

THE *ENERGIEWENDE* UNDER FIRE: THE INFLUENCE OF EUROPEAN UNION LAW ON GERMANY'S CLIMATE POLICY

*Alexander Proelss\**

INTRODUCTION

Tackling global warming requires international cooperation.<sup>1</sup> This cooperation has so far resulted in numerous international treaties and other documents, the most important of which are the 1992 United Nations Framework Convention on Climate Change (“UNFCCC”),<sup>2</sup> the 1995 Kyoto Protocol,<sup>3</sup> the 2012 Doha Amendment to the Kyoto Protocol (“Kyoto II Protocol”),<sup>4</sup> and the recently adopted Paris Agreement.<sup>5</sup>

The institutions of the European Union (“EU”) have adopted numerous legally binding measures to further develop the obligations prescribed by these instruments.<sup>6</sup> Within the scope of competences that Member States have transferred to the EU, measures adopted by the institutions of the EU take priority over conflicting domestic law.<sup>7</sup> The Member States are bound to observe, effectively implement, and enforce legal measures that the EU adopts.<sup>8</sup> While much of Germany's domestic climate change law is thus shaped by EU law, the Member States have so far refrained from allocating to the EU exclusive and comprehensive

---

\* Professor of International and European Union Law, Director of the Institute of Environmental and Technology Law (IUTR) and of the Institute for Legal Policy (IRP), Trier University, Germany.

<sup>1</sup> Kati Kulovesi, *Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends*, in CLIMATE CHANGE AND THE LAW 31, 43 (Erkki J. Hollo et al., eds., 2013).

<sup>2</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

<sup>3</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, of Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

<sup>4</sup> Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 8, 2012, <https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf> (last visited Mar. 6, 2017) [hereinafter Kyoto II Protocol].

<sup>5</sup> United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, Dec. 12, 2016, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 v. 12.12.2015, Draft Decision -/CP.21 [hereinafter Paris Agreement].

<sup>6</sup> See e.g., *EU Climate Action*, EUR. COMM'N, [http://ec.europa.eu/clima/citizens/eu\\_en](http://ec.europa.eu/clima/citizens/eu_en) (last visited Mar. 6, 2017).

<sup>7</sup> See e.g., Damian Chalmers et al., EUROPEAN UNION LAW 208 (2014); Monica Claes, *The Primacy of EU Law in European and National Law*, in THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 178, 182 (Anthony Arnall & Damian Chalmers eds., 2015).

<sup>8</sup> By virtue of Article 4(3) of the Treaty on European Union (“TEU”), all Member States are required to effectively execute EU obligations on the national level. See Consolidated Version of the Treaty on European Union, art. 4(3), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

powers over climate change. As a result, there is still considerable scope for unilateral action. In light of this, climate protection law within Europe is a multi-level regime that involves international, European, and domestic levels of regulation.<sup>9</sup>

This paper addresses the impact of EU law on Germany's domestic climate protection law. Part I outlines the EU's objectives in addressing climate change and describes Germany's efforts in particular. Part II discusses the legality of countries imposing restrictions on the cross-border movement of electricity produced by renewable sources. Part III considers whether Germany's surcharge regime complies with European State aid rules. Part IV contends that one aspect of the German scheme is unconstitutional and considers the implications of this.

## I. CURRENT EU ENERGY POLICY FRAMEWORK

### A. *Primary EU Law: Allocation of Competences*

According to the Treaty on the Functioning of the European Union ("TFEU"), combating global warming is an essential objective of European environmental law.<sup>10</sup> To achieve this aim, the TFEU allocates to the EU the competence to enact relevant secondary legislation.<sup>11</sup> Additionally, the Treaty of Lisbon created a new competence on energy.<sup>12</sup> This competence provides that the promotion and development of renewable energy sources are main goals of the EU.<sup>13</sup>

Articles 192 and 194 of the TFEU, dealing with the environment<sup>14</sup> and the energy sector,<sup>15</sup> respectively, allocate shared competences to the EU. A shared competence is an area of the law with regard to which both the EU

---

<sup>9</sup> See generally Stefan Weishaar, *Multi-level Governance in EU Climate Law*, in *ESSENTIAL EU CLIMATE LAW*, 274 (Edwin Woerdman et al., eds., 2015).

<sup>10</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 191, Oct. 10, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

<sup>11</sup> *Id.* art. 192(1).

<sup>12</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 2 [hereinafter Treaty of Lisbon].

<sup>13</sup> The wording of Article 194(1)(c) TFEU only mentions the "development of new and renewable forms of energy." TFEU art. 194(1)(c). In contrast, the *promotion* of renewable energy is not expressly provided for. It must therefore be concluded that measures to promote renewable energy are not covered by Article 194 TFEU, but rather by Article 192 TFEU (addressing the protection of the environment). TFEU art. 192. See Alexander Proelss, *Die Kompetenzen der Europäischen Union für die Rohstoffversorgung*, in *RECHTSFRAGEN DES INTERNATIONALEN ROHSTOFFHANDELS* 161, 178 (Dirk Ehlers et al., eds., 2012).

<sup>14</sup> TFEU art. 4(2)(e).

<sup>15</sup> *Id.* art. 4(2)(i).

and the Member States are entitled to enact legislative measures.<sup>16</sup> If a shared competence addresses a particular area, Member States may not enact laws overriding EU laws pertaining to that area.<sup>17</sup> Thus, a shared competence generally ensures that there is sufficient room for Member States to make autonomous policy decisions, especially since the EU must apply the principle of subsidiarity when exercising its shared competence.<sup>18</sup>

A notable example of a shared competence is Article 194(2) of the TFEU. This provision safeguards the “. . . Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).”<sup>19</sup>

This provision arguably permits Member States to decide for themselves how to promote renewable energy.<sup>20</sup> However, if the Member States unilaterally decide to promote renewables, they are under an obligation to implement their policies in line with European law.<sup>21</sup> This is exactly why the institutions of the EU are generally barred from dealing with “renegade” Member States that refuse to implement a renewables-oriented energy policy, but rather are only called upon to harmonize the lead States’ policies with supranational requirements such as those arising from State aid provisions.<sup>22</sup>

#### B. *The 2020 Climate and Energy Package*

To achieve the goal of combating global warming, the EU has issued numerous regulations and directives,<sup>23</sup> the “climate and energy package” being the most important set of measures.<sup>24</sup> The EU Parliament enacted this

---

<sup>16</sup> *Id.* art. 2(2).

<sup>17</sup> *Id.*

<sup>18</sup> TEU art. 5(3).

