

EREF comments on the European Commission in-depth inquiry into the German EEG

10 March 2014

EREF strongly regrets the decision of the European Commission (Commission) to open an in-depth investigation according to Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) to examine whether the reduction granted to energy-intensive companies on a surcharge for the financing of renewable energy sources in Germany (the so called “EEG-surcharge”) on the legal basis of the Erneuerbare-Energien-Gesetz (EEG) is compatible with EU State aid rules of the Articles 107 ff. TFEU. In our view, the Commission was wrong to assume that the EEG would involve State aid and with that decision created unnecessary and in fact dangerous insecurity, which threatens to undermine the German “Energiewende”, as well as the development of renewable energy elsewhere in Europe.

To allow you to better understand our point of view, we would first like to briefly introduce our association, then set out which role the EEG has played for us this far, and which would be the consequences of its qualification as State aid. We will thereafter present our legal arguments, and finish with our summary conclusions.

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EREF is a federation of national renewable energy associations from EU Member States, such as wind, solar, small hydro, bio-energy, tidal, wave, and geothermal sources. EREF is striving to defend the interests of independent power, fuel and heat production from renewable sources and to promote non-discriminatory access to the energy market. EREF is a member of EREC, the European Renewable Energy Council.

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About EREF

The European Renewable Energies Federation (EREF) was founded in 1999 as the federation of national renewable energy associations from EU Member States representing sectors such as wind, solar, small hydro, bio-energy, tidal, wave, and geothermal. Our objective is to defend the interests of independent power, fuel and heat production from renewable sources and to promote non-discriminatory access to the energy market. EREF is striving to create, maintain and further develop stable and reliable framework conditions for renewable energy sources (RES).

Unlike other renewable energy associations, EREF – as the representative of the independent power producers - mainly focusses on smaller and midsize renewable energy installations, including in particular installations in the hands of regions, communities or municipalities, as well as cooperatives with citizen participation.

Overall, EREF believes that the energy system transformation we are aiming for in Europe can only succeed following a more decentralized approach. This would take pressure off from the grid but most importantly would bring the benefits from renewables, such as job creation and improvement of infrastructure in the regions, really to the people. We believe that this approach only will find the support and public acceptance it needs for a complete energy system transformation.

The importance of the EEG for the renewable energy industry

For EREF and its members, the German EEG with its support mechanism is a very successful, stable and reliable and thus important legal act. It must be seen as a very effective – if not the most effective – way to support energy from renewable sources in an appropriate manner and to achieve the energy and climate targets of the EU.

In Germany, the support mechanism for RES under the EEG has helped to increase the amount of installed capacity constantly. Since the introduction of the EEG in 2000 the share of renewable energy in the electricity supply has increased from 6,2 % to 23,6 % in 2012 and the share of renewables in the heat supply rose from 4 % to 10 %¹.

With the purchase obligation at fixed prices, the EEG allows small producers to invest in renewables since it provides an excellent basis to negotiate loans with banks that due to the security of the investment often offer loans without additional risk fees. That has allowed the German “Energiewende” to take place in a decentralized manner with support and involvement of the citizens themselves:

¹ http://www.erneuerbare-energien.de/fileadmin/Daten_EE/Dokumente_PDFs/_ee_energiedaten_agee_stat.pdf

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- Currently about 47% of the renewables capacity installed in Germany is owned by citizens!
- In 2012, citizens had invested about 5.1 billion Euro in renewables – which is about 30% of the overall total investment in renewables!

In Germany, feed-in tariffs have helped rapidly decrease renewable technology prices, have created sustainable jobs and increased prosperity in parts of our economies, in Europe and beyond.

The EEG creates the crucial legal certainty needed for the development of the RES industry. Unlike in other Member States, its design has so far allowed a sustainable growth, without retrospective and retroactive changes to legislation that seriously injured the RES industry in other Member States. Reforms to the German EEG have been predictable and decided based on the specifics and developments of the sector, and have not touched its core characteristic.

With that, the EEG has served as a success story for EREF and its members in the negotiations with governments in other Member States, when trying to get an investor-friendly legal framework for renewables.

Consequences of the Commission's decision to qualify the EEG as State aid

Against this background, we see a serious threat in the DG Competition investigation attacking Europe's most successful, effective and cost-efficient support mechanism for RES.

In Germany, the qualification of the EEG as State aid could damage the whole German "Energiewende", in which the rapid integration of increasing shares of renewables is a major backbone, by:

- o Injuring the trust of the German population in renewables and the transformation of the Energy system, as well as in European Union and its institutions;
- o Putting numbers of jobs at risk which were created by the EEG;
- o Endangering the legal certainty and the trust of the market participants in the renewables sector and thus complicating the negotiations in terms of financing renewable energy projects.

