (2023) 2553 final

Commission, ‘Notice 2016/2946 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union’ (2016) OJ C 262*, p. 1–50*

Commission, ‘Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)’ (2008) OJ L 214

Commission, ‘Regulation (EU) 2021/1237 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty’ C(2021)5336 OJ L 270 (GBER)

Commission, ‘Regulation (EU) 2023/1315 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473

declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty' (2023) C 4278 OJ L 167

Commission, 'Regulation (EU) 2023/2055 amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles' (2023) C 6419 OJ L 238

Commission, 'Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty' (2014), OJ L 187

Commission, 'Staff Working Document Better regulation guidelines' (2021) SWD 305 final

Commission, 'Staff Working Document' "Common methodology for State aid evaluation"' (2014) SWD 179 final

Commission, Staff Working Document 'Fitness Check of Eu Supervisory Reporting Requirements' (2019) SWD 403 final

Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Future of Carbon Capture and Storage in Europe' COM(2013) 180 final

Council of the European Communities and representatives of the Governments of the Member States meeting in the Council, 'Declaration on the programme of action of the European Communities on the environment' (1973) OJ C 112

Council, 'Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' (2003) OJ L 283

Council, 'Directive 2008/118/EC concerning the general arrangements for excise duty' (2008) OJ L 9

Council, ‘Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora’ (1992) OJ L 206

Council, ‘Directive 96/62/EC on ambient air quality assessment and management’ (1996) OJ L 296

Council, ‘Directive 91/271/EEC concerning urban waste-water treatment’ (1991) OJ L 135

Council, ‘Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union’ (2015) OJ L 248.

European Parliament and Council, ‘Proposal for a Regulation establishing a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EU) No 1293/2013’ COM(2018) 385 final

European Parliament and Council, ‘Regulation (EU) 2018/1999 of the on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council’ *(2018)* OJ L *328*

European Parliament and Council, ‘Regulation (EU) 2023/1804 of on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU’(2023) OJ L 234

European Parliament and Council, ‘Decision (EU) 2022/591 on a General Union Environment Action Programme to 2030’ (2022) OJ L 114

European Parliament and Council, ‘Directive (EU) 2004/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859’ (2024) OJ L 1760

European Parliament and Council, ‘Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources’(2018) OJ L 328

European Parliament and Council, ‘Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources’ (recast) (2018) OJ L 328

European Parliament and Council, ‘Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU’ (recast) (2019) OJ L 158

European Parliament and Council, ‘Directive 2000/60/EC establishing a framework for Community action in the field of water policy’ (2000) OJ L 327

European Parliament and Council, ‘Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants (2001) OJ L 309

European Parliament and Council, ‘Directive 2002/91/EC on the energy performance of buildings’ (2002) OJ L 1

European Parliament and Council, ‘Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC Statements made with regard to decommissioning and waste management activities’ OJ L 176

European Parliament and Council, ‘Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage’(2004) OJ L 143

European Parliament and Council, ‘Directive 2008/50/EC on ambient air quality and cleaner air for Europe’ (2008) OJ L 152

European Parliament and Council, ‘Directive 2008/98/EC on waste and repealing certain Directives’ (2008) OJ L 312

European Parliament and Council, ‘Directive 2009/31/EC on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC of the European

Parliament and of the Council and Regulation (EC) No 1013/2006 of the European Parliament and of the Council' (2009) OJ L 140

European Parliament and Council, 'Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC'(2014) OJ L 94

European Parliament and Council, 'Directive 94/62/EC on packaging and packaging waste' (1994) OJ L 365

European Parliament and Council, 'Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU' (recast)(2019) OJ L 158

European Parliament and Council, 'Proposal for a Directive of the on ambient air quality and cleaner air for Europe' COM (2022) 542 final

European Parliament and Council, 'Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action' (2018) OJ L 328

European Parliament and Council, 'Regulation (EU) 2019/943 of the on the internal market for electricity' (2019), OJ L158

European Parliament and Council, 'Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088' (2020) OJ L 198

European Parliament and Council, 'Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')' (2021) OJ L 243

European Parliament and Council, 'Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism (CBAM)' (2023) OJ L 130

European Parliament and Council, 'Regulation (EU) 2024/1991 of the on nature restoration and amending Regulation (EU) 2022/869' (2024) OJ L 1991

European Parliament and Council, 'Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance) (2009) OJ L 140, now amended by Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast)' (2018) OJ L 328

European Parliament and Council, 'Directive (EU) 2023/959 e amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system' (2023) OJ L 130