<sup>19</sup> TFEU art. 194(2).

<sup>20</sup> Alexander Proelss & Martin Weiler, *Das EEG in europarechtlicher Perspektive*, in *DEMOKRATISCH-FUNKTIONALE ANALYSE DER ÖFFENTLICHKEITSBETEILIGUNG IM UMWELT- UND INFRASTRUKTURRECHT* 34, 48 *et seq.* (Ekkehard Hofmann et al., eds., 2016).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> According to Article 288 TFEU, whereas regulations have “general application” and are “binding in [their] entirety and directly applicable in all Member States”, directives are “binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but leave to the national authorities the choice of form and methods.” TFEU art. 288.

<sup>24</sup> Detailed information about the 2020 climate & energy package can be found at *Climate Action*, EUR. COMM’N, [http://ec.europa.eu/clima/policies/strategies/2020/index\\_en.htm](http://ec.europa.eu/clima/policies/strategies/2020/index_en.htm) (last visited Mar. 6, 2017).

legislative package in 2009.<sup>25</sup> It aims to ensure that the EU has the ability to meet its ambitious climate and energy targets for 2020.<sup>26</sup>

These targets, known as the “20-20-20 targets,” set three key objectives for 2020. First, the EU decided to reduce greenhouse gas emissions by twenty percent relative to emissions produced in 1990.<sup>27</sup> In order to do so, a binding climate target was set for each Member State.<sup>28</sup> The target applies to policy sectors that are not part of the emissions trading scheme.<sup>29</sup> Germany’s reduction target for these sectors is fourteen percent below 2005 levels.<sup>30</sup>

Second, the EU has set a target for twenty percent of countries’ energy consumption to consist of renewable energy by 2020.<sup>31</sup> In order to achieve this target, the EU passed the Renewable Energies Directive, which prescribes individual targets for each Member State.<sup>32</sup> Germany targets an increase in its share of renewable energy to eighteen percent by 2020.<sup>33</sup>

The last target is to increase energy savings by twenty percent compared to projections made in 2007.<sup>34</sup> This target will be implemented through the Energy Efficiency Directive of 2012.<sup>35</sup> It should be noted, though, that this target is not legally binding *sensu stricto*.<sup>36</sup>

---

<sup>25</sup> *Id.*

<sup>26</sup> Simona Bigerna et al., *The Sustainability of Renewable Energy in Europe* 7–8 (2015).

<sup>27</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2, COM(2008) 30 final (Jan. 23, 2008) [hereinafter COM(2008) 30].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 7.

<sup>30</sup> Fed. Ministry for the Env’t, Nature Conservation, Building and Nuclear Safety, *The German Government’s Climate Action Programme 2020*, 28 (Dec. 3, 2014) (Ger.), [http://www.bmub.bund.de/fileadmin/Daten\\_BMU/Pool/Broschueren/aktionsprogramm\\_klimaschutz\\_2020\\_broschuere\\_en\\_bf.pdf](http://www.bmub.bund.de/fileadmin/Daten_BMU/Pool/Broschueren/aktionsprogramm_klimaschutz_2020_broschuere_en_bf.pdf).

<sup>31</sup> COM (2008) 30, *supra* note 27, at 2.

<sup>32</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L140) 16 [hereinafter Renewable Energy Directive].

<sup>33</sup> *Id.* at 46, annex I. National overall targets for the share of energy from renewable sources in gross final consumption of energy in 2020.

<sup>34</sup> *See* COM(2008) 30, *supra* note 27, at 2.

<sup>35</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on Energy Efficiency, Amending Directives 2009/125/EC and 2010/30/EU and Repealing Directives 2004/8/EC and 2006/32/EC, art.3, 2012 O.J. (L315) 1, 12 [hereinafter Energy Efficiency Directive].

<sup>36</sup> *See id.*

C. *2030 Framework for Climate and Energy Policies*

In October 2014, the European Council set out a policy framework for the EU's future climate and energy policy up to the year 2030.<sup>37</sup> The 2030 framework targets a reduction in greenhouse gas emissions by at least forty percent relative to 1990 emission levels.<sup>38</sup> Furthermore, the EU aims to expand the share of renewable energy in total consumption to at least twenty-seven percent by 2030.<sup>39</sup>

Just as with the corresponding “20-20-20 goal,” this goal binds the institutions of the EU, but there will no longer be individual mandatory targets for each of the 28 Member States.<sup>40</sup> Instead, the Member States will be accorded greater flexibility to set their own national targets in order to promote renewable energy on the domestic level.<sup>41</sup> Lastly, energy savings are to be increased by at least twenty-seven percent compared to projections made in 2007.<sup>42</sup>

D. *Implementation of the EU Renewable Energies Directive in Germany*

The EU's Renewable Energies Directive prescribes individual targets for each Member State.<sup>43</sup> Germany aims to achieve a reduction in greenhouse gas emissions of at least forty percent below 1990 levels by 2020.<sup>44</sup> Germany targets an increase of the share of electricity generated from renewable energy sources to forty percent in 2025.<sup>45</sup> As of 2014, the share of electricity amounted to approximately twenty-six percent.<sup>46</sup> The recent increase in electricity generated by renewable energy in Germany can be attributed to the Renewable Energy Sources Act (“EEG”).<sup>47</sup>

---

<sup>37</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Policy Framework for Climate and Energy in the Period from 2020 to 2030, at 3, COM(2014) 15 final (Jan. 22, 2014).

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *See id.* at 5.

<sup>41</sup> Bigerna et al., *supra* note 26, at 2.

<sup>42</sup> *Energy*, EUR. COMM'N, [https://ec.europa.eu/clima/policies/international/paris\\_protocol/energy\\_en](https://ec.europa.eu/clima/policies/international/paris_protocol/energy_en) (last visited Mar. 6, 2017).

<sup>43</sup> *See* Renewable Energy Directive, *supra* note 32, at 46 and Annex I.

<sup>44</sup> *See* Proelss & Weiler, *supra* note 20.

<sup>45</sup> *See* Act on the Development of Renewable Energy Sources, art. 1(2) (July 21, 2016), translation at [https://www.clearingstelle-eege.de/files/node/8/EEG\\_2014\\_Englische\\_Version.pdf](https://www.clearingstelle-eege.de/files/node/8/EEG_2014_Englische_Version.pdf) [hereinafter EEG 2014].

