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EU's Renewable Energy Target and Fossil Fuel Subsidies

Exercise of the Commissions State Aid Powers in Response to Insufficient Progress

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Abstract

The EU has set the target that 42.5% of energy consumption shall derive from renewable energy. Regulation 2018/1999 governs the Unions endeavors thereof and, when a member state fails to sufficiently contribute with its share of renewable energy, the European Commission shall exercise its powers at Union level. Vast levels of state aid granted to fossil fuel production and consumption in the Union constitutes a major antagonist to the renewable energy transition. This thesis explores legal sources, literature, and reports on the relationship between state aid and the Commissions exercise of powers at Union level. The thesis intends to find legal solutions capable to address harmful state aid and strengthen the Commissions responses to insufficient renewable energy progress. The main finding is that state aid law can be utilized to address state aid to fossil fuels and that there is great potential in interlinking the legal areas.

1. Introduction

1.1 Background

The year is 2024 and anthropogenic climate change is no longer a future hazard but is ongoing, will continue and exacerbate.[1] The EU and its Member States are parties to the Paris agreement with the objective of limiting global average temperature rise to 1.5°C.[2] Production and consumption of energy accounts for approximately 75% of greenhouse gas (GHG) emissions in the Union.[3] Hence, the Green Deal targets the transition to renewable energy sources and sector-wide decarbonization as paramount to create a EU with no net emissions of GHG. The EU and its member states has committed themselves to transform their energy production to in 2030 have 42.5% of its final energy consumption from renewable energy sources.[4] Regulation 2018/1999 on the Governance of the Energy Union and Climate Action (Governance Regulation) sets out the obligations of the member states and the EU institutions in the journey towards the 2030 goals before advancing towards net zero.

Despite the accomplishment to agree on goals and indorsing binding legislation on the matter, the Governance Regulation falls short on rigorous tools for enforcement. In the case of member state disobedience with the targets, the Governance Regulation mandates the Commission to issue recommendations but also to *exercise its powers at union level*. Recommendations are de lege unbinding but shall be duly taken into consideration in a spirit of EU solidarity.[5] Hence, the Governance Regulation is to a great extent reliant on the political will of the member states.[6] Union-wide political will for ambitious climate action cannot be taken for granted and is already wavering in several parts of Europe.[7]

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[1] Intergovernmental Panel on Climate Change 'Climate Change 2023: Sixth Assessment Report of the IPCC' (IPCC 2023), 42.
[2] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156, art 2.
[3] Eurostat 'Greenhouse Gas Emissions Statistics: Air Emission Accounts' (19 February 2024).
[4] Directive 2023/2413 on the promotion of the use of energy from renewable sources [2023] OJ L 328/82; European Commission 'The European Green Deal' (Communication) COM (2019) 640 Final.
[5] Regulation 2018/1999 on the governance of the energy union and climate action (Governance Regulation) [2018] OJ L 328/1, art 34.
[6] Sabine Schlacke and Michéle Knodt 'The Governance System of the European Energy Union and Climate Action' (2019) 16 Journal for European Environmental Planning and Law 323, 333; Kati Kulovesi and others 'The European Climate Law: Strengthening EU Procedural Climate Governance?' (2024) 36 Journal of Environmental Law 24, 31.
[7] Christian Schwägerl 'Shifting Political Winds Threaten Progress on Europe's Green Goals' (Yale Environment 360 2023); Lisa Pelling 'Sweden's Climate policy: of the Rails' (Social Europe 2023).

As underlined, the decarbonization of the energy sector is both the biggest challenge and the biggest opportunity towards a net-zero Europe. A substantial problem for the advancement of the green transition is subsidies granted by states, for the production and consumption of fossil fuels. 11 of the biggest economies in the EU are granting approximately €112 billion in fossil fuel subsidies (FFS). The same 11 member states are accountable for more than 80% of all the GHG emissions in the EU.[8]

Subsidies or state aid is in its very nature disruptive in a free market but may be used to stabilize economies or ensuring that certain goods or services can be sold and bought at desirable prices. Regarding FFS, they may on one hand support the supply of accessible electricity and inexpensive means of transport but on the other hand it effectively breaks the advancement of the energy transition. Economic doctrine and EU law define state aid as a transfer of state resources through measures that are imputable to the state, that are selective and holds the potential to distort competition and trade.[9] In the EU internal market, the logical point of departure is that all state aid is unlawful but is nonetheless subject to various exceptions. Furthermore, the Commission is empowered to declare the legality of member state measures considered as state aid, pursuant to legislated criterium.[10]

Bringing this together; the EU is obligated to reduce GHG emissions and to increase renewable energy production, the decarbonization of the energy sector is vital for achieving these targets. Political will to attain these targets is not a certainty and means of enforcement will likely be necessary. The Governance Regulation states that the Commission shall exercise its powers at Union level when member states act in contrary to the committed targets. A major obstacle for the energy transition and a large source of GHG emissions derive from the existence of state aid to fossil fuel production and consumption. State aid law in the EU is monitored and enforced by the Commission. This thesis investigates the relation between the response to insufficient progress regarding the 2030 renewable energy target and the Commissions powers in state aid law, for the purpose of identifying legal solutions capable of dealing with; political

[8] High-Level Commission on Carbon Prices 'Report of the High-Level Commission on Carbon Prices' Washington, (Carbon Pricing Leadership Coalition 2017), 12; Ipek Gençsü and others 'Phase-out 2020: monitoring Europe's fossil fuel subsidies' (Overseas Development Institute and Climate Action Network Europe 2017), 7 (ODI/CAN report).
[9] Treaty on the Functioning of the European Union [2012] OJ C 326/0, art 107(1); Leigh Hancher & Juan Piernas López (ed), *Research Handbook on European State Aid Law; 2nd edition* (Edward Elgar Publishing 2021), ch 2.
[10] TFEU, arts 26, 107 & 108.

unwillingness to attain the 2030 targets, environmentally and economically harmful financial conduct and enforcing the commitments made by the EU and its attending nations.

1.2 Purpose & Research Questions

The Purpose of this thesis is to investigate the legal possibilities for the European Commission to utilize its powers in state aid law for the purposes of article 32(2) of the Governance Regulation. The thesis explores a legal solution to a multitude of problems of various origins. In line with the purpose, the thesis intends to answer the following main research question together with three facilitating sub questions.

Primary research question:

- **How does article 32(2) of the Governance Regulation on the exercise of the Commissions' powers at Union level relate to its powers in state aid law?**

Sub-questions:

- What is the relation between fossil fuel subsidies and the renewable energy target?
- How does the Governance Regulation function?
- How does the state aid control system function in the EU?
- Can the commissions powers in state aid law be used as a response to insufficient progress towards the Unions renewable energy target?

There are a range of positive implications of reaching a conclusion on the presented questions. The Energy Union needs stronger enforcement tools, unlawful FFS remain unaddressed despite harming the internal market, the environment and counterworking the energy transition. Being able to conclude that the Commission may utilize their mandate in state aid law for the purposes of 32(2) Governance Regulation would strengthen the Commissions response to insufficient progress, it would help to identify and address the high levels of FFS in the EU and emancipate the energy transition from one of its primary obstacles.

1.3 Method & Material

To answer the main question as well as the sub-questions regarding the functioning of state aid law and the Governance Regulation, the thesis will follow a doctrinal legal methodology. Concretized by gathering and assessing the legal sources and outlining their respective standing and implications to establish de lege lata.[11] The EU is its own legal sphere, and its sources and

[11] Christina Eckes 'European Union Legal Methods: Moving Away from Integration' in (ed) Ulla Neergaard and Ruth Nielsen *European Legal Method: Towards a New European Legal Realism?* (DJØF Publishing 2013).

hence also its method is distinct from traditional domestic law and public international law research. The primary source of EU law is commonly referred to as the treaties and include the TFEU, the Treaty on the European Union (TEU), the Charter of Fundamental Rights of the European Union and the European Atomic Energy Community Treaty.[12] Together they constitute the founding treaties of the EU, and for the purpose of this thesis the TFEU will maintain a central role throughout the whole research, the TEU will also be given due consideration. The TFEU and the TEU contain amongst many other elements, the primary rules on how the EU functions, the powers of its institutions and the core principles of the Union. Secondary sources of EU law accounts for the largest share of substantive EU law and includes directives, regulation, decisions, recommendations, and opinions. Moreover, EU legal sources include precedents of the EU courts, general principles of law, international treaties, preparatory works, and doctrine.[13] As the posed question investigates the relation between two legal areas of EU law, state aid law and the Governance Regulation. The former is in its core regulated in the TFEU but includes clarifying secondary law, outlining its functioning and procedures. The latter, Governance Regulation is a piece of secondary legislation, naturally adopted on a legal basis enshrined in the TFEU.

1.3.1 Considerations on the Methodology Concerning State Aid Law

State aid law is one of the older core areas of law of the EU and significant volumes of case law as well as books and journals have developed since its adoption.[14] Both literature and case law have been used to understand the concepts and procedures pertaining to state aid law. As article 107 TFEU only frames the main parts of the state aid ruleset, the thesis will treat a great amount of case law, implementing secondary legislation and literature to facilitate for a deepened understanding of the legal area.[15]

Continuing, state aid law and research thereof is intrinsically linked to economic reasoning just like the whole area of competition law. It is even stated in literature that economic doctrine is

[12] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391; Treaty Establishing the European Atomic Energy Community (adopted 25 Mars 1957, entered into force 1 January 1958) 294 UNTS 261; TFEU; Treaty on the European Union (TEU) [2012] OJ C 326/13.
[13] TFEU, art 288; Jörgen Hettne and Ida Otken Eriksson *EU-Rättslig Metod: Teori och Genomslag i Svensk Rättstillämpning* (2 edn, Norstedts Juridik AB 2011), 39-41.
[14] Treaty Establishing the European Economic Community (Treaty of Rome) (adopted 25 March 1957, entered into force 1 January 1958) 294 UNTS 3, art 92.
[15] Hettne and Otken Eriksson, 2011, 39-41.

to be considered a source of EU law.[16] Due to this, the thesis will bring forth constituents of interdisciplinary research to facilitate for adequate understanding of definitions, reasons to control state aid law and the functioning and operationalization of the internal market. The approach of the thesis to these economic aspects will be further developed in the relevant chapter.

1.3.2 Considerations on the Methodology Concerning the Governance Regulation

Compared to state aid law, the Governance Regulation is on the other hand a much newer piece of legislation and while not having a comparable corpus of legal sources as state aid law do, the Governance Regulation itself is to the furthest extent enough to understand it, where needed it is supplemented by literature. However, given the purpose of the paper the Regulation has not been solely investigated for its functioning, but also for its relation to state aid law and FFS. Hence, case law concerning the relationship between legal areas of the EU will be examined, as well as considering its legal basis and the preparatory works prior to its adoption.

As will be explained further into the thesis, the EU renewable energy target originates from international commitments to brake and mitigate anthropocentric climate change. Not in the strict sense that the international climate regime obliges renewable energy targets, but rather that the renewable energy transition internally in the EU has been decided as one of its contributions to reduce GHG emissions. In accordance with article 3(5) TEU, the EU entrusts itself to promote austere observance and development of international law.[17] Accordingly, international law will affect the application of EU law, hence the thesis will investigate and consider relevant international sources of law. The thesis approaches the recognized sources of international law as established by the International Court of Justice, including international treaties, customary law, general principles, precedents, and high-quality literary sources.[18]

1.3.3 Remarks on Interdisciplinary Research

The thesis will investigate pre-conducted empirical research on the nature and levels of FFS as well as its impacts on the renewable energy transition. This will be done to demonstrate the problems which FFS bring forth and to conceptualize how and why state aid may play a much

[16] Ibid.
[17] TEU, art 3(5)
[18] Statute of the International Court of Justice (adopted 18 April 1945, entered into force 24 October 1948), art 38.1.

bigger role in the attainment of the renewable target than it currently does. The empirical research used includes reports and working papers produced by professional authors, legitimate organizations, and institutions such as the Overseas Development Institute, Eurostat, International Monetary Fund, and the European Central Bank, which the reader will be familiarized with throughout the thesis.

In order to understand the state aid ruleset, the thesis explores literature and reports on economic doctrine. When treating the literary sources of economic doctrine, it is done in close connection to the ideas and rules of the internal market of the EU and is through this connection much connected in legal thinking, however some concepts and notions are explored outside legal contexts to adequately introduce the reader to the notions of subsidies and state aid.

1.4 Delimitations

This thesis aims to examine the Governance Regulation which governs five different dimensions of the Energy Union. However, this thesis is limited to the renewable energy target and does not treat the other objectives pursued in the Governance Regulation. The rationale for doing so is primarily for the reason that the Governance Regulation offers different responses in regard to different targets experiencing insufficient progress.[19] In addition to this, the thesis is limited to the renewable energy target due to its direct contraposition to FFS.

Moreover, the thesis intends to assess the legal possibilities to use the Commissions state aid powers for the purposes of article 32(2) of the Governance Regulation. Being a legal thesis, it will not investigate factors such as political considerations or the composition of the Commission that may affect the chances of utilizing the proposed legal tools.

1.5 Structure

The following chapter two serves as an extended and deepened introduction to the substance of the thesis, examining the origin of the EU renewable energy target, international climate governance and its relation to the EU and the notion of FFS and its effects. Thereafter chapter three addresses the Governance Regulation, starting with an examination of its legal basis, followed by the outlining of its structure and functioning, the chapter finalizes by investigating how the Commission monitors progress and what enforcing mechanisms is at the disposal of

[19] Governance Regulation, art 32.

the it. Subsequently, chapter four swaps the focus to state aid law. Chapter four introduces the concept of state aid before moving on to a thorough description of the definition of state aid pursuant to EU law. With the knowledge of state aid both as separate concept and in law the chapter subsequently investigates the EU control system of state aid. The chapter is concluded with some final remarks on the Commissions powers in the legal area. Chapter five presents a deepened view on existing FFS measures in the EU and thereafter applies the knowledge from chapter four on the real situation, demonstrating the potential of state aid law to combat FFS. Chapter six will connect the seemingly separate legal areas, treating arguments for and against the usage of the Commissions powers in state aid law as a response to insufficient progress towards the renewable energy goal. Chapter 7 will conclude the findings of the thesis and present advice to different actors based on the induced conclusions.

2. Renewable Energy Target and Fossil Fuel Subsidies as Hindrance

This chapter presents the rationales for the EU's renewable energy target and the position of the EU regarding the Paris agreement. Continuing by identifying the impacts of FFS in climate change mitigation and the positive effects the elimination of them may have. Starting with a short history of how and why climate change is understood as an issue in need of all-encompassing and cooperative action. Then moving on to the Paris Agreement and its core characteristics and functions. Thereafter moving on to the implications of the said agreement for the EU and its member states and why this has led to the adoption of a renewable energy target. Lastly, at the core of the purpose of this paper it will examine the extent of FFS in the Union and why it needs to be dealt with.

