The Notion of "State Resources" in EU State Aid Law and the German Renewable Energy Act of 2012 (EEG 2012)

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A. Introduction

The concept of State aid was introduced with the 1958 Rome Treaty, establishing the European Economic Community.[1] Already in its initial state, it encompassed the notion of "State resources" which did not seem to cause many interpretative problems. However, over time it has grown in its complexity making it increasingly difficult to clearly define what is to be understood by it, while being an indispensable criterion under Art. 107(1) TFEU.[2] As the subject matter of many judgements of the Court of Justice of the European Union (CJEU), the notion of State aid underwent a significant evolution. This paper will be dedicated to the exploration of this evolution and to demonstrating how the concept has expanded. With the lines relating to scope of application being blurred, the question whether a measure is or is not to be classified as fulfilling the State resources criterion is not easy to answer. The German Renewable Energy Act of 2012 (*Erneuerbare Energien Gesetz* (EEG)) will serve as an example of the current interpretation of the criterion by the CJEU.

Practitioners, States and undertakings are all equally faced with the growing difficulty of applying the State resources criterion. This is mainly due to the maze of case law of the CJEU and the ever growing complexity and sophistication of structures which govern various relationships between the State and private actors.[3] The necessity of being able to assess the character of a given measure under EU State aid law is particularly crucial for undertakings, which are faced with the risk of having to repay the advantage granted, in the case that the Commission finds illegal State aid. The recovery orders of the Commission usually concern very significant amounts which may decide upon the future life of an undertaking.

The first part of this paper will provide a short summary of the general concept of State aid under EU law, outlining the need for State aid control, the constituent elements and the procedural aspects. Following that, the second part will analyse the particular notion of "State resources" under Art. 107(1) TFEU, showing the evolution from interpreting the wording as alternative criteria to a double criterion of imputability and burden on the State's budget. The case law of the Court of Justice will be analysed and synthesised in order to provide an overview of the current understanding of this notion. The third part will exemplify the difficulties encountered with the application of the notion. This will be done by a case study on the German Re-

1 *Mederer*, in: Schröter et al. (eds.), Europäisches Wettbewerbsrecht, 2nd ed. 2014, p. 2020, para. 1.
2 Treaty on the Functioning of the European Union (TFEU).
3 See similarly *Clayton/Catalan*, The Notion of State Resources: So Near and yet so Far, EStAL 2/2015, p. 260.

newable Energy Act of 2012, which was the subject of a recent decision of the CJEU.[4] The special equalisation mechanism in question will be outlined and the arguments of the German Government in response to the Commission's decisions, classifying it as State aid, will be summarised. Following that, the Court's assessment of the EEG Act of 2012, with a focus on the special equalisation mechanism, will be presented. The part immediately following will comment on the efforts of the Commission to streamline the notion in its Commission Notice on the Notion of State Aid pursuant to Art. 107(1) TFEU.[5] Final remarks will be made on the concept of State resources and the possibility to decrease legal uncertainty in the future.

I. General Prohibition and Need for EU State Aid Control

An ever-recurring element of economic, industrial and environmental policy making in the Member States is the provision of State subsidies or aid having a similar effect. [6] These are often not necessarily oriented towards correcting possible market failures, but rather seek to accomplish a given political goal such as the creation of jobs or saving companies from bankruptcy.[7] The popularity of using State aid comes down to the fact that such aid can be granted swiftly and in a flexible manner, benefitting a very precise undertaking or group thereof, in contrast to structural policy changes which take more time to show positive effects on competition.[8]

However, a fundamental principle underlying the European Union is the creation of an Internal Market where all market participants enjoy equal opportunities and a level playing field.[9] Therefore, EU law must guarantee that free and fair competition on the EU market is not distorted by Member States' unjustified intervention. This is precisely the aim of the four freedoms[10] and EU competition law.[11] EU State aid law imposes a general prohibition of State aid in Art. 107(1) TFEU, subject to very limited exceptions, obliging Member States to construct their economic policy in such a way that does not conflict with EU law.[12]

4 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281.
5 European Commission, Commission Notice on the Notion of State aid pursuant to Article 107(1) TFEU, 2016, http://ec.europa.eu/competition/state_aid/modernisation/notice_of_aid_en.pdf (1/8/2016).
6 See *Heinrich*, in: Birnstiel/Bungenberg/Heinrich (eds.), Europäisches Beihilfenrecht, 1st ed. 2013, p. 69, para. 86; *Sánchez Rydelski*, The EC State Aid Regime: Distortive Effects of State Aid on Competition Trade, 2006, p. 23.
7 See for example GC, case T-351/02, *Deutsche Bahn*, EU:T:2006:104, para. 100; *Heinrich*, (fn. 6), p. 69, para. 86.
8 Ibid.
9 Arts. 3(3) and 26 TFEU; Protocol No. 27 on the Internal Market and Competition. Also *Biondi*, Some Reflections on the Notion of "State Resources" in European Community State Aid Law, Fordham Int'l L. J. 30 (2006), p. 1426.
10 The free movement of goods (Arts. 34-36 TFEU), services (Arts. 49 and 56 TFEU), persons (Art. 45 TFEU) and capital (Arts. 63-66 TFEU).
11 See e.g. CJEU, case C-328/99, *Italy and SIM 2 Multimedia*, EU:C:2003:252, para. 35. Equally *Bungenberg*, in: Birnstiel/Bungenberg/Heinrich, (fn. 6), p. 103, para. 2.
12 Art. 119 TFEU. See also *Heinrich*, (fn. 6), p. 69, para. 86.

II. Constituent Elements of State Aid – Art. 107(1) TFEU

Art. 107(1) TFEU does not provide for a clear definition of what constitutes State aid. Instead, it describes a set of constituent elements, which need to be cumulatively fulfilled.[13] The term State aid has an autonomous meaning under EU law and is interpreted by the EU Courts in a wide manner so as to ensure its *effect utile*.[14]

The particular form or purpose of the aid is irrelevant,[15] only the *effect* of a measure determines its classification.[16] Further, it is established by case law that classic State subsidies are not only covered by the term, but also any measure which is similar in effect and character, mitigating the charges which would normally be included in an undertaking's budget.[17]

Additionally, an economic advantage granted to an undertaking[18] lacking adequate compensation, which would not normally have been granted on the market, must be found.[19] The advantage must be financed by the State or through State resources. This concept includes not only direct payments but also indirect methods of financing which may even occur through designated third parties, whether public or private in nature.[20]

The selectivity criterion seeks to distinguish actual individual State interventions from rightful general steering of the economy.[21] Selectivity will only be established if it is possible to make out a limited group of beneficiaries. The advantage must affect market conditions with the potential for distorting competition.[22] Finally, the advantage must potentially affect intra-EU trade and be appreciable enough to fall within the scope of Art. 107(1) TFEU.[23]

13 As is settled case law CJEU, case C-280/00, *Altmark Trans*, EU:C:2003:415, para. 74 or CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 68. See also *Mederer*, (fn. 1), p. 2021, para. 4; *Bungenberg*, (fn. 11), p. 102, para. 1.

14 See also ibid., p. 104, para. 9; *Kliemann*, in: Schröter et al., (fn. 1), p. 2034, para. 6.

15 *Mederer*, (fn. 1), p. 2022, para. 4.

16 Also called the effects-based approach. See e.g. CJEU, case C-75/97, *Belgium v Commission*, EU:C:1999:311, para. 25; *Rusche et al.*, in: Faull/Nikpay (eds.), The EU Law of Competition, 3rd ed. 2014, p. 1927, para. 17.19; *Bacon*, European Union Law of State Aid, 2nd ed. 2013, para. 2.03; *Biondi*, State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid, CMLR 50 (2013), p. 1731.

17 See e.g. CJEU, case C-200/97, *Ecotrade*, EU:C:1998:579, para. 34; CJEU, case C-387/92, *Banco Exterior de España*, EU:C:1994:100, para. 13.

18 The term undertaking is to be interpreted in a uniform way to EU antitrust law (Arts. 101 and 102 TFEU). GC, case T-128/98, *Aéroport de Paris*, EU:T:2000:290, para. 107 and case law cited therein: "[U]nder Community competition law, the concept of undertakings covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed." See *Bungenberg*, (fn. 11), p. 106, para. 14 or p. 109, para. 25.

19 See equally ibid., p. 106, para. 14.

20 This particular criterion, as the main topic, will be discussed in detail in the following parts.

21 *Bungenberg*, (fn. 11), p. 106, para. 16.

22 *Bacon*, (fn. 16), para. 2.02; *Bungenberg*, (fn. 11), p. 106, para. 17.

23 Advantages of a non-appreciable size will be covered by the General Block Exemption Regulation (EU) No. 651/2014, OJ L 187 of 26/6/2014, p. 1, which declares certain categories of aid as compatible with the Internal Market. See *Bungenberg*, (fn. 11), p. 106, para. 18.