<sup>46</sup> *For a Future of Green Energy*, FED. MINISTRY FOR ECON. AFF. AND ENERGY, <http://www.bmwi.de/DE/Themen/Energie/Erneuerbare-Energien/erneuerbare-energien-auf-einen-blick.html> (last visited Mar. 6, 2017).

<sup>47</sup> *See id.*

To achieve its goals, Germany, unlike other States, has not adopted a single Climate Change Act.<sup>48</sup> Rather, the relevant climate protection measures are included in various federal laws dealing with particular aspects of climate protection, such as the EEG or the Greenhouse Gas Emission Allowance Trading Act.<sup>49</sup> As is the case with all “20-20-20 goals,” these two acts are strongly influenced by EU law, as they serve to transpose EU directives, the most important being the Renewable Energies Directive, into domestic law.<sup>50</sup>

The EU Renewable Energies Directive entered into force in June 2009 and required its transposition into national law by December 2010.<sup>51</sup> It “establishe[d] a common framework for the promotion of energy from renewable sources,” and set “mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy.”<sup>52</sup>

The Directive does not prescribe the way by which the Member States should achieve these targets. Based on Article 4 of the Directive, however, the Member States were obliged to adopt a national renewable energy action plan that the European Commission assesses.<sup>53</sup> Additionally, the Member States were required to submit a report to the European Commission on the progress achieved concerning the promotion and use of energy from renewable sources by December 31, 2011, and every two years thereafter.<sup>54</sup>

---

<sup>48</sup> Note that some of Germany’s Federal States, including Hamburg, North Rhine-Westfalia and Rhineland-Palatinate, have passed climate change acts. In light of the fact that all substantial decisions were taken on the level of federal law, however, these acts are limited to implement and further develop the measures prescribed by the acts described in this section. It should be noted that according to Article 31 of the German Constitution, “Federal law shall take precedence over Land law [i.e., law of the Federal States].” GRUNDGESETZ [GG] [BASIC LAW], art. 31, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0163](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0163).

<sup>49</sup> Greenhouse Gas Emission Allowance Trading Act (July 21, 2011), *translation at* [https://translate.googleusercontent.com/translate\\_c?depth=1&hl=en&prev=search&rurl=translate.google.com&sl=de&sp=nmt1&u=http://www.gesetze-im-internet.de/bundesrecht/tehg\\_2011/gesamt.pdf&usg=ALkJrhgX17NBuSA6PU4IvuwNvcqYOrQxsQ](https://translate.googleusercontent.com/translate_c?depth=1&hl=en&prev=search&rurl=translate.google.com&sl=de&sp=nmt1&u=http://www.gesetze-im-internet.de/bundesrecht/tehg_2011/gesamt.pdf&usg=ALkJrhgX17NBuSA6PU4IvuwNvcqYOrQxsQ).

<sup>50</sup> *Cf.* Energy Efficiency Directive, *supra* note 35; Directive 2003/87 EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC, 2003 O.J. (L 275) 32.

<sup>51</sup> Renewable Energy Directive, *supra* note 32, art. 27(1).

<sup>52</sup> *Id.* at art. 1.

<sup>53</sup> *Id.* at art. 4(1)

<sup>54</sup> *Id.* art. 22(1).

E. *The EEG*

Germany's energy policy, or *Energiewende*, rests on several regulatory pillars, the most important of which is the EEG.<sup>55</sup>

The *Energiewende*'s aim is to facilitate the development of renewable energy in the interest of mitigating climate change and protecting the environment, while simultaneously reducing the costs of the energy transition.<sup>56</sup> Germany hopes for renewable energy to constitute 40 - 45 percent of the share in the gross electricity consumption by 2025.<sup>57</sup> By 2035, Germany aims for the share of renewable energy to rise to fifty-five percent to sixty percent.<sup>58</sup> Germany aims for eighty percent renewable energy share by 2050.<sup>59</sup>

The EEG was first enacted in 2000.<sup>60</sup> It was designed to enable green technologies to enter the electricity market by guaranteeing fixed tariffs to operators of renewable energy.<sup>61</sup> This measure resulted in the expansion of renewable energy from 6.2 percent of the total electricity consumption in 2000 to a share of 27.8 percent in 2014.<sup>62</sup>

At the same time, the rapid expansion resulted in a rise in the surcharge imposed under the EEG ("EEG surcharge").<sup>63</sup> This surcharge, which consumers ultimately bear, was set at 2.05 cents per kilowatt hour (ct/kWh) in 2010, and rose to 6.24 (ct/kWh) in 2014.<sup>64</sup> To stop or at least to slow down the further increase in energy consumption costs, the EEG was revised in 2014.<sup>65</sup>

---

<sup>55</sup> See EEG 2014, *supra* note 45.

<sup>56</sup> See *id.* §1(1).

<sup>57</sup> See *Renewable Energy at a Glance*, FED. MINISTRY FOR ECON. AFFS. AND ENERGY, <http://www.bmwi.de/EN/Topics/Energy/Renewable-Energy/renewable-energy-at-a-glance.html>.

<sup>58</sup> *Id.*

<sup>59</sup> See EEG 2014, *supra* note 45, §1(2).

<sup>60</sup> *Fifteenth Anniversary of EEG: Ongoing Success Story*, FED. MINISTRY FOR ECON. AFFS. AND ENERGY, <https://www.bmwi-energiewende.de/EWD/Redaktion/EN/Newsletter/2015/02/Meldung/15-years-of-eeeg.html> [hereinafter *Fifteenth Anniversary of EEG*].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> JOHANNES N. MAYER & BRUNO BURGER, *KURZSTUDIE ZUR HISTORISCHEN ENTWICKLUNG DER EEG-UMLAGE 2* (July 14, 2014), [https://www.ise.fraunhofer.de/content/dam/ise/de/documents/publications/studies/ISE\\_Kurzstudie\\_EEG\\_Umlage\\_2014\\_07\\_14.pdf](https://www.ise.fraunhofer.de/content/dam/ise/de/documents/publications/studies/ISE_Kurzstudie_EEG_Umlage_2014_07_14.pdf).

<sup>65</sup> See *Regierungsentwurf [Cabinet Draft]*, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/1304 (Ger.).

