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Legal Opinion concerning the competences of the European Union regarding the RED II

A. Executive Summary

- The EU legislator, which in a co-decision procedure means the European Parliament and the Council, may have the competence to structure principles for the promotion of renewable energies and respective legal instruments, as long as the provisions established in secondary law do not undermine the EU Commission's competence to assess State aid compatibility of any measures taken by the Member States in order to implement them and in case those measures would be defined as having the character of state aid. Thus, the competence in the field of State aid control does not prevent the EU-legislator from setting and harmonising common principles for the financial support for electricity from RES based on Art. 194 (2) and (1) lit. c) TFEU.

- The division of competence between the EU legislator and the EU Commission in the field of financial support for electricity from renewable sources (RES) is a matter of determining the scope and boundaries of the competence of the EU legislator in the field of energy according to Art. 194 of the Treaty on the Functioning of the European Union (TFEU) on the one side and the competence of the EU Commission in the field of State aid control according to Art. 108 Para 1 TFEU on the other side. Both competencies are based on primary law and thus stand equally side by side.

- In case of overlapping policy areas, as in the field of financial support for electricity for electricity from RES, both competences have to be put in balance. This means that a secondary law provision like the RED II based on Art. 194 TFEU cannot exclude the competence of the EU Commission regarding State aid control per se.

- There is no case law regarding the question of division of competence between Art. 194 TFEU and Art. 107 TFEU. But case law regarding EU tax law provisions and examples of coexistence of secondary law and State aid guidelines in the banking sector show a diverse picture, which leads to the overall conclusion that there is no rule that the EU Commission`s discretion when exercising its State aid control competence has to remain completely

untouched. But nevertheless the EU legislator has to respect the Commission's central role in the field of State aid control.

- Bearing this in mind, it must be stated that the EU legislator is not prevented from setting out and harmonising common principles for the design of financial support schemes for RES electricity in RED II-. In that regard, it does not matter that the EU Commission has already laid down such principles in its Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG). This is because the legal nature of the EEAG can only be considered as "soft law" or internal law of the EU Commission with self-binding character and thus the EEAG are not binding for the EU legislator when exercising its primary law competence according to Art. 194(2) and (1) lit. c) TFEU. In the hierarchy of norms, primary and secondary law stand higher than any "soft law". The competence of the EU legislator when adopting the former cannot be compromised by the competence of any other institution. Any institution adopting the latter needs to respect the legislative framework as set by the EU legislator.

- Nonetheless, the future secondary law provisions of RED II regarding the design of financial support schemes of electricity from RES have to respect the primary law competence of the EU Commission in the field of State aid control according to Art. 107 TFEU. In this respect, the initial Commission proposal according to Art. 4 RED II relating to the design of renewable energy support schemes do not undermine the EU Commission's competence to assess State aid compatibility of any measures taken by the Member States in order to implement them. This is confirmed by the clear reference to State aid law.

- The same holds true for the additional proposals currently discussed in the European Parliament and the Council, which inter alia propose rules on auctions as the regular instrument for price discovery and exemptions thereof, the choice between technology specific and technology neutral auctions or rules on the design of market premiums to be awarded. The mentioned examples for additional provisions strictly relate to policy objectives of EU energy policy according to Art. 194 TFEU (promotion of renewable energies and the functioning of the energy market). They do not go beyond setting a common political and economic framework, in which the Member States shall take action and help achieve those goals. It is inter alia the Commission's role to watch over those actions and ensure, in line with its competence, that they are compatible with the internal market and the rules of the Treaties.

- There are already examples of policy fields where secondary legislation adopted by the EU legislator in order to achieve certain EU objectives stands next to and partially overlaps with EU Commission's competence to scrutinise the State aid compatibility of individual measures. It is not apparent why this should be different when it comes to the design of renewable energy support schemes.