2.1 History of International Climate Policy and Current Regime

The Intergovernmental Panel on Climate Change (IPCC) of the United Nations was constructed in 1988 for the purpose and responsibility to summarize and present the current state of the scientific knowledge of the climate. In its first assessment report published in 1990 it exhibited fundamental scientific facts, which served the reasons for forthcoming climate change policy. Anthropocentric climate change is a problem with universal characteristics, with impacts and causes spread all over the earth and clear scientific evidence that underlines the need for collective action. Furthermore, the effects of climate change are unevenly distributed and the nations with the greatest emission levels are rarely prospected to suffer from the graver impacts.[20]

2.1.1 The Framework Convention, Kyoto, and Paris

Once that climate change had been brought into the agenda of states and of the international legal community, the drafting of an international framework initiated in the end of 1990. Four years later after the negotiations, the United Nations Framework Convention on Climate Change (UNFCCC) entered into force. As the name implies, the UNFCCC was a framework convention, and it did not prescribe specific emission reduction targets or means to enforce mitigation.[21] The natural development of the framework convention led to the adoption of the Kyoto protocol in 1997, characterized by its binding targets, differentiation between developing

[20] IPCC, 2023, 50-52.
[21] United Nations Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1994) 2303 UNTS 162.

and developed states and a permeating top-down governance.[22] While being celebrated as a considerable achievement, the Kyoto protocol was not an adequate tool to attain necessary mitigation progress. It had two primary shortcomings, namely that it did was void of emission limits post 2013 and it failed to engage substantial emitters like the U.S and China.[23]

Onwards, the choice of the international community ended up with letting the Kyoto protocol flow into obsolescence and to instead adopt a new agreement. During the 21st COP of the UNFCCC, the Paris agreement was unanimously adopted. Contrary to its predecessor the Paris agreement functions on a bottom-up approach, in which partakers decide their own individual non-binding mitigation goals and with less stringent means of enforcement. Article 2 of the Paris agreement prescribes the objective to constrain ongoing global warming to a maximum of 2°C and endeavor towards limiting global average temperature rises to 1.5°C.[24]

2.1.2 Climate Change Mitigation in the Paris Agreement

The Paris Agreement functions by individual target-setting, these targets are presented, communicated, and maintained in the form of nationally determined contributions (NDC). NDCs shall be submitted on a five-year basis and shall reflect the highest possible ambition of that state. An NDC shall not be altered in a manner that lowers the ambition of said state. In a similar manner, the principle of non-regression upholds that a new NDC submitted after the expiration of a five-year period cannot have a lower level of ambition than the previous contribution.[25] Once that the said five-year period expires, the next conference of the parties conducts what is denominated as the global stocktake. During which the collective global progress towards the 1.5℃ target is assessed, including the identification of gaps and negotiation on how the forthcoming NDCs shall be formulated. In addition to the NDCs, parties may also prepare and communicate long-term mitigation plans, wherein the five-year contributions function as intermediary steps.[26]

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[22] Kyoto Protocol (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.
[23] Ibid; Lichao He 'China's Climate Change Policy from Kyoto to Copenhagen: Domestic Needs and International Aspirations' (2010) 34 Asian Perspective 5, 6-9; Igor Shishlov, Romain Morel & Valentin Bellassen 'Compliance of the Parties to the Kyoto Protocol in the First Commitment Period' (2016) 16 Climate Policy 768, 769.
[24] Paris Agreement.
[25] Ibid, arts 4(2), 4(3) & 4(9).
[26] Ibid, arts 4.19 & 14; UNFCCC, decision 19/CMA.1 (2018) FCCC/PA/CMA/2018/3/add.2.

2.1.3 Effectiveness and Compliance

Being a significant diplomatic achievement especially due to being almost universally ratified, critique has been raised on the prospective effectiveness of the Paris Agreement.[27] The agreement itself is in accordance with fundamental international public law undeniably binding[28], however the provisions within it which are intended to bring mitigatory results are ultimately not.[29] Initially, the point of departure of the agreement that allows each state to decide its own goal, does in no way guarantee that the cumulative contributions will suffice keep global temperature rise below 1.5°C. This issue is easily discernible from the global stocktake procedure in 2023, wherein it was concluded that even if all presented NDC's were fulfilled it would imply an average temperature rise of 2.1-2.8°C.[30] Furthermore, as per the wording of article 4 of the Paris Agreement, parties *shall* submit NDC's and *shall* pursue efforts to meet their decided target. Indicating that to fulfill these obligations, it is sufficient to submit and NDC and demonstrate that the state has conducted some degree of measures. Implying that a state cannot be held liable for not meeting its targets.[31]

Continuing, for the purpose of ensuring adequate implementation of the agreement and to promote compliance, the Paris Agreement includes a compliance mechanism. Comprising of a facilitative committee of experts. Established by article 15 of the Paris Agreement, which states that the committee shall in its functioning and behavior be non-adversarial and non-punitive.[32] It shall expressly not serve as an enforcement mechanism, and it does not enjoy the mandate to conduct dispute settlements nor to impose penalties or sanctions.[33]

2.1.4 Recent Developments: COP28

The 28th COP of the UNFCCC took place in December 2023, in the United Arab Emirates. Despite widespread critique on the vast involvement of fossil fuel lobbyism and the fact that the president of the conference was the CEO of UAE's state-owned oil company ADNOC, the

[27] United Nations Office of Legal Affairs 'Chapter XXVII 7.D Paris Agreement' (Treaty Section 2024).
[28] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 26.
[29] Peter Lawrence and Daryl Wong 'Soft Law in the Paris Climate Agreement: Strength or Weakness?' (2017) 26 Review of the European Community & International Environmental Law 276.
[30] UNFCCC, decision 1/CMA.5 (2023) FCCC/PA/CMA/2023/L.17.
[31] Ibid; Paris Agreement, art 4.
[32] Paris Agreement, art 15.
[33] UNFCCC, decision 20/CMA.1 (2018) FCCC/PA/CMA/2018/3/Add.2.

COP did not fall completely short in its results.[34] COP28 conducted the first global stocktake under the Paris regime. Wherein the parties agreed to transition away from fossil fuels in the energy system as well as to phase out phase out FFS provided they are not granted for the elimination of energy poverty. Additionally, the global stocktake decision concluded in an agreement to pursue efforts to triple renewable energy production worldwide by 2030.[35] While COP28 brought forth stronger statements with broader agreeability on the phase out of fossil fuels than any prior agreement, the COP decisions still lacks in their legal bindingness as well as its contents, since they are devoid of concrete targets and means to ensure that parties commitments result in real action.[36]

2.2 The European Union and the Paris Agreement

As known, the focal point of EUs climate efforts is aimed at changing the production and consumption of energy. Due to the construction of the Treaty on the Functioning of the European Union (TFEU) the endeavors towards net-zero and the efforts of the energy transition are separated in two separate policy areas. Namely the environmental policy and energy policy, enshrined in articles 191 and 194 respectively. The competence to act in these policy areas is shared between the Union and its member states.[37] While the policy areas are distinguished from one another in the treaties, their interconnectedness is undeniable, and this is strongly perceptible in EU secondary legislation.[38]

In accordance with the principle of conferral, article 216 of the TFEU empowers the Union with the competence to accede in international agreements on behalf of its member states. Provided that the ratification of such an agreement is essential for the attainment of one or more of the objectives enshrined in the EU treaties. Based on this, the EU ratified and became a party to the Paris agreement together with all its member states who are individual parties as well.[39] According to the Paris Agreement, for the purposes submitting NDCs as per article 4(2), the Paris Agreement allows for economic regional organizations and their partaking member states

[34] UNFCCC, report of the COP on its twenty-eight session (2024) FCCC/CP/2023/11;
The Lancet planetary health 'COP28 Reflections' (2024) 8 The Lancet Planetary Health 1.
[35] UNFCCC, decision 1/CMA.5, 2023, para 28(a, h & d).
[36] Pranay Arora 'COP28 Ambitions, Realities and Future' (2024) 7 Environmental Sustainability 107, 110.
[37] TFEU, arts 4, 192 & 194.
[38] The European Green Deal, 4-6; Seita Romppanen and Kaisa Kuhta 'The Interface Between EU Climate and Energy Law' (2023) 30 Maastricht Journal of European and Comparative Law 45.
[39] TFEU, arts 7 & 216; TEU, art 5; Decision 2016/1841 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change [2016] OJ L 282/1.

to act jointly.[40] When acting through a joint NDC, states are obliged to ensure the avoidance of any double counting but are besides this liable for their own emissions in accordance with the decided joint action agreement.[41] The EU is the sole organization to adopt a joint NDC and its NDC contains the same target as upheld in secondary EU legislation.[42]

As the Paris agreement requires, the EU and its member states have developed two long-term mitigation targets. The targets are prescribed in the Unions collective NDC and in regulation 2021/1119 (Climate Law), they consist of the well-known net-zero emissions target for 2050 and the intermediate steppingstone of 55% emission reduction by 2030.[43] The transposition of the NDC target into an instrument of secondary EU law makes it binding, contrary to a standalone NDC.[44]

2.3 The Collective Renewable Energy Target

The primary raison d'être of a percentual target on the share of energy consumed from renewable energy production is to decrease GHG emissions, as required from the Paris Agreement. In addition to climate concerns is also the aspiration of the EU to a become energy independent and stopping imports of fossil fuels from Russia, following its invasion of Ukraine. The collective renewable energy target is legislated in article 3 of directive 2023/2413 on the promotion of energy from renewable sources and ascertains that the member states shall ensure that 42.5% of Union wide energy consumption derives from renewable energy production.[45] While the renewable energy target strongly relates to the 1.5C target in the sense that it facilitates for more directed and focused emission mitigation, it shall be noted that this is not required as per the Paris Agreement.

The 27 member states of the EU are different from one another in several aspects which affects their respective capabilities and potential to increase its share of renewable energy production. The size of its territory, population, climate, terrain, economy to name a few. Naturally, the

[40] Paris Agreement, art 4(16-18).
[41] Ibid, arts 4(13 & 14) & 4(17).
[42] Commission 'Update of the Nationally Determined Contribution of the European Union and its Member States' (2023).
[43] European Council 'Submission to the UNFCCC on Behalf of the European Union and its Member States on the Update of the Nationally Determined Contribution' (2023); Regulation 2021/1119 establishing the framework for achieving climate neutrality [2021] OJ L 243/1, arts 2 & 4.
[44] Christoph Schwarte 'EU Climate Policy Under the Paris Agreement' (2021) 11 Climate law 157, 175.
[45] Directive 2018/2001 on the promotion of energy from renewable sources (RED II) [2018] OJ L 328 82, art 3; Directive 2023/2413 on the promotion of the use of energy from renewable sources (RED III) [2023] OJ L 328/82, preamble paras 2 & 4.

individual renewable energy targets for each member state are also different. Deciding individual member state goal is done at national level but must take various factors into account in the target-setting procedure. The national target setting procedure is conducted in accordance with the Governance Regulation which will be investigated in the forthcoming chapter.

2.4 Fossil Fuel Subsidies Hampering the Energy Transition

Transforming the European energy sector, which have been built around the combustion of fossil fuels for over a century implies a revolutionary reconstruction of society. To comply with the EU's international commitments to keep global mean temperatures well-below 2°C, the amount of coal fueled energy production must decline with around 80%. While this implies significant changes and rigid efforts, replacing the coal energy production with renewable energy sources has been identified as the most cost-effective way of ensuring that the EU contributes with its part to the Paris Agreement. [46]

FFS are identified as one of the most serious opposing factors for the realization of the renewable transition. It is a policy measures that artificially preserves existing GHG intensive activities and disturbs the operation of the globalized free market.[47] The appreciated magnitude of public financial means granted to fossil fuel consumption or production in the EU is more than 112€ billion.[48] Research indicates that a substantial amount of the existing FFS are legally questionable under EU competition rules.[49] In EU competition law, subsidies are termed as state aid and ascribes the notion wherein a state selectively grants one or more undertakings a competitive advantage that potentially unbalance competition and impact intra-Union trade. The Green Deal underlines the importance aligning national state budgets with the energy transition in the sense of directing public funds towards sustainable alternatives and away from fossil fuels. Additionally, the Paris agreement calls for efforts to make economic patterns compatible with low GHG emissions.[50] Lacking political engagement and will of national governments has been identified as the principal counteractor of FFS dimidiation. [51]

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[46] ODI/CAN report, 7.
[47] Ibid, 31.
[48] Ibid; TFEU, art 107.
[49] Julian Nowag, Luis Mandaca and Max Åhman 'Phasing out Fossil Fuel Subsidies in the EU?' (2021) Exploring the Role of State Aid Rules' 21 Climate Policy 1037.
[50] The European Green Deal; Paris Agreement, art 2.1c.
[51] Richard Bridle and others 'Fossil Fuel to Clean Energy Subsidy Swaps: How to Pay for an Energy Revolution' (International Institute for Sustainable Development 2019), iv.

2.4.1 Pricing Emissions or Paying for Emissions

The damages brought forth by climate change are broad and the impacts thereof affect the planet as a whole. While the degree of impact varies, sea level rise, droughts and extreme weather events impacts the public who thereafter bears the costs. On the other end, emitting GHG is virtually free, and emitters are not liable to bear the costs of the damages caused by their emissions. This situation fits the economist notion of negative externalities. Namely, where the total costs brought forth by an activity pursued in the strive for profit is not reflected in what the performer of said activity disburses oneself.[52] Based on this, internalizing the costs of the universal damage caused by GHG emissions is seen as a cost-efficient manner to mitigate anthropocentric climate change.[53] Legislating the idea of internalizing costs caused by GHG emissions is mainly referred to as carbon pricing and it can be legislated in different ways, the most common measures include carbon taxing or emission allowance trading systems. The definitive share of global emissions subjected to some form of carbon pricing ranges between 26-40%.[54] The role played by carbon pricing in the energy transition is to incentivize the energy production sector towards renewable energy production wherein it is not subjected to the extra cost of carbon taxes or emission allowances. Moreover, revenue collected through carbon pricing mechanisms may additionally be used to combat energy poverty or to incentivize further deployment of renewable energy.[55]

However, the existence of FFS directly counteracts the efficient operationalization of carbon pricing as it reimburses the recipients for the same activities that carbon pricing mechanisms intends to price. In other words, FFS can be understood as a reversed carbon pricing. It is not only constituting a direct finance to increased emissions but also weakens a widely accepted and preferred tool to combat anthropocentric climate change. Furthermore, recalling that the transition of the energy sector is the core aspect of decreasing emissions, and that carbon pricing

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[52] Jean Tirole 'Some Economics of Global Warming' (2008) 98 Rivista di Politica Economica 9.
[53] Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading [2003] OJ L 275 32, preamble paras 18, 19 & Art 1; David Coady and others 'Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates' (International Monetary Fund 2019), 8.
[54] Organization for Economic Cooperation and Development 'Pricing Greenhouse Gas Emissions: Turning Climate Targets into Climate Action' (OECD 2022), 7; Hannah Ritchie and Pablo Rosado 'Which Countries Have Put a Price on Carbon' (Our World in Data 2022); World Bank 'State and Trends of Carbon Pricing Dashboard' <https://carbonpricingdashboard.worldbank.org/compliance/coverage>.
[55] Jeroen van den Bergh and Wouter Botzen 'The Role of Carbon Pricing in Energy Transitions: Policy and Research' in (ed) Kathleen Araújo *Routledge Handbook of Energy Transitions* (Routledge 2022), 261-263 & 269; Melanie Marten and Kurt van Dender 'The Use of Revenues from Carbon Pricing' (OECD 2019), 15-20.

intends to incentivize the transition it becomes obvious that FFS is a forcible antagonist to the renewable energy target.[56]