F. *The Regime of the EEG 2014*

In a nutshell, the EEG 2014 contains five key provisions. First, it prescribes an obligation for grid system operators to “purchase, transmit and distribute, . . . without delay and as a priority” all electricity from renewable energy sources.<sup>66</sup> Operators of installations that produce electricity exclusively from renewable energy sources are entitled to market premiums paid on top of the market price for electricity if they sell their produced energy directly on the electricity market.<sup>67</sup> Fixed feed-in tariffs, which used to be the general rule under the previous EEG 2012, are now only available in exceptional cases.<sup>68</sup> Second, grid system operators must deliver the electricity produced from renewable energy to the upstream transmission system operators without delay.<sup>69</sup> In return, the upstream transmission system operators are obliged to compensate the grid system operators for the amounts paid under Article 19 of the EEG 2014.<sup>70</sup> Third, according to Article 59 of the EEG 2014, the upstream transmission system operators are required to market the electricity, provided that the operators of renewable energy installations concerned do not sell the produced electricity directly on the electricity market.<sup>71</sup> Fourth, the upstream transmission system operators are, again, entitled to invoice their necessary expenses to electricity providers that carry electricity to consumers.<sup>72</sup> Finally, electricity providers may pass on, and normally do pass on, the costs of the EEG surcharge to their customers.<sup>73</sup> An exception to this last step was agreed upon for energy-intensive companies.<sup>74</sup>

G. *The 2014 Revision of the EEG in a European Union Context*

The rising costs for consumers were not the sole reason why the EEG was revised in 2014.<sup>75</sup> The European Commission had opened an investigation to examine whether the EEG surcharge regime and the reduction granted to energy-intensive companies on the EEG surcharge were compatible with EU State aid rules.<sup>76</sup> The redrafting of the EEG was

---

<sup>66</sup> See EEG 2014, *supra* note 45, pt. 2, §11(1).

<sup>67</sup> See *id.*, pt. 3, §19(1).

<sup>68</sup> See *Fifteenth Anniversary of EEG*, *supra* note 60.

<sup>69</sup> EEG 2014, *supra* note 45, §56.

<sup>70</sup> *Id.* at §19.

<sup>71</sup> *Id.* at §59.

<sup>72</sup> *Id.* at pt. 4, §60.

<sup>73</sup> *Id.* at pt. 4, §63.

<sup>74</sup> *Id.*

<sup>75</sup> Communication from the Commission, Guidelines on State aid for Environmental Protection and Energy 2014-2020, EURO. COMM'N, (C 200/2) O.J. 200 (June 28, 2014).

<sup>76</sup> *Id.*



thus also meant to adjust the law as it stood at the time of the opening of the investigation into the newly enacted guidelines of the European Commission on State aid for environmental protection and energy for 2014-2020.<sup>77</sup> These guidelines outline the preconditions under which the Commission considers national supporting schemes for renewable energy to be compatible with European State aid law.<sup>78</sup>

The EEG 2012 had come under fire by EU law for an additional reason: the Commission had questioned the legality of Article 4 of the EEG, which limits the benefits of the national subsidy scheme for renewable energy exclusively to electricity produced on German soil.<sup>79</sup> The Commission took the view that such a spatial restriction might not be compatible with the provisions on the free movement of goods as laid down in Article 34 of the TFEU.<sup>80</sup>

## II. NATIONAL SUBSIDY SCHEMES FOR RENEWABLE ENERGY

The question to what extent a Member State is free to adopt subsidy schemes whose scope is restricted to renewable energy produced within that State has been a matter of controversy for quite some time. In 2001, the Court of Justice of the European Union (“CJEU”) held in its *PreussenElektra* decision<sup>81</sup> that the national subsidy scheme established under the *Stromeinspeisungsgesetz*, the predecessor to the EEG 2012, was not in violation of Article 34 of the TFEU on the free movement of goods.<sup>82</sup> The Court said that scheme could be justified in light of its positive environmental effects.<sup>83</sup> It must be noted, though, that the Court expressly limited its conclusion to “the current state of Community law.”<sup>84</sup> It therefore did not definitively resolve the question of whether national subsidy schemes are in line with the free movement of goods.<sup>85</sup>

After *PreussenElektra*, the EU passed the first Renewable Energy Directive 2001/77/EC dealing with national subsidy schemes for renewable

---

<sup>77</sup> *Id.* at C 200/1.

<sup>78</sup> *See* TFEU, art. 107.

<sup>79</sup> EEG 2014 *supra* note 45, pt. 1, §4.

<sup>80</sup> *See* Ålands Vindkraft, *Swedish Green Electricity Certificate System Complies with European Free Movement of Goods Rules*, GER. ENERGY BLOG (July 1, 2014), <http://www.germanenergyblog.de/?p=16161> [hereinafter *Certificate System Complies*].

<sup>81</sup> Case C-379/98, *In re PreussenElektra AG*, 2001, E.C.R. I-2159.

<sup>82</sup> *Id.* at I-2187.

<sup>83</sup> *Id.* at I-2185–86.

<sup>84</sup> *Id.* at I-2187.

<sup>85</sup> *See id.*

energy.<sup>86</sup> In the European Commission's proposal for what would later become the First Renewable Energy Directive, the difficulties in achieving an internal European energy market were noted.<sup>87</sup> The existing subsidy schemes of nearly all Member States were limited to their national jurisdictions.<sup>88</sup>

However, these national subsidy schemes were considered necessary to promote renewable energy, as other energy sources such as nuclear energy or fossil fuels benefited from existing supporting schemes.<sup>89</sup> Consequently, the Commission's proposal left it to the discretion of the Member States to decide if and to what extent they would opt for supporting the development of renewable energy sources by way of national supporting schemes.<sup>90</sup> Most notably, the 2009 Renewable Energy Directive takes it as its starting point that the 28 Member States have "different renewable energy potentials."<sup>91</sup> Therefore, different needs would exist for controlling "the effect and costs of their national support schemes according to their different potentials" in order to ensure their proper functioning.<sup>92</sup> The Member States' sovereignty is supported by Article 3 (3) of the Renewable Energies Directive.<sup>93</sup> This directive grants Member States the right to decide themselves "to which extent they support energy from renewable sources which is produced in a different Member State."<sup>94</sup>

The majority of EU Member States, including Germany, has opted for support schemes that grant benefits solely to electricity produced from renewable energy sources located on their territory.<sup>95</sup> In this respect, Article 4 of the EEG 2014 stipulates that "[t]his Act shall apply to installations if and to the extent that the electricity is generated in the federal territory including the German exclusive economic zone."<sup>96</sup> The financial incentives provided in the EEG 2014 are thus limited to electricity produced from renewable energy sources on German soil.<sup>97</sup>

---

<sup>86</sup> Directive 2001/77/EC of the European Parliament and of the Council of Sept. 27, 2001 on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, O.J. (L 283) at 33 [hereinafter 2001 Directive].

<sup>87</sup> *Id.* at 34, ¶ 16.