Generally, aid in the sense of Art. 107(1) TFEU is to be understood as a measure imputable to the State, which provides economic advantages to some undertakings through the transfer of State resources, and which noticeably alters competition and potentially affects inter-Member State trade.[24]

III. Exceptions and Procedural Aspects

A limited set of *per se* exceptions in which State aid will be compatible with the TFEU can be found in Art. 107(2) TFEU.[25] The third paragraph of that provision provides for five situations in which compatibility may be established under the discretion of the Commission, subject to appeal to the CJEU.[26] Additionally, activities of general economic interest may be exempted, in line with Art. 106(2) TFEU.[27]

The European Commission has a monopoly over monitoring the compatibility of measures of Member States with EU State aid law, including new and existing aid.[28] Member States have the obligation to notify the Commission of any planned aid and must not proceed with the implementation of the aid until a final decision has been reached.[29] After a preliminary assessment,[30] the Commission may open a formal investigation if the measure raises serious doubts as to its compatibility.[31] The Commission may either find the measure compatible with the TFEU, conditionally compatible or incompatible.[32] Any aid granted in breach of Art. 107 TFEU may be subject to a recovery decision by the Commission.[33]

B. The Notion of "by the State or through State Resources"

I. Wording of Art. 107(1) TFEU – Cumulative or Alternative?

From the mere wording of Art. 107(1) TFEU "aid granted by a Member State or through State resources" it may appear that the legislator has provided two alternatives in order to find State aid: either the aid has to be granted *by* a Member State or *through* State resources. The former of these would imply that it is not necessary that

24 Ibid., p. 105, para. 11.
25 See also *Sánchez Rydelski*, (fn. 6), p. 23.
26 In an annulment procedure under Art. 263 TFEU.
27 Aid shall also be compatible with EU law if it coordinates transport or the reimbursement for certain obligations inherent in public service (Art. 93 TFEU). The so-called "Altmark Trans-criteria" will be applied – CJEU, case C-280/00, *Altmark Trans*, EU:C:2003:415.
28 See Art. 108(1) TFEU; *Kliemann*, (fn. 14), p. 2033, para. 3.
29 This is the so-called "stand still clause" under Art. 108(3) TFEU in conjunction with Art. 3 Regulation (EU) No. 659/1999 of 22/3/1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJ L 83 of 27/3/1999, p. 1 (Procedural Regulation).
30 In line with Art. 4 of Procedural Regulation.
31 Art. 108(2) TFEU in conjunction with Art. 6 Procedural Regulation.
32 Art. 7 Procedural Regulation.
33 Art. 14 Procedural Regulation.

State resources are involved, as long as the aid is granted by the Member State.[34] Some of the early case law[35] of the CJEU in the 1980s interpreted the provision in exactly this manner.[36] However, such an interpretation would result in characterising virtually every State action or spending made by a public entity as State aid.[37] This unreasonable and undesirable result of the Court's interpretation was reversed by later judgments, [38] such as *Van Tiggele*[39] and *PreussenElektra.*[40] Despite the letter of the provision, State resources is rather an essential condition which must be fulfilled and one where the use of *State resources* and the *imputability* to the State must be proven.[41]

II. Broad Language – Direct and Indirect Transfer through any Means

Both terms "State" and "State resources" have been interpreted in a broad way by the CJEU, including not only grants from the central government, but also aid granted by local or regional authorities.[42] Also private entities may fall within the scope of Art. 107(1) TFEU if they have been designated or established by the State to administer the aid.[43]

Furthermore, State resources do not only include direct transfers of money from the State to a beneficiary[44] but also indirect transfers of resources, done by any means.[45] State aid can be found in for example fiscal advantages, undervalued sales of

34 Opinion AG *Jacobs* to CJEU, case C-379/98, *PreussenElektra*, EU:C:2000:585, para. 114 et seqq. See also *Biondi*, (fn. 9), p. 1432.
35 CJEU, case 290/83, *Commission v France*, EU:C:1985:37, paras. 13 and 14. See also Opinion AG *Jacobs* to CJEU, case C-379/98, *PreussenElektra*, EU:C:2000:585, para. 122 et seqq.
36 *Rusche et al.*, (fn. 16), p. 1928, para. 17.20; *Koenig/Kühling*, EC Control of Aid Granted Through State Resources, EStAL 1/2002, p. 11.
37 *Soltész*, in: Montag/Säcker (eds.), Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht): Vol. III – Beihilfen- und Vergaberecht, 1st ed. 2011, p. 157, para. 240.
38 See also CJEU, case 67/85, *Van der Kooy*, EU:C:1988:38, paras. 28, 32 and 38; CJEU, case 57/86, *Greece v Commission*, EU:C:1988:284, para. 12; Opinion AG *Jacobs* to CJEU, case C-379/98, *PreussenElektra*, EU:C:2000:585, para. 126.
39 CJEU, case 82/77, *Van Tiggele*, EU:C:1978:10, paras. 24 and 25.
40 *PreussenElektra* is regarded as one of the most significant cases on State aid rendered and has been a subject of discussion amongst academia ever since, as the Court found no State aid due to the lack of State resources being involved – CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160, paras. 58-62; *Clayton/Catalan*, (fn. 3), p. 262.
41 See *Bacon*, (fn. 16), paras. 2.02 and 2.92; *Clayton/Catalan*, (fn. 3), p. 261 et seq.; *Rusche et al.*, (fn. 16), p. 1928, para. 17.22.
42 CJEU, case 248/84, *Germany v Commission*, EU:C:1987:437, para. 17; *Ebner/Gambaro*, in: Santa Maria (ed.), Competition and State Aid – An Analysis of the EU Practice, 2nd ed. 2015, p. 23 et seq.
43 CJEU, case C-72/91, *Sloman Neptun*, EU:C:1993:97, para. 19; CJEU, case 57/86, *Greece v Commission*, EU:C:1988:284, para. 12; CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160, para. 58; CJEU, case C-345/02, *Pearle*, EU:C:2004:448, para. 34. See also *Ebner/Gambaro*, (fn. 42), p. 24.
44 See e.g. CJEU, case 301/87, *France v Commission*, EU:C:1990:67; CJEU, case C-17/99, *France v Commission*, EU:C:2001:178; CJEU, case C-332/98, *France v Commission*, EU:C:2000:338.
45 *Clayton/Catalan*, (fn. 3), p. 261.

public assets, preferential loan rates, debt write-offs or State guarantees on favourable terms.[46] Equally, revenue foregone such as foregoing taxes, social contributions or other charges, is also covered by the expression.[47]

III. Financed by State Resources

1. General

State aid will only be found if the given measure is financed directly or indirectly[48] through State resources.[49] As stated above, the term "State resources" must be interpreted broadly and includes not only funds in a State's treasury or those of the public sector,[50] but can also include resources of public undertakings, if the State is capable of directing the use of these.[51]

It must not, however, be established in every case that there has been an *actual* transfer of State resources.[52] A burdening of the budget can occur by directly or indirectly granting funds or foregoing revenue which normally would have been collected by the State or by an established or designated body.[53] Notably however, indirect effects on the State budget, such as potential shortfalls in social security contributions or taxes, which are caused by and which are *inherent* in purely regulatory measures, cannot be classified as State aid.[54] Additionally, State measures with a regulatory aim, without commercial considerations, and which are applied on a transparent and non-discriminatory basis may be legitimate.[55]

46 See e.g. CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 32. Future guarantees must have a sufficiently close link to the advantage granted and the reduction of the State budget.
47 See e.g. CJEU, case C-387/92, *Banco Exterior de España*, EU:C:1994:100; GC, case T-106/95, *FFTSA v Commission*, EU:T:1997:23; CJEU, case C-6/97, *Italy v Commission*, EU:C:1999:251.
48 For example by private or public entities set up or designated by the State to administer an aid, see CJEU, case 78/76, *Steinike & Weinlig v Germany*, EU:C:1977:52, para. 21.
49 CJEU, case 82/77, *Van Tiggele*, EU:C:1978:10, paras. 25-26; GC, case T-358/94, *Air France v Commission*, EU:T:1996:194, para. 63.
50 Ibid., para. 56.
51 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 38. Notably, a public entity can be a beneficiary of an aid as well as a grantor of another aid, see GC, joined cases T-443 and 455/08, *Mitteldeutscher Flughafen*, EU:T:2011:117, para. 143 (not available in English).
52 CJEU, case C-279/08 P, *Dutch Nox*, EU:C:2011:551, para. 104; CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 36; CJEU, case C-83/98 P, *Ladbroke Racing*, EU:C: 2000:248, paras. 48-51.
53 CJEU, case C-72/91, *Sloman Neptun*, EU:C:1993:97, paras. 19 and 21; CJEU, case 387/92, *Banco Exterior de España*, EU:C:1994:100, para. 14; CJEU, case C-295/97, *Piaggio*, EU:C: 1999:313, paras. 40-43; CJEU, case C-200/97, *Ecotrade*, EU:C:1998:579, para. 45. See also *Ebner/Gambaro*, (fn. 42), pp. 26-27.
54 See for example CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160, para. 62.
55 CJEU, case C-72/91, *Sloman Neptun*, EU:C:1993:97, paras. 20-21; CJEU, joined cases C-52-54/97, *Viscido and others*, EU:C:1998:209, paras. 13-14; CJEU, case C-189/91, *Kirsammer-Hack v Sidal*, EU:C:1993:907, paras. 17-18.

More recent case law has shown that measures which carry only a *potential* burden[56] on the State budget can equally fall within the scope of Art. 107(1) TFEU if there is a sufficiently direct link between the advantage and the reduction of the budget or a real economic risk of such a reduction in the future.[57] It is, however, not necessary for the reduction to be equivalent to the advantage granted.[58]

2. Controlling Influence and the Necessity to go through Public Hands

State resources can be *any* financial means by which the State can support undertakings, including (partial) compulsory charges.[59] It is irrelevant whether these means are permanent assets of the State or if they originate from private contributions.[60] Decisive is the *degree of public control* over the resources, making the financing of a measure a crucial assessment point.[61] As long as the resources constantly remain available to the authorities by being under public control, they will be classified as State resources in the sense of Art. 107(1) TFEU,[62] implying that resources of public undertakings can also be considered as "State resources".[63]

In the *Essent*[64] case, the Court ruled that measures financed by compulsory contributions collected and administered by a designated body, in accordance with legal provisions, can constitute State resources even if they do not pass through public hands.

56 Such as State guarantees. CJEU, joined cases C-399/10 P und C-401/10 P, *Bouygues and Bouygues Télécom v Commission*, EU:C:2013:175, para. 139.

57 Ibid., para. 109; CJEU, case C-518/13, *Eventech*, EU:C:2015:9, para. 34; CJEU, case C-200/97, *Ecotrade*, EU:C:1998:579, para. 41.

58 CJEU, joined cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission*, EU:C:2013:175, para. 109. See also *Ebner/Gambaro*, (fn. 42), p. 27.

