

EU Guidelines on State Aid: An indirect harmonisation of support schemes for RES-E?

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Outline

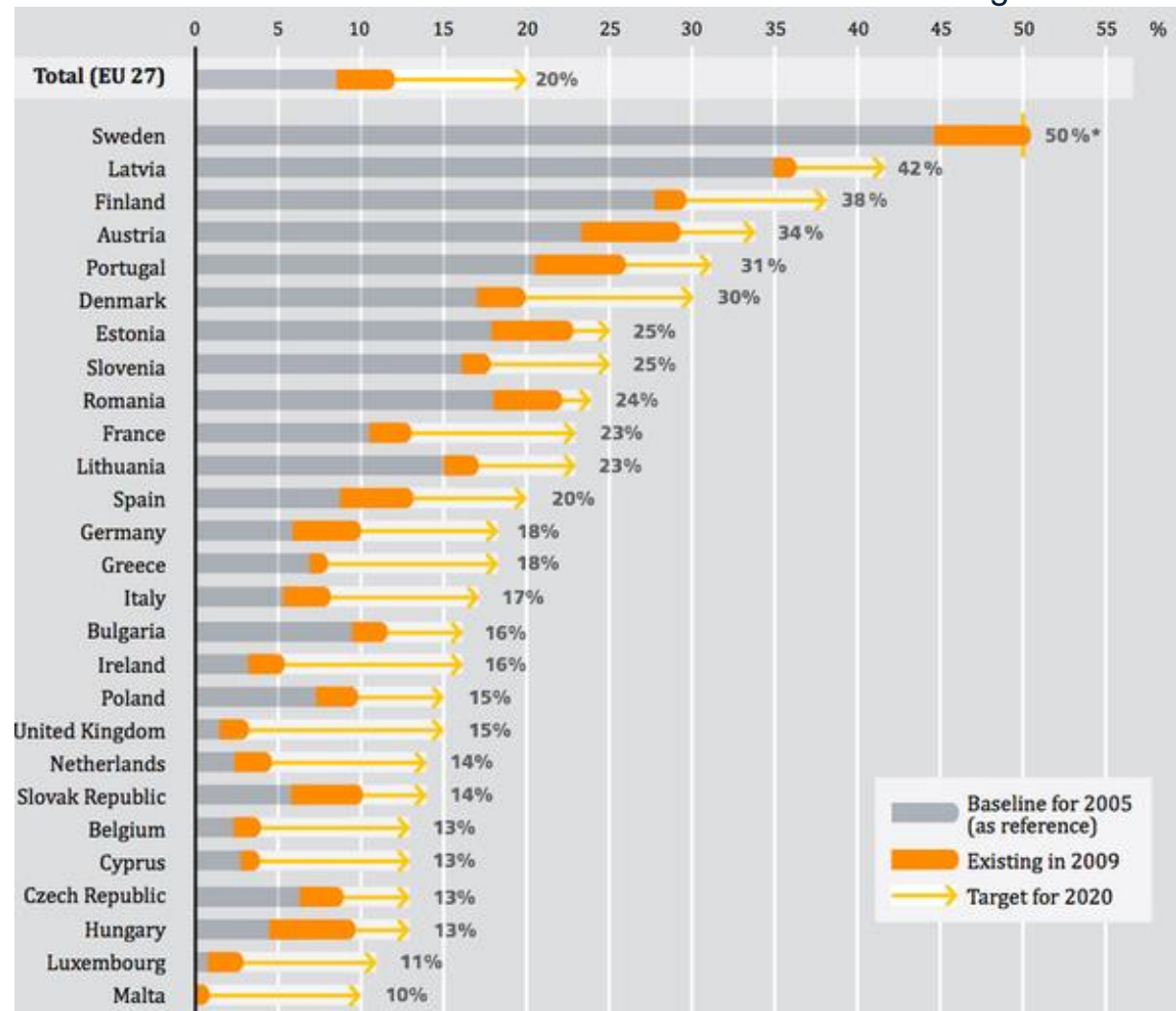
- › The role of support schemes in the transition to a low carbon economy
- › Different regulatory approaches to support RES-E focusing on feed-in-systems
- › Are feed-in-systems within the scope of EU State Aid law?
- › The legitimacy of the State Aid Guidelines as a means to promote harmonisation



