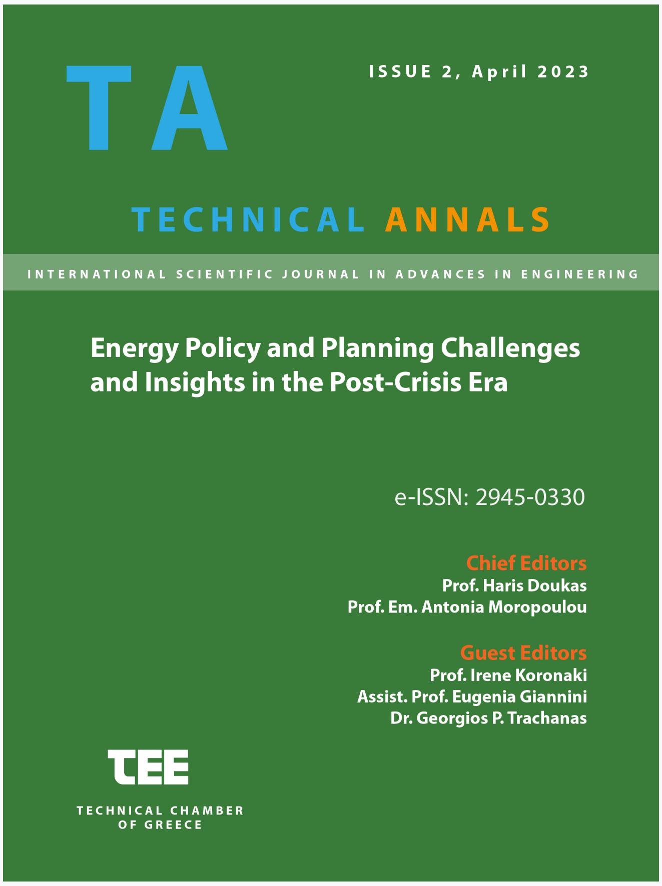
Technical Annals

Vol 1, No 2 (2023)

Technical Annals



The Development of the European Union State Aid Rules in the Energy Sector

Eugenia Giannini, Evi Makri

doi: [10.12681/ta.34088](https://doi.org/10.12681/ta.34088)

To cite this article:

Giannini, E., & Makri, E. (2023). The Development of the European Union State Aid Rules in the Energy Sector. *Technical Annals*, *1*(2). https://doi.org/10.12681/ta.34088

The Development of the European Union State Aid Rules in the Energy Sector

Evi Makri[1], Eugenia Giannini[2]

[1] PhD Candidate at the National Technical University of Athens, Athens, Greece,
[2]Assistant Professor of the National Technical University of Athens, Attorney at Law, Eugenia Giannini and Associates Law Firm, Athens, Greece
evimakri@mail.ntua.gr,giannini@mail.ntua.gr

Abstract. The paper presents the developments on the framework that governs the investments on the energy sector, focusing on competition law and the support to renewable energy sources through state aid. The researchers examine the developments of the state aid cases that have been under assessment by the European Commission over the course of the years and particularly, those regarding investments on renewable energy sources (RES) after the announcement of the European Green Deal, in late 2019. In addition to the above, the decisions of the European Commission and its general tendency to not raise any severe objections against such cases of support schemes provided as state aid, are reviewed in parallel to the energy policy of the European Union, as it has been recently shaped in order to promote the use of RES in the EU. Besides, the increased penetration of RES for the European Union, bares multiple benefits since, apart from playing a key role in the Union's policy to tackle climate change and its severe consequences, it also contributes in the extended efforts of the EU Member States to minimize their dependence on energy products highly imported from Russia, such as natural gas, in the shadow of the recent war in Ukraine. Under that prism, the paper provides a coherent and consistent examination of the ways in which state aid can be accepted by the European Commission, within the broader EU framework on Competition. Thus, the key findings of the paper showcase that when the support, in the form of state aid, is provided to promote the development of activities that serve the common interest of the EU Member States, the support schemes are mostly accepted to be implemented. Such activities that serve the Union's common interest are – inter alia – the activities that support the energy transition as well as the environmental protection within it and lead to the energy independence of the EU as well, as it will be further analyzed in this paper.

Keywords: competition law, energy investments, European Commission, European Union, state aid, support schemes.

1. Introduction

State aid as it has been defined by the European Union and the legislative framework governing it – which will be further discussed following in this paper – is the advantage provided in any form by the state, its national authorities or/and its budget, to undertakings in a selective manner. More particularly, state aid has been addressed within the framework of the European Union legislation, basically under the Treaty on the Functioning of the European Union (TFEU) and Articles 107, 108 and 109 of it. The provisions of these articles provide the exact definition of what kind of support constitutes state aid, as well as the criteria that if met, can make the support schemes compatible with the internal market rules. In that sense, Article 107 specifically foresees that "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 shall, in so far as it affects trade between Member States, be incompatible with the internal market" [1][1].

At this point, it is useful to take into consideration the definition and the notion of the internal market, as provided within the European legislative framework. In particular, Article 26 of the TFEU while highlighting that "the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties" it is further developed by defining that "the internal market shall comprise an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties[2]" [1][3]. Having this noted is important in order to understand that most of the economic sectors within the European Union have been liberalized under this prism, with the sector of energy also included in the above. However, apart from the notion of the internal market as described earlier in the form of a single market, the European Union has proceeded further by adopting a policy that emphasizes the sustainable development of this market. In that sense, provisions of the Article 194 of the Treaty specify that "in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in the spirit of solidarity between Member States, to: ensure the functioning of the market; ensure security of energy supply in the Union; promote energy efficiency and energy saving and the development of new renewable forms of energy; and promote the interconnection of energy networks" [1][4].