59 CJEU, case C-262/12, *Vent de Colère*, EU:C:2013:851, para. 25; CJEU, case C-83/98 P, *Ladbroke Racing*, EU:C:2000:248, para. 50; CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 37; GC, case T-267/08, *Région Nord-Pas-de-Calais v Commission*, EU:T:2011:209, para. 111. Even if part of the measure is financed by private contributions of non-compulsory nature, this does not *per se* preclude the characterisation as State resources as the determinative factor is the degree of State control. However, the fact that private contributions are used alongside public funds does not automatically make them State resources, see CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348, para. 44. See also *Ebner/Gambaro*, (fn. 42), p. 28.

60 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 37; CJEU, case 173/73, *Italy v Commission*, EU:C:1974:71, para. 16; *Rusche et al.*, (fn. 16), p. 1928, paras. 17.23-24; *Carullo*, State Resources in the Case Law: Imputability Under an Organizational Perspective, EStAL 3/2013, p. 459.

61 GC, case T-139/09, *France v Commission*, EU:T:2012:496, paras. 63-64; also *Ebner/Gambaro*, (fn. 42), p. 28.

62 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 38; CJEU, case C-83/98 P, *Ladbroke Racing*, EU:C:2000:248, para. 50; GC, case T-358/94, *Air France v Commission*, EU:T:1996:194, paras. 65-67. See also *Ebner/Gambaro*, (fn. 42), pp. 27-28.

63 This is even the case if parts of the funds are earned from competitive activities on the market. However, in such cases there will usually be a lack of imputability to the State, see *Rusche et al.*, (fn. 16), p. 1929, para. 17.26.

64 CJEU, case C-206/06, *Essent Network Noord*, EU:C:2008:413, paras. 66-70.

However, as the particular facts and circumstances in *Pearl*[65] and *Doux Élevage*[66] have shown, the collection of compulsory contributions does not always lead to the same conclusion. In *Doux Élevage* the funds collected were used exclusively for commercial matters,[67] and not in order to pursue a public policy of the State, benefiting the contributors themselves and the usage of these funds was under the discretion of the private collecting entity. Any costs incurred by the bodies were fully covered by the charges, not creating any burden on the State[68] or that body.[69] The Court did, therefore, not find State resources to be involved,[70] despite the collection of compulsory contributions.

3. State Involvement in Redistribution of Funds

The notion of public control excludes situations where resources are merely redistributed between private entities without State involvement, in the form of passing directly through public hands or through an intermediary designated to administer the shift of resources.[71] This was the situation in the landmark case of *PreussenElektra.*[72] The electricity suppliers were not designated by the State to administer a charge but were only subject to a compulsory purchase obligation which they had to finance from their own resources.[73]

In the *Aiscat*[74] case from 2013, the Court ruled on whether an increase in the toll on two parts of an Italian motorway should be considered State aid in favour of the operator of that motorway. The collection of the toll took place through private undertakings managing the toll stations and were directly transferred to the operator of that motorway. Therefore, the General Court found that the monies were transferred exclusively among private undertakings and did not constitute State resources.[75] The Court did not regard the fact that the amount payable was set by law and a legal duty existed to proceed with the payment as essential indicia to find sufficient State control.[76]

65 CJEU, case C-345/02, *Pearle*, EU:C:2004:448.
66 CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348.
67 Ibid., para. 36 et seqq.; see also *Ebner/Gambaro*, (fn. 42), p. 28.
68 CJEU, case C-345/02, *Pearle*, EU:C:2004:448, para. 36; AG *Wathelet* to CJEU, case C-677/11, *Doux Élevage*, EU:C:2013:58, para. 42.
69 In CJEU, case C-72/91, *Sloman Neptun*, EU:C:1993:97, the Court decided that State resources are involved where there is an advantage creating a burden on the designated or established body.
70 CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348, para. 36.
71 GC, case T-182/10, *Aiscat*, EU:T:2013:9, para. 105. See also *Ebner/Gambaro*, (fn. 42), pp. 28-29.
72 CJEU, case C-379/98, *PreussenElektra,* EU:C:2001:160.
73 Ibid., para. 22; see also *Rusche et al.*, (fn. 16), p. 1929, para. 17.25.
74 GC, case T-182/10, *Aiscat*, EU:T:2013:9.
75 Ibid., paras. 105 and 106.
76 *Clayton/Catalan*, (fn. 3), p. 263.

Another good example is again *Doux Élevage*.[77] This case concerned an inter-trade contribution which was levied on all members of an inter-trade committee, by way of an agreement which also fixed the amount thereof.[78] The revenues from the contribution were to be used for a variety of activities benefitting that industry.[79] The CJEU found no direct or indirect involvement of State resources as the contributions were directly payable from one private entity to another. They "[…] remain private in nature throughout their lifecycle […]"[80] and that enforcement through the inter-trade organisation can only take place via the civil or commercial route.[81] The State's involvement was limited to merely acting as a "tool" to make the contributions compulsory.

IV. Imputability of Aid to the State

In order for a measure to constitute State aid, it must also be *imputable* to the State. A first indication of this can be already found in the early case law of the 1970s[82] and since *Stardust Marine* it constitutes a recognized criterion for the EU State aid assessment.[83]

A measure resulting from a law is almost always imputable to the State as conduct of the legislature flows from the constitutional powers of the State.[84] Also, aid granted directly by a public authority is always imputable, precisely because the State has been involved in the granting of the measure.[85] If a public or private entity is established or designated by the State to administer and grant aid on its behalf, the act is imputable to the State, even if the entity is legally autonomous.[86]

In situations involving public undertakings, imputability cannot simply be assumed, but a demonstration that the authority has incited the undertaking to grant the particular aid is also not required.[87] The relationship between the State and a public entity is a close one and therefore there is an inherent risk of aid being granted by that public entity in breach of Art. 107(1) TFEU and it will be difficult for third parties to

77 CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348.
78 *Clayton/Catalan*, (fn. 3), p. 263.
79 Ibid.
80 CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348, para. 32.
81 Ibid.; *Clayton/Catalan*, (fn. 3), p. 64.
82 CJEU, case 173/73, *Italy v Commission*, EU:C:1974:71, para. 16.
83 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 52-57; *Rusche et al.*, (fn. 16), p. 1930, paras. 17.29-30.
84 GC, case T-358/94, *Air France v Commission*, EU:T:1996:194, para. 59. *Bacon*, (fn. 16), para. 2.108.
85 CJEU, case C-262/12, *Vent de Colère*, EU:C:2013:851, para. 17 and case-law cited therein.
86 Ibid., paras. 30-33; GC, case T-358/94, *Air France v Commission*, EU:T:1996:194, para. 62; CJEU, case 248/84, *Germany v Commission*, EU:C:1987:43, paras. 62-68. See also *Ebner/Gambaro*, (fn. 42), p. 24.
87 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 52-53; GC, case T-141/03, *Sniace SA*, EU:T:2005:129, para. 34.

provide proof of State involvement in each case.[88] Therefore, imputability can be inferred by examining the particularities of the case. For this, the Court has provided a non-exhaustive list of indicators in its *Stardust Marine*[89] judgement. In practice, the fact that the organisation of a given measure originated from the State will serve as a distinguishing feature.[90]

Should the public entity not be able to make the decisions at issue without taking into account the requirements and directives of the public authority, a measure may be imputable to the State.[91] Other relevant indicators include: the integration of the company into public administration structures, the nature of the company's activities on the market, the company being subject to public or private law, the degree of supervision exercised by a public authority or any other factors showing whether or not there is State involvement.[92]

Therefore, where an entity is free to use the collected revenues for its own benefit and aims and can decide freely upon their assignment, it is likely that no State aid will be found.[93] This was precisely the case in *Pearl*[94] where the contributions paid by members of a trade association were assessed in light of Art. 107(1) TFEU. The Court did not find State imputability as there was no State control over the use of these resources and hence, they did not constitute State revenue.[95]

Acts of Member States stemming from EU legislation are not imputable to the States if the law did not leave room for discretion. Should, however, Union law merely allow States to enact certain measures or leave discretion as to the particular characteristics, the measure will be imputable to the Member State or group of Member States implementing it.[96]

88 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 53-54. See also *Ebner/Gambaro*, (fn. 42), pp. 24-25.
89 CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 52 and 55-56.
90 *Bacon*, (fn. 16), para. 2.111.
91 CJEU, case 67/85, *Van der Kooy*, EU:C:1988:38, para. 37; CJEU, case 57/86, *Greece v Commission*, EU:C:1988:284, para. 13; CJEU, case C-482/99, *Stardust Marine,* EU:C:2002:294, para. 55; see also *Ebner/Gambaro*, (fn. 42), p. 24.
92 A non-exhaustive list of indicators was provided by the Court in CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 55-56. See also Opinion AG *Jacobs* to CJEU, case C-482/99 *Stardust Marine*, EU:C:2001:685, paras. 65-68; *Ebner/Gambaro*, (fn. 42), pp. 25-26; *Biondi*, (fn. 9), p. 1426.
93 CJEU, case C-345/02, *Pearle*, (fn. 43), paras. 36-38. See also *Ebner/Gambaro*, (fn. 42), p. 25, fn. 18.
94 CJEU, case C-345/02, *Pearle*, EU:C:2004:448.
95 Ibid., paras. 37 and 41; *Clayton/Catalan*, (fn. 3), p. 262; CJEU, case C-482/99, *Stardust Marine*, EU:C:2002:294, para. 38.
96 GC, case T-351/02, *Deutsche Bahn*, EU:T:2006:104, para. 102; CJEU, case C-460/07, *Sandra Puffer*, EU:C:2009:254, para. 70; Commission Decision 2010/606/EU of 26/2/2010 on State aid, OJ L 274 of 19/10/2010, p. 54.

V. Analysis of Case C-379/98 PreussenElektra

Due to its importance, the decision in *PreussenElektra* will be briefly outlined and some of the effects it created will be assessed.