<sup>88</sup> *Id.* at ¶¶ 15–17.

<sup>89</sup> Marc Jaeger, *Climate Change Law and Policy in the EEA – A View from the General Court*, in *THE EEA AND THE EFTA COURT: DECENTERED INTEGRATION* 215, 228 (EFTA Court ed.).

<sup>90</sup> 2001 Directive, *supra* note 86, at 33.

<sup>91</sup> Renewable Energy Directive, *supra* note 32 at ¶ 25.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 28.

<sup>94</sup> *Id.* at art. 3(3); see also Armin Steinbach & Robert Brückmann, *Renewable Energy and the Free Movement of Goods*, 27 J. ENVTL. L. 1, 4 (2015).

<sup>95</sup> Renewable Energies Directive, *supra* note 32 at 19, ¶ 25.

<sup>96</sup> EEG 2014, *supra* note 45, art. 4.

<sup>97</sup> See *id.*

In its recent *Ålands Vindkraft* decision,<sup>98</sup> the CJEU confirmed that nationally restricted subsidy schemes are still in conformity with the Renewable Energies Directive since “in adopting Directive 2009/28, the EU legislature left open the possibility of such a territorial limitation.”<sup>99</sup> In light of the fact that the Renewable Energies Directive grants Member States the choice as to whether they decide to render applicable their subsidy schemes to renewable energy produced abroad, the Court correctly observed that the Directive had not “harmonised the material content of support schemes designed to promote the use of green energy.”<sup>100</sup> However, even where secondary EU law does not regulate a certain field of policy in its entirety, the domestic legal measures adopted by the EU Member States must still comply with the requirements of primary EU law, in particular the provisions on the free movement of goods in Article 34 of the TFEU.<sup>101</sup>

In this respect, the CJEU held that while support schemes limited to the territory of the Member State concerned would generally constitute non-tariff barriers to trade in terms of Article 34 of the TFEU and thus interfere with the principle of free movement of goods, such interferences would be justifiable.<sup>102</sup> Promoting the use of renewable energy sources for the production of electricity contributes to the mitigation of global warming and is therefore a legitimate objective.<sup>103</sup> In the view of the Court, a territorially based subsidy system could, depending on the individual circumstances, also be regarded as necessary to ensure the increased promotion of renewable energy.<sup>104</sup> Thus, as long as there has not been a complete liberalization of the European electricity market, Member States are essentially free to choose their own regulatory approaches, taking into account that they are in the best position to control the effects and costs of these measures.<sup>105</sup>

If the Court’s conclusions are applied to the EEG 2014, it must be noted that a departure from the existing territorially limited support scheme would most likely have resulted in an increase of foreign-produced green energy in the German electricity market. Higher electricity prices would have financed this increase, endangering the economic design of the EEG 2014.<sup>106</sup> Measured against the line of argument presented by the CJEU, the national subsidy scheme for renewable energy as established by Article 4 of

---

<sup>98</sup> Case C-573/12, *Ålands Vindkraft AB v. Energimyndigheten*, ECLI:EU:C:2014:2037 (dealing with the Swedish subsidy system for renewable energy).

<sup>99</sup> *Id.* ¶ 49.

<sup>100</sup> Case C-573/12, *Ålands Vindkraft*, Opinion of Advocate General Bot (Jan. 28, 2014), at ¶ 61.

<sup>101</sup> *See id.* at ¶¶ 61–64.

<sup>102</sup> *Id.* at ¶ 79.

<sup>103</sup> *See id.* at ¶ 76.

<sup>104</sup> *Id.* at ¶ 92.

<sup>105</sup> *Id.* at ¶¶ 94–97.

<sup>106</sup> Markus Ehrmann, Keine Pflicht zur Erstreckung der Ökostromförderung auf in anderen Mitgliedstaaten erzeugten Strom, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 1073, 1080 (2014).

the EEG 2014 is compatible with the provisions of the free movement of goods.<sup>107</sup>

That said, the conformity of this scheme with primary European law may be challenged in the future if the share of renewable energy continues to expand in line with what is envisaged by Article 1 (2) of the EEG 2014. The higher the market share of renewable energy, the more difficult it will be to insist on a territorially closed electricity market.<sup>108</sup> It is thus very likely that the increase of the share of electricity produced from renewable energy sources will be accompanied by the need for a further liberalization of the European energy market. There will be growing pressure for national energy markets to access green energy produced in other EU Member States.<sup>109</sup>

### III. COMPATIBILITY OF THE EEG 2014 WITH EUROPEAN STATE AID RULES

On December 18, 2013, the Commission initiated proceedings against Germany to examine whether the surcharge regime and the reduction granted to energy-intensive companies on the EEG surcharge are compatible with European State aid rules.<sup>110</sup>

According to the settled case law of the CJEU, State aid within the meaning of Article 107(1) of the TFEU is an intervention by the State, or through State resources, that affects trade relations between Member States.<sup>111</sup> Additionally, to violate the rules, the measure must confer a selective advantage on the beneficiary that distorts or threatens to distort the competition between the Member States.<sup>112</sup> German courts have regarded the EEG surcharge as constituting a statutory price rule regulating the legal relations between private individuals.<sup>113</sup> Therefore, the German government took the position that the surcharge regime and the reduction granted to energy-intensive companies comply with European State aid rules.<sup>114</sup>

---

<sup>107</sup> Case C-573/12, *Ålands Vindkraft AB v. Energimyndigheten*, ECLI:EU:C:2014:2037.

<sup>108</sup> Claudia Erk, *Die künftige Vereinbarkeit des EEG mit dem Verfassungsrecht* 212 (2008).

<sup>109</sup> Ulrich Büdenbender, *Energiewende 2011 und Wettbewerb in der Elektrizitätswirtschaft*, in *JAHRBUCH FÜR UMWELT- UND TECHNIKRECHT* 89 (2015).

<sup>110</sup> C(2013) 4424 Final, European Commission, *In re State aid SA.33995 (2013/C) (ex 2013/NN—Germany—Support for Renewable Electricity and Reduced EEG-Surcharge for Energy-Intensive Users* (Dec. 18, 2013).

<sup>111</sup> Case C-262/12, *Vent De Colère! Fédération Nationale et al v. Ministre de l'Écologie et al*, E.C.J. ECLI:EU:C:2013:851 ¶ 15.

<sup>112</sup> *Id.*

<sup>113</sup> *See* BUNDESGERICHTSHOF [BGHZ] [Federal Court of Justice] June 25, 2014, VIII ZR 169/13, reprinted (in German only) in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 1180, at 1182.