In the light of the above, the European Union seems to emphasize on the need for environmental preservation and its broader improvement, while at the same time, it is noted that such a necessity should be supported by the Member States in ways compatible to the internal market rules. Further examining the above, the results could lead to the consideration that those two elements are contradictory to each other. Thus, it could be considered that the support which is often necessary to be provided by the Member States to undertakings related with the development of renewable energy sources, in order to contribute in the environmental preservation, despite its importance often violates the state aid rules – and the rules of the single market - as it is mainly based on rather selective national support schemes.

[1] TFEU Articles 107-109

[2] The Treaty on the Functioning of the European Union and the Treaty establishing the European Community

[3] TFEU Articles 26

[4] TFEU Articles 194

To elaborate, specific measures that are adopted by the EU Member States in order to achieve the energy transition targets or the climate neutrality targets that the European Union has set, often concern aid schemes granted to particular entities that can contribute in this, even though they may create selective advantages and distort competition. Such measures and aid schemes are going to be examined in detail later in this paper through an overview of indicative state aid cases that have been approved by the European Union despite the competition risks.

Under that prism, this paper provides a holistic coherent overview of how state aid might affect competition, according to the EU and a parallel overview of how the European energy policy has been evolved, prioritizing the energy transition and setting goals as ambitious as having a carbon neutral economy in the Union by 2050. These overviews, even though they might seem irrelevant on a first level, when set together and through the particular cases used as examples in the last part of the paper, they showcase what the paper aims to prove; that the swift on the EU policy towards emphasizing in the green energy transition often allows the European Commission to keep a less strict attitude when deciding whether to accept state aid schemes on renewable energy or energy efficiency investments to be implemented by a Member State or not.

Furthermore, Article 107 also specifies the conditions under which providing support to undertakings can be considered as compatible with the rules governing the internal market. In particular, the respective provisions specify that the types of aid provided, in order to be accepted under the state aid rules should serve a social purpose; be provided to consumers on individual scale; as well as to be given in a way that the origin of the products involved remains irrelevant; and should be granted in order to contribute into overcoming damages resulted by extreme occurrences, weather related incidents included. Following, additional criteria are developed, by the same Article, setting the conditions under which, aid, other than the types of aid mentioned above, can also be considered as aligning with the rules of the internal market. More specifically, aid provided in the form of state aid- as already described - can be considered compatible with the internal market on condition that it supports the promotion of economic development for regions in which living conditions and standards are extremely bad and which are characterized by severe underemployment, as well as for those areas listed in Ar. 349 of the Treaty, considering their structural, financial or social conditions; it promotes the development of a crucial PCI (meaning the projects listed by the European Commission as Projects of Common Interest for the European Union), or it contributes to correct important troubles in the economy of a Member State. Moreover, in accordance with the same provisions, aid provided as state aid, can be compatible with the internal rules if it promotes and facilitates the development of specific activities or fields of the economy of a Member State, while it does not cause immediate impacts on the trading conditions at a level surpassing the significance of the common interest. As an extent to the above, state aid might also be accepted as compatible to the rules of the internal market when it is granted to support the conservation of culture and heritage of a Member State, on condition that such aid, similarly, does not affect trade in ways and severity that overcome the value of the common interest. Following these, it is provisioned that additional types of aid can be

defined by decisions of the Council upon a respective proposal by the European Commission [2], [3].
Apart from the above, within the provisions of the TFEU, in Article 108 important procedural conditions are laid down regarding the granting of aid. According to these, the European Commission needs to be in constant cooperation with the Member States in reviewing their aid providing systems adequately and to provide suggestions to these States on how to adjust, by adopting the necessary measures, on the developments concerning the proper function of the single market. Other than that, it is also provisioned that the Commission has to be notified well in advance, by the Member States, regarding any plans to provide new support in the form of an aid scheme or to alter an already existing one. Following the notice, the Commission shall reach a decision on the compatibility of the proposed measure, prior to which the State shall not put it into effect. Finally, Article 109 of the TFEU foresees that particular regulations may be developed by the European Institutions on the application of the Articles mentioned above [1].

2. The Criteria of Article 107

The importance of state aid and its control of the preservation of proper conditions of competition is highlighted along the relevant European legislation. What has been characteristically noted on this, in the Report on Competition Policy, 2010, drafted by the European Commission is, inter alia, that control on state aid has grown to be a crucial part of the single market, by safeguarding that corporate undertakings can compete each other on fair terms regardless of where they are based; as well as that Member States are not engaging in subsidy races burdening each other or the common interest of the European Union, which would result in a waste of resources and threaten the cohesion of the Union in general [4].In the light of the above it is important to examine the criteria set by Article 107 regarding the compatibility of state aid in order to avoid cases where the competition might be distorted due to state intervention in the market.
More specifically, on the basis of the provisions of Article 107, paragraph 1, as explained above, it can be concluded that the article initially provides a negative condition concerning the plans of the Member States to provide aid in order to serve particular purposes, excluding the occasions laid out in paragraphs 2 and 3 of the Article [5]. These exceptions are usually applied in a further processing stage of the assessment of each scheme's compatibility, after being reviewed under the main four criteria set by Article 107, par. 1, that constitute such aid incompatible to the rules of the internal market in the first place, as they will be presented below. The four criteria on the state aid, spotted through these provisions, are as such:

