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The Swedish tax rules for electricity production in breach of EU tax law

by

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Summary

This thesis explores what can, and what cannot be done, in regards to energy taxation, the objective of which is to facilitate green energy and pursue climate neutrality set forth by the EU. There are general rules on State aid which can, in some cases, be considered outdated and not in line with the objectives and ambitious goals which the EU intends to achieve.

As such, the EU has been hard at work adopting new measures which create derogations from the general State aid rules, thereby facilitating new opportunities for Member States to transition from environmentally unfriendly and non-renewable sources of energy production, towards greener energy.

However, as with most things, there is a limit to what rights Member States have in their pursuit of achieving these goals, which must be adhered by, irrespective of the objective which is being pursued, such as climate neutrality. As such, these limits must be explored to see how far Member States are permitted to go in their pursuit of green energy. Furthermore, the way in which the Commission determines which types of aid measures, which are at first sight incompatible with the internal market, are permissible due to the objective they pursue.

Once what can, and what cannot, be done has been explored, the thesis shifts its focus towards what has happened in Sweden regarding energy taxation, and applies the knowledge gathered throughout the thesis in order to come to a conclusion about whether Sweden are within the rights conferred upon them or not.

List of Abbreviations

AG	Advocate General
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEAG	Energy & Environmental State Aid Guidelines
EIPA	European Institution of Public Administration
GBER	General Block Exemption Regulation
kWh	Kilowatt-hour
P.	Page
Para.	Paragraph
Prop.	Proposition (Swedish)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

EU competition law has traditionally prohibited support being granted to undertakings, or sectors of the economy, which distort or may distort competition in the Internal Market. However, there are derogations from the general rules laid out for some higher ranking policy objectives, which environmental protection has fallen to the wayside of in the past in favour of fiscal harmonisation.[1] In some cases, the pursuit of fiscal harmonisation would even go so far as to harm the environment, if implemented as proposed.[2] It is important to note, however, that the historical lack of pursuit for greener energy policies is not due to the EU not wanting to pursue them, but rather due to the requirement of unanimity in proposals regarding taxation, before they can be implemented at an EU level, as well as the lack of consensus between Member States when it comes to the need for green energy.[3]

Despite this, a much bigger focus has been placed on combating climate change lately, through measures such as the European Green Deal, which the Commission presented in December 2019, and the 'fit for 55' package. As focus is being shifted towards green energy and combating climate change, the question arises of which types of green energy are considered higher ranking policies, and thereby privy to the aforementioned derogations, and as such permitted to receive aid measures otherwise considered incompatible with the internal market.

While the aforementioned hurdles seem to have been overcome, there is another hurdle, in that State aid rules are widely considered to be at the very least fairly complex in their nature.[4] Furthermore, practitioners are required to update their knowledge constantly since the jurisprudence and legislation regarding State aid rules evolves on a regular basis.[5] It naturally follows that the proper application and implementation of State aid rules may pose a challenge as a result, particularly since there has historically been inconsistency between the tax energy policy of the EU, on the one hand, and the goals and climate commitments set forth by the EU, on the other.

When the energy market in Sweden underwent reform in 1996, production of renewable energy through windmills and hydropower plants was changed to be taxed based on a property tax system set at a general rate of 0.5%, rather than a production tax based on the amount of kWh produced. The tax levied on windmills was lowered once to 0.2% in 2007, whereas the tax levied on hydropower plants was increased multiple times between the years of 2007 and 2011 ending up on 2.8%, before it was ultimately lowered back down to 0.5% in 2017. The Swedish

[1] *Task Force Report on The Environment and the Internal Market,* (The Environmental Dimension 1992), p. 71, section 2.6.2, para. 1.
[2] Ibid., para. 2.
[3] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Towards a more efficient and democratic decision making in EU tax policy, 15 January 2019, COM(2019) 8 final.
[4] Phedon Nicolaides, *Compliance with State Aid Rules in Cohesion Policy: A Special Report of the European Court of Auditors*, (Lexxion 2016).
[5] *State aid*, (EIPA).

legislation implementing these taxes was amended in 2017 to reflect that the lower level of tax levied on windmills may constitute a form of *de minimis* aid and thereby not be incompatible with State aid rules.