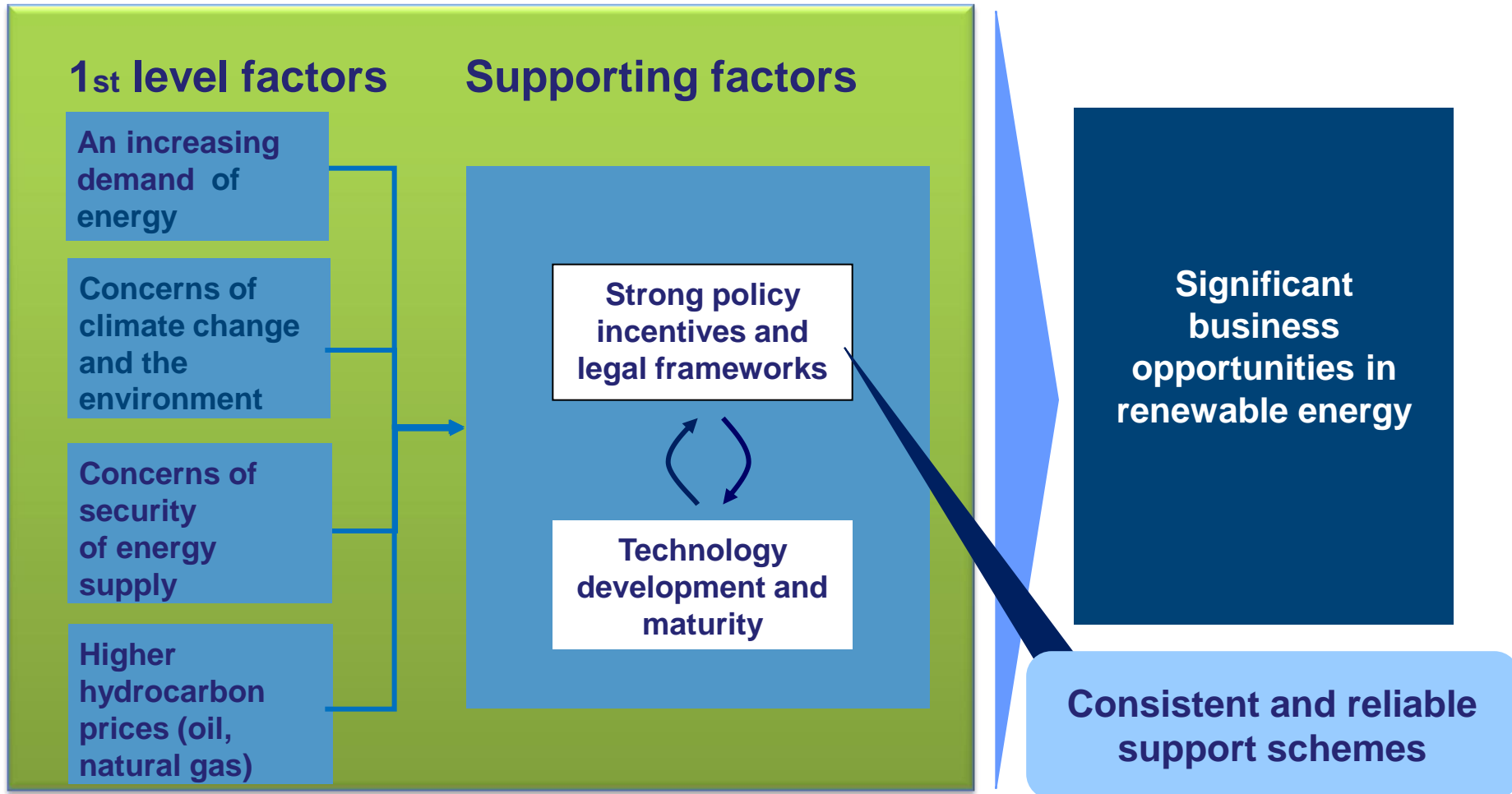
The EU 20% renewable energy target

- The target is to increase the share of renewable energy sources in the total energy consumption to 20% in 2020
- Codified in the Renewable Energy Directive
- “Public support is necessary to reach the target with regard to the expansion of RES-E”

EU renewable energy share of final energy:
2005 and 2009 with target for 2020



Factors driving Renewable Energy Growth



The current situation: The bottom up approach and the diversity of support schemes

The EU approach to RES-E support schemes

- Member States are obliged to develop policy measures to reach the RES-target
- RED Art. 2k: “support scheme’ means any instrument, scheme or mechanism that promotes the use of energy from renewable sources”
- The “bottom-up approach” is monitored by the EU Commission for State Aid

