

Ways to accelerate the deployment of renewable energies in EU State aid law

Legal bases and courses of action of the EU Commission and the Council in the current energy crisis

Legal Background Paper (in German): *Kamm/Kahles, Wege zur Beschleunigung des Ausbaus erneuerbarer Energien im EU-Beihilfenrecht*, Würzburger Berichte zum Umweltenergie recht Nr. 54 vom 26. April 2022.

Alongside energy reduction, the deployment of renewable energies is a core component of climate protection and energy security. With the Russian war of aggression against Ukraine, the urgency to deploy renewable energies, which already exists for reasons of climate protection, has become even clearer. This requires increased efforts at the national level to drive forward the expansion in a more ambitious manner. Those efforts need support and an enabling framework at the EU level. Here, it is necessary to remove legal barriers to give the Member States more room for manoeuvre in promoting and accelerating the deployment of renewables.

The requirements of European State aid law are of particular relevance in this context. Currently, the Guidelines on State aid for climate, environmental protection and energy (CEEAG) outline the rules the EU Commission applies when assessing State aid for renewable energy. These were published in January 2022 and are not yet conceptually geared to the new additional challenges resulting from the Russian war against Ukraine. In their current form, they represent a significant obstacle to the necessary additional development of renewable energies because their numerous and detailed funding design requirements increase assessment efforts and examination complexities, but result in a low predictability of the outcome of the assessment regardless.

As such, more clarity is needed on what is happening inside the black box of

State aid assessment. Additionally, the CEEAG cause a formal obstacle, namely the duration of the approval procedure. The long uncertainty as to whether, when and in what form a specific support scheme will be approved by the EU Commission often makes it difficult for national legislators and market players to plan accordingly.

This detrimental effect can be seen particularly clearly in the past reforms of the German Renewable Energy Law (EEG) and, if the State aid requirements remain unchanged, will very likely also be the case with the current reform of the EEG 2023. Particularly in view of the fact that the deployment of renewables is progressing too slowly in many areas, and due to the changed state of affairs and urgency, it is crucial to apply support schemes to accelerate the deployment of renewables in a quick and decisive manner.

The most important issues to address for an acceleration of renewables deployment thus lie in formulating criteria that give the Member States more leeway in the details of the design of their support schemes and only outline minimum requirements on the EU level, but are much clearer than they have been up to now. This simplification would enable a streamlining of the assessment with lower control complexity for the EU Commission and less burden of providing evidence for the Member States, thus reducing administrative burden. As a result, procedurally faster and more

predictable State Aid decisions would be possible.

State aid control is essential to prevent distortions of competition. The aim should therefore not be to suspend State aid control, but to reduce the control density to a manageable and transparent level for the EU Commission, the Member States and the final recipients of support as well as creating the leeway necessary to accelerate renewables deployment. In this context, it must also be considered that up to now, there has been no free competition in large parts of the energy sector, but rather a dependence on Russian imports from a choice few market players. Thus, a more diverse range of market players that goes hand in hand with the expansion of renewables would be beneficial for competition on the EU internal market as a replacement for the current import dependency. The diversification of stakeholders in any market is crucial to enable long-term competition. A reduction in the control density under State aid law in favour of an accelerated renewables deployment is therefore not in conflict with the goal of protecting the EU internal market from adverse effects on competition.

EU primary law offers various options and legal bases to simplify, clarify and speed up the existing approval procedure on the basis of the State aid provisions of the Treaty on the Functioning of the European Union (TFEU). These could be implemented either by the EU Commission itself or by the Council. The respective options are outlined in our legal background paper.

The existing temporary framework for State aid to support the economy in the current COVID-19 Outbreak and the EU Commission's temporary crisis framework for State aid measures to support the economy following the aggression against Ukraine by Russia can serve as a model for quick action. Such a

temporary framework could also support the accelerated deployment of renewable energies and thus combine the goals of climate protection with the goal of a reduced import dependency.

Art. 4 of the Renewable Energy Directive (RED II) outlines the legal requirements in the design of support schemes for energy from renewable sources. The previously highly detailed and complex requirements of the CEEAG could therefore be reduced, at least temporarily, to the legal minimum requirements according to Art. 4 RED II.

In this way, many of the freedoms in the funding design that actually exist according to the Renewable Energy Directive could be used and would require less justification effort under State aid law. This would affect, for example, the possibility for regional or technology-specific design of bidding processes, the budget or volume related to the bidding process and the option of using exemptions from tendering obligations.

In the course of such a simplification, the EU Commission could reserve the right to evaluate the measures and, should any undesirable developments become foreseeable in the long term, propose appropriate measures for readjustments in the future. The role of the EU Commission as the guardian of State aid law would thus not be undermined.

Likewise, if the minimum requirements are met, the deadlines for approval, which have so far only been very indefinite in State aid law, could be specified in a temporary state aid framework. When the deadline expires, a fictional approval should also be considered, so that there is clarity at national level from the outset as to when the measure could be implemented at the latest.

The above-mentioned substantive and procedural options for accelerating the expansion of renewables could be determined not only by the EU

Commission itself, but alternatively also by the Council. In this case, however, the procedural requirements for decision-making laid down in the respective legal bases would have to be observed.

Key results

- ▶ Climate protection already requires a rapid deployment of renewable energies. Additional urgency arises from the objective to end the dependence on Russian energy imports as soon as possible.
- ▶ In order to create a State aid framework to accelerate the deployment of renewable energies, both the necessary legal bases and exemplary models for reacting to current crises situations already exist.
- ▶ To at least temporarily reduce the density of assessment criteria outlined in the CEEAG would make a significant contribution to reduce legal obstacles for the accelerated deployment of renewable energies.
- ▶ Within such a framework, the EU Commission could give the Member States the leeway to design their funding schemes based on the requirements of Art. 4 RED II and enable procedural acceleration.
- ▶ Additionally, EU law also gives the Council appropriate options to simplify the content and procedures of State aid law.