

**The new Guidelines on State aid for Climate,
Environmental Protection and Energy Seminar**

**The Climate, Environmental
Protection and Energy Guidelines in
a broad State aid context**

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Notion of aid

Article 107(1) TFEU/61(1) EEA:

1. Transfer of state resources and imputable to the state
2. Economic advantage
3. Selective
4. Affects or may affect competition
5. Liable to affect trade between Member States.

[Commission Notice](#) on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1–50.

Transfer of state resources

- *Presussen Electra* of 2001 and renewable energy support schemes not involving state resources
- Distinguished from *Preussen Electra* - State control:
 - *Essent Netwerk* of 2008
 - *Iride* of 2009
 - *Vent de Colère!* of 2013
- *ENEA* of 2017 and *EEG 2012* of 2019 - the “fate” of the compulsory surcharge - no aid
- Green Certificates – tradable permits?

Imputability

- Energy undertakings = State?
- Criteria established in *Stardust Marine* of 2002
- Case-by-case assessment of i.a. degree of supervision/influence, requirements/guidelines, degree of integration into the public administration, nature of activities, legal status
- **EU legislation v national legislation allowed by the EU.**

Economic advantage

- Economic advantage that a recipient would not have received under normal market conditions
- **Public service obligations – *Altmark* criteria:**
 - Entrustment and clearly defined obligations (*Hinckley Point decision* and Contract for Difference)
 - Parameters of compensation
 - No overcompensation
 - Public procurement procedure or “typical undertaking”
- **The Market Economy Operator Principle (MEOP)**
 - *EDF* of 2012 – tax measure – fiscal powers v state as owner
 - *EDF* and paper mills (Commission decision).

Selectivity

- General measures
- Tax measures
- Three step test (material selectivity):
 - Reference framework,
 - Derogation – comparable factual and legal situation,
 - Justification by the nature or general scheme of the legislation.
- *Kernkraftwerke Lippe-Ems* of 2015
- *Adria-Wien Pipeline* of 2001
- Eco-tax exemption schemes.

Distortion of competition and effect on trade

- **Liberalisation v market closed for competition**
- Construction and operation exclusively reserved for the transmission system operator (TSO) or distribution system operator (DSO)
- **Legal monopoly**
- **Natural monopoly**
- For details, check Birgitte's presentation!

Distortion of competition and effect on trade

- Energy infrastructure aid
- Who benefits from the infrastructure?
- Owners/shareholders, operators, end-users
- Is open and non-discriminatory access sufficient to exclude aid?
- See Infrastructure analytical grid for energy infrastructure, https://ec.europa.eu/competition-policy/system/files/2021-04/notion_of_aid_grid_energy_en.pdf.

State support amounts to aid, what now?

- **General Block Exemption Regulation (GBER) 651/2014 (with amendments)**
- Compatible aid
- No notification obligation
- No prior authorisation
- **Section 7** – aid measures for environmental protection and energy
- Extended to 31 December 2022
- Under revision!

Compatibility assessment - Guidelines

- State aid not covered by GBER or a specific decision – notify and make out a convincing case
- “Soft law” measures: Guidelines, Communications
- Legal status of Guidelines
- What if not applicable to a given measure?
- Article 107(3) TFEU applies directly, as in *Hinckley Point*

Article 107(3)(c) TFEU

«aid to facilitate 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».

Positive and negative tests under Article 107(3)(c) TFEU

- Balancing **positive effect of aid towards an objective of common interest** against its **potential effects on competition and trade**
- **7 Common Assessment Principles (State Aid Modernisation):**
 1. **Aimed at a well-defined objective of common interest**
 2. **Necessary to achieve it**
 3. **Appropriate policy instrument**
 4. **Incentive effect**
 5. **Proportional**
 6. **No undue distortion of competition and trade**
 7. **Transparency.**