A. Granted through State Resources or by the State

First of all, Article 107, par. 1 notes that "any aid granted by a Member State or through State resources […]" shall be considered as incompatible with the rules, setting a quite broad definition where confusion might arise regarding what is included in the State or the State resources. Through a long collection of the European Commission's decisions on state aid – some of which will be indicatively presented in the following parts of the current paper - it has been concluded that all state authorities, included local or regional ones shall be included in the above provision, while as far as the state resources is concerned these have been found to include direct funding from the state budget, as well as indirect financial support in the form of tariffs, taxation related measures and more [6], [7].

B. Economic Advantage

In addition, for a support scheme to constitute state aid incompatible with the rules of the internal market, the beneficiaries of the aid need to be granted particular economic advantages which would not be provided to them in absence of the support. On top of that, it is noted that in order for an undertaking to be in position of receiving such an advantage, it shall be any natural or legal person that executes economic activities of particular regularity and duration, no matter its legal status or the means by which it is supported [8]. Besides, considering that the aid provided to an undertaking will be provided directly or indirectly through the state budget, it is obvious that the economic support it will receive is going to place it in an advantageous position [9].

C. Selectivity

Following the above, the criterion of selectivity is quite important in the assessment of support provided as state aid because the beneficiaries involved receive advantages that are not accessible by other similar or not undertakings often operating in the same sector. In other words, the state's intervention is considered illegal when it benefits specific undertaking or the production and promotion of particular goods more than it benefits others. However, should the intervention be inclusive for all undertakings and activities indistinctively, the legality of it would not be under such consideration. Consequently, it seems that the legality of the state support and the selective character of it, regarding the advantages it provides, cannot be considered compatible, unless the support scheme falls under the exceptions foreseen in the following points of Article 107 [9, pp. 103-150].

D. Effects on Trade and Competition Conditions

As it is expected, since the internal market has been developed in a way that operates commonly beyond the borders of the Member States, the benefits provided under the state aid schemes have high potential to impact the trade conditions between these Member States, as well as the competition conditions in general. However, due to the fact that the distortion of competition is often challenging to be clearly proved, when assessing state aid cases under the prism of this criterion it is enough to examine the level at which the measure even threatens to distort competition. In addition to that, when assessing such support schemes, the European Commission also needs to provide adequate reasoning that they affect the trade within the Member States, no matter the size of either the aid or the beneficiary. Besides, considering that the undertaking benefited by the aid is active within an existing and liberalized market, such as the integrated electricity market is, this criterion is highly possibly met [10].

E. Exceptions of Paragraphs 2 and 3 of Article 107

Following the above mentioned criteria, which if met cumulatively, the state aid is considered to be incompatible with the internal market rules and thus illegal, several occasions of state support are excluded by the prohibition of the Article 107 on the basis that such aid serves particular purposes, necessary for either the protection of an area in need, or the development of particular activities that highly contribute to the support of the common interest of the European Union and its Member States, regarding various economic sectors. An important example of activities related to the common interest of the Union and its Members States, especially under the recent developments either regarding the climate crisis or related to the developments in the EU energy sector, are those activities dedicated to tackle climate crisis and its consequences or to safeguard the security of energy supply for the European Union.

3. The European Energy and Climate Policy and the State Aid

The European Union has developed significantly the common policy adopted internally in order to adjust its climate targets, increase its climate ambitions and align with the most recent developments. At the same time, the severity of climate crisis and its consequences, along with the risks related to the Union's energy security have escalated making these issues be included in the top priorities of the European policy [11]. Under that prism, the European Commission announced in late 2019 the European Green Deal; a set of proposals laid out across several important policy areas, which aims to support Europe in becoming climate-neutral by 2050 and to succeed in fully decoupling economic growth from the use of resources. More specifically, in the process of reaching this target, emphasis is put on enhancing the economy while improving people's quality of life and taking care of the natural environment. Hence, the EU Green Deal constitutes a roadmap to govern the transition of the Union into a more sustainable future, which presents the current challenges as opportunities in the policy areas it includes, in a way that will be inclusive for everyone. The policy areas included in the EU Green Deal are Biodiversity; Farm to Fork Strategy; Sustainable agriculture; Clean energy; Sustainable industry; Building and renovating; Sustainable mobility; Eliminating pollution; and Climate action [12].

Following the above and within the framework of the European strategy as laid out by the EU Green Deal, the European Commission presented shortly after the "Fit for 55" Package. Thus, in July 2021, the Commission adopted a set of measures to make the European policies on land use, transportation, energy and taxation, inter alia, align with the revised and more ambitious targets of reducing GHG (greenhouse gas) emissions by minimum 55% by the end of the decade, in comparison to the respective emissions of 1990. These proposals brought together the development of the existing EU Emissions Trading System with the application of a respective system on additional sectors, along with measures for the increased use of renewable energy sources and the enhancement of energy efficiency, among others [13].