The basis for this case was a German law, called *Stromeinspeisungsgesetz*,[97] which obliged electricity suppliers to purchase "green electricity" in their supply area at a minimum price fixed above the market price.[98] The entire burden of this measure was shouldered by the electricity suppliers and some of their suppliers on an upstream level, using their own financial resources. While the Commission's formal investigation procedure found the existence of illegal aid, the Court decided that a mere obligation to purchase a good at a minimum price does not constitute State aid due to the lack of State resources involved.[99] Also the potential of losing tax revenue did not change this conclusion as this possibility was an inherent feature of the measure and not the aim of it.[100]

With this judgement the Court opened a "Pandora box", as Jaeger has rightly stated.[101] States started relying on it and sought to apply this exception for minimum price systems within their aid schemes.[102] In particular, this judgment was interpreted in the area of renewable energy support mechanisms as a convenient loophole.[103]

Member States tend to believe that by structuring aid in a particularly sophisticated way, they will conveniently escape the Commission's scrutiny.[104] However, CJEU judgments and the Commission's practice have shown that such schemes are, in fact, very often examined and found to constitute State aid, which leads to increased legal uncertainty for beneficiaries and practitioners.[105] Jaeger suggests that the potential loophole created by the *PreussenElektra* judgment could be at least partially closed by finding State initiative behind a measure sufficient for the State aid prohibition to apply, next to the finding of the other criteria of Art. 107(1) TFEU and discarding the necessity of State control over the resources.[106] He supports this claim by exemplifying the following situation: if a State chooses to impose a legal financing obligation on private undertakings, channelling the financial flow by a legal act in such a way so as to make further intervention of a designated intermediary redundant, such schemes

97 *Stromeinspeisungsgesetz* (StromEinspG), Energy Conservation Law of 7/12/1990, BGBl. 1990 I, 2633.

98 Generated from renewable energy sources (RES). CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160, paras. 6-7.

99 Ibid., paras. 58-62; *Sánchez Rydelski*, (fn. 6), p. 40.

100 CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160, paras. 59-62. Equally in CJEU, case C-72/91, *Sloman Neptun*, EU:C:1993:97, para. 21; CJEU, case C-200/97, *Ecotrade*, EU:C:1998:579, para. 36. *Ebner/Gambaro*, (fn. 42), pp. 29-30.

101 *Jaeger*, Goodbye Old Friend: Article 107's Double Control Criterion, EStAL 3/2012, p. 536.

102 Ibid.

103 Compare *Catti De Gasperi*, in: Santa Maria (ed.), Competition and State Aid – An Analysis of the EU Practice, 2nd ed. 2015, p. 354; *Koenig/Kühling*, (fn. 36).

104 *Jaeger*, (fn. 101), p. 537; *Koenig/Kühling*, (fn. 36), p. 16; *Carullo*, (fn. 60), p. 461.

105 *Soltész*, (fn. 37), p. 159, para. 252.

106 See *Jaeger*, (fn. 101), p. 537.

will fall outside the scope of State aid due to the lack of State control over the funds. The aim and effect of such a scheme can certainly be categorised as being the same as those measures where State control is directly or indirectly present.[107]

A remedy could be a future ruling of the Court that in such cases, State control can also be established on the basis of the legal act which lays down the particular measure. This would have to be qualified in a way that only such legal acts which are sufficiently detailed and complex can generate State control and each case would have to be assessed on a case-by-case basis. This could be concluded by way of an *argumentum e contrario.* The Court has consistently held in its case law that Member States cannot circumvent State aid control by merely establishing an entity with the task of administering an aid. Hence, the reverse situation where a State seeks to circumvent State aid control by *not* establishing a separate entity and instead regulating the flow of private funds in such a detailed manner, to exercises *de facto* control,[108] could also warrant the finding of State resources.[109]

C. Assessment of the German Renewable Energy Act 2012

I. Introduction to German EEG Law

The area of environmental policy has, in particular, experienced an intense scrutiny from the Commission. Many Member States have introduced measures all of which pursued an environmental aim, but the Commission's assessment of these did, in fact, lead to varying results. While some where considered compatible with EU law,[110] others were found to merely pursue an economic interest of the State and were not in line with Art. 107(1) TFEU.[111] Although many measures were set up on a compulsory private contributions scheme they did exemplify a variety of different ways in which the State was involved.[112] And this is exactly the crucial point which the Commission will take into account. The more State involvement is present, the higher the possibility of finding a breach of Art. 107(1) TFEU.

The German Renewable Energy Law Act (*Erneuerbare-Energien-Gesetz*) was initially adopted in 2000.[113] Since then, it has undergone many revisions. The version of the act at issue was adopted on 28 July 2011, entering into force on 1 January 2012

107 Ibid.
108 Using the private parties involved for its policy purposes without explicitly designating them to administer aid. See similarly *Steffens*, in: Säcker (ed.), Berliner Kommentar zum Energierecht, 3rd ed. 2014, Vol. 2, p. 178, para. 132.
109 Ibid., pp. 173-174, para. 122 and p. 180, paras. 136-137.
110 Such as recently in CJEU, joined cases C-204-208/12, *Essent Belgium*, EU:C:2014:2192.
111 Such as in the Dutch case on tradable emission allowances provided for free by the State, see CJEU, case C-279/08 P, *Dutch Nox*, EU:C:2011:551.
112 *Jaeger*, (fn. 101), p. 535. For a description of different mechanism used see *Ohms*, Recht der Erneuerbaren Energien – Klimaschutz im Wirschaftsverwaltungsrecht, 2014, p. 106, paras. 417-418; *Eckardt*, in: Frenz/Müggenborg (eds.), EEG: Erneuerbare-Energien-Gesetz, 3rd ed. 2013, Einleitung, p. 105, paras. 29 et seqq.
113 Initial EEG Act of 29/3/2000, BGBl. 2000 I, 305.

(EEG-Act 2012).[114] Further substantive changes were introduced in 2014 (EEG-Act 2014)[115] *inter alia* in order to be in line with EU law *ex nunc*,[116] which found the Commission's approval on 23 July 2014.[117]

Despite the fact that the EEG-Act 2012 is no longer in force and is replaced with the 2014 version of the act, the German government sought to clarify whether the assessment of the Commission in its decision of 25 November 2014, identifying the EEG-Act 2012 scheme as State aid,[118] was in line with Art. 107(1) TFEU. Germany claimed that no State aid should have been found as, *inter alia*, the State resources criterion was not fulfilled. The following section of this paper will study the functioning of the EEG-scheme and the Court's assessment in case T-47/15.[119]

II. Functioning of the General Equalisation Mechanism under EEG-Act 2012

A very complex equalisation mechanism has been established by the EEG-Act 2012 and will be roughly outlined below. The next part will deal with the special equalisation rules (*besondere Ausgleichsregelung*),[120] which are an integral component of the general mechanism and which have been qualified as State aid by the Commission in its decision of 25 November 2014.[121] This decision is the core subject of the recent CJEU judgement.[122]

The system of the EEG-Act 2012 is based on four levels.[123] On the first level, network operators (also called Distribution System Operators (DSOs)) are legally obliged[124] to purchase "green electricity"[125] produced from renewable energy sources (RES) from plant operators.[126] In return, the DSOs pay a fixed feed-in tariff determined by law.[127]

114 EEG-Act 2008 of 25/10/2008, BGBl. 2008 I, 2074, as amended by EEG-Act 2012 of 17/8/2012, BGBl. 2012 I, 1754, further referred to as "EEG-Act 2012".
115 BGBl. 2014 I, 1066.
116 See for example *Bungenberg/Motzkus*, in: Graf von Kielmansegg (ed.), Die EEG Reform – Bilanz, Konzeptionen, Perspektiven, 1st ed. 2015, p. 116.
117 Commission decision of 25/11/2014 on the State aid scheme SA.33995 (2013/C) (ex 2013/NN) C (2014) 8786 final, OJ L 250 of 25/9/2015, p. 3 (COM decision SA.33995).
118 Ibid.
119 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281.
120 §§ 40 et seqq. EEG-Act 2012.
121 COM decision SA.33995.
122 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281.
123 It is optional also to be qualified as five levels (as will be shown below) if the non-compulsory burden shift to the end consumer is taken into account.
124 §§ 5 and 8 EEG-Act 2012.
125 Also referred to as renewable energy source electricity (RES electricity) or EEG electricity (also including electricity produced from mine gas), as defined in § 1(3) EEG-Act 2012. See COM decision SA.33995, (fn. 117), p. 3; *Catti De Gasperi*, (fn. 103), p. 354.
126 Optionally, producers of RES electricity may also choose to for "direct marketing" of the electricity and are then entitled to market premiums form the network operators which is regulated by §§ 33a et seqq. EEG-Act 2012. See COM decision SA.33995, (fn. 117), p. 3.
127 §§ 16 et seqq. EEG-Act 2012. See also COM decision SA.33995, (fn. 117), p. 3.

On the second level, DSOs are required to pass on the EEG electricity to one of the four respective German Transmission System Operators (TSOs). These TSOs operate the commonly named "electricity highways" and are each responsible for a particular grid area.[128] The DSO's economic burden of having to pay the feed-in tariff is therefore vertically passed on[129] to the TSOs, which have to compensate them with the same fixed feed-in tariff.[130]

On the third level, a horizontal economic burden equalisation mechanism is set up. Each TSO has to bear the same proportion (percentage wise)[131] of the burden, corresponding to the average share of RES electricity with respect to its overall electricity supply sold to final consumers of its grid area in the previous calendar year.[132] Therefore, the respective TSOs establish the share of RES electricity which has been fed into their grid area.[133]

On the fourth level, TSOs are under the obligation to sell RES electricity on the spot market without any discrimination.[134] Should the market price obtained not be sufficient to cover the economic burden of the feed-in tariff payable to the DSOs, TSOs may require electricity suppliers to pay a fixed surcharge on each kWh of electricity which is delivered to the end consumer.[135] This surcharge constitutes the "EEG-surcharge" which is designated by law.[136] It is equal for all electricity suppliers, paid in monthly advances to the TSOs.[137]

All surcharge payments are collected in a joint EEG-account, set up separately and transparently to administer the system.[138] The amount of the surcharge is determined and published for the following year,[139] leaving no room for discretion as to the method of calculation.[140] The calculation is designed to cover all costs incurred by the TSOs and DSOs through their legal obligations, towards the network operators and the RES electricity producers. Any excess of the advance payments made for the fol-

128 *Bungenberg/Motzkus*, (fn. 116), p. 87.