Feed-in-tariffs

- Guarantees a fixed price
- Market risk diminished

Feed-in-premiums

- Guarantees an add-on to the market price
- Underlying market risk

Other support mechanisms

New "Guidelines on State Aid for Environmental Protection and Energy 2014-2020"

Requirements of the new State Aid Guidelines

- A shift to feed-in-premiums ("an addition to the market price whereby generators sell directly in the market")
- No refund for balancing costs
- Prevent generation under negative prices
- Intro of competitive bidding process
- Max period of 10 years

Denmark

Onshore wind

- Fixed add-on to market price for a predetermined production period
- Open-door procedure

Offshore wind

- Target-price paid as a variable add-on to the market price for a predetermined production period
- Tender or open-door procedure

No refund of balancing costs

Adopt measures to prevent generation under negative prices

Establish open competitive bidding processes

The State Aid Guidelines assume that feed-in-
systems constitute State aid

BUT DO THEY?

The State aid system

- › Prohibition – Article 107(1) TFEU
 - › There must be an economic benefit/aid
 - › **Provided by the State and out of State resources**
 - › To certain undertakings/productions (selectivity)
 - › Distortion of competition (above the “de minimis” level)
 - › Affect trade between Member States
- › Exemption – Article 107(3)(c) TFEU
 - › “Group” assessment
 - › Block exemption regulation
 - › Individual assessment
 - › The guidelines for environmental protection and energy

Provided by the State and out of State resources (1)

- › The aid must be imputable to the State
 - › “State”
 - › Central state, regional and local authorities
 - › Private and public bodies appointed by the State to administer aid
 - › Public undertakings
 - › Imputable
 - › The aid would not have been granted without State intervention
 - › Imputable if a public authority designates a (private or public) body to administer aid
 - › Imputable if the legal basis for providing the aid is statutory law
 - › E.g. if a price supplement/feed-in-system has its legal basis in statutory law

Provided by the State and out of State resources (2)

› State resources

› Financial resources under public control?

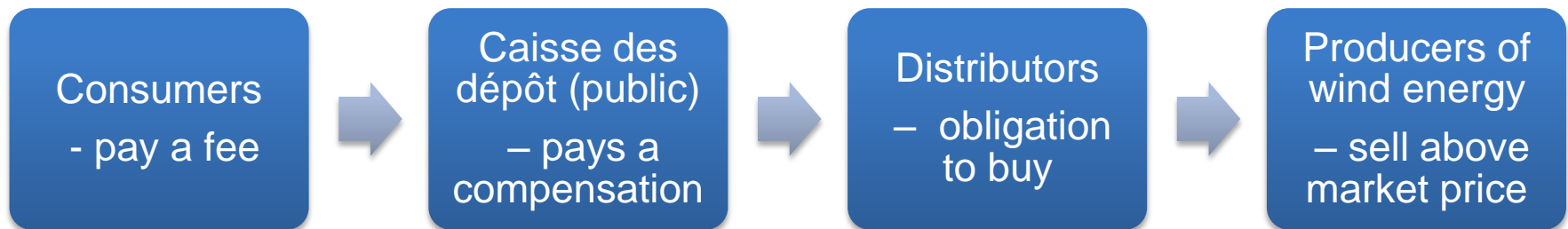
› Examples:

› Case C-262/12, Vent De Colère > < Case C-379/98, PreussenElektra

› The Danish feed-in-system (Commission decision, 22.07.2013)

Provided by the State and out of State resources (3)