Indicatively, the new package, regarding the already existing EU ETS, includes proposals on the gradual seizure of free emission allowances in the sector of aviation and that the ETS should be aligning with the CORSIA (Carbon Offsetting and Reduction Scheme for International Aviation), as well as the inclusion of the shipping sector in the system too. In the same spirit, the Commission proposed a new ETS to apply on the sectors of road transportation and buildings too. In addition, it includes proposals on the revision of the Renewable Energy Directive (Dir. (EU) 2018/2001) and the Energy Efficiency Directive (Dir. 2012/27/EU) in order to increase their respective targets to 40% RES in the Union's energy mix by 2030 and 3% of the buildings of the public sector to be renovated on an annual base accordingly. Additional proposals of the Package include measures on the use of fuels in aviation and maritime, on energy taxation, as well as on the establishment of a carbon price on imports from non-EU countries.

In parallel, the European Commission, in order to increase the dynamics of the previously mentioned measures, proceeded to the first European Climate Law (Regulation (EU) 2021/1119) which practically wrote into law the targets set by the EU Green Deal and the EU Fit for 55 Package, aiming to make the European economy climate-neutral by mid-century, 2050, and to achieve the reduction of the GHG emissions by 55% until the end of the current decade (2030), in comparison to the levels of 1990. In total, the law focuses on safeguarding that all the European policies shall contribute to the above, as well as that no economic or social sector is excluded from the process [14].

Following these, the European legislative framework that shapes the broader rules on the state aid [15], includes provisions within several of its texts, which facilitate the granting of state aid as an exception to the prohibition of Article 107, on specific conditions. Initially, such a legislative text is the Council Regulation (EU) 2015/1588 regarding the application of the provisions developed in Ar. 107 and 108 of the TFEU and the first article of it, where several categories of aid – included this in favor of environmental protection – can be considered as compatible with the rules of the internal market without being obliged for the prior notification requirements of Art. 108, par. 3 of the Treaty [16].

Additionally to this, the Commission Regulation (EU) 651/2014, which declares particular categories of aid as complying with the internal market, provides a set of definitions that apply on such aid provided for environmental protection, starting with the very "environmental protection" defined as "any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy", followed by several energy related definitions such as energy efficiency; energy efficiency project; high-efficiency cogeneration; renewable energy sources; energy efficient district heating and cooling; energy infrastructure and internal energy market legislation, among others [17]. Within the framework of the above, the Regulation 651/2014 also includes – in its section 7 and the articles 38 to 48 of it – the provisions that set the conditions necessary to be met for investment and/or operating aid to be considered compatible with the rules of the internal market, on the fields of energy efficiency measures; energy efficiency projects in buildings; high-efficiency cogeneration; promotion of energy from renewable sources; promotion of electricity from renewable sources; promotion of energy from renewable sources in small scale installations; energy efficient district heating and cooling; energy infrastructure; as well as for the aid in the form of reductions in environmental taxes [17].

Then, an additional regulation, prior to the ones mentioned above, the Commission Regulation (EC) 794/2004, as amended and in force, is important to be mentioned, since its Chapter III governs the monitoring of the state aid policies of the Member States through the relevant annual reports its provisions foresee. In that sense, it is noted that every Member State shall, under the current provisions, provide its annual reports to the Commission in due time and the Commission in its turn, shall publish a state aid synopsis that shall include the information provided in the separate reports compiled. In the light of these provisions, the European Commission publishes on an annual base the “State aid Scoreboard” resulting from the expenditure reports submitted by the Member States [18].

The State aid Scoreboard is a key tool of the European Commission to showcase a State aid synopsis of the situation regarding the state aid measures in the Member States. Its issuance is based on the Article 6 of the Commission Regulation (EC) 794/2004 on implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty and it aims on providing a publicly available platform of information on the current state aid conditions across the EU and the control mechanisms the Union has for the state aid schemes. In that sense, the Scoreboard acts as an important tool for keeping track of the potential effects of the major policy developments in the field of State Aid. Thus, the focus points of the latest edition of the State Aid Scoreboard (2021) concern schemes related to the COVID-19 pandemic crisis and schemes related to the energy transition and the environmental protection, among others. [19]

The methodology used for the Scoreboard includes the examination of the Member States’ expenditure for state aid measures that benefit specific industries, while it does not consider any cases for which decisions have not been made. In addition, it does not include any cases related to aid provided under de minimis rules; without favoring specific undertakings or sectors and without threatening to distort competition within the EU market. Further, the Scoreboard, makes a special reference to policy developments amongst which it includes the revision of the State aid rules with the guidelines on State aid for climate, environmental protection and energy (CEEAG) and the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [19].

Under the prism of the above, the tendency depicted in the Scoreboard for the granting of state aid on the objective of environmental protection and energy savings, shows that this has been the primary objective for five EU Member States (Belgium; Czechia; Finland; Croatia; and Sweden) while it has been among the top 3 of the state aid objectives for the majority of the rest of the EU (28, UK included) Member States, such as Austria; Germany; Denmark; Estonia; France; Greece; Ireland; Lithuania; Luxembourg; Malta; the Netherlands; Romania; Slovenia; Slovakia; and the UK. On top of that, state aid on environmental protection and energy savings, according to the State Aid Scoreboard, seems to account for 20% of the total expenditure for the EU, in 2020. [19]

4. The Guidelines on State Aid for Climate, Environmental Protection and Energy

On top of the above, the European Commission has adopted a set of guidelines, which has been kept up to date with newer versions of it replacing the previous ones, regarding the state aid provided for reasons related to environmental protection and energy (EEAG). In that sense, the latest version of the EEAG, the "Guidelines on State aid for climate, environmental protection and energy 2022" continues to provide support on such aid following the prior set of "Guidelines on State aid for environmental protection and energy 2014-2020". In the first place, the scope of the 2014-2020 guidelines was to apply on state aid provided for environmental protection and the achievement of energy objectives in sectors such as transport, coal, agriculture, forestry and fisheries, unless otherwise defined by particular rules [20]. These guidelines, as expected, have been greatly taken into consideration in the cases of state aid examined by the European Commission over the latest years and have played significant role in the Commission's decisions not to raise objections against several state aid schemes.