129 § 34 EEG-Act 2012.

130 § 35 EEG-Act 2012 and § 18 Electricity Grid User Charge Ordinance (*Stromnetzentgeldverordnung*, (StromNEV)), BGBl. 2005 I, 2225, possibly reduced by a network charge (§ 35(2) EEG-Act 2012). In case of direct marketing of the electricity by the plant operator on the market, the TSO's also have to compensate for the market premium, see COM decision SA.33995, (fn. 117), p. 3.

131 *Bungenberg/Motzkus*, (fn. 116), p. 88.

132 § 36(3) EEG 2012. COM decision SA.33995, (fn. 117), p. 3.

133 § 36 EEG-Act 2012.

134 In line with § 37(1) EEG-Act 2012 and § 2 *Ausgleichsmechanismusverordnung* (AusglMechV), BGBl. 2015 I, 146.

135 § 37(2), first sentence EEG-Act 2012 in conjunction with § 3 AusglMechV. See also *Bungenberg/Motzkus*, (fn. 116), p. 88.

136 § 37(2) EEG-Act 2012.

137 § 60 EEG-Act 2012.

138 § 7 AusglMechV. See COM decision SA.33995, (fn. 117), p. 4.

139 § 3(2) AusglMechV.

140 The calculation made in accordance with § 3 AusglMechV is composed of the forecasted financial needs of the TSO to pay the fixed compensations and premiums to the DSOs, the expected income from the sale of green electricity on the market, the forecasted consumption of electricity in the following year and various EEG-surcharge management costs. See COM decision SA.33995, (fn. 117), pp. 5-6.

lowing year will automatically be carried over to the next and the surcharge will be adjusted accordingly. *Mutatis mutandis*, shortfalls will be adjusted by increased advances for the following year.[141]

III. The Capped EEG-Surcharge for Energy Intensive Undertakings

The EEG-Act does not require electricity suppliers to pass on the EEG-surcharge to final consumers.[142] Nevertheless, if the supplier chooses to do so[143] – which constitutes a sound economic and business decision to minimise own costs – the EEG-Act mandates transparent reporting on the end consumer's electricity bill.[144]

Energy Intensive Undertakings (EIUs)[145] benefit from a special provision under the EEG-Act 2012 which limits the passing on of the surcharge by the supplier to them, known as the "special equalisation rule" (*besondere Ausgleichsregelung*).[146] The goal of this provision is to reduce the costs of EIUs to maintain their international competitiveness.[147] For high energy consumption industries, a significant geographical as well as competitive disadvantage may occur.[148] Hence, the special equalisation rule was set up to equalise this burden for EIUs, effectively shifting the additional cost of RES energy production to consumers[149]

Under § 40 et seqq. EEG-Act 2012, EIUs may apply for[150] a limitation decision (*Begrenzungsbescheid*) on the EEG-surcharge from the Federal Office for Economic Affairs and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle* (BAFA)). As a rule, the higher the electricity consumption, the bigger the limitation on the payable EEG-surcharge will be.[151] The extent of the limitation claim of each EIU is based on § 41(3) EEG-Act 2012[152] and depends on the particular electricity usage of the applicant in the previous financial year.[153] Generally, no reduction of the EEG-surcharge is provided up to one GWh[154] of electricity use by the end consumer.

141 In line with §§ 38 and 39 EEG-Act 2012. See also COM decision SA.33995, (fn. 117), p. 6.
142 *Bungenberg/Motzkus*, (fn. 116), p. 88.
143 In practice, all suppliers pass on the economic burden of the EEG-surcharge to their customers in full. See COM decision SA.33995, (fn. 117), p. 7.
144 Ibid., p. 7. *Bungengerg/Motzkus*, (fn. 116), p. 110.
145 Including also railway undertakings. For readability purposes, the following will only refer to EIUs in general.
146 § 40 EEG-Act 2012.
147 As long as the goals of the EEG-Act itself are not jeopardized and it is reconcilable with the interests of electricity consumers. See § 40 second sentence EEG-Act 2012.
148 *Bungenberg/Motzkus*, (fn. 116), p. 86.
149 *Ohms*, (fn. 112), p. 219, para. 866.
150 Such a request must be made before the 30 June each year, see § 43(1) first sentence EEG-Act 2012.
151 Compare § 41(3) EEG-Act 2012. See *Bungenberg/Motzkus*, (fn. 116), p. 89.
152 For the railway sector the calculation is done in accordance with § 42 EEG-Act 2012. For simplicity reasons, this will not be elaborated separately.
153 In the sense of § 41(1) no. 1 lit. a EEG-Act 2012. For a description of this system see also *Ohms*, (fn. 112), p. 221, paras. 875-876; *Große/Kachel*, in: Altrock/Oschmann (eds.), EEG: Erneuerbare-Energien-Gesetz, 4th ed. 2013, p. 1031, para. 87.
154 Gigawatt per hour. § 41(3) no. 1 lit. a EEG-Act 2012.

For an electricity purchase over one GWh and up to (and including) ten GWh the limitation amounts to 10 % of the EEG-surcharge.[155] Electricity use of over ten GWh up to 100 GWh results in a limitation to 1 % of the payable EEG-surcharge.[156] Uses over 100 GWh are limited to 0.05 ct/kWh.[157] For undertakings which not only have a yearly use of electricity of at least 100 GWh but which also have a cost of electricity of more than 20 % of the gross added value, a special rule applies which limits the EEG-burden on the undertaking to 0.05 ct/kWh for the *entirety* of the used electricity (including the first GWh).[158]

As a result of this cap on the EEG-surcharge, electricity suppliers can only pass on a part of their financial burden,[159] caused by the EEG-Act 2012, to the EIUs, resulting in a shortfall on receipts.[160] To prevent the electricity suppliers from bearing this unequal burden and from passing it on to non-privileged end consumers in the form of higher electricity prices the respective TSO may only ask for the RES electricity compensation minus the resulting deficit of the supplier.[161] With that, the "saved costs" of the EIUs result in the rolling back of the EEG-surcharge burden onto the TSOs.[162] Any regional differences are equated horizontally among the TSOs to distribute the distortions caused by the special compensation rule.[163]

IV. State Monitoring, Transparency and Separate EEG-Account

Under the EEG-Act 2012 a number of supervision, control and enforcement tasks have been given to the German Federal Networks Agency (*Bundesnetzagentur* (BNetzA)). RES electricity producers, TSOs as well as electricity suppliers are required to manage all the necessary data, which is needed for the functioning of the EEG-system, in a transparent manner and to make it readily available amongst each other.[164] A detailed and systematic reporting system is provided by law and data may, upon request, be subject to auditing by an accountant.[165]

The EEG-Act and two of its implementing decrees (*Ausgleichmechanismusverordnung* (AusglMechV)[166] and *Ausgleichmechanismus-Ausführungsverordnung* (Ausgl-

155 § 41(3) no. 1 lit. b EEG-Act 2012.
156 § 41(3) no. 1 lit. c EEG-Act 2012.
157 § 41(3) no. 1 lit. d EEG-Act 2012.
158 § 41(3) no. 2 EEG-Act 2012. See also COM decision SA.33995, (fn. 117), p. 8.
159 A decision to reduce the EEG-surcharge for an undertaking will be enforceable as of the 1 January following the year of application and will be valid for one year, see § 43(1) EEG-Act 2012. See also *Bungenberg/Motzkus*, (fn. 116), p. 89.
160 COM decision SA.33995, (fn. 117), p. 8.
161 § 43(3) EEG-Act 2012.
162 § 43(3) EEG-Act 2012. *Bungenberg/Motzkus*, (fn. 116), p. 90.
163 § 43(3) in conjunction with § 36 EEG-Act 2012.
164 In accordance with §§ 45-52 EEG-Act 2012.
165 COM decision SA.33995, (fn. 117), para. 31.
166 From 17/7/2009, BGBl. 2009 I, 2101, last amendment made on 17/2/2015, BGBl. 2015 I, 146.

MechAV))[167] additionally oblige TSOs and DSOs to publish certain data related to the EEG-system,[168] such as detailed knowledge on the yearly EEG-surcharge calculation.[169] Moreover, transparency is guaranteed by the strict separation of financial accounts, mandated by law, in relation to all transactions connected to the EEG-Act 2012.[170]

The BNetzA is entrusted with the task of ensuring the proper functioning of the EEG-system, such as the monitoring of the electricity sale on the spot market, the feed-in tariffs and premiums, and the proper application of the cap system. These tasks are complemented by a set of enforcement powers such as the possibility to give orders and render decisions,[171] including fines,[172] and the right to audit the DSOs' and TSOs' compliance.[173] In turn, the Agency must report certain data to the German Federal Ministry for Environment, Nature, Conservation and Nuclear Safety the Federal Ministry of Economics and Technology.[174]

V. Formal Investigation Decision and Opposing Legal Arguments Raised

The initial problem with the EEG-Act of 2012 was that Germany failed to notify the scheme and in particular the special equalisation rule for EIUs, as is mandated by Art. 108(3) TFEU.[175] The Commission decided on 18 December 2013, upon having serious doubts as to its compatibility with EU law, to open a formal investigation procedure.[176] The concern was centred on the preliminary conclusion that the EEG-Act 2012 conferred a selective economic advantage on producers of RES energy[177] and on EIUs. This advantage was assessed to be the feed-in tariffs for the producers and the surcharge reduction for EIUs respectively.[178] In its decision, the Commission concluded that it was financed through State resources, as the surcharge was intro-