In Europe, the renewables sector has been hit by a severe crisis, mainly due to retrospective changes made to renewables law and policy experienced in several EU Member States. This is leading to investors struggling to pay back their loans, leading individual projects to bankruptcy and lack of confidence and positive investment climate in the entire sector.

Putting the EEG under the State aid regime would mean questioning the successful feed-in tariffs. The Commission has lately in its draft Guidelines for Environmental and Energy aid proposal that those could only still be applied to small scale installations – and if the EEG would be State aid, as with all other support schemes constituting State aid, it would have to be transformed the way the Commission deems appropriate.

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The end of Feed-In Tariffs would mean the end of decentralized renewable energy generation. Tendering systems generally only support “big” projects, mostly run by incumbent utilities. Small projects do not stand a chance.

EREF and its members individually and directly concerned

EREF and its members are individually and directly concerned by the Commission (preliminary) decision, in which it declares the support to electricity from renewable energy sources as well as the surcharge reduction for energy-intensive companies on the legal basis of the EEG 2012 to be State aid.

Following the qualification as State aid, the Commission would directly determine what the EEG would look like taking the decision power on how to design their national support scheme away from the German government. This would have immediate and huge impact on the entire renewables sector, as described above. Thus, EREF and its members are directly concerned by the Commission’s decision. The Commission has asked stakeholders to comment, and EREF took this opportunity as a Federation and on behalf of its members. With that we would understand EREF and its members as being individually concerned. The negative impact would hit EREF’s members with a view to their economic interests. As investors in the renewables sector, they would see the financing of their projects failing due to legal uncertainty and high risk rates at banks. Their financial efforts so far undertaken would go unrewarded and the objectives and policies of their undertakings would be going to waste.

According to our understanding, EREF and its members would have standing under the European Court of Justice’s case-law to initiate annulment proceedings, in case the European Commission does not in the course of the investigation change its views and come to the final conclusion that the EEG is not State aid. Thus, we as EREF, by ourselves and representing our membership, reserve the right to take further legal steps.

The German EEG is not State aid

EREF is convinced that the support to electricity from renewable energy sources and the surcharge reduction for energy-intensive companies under the EEG do not constitute State aid according to Article 107(1) TFEU.

There is neither any State aid to the transmission system operators (TSO), the producers of renewable energy nor – in terms of the surcharge reduction – to the energy-intensive companies, for the following reasons:

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The European Court of Justice judged that the EEG did not consist in State aids

In 2001, the European Court of Justice (ECJ) decided in the case *PreussenElektra* (C-379/98) that the German feed-in mechanisms under the preceding law to the EEG (the *Stromeinspeisegesetz – StREG*) did not involve State aid, as there were no State resources involved.

Following this judgment, the European Commission had finally accepted that the German EEG does not constitute State Aid (NN 27/2000).

Since then, no relevant changes have been made to the EEG – rather it still consists of a purchase obligation with fixed minimum prices. EREF thus questions how the Commission could suddenly – and against the ECJ’s and its own previous judgment – conclude that there would be State resources involved and the measure would thus be State aid.

The January 2010 regulation on the development of the nationwide equalization mechanism (in the *Ausgleichsmechanismusverordnung; AusglMechVO*) modernized the existing procedure for balancing the loads from the EEG. This aimed at facilitating market penetration of renewable energies and at streamlining the balancing mechanism among market players by defining a strong role of the transmission system operators to fulfill the balancing obligation. However, the law changed nothing as regards the origin of the resources.

Rather, if the Commission now says that the modernization has led to the EEG being State aid, then there is either an error in the understanding of the regulation in question, or the Commission seems to go against *PreussenElektra* and the Court, as well as reevaluate their own conclusions of 2003. Both outcomes are unacceptable. EREF is convinced that the EEG still does not constitute State aid, the main arguments why, including the relevant case-law, will again be briefly presented below.

The EEG is not financed “by the State or through State resources”

Unchanged to the situation the ECJ had to rule about in *PreussenElektra*, the EEG does not meet the requirement of being granted “by the State or through State resources”. EREF sees the judgment of the Court in the case *Doux Élevage SNC* (C-677/11) as an explicit confirmation of this position. In that case, the ECJ also denied the involvement of State resources respective the involvement of resources under State control and therefore the presence of State aid. Based on the apparent parallels in the facts, the decision in this case can be transferred to the EEG.

According to the judgment in *Doux Élevage*, a mechanism does not involve any direct or indirect transfer of State resources, if the contributions are made by private-sector economic operators. Those contributions do not go through the State budget and the State does not dispense with any resources, in whatever form (such as taxes, duties, charges and so on), which, under national

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legislation, should have been paid into the State budget. There is no such transfer if the contributions remain private in nature throughout their lifecycle and, in order to collect those contributions in the event of non-payment, the inter-trade organisation must follow the normal civil or commercial judicial process, not having any State prerogatives.