B. Background

I. EU-Commission`s proposal

The EU Commission, in its role as legislative initiator, on 30 November 2016 presented a proposal for a recast of Renewables Directive 2009/28/EC[1] (in the following: RED II). This draft contains provisions on financial support for electricity from renewable sources according to Art. 4:

> *"1. Subject to State aid rules, in order to reach the Union target set in Article 3(1), Member States may apply support schemes. Support schemes for electricity from renewable sources shall be designed so as to avoid unnecessary distortions of electricity markets and ensure that producers take into account the supply and demand of electricity as well as possible grid constraints.*
>
> *2. Support for electricity from renewable sources shall be designed so as to integrate electricity from renewable sources in the electricity market and ensure that renewable energy producers are responding to market price signals and maximise their market revenues.*
>
> *3. Member States shall ensure that support for renewable electricity is granted in an open, transparent, competitive, non-discriminatory and cost-effective manner.*
>
> *4. Member States shall assess the effectiveness of their support for electricity from renewable sources at least every four years. Decisions on the continuation or prolongation of support and design of new support shall be based on the results of the assessments."*

[1] COM(2016) 767 final, 30.11.2016, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast).

In the course of the discussion of this proposal, questions have arisen on whether the EU legislator is actually competent to add further principles to Art. 4 RED II on the concrete design of renewable energy support schemes. The main argument was that the design of renewable energy support schemes would be the exclusive competence of the Commission, or even DG COMP; and not the legislator, as it would concern questions regarding the compatibility of State aid measures with the internal market. Only the Commission would be competent to decide how renewable energy support schemes could be designed in order to comply with the State aid rules. The current Commission proposal is the result of an internal discussion between the different services. It does not contain any specific provision about concrete and common design elements of financial support instruments (e.g. auctions, technology neutrality vs. specificity).

II. Proposals for amendments within the European Parliament and the Council

However, this compromise driven reluctance of the Commission to go beyond a certain minimum as outlined in the Art. 4 of the RED II proposal is facing strong opposition within the Council and the European Parliament (EP). Strong allies in the Council and within and between the political groups in the EP call for much more details on governance principles in the Governance Regulations and on detailed principals in the REDII Directive, all influencing future Member States' policies in order to achieve better coherence, common approach, robustness, reliability and a swift acknowledgement of the changing energy system.

Proposed amendments by Members of the ITRE Committee of the European Parliament[2] and the joint proposal for Art. 4 RED II published by the member states Finland, France, Germany and Italy[3] address several concrete design aspects of financial support schemes (inter alia the obligation for marked-based support, the option to apply technology specific support and exemptions relating to the auctions):

[2] European Parliament, Committee on Industry, Research and Energy, 2016/0382(COD), 04.07.2017, Amendments 351-635 on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast).

[3] Joint proposal on Common Rulebook elements in the recast Renewable Energy Directive by Finland, France, Germany and Italy.

- Financial support for electricity from renewable sources should be market compatible and thus be granted through direct price support schemes which shall take the form of a premium paid in addition to market revenues.

  Joint proposal for Art. 4 RED II published by the member states Finland, France, Germany and Italy:

  "1. Without prejudice to Articles 107 and 108 TFEU, in order to reach the Union target set in Article 3(1) or more ambitious national targets, Member States may apply support schemes. Support schemes for electricity from renewable sources shall be ***market-based*** *and market-responsive, subject to the following paragraphs, thereby incentivising market integration and avoiding unnecessary distortions of electricity markets.*

  2. Support for electricity from renewable sources shall be designed so as to integrate electricity from renewable sources in the electricity market and ensure that renewable energy producers are responding to market price signals and maximise their market revenues."

  ITRE, European Parliament, Proposed amendments on RED II: AM 546 to 578:

  "2. Support for electricity from renewable sources shall be designed so as to maximise the integration of electricity from renewable sources in the electricity market and ensure that renewable energy producers are responding to ***market price signals*** *and maximise their market revenues, while offering renewable energy sources reasonable compensation for market distortions caused by inflexible generation capacity and lack of liquidity in intraday-markets. Except for small scale installations of less than 500 kW and demonstration projects, support for electricity generated from renewable sources granted through direct price support schemes shall take the form of a* ***fixed or sliding premium*** *paid in addition to market revenues. Member States may decide to remunerate renewable energy communities through direct support, including via feed-in-tariffs."*

- Financial support for electricity from renewable sources should take into account various influencing factors and may also be technology specific when appropriate:

  Joint proposal for Art. 4 RED II published by the member states Finland, France, Germany and Italy:

"3. Member States shall ensure that support for renewable electricity is granted in an open, transparent, competitive, non-discriminatory and cost-effective manner. Member States may apply either ***technology specific mechanisms or technology neutral*** *mechanisms to grant support."*