2.4.2 Economic Inefficiency

As known, the EU energy transition implies a sizable transformation of European societies. Besides other obstacles and challenges pertained to it, it also requires investment levels beyond anything the EU has experienced before. During the period 2011 to 2020, annual EU wide investments in renewable energy averaged at €229 billion.[57] To align investments in renewable energy with the climate neutrality objective, the current decade needs to average at €396 billion per year and thereafter increase further to around €520-€570 billion per year in 2030 to 2050.[58] While private investment by far accounts for the largest expenses[59], the energy transition will naturally imply a heavy burden on member states budgets. So does the subsidizing of fossil fuels, as it decreases other public expenditure levels as well as it debilitates the efficiency of renewable energy investments.[60] In light of this discussion, it shall also be noted that the protection of consumers from the energy crisis brought forth by the drastically changed geopolitical circumstances of the EU has entailed costs of approximately €540 billion.[61] Costs that could have been avoided in a more self-sufficient Europe running on renewables rather than the imports of fossil fuels.[62]

2.4.3 Competitiveness and Incentivization

Recalling that the largest financial burden of the energy transition will be expended by the private investors, ensuring the financial attractivity of renewables is of great importance. The act of subsidizing fossil fueled energy production and consumption effectively reduces the costs of said energy. To ensure that consumers or producers of energy or fossil fuels transition to

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[56] Achim Steiner 'A Guide to Carbon Pricing and Fossil Fuel Subsidy Reform' (United Nations Development Programme 2021), 8-10.
[57] European Investment Bank 'EIB Energy Lending Policy: Supporting the Energy Transformation' (EIB 2023), 10.
[58] Commission 'Sustainability and Peoples Wellbeing at the Heart of Europe's Open Strategic Autonomy' COM (2023) 376 Final, 7; Agnieszka Widuto 'Energy Transition in the EU' (European Parliamentary Research Service 2023), 7.
[59] Commission 'Investment Needs assessment and funding availabilities to strengthen EU's net zero technology manufacturing capacity' SWD (2023) 68 Final, 24-26.
[60] Henok Asmelash 'Phasing out Fossil Fuel Subsidies in the G20: Progress, Challenges and Ways Forward' (International Center for Trade and Sustainable Development 2017), vii.
[61] Giovanni Sgavaratti and others 'National fiscal policy responses to the energy crisis' (Bruegel Datasets 4 November 2021).
[62] Commission 'Report on Energy Prices and Costs in Europe' COM (2024) 136 Final, 1 & 15.

renewable energy sources, the price difference between the different sources is highly relevant.[63] Reiterating the conceptualization of FFS as reverse carbon pricing, the removal of them can ensure that the private sector is incentivized in accordance with the objectives of the EU. Moreover, lowering the prices of energy through subsidies decrease the innovativeness and further development of green technologies.[64]

[63] Laura Merill and others 'Tackling Fossil Fuel Subsidies and Climate Change: Levelling the Energy Playing Field' (Nordic Council of Ministers 2015), 33.
[64] Marius Ley, Tobias Stucki and Martin Woerter 'The Impact of Energy Prices on Green Innovation' (2016) 37 The Energy Journal 41.

3. The Governance Regulation

The Governance Regulation, consists of 59 articles and eight chapters it is the instrument intended to maneuver the strategies and measures construed for the attainment of the goals and objectives of the Energy Union, Paris Agreement, and in particular the Unions 2030 targets for energy and climate. [65] Similar to the vast majority of national climate legislation, the Governance Regulation is an embodiment of procedural climate governance.[66] To attain the vast societal changes that climate neutrality and the energy transition requires, procedural governance instruments represents the skeleton on which the substantive climate governance builds on with actual change. With the skeleton laid out, the substantive action and climate related decisions follows its shape [67]

3.1 Dual Legal Basis

Concrete action towards a renovation of the energy system in Europe embarked year 2014, wherein the Council presented its aspirations to create an Energy Union. This conclusion was taken by the Council against the background of geopolitical events, climate change concerns and to support EU competitiveness in the energy market. The main characteristics of the intended Energy Union was the focus on ensuring affordable, secure, and climate-friendly energy. These three-sided objectives placed at the core of EU energy and climate policy must be balanced against one another and is termed as the energy trilemma.[68]

Four years later the framework instrument of the Energy Union was adopted, namely the Governance Regulation. An instrument of considerable size and with broad implications for the member states. In line with as described earlier, the interconnectedness between climate and energy policy is logically and de facto strong. Consequently, the Governance Regulation was adopted through an ordinary legislative procedure on basis of articles 191-192 and 194 on environmental and energy policy respectively. While being closely connected to one another, the legal bases both entail certain implications affecting the application of the Governance

[65] Governance Regulation, preamble paras 1-9.
[66] Brendan Moore and others 'Transformative Procedural Climate Governance: Mechanisms, Functions, and Assessment Criteria' (4i-TRACTION 2023), 6-12; Kati Kulovesi and others, 2024, 24.
[67] Ibid.
[68] Council 'Conclusions-26/27 June 2014' (Cover Note) EUCO 79/14, 19.

Regulation. The mandate to legislate in the energy and environment field is shared between the Union and its member states.[69]

3.1.1 EU Energy Policy: Article 194

The overriding purpose of the energy policy area is the operationalization of the internal market and the protection of the environment. EU action on energy shall ensure, the functioning of the internal market and security of supply in the Union. Additionally, it shall promote interconnection of energy networks, energy efficiency and energy savings and foster the development of renewable energy. The elements of environmental protection in the energy policy area are brought forth by the commitments that decrease consumption of energy and foster the deployment of renewable energy in the Union.[70] Legislation originating from the energy legal basis, shall by virtue of article 194(2) not affect the member states right to determine the general structure of their domestic energy supply nor the terms for utilizing their available energy resources.[71] While this provision upholds the seemingly principal autonomy for member states to decide their own energy mix, it applies without prejudice to article 192(2)(c). Said article belongs to the environmental legal basis and it prescribes the special legislative procedure that must be performed when measures entail a significant impingement on member states freedom of choosing energy sources and governing the general structure of its energy system.[72]

In case 490/10 EP v Council, the question arose whether a regulation on the collection of data with effects on the energy policy and its objective should be legislated on basis of article 337 TFEU on data collection or article 194 TFEU. In other words, the question was how secondary EU law which in its entirety or part has impacts on other policy areas influences the choice of legal basis. Whereas the ECJ stated that article 194 TFEU implies the legal basis designated for all EU acts in the field of energy which are of the nature as to implement the objectives enshrined in 194(1). And any acts that in its aim and content are necessary for attaining the said objectives, shall be legislated under article 194 TFEU. In connection to this, it was stated that

[69] TFEU, arts 4(2), 191-192 & 194.
[70] Ibid, art 194(1)
[71] Ibid, art 194(2)
[72] Ibid, art 194.

an act as described above which influences other legal bases may be due to this be regarded as a component of the prevailing legal basis.[73]

This judgement entails that while the Governance Regulation is adopted under article 194 TFEU and undeniably will affect other EU policy areas, it may legitimately do so. Further on, parts of the Governance Regulation, especially response to insufficient progress may in line with the questions posed by this thesis affect competition policy state aid law. But as the enforcement of the Governance Regulation reasonably may be regarded as a constituent part of the achievement of the energy policy objectives it can rightfully affect the other mentioned legal areas. The reasoning of the court naturally also applies vice versa, implying that the adoption and enforcement of EU state aid law may rightfully affect the policy areas of energy and environment.

3.1.2 EU Environmental Policy: Article 191

Legislative action taken on basis of article 191 TFEU shall be done for the purpose of preserving, protecting, and improving the environment. Furthermore, environmental policy shall be guided by the principles of: precaution upholding that scientific uncertainty is not a legitimate reason for inaction, preventive action to prevent harm rather than compensating, rectification at source and that the polluter shall pay.[74] Elaborating on the two latter principles, the principle to rectify at source implies that the origin of environmental harm shall be addressed rather than adapting or compensating in-situ of the harm. Additionally, it infers that member states are obliged to act regarding activities that undisputedly are inherently environmentally harmful notwithstanding if the close-proximity environment is unaffected.[75] Continuing to the polluter pays principle (PPP), it introduces an economic approach to environmental harm as it is intended to correct market failures. A market failure may in the context of this thesis be concretized as a scenario where a producer of energy releases GHG emissions but does not bear the costs of the harm caused by said emissions. According to the

[73] Case C-490/10 *European Parliament v Council of the European Union* [2012] EU:C:2012:525, paras 62-64 & 66-68.
[74] TFEU, art 191(1 & 2).
[75] Case C-2/90 *Commission v Belgium* [1992] ECR I-4471, para 34; Case C-364/03 *Commission v Greece* [2005] ECR I-6162, para 34.

PPP, the costs caused by said emission shall not be borne by public means funded by taxation but instead be imputed to the producer.[76]

Recalling the discussion on article 194(2) TFEU on the energy legal basis. It was concluded that wherein an EU legal act affects the general structure of the energy system in a member state, it shall be done in accordance with the legislative procedure set forth by 192(2)(c) TFEU. As now determined, the Governance Regulation was adopted on the basis of article 191 TFEU, it can be concluded that the Regulation do not impair on member states right to decide their own energy mix.

3.2 Structure and Operationalization of the Regulation

Based on long term strategies and national energy and climate plans, forged upon the values of effectiveness, inclusion, transparency, and structure, the Governance Regulation is intended to stimulate member state cooperation, ensure compliance with the UN climate regime all while contributing to investor certainty and economic development. The Energy Union is divided in five dimensions, whose interconnectedness and enforcing effect on one another is emphasized. Continuing, the five elements of the Energy Union are: energy security, internal energy market, energy efficiency, decarbonization and research, innovation, and competitiveness.

The chapters of the Governance Regulation are structured as follows, (1) General provisions, (2) Integrated national energy and climate plans (INECP's), (3) Long-term strategies, (4) Reporting, (5) Assessment of progress and policy (6) GHG removals by sinks, (7) Cooperation and support, (8) Final provisions. As known, the scope of this thesis addresses commissions enforcement powers regarding the 2030 targets for renewable energy and will hence dissect the relevant articles thereto. Hence this chapter will discuss the function and content of INECPs, reporting, monitoring, responses to non-compliance as well as its provisions on subsidies.[77]

3.2.1 INECP's

Since the last December 2019, by the first of January 2029 and every ten years thereafter the EU member states must submit an INECP to the Commission. The main requirements regarding the content of INECP's are listed in article 3(2), moreover annex I consists of a detailed outline

[76] Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2002] ECR I-13772, Opinion of AG Jacobs, para 66.
[77] Governance Regulation, art 1.

for the content of an INECP. Firstly, it shall include a description on the conducted drafting procedure, describing opportunities for public consultation, stakeholder involvement and regional cooperation with neighboring member states. Onwards, the INECPs of member states set out and describe their national targets and contributions in all five dimensions of the Energy Union. The member states ought also to illustrate the planned measures under each target. Linked to the planned actions, member state shall include assessments of the impacts of the said measures on the objectives, the net-zero target and competition. Moreover, the INECP shall provide a clear depiction on the prevailing situation of every Energy Union dimension together with the measures already in place. Insofar as it is pertinent, a description of non-regulatory and regulatory obstacles for the attainment of the targets shall be included.[78] In connection to the last content requirement, several of the member states e.g., Germany, Italy, Netherlands, and Slovakia emphasized the need to eliminate existing FFS or identified them as barriers to the energy transition.[79] On the contrary, other member states like Sweden and France claim to have no FFS or abstain from shedding any light on the issue.[80]

3.2.2 The National Targets

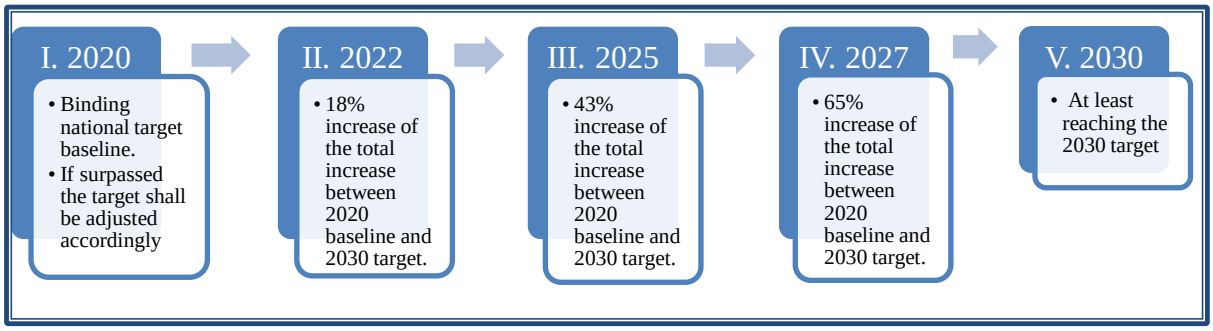
Article 4 sets forth that all member states ought to decide and describe their targets and contributions in respect to the five dimensions of the Energy Union. Directly relevant with the purpose of the thesis, article 4(a)(2) sets out the target-setting procedure in the dimension of renewable energy. Initially, member states shall set a contributing target on renewable energy in line with the target of at least 32% renewable energy in EU final consumption enshrined in RED-II.[81] It shall once again be noted that the current target is nonetheless 42.5% as amended by RED-III.[82]

To understand the implications of the current renewable energy target, it is necessary to look back to the previous goals in the field. The no longer in force Directive 2009/28 prescribed a Union-wide target on renewable energy share of 20% wherein member states decided their own binding national targets in line with the collective goal.[83] Just as the 2030 targets, the 2020

[78] Ibid, art 3.
[79] INECP of Germany, 83 & 84; INECP of Italy, 171, 172 & 288, INECP of Netherlands, 80 & 81; INECP of Slovakia, 19 & 340.
[80] INECP of France, 132; INECP of Sweden, 68 & 148.
[81] Governance Regulation, art 4; RED II, art 3.
[82] RED III, art 3.
[83] Directive 2009/28 on the Promotion of the use of Energy from Renewable Sources [2009] OJ L 140 16, preamble para 13 & art 3.

national renewable energy targets were binding and all member states except France fulfilled their targets in time.[84] This attained milestone currently functions as individualized binding minimum baseline levels that member states never shall fall below of.[85] Many member states overachieved their targets, and in that situation an effigy of the non-regression principle of the Paris Agreement applies. Meaning that under no circumstances shall the share of renewable energy decline below the highest share measured.[86]

In addition to the 2030 goal and with the 2020 goal as the point of departure, the INECP's shall also contain an indicative trajectory regarding the members renewable energy contribution during the decade in question. The indicative trajectory contains three checkpoints between the baseline of 2020 and the goal in 2030, each milestone implies its own target of renewable energy share. If a member state expected or in de facto overachieved its 2020 target, the anticipated or attained level of renewable energy share shall serve as the 2020 baseline. Since the indicative trajectory applies to all member states it indirectly applies to the whole Unions gross share as well, simply referred to as the indicative Union trajectory. As illustrated below, each one of the three milestones seen in II-IV indicates the corresponding percentual increase out of the total increase required within the applicable timeframe of the INECP, 2020-2030. In 2030, the indicative trajectory shall align with the 2030 target.[87]



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[84] Eurostat 'Renewable Energy Statistics' (2023) <https://ec.europa.eu/eurostat/statistics/Renewable_energy_statistics>
[85] RED II, preamble para 10 & art 3(4).
[86] Eurostat, 2023; Governance Regulation, preamble paras 57 & 58.
[87] Governance regulation, art 4(a)(2).
[88] *Figure **Error! Main Document Only.**, Illustration is based on the text of the Governance Regulation.*

To concretize the indicative trajectory further, a hypothetical example will follow. For this reason, the example presumes that the energy consumption of the member state in question is static and unchanged throughout the 10-year period.

- State X has a total energy consumption of 100 TWh.
- State X 2020 baseline share of renewable energy consumption was 20%.
- Hence, in 2020 State X had 20TWh renewable energy consumption.

