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Florence School of Regulation,

EU Law on RES Support schemes

Art. 4 RED-II versus State Aid Law

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Berlin, 12.05.2020

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Agenda

- History of RES-E support scheme regulation in the EU
- Art. 4 RED-II – Legal requirements for RES-E support schemes
- Art. 4 par. 9 RED-II - Interaction with State aid Law
- Comparison: Art. 4 RED-II – EEAG
- Outlook: Adaptations and development of the „future“ EEAG

The early years – MS discretion as a principle

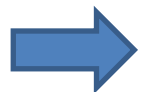
- Renewable Electricity Directive 2001/77/EC (RES-ED)
 - COM to assess direct and indirect support according to State aid rules
 - Renewable electricity to be deemed in line with the EU objectives (aka in principle justified)
 - COM to report on support scheme practice and effects of different national support policies
- Renewable Energy Directive 2009/28/EC (RED)
 - Possibility to use support schemes (inter alia)
 - Wide definition of what support schemes may be
 - But no „rules“ on what they have to be

Attempts for harmonization - failed

- COM in favor of a harmonized support scheme for RES in all EU Member States
 - Allegedly more efficient to develop RES where conditions are best and development thus cheapest
- BUT: MS (and industry) opposition
 - Plus: Art. 194 (2) TFEU and as a potential „competence obstacle“ ?
- COM attempt to (at least) turn GO into green certificates scheme
 - Failed and MS insisted on provisions in the RED preamble stressing
 - GoO are not „tradable green certificates“
 - MS in control over the functioning of their support schemes
- Instead RED introduced some (voluntary) cooperation mechanisms

Commission practice and the EEAG

- Support schemes traditionally under State aid control
 - If „State aid“, COM watches over necessity and proportionality
- COM since RES-ED approved several different support schemes
 - Sometimes under certain additional conditions
- Energy and Environmental Aid Guidelines 2014-2020 (EEAG) supposed to codify COM practice
 - Non-binding on the MS, but indication of what COM will look at during investigation procedure



Sometimes seen as „Harmonization through the back door“?

The new Art. 4 RED-II

- 10 years after MS opposed to harmonization, suddenly they agree
 - Influence of the EEAG? More experience/best practices?
Development of RES(-E)?
- COM proposal for Art. 4 RED-II was shorter and more „reluctant“
- During trilogue, EP and Council introduced more detailed rules

„What is in the law, cannot be with DG COMP?!“

THE NEW ART. 4 RED-II – LEGAL REQUIREMENTS FOR RES-E SUPPORT SCHEMES

Market Principles for RES-E support

- No obligation to use RES-support schemes (par. 1)
- If RES-E support then
 - Market-based and market-oriented integration into the electricity system (par. 2)
 - Passing on price signals and support in the form of a (fixed or sliding) market premium (par. 3)
 - Exceptions for „small installations“ allowed – BUT: no definition?!
 - EMR on market-based dispatch: exceptions for small installations < 400 kW (future: <200 kW)
 - Thus: Only those may (practically) in the future still receive feed-in tariffs

Tenders for RES-E support

- Support in an „open, transparent, competitive, non-discriminating and cost-efficient way“(par. 4)
 - Tenders are thus not „a must“
 - Can e.g. market premium sufficiently encourage competitiveness?
 - What if tenders are not „cost-efficient“? E.g. because tenders are under-signed?
 - Exceptions possible where tenders would lead to „suboptimal results“
 - Technology diversification, grid integration etc...
 - Small installations
 - Reference to the EEAG?
 - Regional diversification

Technology-neutrality as the „norm“

- Generally „technology neutral“ (par. 5)
 - Exceptions possible where tenders would lead to „suboptimal results“, e.g.
 - the long-term potential of a particular technology;
 - the need to achieve diversification;
 - grid integration costs;
 - network constraints and grid stability;
 - for biomass, the need to avoid distortions of raw materials markets.
 - Publication obligations (pre-qualification criteria, timing, etc.) (par. 6)

ART. 4 PAR. 9 RED-II – INTERACTION WITH STATE AID LAW

Support schemes under State aid scrutiny

- As in the past (RES-ED, RED)...
 - *„This Article shall apply without prejudice to Articles 107 and 108 TFEU.”* (Art. 4 Par. 9 RED-II)
- BUT: Influence of EEAG limited to „State aid“
 - Art. 107 par. 1 TFEU: “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”