Furthermore, the guidelines provided a simpler framework regarding the assessment criteria compared to the ones established by the previous edition of guidelines, especially on the topics of energy efficiency and cogeneration. What is more, the 2014-2020 guidelines excluded the issue of state aid on nuclear power projects establishing that it shall therefore be examined on a case-by-case level. In addition, in order for the European Commission to assess a measure of state aid regarding its compatibility, it shall examine whether the positive impacts on trade are more and of more importance than the potential negative effects on that. To do so, the guidelines provide several criteria that have to be met, in order for a measure to be considered lawful, among which that the measure should contribute to the objective of a PCI; that it needs to bring improvements which cannot be brought in the market if the measure is not provided; that it must have an incentive character; that it needs to be aligning with the principle of proportionality; that it has to be appropriate and transparent; as well as that it shall not cause undue negative impacts on the competition. Then, as far as the support on renewable energy sources is concerned, the guidelines foresaw that market instruments should be implemented in such a way that subsidies would be gradually reduced until minimized completely. Despite this, during the transitional phase towards this goal, state aid schemes on RES should be provided – according to the guidelines – for periods of maximum of a decade long and in the form of premium on top of the market price, where the beneficiaries would have to be under standard balancing responsibilities [21].

As an extend to that, the Guidelines on State aid for climate, environmental protection and energy 2022, proceed in replacing the previous set of guidelines having taken under consideration the EU Green Deal, the EU "Fit for 55" Package, as well as the proposals of these on the already existing European regulatory framework. Adopted in the beginning of 2020, the scope of the current guidelines is to apply on state aid measures used to support the development of particular economic activities in ways that boost environmental protection along with activities in the field of energy. Moreover, these guidelines shall apply on sectors that belong to EU state aid rules, unless these rules set otherwise. Further, the guidelines include a provision on the types of aid on which they do not apply, where among others, state aid for nuclear energy is included. Then, the kinds of measures covered by the provisions are laid out in the text. Among these, aid for cutting off GHG emissions; for supporting RES; for improving the energy performance of buildings; for promoting the use of clean vehicles; for incentivizing the transition towards a circular economy; for securing energy supply; for developing energy infrastructure and district heating and cooling projects; for providing discounts of electricity levies for the energy-intensive users; as well as for phasing out of fossil fuels are included indicatively. In addition, all the above-mentioned prerequisites on the principles of proportionality, appropriateness, necessity and eligibility that the state aid measure shall meet in order to be considered compatible to the state aid rules, are once again further developed [22].

5. Energy Related State Aid Cases and the Reasoning in them

Statistically, according to the data presented in the State aid Scoreboard of the European Commission for the year 2020, the country in which the biggest amount of state aid support was provided – as found based on the expenditure of 2019 – on projects under the category of "Environmental protection including energy savings" was found to be Germany by totally surpassing the amount of 36,000 EUR million in several support schemes, with others, such as France, Denmark, the Netherlands, Sweden etc. to follow with significantly lower amount of money provided through state aid schemes [19].
In this part of the paper, a short reference will follow to – indicatively - some of the state aid cases the European Commission has assessed and accepted since 2019, in order to present the main elements of these and the base on which the European Commission's reasoning is usually developed.

5.1 State Aid Case SA.55891 (2019/N) –Operating Aid Scheme for Electricity Generated by Incinerating Biomass in Existing and Fully Depreciated Biomass Plants in Denmark [23]

Under the state aid case SA.55891, the European Commission examined the Danish scheme which concerns the provision of a price premium to depreciated installations that generate electricity from biomass. Additionally, under the proposed scheme, the premium shall also be addressed to other existing biomass fired installations, which will be covering the additional operating costs of electricity production from biomass compared to the corresponding fossil fuels substitutes. The objective of the scheme is to contribute in increasing the level of the environmental protection in the country, since it was planned to contribute in achieving the national target of 55% of RES by 2030 and to complete the phasing out of coal for electricity production by the same year as well. Moreover, it will further contribute in achieving the EU target of at least 32% share of RES on energy consumption in 2030.
The beneficiaries of the scheme are a) depreciated installations generating electricity from biomass, b) existing non-depreciated biomass fired installations and c) a single plant that has been granted investment aid under the scheme SA.40397 (Support for the use of renewables in production processes in Denmark), while among the decisive

criteria is that all supported installations must have used biomass before 1 April 2019 (the expiry date of the past biomass support scheme).