European Parliament, 'Resolution on proposals of the European Parliament for the amendment of the Treaties' (2023) (2022/2051(INL))

European Parliament, 'Resolution on the 2018 UN Climate Change Conference in Katowice, Poland' (COP24) (2018/2598(RSP)) OJ C 345

European Parliament, 'Resolution on the climate and environment emergency' (2019) (2930(RSP)) OJ C 232

INTERNATIONAL CONVENTIONS AND OFFICIAL ACTS OF INTERNATIONAL ORGANIZATIONS

United Nations Environment Programme (UNEP) *Emissions Gap Report 2024: No more hot air ... please! With a massive gap between rhetoric and reality, countries draft new climate commitments* (24 October 2024) DEW/2672/NA

United Nations Framework Convention on Climate Change (UNFCCC) , *The Paris Agreement to the United Nations Framework Convention on Climate Change'*, (12 December 2015), T.I.A.S. No. 16-1104

United Nations General Assembly, 'Resolution 70/1 Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1

EUROPEAN UNION COURT OF JUSTICE CASE LAW

EUROPEAN COURT OF JUSTICE

C-15/14 P European Commission v MOL Magyar Olajés Gázipari Nyrt. [2015] ECLI:EU:C:2015:362

Case 7/61 Commission of the European Economic Community v Italian Republic ECLI:EU:C:1961:317

Case C- 470/20, Veejaam & Espo ECLI:EU:C:2022:981

Case C-11/22 P Est Wind Power v Commission ECLI:EU:C:2023:765.

Case C-159/01 Kingdom of the Netherlands v Commission of the European Communities ECLI:EU:C:2004:246

Case C-179/20 Fondul Proprietatea v Guvernul României, SC Complexul Energetic Hunedoara SA and SC Complexul Energetic Oltenia SA ECLI:EU:C:2022:58.

Case C-194/09 P Alcoa Trasformazioni S.r.l. v European Commission ECLI:EU:C:2011:497

Case C-206/06 Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV ECLI:EU:C:2008:413

Case C-262/12 Vent De Colère and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement ECLI:EU:C:2013:851

Case C-279/08 P European Commission v Kingdom of the Netherlands ECLI:EU:C:2011:551

Case C-280/00 Altmark Trans GmbH, Regierungspräsidium Magdeburg v Regierungspräsidium Magdeburg ECLI:EU:C:2003:415

Case C-329/15 ENEA S.A. v Prezes Urzędu Regulacji Energetyki ECLI:EU:C:2017:671

Case C-334/07 P Commission v Freistaat Sachsen ECLI:EU:C:2008:709

Case C-379/98 Preussen Elektra AG v Schhleswag AG ECLI:EU:C:2001:160

Case C-40/23 P European Commission v Kingdom of the Netherlands ECLI:EU:C:2024:492

Case C-405/16 Federal Republic of Germany v European Commission ECLI:EU:C:2019:268

Case C-487/06 P British aggregates Association v. Commission of the European Communities ECLI:EU:C:2008:757

Case C-5/14 Kernkraftwerke Lippe-Ems GmbH v. Hauptzollamt Osnabrück ECLI:EU:C:2015:354

Case C-558/22 Autorità di Regolazione per Energia Reti e Ambiente (ARERA) v Fallimento Esperia S.p.A., Gestore dei Servizi Energetici S.p.A. – GSE ECLI:EU:C:2024:209

Case C-594/18 Republic of Austria v Commission (Hinkley Point C case) ECLI:EU:C:2020:742

Case C-730/79 Philip Morris Holland BV v Commission of the European Communities ECLI:EU:C:1980:209

Case C-88/03 Portuguese Republic v Commission of the European Communities ECLI:EU:C:2006:511

Case C-241/94 French Republic v Commission of the European Communities ECLI:EU:C:1996:353

Case C-342/96 Kingdom of Spain v Commission of the European Communities ECLI:EU:C:1999:210

Case C-594/18 P Republic of Austria v European Commission ECLI:EU:C:2020:742

Case C-75/97 Kingdom of Belgium v Commission of the European Communities ECLI:EU:C:1999:311

Joined Cases C-105/12 Staat der Nederlanden v Essent NV, C-106/12 Staat der Nederlanden v Eneco Holding NV, C-107/12 Staat der Nederlanden v Delta NV ECLI:EU:C:2013:677

Joined Cases C-106/09 P European Commission and Kingdom of Spain C-107/09 P v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland ECLI:EU:C:2011:732