ITRE, European Parliament, Proposed amendments on RED II: AM 531 to 533:

"(3). Member States shall ensure that support for renewable electricity is granted through an open, transparent, competitive, non-discriminatory and cost-effective bidding process in accordance with paragraphs 3a, 3b, and 3c. Member States may apply a ***different procedure*** *to small scale installations of less than 1 MW and demonstration projects.*

3b. When support for electricity generated from renewable sources is allocated through a competitive bidding process as referred to in paragraph 3, Member States shall examine the feasibility of competition between renewable energy technologies. Member States shall, to the extent possible, grant support in tender procedures which are open to all technologies but which retain the right to use a ***technology-specific*** *bidding process in order to take into account the longer term potential of a particular new and innovative technology and the need to achieve technology diversification, network constraints and grid stability, system integration costs and environmental constraints, where those constraints cannot be addressed in the tender design."*

- Financial support for electricity from renewable sources should contain provisions for exemptions from auctions and to ensure the further development of small-scale installations:

Joint proposal for Art. 4 RED II published by the member states Finland, France, Germany and Italy:

"*4. Member States may provide for* ***exemptions from competitive bidding*** *procedures according to paragraph 3 for* ***small scale installations****, as well as in cases where it can be demonstrated that there is* ***insufficient competition****. Market-responsiveness of support schemes according to paragraph 2 may be limited to installations that are above the thresholds according to [Art. 11 paragraphs 2 to 4 of the Electricity Market Regulation]."*

ITRE, European Parliament, Proposed amendments on RED II: AM 531 to 533:

> *"(3). Member States shall ensure that support for renewable electricity is granted through an open, transparent, competitive, non-discriminatory and cost-effective bidding process in accordance with paragraphs 3a, 3b, and 3c. Member States may apply a* ***different procedure*** *to small scale installations of less than 1 MW and demonstration projects.*

Against this background it is the aim of this paper to point out the relationship between the EU legislator`s competence to take secondary legal measures and the EU Commission's competence in the field of State aid control.

C. Differentiation between the competences of the EU legislator and the EU Commission

I. Legislative competence in the field of energy legislation - Art. 194 TFEU

Legislation in the field of energy is generally a competence shared between the European legislator and the Member States. According to Article 194 of the Treaty on the Functioning of the European Union (TFEU), the EU however does have its own energy policy:

> *" 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
>
> *ensure the functioning of the energy market;*
>
> *ensure security of energy supply in the Union;*
>
> *promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
>
> *promote the interconnection of energy networks." (emphasis added)*

To that end, Art. 194 TFEU gives competence to the European legislator to adopt legislation, in the course of the ordinary legislative procedure:

> *"2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions." (emphasis added)*

The wording ("*without prejudice to the application of other provisions of the Treaties*") does thereby not degrade Art. 194 TFEU compared to other Treaty provisions. Rather, to the contrary, it expresses that, in principle, all competences contained in the TFEU stand next to each other on equal footing and there is no hierarchy between e.g. energy competences and State aid competences.

Therefore Art. 194 TFEU constitutes the legal basis for all acts adopted by the EU in the energy sector which aim at those objectives stated in Art. 194(1) TFEU as long as there are no "*more specific provisions laid down by the TFEU on energy*. " (Court of Justice of the European Union, (CJEU), C¬490/10, European Parliament v Council of the European Union, para. 67).

And as is clear from Art. 194(2) TFEU, such legislative competence in the field of energy stays and remains with the Council and the Parliament as the EU legislative branch.

II. Legislative competence in the field of State aid legislation– Art. 109 TFEU

While internal market legislation is also a shared competence between EU and Member States, legislation in the field of State aid is a competence reserved to the Council under Art. 109 TFEU:

> *"The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure."*

Regulations which have been adopted under this provisions include the so-called "Procedural Regulation" (Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union) as well as the so-called "Enabling Regulation" (Council Regulation (EC) No 1588/2015 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid).

With the latter the Council has exercised its legislative power under Art. 109 TFEU and enabled the Commission to exempt certain categories of aid from the notification procedure. However, it is clear from the Enabling Regulation that in doing so, the Council did not totally withdraw from its legislative competence. Rather, the Commission was given a well-defined mandate to adopt certain implementation measures.

The general legislative competence in the field of State aid legislation nonetheless remains with the Council under Art. 109 TFEU.