- By 2030 State X, has in its INECP set a target of 80% renewable energy share.
- Meaning 80TWh of renewable energy consumption
- This implies that the total increase between 2020 and 2030 is 60TWh.

The indicative trajectory then implies that state X shall by 2022, 2025 and 2027 respectively attain:

- **(2022**: 18% of 60TWh = 10,8TWh)
- (**2025:** 43% of 60TWh = 25,8TWh**)**
- **(2027:** 65% of 60TWh = 39TWh)

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The purpose of the indicative trajectory is to facilitate for early action and to minimize potential risk of free riders in the renewable energy transition.[90] Lest some member states would postpone their transition closer to 2030. The intent of requiring early action is regarding GHG emissions an important constituent, because for every year earlier the decoupling of fossil fuels from energy production takes place, implies a year where the energy production do not contribute to the accumulation of GHG in the atmosphere. Despite not being expressed in the Regulation, the indicative trajectory upholds several other values. Such as inter-generational equity, ensuring that no age group bears unproportionally large responsibility for the transition.

Lastly on the national targets, article 5 of the Governance Regulation prescribes several factors that are to be considered when deciding on national contribution. Initially stated are the implications provided by RED-II, which as above explained correspond to the baseline minimum energy share for member states. Other key provisions from RED-II that connects to the target-setting may be, the request and permissibility of support schemes for renewable energy, cooperative mechanisms between member states intended for the 2030 target, streamlining, and shortening of administrative procedures.[91] Other member state or EU level measures on the promotion of renewables are also to be considered, as well as non-regulatory

[89] *Figure **Error! Main Document Only.**, Exemplification of the indicative trajectory pursuant to Governance Regulation. The numbers are hypothetical.*
[90] Governance Regulation, preamble para 59.
[91] RED-II, arts 4, 8, 9, 11, 13 & 15.

factors affecting the expansion of renewable energy production. Continuing, member state ought to pay regard to the energy efficiency target as per directive 2012/27 and pertaining measures thereto.[92] Withal, article 5(2) prescribes that it is the collective duty of the member states to ensure that their aggregated national contributions at the least amounts to 42.5% of renewable energy in gross Union-wide consumption.[93]

3.2.3 Update and Renewal of INECP's

Keeping the climate and energy action of the EU up to date, INECP's must be updated and renewed on a regular basis. By the time this thesis is written the member states are preparing to submit complete versions of their updated INECP's, which shall be done at its latest by the end of June 2024. The updating and renewal of INECP functions on a 10-year circular schedule, the first part of the cycle obliges member states to submit a draft INECP, thereafter a complete version. On the fifth year after the submission of the complete INECP, member states shall adduce a draft update and the following year present a finished update. A new INECP implies a novel target-setting procedure and conformity with the content requirements as per article 3(2). When updating INECP's, the targets shall similarly be modified in line with the quantified collective targets. In all the required subsequent modifications of the national targets the principle of non-regression applies, and a following target shall be further ambitious than the previous one. Notwithstanding the described mandatory updates, member states retain their right to at any alter their national action and policy covered by the INECP.[94]

[92] Directive 2012/17 on energy eficiency [2012] OJ L 315/1, preamble para 64. *Like the renewable energy target and the GHG emission reduction target, directive 2012/17 establishes a target for energy efficiency, furtherly strengthened by the energy efficiency first principle enshrined in Governance Regulation.*
[93] Governance regulation, art 5.
[94] Governance regulation, arts 3, 9, 14.

[95]

The Commission is highly active in each of the stages and may give its recommendations in accordance with article 31 and 34. Recommendations issued by the Commission are made publicly available. When submitting complete INECP's, draft updates and complete updates the Commission examines if the national targets are collectively sufficient for the purpose of the Union-wide targets and if the plans contain the necessary constituents. When submitting the draft for a renewed INECP's, as due to article 9, the non-exhaustive list on what the recommendations may address includes the level of ambition of the national targets, national actions relating to other Union or member state measures, consistency, and relation to existing measures. The Commission may additionally inquire for extra measures, provided such are required by the content requirements of INECP's. Besides the substantive requirements on updated and renewed INECP's, member states shall guarantee adequate and effective opportunities for public participation in the process. Moreover, states shall cooperate with each other and utilize existing cooperative formations when preparing their plans.[96]

3.3 Reporting, Assessing & Enforcing

Reiterating that this thesis intends to investigate the legal feasibility for the Commission to utilize its powers in state aid law as a response to insufficient progress. Due to this, it is necessary to investigate how insufficient progress is identified and established. Onwards, this subchapter will explore the provisions on the reporting of member states, the assessment of the Commission and its responses thereto.

3.3.1 Biennial Progress Report: Integrated Reporting on Renewable Energy

Through the procedural functioning of the Governance Regulation, the Commission observes the ongoing work and implementation of the INECP's in the member states through a biennial

[95] *Figure **Error! Main Document Only.**, Figure is based on the text of the Governance Regulation.*
[96] Governance Regulation, arts 9(2), 10, 12 & 14(3-6).

reporting system. The submissions made in accordance with article 17 of the Regulation are referred to as integrated national energy and climate progress reports (INECPR). Article 17 ordered the member states to submit to the Commission their first progress reports in March 2023 and shall onwards be delivered regularly every two years thenceforth. INECPR's shall cover the five dimensions of the Energy Union and specialized content requirements are prescribed for each dimension throughout articles 18-25. Regarding the reporting of renewable energy in the INECPR, states must inter alia present information on its indicative trajectory for the overall share of renewable energy consumption, shares of renewable energy in the sectors of electricity, transport, heating, and cooling and the indicative trajectory for each different renewable energy technology.[97]

3.3.2 Assessment of Progress

In line with the two-year cyclical submissions of INECPR's, the Commission shall examine the progress of the EU in attaining its targets. The finalized assessment is presented in the State of the Energy Union report in accordance with article 35. The Commissions review is primarily based but not limited to the INECPR's, additionally it may base its assessment on other information reported under the Regulation and of other available European statistical data. The assessment is conducted both as an all-encompassing review of the progress towards the Unions collective targets and on individual member state level. The Union-wide scrutiny is principally conducted to identify and correct possible gaps in the attainment of the 2030 target for renewable energy and energy efficiency. Gaps are identified by evaluating the alignment of the Unions aggregate gross consumption with the indicative Union trajectory.[98]

Before moving on to the assessment of individual member state progress, it shall be known that while the assessment of individual member state progress is part of the biennial monitoring, progress in meeting national objectives as set out in respective INECP is evaluated annually in accordance with article 29(5). The same article also prescribes an annual evaluation on member state compliance with article 4 of the UNFCCC, that inter alia obliges its parties to take climate change in consideration in their economic policy wherein practically possible.[99]

[97] Governance Regulation, art 17
[98] Governance Regulation, arts 29 & 35.
[99] UNFCCC, art 4(1)(f).

In the biennial assessment, the Commission shall examine the degree of implementation of the presented action and policies. Naturally, the biennial assessment also includes an assessment on the progress of national targets, wherein the national indicative trajectories are established.

3.3.3 Response to Insufficient Progress

Where the Commission, based upon the assessment of progress explained above identifies and concludes that a member state is making inadequate progress it shall issue recommendations to the relevant member state. Moreover, if the assessment procedure demonstrates that national measures in the dimension of renewable energy are insufficient: "*The Commission shall as appropriate, propose measures and exercise its powers at Union level, in addition to those recommendations in order to ensure, in particular the achievement of the Union's 2030 target for renewable energy".*[100] Reiterating that the assessment covers the general progress towards meeting national targets, states indicative trajectory and the implementation of their presented measures, it is only when the existence of insufficient national measures have established that grants the Commission the mandate to exercise Union level powers as response. The wording of the quoted article indicates clearly that this exercise is a separate action from the recommendations. One shall also acknowledge that the article presents a stronger emphasis on the 2030 target for renewable energy than it does on other dimensions and timeframes.

Wherein the Commissions responds to insufficient progress by proposing measures, it implies both legal and non-legal measures such. The former, may constitute that the Commission may propose additional regulatory action which strengthens the role of already existing legislation. Non-legal responses in line with this part of the article refers to the adoption of Commission communications.[101]

Continuing to the topic of recommendations issued under the Governance Regulation, it is evident that they play a significant role in several parts of its functioning. The Commission may issue them in the drafting, renewal, implementation, and assessment of the INECPs of the member states. In accordance with the TFEU, recommendations are secondary legal acts and shall have no binding force. In addition to the ordinary implications of recommendations, the Governance Regulation expands its significance to some degree. Article 34 states that the addressed member state shall take due account of the recommendation in a spirit of EU

[100] Governance Regulation, article 32(2).
[101] Sabine Schlacke and Michéle Knodt, 2019, 331.

solidarity. Moreover, a member state who have received a recommendation, shall in its subsequent INECPR explain how the recommendations has been given due consideration. In the case where a recommendation partly or in its entirety have been neglected, the relevant member states shall in its subsequent INECPR provide its reasons for non-compliance with the recommendation.[102]

While recommendations are de lege non-binding the additional procedural requirements to provide evidence why a recommendation has been disregarded strengthens their standing. It aggravates the possibility for member states to ignore recommendations where no legitimate reason to do so exists. However, the extent of compliance with recommendations from the Commission this far into the reign of the Governance Regulation in the context of INECP drafts, may be regarded as unsatisfactory. In October 2020 the Commission issued country specific recommendations on the member states INECP's. 17 of the member states partially addressed its recommendations and 10 largely addressed them, including Lithuania who fully considered their received recommendations. The ongoing COVID-19 pandemic was indicated as a major obstacle for member states to fully consider the recommendations.[103]

3.3.4 Exercise of Power at Union Level as per the Governance Regulation

As clarified, when insufficient progress of a member state towards its renewable energy target, the Commission can in addition to proposing measures and giving recommendations exercise its powers at Union level. The provision provides a mean of enforcement of the Commission whose implications is unclear. It can possibly be interpreted in ways that open for a multitude of powers to be exercised or contrarily be nothing more than empty words. The Commission possesses a strong position in the Union, and its core powers includes the duty shared with the ECJ to enforce EU law, to ensure proper application of EU law, and is besides a few exceptions the only institution empowered to adopt legislative proposals.[104] Moreover, it oversees and manages the EU budget together with the Parliament and the Council, and it represents and negotiates on behalf of the Union in international forums.

[102] Governance Regulation, art 34; TFEU, art 288.
[103] Georgios Maris and Floros Flouros 'The Green Deal, national energy, and climate plans in Europe: member states' compliance and strategies' (2021) 11 Administrative sciences 75, 1, 8 & 14.
[104] TEU, art 17; Robert Schütze *European Union Law* (2nd edn, Cambridge university press 2018), 198.

As the forthcoming chapter will illustrate further, the Commission enjoys significant powers in state aid law. Its strong role will be discernible from the TFEU and the clarifying secondary law.[105] It has been stated by several authors and in case law that the control of state aid is one of the most important powers of the Commission, as its role therein is vital for the functioning of the internal market.[106]

The meaning of the discussed exercise of powers is to be understood in broad terms, implying that it de lege allows for concrete action rather than being devoid of implications.[107] In the first hearing on the report on the proposal of the Governance Regulation it is put forth that the view of the Commission is that relying solely on recommendations is not sufficient as they are per definition not binding and can without meaningful consequences be disobeyed.[108] Moreover, it was also considered whether the Commission should be empowered to impose specific requirements to all member states as response when a risk of not attaining the collective target had been established. The legal status of such requirements remains unclear but together with the view that recommendations are not sufficiently binding, one may assume they are to some extent more stringent.[109]

Moreover, the Governance Regulation confers the power to the Commission to adopt delegated acts, as enabled pursuant to article 290 TFEU. Stated in article 43, with a heading referring to an exercise of the Commission. Wherein the Commission decides to adopt the delegated acts as mandated to it, they shall amend the general framework of INECP's. Article 43 lists in relation to which articles the Commission can adopt delegated acts, including 3(5), 15(5), 26(6), 37(7) and 40(4).[110]

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[105] Andrea Biondi and Martin Farley in Erika Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011), 279.
[106] Case C-301/87 *France v Commission* [1990] ECR-I 00307, opinion of AG Jacobs, para 39; Conor Quigley *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015), 493 & 577; Herwig C.H Hofmann and Claire Micheau *State Aid Law of the European Union* (Oxford University Press 2016), 224; Vincent Verouden and Philipp Werner *EU state aid control* (Kluwer Law International 2017), 10 & 11; Giorgio Monti and Marco Botta 'Introduction' in Pier Luigi Parcu (ed) *EU State aid law: emerging trends at national and EU level* (Edward Elgar Publishing 2020), 1-5.
[107] Sabine Schlacke and Michéle Knodt, 2019, 331.
[108] Parliament 'Report on the proposal for a regulation of the European Parliament and the European Council on the governance of the energy Union' COM (2016) A8-0402/2017, 162.
[109] Ibid.
[110] Governance Regulation, preamble para 66 & arts 3(5), 15(5), 26(6), 37(7), 40(4) & 43.

Considering the clues on the implications of exercise of power at Union level together with the fact that the Commission can propose for additional legislation as response, it strengthens the argument that the Commission holds a rather forceful mandate in its response.

3.3.1 Provisions on Fossil Fuel Subsidies in the Governance Regulation

Despite the adversary impacts fossil fuel subsiding has on the deployment of renewable energy, its appearances in the Regulation are scarce. Paragraph 20 of the preamble upholds that for the purpose of fulfilling the commitments ascribed to in the Paris Agreement, member states shall report on their efforts conducted for the elimination of FFS. Reporting on FFS elimination efforts occur in the INECPR's in the fifth dimension of the Energy Union on competitiveness. Therein, member states shall present the national objectives on the phaseout of FFS.[111] While the Paris Agreement is in direct sense tacit on FFS, article 2(c) yet again calls for financial flows to become aligned with low GHG emissions. Another possible indirect connection between the phaseout of FFS and Paris Agreement commitments, is evident from the IPCC which states that it would be an environmentally and economically effective action to reduce emissions.[112] Additionally, the framework INECP in annex 1 of the Governance Regulation, requests states to submit information on existing energy subsidies with a focus on those to fossil fuel consumption and production.[113]

[111] Governance Regulation, art 25(d).
[112] IPCC 'Climate Change 2022 - Mitigation of Climate Change Summary for Policymakers' (IPCC 2022).
[113] Governance Regulation – Annex 1, art 4(6)(iv).

4. State Aid Law

Having concluded that the Commission has the possibility to exercise its powers at Union level. And with case 490/10, upholding that the Governance Regulation rightfully can affect the area of the internal market. Together with the understanding on how countries must identify their own FFS and how the reporting and monitoring under the Governance Regulation both identify and provide tools on how the Commission shall act in response to insufficient progress. This chapter will investigate how the EU state aid law functions and what the Commission shall do to address illegal state aid.

The basic concepts of regulating subsidies, which in the EU goes by the name state aid has only briefly been mentioned and placed in the context of this thesis. This chapter will initiate with the concept of state aid, why it is a utilized practice, why it is legislated and investigate the powers of the Commission therein.