› Case C-262/12, Vent De Colère

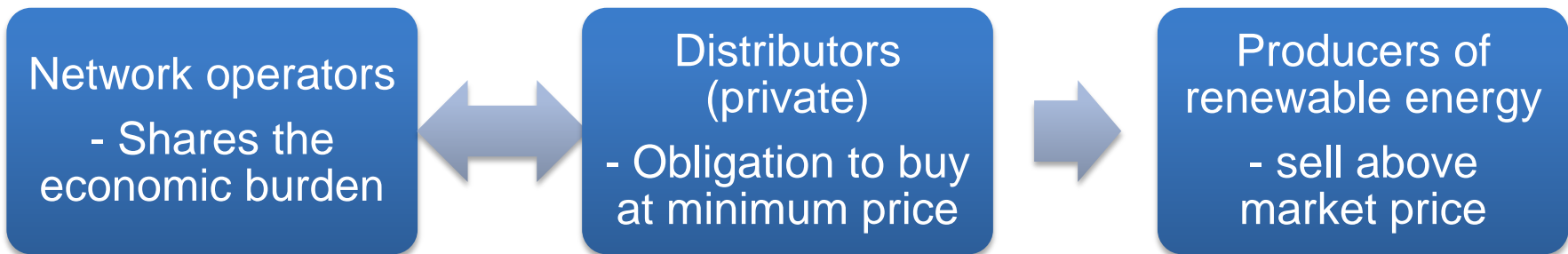


› “Article 107(1) must be interpreted as meaning that a mechanism offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that is financed by all final consumers of electricity in the national territory, ..., constitutes an intervention through State resources.” (Case C-262/12, Vent De Colère, judgement of 19 December 2013, para. 37)

Provided by the State and out of State resources (4)

> Case C-379/98, PreussenElektra

- > private net operators and electricity suppliers were obliged to pay a fixed minimum price for electricity produced from renewable energy sources – no State resources were involved.

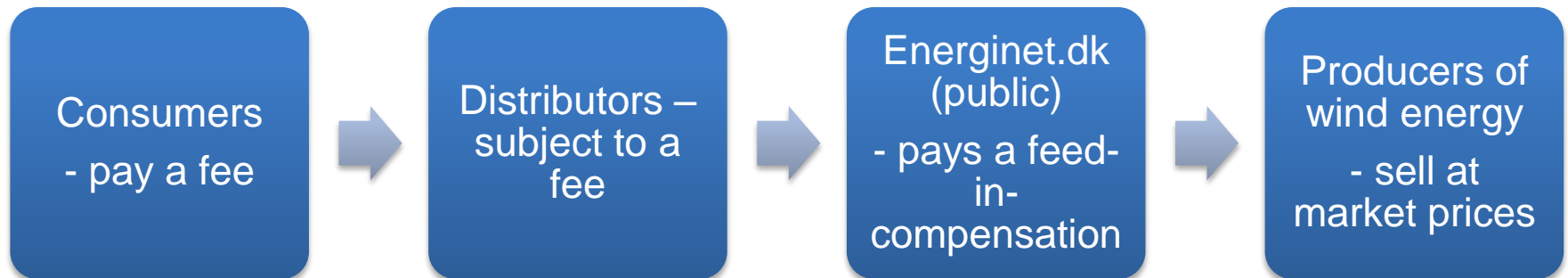


Different from the French system, because:

- > not appointed by the Member State to manage a State resource – but bound by an obligation to purchase by means of own financial resources
- > the funds were not at any time under public control and there was no mechanism established and regulated by the Member State, for offsetting the additional costs arising from the obligation to purchase and through which the State offered the private operators the certain prospect that the additional costs would be covered in full.

Provided by the State and out of State resources (5)

> The Danish system



- > The Commission has not taken an explicit position on whether or not State resources are included
 - > But – Energinet.dk is a public undertaking administering the aid and paying the compensation to the producers of wind energy based on statutory law
 - > Further, the feed-in-system is financed by all final consumers of electricity in Denmark
- > Approved under the previous guidelines (22.07.2013)

Provided by the State and out of State resources (6)

> In conclusion

- > The design of the system is important
 - > If no State resources – the feed-in-system will be outside the scope of State aid law, and State aid law does not limit the choice of the Member States
 - > The PreussenElektra-case – instead of an obligation to buy at a minimum price, there could be an obligation to buy at a price calculated on the same basis as a feed-in-premium/tariff
 - > If both private and public operators are subject to the obligation, the Commission has found it justifiable to extend the PreussenElektra-ruling to all companies subject to the obligation, (regardless of their ownership structure) where privately owned companies represents a majority of the system
 - > If + State resources – look for an exemption under Art. 107(3)(c)
 - > The Member States must take the guidelines into account

The State Aid Guidelines as a means of harmonisation?

- › The legitimacy of the State Aid Guidelines as a means of harmonisation
 - › Not binding in principle, but in practice
 - › The adoption procedure: consultations
- › Are the State Aid Guidelines in fact used as a legal instrument to promote indirect harmonisation sidestepping the legislative procedures of the TFEU?
- › Why did the Commission not present a proposal for a Directive, i.a. an amendment to the Renewable Energy Directive?

THANK YOU!

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