As assessing the measure proposed under the current case, the European Commission noted that the measure is selective, considering that it is granted only to subsector covering electricity production from biomass without being accessible for other electricity producers or other sectors of the economy. In addition, it was found that it derives directly from the state budget of the country, which means that it is financed through State resources. In the light of the above, the Commission noted also that the measure is likely to distort competition and affect trade between Member States; considering that as an advantage it is granted to producers of electricity from biomass who are engaged in transnational trade within the framework of the liberalized European electricity market. However, when examined under the prism of serving the common interest; under the level of necessity it is characterized with, as well as its alignment to the principle of proportionality, the Commission considered that the scheme aims at well-defined objectives of common interest, supporting the environmental protection by promoting the deployment of renewable energy, while it also provides an incentive effect, if it is taken into account that the premium induces the beneficiaries to change their behavior by enabling them to produce electricity from biomass. In that sense, the Commission decided not to raise objections to the aid on the grounds that it is compatible with the rules of the internal market.

5.2 State Aid Case SA. 53525 (2020/N) – The Netherlands SDE+++ Scheme for Greenhouse Gas Reduction Projects Including Renewable Energy [24]

In the state aid case SA. 53525, the scheme under examination concerns the expansion of the already existing StimuleringDuurzameEnergieproductie (SDE+) aid scheme, which focuses on the support of investments in renewable electricity and gas and heat production. With the previously accepted aid scheme to reach its closing period at the end of 2020, the national authorities notified the European Commission for its updated version, considering the increased climate ambitions the country has adopted for 2030. This new version, the legal base of which lies on the Royal decree “BesluitstimuleringduurzameenergieproductieenKlimaattransitie” (SDEK), falling under the legislation on subsidies, not only foresees the duration expansion of the measure previously supporting the promotion of RES, but it also includes additional the measures on the GHG emissions reduction too.

More specifically, the measure’s scope is to subsidize incentives for the beneficiaries to work on the GHG emissions reduction. According to it, all the RES technologies from the previous version of the scheme are included in this as well, with the additions of further technologies such as a broader prism of solar thermal and geothermal technologies, aqua thermal energy solutions and technologies of compost heating, on condition that they are complying with the relevant definitions set in the EEAG. Moreover, technologies on reducing the GHG emissions shall be therefore supported by the scheme, such as those related to managing waste heat or to carbon capture and storage (CCS), as well as projects under which fossil fuel inputs are going to be replaced by electricity. In the light of the above, the subsidies provisioned by the measure shall be accessible only to new installations or to those – already existing – where additional

renewable heat or gas or new CCS equipment are going to be added.
As assessing the aid under the state aid rules, the Commission noted that it derives from state resources, since – similarly to the previous version of it – it is financed by the state budget. However, the Commission had been notified for the proposed expansion by the country's authorities in adequate time before its implication. Moreover, the measure seems to be contributing to the development of particular economic activities – those of the investments on the technologies described earlier – as well as to be necessary in order to support these activities in ways that also support the preservation of the environment. In addition, the measure was judged as both appropriate and proportionate in order to serve the above scope, while due to the fact that it includes a competitive bidding process, it is also considered to potentially cause limited negative effects on trade and competition conditions, with its positive ones clearly outweighing any risks and not jeopardizing the common interest. Thus, the Commission decided not to raise objections finding the proposed scheme to be compatible with the internal market rules.

5.3 State Aid Case SA.58181 (2020/N) –Tender Mechanism for the Phase-out of Hard Coal in Germany [25]

The support scheme examined under the state aid case SA. 58181 derives from the initiatives of the German state to phase out of hard coal. More particularly, the support scheme was introduced to facilitate the phase-out of hard coal powered electricity generation in the country and includes the carrying out of seven auctions that have been planned to encourage the early closure of hard coal-fired electricity generation and small lignite installations within the period 2020-2026. German authorities considered this as the most suiting policy tool, considering that the auctions allow the compensation for each installation to be determined on a competitive basis.
Moreover, the country has adopted ambitious climate targets such as becoming climate neutral by 2050 and reducing the economy wide GHG emissions before 2030, by at least 55% compared to the levels of 1990. In that spirit, the country has additionally set sector-specific targets which - for the energy sector - means the reduction of CO2 emissions from approximately 254 million tonnes CO2 in 2019 to maximum 183 million by 2030. Under the light of the above, the reduction gradually and the phase-out eventually of coal-fired power generation (including hard coal and lignite) is crucial for the country to reach these targets.
The legal basis of the support scheme derives from the Coal Commission's proposals - a body which has been appointed by the government to ensure social consensus on the energy and climate policy of the country – and the following to these, "Act on the reduction and termination of coal-fired power generation and on the amendment of other laws", or else "Coal Exit Act".
Furthermore, the installations eligible for the scheme's support as beneficiaries are those installations that use hard coal as their prior energy source and have, at the same time, a valid authorization to operate. In parallel, excluded from the support scheme are, inter alia, those installations that have already issued a binding closure notice or a binding coal combustion ban notice; those that have already been included either in the capacity reserve or in the network reserve and have also announced their permanent closure; as well as those that have already been awarded a compensation in a prior

tender procedure under the same law or that have been ordered to close in accordance with the regulatory closure too. Notably, several installations located in specific areas (such as the federal states of Baden-Württemberg, Bayern, Hessen, Rheinland-Pfalz and Saarland) have also been excluded, though only from the first auction in order to contribute to ensuring security of supply.

Following the development of the scheme, the European Commission received several third-party submissions against the support it provides claiming that it would lead to certain installations phasing-out quite later as the auctions process would encourage loss-making plants to keep operating so that they can participate to the tenders. At the same time, some questioned the proportionality of the measure comparing it with practices followed in different European countries, while others also contested that the scheme’s auctions are indeed planned in a competitive and non-discriminatory way. Germany, responded to all submissions supporting the necessity and transparency of the measure to the European Commission that while assessing the notified aid scheme reached the following findings.