167 From 22/2/2012, BGBl. 2012 I, 134, last amendment made by Art. 2 of the Regulation of 17/2/2015, BGBl. 2015 I, 146.
168 COM decision SA.33995, (fn. 117), paras. 33 and 34.
169 § 7(2) AusglMechV. COM decision SA.33995, (fn. 117), para. 37.
170 § 5 AusglMechAV. COM decision SA.33995, (fn. 117), para. 33.
171 Decisions enforceable against private actors are based on § 61(1) and (2) in conjunction with §§ 65 et seq. of the German Energy Industry Law (*Energiewirtschaftsgesetz* (EnWG)). Orders regarding the setting of the amount of EEG-surcharge are based on § 38 no. 5 in conjunction with § 61(1) no. 2-4 EEG-Act 2012. See also *Salje*, Erneuerbare-Energien-Gesetz 2012, 6th ed. 2012, p. 1389; COM decision SA.33995, (fn. 117), para. 107.
172 § 62 EEG-Act 2012; COM decision SA.33995, (fn. 117), paras. 39-43 and 120.
173 Ibid., para. 36.
174 § 63 EEG-Act 2012; COM decision SA.33995, (fn. 117), para. 44; *Große/Kachel*, (fn. 153), p. 1023, paras. 49-50.
175 See also *Bungenberg/Motzkus*, (fn. 116), p. 86.
176 The formal investigation procedure was opened in accordance with Art. 108(2) TFEU and the Council Regulation (EU) No. 734/2013 of 22/7/2013 (OJ L 204 of 31/7/2013, p. 11) and was lead under the case number SA.33995 (2013/C) (ex 2013/NN). The initial complaint against the EEG-Act 2012 came from the German Association of Energy (*Bund der Energieverbraucher*), see COM decision SA.33995, (fn. 117), para. 54.
177 Also including mine gas, see ibid., para. 47.
178 Ibid.

duced by the legislator to support green energy production and the TSOs have been designated with collection and administration tasks, while being closely monitored by public authorities.[179] Although the support for EEG electricity was found to be covered by the exception in Art. 107(3) TFEU, the Commission questioned the conformity of the reduction mechanism with paras. 2 and 3 of that provision.[180] The Republic of Germany has lodged an annulment action against the Commission's decision SA.33995 on the EEG-Act 2012 scheme on which the CJEU ruled on 10 May 2016.[181]

The following part will outline the main legal arguments raised by Germany and other interested parties against the findings of the Commission and will describe the Court's findings in case T-47/15.

VI. Arguments brought by Germany against Commission Decision SA.33995

First of all, Germany argued that most actors involved in the system were private. The only public involvement was claimed to be the adoption of the law and the strict implementation control by the public authorities, BAFA and BNetzA.[182]

Most interested parties also asserted that the cases *Essent*[183] and *Vent de Colère*[184] were legally and factually not comparable to the issue at hand.[185] Instead, they relied on the *PreussenElektra*[186] and *Doux Élevage*[187] judgements, claiming the lack of State control, arguing that the system is of a purely private nature and merely organises successive payments between private operators, using their own resources. The fact that it was set up by law and that there was an (allegedly) marginal involvement of public authorities should not be construed so as to make it fall within the scope of EU State aid law.[188]

The public authorities involved were argued to have had merely supervisory functions and no control over the resources collected.[189] In particular, they claimed that the BNetzA only monitored the legality of the surcharge, without the ability to influence the amount of the surcharge.[190]

The EEG-surcharge was claimed to be determined solely by TSOs, and not by the EEG-Act 2012 or by public authorities, on the basis of market mechanisms where the TSOs sell the RES-electricity on the spot market, and only after that the remaining

179 Ibid., para. 48.
180 Ibid., para. 49.
181 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281.
182 COM decision SA.33995, (fn. 117), paras. 56 and 119 and GC, case T-47/15, *Germany v Commission,* EU:T:2016:281, para. 30.
183 CJEU, case C-206/06, *Essent Network Noord*, EU:C:2008:413.
184 CJEU, case C-262/12, *Vent de Colère*, EU:C:2013:851.
185 Ibid., para. 57.
186 CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160.
187 CJEU, case C-677/11, *Doux Élevage*, EU:C:2012:348.
188 CJEU, case C-262/12, *Vent de Colère*, EU:C:2013:851, para. 110.
189 COM decision SA.33995, (fn. 117), paras. 56 and 119.
190 Ibid., para. 110.

costs which should be covered by the surcharge were determined.[191] The fact that the calculation method and transparency requirements were set by the EEG-Act 2012, and that the BNetzA had a supervisory task, were only measures to prevent unjust enrichment in the system.[192] Additionally, it was asserted that the DSOs and plant operators did not enjoy any special powers under public law and hence, had to rely on civil law courts for the enforcement of claims.[193] Further it was relied upon that that there was no obligation for electricity suppliers to pass-on the burden to final consumers[194] and the choice to do so was merely a part of the suppliers chosen pricing policy.[195]

Hence, Germany and other interested parties claimed that the resources never passed through State hands[196] and the advantages, alleged by the Commission, were not imputable to the State as the TSOs were not designated but were acting on their own account.[197] Therefore, they drew the conclusion that the entire mechanism under the EEG-Act 2012 does not fall within the notion of State resources and is not in breach of Art. 107(1) TFEU.

VII. Case T-47/15 Germany v Commission: Assessment of the Special Equalisation Rule under EU State Aid Law

In contrast to the arguments of Germany and other interested parties, the Commission asserts that in particular the special equalisation mechanism under the EEG-Act 2012 does constitute State aid and does not fall within the limited exception of Art. 107(2) and (3) TFEU.[198]

In order to be classified as illegal Sate aid, a measure must cumulatively fulfil the conditions set out in Art. 107(1) TFEU. Focusing on the special equalisation rule for EIUs under § 40 EEG-Act 2012, the following analysis of the Court's ruling in case T-47/15 will first briefly outline that most conditions are relatively straight forward and were fulfilled, and will then turn to the more problematical "State resources" criterion.

1. Advantage, Selectivity and Distortion of Cross-Border Competition

The criterion of "advantage" is to be interpreted in a wide sense. It includes any direct and indirect benefits or mitigation of a burden, which are granted without an appro-

191 Ibid., paras. 56 and 109.
192 Ibid., para. 119 and GC, case T-47/15, *Germany v Commission*, EU:T:2016:28, para. 78.
193 COM decision SA.33995, (fn. 117), para. 56 and GC, case T-47/15, *Germany v Commission*, EU:T:2016:28, para. 31.
194 *Bungenberg/Motzkus*, (fn. 116), p. 88.
195 COM decision SA.33995, (fn. 117), paras. 56 and 110.
196 Ibid., para. 108.
197 Ibid., paras. 96, 110 and 117.
198 E.g. ibid., para. 140. The issue of the non-applicability of the exceptions to the State aid prohibition will not be discussed further due to length limitations. For an analysis see for example *Bungenberg/Motzkus*, (fn. 116), p. 113 et seqq.

priate consideration.[199] A clear advantage is the (partial) exemption from the EEG-surcharge for EIUs, upon request, under the special equalisation mechanism (*besondere Ausgleichsregelung*).[200] The Court confirmed the Commission's finding that the EEG system was established to limit the additional economic burden resulting from the support for the production of EEG electricity, mitigating the charges which normally would be included in the budget of EIUs and hence constituting an advantage.[201]

The requirement for the advantage to be granted in a factually selective manner was not contested as it is readily apparent in the case of the special equalisation mechanism.[202] The EEG-Act 2012 sets out clear conditions for being considered an EIU. Therefore, the group of beneficiaries can be clearly distinguished and includes only undertakings from the manufacturing and railway sector.[203]

The potential to distort competition is not contested and is also given, as EIUs enjoy a mitigation of the regular financial burden which they would encounter with electricity as a production component, giving them a stronger position on the market.[204] The cross-border element is also satisfied as EIUs do engage in international trade and actions and hence, the effect of the advantage is not merely reduced to a local market.[205]

2. The Notion of State Resources

The criterion of a measure having to be financed by the State or through State resources lies in the grey area and has been the major part of the dispute between the German Government and the Commission. While Germany and many interested parties claimed that no State resources were involved and hence, no State aid was present, the Commission held on to its assessment of all criteria being fulfilled.

a) Imputability

Due to a relatively simple assessment, imputability to the State will be analysed first. The Court dealt with the issue of imputability in a rather concise manner stating that where public authorities have been involved in the adoption of the measure, imputability will be found.[206] Since the EEG-surcharge and the cap for EIUs have been

199 In line with settled case law of the CJEU. See for e.g. CJEU, case 47/69, *France v Commission*, EU:C:1970:60, para. 16 or CJEU, case C-39/94, *SFEU and others*, EU:C:1996:285, para. 60. See also *Bungenberg/Motzkus*, (fn. 116), p. 92.

200 COM decision SA.33995, (fn. 117), para. 65. For a more detailed analysis of the existence of an advantage see *Bungenberg/Motzkus*, (fn. 116), pp. 92-94.

201 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, paras. 54-55.

202 Ibid., para. 44.

203 § 40 in conjunction with § 3 no. 13 and 14 EEG-Act 2012; COM decision SA.33995, (fn. 117), para. 65.

204 *Bungenberg/Motzkus*, (fn. 116), p. 96.