Joined cases C-626/15 and 659/16 Commission v Council ECLI:EU:C:2018:925

Joined cases C-78/08, C-80/08 Paint Graphos and others ECLI:EU:C:2011:550

GENERAL COURT

Case T-162/06 Kronoply GmbH & Co. KG v Commission of the European Communities ECLI:EU:T:2009:2

Case T-219/10 Autogrill España v Commission ECLI:EU:T:2018:784

Case T-228/99 Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities ECLI:EU:T:2003:57

Case T-25/07 Iride S.p.A. and Iride Energia S.p.A. v Commission ECLI:EU:T:2009:33

Case T-251/11 Republic of Austria v European Commission [2014] ECLI:EU:T:2014:1060

Case T-308/00 RENV Salzgitter v Commission ECLI:EU:T:2013:30

Case T-356/15 Republic of Austria v European Commission ECLI:EU:T:2018:439

Case T-379/06 Kaimer GmbH & Co. Holding KG and Others v European Commission ECLI:EU:T:2011:110

Case T-399/11 Banco Santander, SA and Santusa Holding, SL v European Commission ECLI:EU:T:2018:787

Case T-47/15 Federal Republic of Germany v European Commission ECLI:EU:T:2016:281

Case T-47/15 Federal Republic of Germany v European commission ECLI:EU:T:2016:281

Case T-793/19 Tirreno Power S.p.A. v Commission ECLI:EU:T:2022:504

Case T-469/20 Netherlands v Commission ECLI:EU:T:2022:713

NATIONAL COURTS CASE LAW

Cons. Stato, sez. IV, 3 settembre 2019, n. 6078. (Italian Council of State, fourth section, no. 6078/2019).

NATIONAL ACTS AND LEGISLATION

Decreto legislativo 16 marzo 1999, n.79– Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica (Legislative Decree of the Republic of Italy No 79/1999 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity, of 16 March 1999)

Decreto legislativo 29 dicembre 2003, n. 387 — Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità (Legislative Decree of the Republic of Italy No 387/2003 on the implementation of Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market)

Elektrituruseadus (Estonian law on the electricity market) of 11 February 2003 (RT I 2003, 25, 153)

Erneuerbare Energien Gesetz" (German Renewable Energy Sources Act, amending EEG 2021) – EEG 2023

Erneuerbare-Energien-Gesetz (German Renewable energy sources act, amending its predecessor version of 2000) - EEG 2012

Gesetz zur Änderung des Erneuerbare-Energien-Gesetzes und weiterer energierechtlicher Vorschriften (GermanLaw amending the Renewable Energy Sources Act and other energy law provisions (EEG2021-EG))

Kernbrennstoffsteuergesetz (German Law on excise duty on nuclear fuel) of 8 December 2010 (BGB1. 2010 I, p. 1804) ('KernbrStG')

LOV (Danish Climate Act) no. 965 af (2020)

Ökostromgesetz, as amended in 2008 (Austrian Green Electricity Act, BGBl. I, 114/2008

'Piano nazionale integrato per l'energia e il clima' (2019) - (Italian National integrated plan for energy and climate transposing Regulation (EU) 2018/1999)

The British Finance Act (2001), amended by the Finance Act (2002), S.I. 2002/761

Wet belastingen op milieugrondslag BWBR0007168/2009, (Dutch legislative act on environmentally based taxation)

WindSeeG (2017) (German Offshore Wind Energy Act)– Erneuerbare-Energien-Gesetz (EEG)(2017)

SITOGRAPHY

Arhold C, 'A More Restrictive Approach to "State Resources"? The ECJ Annuls the Commission's Decision on the German Law on Renewable Energy (EEG 2012) | White & Case LLP' (*Whitecase.com* 9 April 2019)

Canestrini C, 'The Green Deal Industrial Plan' (*Florence School of Regulation*, 20 March 2024) https://fsr.eui.eu/the-green-deal-industrial-plan/ accessed 18 December 2024

Christoph Arhold, 'A More Restrictive Approach to "State Resources"? The ECJ Annuls the Commission's Decision on the German Law on Renewable Energy (EEG 2012) | White & Case LLP' (*Whitecase.com* 9 April 2019) <https://www.whitecase.com/insight-alert/more-restrictive-approach-state-

resources-ecj-annuls-commissions-decision-german-law> accessed 20 January 2025

Commission, 'EU greenhouse gas emissions down 23% since 1990, still implementation will have to be further accelerated to reach current 2030 targets', (Climate Action, News, 31 October 2019) https://ec.europa.eu/clima/news/eu-greenhouse-gas_-emissions-down_en accessed 7 October 2024