4.1 What is State Aid Law and Why do States Adopt Aid Measures

Subsidies and state aid are beyond their legal definitions, the same concept. The principal difference one should acknowledge is that in the EU legal sphere the notion of public expenditure for the consumption or production of certain goods or services is called state aid. Whereas subsides may one hand be a more common expression in everyday speech, it is additionally the termination given by the World Trade Organization (WTO) in its own regulatory control of the harmful economic conduct.[114] Reiterating the EU state aid definition of article 107 of the TFEU it states: "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, in so far as it effects trade between member states, be incompatible with the internal market".*[115] It is per definition a conduct that is regarded as harmful to the internal market, and while it is to a low extent controlled in domestic legal systems, the EU contrarily has a distinguishably strong control of state aid.[116]

[114] General Agreement on Tariff and Trade (adopted 30 October 1947, entered into force 1 January 1948) 64 UNTS 187, art XVI; Agreement on Subsidies and Countervailing Measures (ASCM) (adopted 15 April 1994, entered into force 1 January 1995) Uruguay Round of Multilateral Trade Negotiations.
[115] TFEU, art 107.
[116] Raj Chari, Hofmann and Micheau 'Rationales for State Aid Rules' in Hofmann and Micheau *State Aid Law of the European Union* (Oxford University Press 2016), 1.

4.1.1 Reasons for Granting State Aid

State aid is given with the intention of achieving a policy objective, it is an option of governmental action beyond traditional frames of command and control. The reasons why state aid is given are several and are primarily given for economic and political reasons but given the consistent expansion of EU monetary and economic policy it is additionally one of the few tools left at the disposal of the member states. While the legal definition covers the unlawful types of state aid, it is not plainly a harmful conduct and may in certain scenarios be regarded as necessary for achieving goals of public interest.

To mention a few of the multitude of economic motivations to grant state aid, it includes the protection of job opportunities, funding research or steering individual behavior towards certain products or services.[117] Governments also issue subsidies for the simple reason to increase the likelihood of being re-elected, e.g., through support that lowers costs for food or fuel.[118] Lastly, member states may be motivated to grant for state aid within sectors wherein the supremacy and direct effect of EU law prevails over national law, which is the case for more and more areas.[119]

4.1.2 Exceptions to the General Presumption of Unlawfulness

Considering the weighing of interests between the usefulness of state aid and the protection of the internal market, the EU has deemed certain categories of state aid as compatible with the internal market. Article 107(2) and (3) TFEU lists aids whose objectives justify the means of utilizing state aid. The former, article 107(2) TFEU lists aids where the basic assumption is that they are compatible, encompassing aid of social character to individual consumers, to recompense damaged caused by natural disasters or comparable accidents and aid granted to certain areas of Germany suffering from economic impacts of the country's former division. Moreover, article 107(3) TFEU lists aids who may be considered compatible thus not enjoying the same guarantees as the former article. 107(3) TFEU includes aid that promotes economic development in areas characterized by low living conditions and widespread underemployment,

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[117] Organization for Economic Co-Operation and Development (OECD) 'Competition Policy in Subsidies and State Aid' (Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy 2001), 7.
[118] Mathias Dewatripont and Paul Seabright 'Wasteful Public Spending and State Aid Control' (2006) Journal for the European Economic Association 513, 514.
[119] Wolf Sauter *State and Market in European Union Law: The Public and Private Spheres of the Internal Market Before the EU Courts* (Cambridge University Press 2009), 193.

supports the realization of important projects of European interest, remedies serious economic disturbance in a member state, intends to strengthen certain sectors or regions or fosters cultural and hereditary conservation.[120]

Continuing the topic of excepted state aids, regulation 2015/1588 empowers the Commission to except more aid categories from the general prohibition through block exemption regulations.[121] In the present context of the renewable energy target, aid granted for the purposes of promoting renewable energies has been declared compatible through regulation 651/2014.[122]

4.2 Why Regulate State Aid?

Having clarified the reasons why governments utilize state aid, it is now time to investigate why it is controlled. Fundamentally, controlling state aid is a mean to protect member states from negative effects originating from the state aids granted by other member states. To draw a simple illustration, the granting of state aid in one state may in that state increase production of a certain product but on the other side weaken and outcompete producers of the same product in other jurisdictions. In other words, state aid potentially unlevel the playing field in the internal market which will imply negative effects in the jurisdiction whose market actors are affected.[123]

4.2.1 Considerations on Economic Reasoning in State Aid Law

State aid law and competition law in general contains strong features of economic reasoning. The following sections will encounter notions sprung from this economist reasoning, primarily the idea of the normal functioning of the market or perfect competition. As when the above sections investigated and explained the concept of subsidies, it is done so in a provided scenario wherein they occur in quixotic market circumstances.[124] One shall acknowledge that the normal functioning of the market and equal competition does not exist but serves a purpose in

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[120] TFEU, art 107.
[121] Regulation 2015/1588 on the application of articles 107 and 108 of the TFEU to certain categories of horizontal state aid [2015] OJ L 248/1, art 1.
[122] Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty [2014] OJ L 187/1, section 7.
[123] Philip Lowe 'The Design of Competition Policy Institutions for the Twenty-First Century: The Experience of the European Commission and the Directorate-General for Competition' in Xavier Vires *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009), 33 & 34.
[124] Gustavo E. Luengo Hernández de Madrid *Regulation of subsidies and state aids in WTO and EC law: conflicts in international trade law* (Kluwer Law International 2007), 13 & 14.

understanding subsidies. These concepts are unattainable in a real world where markets are affected by different tax regimes, historical developments, and political decisions.[125]

4.2.2 Establishing and Maintaining the Internal Market

The wording of article 107 TFEU indicates that the purpose of the prohibiting state aid, is to protect the competition in markets from disruptive economic national conduct. The protection of competition shall be understood in the context of the internal market as upheld by article 26 TFEU. The internal market implies an area wherein internal barriers to trade are eliminated. Continuing, in the realization of the internal market the four freedoms shall be guaranteed, namely free movement of goods, persons, services and capital.[126] Placing article 107 TFEU in the context of the internal market, it may in its essence be understood as that distorted competition implies a distortion of internal market. In case Sovreprezzo, the ECJ has upheld that the primary purpose of state aid control is to achieve a functioning internal market.[127] The case was adjudged in accordance with article 92 and 95 of the Treaty of Rome, and the ECJ therein established that the application of the rules on state aid shall never be applied in a manner that that results to a contradiction with the free movement of goods.[128] Article 107 TFEU is broadly applicable and in its application the practical consequences of state aid is the decisive factor on determining compatibility with the internal market. Considering the establishment of the internal market wherein internal barriers of the four movements ideally are removed, aid granted by states to certain economic activities that distort that market will practically directly counteract the removal of said barriers.

4.2.3 Fair Competition

Since article 107 is prescribed in TFEU's chapter on competition, perhaps it is the most evident element explaining the purpose of state aid control. The fundamental idea of competition policy is that a competitive market-based economy is an effective manner to improve the living conditions of citizens. This idea presumes that the markets are functioning in a desirable manner, embodied by a leveled playing field for undertakings competing on the basis of price, quality, and innovation.[129] As concluded in the previous section, a distortion on competition

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[125] Herwig C.H. Hofmann and Claire Micheau, 2016, 7.
[126] TFEU, art 26.
[127] Case C-73/79 *Commission v Italy* [1980] ECR-I 01533, paras 3, 8, 10 & 11.
[128] Treaty of Rome, arts 92 & 95.
[129] Commission 'Less and Better Target State Aid: A Roadmap for State Aid Reform 2005-2009' (Communication) COM (2005) 107 Final, 3-5; Parliament 'Fact Sheet on Competition Policy' (October 2023).

implies a distortion of the internal market. Hence, competition law is a significantly important constituent in the establishment of the internal market. Reiterating the discussion in the first part of the current subchapter, a way of understanding state aid law is as a legal manner to protect other jurisdictions from negative externalities brought forth as consequence of the positive effects enjoyed in the state that issue aid. It is discernible that this rationale of state aid contains a clear element of non-discrimination. Since the granting of state aid strengthens the position of the receiving undertakings, it creates less favorable conditions for other undertakings competing in the same market.[130]

4.2.4 Adequate Public Spending

During the adoption of the Treaty of Rome, the original purpose of state aid control was somewhat different than the promotion and protection of healthy competition and the internal market, namely that state aid law also served a supervising purpose in regard to public spending. The rationale of adopting a scrutiny of state aid as a mean of financial supervision derives from the risk of profligatory subsidy races.[131] Subsidy racing is a financially wasteful occurrence where states respond to one another's aid by granting aid within one's own jurisdiction, as a means of avoiding the negative externalities resulting from the foreign subsidies.[132] This situation generally tends to occur wherein subsidies are issued as a mean to incentivize private investments.[133] Following the economic crisis in 2008, the Commission launched the Europe 2020 strategy to overcome the deep recession, with a focus on sustainable growth.[134] In light of this the Commission additionally launched a modernization of its state aid control, purposed to ensure a more effective control of state aid to improve the allocation of public financial resources.[135] It shall be noted that while the determination of wasteful public spending initially was a core motive for the drafting of state aid control, it has transformed to an additional

[130] Case C-120/78 *Cassis de Dijon* [1979] EU:C:1970:42.
[131] Philip Werner 'Part IX article 108 TFEU' in Franz Jürgen Säcker and Frank Montag (ed) *European State Aid Law* (Verlag C.H. Back oHG 2016), 1511.
[132] Lorenzo Coppi 'The Role of Economics in State Aid Analysis and the Balancing Test' in Erika Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011), 75.
[133] Hofmann and Micheau, 2016, 10.
[134] Commission 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM (2010) 2020 Final.
[135] Commission 'EU State Aid Modernisation' (Communication) COM (2012) 209 Final, 3.

function besides the current core tenets of healthy competition and establishment and maintenance of the internal market.[136]

4.3 Dissection of Article 107 TFEU

To understand the role of the Commission in the area of state aid law and their powers therein, it is necessary to investigate the definition of state aid in accordance with article 107 TFEU. Notwithstanding the purpose of the thesis to investigate the use of state aid law as a response to insufficient progress, state aid law is a self-standing area of Union law. To reach conclusions on which state aids and implicitly FFS may be subjected to the exercise of power by the Commission this subchapter will investigate how article 107 TFEU is applied. The following investigation on the constituent parts of article 107 is a necessary precondition for the understanding of the conduct of the Commission when it decides on the legality of aid measures. The thesis will in the next chapter look at the levels of FFS in the Union that may be de lege unlawful, hence examining the constituents of article provides for the understanding why said FFS may be impeached or not.

Article 107 TFEU comprises of four cumulative requisites. Aid granted by a member state or through state resources (state origin) in any form whatsoever which distorts or threatens to distort competition (hindrance to intra-union trade & distorting competition) by favoring (competitive advantage) certain undertakings or the production of certain goods (selectivity).[137] The following sections will take a similar approach, looking at attribution to the state, definition of an undertaking, selectivity, competitive advantage, and distortion on competition.

4.3.1 State Origin: "Aid Granted by a Member State or Through State Resources"

Establishing the criteria of state origin contains two assessments, whether the aid comprise of public resources and attributing the aid to the state. Initiating with the former assessment, to establish if the aid is granted through states resources. There are several forms of public support that may account as state aid, including but not limited to capital investments, direct transactions, loans and guarantees. The ECJ has in connection to this declared that a factual transfer of the aid does not necessarily need to take place, but merely the promise thereof can

[136] Christian Buelens, Gaëlle Garnier and Roderick Meiklejohn 'The Economic Analysis of State Aid: Some Open Questions' (Commission, Directorate-General for Economic and Financial Affairs 2007) Economic Papers no 286, 8.
[137] Conor Quigley, 2015, 12-35; Hofmann and Micheau, 65-150.

suffice to establish that the aid originates from state resources.[138] Finding that state aid consist of state resources implies that the advantage shall directly or indirectly derive from state resources or place additional burdens on it. In case 399/10 the ECJ found that the granting of a loan constituted such an additional burden.[139] Continuing on the establishment of aid involving state resources, the resource in question must be subject to the control of the state and any emanations of it, e.g., regions, departments, or state-owned entities.[140] In the landmark case in the focal point between state aid law and renewable energy, case *PreussenElektra* treated a national law that obliged electricity suppliers to acquire a certain share of its electricity from renewable energy producers. In *PreussenElektra* the ECJ did not consider the rule as state aid, as the imposed obligation in no stage involved resources originating from the public sector.[141]

Onwards to the second point, if the aid is imputable to the state. The general approach to this question is to clarify if the aid derives from a legal measure, if that is the case, the aid will virtually always be considered attributable to the state. Reiterating the judgement in *PreussenElektra*, while the measure did not involve state resources it was deemed imputable to the state as the measure in question was a national law.[142] On the contrary, in situations where the aid has been granted through or by intermediaries of public undertakings the question of attributability must be considered in line with several factors. For instance, ECJ case law has stipulated that the mere fact that a measure was adopted by an undertaking acting under the auspices of the state, is not a sufficient ground to establish attributability. In doing so, the Commission must consider inter alia the legal status of the undertaking, integration in the public administration and to what extent the public authorities were involved in adopting the measure.[143]

4.3.2 Addressees of Aid: "Undertakings"

Pursuant to article 107 TFEU, state aid is issued to certain undertakings or to the production of certain goods. This sentence mainly underlines the criterium of selectivity, however to establish selectivity it is first necessary to examine the definition of undertakings in the context of EU

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[138] Case C-404/97 *Commission v Portugal* [2000] ECR-I 4922, para 45
[139] Case C-399/10 *Bouyges SA and Bouyges Telecom SA v Commission and others* [2013] EU:C:2013:175, paras 99, 109 & 128.
[140] Case C-248/84 *Germany v Commission* [1987] ECR-I 04013, para 17; Case 103/00 Diputación de Álava v Commission [2002] ECR-I 01385, para 57.
[141] Case C-379/98 *PreussenElektra v Schhleswag* AG [2001] ECR-I 02099, paras 57-60.
[142] Ibid, paras 59 & 61.
[143] Case C-482/99 *France v Commission* [2002] ECR-I 4427, paras 52, 56 & 57.

competition law. The definition of undertaking encompasses all entities conducting an economic activity, notwithstanding its legal status in any member state jurisdiction.[144] Following this trail, an economic activity is the conduct wherein an autonomous natural person (in the role of self-employer) or legal person offers goods or services in a distinguished market and receives renumeration in return.[145] In addition to this, the activity carried out by the person shall or conceivably be conducted in competition with other actors.[146]

4.3.3 Selectivity: "Certain Undertakings or the Production of Certain Products

Determining the existence of selectivity in the assessment of a national measure, is a fundamental corollary following the logic of why to control state aid. Recalling the fact that state aid is controlled amongst other reasons, for ensuring that the undertakings engaging in economic activities compete against each other on a level playing field. Logically, the existence of selectivity in the measure of a member state, to only provide support to *certain undertakings or the production of certain goods*, is essentially what brings forth the inequitable market circumstances.[147] Recent development in EU state aid law, tends to distinguish the criteria of selectivity as either material or regional. The former, encompasses the rather clear-cut cases wherein the legal criteria for undertakings to obtain the aid are selective, for instance being only available to particular sectors or undertakings of certain size or legal form. Included within the concept of material selectivity, is also cases wherein the criterium for achieving aid is theoretically fulfillable to all undertakings but is limited to certain undertakings due to the nature of the pertaining administrative procedure.[148] Moving on, regional selectivity is established when measures are only available to undertakings in specific geographical areas or regions.[149]

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[144] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1979] ECR-I 01979, para 21; Case C-159/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR-I 00637, para 5.
[145] Case C-309/99 *Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR-I 01577, para 46.
[146] C-41/90 *Höfner*, para 22.
[147] Andreas Bartosch 'The Concept of Selectivity?' in Erika Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011), 187-190.
[148] Eugene Stuart and Iana Roginska-Green *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (Kluwer Law International 2018), ch 2.6.3; Case C-760/15 *Kingdom of Netherlands and others v Commission* [2019] EU:C:2019:669, paras 381 & 388; Case C-885/19 P *Fiat Chrysler Finance Europe and Ireland v Commission* [2022] EU:C:2022:859, paras 17 & 18.
[149] Case C-88/03 *Portugal v Commission* [2006] ECR-I 07115, paras 61 & 79.