Although the tax measures implemented by Sweden may be in violation of State aid rules, in accordance with Article 107(1) TFEU, there are still other means in which measures are permitted, and therefore not considered a violation of Article 107(1) TFEU. Among these are the derogations laid out in the *de minimis* aid Regulation, GBER, and the EEAG. As such, it is important to explore whether the aid measures implemented by Sweden, if found to be in violation of Article 107(1), are still considered compatible and permissible due to one of these derogations from the general rules.

1.2 Aim

The aim of the thesis is, firstly, to explore whether the way in which Sweden implemented their energy taxation is in breach of EU tax law, with regard to Article 107(1) TFEU, which would also breach article 108(3) TFEU as a result. Secondly, the thesis will explore whether other EU policies or measures exist which effectively change the outcome, thereby resulting in the implemented measure by Sweden being compatible and permissible.

1.3 Method and materials

The main method used for the thesis is legal research applicable to the way in which Sweden set up their aid measure, by looking into relevant case-law, as well as Commission rulings to see the way in which they determine the compatibility of aid measures which otherwise might constitute a violation of State aid rules.

The materials used are Swedish Props.,[6] Swedish legislation, primary and secondary EU law, case-law of the ECJ as well as other courts, rulings by the Commission, as well as books, articles, and other sources.

1.4 Delimitation

The thesis is focused on the way in which Sweden set up their taxation of renewable energy and will focus on windmills and hydropower plants,

despite nuclear power also being a big source of production. Furthermore, as solar power only makes up roughly 1% of Sweden's electricity production, solar power will also be left out of the research.

1.5 Outline

The thesis will start off by exploring what State aid is both in general, as well as in more depth regarding Articles 107(1) and 108(3) TFEU and how they should be interpreted and implemented by Member States. Once State aid has been explored in depth, the thesis will continue on by applying the same methodology to the *de minimis* aid Regulation and special

[6] Proposed bills, for example for legislative changes, which the government sends to the Swedish Parliament.

charges, in order to assess whether these may be of any relevance to Sweden's situation later on.

Continuing on from this, the thesis will explore the existing derogations from State aid which either exist, or existed at the time in question in Sweden, which for windmills is from the year of 2007, and for hydropower plants between the years of 2007 and 2020, when the taxation levied on hydropower plants was back to the general level of 0.5%.

After exploring the rules which are, or were, in effect as well as the derogations under the same criteria, the thesis will then explore what happened in Sweden regarding their tax rules for electricity production, and whether these are in line with State aid rules, or covered by any of the derogations if not.

After all of this has been explored, a conclusion should be able to be drawn regarding Sweden's energy taxation and whether or not it violated EU law in the way in which it was implemented and has been maintained since implementation.

2. State aid, the *de minimis* aid rule, and special charges

2.1 Background

The definition of State aid is as follows: "an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis."[7] The criteria which must be fulfilled in order for an aid measure to constitute an illegal form of State aid which is incompatible with the internal market are laid out in Article 107(1) TFEU, and the four criteria are; the support is granted by the State or through State resources, it distorts or threatens to distort competition, it favours specific undertakings by being selective, and it affects trade between EU countries. All four of these criteria are cumulative and must occur both simultaneously and cumulatively as a result in order for aid to be considered prohibited in accordance with Article 107(1) TFEU.[8]

2.1.1 First criteria

The first condition refers to any aid granted by Member States or through State resources in any form whatsoever and may seem to be worded in a manner which could be considered vague, ambiguous, or even to suggest a differentiation between the two. However, no differentiation should be made between the two, instead the wording should be interpreted in a manner such that aid, in the sense of the article, can be granted directly by the State, as well as by public or private bodies which are either designated or established by the State. Furthermore, State aid can also be granted either directly or indirectly by means of State resources. Although no differentiation should be made between aid granted by Member States or through State

[7] European Commission, *State Aid Overview*.
[8] Rossella Miceli, *The Role of State Aid in the European Fiscal Integration,* (Springer International Publishing Switzerland and G.Giappichelli Editore 2022), p. 25.

resources, one should be made between State imputability and State resources, which also is not made clear from the wording of the article.[9]

However, López mentions in his text on the selectivity and consequences of State aid that in matters of determining whether a form of aid is materially selective or not, there is no solid or clear doctrine, even in recent works by the Court, and they are not without their contradictions.[10] So too seems to be the case when it comes to the first criteria of illegal State aid, as the article states that all forms of aid are to be incompatible with the internal market, so long as they fulfil all the conditions laid out within the article. However, the ECJ has consistently held in, inter alia, Tesco[11] and Vodafone[12], that a tax cannot form an integral part of an aid measure if the tax is not hypothecated to the aid measure in the relevant national legislation.