III. EU Commission`s competence in the field of energy legislation – Art. 17(2) TEU

According to Art. 17(2) Treaty on the European Union (TEU), the Commission is in principle responsible for the preparation of all proposals for new or amended legislation. This exclusive right of initiative can only be limited by the Treaties itself.

The right of initiative covers the entire spectrum of EU action, thus including legislation relating to EU energy policy, or – as is the case here – legislation specifically on renewable energy support schemes.

However, having submitted the initial proposal, the Commission's role in the legislative procedure becomes limited: It is not for the Commission to decide whether and possibly with which amendments the act is to be adopted. This is left to the democratic decision making processes in the European Parliament and the Council, as the legislative institutions of the EU (compare e.g. Art. 293 TFEU).

This relates to the very heart of the balance of powers within the EU, the democratic principle which distinguishes between executive, legislative and judicial branches. With the EU being a democratic organisation (Compare Art. 2 TEU), this system of balance of powers should be held up and not confused at any times.

So the Commission as such does not have legislative competence no matter in which policy sector. That being the case, it should be self-explaining that DG COMP could not act as legislator or a "de facto" legislator.[4] Rather, but for the right of initiative, the Commission remains the executive organ of the EU.

IV. EU Commission`s competence in the field of State aid – Art. 107 TFEU

Undeniably, the Commission has broad powers in the field of State aid. As the EU executive branch, it acts as the "guardian of the Treaties" and is generally in charge of making sure that the Member States respect the EU legislative framework in their legislative and other actions.

[4] Michelle Cini, the European Commission, an unelected legislator, http://www.tandfonline.com/toc/fjls20/current, Volume 8, 2002, issue 4, S. 14

Under Art. 108 TFEU and the Procedural Regulation, the Commission is the authority to decide whether or not certain measures falling under the definition of Art. 107(1) TFEU are compatible with the internal market. While for measures falling within the categories of Art. 107(2) TFEU, this decision is a "bound" one, meaning that the Commission has to find in favour of their compatibility, for measures falling under Art. 107(3) TFEU, the Commission enjoys discretion.

Over the years, the Commission has established the practice of publishing certain guidelines on how those measures are approached and how the discretion will normally be exercised. However, those guidelines are not legislative acts, but "soft law" that has at most a self-binding power on the Commission itself and is not binding for the Member States (CJEU C-526/14, 19.07.2016 – Kotnik, para. 40, 45). By no means do those guidelines take away or restrict the legislative competences of the EU legislator, may it be under Art. 109 TFEU relating to State aid or under any other provision transferring legislative power to the EU. This is the result of the hierarchy of norms established by the Treaties (Art. 288 ff TFEU).

As the name suggests, primary law is the very heart of the EU and "goes first". Secondary law, in a hierarchy of norms, comes second. Art. 288 TFEU lists regulations, directive and decisions as binding secondary law.[5] And here the TFEU makes another distinction: Within secondary law, legislative acts according to Art. 289 TFEU come before delegated acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU). Any kind of other non-legislative acts such as guidelines, position papers, notices etc. which could have some self-binding effect on the author might be considered "soft law".

In practice, the hierarchy of norms means that the EU legislator when adopting secondary legislation, is bound by primary legislation. It is thus not possible to deviate from the "higher rules" – unless of course they specifically provide for such a possibility. Within secondary legislation, the same holds true for delegated or implementing acts which cannot negate legislative acts.[6]

Any kind of "soft law", such as the Commission's guidelines in the field of State aid, is then subject to both primary and secondary law. Accordingly, the CJEU has re-

[5] Note that it also names recommendations and opinions, though expressing that they do not have binding force.

[6] See for example: Ruffert in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 288 AEUV, para. 11.

cently evaluated the Commission's "Banking Communication"[7] against secondary legal provisions of Directive 2012/30/EU[8] (CJEU C-526/14, 19.07.2016, – Kotnik, para. 81 – 94).

V. Interim conclusion

Under the EU Treaties, different tasks and competences are set aside for the EU legislator on the one side, and the Commission on the other side.

Most importantly, the Commission is not the legislator, neither in the field of State aid nor in the field of energy. It does have a right of initiative though, to propose rules to the EU legislator. It can however not decide on them.