4.3.4 Advantage: "Favoring"

In the same sense that the notion of selectivity lies within the core of why state aid constitutes to distortion on competition, so does the criterium of advantage. The point of departure when establishing advantage is whether the benefit enjoyed by the undertaking would have been obtained despite of Member State intervention. Implying that for a measure to deviate from being qualified as state aid, the measure cannot be of the nature that it would not be acquired under normal market conditions.[150] In the assessment whether a member state measure induces an advantage, the effect of the measure is the determining factor, regardless of its intention or reasons for adoption.[151]

Considering the wording of article 107 TFEU, it applies to measures that constitute an advantage in *"any form whatsoever."*[152] Besides obvious positive benefits such as cash transactions, loans, or investments the ECJ has adjudged that the notion of advantage also includes actions that relieves undertakings from expenditures normally covered by themselves. For instance, this form of mitigating intervention of the state encompasses tax reliefs or the suppliance of goods or services.[153]

4.3.5 Disruption: "Distorts or Threatens Competition and Affect Intra-Union Trade"

The conclusive requisite left when assessing whether a measure constitutes as state aid is the measure's disruptive or potentially disruptive interference with competition and on trade between member states. While impact on competition and intra-union trade are two separate conditions, they are tightly interlinked and the practice of the ECJ is generally to decide on the topics jointly.[154] The inseparability of the two notions was illustrated in the discussion on how distortion on competition counteracts the four freedoms and hence the internal market.[155]

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[150] Case C-39/94 *Syndicat Français de l'Express International and others v La Poste and Others* [1996] ECR-I 03547, paras 60 & 61; Case C-342/96 *Spain v Commission* [1999] ECR-I 02459, para 41.
[151] Case C-173/73 *Italy v Commission* [1974] ECR-I 00709, para 13; Case C-241/94 *France v Commission* [1996] ECR-I 04551, paras 19 & 20.
[152] TFEU, art 107.
[153] Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2002] ECR I-13769, paras 28 & 29.
[154] Case C-298/96 *Mauro Alzetto and others v Commission* [2000] ECR-II 02319, para 81; Commission 'Commission Notice on the Notion of State Aid as referred to in Article 107(1) of the TFEU' (July 2016) C/2016/2946, 40.
[155] *See* sections 4.2.1 & 4.2.2.

Continuing, the establishment whether a measure distort competition or trade within the internal market has been significantly streamlined in the assessment of state aid. In fact, no proper assessment of effect on trade takes place at all.[156] The rationale for this resides in the low threshold prescribed in article 107 TFEU, distinguishable by reiterating that the measure merely needs to threaten competition to account for as state aid.[157] In other words, it is enough if it exists sufficient grounds proving that the inquired member state measure potentially could impact competition. Demonstratable, the Commission and the ECJ has interpreted article 107 TFEU with the perspective that an advantage to an undertaking which constitutes adversary effects on other undertakings as a rule infringes on healthy competition and the four freedoms.[158]

Despite the rather low threshold to determine the market-related disruptiveness, aids falling below certain monetary amounts escape from being defined as incompatible state aid. Regulation 2023/2381 prescribes that state aid that constitute a sum of less than 300 000€ over a three-year period for one undertaking, are to be regarded as compatible with the internal market.[159]

4.4 Functioning of State Aid Control

Beyond the definition of state aid and the general rule of incompatibility with the internal market enshrined in article 107 TFEU, the following two articles 108 and 109 TFEU delineate how state aid is controlled. Firstly, article 108(1) TFEU prescribes that in cooperation with the member states, it is the duty of the Commission to incessantly monitor all national aid measures. Secondly, 108(2) TFEU upholds that that the Commission is empowered to declare the legality or illegality of domestic aid. Thirdly, 108(3) TFEU stipulates that in the event a member state is planning to adopt new aid, it is obligated to inform the Commission. And lastly, article 109 TFEU mandates the EU institutions to adopt legislation that furtherly specifies the state aid control procedures. The operationalization of state aid control is specified in regulation

[156] Commission 'Commission Notice on the Notion of State Aid as referred to in Article 107(1) of the TFEU' (July 2016) C/2016/2946, 42.
[157] TFEU, art 107
[158] Case C-730/79 *Philip Morris Holland BV v Commission* [1980] ECR-I 02671, para 11.
[159] Regulation 2023/2381 on the application of Articles 107 and 108 of the TFEU to de minimis aid [2023] OJ L 2023/2381, para 3

2015/1589 as adopted on basis of article 109 TFEU, which will be investigated in the following sections.[160]

The Commission also known as the guardian of the treaties[161] while being monitored by the ECJ possesses an indefectible role in ensuring the proper implementation and controlling of state aid law. It is the ultimate authority in deciding on whether measures constitute aid and if said measures are compatible with the internal market.[162]

4.4.1 Notified Aid

The state aid control procedure differs between aid that has not been notified and aid that in accordance with article 108(3) have been submitted to the Commission in due time prior to eventual granting. Starting with procedural steps of notified aid, post notification the Commission initiates a preliminary examination pursuant to article 4 of regulation 2015/1589. The preliminary investigation is terminated by a decision of the Commission and has three possible outcomes.[163] Presumed that the member state has included necessary information in the notification, the Commission can either conclude that (1) the measure is not aid, (2) that the measure is aid and is regarded compatible with internal market or (3) the measure constitutes aid and combability must be further examined. In the two former options, the preliminary investigation is closed pursuant to a Commission decision and allows the member state to execute the planned measure.[164]

Moving on to the third possible outcome of the preliminary investigation, namely that the Commission has identified doubts on the planned measure's compatibility with the internal market. Thereafter, the Commission is obliged initiate the formal investigation procedure in accordance with articles 108(2) TFEU and 6 regulation 2015/1589. [165] In which the Commission conduct an in-depth analysis on the pertinent legal and factual circumstances regarding the combability of the aid. Additionally, the formal investigation ensures that the concerns and rights of involved parties are heard and protected. When the Commission

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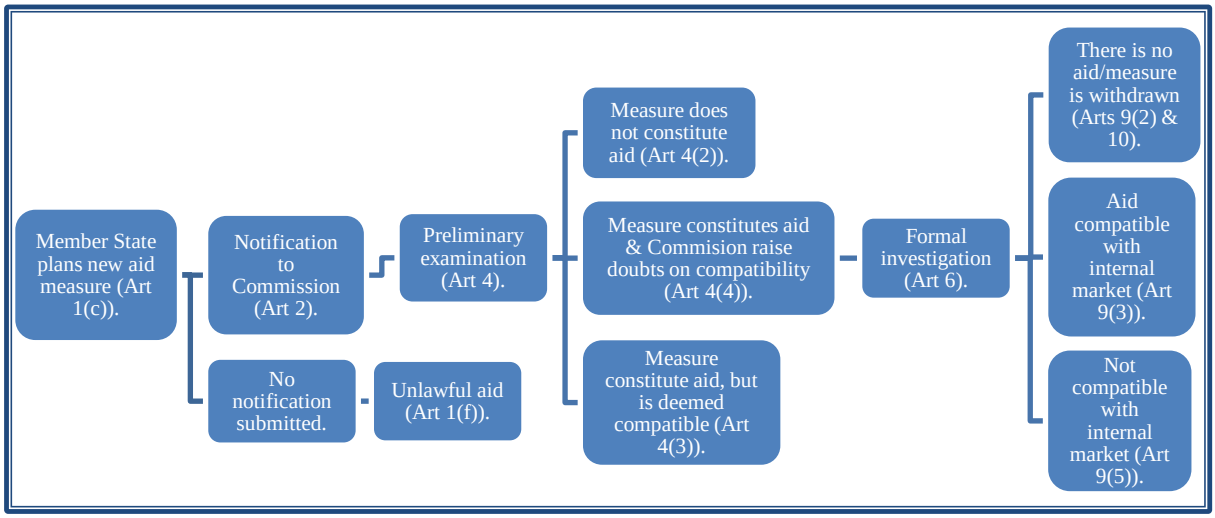
[160] Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the TFEU [2015] OJ L 248/9, arts 1(c), 2.
[161] TEU, art 17.
[162] Case C-354/90 *Federation Nationale du Commerce Extérieur des Produits Alimentaires, Syndicat National des Négociants et Transformateurs de Saumon v France* [1991] ECR-I 5523, para 14; Hofmann & Micheau, 224.
[163] Regulation 2015/1589, art 4; *A fourth possible scenario occurs when the notification fails to present the necessary information, when so the Commission can request for supplementary data as per article 5.
[164] Ibid, art 4.
[165] Case C-73/98 *Société chimique Prayon-Rupel SA v Commission* [2001] ECR-I 00867, paras 42-47.

establishes that the measure in question is compatible or not it issues a decision, declaring its approval or orders that the measure is not implemented.



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4.4.2 Identifying Unlawful Aid and Monitoring

As mentioned, and depicted above, aid measures that have not been notified are unlawful. The remaining question is then how to detect, and reprimand such aids, as the Commission is obliged to.[167] In light of the Commissions duty to monitor state aids in the Union, member states are obliged to annually submit a report on all their aid measure to it. The gathered information from member states reports, is compiled, and openly published by the name of the state aid scoreboard.[168] The annual reporting of member states primarily serves purposes of transparency and enabling for public scrutiny. This reporting obligation of member state does not correspond or suffice to the notification requirements on new aid measures pursuant to article 2 of regulation 2015/1589.[169]

The State Aid Scoreboard facilitates for transparency and insight on the collective state aid behaviour of the member state and the conduct of the Commission in its enforcing and monitoring. According to the contents of the latest state aid scoreboard report, there is no

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[166] *Figure* ***Error! Main Document Only.*** *– Note. Figure presents the structure of the state aid procedure for notified aid, based on Regulation 2015/1589.*
[167] TFEU, art 108(1 & 2); Regulation 2015/1589, preamble paras 9,13 & 22-24.
[168] Regulation 794/2004 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L 140/1, Art 6; Regulation 2015/1589, art 26; *See also* Commission 'Scoreboard State Aid Data Dissemination Tool' <https://competition-policy.ec.europa.eu/state-aid/scoreboard_en> .
[169] Regulation 794/2004, art 7.

separate category for FFS.[170] It has been suggested that existing FFS instead is categorized in the bracket for energy and environmental protection.[171]

For the purpose of detecting unlawful aids, the Commission enjoys the right to review information of any source and additionally accepts complaints by interested parties.[172] In the instance the Commission experience premonitions of potential existence of unlawful aid, it enjoys the mandate to execute ex officio investigations and based on its findings initiate the formal examination procedure. In the scenario wherein the Commission receives a complaint by an interested party it is obliged to examine the measure in a timely manner.[173] An examination of potential lawful aid is concluded by either a negative decision or a positive decision, in other words announcing its unlawfulness or legality.

On another instance, where the Commission based on any information available to it has sufficient reasons to suspect that a certain sector benefits from distortive aid measure it is eligible to perform sector wide investigations. Due to it being a sectoral survey, the examination may encompass several member states and their potentially distortive aid measures. Its findings therein can serve the purpose to open separate formal investigation procedures for each questionable measure.[174]

4.4.3 Seizing, Freezing

Upon the occurrence of a complaint or ex officio investigation regarding a potentially unlawful aid, the Commission shall whereas needed demand the relevant member state to submit the information it deems necessary. To prevent the aid in question to remain on the market during the investigation, the Commission can order intermediary actions to prevent further harm on competitors and the internal market. In first instance the Commission can order a suspension injunction, implying a freezing of the measure in question, proscribing any more benefits to be granted until a decision is taken.[175] The second option, a recovery injunction, can be ordered if the measure confidently can be considered as aid and urgent action is needed to prevent

[170] Commission 'State Aid Scoreboard'.
[171] Nowag, Mandaca and Åhman, 2021, 1047.
[172] Regulation 2015/1589, preamble paras 23, 32 & arts, 12 & 24. *Pursuant to art 1(h) an interested party for the purpose of this regulation is any member state, person, undertaking or association whose interests are affected by the aid in question*.
[173] Ibid, art 12.
[174] Ibid, arts 6 & 25.
[175] Ibid, art 13(1).

significant and irreversible damage to one or more competitor.[176] Subsequently to the investigation when a negative decision has been taken by the Commission, it shall order the member state to recover the aid from the recipient. The decision to recover aid, implies that the undertaking in question repays the member state the sum of the granted aid together with an appropriately decided interest rate, applying from the date the aid was received.[177]

Moreover, to ensure compliance with the decisions of the Commission regarding inter alia decisions on incompatibility of proposed aid measures the Commission can perform on-site visits at the undertaking in question. During which the Commission is warranted to enter the premises of the undertaking, obtain oral explanations from responsible personnel and to review its accountancy. If incompliance is established, the Commission can confer the case to the ECJ. It shall be noted that while on-site visits may be a useful tool to ensure compliance with the state aid ruleset and the decisions taken pursuant to it, it is not a mandatory step and non-compliance can be proven by other means.[178]

4.4.4 Legal Nature of Decisions

Pursuant to article 288 TFEU, a decision must be complied with in its entirety and where a recipient is provided it is only binding on the addressee.[179] Hence, decisions taken pursuant to state aid law are undeniably binding. Upon situations wherein a member state acts in contrary to a decision, the Commission or any affected member state can bring the issue to the ECJ.[180] The mandate granted to the Commission in adopting these decisions, is carried out without the performance of a legislative procedure. Meaning that the decision are non-legislative acts.[181] This is primarily a formal difference, and it does not affect the bindingness of the act.

4.5 Concluding remarks on the Commissions Powers in State Aid Law

Explicitly stated in literature and convincingly deductible from the state aid control ruleset, it is evident that the Commission enjoys a great degree of power in the field of EU competition law. It is the primary institution that reviews and declares the legality of planned support

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[176] Ibid, art 13(2).
[177] Ibid, art 16; *See also* Regulation 271/2008 laying down detailed rules for the application of Article 93 of the EC Treaty [2008] OJ L 82/1, art 9.
[178] TFEU, art 260; Regulation 2015/1589, arts 27 & 28.
[179] TFEU, art 288.
[180] Ibid, arts, 108(2), 258 & 259.
[181] Eur-lex 'Non-legislative acts' (Publications office of the European Union) < https://eur-lex.europa.eu/EN/legal-content/glossary/non-legislative-acts.html>.

measures and possesses an investigatory role. Entitled to conduct sector wide inquires, on site visits and enjoys the right consider any information at its disposal to ensure that illicit support measures adversely impacting the functioning of the internal market are adressed.

It can be concluded from the exposition of the state aid rules that the role of the Commission as the guardian of the treaties is on one hand granted wide discretion in its approach to enforce it, but it also infers a great extent of duty to do so. It is clear that the Commission shall guarantee the proper implementation of the four freedoms, maintain continuous monitoring of aid schemes in the Union, initiate investigations when suspecting wrongful aid conduct and take decisions in state aid cases deriving from complaints or other sources.