<sup>114</sup> Case T-47/15, *Germany v. Commissioner* (E.C.J. General Court), ECLI:EU:T:2016:281 ¶ 31.

Nonetheless, Germany decided to notify the European Commission of the changes made under the EEG 2014.<sup>115</sup>

Originally, the European Court had held in its *PreussenElektra* judgment that funds provided to promote the increase of electricity from renewable sources did not amount to State aid under Article 107 of the TFEU.<sup>116</sup> In a later case, however, the Court clarified that “the funds at issue [in *PreussenElektra*] could not be considered a State resource since they were not at any time under public control . . . .”<sup>117</sup> According to the European Commission, the issue of State control constituted the decisive factor in the case.<sup>118</sup> The European Commission argued that the necessary State control existed because

[T]he State has established a special surcharge, called the EEG-surcharge . . . . [T]he Commission observes that the State has entrusted the TSOs [Transmission System Operators] with the task to centralise and administer all financial flows related to the feed-in tariffs and the EEG-surcharge. Also, the State has established very detailed rules governing the determination of the EEG-surcharge and its use and destination. [Finally], [t]he Commission notes that there are extensive control mechanisms in place that allow the State to monitor the financial flows.<sup>119</sup>

Against this background, the European Commission confirmed, in its final decisions of July 23, 2014 concerning the EEG 2014, and November 25, 2014 concerning the EEG 2012, that the surcharge regime as well as the reductions granted to energy-intensive companies under both the EEG 2012 and EEG 2014 constituted State aids.<sup>120</sup>

The Court, though, essentially “saved” the approach on which the *Energiewende* is based by concluding that Germany was, by way of exception, justified under Article 107(3) of the TFEU in establishing the pertinent supporting mechanisms.<sup>121</sup> The German government, supported by

---

<sup>115</sup> As required under the TFEU. See TFEU, art. 108(3).

<sup>116</sup> Christian König & Jürgen Kühling, EC Control of Aid Granted through State Resources: Public Undertakings, Funds, Imputability, and the Importance of How Resources are Transferred—What do *PreussenElektra* and *Stardust Marine* Tell Us?, in 1 EUR. STATE AID L. Q. 1, 7 (2002).

<sup>117</sup> Case C-262/12, *Vent De Colère*, ECLI:EU:C:2013:851 ¶ 36.

<sup>118</sup> C(2014) 5081 Final, State Aid SA.38632 (2014/N)—Germany EEG 2014—Reform of the Renewable Energy Law, European Commission ¶ 192 (July 23, 2014), [http://ec.europa.eu/competition/state\\_aid/cases/252523/252523\\_1589754\\_142\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252523/252523_1589754_142_2.pdf) [hereinafter Final Decision on EEG 2014].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at ¶¶ 191-92; C(2014) 8786 Final, Commission Decision of November 25, 2014 on the Aid Scheme S.A. 33995 (2013/C) (ex 2013/NN) [implemented by Germany for the Support of Renewable Electricity and of Energy-Intensive Users], European Commission ¶ 140 (Nov. 25, 2014), [http://ec.europa.eu/competition/state\\_aid/cases/251153/251153\\_1609393\\_4127\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251153/251153_1609393_4127_2.pdf).

<sup>121</sup> TFEU art. 107(3) (listing aids of the Member States which “may be considered to be compatible with the internal market”).

the majority view in domestic legal scholarship,<sup>122</sup> reaffirmed its opinion that the relevant funds did not originate from State resources and could thus not constitute State aids.<sup>123</sup> The German government thus decided to challenge the validity of the Commission's decision of November 25, 2014, before the CJEU.<sup>124</sup>

This author has argued elsewhere that the European Commission's line of argument, if measured against the settled case law of the CJEU, is correct in light of EU law.<sup>125</sup> The opposite position taken by the German government can best be explained by (understandable) political motives.<sup>126</sup> The details of the line of argument presented at that occasion cannot be recapitulated here in detail. Suffice it to say that the influence of the State on the national support mechanism established by the EEG has systematically increased since the CJEU's *PreussenElektra* decision.<sup>127</sup>

Within the current framework of the EEG 2014, the State prescribes detailed guidelines as to how the EEG surcharge ought to be calculated, and in what way it can be used.<sup>128</sup> All parameters necessary for the calculation of compensations and surcharge are specified by way of legislative or executive instruments. Furthermore, transmission system operators do not have any autonomous scope of discretion in the decisionmaking process;<sup>129</sup> rather, they are only tasked with the implementation of the already fixed and prescribed rules and parameters and are thus privates being entrusted with public powers.<sup>130</sup>

The scope of control and enforcement powers allocated to State agencies such as the Federal Network Agency (*Bundesnetzagentur*) further confirm that the support mechanism established by the EEG cannot be adequately understood in terms of a price regulation between privates.<sup>131</sup> Consequently, in light of the existing element of State control over the cash flow, the EEG surcharge—and even more the reduction granted to energy-intensive companies on the EEG surcharge—must be defined as State aid in terms of Article 107 of the TFEU.<sup>132</sup>

---

<sup>122</sup> See e.g., Proelss & Weiler, *supra* note 20, at 53–55.

<sup>123</sup> See Final Decision on EEG 2014, *supra* note 118, at ¶ 191-92.

<sup>124</sup> *Id.* at ¶¶ 1–5.

<sup>125</sup> See generally Proelss & Weiler, *supra* note 20.

<sup>126</sup> *Id.* at 55.

<sup>127</sup> See generally *id.*

<sup>128</sup> EEG 2014, *supra* note 45, at §§60–61.

<sup>129</sup> *Id.* at §60(3).

<sup>130</sup> According to § 3 of the Ordinance on a Nationwide Equalization Scheme (*Ausgleichsmechanismusverordnung*), the transmission system operators are required to jointly calculate a surcharge that is nationwide applicable.

<sup>131</sup> EEG 2014, *supra* note 45, §85.

<sup>132</sup> See TFEU art. 107.