What is more, while the Commission can e.g. adopt certain guidelines, those are not legislation, but - at most – self-binding "soft law". In that, they stand lowest in the hierarchy of norms and cannot negate primary or secondary law. In particular, they cannot undermine the competences and democratic legislative procedures established by the Treaties and thus are not binding for the EU legislator.

D. The design of common principles for renewable energy support schemes falls within the competences of the EU legislator

As described above, the functioning of the energy market and the promotion of renewable energy are objectives, the pursuit of which falls within the competence of the European legislator according to Art. 194 TFEU.

When exercising his competence under Art. 194 TFEU, , the European legislator is bound to the objectives of the EU and has to find a balanced approach with regard to all of them according to the hierarchy of norms in the EU. According to Art. 3

[7] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') Text with EEA relevance, OJ C 216, 30.7.2013, p. 1–15.

[8] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent OJ L 315, 14.11.2012, p. 74–97 (no longer in force).

TEU, those objectives include competition and internal market objectives as well as environmental and climate protection objectives.

For the field of energy, the objectives in Art. 194 (1) TFEU reflect these ideas. Furthermore, Article 191 (2) TFEU generally requires the Union policy on environment to aim at a high level of protection covering all Union policies, thus the promotion of renewable energies is also embedded under the environmental protection objective of the treaty.

The design of renewable energy support schemes falls within this legislative competence under Art. 194 TFEU for the following reasons:

Explicit mentioning: From the very wording of Art. 194(1) c) TFEU, the European legislator is in charge of the promotion of the "*development of new and renewable forms of energy*". Effectively, this is done through support schemes in the Member States, as laid down following secondary legislation such as Directive 2001/77/EC or current Directive 2009/28/EU. By setting certain additional rules on how Member States should design their support schemes in the draft RED II, the EU legislator is trying to avoid unclear support situations by creating more coherence and convergence of support schemes across Member States. It is, thereby aiming to fulfil its task in accordance with the above mandate.

On the one hand, further common support scheme design elements in Art. 4 RED II would also apply for support schemes which are not fulfilling the definition of state aid under Art. 107 TFEU. We can refer to the German support legislation for renewables which until 2012 was following a ECJ judgment not deemed to be a state aid mechanisms, PreussenElektra (C-379/98). Thus, Germany realised the energy policy quest of Directive 2001/77/EC on the promotion of renewable electricity without state aid mechanisms. Nonetheless, the political objectives and indicative targets laid down in the above directive as -in binding form- equally under the current Directive 2009/28/EU on the promotion of renewable energies steered the national policies towards increased use of renewable energy and in a way as to set specific overarching principles and in the same time allowing Member States to find their specific pathway, as outlined in the Ålands Vindkraft judgement by the ECJ (CJEU, C-573/12).

On the other hand, as also reflected upon in the proposals and in several communications not the least by the European Commission, support schemes have sometimes been flawed, or Member States have introduced rules altering them to the detriment of the development of renewable energy and investment security.

With setting further certain rules on how Member States should design their support schemes in the draft RED II, the European legislator is trying to avoid such situations by creating more coherence and convergence of support schemes across member states.

Importance for the functioning of the energy market: Provisions regarding the design of renewable energy support schemes are closely related to the aim of ensuring the functioning of the energy market (Art. 194(1) lit. a) TFEU) This is even more so as the EU is now aiming at a continuously improved system and market integration of increasing shares of renewable energy. The objective is to move gradually further away from national economic niches and towards a real European Energy Market – and that requires European legislation. The initial proposal as well as the amendments currently discussed in the European Parliament and the Council aim to meet the demands for transitioning to such a European Energy Market, and are thus fully in line with the mandate under Art. 194(1) lit a) TFEU.

Security of energy supply: The increased production of energy from renewable sources calls for a changing energy system based more and more predominately on renewable energies. For example, including the possibility of a (regionally) differentiated and technology specific support as a future design option of support schemes in Art. 4 RED II therefore also is a matter of energy supply security Art. 194 (1) lit. b) TFEU). Such a provision e.g. could provide for legal support in areas of sector coupling, storage, efficiency by reflecting sector specific needs in order to guarantee an efficient energy system change in combination with a strong supply security.

Additionally Art. 194(2) TFEU does not merely allow the EU legislator to legislate in order to achieve the above mentioned objectives. It rather calls upon the legislator to take all the legislative measures necessary to achieve these objectives. In a nutshell, the proposed provisions on the design of support schemes for renewable energy in the draft RED II fall within the competence of the European legislator under Art. 194(2) TFEU, where and to the extent they serve to achieve a functioning energy market and the promotion of renewable energy.