205 Ibid., p. 97.

206 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, paras. 37 and 40.

established by a set of legislations and implementing decrees,[207] the measure at issue is attributable to the State.

b) Issue of Being Financed from State Resources

Much less straightforward is the question of whether the advantage was financed from State resources. At first sight it is not apparent that a burdening of the State budget could be involved since all parties to the equalisation mechanism which were affected were private in nature.[208] However, this and the fact that the advantage was not directly financed by the State budget[209] does not exclude classification as State resources.[210]

The Court emphasises the fact that it is not necessary to establish in each and every case that a transfer of State resources has occurred and that even if sums corresponding to the measure are not permanently held by the State's Treasury, but which remain under constant public control, are sufficient to be categorised as State resources.[211]

The CJEU found that the Commission was correct in finding that a series of obligations and rights was conferred on the TSO and that, in effect, these can be assimilated with a State concession. It was stressed that the TSOs functioned as an intermediary as the funds collected from the final consumers were not directly passed to the electricity producer but went to a separate account managed by the TSOs. The resources were not freely available to the TSOs but instead were subject to separate accounting and were subject to exclusive allocation to the financing of the support and compensation scheme under the 2012 EEG.[212] This led the Court to the conclusion that the resources, while being administered by the TSOs, remained under the dominant influence of the public authorities in that the governing provisions enabled the TSOs to be assimilated with an entity executing a State concession.[213]

It was acknowledged by the CJEU that the resources generated by the EEG surcharge and intended to finance both the support scheme for EEG electricity and the special compensation scheme for EIUs were obtained by means of charges ultimately imposed on private persons, effectively shifting the burden away from green electricity producers. It was further held that passing on the burden to final consumers must be regarded as a foreseen consequence and organised by the German legislature and which can be assimilated, from the point of view of its effects, with a levy on electricity consumption in Germany.[214]

207 The *Stromeinsparungsgesetz* (StromEinspG), the EEG-Acts 2009 and 2012, and the implementing decrees AusglMechV and AusglMechAV. The StromEinspG (German Energy Conservation Law) was the initial legal act which was underlying the *PreussenElektra* judgement. See also *Steffens*, (fn. 108), p. 176, para. 130.
208 *Bungenberg/Motzkus*, (fn. 116), p. 100.
209 CJEU, case C-677/11, *Doux Élevage*, EU:C:2013:58, para. 34.
210 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, para. 86 and CJEU, case C-262/12, *Vent de Colère*, EU:C:2013:851, paras. 16-20.
211 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, paras. 82-83.
212 Ibid., para. 93.
213 Ibid., para. 94.
214 Ibid., para. 95.

Further, the Commission's assessment confirmed that the State had not only defined to whom the advantage was to be granted, the eligibility criteria and the level of support, but it had also provided the financial resources necessary to cover the costs of the support to EEG electricity.[215] Without the TSOs' ability to freely dispose of the funds, the resources must be considered to constitute State resources in the sense of Art. 107(1) TFEU.[216] This conclusion was drawn also by the fact that it is settled case-law that for levies, such as the EEG surcharge, to be regarded as being an integral part of an aid measure, the revenue of the levy must be allocated for the financing of the aid, which was precisely the case under the 2012 EEG scheme.[217]

Classifying the EEG-mechanism as not constituting State aid,[218] by purely relying on the judgment in *PreussenElektra*,[219] was found not to be legitimate due to the strong dissimilarity of facts and applicable laws. In contrast to the EEG-Act 2012, the *Stromeinspeisungsgesetz* in *PreussenElektra* merely provided for a contracting obligation for the operators and the setting of minimum prices for RES energy by the State. The additional burden resulting therefrom had to be paid from the private entities' *own* resources.[220] The law underlying the *PreussenElektra* judgement did neither provide for additional costs to be expressly passed on to final consumers nor for the intervention of intermediaries entrusted with the collection or administration of the aid. Private undertakings were not appointed by the Member State to manage State resources but only had a purchasing obligation using their own resources. The funds at issue in that case were not considered State resources since they were never under public control and no mechanism, resembling the one in the 2012 EEG scheme, was present which would guarantee the full coverage of additional costs incurred.[221]

The TSOs were entrusted with additional responsibilities under the 2012 EEG-Act and are monitored when performing those tasks while not being able to use the collected funds for any other purpose than the one defined in the legislation. Hence, the Court concluded that these tasks and actions of the TSOs could be interpreted as being those of a profit driven economic entity acting freely on the market but rather, the TSOs must be seen as an administrator of aid granted through State funds.[222]

The Court also upheld this conclusion regarding the special advantage for EIUs, stating that the compensation mechanism constituted an additional burden for TSOs. It further noted that although any reduction of the EEG surcharge had the effect of leading to losses in revenue for TSOs, these losses were *de facto* recovered from other suppliers and final consumers, resulting in a certain subsidising involvement of the EIUs for which the EEG surcharge is limited. The funds generated by the EEG sur-

215 Ibid.
216 Ibid., para. 96.
217 Ibid., para. 97 and CJEU, joined cases C-393/04 and C-41/05, *Air Liquide Industries Belgium*, EU:C:2006:403, para. 46 and the case-law cited therein.
218 Claimed by Germany and other interested parties. COM decision SA.33995, (fn. 117), paras. 52 and 57.
219 CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160.
220 COM decision SA.33995, (fn. 117), para. 115.
221 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, paras. 98-102.
222 Ibid., paras. 106 and 110.

charge can be equalized with a levy on electricity consumption, to be used for strictly defined purposes within a framework of implementing public policy, due to the fact that final electricity consumers bore the additional cost of capping the surcharge for EIUs.[223]

The EEG-case was further distinguished by the Court from the facts of *Doux Élevage.*[224] The CJEU also distinguished the circumstances in the 2012 EEG case from *Doux Élevage* as the TSOs could freely decide on the use of the funds collected. The separate accounting rules and the annual adaptation of the surcharge precluded any positive or negative balance in the account used to manage the financial flows linked to the EEG scheme.[225] The fact that the State did not have actual access to the resources generated by the EEG surcharge does not affect the conclusion that the State had a dominant influence over the use of those funds and the ability to decide in advance on the use by providing for the detailed EEG scheme.[226] While Germany tried to rely on the *Eventech*[227] judgement claiming that there was not a sufficiently direct link between the advantage given and the reduction in the State budget or a sufficiently concrete economic risk of burdens on the budget, the Court clearly noted that the circumstances in the EEG case must be distinguished.

The State resources involved result from the very fact that Germany organised the transfer of financial resources by legislation and provided for the purpose and use of those funds, and not from the existence of a close link with the State budget.[228] The funds must be classified as State resources from the outset as the final electricity consumers are required to pay a price supplement, which can be assimilated with a levy for the implementation of State policy.[229]

The Court concluded that the mechanism under the EEG-Act of 2012 resulted, in principle, from the implementation of a public policy supporting producers of electricity from renewable energy sources. The complex legal framework established under the EEG law effectively provided for the resources, generated by the imposition of the EEG surcharge and assimilated by the Court into a levy, to remain under the dominant influence of the public authorities in Germany. Furthermore, the provision of a set of detailed tasks and powers of the TSOs in relation to the administration of the funds, effectively not allowing them to use and dispose of those funds freely, warrants an assimilation with administrators who execute a State concession.[230] With that, the Court upheld the decision of the Commission, classifying the EEG-Act 2012 as State aid under Art. 107(1) TFEU and dismissed the action.[231]

223 Ibid., para. 112.
224 CJEU, case C-677/11, *Doux Élevage*, EU:C:2013:58.
225 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, paras. 114 and 117.
226 Ibid., para. 118.
227 CJEU, case C-518/13, *Eventech*, EU:C:2015:9.
228 GC, case T-47/15, *Germany v Commission*, EU:T:2016:281, para. 122.
229 Ibid., para. 125.
230 Ibid., para. 127.
231 Ibid., para. 128.

3. Commitments and Adjustment Plan

The Commission found the aid to have been put into effect in an unlawful manner due to the lack of notification to the Commission, as is mandated by Art. 108(3) TFEU.[232] However, the aid will be regarded as compatible with the Internal Market if the commitments offered by Germany are implemented,[233] relying on the exemption from the prohibition of Art. 107(3)(c) TFEU and the Commission Environmental Guidelines of 2014.[234] Additionally, the proposed adjustment plan for the years 2013 and 2014 has been accepted by the Commission.[235] However, Art. 3(1) of the Commission decision SA.33995, qualifies the special equalisation scheme for EIUs, which reduced the EEG-surcharge in 2013 and 2014, as being in line with the Internal Market, *only* if the beneficiary fulfils one of the specific sets of conditions set out in that provision. Aid granted to beneficiaries which do not fulfil these conditions is incompatible with the Internal Market[236] and shall be recovered to the extent to which it is incompatible with the Internal Market.[237]

D. The 2016 Commission Notice on the Notion of State Aid

Having described the evolution of the CJEU case law on the notion of State resources and having seen a practical example of an assessment of the German EEG-Act 2012, another aspect should be the consideration of the recent efforts of the European Commission in this area. The following part will briefly describe the content of the 2014 Commission Notice on the Notion of State Aid pursuant to Art. 107(1) TFEU[238] and its aims. Comments will be provided on the section of State resources, where room for improvement exists in order to make it a truly useful tool. Following that, the author will offer some final remarks on the current state of the notion and the future ahead.

In 2012, the Commission has launched an "EU State aid modernisation" (SAM) reform programme[239] which seeks to streamline rules on State aid, to strengthen the Internal Market and foster quicker and easier EU State aid law enforcement.[240] One of its main tasks is, therefore, the identification of common principles used for the

232 Art. 1 of COM decision SA.33995, (fn. 117), p. 54.
233 Ibid. The commitments are to be found in Annex I to the decision.
234 Commission Communication of 28/6/2014, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, OJ C 200 of 28/6/2014, p. 1. Due to space limitations, the issue of applicable exceptions, commitments and the Commission Environmental Guidelines will not be further discussed. For a detailed analysis see for example *Bungenberg/Motzkus*, (fn. 116), p. 113 et seqq.
235 Art. 3 of COM decision SA.33995, (fn. 117), p. 54. The commitments are found in Annex II to the decision.
236 Art. 3(2) COM decision SA.33995, (fn. 117), p. 55.
237 Art. 6(1) COM decision SA.33995, (fn. 117), p. 56 and para. 247.
238 Commission Notice 2016, (fn. 5).
239 Introduced by the Commission Communication of 8/5/2012 on EU State Aid Modernisation (SAM), COM (2012) 209 final.
240 *Mederer*, (fn. 1), p. 2026, para. 15; *Kliemann*, (fn. 14), p. 2034, para. 5.

assessment of measures across the large number of guidelines and frameworks and to revise these for more consistency.[241]

A Draft Commission Notice on the Notion of State Aid was an integral part of this programme which sought to clarify the concept, to allow an easier, more transparent and coherent application. The Commission attempted to set out the case law in a simple and accessible form.[242] Notably however, such soft law instruments adopted by the Commission are not legally binding toward third parties[243] and the legality of a given measure must be assessed only in the light of Art. 107(1) TFEU itself and the relevant case law.[244] After its publication, this draft has been subject to a public consultation from 17 January 2014 to 14 March 2014.[245] On 19 May 2016, the Commission published the final version of the Notice, which takes account of some of the concerns voiced by academia and respondents during the public consultation on the draft text.[246]

As a general remark, the Commission's aim to streamline and clarify the notion of State resources should be welcomed. The relevant section on State resources is rather short and is risking oversimplification of some aspects. This might give the false impression that the concept is rather readily apparent and does not cause many troubles. As has been demonstrated above, this is not the case in practice.