2.1.2 Second and fourth criteria

The second and fourth criteria which must be met is that aid measures must either distort or threaten to distort competition in some way, as well as the aid measure affecting trade between Member States. These two criteria are being explored together as the Court has held that: "in matters relating to State aid, the two conditions for the application of [Article 107 §1] of the Treaty, namely that trade between Member States must be affected and competition distorted, are as a general rule inextricably linked".[13] Furthermore, although the second criterion states that aid measures must either distort or threaten to distort competition, the Court has held that the Commission does not need to ascertain an actual occurrence of the aid measure affecting trade between Member States or distorting competition, but rather having to examine whether it is possible that the aid measure could do so.[14]

2.1.3 Third criteria

The third condition states that the proposed aid cannot favour certain undertakings or the production of certain goods, and is the selectivity criterion of State aid, although not specifically named so. Furthermore, the selectivity criterion is arguably the most important out of the four different criterions and raises way more important problems within taxation than the other three.[15]

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[9] Micheau, C., *State Aid, Subsidy and Tax Incentives under EU and WTO Law,* (Kluwer Law International 2014), p. 160.
[10] López López, Hugo, *General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters*, (Lexxion Verlagsgesellschaft mbH, 2010), p. 812.
[11] Case C-75/18 *Vodafone Magyarország*, para. 27.
[12] Case C-323/18 *Tesco-Global Áruházak*, para. 39.
[13] Supra n. 9, p. 206-207. See also Case T-288/97, *Regione autonoma Friuli-Venezia Guilia v Commission*, para. 41, and Joined cases T-298/97, T-312/97, T-313/97, 315/97, T-600/97 to T-609/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta and Others v Commission,* para. 81.
[14] Supra n. 9. See also to that effect, Case C-279/08 P, *European Commission v Kingdom of the Netherlands*, para. 131.
[15] Supra n. 9, p. 220.

The criterion for selectivity is fulfilled when a measure applies to specific groups, as opposed to being general measures applicable to the entire system,[16] The criterion can be fulfilled in various different ways, so long as it is selective in nature, as previously mentioned, although selectivity is far too complex in nature to narrow down to a comprehensive list.[17] However, as with most things, some forms of selectivity are more common than others, and the four most common forms of selectivity could be used to form somewhat of a basis to go by, in an incredibly complex part of competition law. These four forms are: structural, territorial, and national selectivity, as well as selectivity which is contingent upon activities.[18] It is important to note that the four forms of selectivity are not mutually exclusive, and measures are in fact more likely to take on multiple of these forms at once, as the combination of the forms is usually what establishes selectivity in the first place.[19]

However, the forms of selectivity are also commonly looked at from two different angles, namely geographic and material selectivity. The geographical criterion was applied in a broad sense by the Commission,[20] meaning that any measures had to apply to the entire territory of the State in order to not fulfil the selectivity criteria laid out in Article 107.1 TFEU. However, the broad application of geographical selectivity later changed after the ECJ's ruling in Azores, where the Court held that a measure was not necessarily selective simply due to not applying to the entire territory of the Member State, as a measure was implemented by an intra-State body, and applied to the entire competence of that intra-State body.[21]

2.2 The obligations inferred by Article 108(3) TFEU

Article 108(3) lays out the obligation of notifying the Commission of any aid Member States plan to grant or alter, as well as the fact that Member States are prohibited from doing so without first notifying the Commission for their approval of the aid, otherwise known as the standstill clause. Article 108(3) has been held by the ECJ, as per settled-case law, to have direct effect.[22]

Although certain aid measures might appear to, or go as far as actually, constitute a form of illegal State aid in accordance with Article 107(1) TFEU, the Commission can deem these measures to be compatible with the internal market, for example on the basis of the EEAG. Two such cases occurred, when the Commission tested proposed aid measures in Italy and Poland. In both cases, it was found that the proposed aid measures constituted a form of State aid in accordance with Article 107(1), however, after testing several factors, such as whether the objective of the aid was for a common interest, whether it needed State aid and as a result the appropriateness and the incentive effect, proportionality, distortion of competition, and