The proposals thereby pay due account to the principle of subsidiarity (i.e. the EU only intervenes where this is more effective than leaving it to the Member States), and only address potential disturbances for the European Energy Market that could stem from differing rules in the Member States. In that regard, they are limited to what is necessary and proportionate to the objectives of Art. 194 TFEU - the promotion of renewable energy in an integrated European Energy Market, and respect the Member States sovereignty rights under Art. 194(2) subpar. 2 TFEU.

Rather, the clarity on principles of support policies helps Member States to design their national schemes - be it in form of State aid mechanisms or not. When setting common principles for the design of support schemes the EU legislator can also add further substance to the initial Commission proposal of Art. 4 RED II. Thus, according to the aim of promoting renewable energies (Art. 194 (1) lit. c) TFEU) it is possible to establish auctions as an instrument for determining the level of market premiums as one option for financial support of electricity from RES. The legislator can also provide for rules on the design of market premiums e.g. on the use of sliding and fixed premiums in order to facilitate market integration of variable renewable energy and thus contribute to the functioning of the energy markets. Member States can also be given the right to choose between technology neutral or technology specific auctions to diversify deployment of renewables to facilitate market integration and thus ensure the functioning of the energy market as called for in Art.194(1) lit a) and support security of supply according to Art.194 (1) lit b). This competence is corroborated by Art. 194 (2) par. 2 TFEU which explicitly states the Member States` right to choose between different energy sources.

E. No infringement of the EU Commission's` competence relating to the State aid compatibility of any implementing measures

The overall Treaty principle on state aid is set in Art. 107 (1) TFEU:

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

There is thus no question that the state aid scrutiny privilege of the Commission could be directed against the EU legislator in a way prohibiting the regulation of support mechanisms which could later be seen as state aid on a specific Member State level. The scrutiny privilege is directed only against a respective single Member State. The Commission cannot interfere at the stage of the design of policy principles under Art. 194 TFEU in proactively blocking any Directive principles which, in theory, subsequently could lead to state aid scrutiny once a Member States has transposed the Directive into national law and applies measures in contradiction to state aid rules. It could only interfere when it becomes clear that a Directive would explicitly forbid any state aid scrutiny for measures foreseen on Member States level.

This limitation of the scrutiny privilege to the specific Member States' situation can also be deduced from Art.108 (2) para 3, 1. Sentence TFEU: "*On application by a*

Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances."

As set out above, the Commission is principally responsible for the assessment of the compatibility of certain State aid measures under Art. 107 (2) TFEU. Those measures are measures adopted by the Member States, usually to achieve certain national or European objectives. The Commission has the power to examine a specific support instrument by a specific Member State regarding its compatibility with State aid law (as far as it is not bound by a regulation according to Art. 109 TFEU). In that sense only the Commission is the "guardian of the Treaties". And in that sense the Commission's competence in the field of State aid is "exclusive" with regard to national courts in the Member States (Compare e.g. CJEU, C-574/14, para. 32). However, this case-law cannot be used to justify any restrictions on the above competence of the EU legislator when it comes to adopting rules relating to EU energy policy and internal market objectives.

Rather, the Commission's discretion to inter alia adopt guidelines on the compatibility of national measures with the State aid provisions under Art. 107(3) TFEU shall "*not depart from the rules of the Treaty*" (Compare e.g. CJEU, Case C-288/96 Germany v Commission, par. 62). The TFEU clearly reserves the competence to adopt rules relating to the EU energy policy, and explicitly to the promotion of renewable energy as well as the functioning of the market and the security of the energy supply, to the EU legislator according to Art. 194 TFEU.

When exercising its competence the EU legislator however cannot directly exclude the EU Commission's competence to determine whether an aid is compatible with the internal market. This is only possible within the narrow scope of Art. 108(2) par. 3) TFEU (CJEU C-272/12 P, 10.12.2013 – European Commission v Ireland and Others, par. 48-49). But the current proposals in the draft RED II recognize the Commission's competence as they are formulated "*without prejudice to State aid rules*" (see Art. 4(1) RED II). Their regulatory content is limited to the core political decisions relating to the design of support schemes for renewable energy, and – once implemented by Member States – leave it to the competence and discretion of the EU Commission to assess the compliance of these instruments with State aid law.