Those conditions are all met by the EEG:

- The EEG-surcharge is collected and managed only by private-sector economic operators in form of the TSO and the energy supply companies.
- The legal relations and payments between the parties are completely private and the State has no control or influence concerning these private legal relations.
- In the event of non-payment, the TSO must follow the normal civil judicial process, because they do not have any State prerogatives.
- The amount of the EEG-surcharge is not set by the State, but the EEG-surcharge results from the difference between the price, which the TSO achieve in the stock market for the sold electricity, and the EEG-payments, which the producers of renewable energy get. The State has no influence on the stock market prices for electricity.
- The State's executive – for example in form of an authority or another unit of the public law – has never any access to the EEG-surcharge. At no time the EEG-surcharge becomes part of or flows through the State budget.
- The fact, that German legislation determines how the EEG-surcharge has to be calculated and who is entitled to what, does not give the State the actual power of disposal over the use of funds. The State Executive's control is limited the control of legality and regularity as well as the functioning of the mechanisms created by legislative and this kind of Executive's control is not sufficient to categorize the EEG-surcharge as State resources according to the ECJ's judgment in *Doux Élevage*.

Thus, following the ECJ in *Doux Élevage*, the EEG is not financed “by the State or State resources” and thus does not constitute State aid. Turning to the ECJ's judgment in the case *Vent de Colère* (C-262/12) this conclusion does in no way change.

In the *Vent de Colère*-decision the ECJ concluded that the French support system does involve State resources and is State aid because of that, but there are several deciding differences between the German and the French support system, so that they are not comparable (at all) and thus the conclusions from *Vent de Colère* cannot be applied to the German EEG.

- While in France a governmental fund is installed to collect the levy from the consumer, the German EEG-surcharge is collected by the TSO from the energy supply companies, which can decide whether they want to transfer their costs to the consumer or not or just partially.
- In France, the amount of the levy is set by the government and in Germany the amount of the EEG-surcharge is calculated by the TSO according to the methodology in the *AusglMechVO*, and is in the end based on the actual costs, that will be incurred in the TSO.

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- And finally and most importantly, in France the State will step in if the income from the levy is insufficient, while in Germany a deficit (first of all) has to be borne by the TSO and to be taken into account when calculating the surcharge for the following year.

The reduction for the energy-intensive industry under the EEG is not State aid

Consequently and following the Commission's own logic, as the EEG does not meet the "by the State or through State resources" criterion of Art. 107 TFEU, the reduction for the energy-intensive industry from the EEG-surcharge cannot meet that criterion either. Therefore, it does not constitute State aid.

Further, one may point to the fact that the reduction is not selective, and does not even give an advantage but rather compensates for a disadvantage the German industry is facing due to the higher energy costs in Germany than in other Member States and in particular in third countries, as the costs related to the support to renewable energy are higher in Germany than elsewhere. Therefore, the surcharge reduction has being put in place to ensure a wide acceptance for renewable energy support.

The reduction for the energy-intensive industry thus has to be seen as an integral part of the EEG. In fact, it makes the renewables support possible. And, it should be noted that we are speaking about a reduction – not an exemption – and even the energy-intensive industry is contributing to the deployment of RES.

Further, we would like to add that we share the position of the German Government, in that even if the EEG would constitute State aid, the reduction would be compatible with Art. 107(3) lit. b and lit. c AEUV.

In any event, the reduction to the energy-intensive industry should be decided at German level

As it is understood that the reduction must have its limits, , and despite the fact that the EEG is not State aid, EREF's German member associations are in exchange with the German Government and Parliament on the reduction of the energy-intensive industry. In order to really be a compensation for an disadvantage due to the higher energy costs in Germany, it is important to ensure that these reductions apply only the of companies that are actually affected by international competition and the RES industry in Germany is willing to help finding an appropriate and balanced solution.

EREF is however convinced that this debate needs to be decided in Germany in terms of successfully implementing the "Energiewende", which would otherwise be seriously endangered, as mentioned above.

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Conclusions

The EEG has played an important role for EREF and its members in the past and has helped to drive forward the development of renewable energy in Germany and – thanks to its role model function - in Europe. Putting the EEG under the State aid regime and making it subject to the European Commission's vision on how support schemes should look like would affect the direct and individual interest of our members.

Further, and most importantly, such a conclusion – that the EEG out of a sudden should be State aid, when for years it was not - is not in line with the *PreussenElektra* decision, the own evaluation of the Commission in 2003 and the very recent case-law of the European Court of Justice. The EEG does not involve State resources – as it had not for the years of its existence. It is not State aid. Neither is the reduction for the energy-intensive industry, which anyways, as an integral part of the German plans to achieve the "Energiewende" should be discussed in Germany not in Brussels.

Thus EREF would like the European Commission to reconsider its assessment as set out in the decision of 18.12.2013 opening the formal investigation procedure. We are positive that based on the submissions received and proper application of the case-law, it will be concluded that the EEG still does not constitute State aid.

Yours sincerely,

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President