[16] Ibid.
[17] Ibid, p. 221.
[18] Ibid.
[19] Ibid.
[20] Supra n 10, p. 811. See also Commission's Notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03), para. 17.
[21] Ibid. See also Case C-88/03, *Portugal v Commission,* para. 57-60
[22] Case C-39/94, *SFEI and Others,* para. 39-40.

compliance with other provisions of EU law, the Commission ultimately found that the proposed aid measures were compatible with the internal market on the basis of the EEAG.[23]

As is made apparent from the two aforementioned Commission assessments on the compatibility of aid, as well as the fact that the Commission has an exclusive competence when it comes to assessing whether aid measures are compatible with the internal market or not,[24] so long as they do not fall within certain derogations from the general rules, such as the *de minimis* Regulation, that if Member States are uncertain about whether or not their aid measures are properly implemented, or could be incompatible with the internal market, then they should refer the aid measure in question to the Commission for an assessment.

2.3 De minimis aid

2.3.1 General rules

The *de minimis* aid Regulation[25] is a derogation from the general rules on State aid laid out in Articles 107(1) and 108(3) TFEU, and must therefore be interpreted strictly[26], as the Court has consistently held in, inter alia, Statoil Fuel & Retail[27] and Dietrich.[28] Derogations would, if not interpreted strictly, deprive the general rules of their restrictive nature.[29] Article 3(1) of the *de minimis* aid Regulation lays out this derogation from the general State aid rules, so long as the measure in question fulfils the conditions laid out in the Regulation.

Some of the important conditions which measures must abide by in order to comply with the Regulation can be found in, inter alia, Article 3(2), which lays out the ceiling for granted aid at EUR 200 000 over a period of three fiscal years. Article 3(4) states that *de minimis* aid is to be deemed to be granted when the legal right to receive it has been implemented into national legislation, regardless of when the undertaking actually receives the aid. Furthermore, Article 3(5) states that the *de minimis* ceiling may not be exceeded, regardless of the form under which the aid is implemented, or the objective pursued by the measure.

2.3.2 Calculation of gross grant equivalent

Article 4 of the Regulation regards the calculation of the measure to be granted as aid, and Article 4(1) states that aid shall only be granted transparently, in other words, it has to be possible to calculate exactly the “gross grant equivalent of the aid *ex ante* without any need to

[23] See to that effect European Commission, State Aid SA.53347 (2019/N) – Italy – Support to electricity from renewable sources 2019-2021, C(2019) 4498 final, para. 87 and 132.
See also European Commission, State Aid SA.101842 (2022/N) – Poland – Individual Aid for Baltica 2 and Baltica 3 Offshore Wind Farms, C(2022) 6476 final, para. 85 and 134.
[24] Commission Notice on the enforcement of State aid rules by national courts, (2021/C 305/01), para. 10.
[25] Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty of the Functioning of the European Union to *de minimis* aid.
[26] Commission Opinion of 29.8.2019 C(2019) 6290 final, p. 2.
[27] Case C-553/13 *Statoil Fuel & Retail*, para. 39.
[28] Case C-11/99 *Dietrich,* para. 50.
[29] Supra n. 24.

undertake a risk assessment".[30] Furthermore, Article 4(2) states that aid in the form of grants or interest rate subsidies shall be considered transparent aid.

2.3.3 Monitoring the aid

Article 6 of the Regulation builds on Article 4(1) as Member States are required to inform undertakings in writing, when they intend to grant them *de minimis* aid, notifying the undertaking of the prospective amount of the aid, which shall be expressed as a gross grant equivalent, as well as of its character as *de minimis* aid.

Article 6(3) states that Member States shall only grant new *de minimis* aid in accordance with the Regulation *after*[31] having checked that in doing so, the aid will neither exceed the ceiling, nor fail to comply with any of the conditions laid out. Indeed, the Article specifically states: "… and that *all*[32] the conditions laid down in this Regulation are complied with."[33] Article 6(4) of the Regulation sets out a requirement for Member States to record and compile all information regarding their application of the Regulation, among which there needs to be the necessary information in order to show that the conditions of the Regulation have been complied with. Continuing on, Article 6(5) states that Member States are required to provide the Commission with all the necessary information which the Commission needs in order to assess whether the conditions have been compiled with, should the Commission send a written request for such information.