Some claims are supported by referring merely to Commission decisions and not to CJEU case law, which does not aid legal certainty as only the Court may interpret Union law, and any Commission attempts to enlarge or classify the interpretation of Art. 107(1) TFEU may be overturned by the Court of Justice on appeal.[247]

At times, the wording chosen is too imprecise and does not reflect case law properly. For instance, paragraph 53 needs more clarification and examples. It seems insufficient to refer to the granting of special rights, access to public domain or natural resources in such general terms and by merely making a reference to a Commission Communication. In particular, *Biondi et al.*[248] has rightly pointed out that in most cases, the granting of special or exclusive rights will be done in the general economic interest and will hence fall within the scope of Art. 106(1) TFEU instead of Art. 107(1) TFEU.

The usage of the phrase "the relevant factor is not the origin of the resources" in paragraph 58 is misleading. A more precise phrasing would include the fact that re-

241 See on para. 1 of the declarations made on the official website, http://ec.europa.eu/competition/state_aid/modernisation/index_en.html (1/8/2016).

242 See equally *Clayton/Catalan*, (fn. 3), p. 260. A critique of the Commission's practice of adopting soft law instruments on the interpretation of State aid is expressed by, for example, *Biondi*, (fn. 9), pp. 1426-1448, calling it a "*constitutionally dubious practice*".

243 Art. 288 TFEU.

244 Also Commission Notice 2016, (fn. 5), paras. 3-4; *Rusche et al.*, (fn. 16), para. 17.18.

245 The submitted comments can be found on the official Commission website, http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html (1/8/2016).

246 Available on the Commission's website, http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html (1/8/2016).

247 In line with Art. 263 TFEU.

248 *Biondi et al.*, Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107(1) TFEU, Centre of European Law, King's College London of 12/3/2014, p. 6.

sources originating directly from State resources will, as a rule, fall within the notion of Art. 107(1) TFEU and additionally, in cases where these resources are not originating directly therefrom, they may still be regarded as constituting State resources if a sufficient degree of State control over the funds can be established.[249] Also the last sentence of this paragraph should be changed as the general statement, of ruling out a transfer of State resources only in very specific circumstances, does not emphasise enough that a case-by-case analysis will still be necessary and that the situations mentioned are only examples where such transfer was, in fact, not found.

Paragraph 61 should make a reference to the relevant case law in *Doux Élevage*[250] and *Aiscat*.[251] It should also be noted that in both cases, the Court did not decide on the lack of State resources only due to the resources being distributed among private parties, rather this was only one component for the decision and the finding of a lack of public control and availability of the funds to the State also played a role.[252]

All in all, it is commendable that the results of the public consultation led the Commission to improve the text of the Notice by providing further elaborations on some issues.

E. Conclusion

The analysis of the notion of "State resources" in the sense of Art. 107(1) TFEU has shown that this concept is not as easily comprehensible as the mere wording of the provision might indicate. The complexity and the Courts' struggles to provide a precise definition of what is to be included in it is exemplified by the large amount of jurisprudence, which has created a web of distinctions, indicators and exceptions.

Despite the efforts of the Commission and the Court, practitioners, potential beneficiaries, Member States and other interested parties still struggle to *ex ante* determine whether a particular measure creates a selective advantage, potentially affecting inter-State competition and which is also being financed "by the State or through State resources".[253]

Especially in the light of cases such as *PreussenElektra*,[254] where the Court has ruled that the particular circumstances do not warrant a classification as State aid due to the lack of State resources being involved, Member States have tried to avoid the classification as State aid. With the Commission's very narrow reading of such "exceptions", this has created a significant amount of legal uncertainty.

Many such uncertainties exist, in particular, in the area of environmental measures set up by Member States, which encompass specific exceptions and complex financing mechanisms. The recent judgement in T-47/15 on the issue of the EEG-Act 2012 shed

249 A reference to for example CJEU, case C-677/11, *Doux Élevage*, EU:C:2013:58, could be made.
250 Ibid., paras. 32-40.
251 GC, case T-182/10, *Aiscat*, EU:T:2013:9, paras. 105 and 106.
252 For a somewhat similar conclusion, see *Biondi et al.*, (fn. 248), p. 6, para. 4.6.
253 Art. 107(1) TFEU. See also *Clayton/Catalan*, (fn. 3), p. 270.
254 CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160.

some light on the applicability of the notion of State resources in such circumstances. The analysis of the judgment has shown that the core criterion on which the assessment of the special equalisation rule under the EEG-Act 2012 is based is the "degree" of State control over the money-flow. The lower the degree of market-oriented and autonomous decision-making power of the administering entity, and the higher the degree of State control and intervention, the more likely it is that State resources are involved. Even in cases where resources are originally of private nature and where they do not directly pass through State hands or directly diminish the State's budget, State resources in the sense of Art 107(1) TFEU can be found if national legislation provides for such a detailed framework as in the 2012 EEG scheme. Funds, such as the EEG surcharge, can be assimilated with a levy and where these funds are administered by an entity acting as an administrator on behalf of the State, and hence not acting freely on its own behalf, over which the State has dominant influence, can be classified as State resources under EU law. While this judgement of the Court provides for some clarifications on the interpretation of the notion of State resources, it is nevertheless a very specific set of facts which might not be applied *mutatis mutandis* to other schemes set up by Member States due to their complex and varied structures. Rather, the necessity of detailed case-by-case analyses will remain and full legal certainty will still not be established.

Surprisingly and regrettably, many German commentaries and academic works on renewable energy law currently dedicate only a brief paragraph or two to this notion of State resources.[255] EU State aid law was, up until now, often dismissed with a short reference to the ruling in *PreussenElektra*[256] while neglecting subsequent jurisprudence of the Court. Often, a clear differentiation between the facts and legal circumstances is missing,[257] resulting in an imprecise and insufficient examination.[258] This is even more astonishing as the very purpose of these commentaries is to comment on the large number of legal rules added to the EEG law in 2012 and the provisions which have been significantly amended.[259] Hopefully, the Court's ruling on the 2012 EEG scheme will trigger more elaborate and critical discussions of EU State aid law in the future, not only on the particular case of the German EEG scheme but also in terms of a general reflection on the wide variety of schemes and measures available across Europe.

States are becoming more and more creative in order to set up such a complex mechanism that State intervention is not readily apparent, and even after undergoing a complex analysis of all the elements of the mechanism, imputability and State re-

255 See for example *Altrock/Oschmann*, (fn. 153), p. 117; *Ehricke*, in: Frenz/Müggenborg, (fn. 112), pp. 179-180; *Ohms*, (fn. 112), p. 107.

256 CJEU, case C-379/98, *PreussenElektra*, EU:C:2001:160.

257 See for example *Scholz/Moench/Herz*, Verfassungs- und Europarechtliche Grundsatzfragen einer EEG-Reform, 2014, pp. 124-126.

258 *Große/Kachel*, (fn. 153), p. 1017 is an example of a very imprecise assessment, where case law is not applied correctly, by claiming that only the origin of a measure is of relevance for the assessment of State aid and not the effect it creates. This statement is clearly contrary to established case law of the Court.

259 *Salje*, (fn. 171), p. V.

sources cannot be found in a "black and white" form. Despite that, the author believes that the Court will aim to emphasise also in the future that it is the *effect* that is determinative of classifying a given measure as State aid, and that simply using different or innovative regulatory ways to achieve such an effect will not ensure that they will fall outside the scope of EU State aid law.[260] Maybe even finding illegal aid in mechanisms which are entirely *inter partes* but *de facto* show State control over the flow of funds and where the particular private entities are "tools" of the State to implement a policy goal.[261]

Reading the more recent judgements on State aid[262] it is evident that the Court is very careful not to cause a too extensive interpretation of this notion.[263] This is understandable, as an interpretation going "beyond" the specific measure examined in each case, and which would be of a more general nature, could run the risk of unintentionally including or exempting too many measures under the notion of EU State aid.[264] The result is a double-edged sword which, for good reason, tries to limit the application of a notion to the specific case at hand while causing, instead of eliminating, legal uncertainty. Maybe it simply has to be accepted that this uncertainty is an "inherent" feature of the State resources concept, which will not and cannot be completely erased by the Court, leaving the Shakespearean question "to be or not to be" with respect to State resources in the sense of Art. 107(1) TFEU without a simple and clear-cut answer.

260 See also *Biondi*, (fn. 16), p. 1726. As also noted above, it may indeed be the case that the Court will develop its case law in the future to also find the necessary State control in cases where factually there is no direct or indirect intervention. This could include cases where a very detailed mechanism regulating the financing mechanism *inter partes* is set up but no intermediary body controlled by the State exists.

261 See arguments presented under B.V.

262 For example CJEU, case C-518/13, *Eventech*, EU:C:2015:9; GC, case T-182/10, *Aiscat*, EU:T:2013:9 or CJEU, case C-279/08 P, *Dutch Nox*, EU:C:2011:551. On similar thoughts, see *Clayton/Catalan*, (fn. 3), p. 270.

263 *Biondi*, (fn. 16), p. 1719 even going so far as to call it the EU Court's "*mental fatigue in determining the criteria*" of Art. 107(1) TFEU.

264 See similarly ibid., p. 1724 et seqq.