Initially, the Commission noted that the measure clearly derives from State resources considering that the compensation amount paid to the winning operators from the auctions derives from the state budget. Further, it was noted that since the measure is addressed only to hard coal-fired electricity generation and small lignite installations, it clearly provides a selective advantage, while the phase-out of these also leads to electricity share being produced by other generators, which has the potential to affect the merit order curve and thus the wholesale electricity prices, threatening to distort competition and affect trade between Member States.

On the other hand, following the above, the Commission highlighted that the measure is considered to contribute to the development of certain economic activities, as well as to the efforts in order to achieve the climate targets of emissions cuts in both national and EU levels. Additionally, the Commission resulted in the view that the scheme is well designed to support the development of electricity generation from alternative sources, while handling successfully the risks related to security of supply, considering the measure as an appropriate instrument to this scope. Further, as the measure under examination facilitates the development of additional electricity capacity based on alternative and innovative technologies, other than the so far used hard coal and fossil fuels, it has great potential to bring positive effects in terms of environmental gains, which in total overweigh any risks accompanying it for negatively affecting the trade and competition conditions. Consequently, the European Commission, noting that the measure also serves the proportionality principle, decided not to object to it, considering it to be compatible with the framework governing the internal market.

5.4 State Aid Case SA. 57858 (2021/N) – Thor Offshore Wind Farm in Denmark [26]

The scheme under examination in the current state aid case, concerns the process of a tender on the design, building and operation of an offshore wind farm in Denmark, in the North Sea (Thor site), located 20 km away from the shore. The project includes, except of the wind farm, the offshore substation and the process of the connection to the grid to the point of connection in the shore. Its objective is that Denmark will be supported to achieve its national target of 55% of RES by the end of the decade, with the development of the farm, while it can also accelerate the process of phasing out from coal. Additionally, the project can also support the country – in the long run – to become less and less dependent on fossil fuels as well as to approach the goal of climate neutrality by 2050. At the same time, it can accordingly contribute to the respective goals of the European Union too.

The legal basis of the measure derives from the revision of the Act on Promotion of Renewable Energy (RE Act) and the Act on Electricity Supply that allows an amount of state aid to be provided as a payment within the caps in the two-way contract for the model that concerns the electricity generated by this offshore wind farm. On top of that, the revision was planned to be implemented as soon as the European Commission would approve the scheme and notify the country's authorities for this approval, in adequate time prior to the submission of the final bids for the project. Moreover, considering that the scheme includes a tender process open to all interested actors, the beneficiary could finally be any kind of undertaking, meeting the requested for the project criteria. In particular, the beneficiary would need, inter alia, to not be or have recently been in difficulty, to have fulfilled the repayment of any illegal aid it might had received in the past, to be capable of undertaking all the relevant balancing responsibilities, as well as to be willing not to initiate any processes prior to the granting of the aid. Additionally, the scheme includes aid that shall be provided in the form of a two-way CfD premium, on top of the price for the electricity sold on the market as the difference between the offered price and the reference price, for a specific period of time.

As examining the aid scheme notified by the Danish authorities, the European Commission noted that it derives from State resources since it is planned to be fully funded by the State budget. Moreover, the Commission concluded that it does offer a selective advantage to a specific beneficiary – whichever this might be after winning the tendering process – since this beneficiary is going to be granted additional support in the form of premiums paid on top of the market price. In that sense, the proposed scheme was found as likely to both distort competition and affect trade conditions between Member States. However, the Commission also resulted that the measure is going to contribute to the development of certain economic activities, which are not only beneficial in the national and EU levels but are also unlikely to be properly developed without the granting of the scheme's aid. Taking this into account, the support scheme seems to also provide incentivization, on the basis that the beneficiary will be supported to alter its behavior towards the development of electricity production from the particular offshore wind farm and will lead to increased investments in offshore wind energy production and their interconnections to the grid. As a result, the Commission found the aid to be aligning with the principles of necessity, appropriateness and proportionality, as well as to have higher potential of causing positive effects by both facilitating specific economic activities and promoting environmental protection, then it has to cause any negative ones in the trade and competition conditions, serving the EU's common interest. In the light of the above, the European Commission also decided that the aid scheme is compatible with the internal market rules.

5.5 Observations

In total, as overviewing the state aid cases that indicatively but quite representatively have been overviewed in this paper, it can be noted that among the cases the European Commission has assessed over the last years, most of the times the Commission finds the measure to fall under the four criteria of the Article 107 of the TFEU. Thus, the Commission concludes that the proposed schemes are mostly planned to derive from state resources, as well as to provide selective economic advantage to particular beneficiaries, while threatening to cause distortion on the trade and competition conditions. These are the main elements that are commonly found in such cases and have also been found in all the cases presented in the paper. In that sense, the Commission deeply examines the ways in which these state aid cases can cause negative impacts on the common EU market and the ways in which they can cause positive ones, in order to reach the decisions of not raising objections against them.

Thus, even though the cases indicatively presented above do constitute State Aid, the European Commission assessed them baring into account the “Guidelines on State aid for environmental protection and energy 2014-2020” and the ways in which these schemes are important and contribute to the development of particular economic activities regarding the development of Renewable Energy projects and the innovation on methods of decarbonizations. These economic activities and fields clearly serve the common interest of the EU and the EU Member States as they are connected to both the environmental protection policies of the EU and the energy security strategy of the Union.