Directorate-General Internal Policies Policy Department C Citizens Rights and Constitutional Affairs, Better Regulation and the Improvement of EU Regulatory Environment Institutional and Legal Implications of the Use of "Soft Law" Instruments – Background Note (March 2007) https://www.europarl.europa.eu/RegData/etudes/note/join/2007/378290/IPOL-JURI_NT(2007)378290_EN.pdf accessed on 11 October 2024

European Commission - Competition - State aid transparency database Public Search https://webgate.ec.europa.eu/competition/transparency/public?lang=en

European Commission – Competition Policy, EEAG Public consultation - Revision of the Energy and Environmental Aid Guidelines (EEAG) (2021) https://competition-policy.ec.europa.eu/public-consultations/2020-eeag_en#objective-of-the-consultation accessed 28 September 2024

European Commission, – Competition Policy, EEAG Public consultation - Factual summary of contributions on State aid for environmental protection and energy – Revised guidelines (2021) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12616-State-aid-for-environmental-protection-and-energy-revised-guidelines/public-consultation_en accessed 28 September 2024

European Commission, Press release - 18 December 2014, Brussels "State aid: Commission turns State aid modernization into actions and calls for better cooperation with Member States to boost growth" https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2783

European Commission, Press release - Daily News of 18 December 2014, Brussels "President Juncker appoints Dr Edmund Stoiber Special Adviser for Better Regulation; First Vice-President Timmermans announces reform of the Impact Assessment Board" https://ec.europa.eu/commission/presscorner/detail/en/MEX_14_2781

European Commission, Press release of 16 July 2018, Brussels "State aid: Commission adopts Best Practices Code to streamline and speed up State aid control": https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4544

European Environmental Agency (EEA), 'Green Certificate (Electricity) — European Environment Agency EEA Glossary' (*www.eea.europa.eu)* accessed 25 January 2025

European Union Agency for the Cooperation of Energy Regulators (ACER) website on the European Resource Adequacy Assessment (ERAA): https://www.acer.europa.eu/electricity/security-of-supply/european-resource-adequacy-assessment

Federal German Ministry For Economic Affairs and Climate Action, 'Overview of the Easter Package' (*Überblickspapier Osterpaket* 6 April 2022) https://www.bmwk.de/Redaktion/EN/Downloads/Energy/0406_ueberblickspapier_osterpaket_en.pdf?__blob=publicationFile&v=5accessed 23 January 2025

Fernandes ML, 'Carbon Capture and Storage: Dos and Don'ts' (*META EEB European Environmental Bureau* 31 January 2024) https://meta.eeb.org/2024/01/31/carbon-capture-and-storage-dos-and-donts/ accessed 11 October 2024

IEEP (Institute for European Environmental Policy), 'European Green Deal Barometer 2023' (2023) https://ieep.eu/publications/european-green-deal-barometer-2023/ accessed 23 December 2024

Nicolaides P, 'Green Energy Certificates' (Lexxion - State Aid Uncovered by Phedon Nicolaides 2 July 2024) https://www.lexxion.eu/en/stateaidpost/green-energy-certificates/ accessed 25 January 2025

Nicolaides P, ‘Selectivity and Tax Measures’ (Lexxion - The Legal Publisher 16 November 2021) https://www.lexxion.eu/en/stateaidpost/selectivity-and-tax-measures/ accessed 22 July 2024

Nicolaides P, ‘State Resources, Control and Imputability - Lexxion’ (Lexxion - The Legal Publisher 13 February 2024) https://www.lexxion.eu/en/stateaidpost/state-resources-control-and-imputability/ accessed 5 July 2024

The Federal German Government (official website), ‘Elimination of EEG Levy Relieves Electricity Consumers | Federal Government’ (Website of the Federal Government | Bundesregierung 27 April 2022) https://www.bundesregierung.de/breg-en/federal-government/renewable-energy-sources-act-levy-abolished-2011854 accessed 23 January 2025

The German Federal Government (official website), ‘Development of Renewable Energies | Federal Government’ (Website of the Federal Government | Bundesregierung 23 December 2022) https://www.bundesregierung.de/breg-en/news/amendment-of-the-renewables-act-2060448accessed 23 January 2025

VREG (Vlaamse Nutsregulator - Independent authority of the Flemish energy market), ‘Support System: CHP Certificates’ (VREG 20 December 2018) https://www.vreg.be/en/support-system-chp-certificates accessed 11 July 2024