5. Applying Article 107 to Identified FFS Measures

The purpose of this chapter shall be understood as estimates that depict the degree of impact that utilizing state aid as a response to insufficient progress could have. To assess every existing state aid measure according to the state aid criteriums prior to any de facto insufficient progress of a member state is nor relevant or worthwhile for the purpose of this thesis. Hence, the primary instruments used for adopting FFS will be placed against article 107 TFEU to give an indication on its impact power. The primary utilized source of information for this chapter, is the Overseas Development Institutes and Climate Action Network report on Europe's fossil fuel subsides referred to as the ODI/CAN report.[182] In addition the ODI/CAN report, Julian Nowag, Luis Mandaca and Max Åhman have conducted an in-depth analysis on different FFS instruments identified by ODI/CAN and applied them against the state aid criteria. The conclusions of this chapter made on broader concepts than theirs do to great extent resemble their findings.[183]

At this point, it should be clear that FFS is a substantial hindrance for the realization of the energy transition, when the Commission can exercise its powers at Union level as response to insufficient progress as well as the scope of application and the tools available to the Commission to address unlawful aid measures. The next step is to investigate to what extent the FFS in the EU can be addressed by the state aid toolkit. Before heading into the report, some acknowledgements shall be made.

5.1 Preliminary Remarks

The ODI/CAN report has based its findings on FFS in the EU on the WTO definition of subsidies. Which according to the ASCM is a financial benefit involving direct transfers, grants, loans guarantees or indirect benefits through tax rebates by the government to a certain enterprise or certain group of enterprises.[184] Evidently, the notion resembles the definition of state aid in the EU legal framework. Moreover, without a thorough analysis of the WTO definition taking place in this thesis, the TFEU definition has been regarded as having a broader scope of application, largely due to the preset that aid is unlawful and the broadly applicable notion of economic activity.[185] This implies, that when the forthcoming subchapter assesses the

[182] ODI/CAN report.
[183] Nowag, Mandaca and Åhman, 2021.
[184] ASCM, arts 1 & 2.
[185] Ilze Jozepa 'EU State Aid Rules and WTO Subsidies Agreement' (August 2021) House of Commons Library, 31.

existing FFS identified in accordance with the WTO definition, it can roughly be presumed that the state aid ruleset will be applicable as well. However, two of the major differences between the definitions is that an aid granted to individuals or households may be regarded as subsidy pursuant to the ASCM while on the contrary, the TFEU definition requires the addressee of an aid to be an undertaking. Also, subsidies granted by the EU institutions are excluded from the forthcoming application of article 107 as they cannot be attributed to a state. Support deriving from e.g. the EU Development Bank and the European Central Bank and support granted by states to household or other non-undertakings account for around €4.3 billion.[186]

The ODI/CAN report reports on the existence of around €2 billion of FFS through means categorized as unspecified transition support. The report underlines on the vast obscurity regarding this unspecified support, especially in establishing who the recipients are. Recalling that the recipients of aid must be undertakings to constitute to state aid as well as other remaining questions on the nature of these measures, the unspecified transition support will not be regarded as applicable pursuant to article 107 TFEU.

Additionally, one shall also be recalling the now known fact that the EU state aid control system functions on individual assessments for each aid measure and the Commission must take due account to the specific circumstances in each case prior to establishing either existence or illegality. An additional important remark is that the report does not encompass all EU member states but on 11 significant economies therein, accounting for 83% of the total EU GHG emissions.[187]

Last point to be brought forth, is the fact that the ODI/CAN report is at the time writing 7 years old, and it is possible that the situation has changed. To rebut any assumptions that FFS has decreased and no longer extensive and harmful, more recent data indicates that FFS levels has increased in the OECD states in the last decade.[188] Hence, the likelihood that the approximate FFS levels have diminished to levels that would open for assumptions that the current discussion is obsolete can with moderate confidence be disregarded.

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[186] Nowag, Mandaca and Åhman, 2021, 1048.
[187] *The report covers: Czech Republic, France, Germany, Greece, Hungary, Italy, Netherlands, Poland, Spain, Sweden, and the UK*.
[188] *All states covered in the ODI/CAN report are parties to the OECD Convention*; Convention on the Organization for Economic Co-operation and Development (adopted 14 December 1960, entered into force 30 September 1961) 888 UNTS 179.

5.2 Types and Extent of Primary FFS Measures

The state aid control ruleset of the EU is applicable to any support notwithstanding its form. The ODI/CAN report identify three principal state measures defined as subsidies according to the ASCM utilized in the EU. Namely, public finance, investments by state owned enterprises (SOE) and fiscal support. This chapter will address these types of measures by examining their core features and subsequently assess them in the light of the requisites of article 107 TFEU.

5.2.1 Public Financing

Public financing is when a state through a financial institution that is owned or is under the effective control (50% of voting rights in corporate body or equity share) by the government, grants loans, provide bail guarantees or insurances to private investors. These financial institutions principally infer banks and credit agencies. Approximate levels of aid granted by the means of public financing accounts to €12 billion.[189] Investors that receive e.g., a loan from a state-controlled institutions much less prone to the risks that other undertakings are subjected to when obtaining a loan from a privately controlled financial institution. This reduced risk derives from the fact that state owned financial institutions naturally possesses a higher credit worthiness. In addition to the plain advantage of having their investments enjoy a greater degree of security, being backed up by the state when making investments also enables the relevant undertaking to invest in areas and sectors that are otherwise too unstable for regular market actors to access. [190]

The first step in applying article 107 TFEU is to establish that the measure derives from the state. Requiring the existence of both government resources and attributing said resources to it. Loans and guarantees are amongst the standardly included measures. Recalling case 399/10, loan have explicitly been adjudged to constitute as aid provided that the loan originates from a state-controlled entity.[191] Attributability is ordinarily established by the existence of a legal act, but in the case of an intermediary institution such as a credit agency it is established on a case-to-case basis.[192]

[189] ODI/CAN report, 19
[190] Ibid.
[191] Case C-399/10 *Bouyges SA*; Case 248/84 *Germany v Commission*.
[192] Case C-482/99 *France v Commission*.

Moving on to selectivity between undertakings, the recipient must firstly be an entity notwithstanding its legal form or a self-employed person offering goods or services in exchange for renumeration and exposed to competition.[193] Thereafter the aid must be considered selective due to a selective character of the imposed aid procedure, by regionality or by merely being granted in certain sectors.[194] In regards to public finance as instrument, it is unlikely that e.g. loans or insurances are granted widely enough to not be considered as selective.

Establishing that public financing constitutes an advantage is rather simple, since enjoying from lesser investment risks and extended scope of investments than other market actors put the undertaking in question in a more beneficial position. The decisive factors being that it the aid would not possibly be obtained under normal market conditions.[195] A loan granted by or otherwise guaranteed from a state-controlled entity naturally implies less market risk than a normal loan, hence constituting a favored position.

Lastly, distortion on competition and impairment to intra-union trade may be sufficiently determined if the measure potentially entails such effects.[196] In light of this low threshold, it can be confidently presumed that public financing FFS will fulfill the criteria of distortion on the internal market and competition.

Evidentially, public financing to fossil fuel subsidies does broadly fulfill the criteriums of article 107 TFEU, hence contradicting EU competition law. In the future scenario wherein, the Commission responds to insufficient progress by exercising its powers at Union level, FFS in the form of public financing could likely be targeted. Public financing measures of levels below the de minimis thresholds, would however be excluded.[197]

5.2.2 Investments by SOE's

Proceeding with the next instrument used for subsidizing fossil fuels, investments by SOE's. Rather self-explanatory, this type of aid covers the situation where an enterprise that is under the effective control of the state supports the consumption or production of fossil fuel. While an SOE may prima facie resemble a normal operator on the market, however as it directly or

[193] Case C-41/90 *Höfner*; Case 159/91 *Poucet*.
[194] Case C-88/03 *Portugal v Commission*.
[195] Case C-39/94 *Syndicat Francais*.
[196] Case C-730/79 *Philip Morris Holland BV*.
[197] Regulation 2023/2381.

indirectly enjoys from governmental support by being under its effective control it may constitute as state aid. Around €12 billion of FFS is granted through SOE investments.[198]

Attributability to the state is proven wherein the measure imposes an additional burden on public finances. Even though the investment takes place through an enterprise it would still likely be attributable to the state. Since the undertaking in question is controlled by the state, the investment would indirectly derive from public resources.

The recipient must be an undertaking and will depend on the exact circumstances of each case. Whether the SOE investment will be considered as selective depends on whether it could have been obtained under normal market conditions. Presumed that the investment decision has been taken with due account to only the investment per se and is not limited to certain regions or sectors it will not be considered selective. However, virtually all current SOE investments are adopted to already operating production or consumption of fossil fuel it will unlikely account for as selectivity.[199]

Moving on to the existence of an advantage, evaluating whether the SOE investment could have been received under regular market circumstances. Similarly, to receiving a loan, investments also fall within the standard means of obtaining an advantage. Hence it is likely that the SOE investments occurring in the EU fulfill for the criteria of advantage.

Recalling that the fulfillment of the competitively distortion holds a low threshold of mere potential effect, it can confidently be assumed that also SOE investments constitute to impact on intra-union trade and competition.

5.2.3 Fiscal Support

The last instrument to assess is fiscal support, which by far accounts for the largest share of the total FFS in the EU. Estimably answering for more than €88 billion.[200] In the ODI/CAN report fiscal support is divided in three subcategories of measures. Firstly, direct budget transfers to research and development of fossil fuel usage or exploration for fossil fuel deposits. Secondly, tax exemptions including but not limited to tax rebates for transport fuels. Lastly, it covers price

[198] ODI/CAN report, 23.
[199] Nowag, Mandaca Max Åhman, 2021, 1044.
[200] ODI/CAN report, 23.

support measures, implying a price reduction for purchasing electricity produced by fossil fuels to certain industries or households.[201]

All the three included practices entail expenditures of state resources to facilitate the prices on either direct consumption of fossil fuels or electricity generated by fossil fuel plants. Fiscal support is in its essence the most direct form of support compared to the two previous measures, as it involves to a great degree a direct spending. Intermediary bodies, entities and agencies does not absolve the state from being attributed from the spending of public finances.

Continuing, the legal or natural persons enjoying from the facilitated prices shall consist of undertakings to enable application of article 107. While the selectivity criteria may be avoided wherein the price rebates are granting in a technology-neutral manner, namely including renewable energy production and consumption. However, since they included in the findings of the report, the fiscal support measures identified in line with the WTO definition have been assessed with its selectivity criteria as well. Hence, it is likely to assume that the €88 billion are directed selectively to the fossil fuel sector.

That fiscal support can entail a benefit that would not have been attainable under normal market circumstances could realize in various ways. E.g., Price reductions on electricity produced on fossil fuels would benefit the producer by attracting more consumers and keeping purchasers of electricity who under normal circumstances would consider renewable production. Artificially lowering the prices or the strengthening the buying capacity of certain sectors will most likely imply an advantage for the purposes of article 107 TFEU.

Fiscal support will be due to the low threshold of market and competition distortion in the largest majority of cases imply incompatibility with the internal market.

5.2.4 Levels of FFS Targetable Under State Aid

Following this indicative presentation on the extent that FFS measures comprise of state in by virtue of article 107, there evidentially exists more than €90 billion questionable subsidy measures. Total FFS levels were €112 billion, however recalling that due to the unclear nature of existing unspecified transition supports, those €2 billion are excluded. Resulting in a

[201] Ibid, 18. *Note that price reductions granted to households will not be covered by state aid law since they unlikely qualify for as undertakings*.

remaining €110 billion and subtracting the sum of SOE investments which are non-applicable due to their non-selective nature leaves €98 billion. Thereafter, counting out €4.3 billion FFS granted by the EU institutions due to them being non-attributable to a state and FFS granted to non-undertakings leaves a total of €93.7 billion.

Evidently, the levels of FFS that at least indicatively can be targeted through the means of existing state aid legislation underlines the forcible impact of the proposed interpretation of article 32.2 of the Governance Regulation. It shall be noted that it is impossible for these aids to be regarded as compatible if the member states can convincingly prove to the Commission that the aid have been granted for the purposed listed in article 107(2) or in block exempted categories of aid.

6. The Commissions State Aid Mandate as Exercise of Powers at Union Level Pursuant to Article 32(2) of the Governance Regulation

Paramount to the purpose of thesis, is interpreting and establishing the meaning of the Commission shall exercise its powers at union level. It is not vague in a manner that it leaves no indications on its meaning, rather that it has too many possible interpretations to establish any certainty. Especially in a civil law system but in law overall, generality of legal provisions is often beneficial as it allows for the rule question to be applied and regulate a quantity of different scenarios.[202] The main question at hand, is in essence what power the Commission should exercise, as it is simple to conclude that the Commission is not mandated with only one power at Union level. Historically, when the ECJ has been subjected to provisions with several possible interpretations, it tends to choose the interpretation that is the most consistent with the purpose of the relevant legislation.[203] This chapter will also identify legal indications that interconnect FFS and the renewable energy target, which in a practical sense are closely related due to the strong evidence that FFS is a main antagonist to the renewable transition.

6.1 Linking the State Aid Mandate and Exercise of Power

It is of utmost significance to reiterate that the Commission notwithstanding the Governance Regulation, always maintain the power to control and enforce state aid in the EU. It is not on any way conditional on the interpretation of article 32(2) of the Governance Regulation. However, the identified problems within both legal areas namely: the need of stronger enforcement in the Governance Regulation,[204] FFS hindering the renewable transition and high levels of FFS distorting the internal market despite state aid control system in place,[205] may all be addressed by including and activating in a vigilant manner the Commissions power in state aid under article 32(2) of the Governance Regulation.

Utilizing the intricate reporting and monitoring system of the Governance Regulation together with the Commissions power and duty to enforce state aid law could open a possibility to solve a multitude of problems in several areas of EU law. Due to the strong causal link between FFS

[202] Ralf Poscher 'Ambiguity and vagueness in legal interpretation' in Lawrence M. Solan and Peter M. Tiersma (ed) *The Oxford handbook of language and law* (OUP 2012), 130.
[203] Case C-34/74 *Roquette Frères v France* [1974] EU:C:1974:117, paras 1-24.
[204] Sabine Schlacke and Michéle Knodt, 2019, 333; Kati Kulovesi and others, 2024, 31.
[205] ODI/CAN report.

and hardship in performing an energy transition,[206] when insufficient progress towards a member states renewable energy goal is established, the Commission may see it as a warning bell to investigate whether the state in question grants FFS and strike at those subsidies. This would be a legitimate use of power already in the hands of the Commission, which would strengthen the enforcing tools in the Governance Regulation, promote the functioning of the internal market and overall support the energy transition.

6.2 Analysis

This chapter will analyze the provision at issue in accordance with the primary means of interpretation used by the ECJ, utilizing the information presented. In case 129/19 treating the subject of interpretation of EU secondary law, the ECJ contented that "*it is necessary to consider not only the wording of that provision, but also its context and the objectives of the legislation of which it forms part"*.[207] Indicating three means of interpretation, the wording, its context, and its purpose.