Consequently, it has been recorded that the European Commission eventually accepts the granting of such measures, mainly on the grounds that they serve the common interest, contribute in the development of particular and important economic activities that could not have been as such developed in absence of the schemes, as well as that they are necessary for the enhancement of the environmental protection policy and the energy transition both in the Member States and the EU.

6. Conclusion

Having taken into consideration the framework on the State Aid as set by the European Union rules, the policy developments within the European Union; especially regarding the prioritization of the energy transition in a way that promotes the energy security too; as well as the indicative presentation of state aid cases that represent the tendency in the European Commission’s State Aid Decisions, as developed in the current paper, it can be concluded that state aid plays a crucial role on the development of several policy areas within the Member States of the European Union. Most importantly, the key findings of the paper show that state aid is crucial for the development of those economic areas related to the investments on renewable energy and new technologies used in the energy sector and the decarbonization efforts, as well as to the environmental protection. In that sense, state aid measures seem to be generally accepted by the European Commission when they aim to support such fields and serve

the common interest of the EU Member States, especially on environmental protection and the energy transition.
In addition, it has been showcased that the energy and environmental policy of the EU has been developing in a highly dynamic way leading the framework on state aid to follow this dynamic development accordingly. Under that prism, it is highlighted that the main policies regarding the energy efficiency, the use of renewable energy and the decarbonization of the energy sector are the ones pushing the relevant state aid guidelines of the EU to become more flexible in order to overcome policy implications like the ones included in the current paper.
This parallel development of the energy and environmental policy of the EU on one hand and the State Aid rules of the EU on the other, is expected to continue an ongoing course leading to new frameworks that will allow the energy shielding of the European Union.

References

1. "Treaty on the Functioning of the European Union (TFEU)".
2. T. M. M. K. M. K. a. J. T. Rusche, "'Article 107 TFEU'," in The EU Treaties and the Charter of Fundamental Rights: A Commentary, New York, online edn, Oxford Academic, 2019, p. 1111–1166.
3. A. Metaxas, "Introduction to EU State Aid Law," in Hellenic State Aid Institute, EU State Aid Law: Basic Normative Texts, Athens, Commented Edition, Nomiki Vivliothiki, 2011.
4. Commission, "Report on Competition Policy," COM (2011) 328 final, p. 7, 2010.
5. P. Nicolaides, "The Evolving Interpretation of Article 107 (3)(b) TFEU," European State Aid Law Quarterly, vol. 21, no. 1, pp. 31-42, 2022.
6. J. J. Piernas López, "The Notion of Aid Granted by the State or through State Resources," in The Concept of State Aid Under EU Law: From internal market to competition and beyond, Oxford, online edn, Oxford Academic, 2015, pp. 151-182.
7. Case C-83/98 French Republic v. Ladbroke Racing Ltd and Commission of the European Communities ECR I-3271, 2000.
8. P. B. P. &. K. M. Nicolaides, "State Aid Policy in the European Community: Principles and Practice.," 2nd ed., Netherlands: Kluwer Law International, 2005, p. 25.
9. J. J. Piernas López, "The Notion of Advantage," in The Concept of State Aid Under EU Law: From internal market to competition and beyond, Oxford, online edn, Oxford Academic, 2015, pp. 67-102.
10. J. J. Piernas López, "The Notions of Distortion of Competition and Effect on Trade," in The Concept of State Aid Under EU Law: From internal market to competition and beyond, Oxford, online edn, Oxford Academic, 2015, pp. 183-218.
11. K. Talus, "State Aid in the Energy Sector," in Introduction to EU Energy Law, Oxford, online edn, Oxford Academic, 2016, p. 105– 118.
12. E. Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the

Committee of the Regions, The European Green Deal," Brussels, COM/2019/640 final., 2019.
13. E. Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality," 2021, Brussels, COM/2021/550 final.
14. "European Commission, European Climate Law," [Online]. Available: https://ec.europa.eu/clima/eu-action/european-green-deal/european-climate-law_en.
15. A. Metaxas, "EU State Aid Control in a Dynamic Global Environment," European State Aid Law Quarterly, vol. 21, no. 1, pp. 43-53, 2022.
16. "Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, Article 1.".
17. "Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Article 2, Articles 38-48.".
18. "Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Articles 5-7.".
19. "European Commission, State aid Scoreboard 2021," [Online]. Available: https://competition-policy.ec.europa.eu/state-aid/scoreboard_en.
20. E. Commission, "Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020.".
21. F. Alongi, "Joining the Market: State Aid and Renewable Energy in the EU. M. Timoteo (Edited by)," Environmental Law Survey Dipartimento Di Scienze Giuridiche - Alma Mater Studiorum - University of Bologna, ISBN 9788898010226, Bologna, 2014.
22. E. Commission, "Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy 2022.," 2022.
23. State aid case SA.55891 (2019/N) – Denmark – Operating aid scheme for electricity generated by incinerating biomass in existing and fully depreciated biomass plants in Denmark, 2019.
24. State aid case SA. 53525 (2020/N) – The Netherlands SDE+++ scheme for greenhouse gas reduction projects including renewable energy, 2020.
25. State aid case SA.58181 (2020/N) –Tender mechanism for the phase-out of hard coal in Germany, 2020.
26. State aid case SA. 57858 (2021/N) – Thor Offshore Wind Farm in Denmark, 2021.