The current proposal of the European Commission for Art. 4 RED II with this wide reference to "state aid rules" and not to the TFEU nevertheless is misleading and discussion in EU Parliament and Council (e.g. Joint proposal on Common Rulebook elements in the recast Renewable Energy Directive by Finland, France, Germany

and Italy especially on Recital 18 and on Art. 4 (1) Red II draft) will give more clarity, if adopted.

The Commission uses the term "without prejudices to adaptations of support schemes to bring them in line with State aid rules" (from Recital 18), respectively "Subject to state aid rules" (from Art. 4 (1) RED II directive proposal). The above mentioned proposal of different Member States re-introduces the usual reservation clause "without prejudice to Articles 107 and 108 TFEU". The Member States clarify in their rationale: "The Directive is subject to the Treaty provisions, but not subject to state aid guidelines, which are internal Commission rules. The democratic legislator may not transfer its legislative competence to executive institutions if not explicitly provided for in the Treaties. The Directive should therefore make direct reference to the relevant Treaty provisions only."

The abovementioned proposed amendments within the Council and the EP, which are concretising the financial support, therefore do not exclude the Commission's competence as the final State Aid assessment of measures taken by the Member States to implement those secondary law provisions would remain with the Commission, for example:

- In case the EU legislator would oblige Member States to grant support in a way responding to market price signals (e.g. by a market-based mechanism such as a market premium), there is no infringement of the EU Commission's State aid competence, because this competence only comprises the determination whether or not a specific support instrument chosen by a Member State distorts or threatens to distort competition on the internal market, e.g. by assessing if the aid contributes to an objective of common interest and is limited to the necessary amount (financing gap). The choice of the support instrument itself thus remains with the Member State. This conclusion is supported by ECJ legislation, where it is stated that the Member States retain the right to notify the Commission of proposed State aid which does not meet the criteria laid down by a State aid communication and the Commission may authorise such proposed aid in exceptional circumstances (CJEU C-526/14, 19.07.2016 – Kotnik, para. 43). With regard to market premiums it must first be stated that those do not even constitute an exceptional case but are the rule even under the current EEAG (para 124 lit. a). Secondly, if one Member State alone already can decide to choose market premiums as a state aid compatible support instrument, there is no clear reason why this should not be possible for the Member States represented in the Council by adapting such a provision in the EU legislative procedure.

- A commitment, that technology specific support might be admissible, e.g. still leaves the decision up to the Commission which technologies exactly qualify for such specific support.
- Even the right for Member States to conduct technology neutral and technology specific auctions would still be open for detailed assessment by the EU Commission. For example, the EU Commission would still have to assess in detail, which technologies exactly qualify for technology specific auctions and which technologies would have to compete in technology neutral auctions.

Thus, even if there are certain provisions influencing the Commissions state aid decision, these provisions do not exclude the Commissions competence in this field. Moreover these provisions are political decisions, leaving the core of the state aid decision with the Commission. While the legislator sets the target, furthermore the design in each particular case has to be approved by the Commission.

F. Examples of secondary legislation with impact on State aid control

There are several examples of where the European legislator and the EU Commission have exercised their respective competences in parallel. Usually, the legislation then provides for application "notwithstanding the rules of" or "without prejudice to" the rules on State aid, e.g. Art. 5(2) of Directive 2005/89/EC, Art. 7 of Directive 2004/8/EC and Art. 20(1) Directive 2012/27/EU.

Another example worth mentioning is the current Directive 2009/28/EC, in which Art. 3(3) regarding renewable energy support schemes provides that Member States may decide whether they would like to support renewable energy produced in other Member States, but where this right is granted "without prejudice" to the rules on State aid. The CJEU has not found this provision to be in violation of the treaties, on the contrary, it has based its legal reasoning on it in the Ålands Vindkraft case (CJEU, C-573/12). This clearly underlines that EU legislation based on Art. 194 TFEU is complementary to State aid control and not precluded by the latter. Moreover, the Court found that it was the decision by the European legislator with its approach under Directive 2009/28/EC and the priority of binding national targets and national support schemes not to harmonize renewable energy legislation and thus set limits to the application of internal market rules.

