

DELIVERING ENERGY LAW AND POLICY IN THE EU AND THE US

A READER



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RES: TOWARDS A NEW EUROPEAN POLICY

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INTRODUCTION

The economic crisis currently affecting some EU member states resulted in the initiation of a general discussion concerning the revision of the Renewable Energy Sources (RES) Support Schemes throughout the EU.² These schemes were mainly adopted in order for private entities to be able to run their RES projects with a reduced business risk within the liberalised energy market. The member states adopted such schemes at least fifteen years ago, targeting the quick penetration of RES into their energy mix.³ However, a likely revision has been recently recommended by the Commission and the message seems to be clear that although the RES should be moved to the centre of the energy mix in Europe, they should change from subsidised to competitive models.⁴ This

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² See Art. 3 of European Parliament and Council Directive 2009/28/EC 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) OJ L140/16 (RES Dir).

³ See also Art. 3(1) of RES Dir, concerning the mandatory national overall targets and measures and Art. 4, concerning the national renewable energy action plans and Energy Union Package, COM (2015) 80 Final, 25 February 2015.

⁴ European Parliament Resolution on the Energy Road Map 2050, a future with energy of 14 March 2013 (2012/2103/INI), para. 28 along with Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Renewable Energy: a major player in the European energy market (COM (2012) 271 Final, 6 June 2012) and European Commission, Guidelines on State aid for environmental protection and energy 2014–2020, 2014/C 200/01, OJ C200/28-6-2014, paras 107–24.

chapter examines the issues that may arise from such revision and the relevant future regulatory framework for not having a significant impact on the RES penetration on the one hand, without challenging the actual legal framework and the certainty of law on the other.

The development of RES has been at the top of the EU's strategic choices since the 1990s. Among the main purposes of this initiative were the diversification of the energy sources and materials in order to achieve European security of supply (due to the fact that oil and natural gas were mainly imported from third countries); the protection of the environment; and the growth of regional economies. The diversification of energy sources and the use of RES are becoming more necessary and emphatic following the likely reduction of nuclear energy in Europe as well as the various geopolitical issues that threaten the smooth transmission of natural gas from east to west. Moreover, increased environmental sensitivities in Europe call for more RES capacity rather than the use of polluting carbon and oil power plants. In any case, a low carbon economy remains an EU target.⁵

Within the framework of the Support Schemes, which were adopted by the member states and 'blessed' by the Commission, high feed-in tariffs (FiTs) and long-term power purchase agreements (PPAs) were set out for the RES producers' compensation. More specifically, the FiTs were usually linked to the cost of construction of the respective parks. The producers' compensation is mainly recovered from the wholesale electricity market and a levy, usually charged to the consumers. Under these circumstances, the RES are subsidised, as they do not participate in the wholesale market, but they enjoy a mandatory priority access⁶ (and dispatch) in the electricity systems and are compensated by maintaining a guaranteed price (FiT).

Thus, while the RES penetration was proceeding swiftly and the EU was receiving the advantages thereof, the member states were not adjusting the Support Schemes in order to mitigate their economic impacts, especially with the consumer in mind. The lack of such adjustment resulted in economic problems within the budgets of the electricity market operators and consequently delays in payments of the RES producers' compensation.

THE IMPACT OF THE ECONOMIC CRISIS ON THE RES SUPPORT SCHEMES

The consequences of the economic crisis in many member states resulted in an additional impact on the construction of further RES projects. In particular, under the pressure of the crisis, the states intervened in the Support Schemes, mainly in FiTs, in order to mitigate the deficits, creating legal uncertainty and thus a loss of security for investors. Moreover, the banking system was reluctant to finance RES projects. In some member states (including Spain, Bulgaria and Greece) the

⁵ See European Parliament Resolution of 15 March 2012 on a Roadmap for moving to a competitive low carbon economy in 2050 (2011/2095 INI).

⁶ See Art. 16(2)(b) of RES Dir.

state proceeded with the reduction of FiTs, even for the already signed PPAs. Thus, legal uncertainty was added to the likely violation of both the constitutional provisions of these countries and the provisions of the ECHR.⁷ The lack of legal certainty along with these interventions created a further delay of RES development as the investors were (and are) reluctant to continue with the construction of the parks. These interventions were instigated usually by the states following the invocation of the *circonstances exceptionnelles* doctrine. However, it is doubtful whether these measures, touching on the nucleus of fundamental rights, are compatible with the European and national legislation. Furthermore, the reluctance of the banking system was (and is) obviously not only due to the fact that banks do not have adequate funds for the respective finance, but because they also felt (and still feel) unsafe concerning the repayment of financing.

TOWARDS A NEW REALITY

It does not seem that RES power plants could be utilised in electricity systems in the same way as conventional ones, mainly due to their high volatility and other particularities. If they were to be so used, this would make them non-competitive. For this reason, the regulatory framework should continue granting them a kind of sustainable protection on the following grounds: (1) access priority; (2) minimum guaranteed FiT; and (3) certainty of law. The above aspects are necessary for a new investment in RES to be realised, so that these projects are not exposed to a significant business risk that is not compatible with their nature.

In light of the above, a transitional roadmap from the RES subsidised regime to a *sui generis* competitive one, compatible with the nature of RES, so that RES producers could offer their energy directly in the market, could be based on the following presuppositions. First, the removal of electricity wholesale market distortions, where they exist, is absolutely necessary, so that the system marginal price should reflect at least the average variable cost of the conventional power plants. This will ensure that RES producers will receive fair and reasonable revenue from the market, over time. The Target Model for Electricity would hopefully help towards this direction at a European level. In this regard, a threshold (minimum) of FiT at a European level should be guaranteed by a European mechanism that should be established.

The mandatory implementation of every mechanism of additional income as provided for by European legislation⁸ (that is, green certificates, guarantees of origin) must be supported, so that the impact on the consumer will be diminished. In addition, the activation and intensification of the rest of the mechanisms that could support the cooperation of the member states on further RES development (that is, joint projects, statistical transfers and so on) should be implemented as soon as possible.⁹ Furthermore, a fair and reasonable fixing of a basic FiT and its premium per RES technology should be determined, in the

⁷ The European Convention on Human Rights and in particular its First Additional Protocol.

⁸ See Art. 15 of RES Dir.

⁹ See Arts 6 and 7 of RES Dir.

event that this methodology is implemented. At this point, the priority access of RES should be maintained. Instead of a unilateral mandatory reduction of the FiTs, especially for the photovoltaic technology, member states could proceed towards an initiative for a negotiated reduction, after a period of five to six years from the beginning of their operation, against a reasonable retribution (that is, extension of the duration of PPAs and so on). Finally, a safe regulatory and legal framework should be complied with over time, so that legal certainty is ensured.

CONCLUSION

The development of RES seems to be a continuous and necessary goal for the energy sector in the EU. The member states should take measures in order to mitigate the impact of the RES Support Schemes on national economies, in particular during the crisis period. However, this must not change the objectives of the general strategy of the EU, which states that RES development is still one of the main pillars of the European decarbonisation energy policy. Given that RES development constitutes a mandatory target, a threshold of RES FiT should be guaranteed at European level through a relevant mechanism during the first eight to ten years of operation. Any likely measures should respect the national and European principles of law and especially constitutional rights.

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