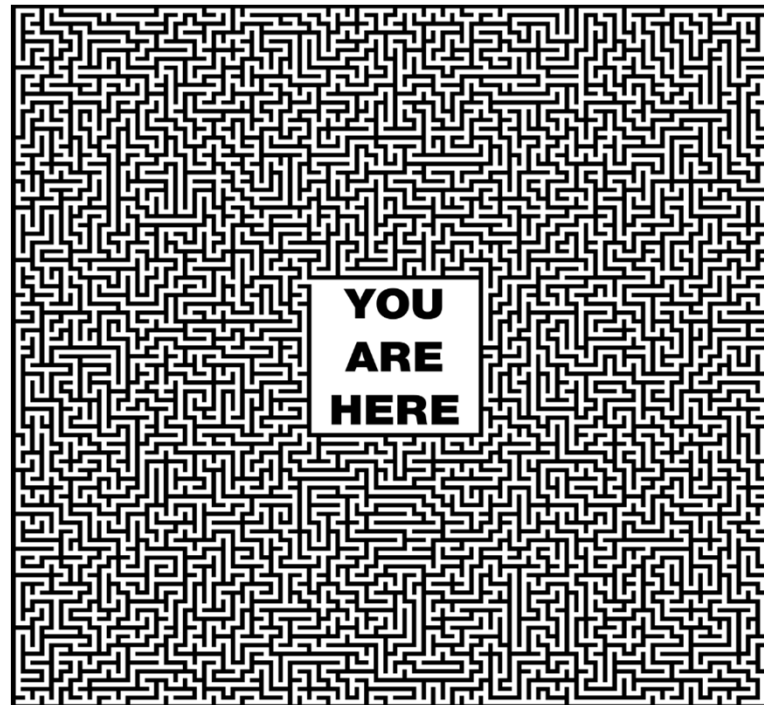


Not all support schemes necessarily involve State aid

But: State aid law only applies to State aid

- Regulation (EU) 2019/943 (EMR) = directly applicable as of 01.01.2020
- RED-II = legally binding on all MS
 - Implementation due until 30.06.2021
- EMR/RED-II also binding on COM
 - ECJ: COM is bound by guidelines and notices that it issues to the extent that they do not depart from the provisions of the Treaty (C-464/09, Holland Malt, Rn. 47)
 - „Treaty“ means primary and secondary law
- Thus: What do MS need to/may do? What can/should the COM do?

Finding your way between the RED-II and the EEAG



COMPARISON: ART. 4 RED-II – EEAG

Similarities and differences

RED-II	EEAG	Relevance?
No obligation to use support schemes	/	Meaning of alternative instruments? Cooperation mechanisms? URDP?
RES-E support scheme market-based and market-oriented	Standard balancing responsibility	Balancing responsibility regulated by EMR (> 400/200 kW)
Price Signals and market premiums	No incentive to produce at negative prices, market premiums	Exceptions for small installations from EMR (> 400/200 kW)
Open, transparent, competitive, non-discriminating and cost-efficient	Auctions as the general way to establish the level of support, with exceptions possible	Other „competitive“ mechanisms possible – relevance of „cost-efficiency“

Similarities and differences

RED-II	EEAG	Relevance?
If auctions, then technology-neutral, exceptions possible	Auctions technology-neutral, exceptions possible	Meaning of the exceptions? What are „suboptimal results?“ Which „combinations“ are possible?
Exceptions from auctions for small installations	Exceptions from auctions for installations under 1 MW	Meaning of „small installation“? Different thresholds set by EMR, EEAG, RED-II?
Regional diversification	Need for diversification as justification for technology-specificity	Regional auctions/different support schemes/rates for regions?

Similarities and differences

RED-II	EEAG	Options?
Publication obligations	/	Best practices on when/what to publish? Also: Implementation Art. 6 RED-II
Special financial support for outermost regions/small islands (par. 7)	/	Identify and possibly cater to „special needs“ of those regions?
Reporting obligation on the COM to 31.12.2021 (par. 8)	/	Guidance/Best Practice? Influence on the EEAG? (Though tough timing?)
Without prejudice to State aid	/	Interaction (future) EEAG will remain – provided „State aid“

OUTLOOK: ADAPTATIONS AND DEVELOPMENT OF THE „FUTURE“ EEAG

The EEAG - need for adaptations?

- Exemptions from market premiums need to be adjusted to EMR
 - Market-based dispatch for installations > 400/200 kW
- Otherwise no clear contradictions, but uncertainties
 - „Price signal“ vs. „negative prices“;
 - „competitive, cost-efficient“ vs. Auctions with exceptions;
 - Reference to the EEAG with the exceptions from auctioning for small installations?



What does that mean for the „future“ EEAG? Change wording? Redundancy? Interpret according to RED-II or use to clarify/add to RED-II?

Food for thought for the future EEAG?

- Focus on design of support for RES not addressed in the RED-II?
 - Heating and Cooling?
 - Transport?
- „Guidance“ where MS want to support specific RES-E projects?
 - Sustainability?
 - Guarantees of Origin and relation to level of support?
 - Demonstration projects, small installations?
 - Self-consumption/Communities?
- Potentially moving certain support schemes from the scope of EEAG to GBER?
 - E.g. when now backed by the RED-II?

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