There are further examples of EU legislation which affect the EU Commission's power to exercise State aid control even more directly, some of which already have been subject to CJEU rulings.

I. Tax exemptions and reductions

There are several examples of tax exemptions or reductions based on secondary law, which influence the State aid assessment by the EU Commission. In case of Directive 92/81/EEC on the harmonization of the structures of excise duties on mineral oils, the CJEU ruled that a national tax exemption for mineral oil based on Article 8(1) (b) of Directive 92/81/EEC did not even constitute State aid, because the Member State was only implementing a binding secondary law provision (CJEU T-351/02 – Deutsche Bahn AG v Commission of the European Communities, para. 102).

Another example would be the right to deduct VAT input tax payable according to Art. 17(2) lit. (a) of the Sixth Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes. The CJEU stated in this regard that Art. 87 (1) EC [Art. 107 (1) TFEU] would not even apply to a national measure transposing Article 17(2)(a) of the Sixth Directive and which provides that the right to deduct input VAT payable is confined to taxable persons carrying out taxable transactions (CJEU C-460/07 – Puffer, par. 67-71). These examples show that secondary law, under certain circumstances, can even exempt from State aid control.

In this regard, the EEAG themselves show an example of how secondary law can influence the assessment of State aid by the EU Commission. According to para. 173 EEAG the EU Commission will consider aid in the form of tax reductions to be necessary and proportional, provided the beneficiaries pay at least the Union minimum tax level set by the relevant applicable Directive (Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity).

II. Banking sector

In the banking sector there is in fact a similar situation to the energy sector in which secondary law[9] and subsequent EU Commission State aid guidelines[10] are

[9] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348 and Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform pro-

existing in parallel. Directive 2014/59/EU contains, inter alia, conditions for resolutions to failing institutions and explicitly lays down specific forms for extraordinary public financial support according to Art. 32 (4) lit. d) Directive 2014/59/EU. Those include state guarantees to back liquidity facilities provided by central banks according to the central banks' conditions, state guarantees of newly issued liabilities; or an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution. For each of the mentioned forms Art. 32 (4) par. 2 Directive 2014/59/EU states that they shall be conditional on final approval under the Union State aid framework. The banking sector therefore is an example of coexistence of detailed secondary law provision on financial aid and State aid control rules.

III. Interim conclusions

The different examples from other areas of law, in which secondary law impacts the exercise of State aid control by the EU Commission show that the EU Commission`s discretion in assessing the compatibility of aid with the internal market is not completely untouchable and can be influenced and sometimes even limited by secondary law.

G. Conclusion

A number of key proposals on the design of renewable energy support schemes in the draft RED II, which are currently discussed in the European parliament and the Council, are in line with the division of competences within the EU legal framework. They are based on the EU's legislative power in the energy sector according to Art. 194 TFEU and can be adopted following the established legislative procedures envisioned in this provision.

Neither the initial proposal nor the proposed additional amendments are in conflict with any competences of the Commission in the field of State aid. First of all, the EU legislator is not bound by the EU Commission's State aid guidelines when exer-

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cedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90.

[10] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1–15.

cising its competences under the Treaties, because State aid guidelines cannot be considered legislation and constitute "soft law" with self-binding character.

Rather, substantive harmonization efforts as well as fundamental political and economic decisions in order to better integrate and promote renewable energy in the EU would need to be undertaken through legislation under Art. 194 TFEU. While exercising this competence, the EU legislator nonetheless has of course to respect the competencies of the EU Commission in the field of State aid control according to Art. 107 TFEU. This is the case in the discussed provisions in the RED II, because, when it comes to the implementation of those provisions by the Member States, the Commission's competence comes in – which in essence is an executive competence to scrutinise the individual national measures.

There are various examples of those legislative competence and executive State aid competence standing next to each other, the latter working to enforce the former. In many of those instances, explicit reference is made to the State aid assessment of measures Member States may take to implement the legislation and a disclaimer like this is already included in the draft RED II.

Those examples and the competencies given to the EU legislator by Art. 194 (2) and (1) lit. c) TFEU would even allow to lay down specific forms of support, like specifically designed market premiums and auctions to determine the support level and exemptions thereof or give a choice between technology-neutral and technology-specific support schemes, as long as the financial support given by the Member State according to this provisions would be conditional on final approval by the EU-Commission under the State aid framework.