This position was recently confirmed by the judgment of the General Court of the European Union (“GCEU”).<sup>133</sup> The GCEU rejected the action for declaration of nullity taken by Germany against the decision of the Commission of November 25, 2015.<sup>134</sup> The Court observed:

[T]he TSOs [Transmission System Operators] are entrusted, in addition to the responsibilities inherent in their main activity, with managing the system of aid for the production of EEG electricity. They are, moreover, monitored when performing that task, as the Commission notes in recital 107 of the contested decision, so that they are unable to use the funds collected in the context of the measure at issue—which are paid to them by the suppliers covered by that measure—for purposes other than those laid down by the German legislature. That being so, it must be held that, in the context of performance of the tasks falling to them under the EEG 2012, the action of those bodies is not that of an economic entity acting freely on the market for the purpose of making a profit, but an action defined by the German legislature, which circumscribed it so far as the performance of those tasks is concerned.<sup>135</sup>

Consequently,

[T]he fact that the State does not have actual access to the resources generated by the EEG surcharge, in the sense that they indeed do not pass through the State budget, does not affect, in the present instance, the State’s dominant influence over the use of those resources and its ability to decide in advance, through the adoption of the EEG 2012, which objectives are to be pursued and how those resources in their entirety are to be used.<sup>136</sup>

#### IV. ENERGY POLICY, DEMOCRACY, AND THE RULE OF LAW

The constraints of EU law on the drafting of the EEG were threefold: First, the national Renewable Energies Act had to be compatible with the Renewable Energy Directive.<sup>137</sup> Second, the EEG system had to conform to the provisions of the free movement of goods.<sup>138</sup> Third, the Renewable Energy Resources Act had to abide by the existing State aid rules as laid down in Art. 107 of the TFEU.<sup>139</sup>

---

<sup>133</sup> The GCEU is part of the CJEU. Its jurisdiction covers, inter alia, actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the EU as well as actions brought by the Member States against the Commission.

<sup>134</sup> Case T-47/15, *Germany v. Commissioner* (E.C.J. General Court), ECLI:EU:T:2016:281 ¶ 106.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at ¶ 118.

<sup>137</sup> Severin Klinkmüller, *Of Surcharges and Supervision: German Renewable Energy Act is State Aid*, 1 EUR. PAPERS 1055, 1059 (2016).

<sup>138</sup> *See generally* Certificate System Complies, *supra* note 80.

<sup>139</sup> C(2016) 2406 Final, Re: State Aid SA.40912 (N/2015)—Germany—Modification of the Modalities of the Support Under the EEG 2014—Reform of the Renewable Energy Law, European Commission ¶ 16. (Apr. 19, 2016).

As far as the political and legal consequences are concerned, the third point is arguably the most sensitive issue. If the view taken by the GCEU reflects the realities of EU law, it will also have an impact on the legal situation within Germany.

In this respect, it should be noted that the German Constitution considers taxes to be the way for German nationals to fulfill public duties.<sup>140</sup> In contrast, so-called *Sonderabgaben* (special levies) are only compatible with the German Constitution under strict conditions. They may only be imposed on a limited and definable group of persons in light of their specific and clearly attributable economic or social responsibility.<sup>141</sup>

The distinction between taxes and special levies is particularly important in the present context in light of the fact that the EEG 2012 and 2014 have developed a legal regime under which, as held by the GCEU, the State, and not private actors, exercise effective control over the cash flow.<sup>142</sup> While the European Court only assessed the compatibility of the EEG regime with European State aid rules, public control over the funds also affects the compatibility of the EEG surcharge with the financial provisions of the German Constitution.<sup>143</sup>

Given that the German legislator has refrained from complementing the EEG regime with a renewable energy tax, and taking into account that energy supply is clearly a matter of general public interest for which no particular group responsibility exists,<sup>144</sup> the EEG surcharge ought to be regarded as a special levy that is not in line with the German Constitution. Even if one would, for the sake of argument, accept that energy consumers constitute a sufficiently definable group that bears the main responsibility for paying the expenses of the *Energiewende*,<sup>145</sup> it would seem to be impossible to justify the inclusion of independent self-providers into the EEG regime, as these actors, regardless of whether they are private persons or industry entities, do not contribute to the costs of energy production.<sup>146</sup> By creating a legal regime that allegedly privatizes the financial flows generated by its operation, but in reality adheres to the State control of the

---

<sup>140</sup> See *Bundesverfassungsgericht* (Federal Constitutional Court) 2 BvR 633/86, BVerfGE 91, 186, 206 (Nov. 10, 1994) [Ger.].

<sup>141</sup> *Bundesverfassungsgericht* (Federal Constitutional Court) 2 BvF 3/77, BVerfGE 55, 274, 297 (Oct. 12, 1980) [Ger.].

<sup>142</sup> Case T-47/15, *Germany v. Commissioner* (E.C.J. General Court), ECLI:EU:T:2016:281 ¶ 83.

<sup>143</sup> *Id.*

<sup>144</sup> The Federal Constitutional Court decided that no difference exists between the need to be supplied with electrical power and that concerning the staff of life. See *Bundesverfassungsgericht*, 2 BvR 633/86, BVerfGE 91, 186, 206.

<sup>145</sup> See Parliamentary Pub. No. 18/1304 ¶ 110, (May 5, 2014) [Ger.].

<sup>146</sup> According to EEG 2014, *supra* note 45, at art 61, self-providers are, as a matter of principle, also obliged to pay the energy surcharge to the transmission network operators.



cash flow, the German legislator has circumvented the comparatively strict requirements of the financial provisions of the German Constitution.<sup>147</sup>

A second issue concerns the practice of the institutions of the EU on the field of energy policy. Notwithstanding the fact that the EEG 2014 was held to be compatible with EU State aid law, the European Commission has arguably used the exclusive EU competence on the functioning of the internal market,<sup>148</sup> which also covers aids granted by States, as a mechanism to interfere with the structure of the energy policy of the Member States.<sup>149</sup> If viewed from a formal perspective, the Member States are generally obliged to implement their energy policies in line with European law, including the requirements of the rules on State aids. That said, Article 194(2) of the TFEU expressly safeguards the “Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).”<sup>150</sup> Moreover, Article 192(2)(c) of the TFEU allocates to the Member States a wide scope of discretion concerning the promotion of renewable energy, as the Council must decide unanimously when adopting measures that would significantly affect “a Member State’s choice between different energy sources and the general structure of its energy supply.”<sup>151</sup>

The Renewable Energy Resources Directive further highlights the Member States’ powers to make autonomous decisions.<sup>152</sup> That Directive’s careful terms were arguably intended to safeguard the Member States’ national sovereignty over renewable energy sources.<sup>153</sup> Measures adopted by the EU concerning the promotion and development of renewable energy sources therefore cannot be held to take primacy over unilateral legislative action taken by Member States.<sup>154</sup>