Interpreting through the wording or linguistic interpretation, focuses on grammar and the usual meaning of words.[208] Next, considering the context refers to a systematic interpretation, where one analyzes the provision in question based on its legal surroundings. It infers a pure legal interpretation by reaching a conclusion by assessing the legal act the provision its part of other provisions therein, legal principles, case law and other recognized sources of law.[209] The Court have reasoned in this manner by motivating that a certain interpretation is correct because a different interpretation, would disrupt the coherence of the system for legal remedies,[210] clearly demonstrating its contextual interpretation. Lastly, purposive interpretation may in difference to a systematic interpretation illuminate and consider values outside the law and incorporates the reasons for why the law was adopted,[211] e.g., climate mitigation. Purposive driven interpretation is regularly conducted with strong consideration given to effet utile or in other words the effectiveness of EU law. While subjected to critique for conducting non-democratic

[206] Ibid
[207] Case C-129/19 *Prezidenza del consiglio dei ministri v BV* [2020] EU:C:2020:566, para 38; *See also* Case C-26/62 *Van Gen end loos v Netherlands* [1963] EU:C:1963:1, 12.
[208] Davor Petrić 'A Reflection on the Methods of Interpretation of EU law' (2023) 17 Vienna Journal on International Constitutional Law 83, 95.
[209] Ivan L. Padjen 'Systematic Interpretation and the Re-Systematization of Law: the Problem, Co-Requisites, a Solution, Use' (2019) 33 International journal for the Semiotics of law 189, 192.
[210] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] EU:C:1987:452, paras 16 & 17.
[211] Davor Petrić, 2023, 96.

lawmaking,[212] the strong presence of effet utile in ECJ judgements promotes the effectiveness of EU law as well protecting it from interpretations decreasing its effectiveness.[213]

6.2.1 Effet Utile

Situated in the context of the green deal, the objectives of the Governance Regulation are multifaceted but connected by the core aims to achieve the 2030 target and the long-term targets as established by the EU in congruence with the Paris Agreement.[214] Considering the low degree of adherence with recommendations, and solely relying on them for the attainment of the renewable energy goal can unlikely be considered as promoting the effectiveness of EU law.[215] It would possibly decrease harmonious implementation between member states, between states who comply with their own INECP's and those who follow recommendations versus member states who does not.

One way to get closer to an answer, is to consider the other possible powers to be exercised pursuant to article 32(2) of the Governance Regulation, in light of the customary method of the ECJ to adjudicate in accordance with the interpretation mostly compatible with the purpose of the relevant legislation.[216] While differing interpretations do not necessarily rule out each other, assessing different powers and their compatibility with the purpose of the Governance Regulation, may however strengthen or weaken certain arguments. To argue that the Commissions budgetary powers and its role as the EUs international negotiator may be used to ensure the purpose of the Governance Regulation is much unlikely, as those powers have far-fetched implications or little connection to member states progress towards their renewable energy targets. Amongst its main powers, left is then the Commissions power to adopt legislative proposals and state aid control. While legislative proposals may be used to strengthen the implementation of the Governance Regulation it is a lengthy procedure and may take years before seeing effect, it would additionally be an inefficient approach to address a singular member state. Contrastingly, a state aid measure review of the member state in

[212] Jan Blockx 'Effet Utile Reasoning by the Court of Justice of the European Union is Mostly Indirect: Evidence and Consequences' (2022) 14 European journal of legal studies 142, 143.
[213] Ibid.
[214] Paris Agreement; Governance Regulation.
[215] Georgios Maris and Floros Flouros, 2021, 1,8 & 14.
[216] Davor Petrić, 2023, 96.

question and possible decisions thereof can take effect faster and be much more precise than proposed legislation.

The preparatory work and proposals for the Governance Regulation, is a reasonable source to identify its objective. Recalling that it was held by the Commission that recommendations is an insufficient mean of enforcement and the idea of allowing the Commission to impose binding requirements on member states making insufficient progress.[217] It may accordingly be stated that article 32(2) in a purposive interpretation gives the Commission powers beyond only recommendations. Preparatory work indicates the draft of legislative acts, but it was not included in the finalized texts, but it arguably allows for an exercise of power more stringent than recommendations. Indicating that decisions as used by the Commission in state aid control, not adopted by a legislative procedure as a possible middle ground between the different interpretations.

One of the primary functions of a teleological interpretation, is to adjudicate in gaps in the legislation that should be in the law.[218] The gap here can both by seen as the interpretative gap in the sense that the meaning of article 32(2) of the Governance Regulation is not sufficiently clear, or otherwise one can identify the lack of enforcement measures as the gap in need of closing. For both scenarios, there are as mentioned a lot of possible interpretations capable of closing this gap, however due to its close real-life connectedness to the issue and the fact that it fits well into the description of powers of the Commission the utilization of its state aid mandate would be an adequate gap-filler.

The possibility that the delegated acts as per article 43(3), can be exercised in relation to article 32(2) can be excluded since the former article legibly lists for what purposes and in connection to which articles delegated acts may be exercised.[219]

Deciphering the provision at hand in a manner that entails an interpretation steering towards the purpose and the goals of the Governance Regulation would indicatively grant the Commission stronger tools of enforcement. An interpretation opening for the Commission to

[217] Parliament, 2016, 162.
[218] Jörgen Hettne and Ida Otken Eriksson, 2011, 168.
[219] Governance Regulation, arts 3(5), 15(5), 26(6), 37(7), 40(4) and 43.

utilize its state aid powers would align with the objective of competition law as well, to ensure that no illicit state aid measures distort the internal market.[220]

Additionally, considering the fact that the Commissions powers in state aid law shall in accordance with article 2 and 3 TEU be exercised in light of European Interests. It can be strongly argued for that the importance in fulfilling the renewable energy target is a highly prioritized and legitimate objective of European interest.[221]

To determine the usage of state aid powers as a response as an interpretation ensuring the effectiveness of the Governance Regulation, the member state in question must be granting questionable state aid measures. It shall be highlighted that the thesis does not propose that the utilization of state aid powers shall be the only power to be exercised as response but rather one viable option. Otherwise, in a scenario wherein a member state is lacking in progress but is not granting any fossil fuel subsidies, the status quo with only recommendations as compliance mechanism would be maintained.

6.2.1 Textual interpretation

To evaluate the meaning of the provision at hand according to its wording, a rational approach would be to divide it in two segments. Exercise its power as the first constituent and at Union level as second. The implications of the former segment have been touched upon several times in the thesis but may in a pure linguistic approach be encapsulated to imply the active use of its authority through legal and non-legal measures, presumably through enforcement, legislation, and implementation. Which would align with the possibility to use state aid as a response to insufficient progress.

Continuing, at Union level indicates that the aforementioned powers shall be exercised comprehensively across the whole Union and not individually against individual member states. On one hand, the state aid control system is applied equally across the whole Union as it does not differentiate between member states in its application.[222] In another sense, it could be regarded as speaking against the utilization of state aid powers as it can only be used against member states whose national aid measures are questionable as per state aid law. However, this

[220] TFEU, art 107.
[221] Governance Regulation, preamble paras 1-5.
[222] *Except for the purposes of article 107(2)(c) TFEU which exempts aid granted to regions of Germany affected by the division of the country*.

argument can be disarmed by reiterating that the Governance Regulation allows for the exercise of powers as a response wherein national measures are lacking. That fact would speak against the interpretation that the exercise of power must be identical across the whole Union, as it would straightforwardly be much inefficient and counterintuitive to reprimand or advice the whole Union when a single member state has lacking measures and progress. To support this further, article 34 of the Governance Regulation clearly states that recommendations which forms the main part of the response towards insufficient progress are given individually to member states. Naturally, one should be able to conclude that additional responses are targeted at directed in a similar manner.

6.2.2 Systemic Interpretation

Continuing with a contextual interpretation and sticking with the recently discussed article 2 and 3 TEU. To ensure the coherence of EU law and acknowledging that the treaties overrule secondary law, a systemic interpretation would also align with the conceptualization that the renewable energy target is a legitimate objective of European interest, and the Commission shall exercise its powers in state aid accordingly.

Considering the hierarchical relationship between article 107 TFEU and 32(2) of the Governance Regulation, the former derives from primary EU law and needs not to rely on the latter for its application. In connection with the acknowledgement that state aid law is a separately standing legal area, it can always be applied and utilized. Considering the arguments linking the use of state aid as a warning bell for the Commission to utilize this power, it would not disrupt the coherency nor the hierarchy of legal sources of the EU.

Recalling that the Commission can initiate ex officio investigations wherein it suspects the existence of unlawful state aid measures based on any information available to it.[223] It implies, that the vast reporting system under the Governance Regulation who to varying degree directly contains information on FFS can be used for identifying unlawful aid.[224] Many of the constituent parts of the report under the Governance Regulation, including inter alia existing barriers for the attainment of their national targets can hint the Commission towards

[223] Regulation 2015/1589, art 12(1).
[224] Governance Regulation, art 25(2)(n).

incompatible aid measures.[225] Enabling the Commission to both protect the internal market, enforce INECP target and support renewable energy deployment.

As known by now, the Governance Regulation entail a vast system of reporting and monitoring, and similarly but perhaps a bit lesser extent does the state aid control system. The information gathered under both the legal areas are compiled in the state of the Energy Union report and the state aid scoreboard report.[226] Which both covers shared topics, further demonstrating the logical interconnectedness between state aid and the renewable energy goal.

The legal principles pertaining to article 191 TFEU, the environmental legal basis may be interpreted in favor of utilizing the Commissions state aid mandate. The PPP can be applied in a very suitable manner on the current situation. As it is undeniably contrary to the PPP to subsidize fossil fuels to as it de facto equals the opposite action of what the principle upholds, paying the polluter. Moreover, the principle to take preventive action implies the obligation of state to act against activities that are inherently harmful notwithstanding if it currently does not harm the close vicinity.[227] Even though the use of Commissions power in state aid does not equal to that the state do or do not act, but direct or indirect funding of such activities is undoubtedly questionable as it can not be regarded as preventing the harm in question.

An argument that may be raised against this interpretation, would be that it would infringe member states right to determine their own energy mix pursuant to article 194(2) TFEU. Yet, the mentioned article is applied when legislating under the energy legal basis policy area, which the Governance Regulation partly is but not state aid. Reiterating that the Governance Regulation was not adopted on the basis of article 194(2) indicates that it does not infringe this right. Claiming that the application of state aid law would infringe this right, would additionally leave state aid completely ineffective for large part of a significant sector, and hence distort the functioning of state aid in the EU legal system.

It shall also be brought into consideration that ECJ case law has explicitly adjudged that law deriving from different legal bases, may still rightfully affect other policy in the strive towards the objectives pertaining from its own legal basis.[228] In the present case, exercising the

[225] Governance Regulation, art 3.
[226] Ibid, art 35; Regulation 794/2004, Art 6.
[227] Case C-2/90 *Commission v Belgium*, para 34; Case C-364/03 *Commission v Greece*, para 34.
[228] Case C-490/10 *Parliament v Council*, paras 62-64 & 66-68.

Commissions state aid power in congruence with the Governance Regulation would affect the policy areas of energy, environment, and competition. Yet, the suggested solution would support all the respective objectives of the mentioned policy areas. In the sense that it would promote the journey towards net-zero, protect the functioning of the internal market overall but also in special regard to the electricity market. Addressing FFS in this manner would not only hinder unlawful advantages to occur on the market but would also further incentivize more renewable energy deployment, research, and development by decreasing the competitive pressure otherwise brought forth by a subsidized fossil fuel industry.

Looking outside of the EU legal sphere, the EU is an organization partaking and acting in public international law. In addition to this it has pursuant to 3(5) TEU committed itself to the strict observance and to promote adherence and development of international law. In its role as a party to the UNFCCC as well as the Paris Agreement, the COP28 indicated commitments both to phase out fossil fuels in energy systems as well as working against inefficient FFS.[229] Not acting in line with this, would be questionable in the light of 3(5) TEU and distort the implications that the COPs and other international agreements are intended to bring forth.

[229] UNFCCC, decision 1/CMA.5 (2023), para 28(a, h & d).

7. Conclusions and Future Recommendation

This thesis initiated with depicting a multitude of needs and problems. High levels of FFS in the EU hurting the environment, the economy, and the energy transition as well as the needs to further foster the EU energy transition and lacking enforcement tools in the Governance Regulation. The relationship between FFS and the renewables energy target is clearly problematic, as FFS in various ways effectively counteracts its realization. Thereafter, in the search of a solution to this the thesis explored the main piece of legislation intended to bring forth the Unions targets. Exploring the functioning of the Governance Regulation with its INECPS, individual target setting, indicative trajectory, reporting and monitoring. Wherein it was concluded that the Commission can respond to insufficient progress and measures inter alia by exercising its powers at Union level, whose implications remained unclear.

Thereafter the thesis moved on to one of the Commissions primary powers at Union level, enforcing and controlling state aid, the ruleset that governs subsidies in the EU. After fathoming the notions of state aid, why it is used, why it needs to be controlled and how the control system functions, it was clear to conclude that the Commission possesses substantial powers therein. To address the high levels of FFS in the Union the then thesis applied the definition of state aid onto the existing FFS in the EU, identified in pre-conducted empirical research. The results were that substantial levels of the existing measures were addressable through state aid law, indicating that it may serve as an effective tool to address them with.

Lastly, based on the founding from the separate legal areas the thesis explored the arguments for and against the usage of state aid powers for the purpose of article 32(2) of the Governance Regulation on the exercise of powers at Union level. Always keeping in mind that the enforcement of state aid control applies independently notwithstanding the Governance Regulation. There it was concluded that the posed problems may be overcome by interlinking the otherwise disconnected rulesets. By utilizing the extensive reporting and monitoring in both rulesets, seeing the establishment of insufficient progress as a warning bell to suspect illegal aid measures, more FFS can be identified and combatted for the protection of the internal market, environment, and the Unions collective renewable energy target.

The legal and factual linkages between the two areas and the procedural functioning of the Governance union can support and strengthen the enforcement of state aid rules and vice versa. Opening for possibilities for them to mutually enforce their respective objectives. By utilizing

its state aid powers, the Commission can effectively steer member states towards more ambitious and effective action to meet the Union's 2030 renewable energy targets. This approach would not only support the road towards a net zero Europe but would additionally also foster a more competitive and innovative environment for renewable energy within the EU.

Looking ahead, it would prove beneficial if the Commission held a stricter overview of state aid measures in the Union as the information presented in the thesis demonstrates high levels of FFS which classify as subsidies in WTO law and according to the results of the thesis also accounts for as state aid pursuant to article 107 TFEU. In improving their scrutiny, the utilization of the reporting and monitoring system under the Governance Regulation could prove useful to identify such measures and at the same time also strengthen implementation of the Governance Regulation as well as supporting renewable energy market operators. In connection to this, the current categorization of the state aid scoreboard report entails a seriously flawed clarity by placing FFS in the same bracket as environmental protection aids. It would be recommended to create a separate category for FFS, or at the very least not place it together with environmental protection aids.

Continuing, another recommendation towards the EU and its institutions is that it would advisably strive to not include such vague provisions in such important legislations as the Governance Regulation. Both as it creates obscurity for member states on what their failure to meet national targets will imply but it may also discourage the Commission to take necessary action because the extent of its mandate is indefinite.

Turning towards other actors than the EU institutions, the renewable energy sector should maximize their right to issue complaints on unlawful aid measures to the Commission. The Commission is bound to investigate complaints and must conclude the proceedings with a decision. By submitting complaints especially on FFS measures, they can invoke their right to fair competition within the internal market and foster the development and deployment of renewable energy in the whole Union.

To the broader public, the vast transparency provisions on both state aid and the Governance Regulation through their respective reports are good sources to engage public pressure on both the EU but primarily their member states. It should be a high interest for every European citizen that their taxes do not fund the aggravation of our planet's climate through fossil fuels and that

their money instead promotes their individual wellbeing and ensures that our part of the world contributes with its part in keeping global average temperatures down.

Concludingly, this thesis has illustrated additional means for the Commission to identify illegal FFS measures, and that the Commission of the EU has the legal possibility to use its state aid powers as an exercise of power in response to insufficient progress. A Commission discouraged to do this towards the member states in the name of climate change, even has the possibility to invoke the internal market as scapegoat. In doing so, the Commission holds a greater possibility to overcome political unwillingness by enforcing our agreed goals, to combat environmentally and economically harmful public spending, all while promoting the attainment of the 2030 renewable energy target.

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