---

<sup>147</sup> Gerrit Manssen, *Die EEG-Umlage als verfassungswidrige Sonderabgabe*, in DIE ÖFFENTLICHE VERWALTUNG 499, 499 (2012); Martin Maslaton & Florian Brahms, VERFASSUNGSRECHTLICHE ZULÄSSIGKEIT DER ERHEBUNG DER EEG-UMLAGE AUF DIE EIGENSTROMVERSORGUNG IM EEG 2014, 27, [http://www.bkww.de/fileadmin/users/bkww/infos/studien/20140520\\_Gutachten\\_Verfassungsmaessigkeit\\_der\\_EEG-Umlage.pdf](http://www.bkww.de/fileadmin/users/bkww/infos/studien/20140520_Gutachten_Verfassungsmaessigkeit_der_EEG-Umlage.pdf) (last accessed July 17, 2016); Martin Maslaton & Florian Brahms, *Verfassungsrechtliche Bedenken gegen die EEG-Umlage auf die Eigenstromversorgung*, in NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 760, 763 (2014); Christian Bickenbach, *Die Finanzierung der “Energiewende“ in der Zwickmühle aus Finanzverfassung und Art. 107, 108*, in DIE ÖFFENTLICHE VERWALTUNG 953, 955 (2013).

<sup>148</sup> See TFEU Art. 3(1)(b).

<sup>149</sup> Martin Burgi & Daniel Wolff, *Der Beihilfebegriff als fortbestehende Grenze einer EU-Energieumweltpolitik durch Exekutivhandeln*, in EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 647, 651 (2014) (accusing the European Commission of developing an “all-encompassing meta law of State aid control”).

<sup>150</sup> TFEU art. 194(2).

<sup>151</sup> TFEU art. 192(2)(c).

<sup>152</sup> Renewable Energy Directive, *supra* note 32, at ¶¶ 25, 36.

<sup>153</sup> Steinbach & Brückmann, *supra* note 94, at 4.

<sup>154</sup> Proelss, *supra* note 13.

To preserve the institutional balance the TFEU establishes between the EU and Member States, the careful approach on which European energy policy is based must not be circumvented by way of an overly generous handling of the EU's exclusive competence regarding State aid rules. The EU should not use State aid control to interfere with the Member States' choice between different energy sources and the general structure of their energy supply.

In 2014, the European Commission proposed a comprehensive set of guidelines on State aid for environmental protection and energy concerning the period 2014-2020.<sup>155</sup> These guidelines set out “the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty.”<sup>156</sup> While it is the task of the European Commission to oversee Member States' compliance with European legal requirements concerning the granting of State aid, the European Commission does not have the competence to authentically interpret the provisions of the TFEU.<sup>157</sup> Nevertheless, Member States who disregard the guidelines risk being brought before the CJEU by the Commission for violations of Article 107 of the TFEU. Even though the guidelines lack binding effect, the Commission can potentially rely on them to implement a truly regulatory policy.<sup>158</sup> The Commission's actions under the guidelines exceed the inner-European institutional balance (and thus conflict with the principles of democracy and the rule of law)<sup>159</sup> as well as interfere with the Member States' sovereign powers concerning the development of their energy policies.

Taking into account that on the European level the Commission has an exclusive right to initiate legislation, it is the task of the CJEU to carefully observe in each case whether the guidelines and their application by the Commission go beyond what is necessary to enable effective supervision of State aids. It is called upon to take a critical stance towards the guidelines being used in a manner that treats them as a legally binding document, and

---

<sup>155</sup> Communication from the European Commission, Guidelines on State aid for Environmental Protection and Energy 2014-2020, O.J. (2014/C 200) 1 (June 28, 2014)

<sup>156</sup> *Id.* at 3.

<sup>157</sup> See Moritz Bonn et al., Entwurf der Leitlinien der Europäischen Kommission für staatliche Umwelt- und Energiebeihilfen 2014-2020: Juristische und ökonomische Bewertung der Prüfkriterien zur Förderung erneuerbarer Energien, in *CENTRUM FÜR EUROPÄISCHE POLITIK*, 22, 22–26 (2014), [http://www.cep.eu/Studien/Beihilfeleitlinien/cepStudie\\_Beihilfeleitlinien\\_Umwelt\\_\\_Energie\\_2014-2020.pdf](http://www.cep.eu/Studien/Beihilfeleitlinien/cepStudie_Beihilfeleitlinien_Umwelt__Energie_2014-2020.pdf) (last accessed July 17, 2016) (arguing that the guidelines violate Article 194 TFEU).

<sup>158</sup> Martin Nettesheim, *EU-Beihilfenrecht und nichtfiskalische Finanzierungsmechanismen*, in *NEUE JURISTISCHE WOCHENSCHRIFT* 1847, 1852 (2014).

<sup>159</sup> This situation arguably amounts to ‘policymaking by proposal’ as identified by James W. Coleman in respect of the course of action pursued by the US Environmental Protection Agency. See James W. Coleman, *Policymaking by Proposal: How Agencies are Transforming Industry Investment Long Before Rules Can be Tested in Court*, 24 *GEO. MASON L. REV.* 497 (2017).

to indirectly safeguard the Member States' broad powers in the field of energy policy.<sup>160</sup>

#### CONCLUSION

The Member States have not allocated to the EU the competence to enact binding rules on the extent and ways to promote renewable energy. If the Member States unilaterally decide to promote renewables, they must implement their decisions in line with European law, in particular freedom of goods and State aid rules.<sup>161</sup> The real task of the EU, as foreseen by the TFEU, is thus to harmonize the lead States' unilateral policies with supranational requirements.

This scheme has been challenged from two different fronts. On the one hand, the European Commission, supported by the case law of the CJEU, has made use of its control powers concerning State aid rules to introduce through the backdoor energy regulatory policy. At the same time, Germany has somewhat naively ignored the settled practice of the EU institutions in relation to the scope of the supranational legal requirements on State aid rules. More severely, by creating an energy policy that privatizes the financial flows generated by its operation, but in reality adheres to the State control of the cash flow, the German legislator has arguably circumvented the comparatively strict requirements of the financial provisions of the German Constitution. These developments should be regarded as sufficient cause for a broad debate on a fundamental reform of the European energy policy as well as the legal foundations of the *Energiewende* in Germany

---

<sup>160</sup> *Case Law: Difference Between 'Delegated' and 'Implementing' Acts*, EUR.ENVTL. L. (Apr. 30, 2014), <http://www.asser.nl/media/2315/new-service-2014-4-pdf.pdf>.

<sup>161</sup> COM(2008) 30, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *20 20 by 2020* (Jan. 23, 2008), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0030&from=en>.