2.3.4 Other obligations

In paragraph (21) of the draft by which the *de minimis* aid Regulation was adopted, as well as in paragraph (21) of the draft for the proposed updates for 2024[34] two more obligations are conferred onto member States.

Firstly, the first paragraph mentions the principle of sincere cooperation, laid out in Article 4(3) TEU, stating that Member States and the Union shall assist each other in carrying out tasks of the Treaties, in full mutual respect. Member States shall, as such, ensure that the way in which they implement aid in accordance with the Regulation complies with all the conditions laid out.

Secondly, the first paragraph also states that Member States should fulfil these obligations, i.e. that the ceiling is not exceeded and that all obligations of the Regulation are complied with, by establishing the tools necessary in order to ensure that the aid does not exceed the permitted ceiling.

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[30] Supra n. 25.
[31] Emphasis added by author.
[32] Emphasis added by author.
[33] Supra n. 25.
[34] Communication from the Commission, *Approval of the content of a draft for a Commission Regulation on the application of Articles 107 and 108 on the Treaty of the Functioning of the European Union to de minimis aid,* (2022/C 435/05).

2.4 Special charges

2.4.1 Background

The prohibition of special charges was laid out, alongside State aid, in Article 4(c) of the ECSC Treaty, and the Article read as follows: "[4]The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: [c] subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;".[35] The prohibition of special charges was not, however, specifically included in the provision of Article 92(1) EEC-V (nowadays Article 107(1) TFEU), which may in part be due to a massive political dispute regarding "the handling of additional- and reduced fiscal charges in export and import"[36], during the years of 1953 to 1956 between Germany and France.[37]

2.4.2 *'Special Charges – a Gap in European Competition Law?'*

In his article, Schön goes on to mention that: "… special charges are the logical counter piece of State aids, and that through their introduction, similar distortions of the competitive situation can occur."[38], despite the fact that special charges are not explicitly mentioned in the Treaty today. In other words, by imposing less favourable conditions onto an undertaking, a group of undertakings, or a sector, which is selective to those specific undertakings and not general in nature, one might argue that it results in the mirror effect of State aid. Furthermore, such a special charge puts those undertakings not subject to it in a more advantageous position relatively to those who are subject to it by proxy of not being placed in a less advantageous position relative to the general market.

Schön further goes on to mention the 'Spaak Report', which played a decisive role in shaping the economic-political objectives and instruments of the EEC and focused heavily on the ban of State aid, whilst not addressing special charges in any fashion whatsoever.[39] Fiscal distortions of the competitive situation were discussed, however only in the context of competences for the harmonisation of legislation.[40] The backdrop, or in other words the notion that special charges are only legally relevant in the coal and steel industry, is questioned by early literature,[41] and as Schön says: "… the question is worthy of a study, whether and to which extent the existing EC prescriptions are opposed to such fiscal charges, by 'penalising certain undertakings or the production of certain goods' in comparison with the mainstream undertakings or the production of certain goods…"[42]

[35] *Treaty establishing the European Coal and Steel Community*.
[36] Wolfgang Schön, *Special Charges – A Gap in European Competition Law*, (HEINONLINE, 2006), p. 497.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.

2.4.3 AG Geelhoed's Opinion

Although it is not clear whether, or to which extent, the current Treaties are opposed to special charges, or whether they have legitimate legal relevance, AG Geelhoed emphasised the mirror image characteristics of State aid and special charges in the opinion he gave for the *Gil Insurance and Others* case, and said that special charges are a measure which is used in order to influence the way in which market participants conduct themselves by means of disincentives, rather than by incentives as State aid would.[43] This would serve to suggest that the legal legitimacy of special charges are acknowledged, at the very least at the AG level.

2.4.4 The characteristics of tax selectivity

The word aid is generally associated with something positive, such as help or assistance, and when it comes to State aid is generally associated with such measures as lowered taxes being levied onto certain undertakings. However, as Micheau wrote about the characteristics of tax selectivity, the implemented measures do not need to necessarily improve the situation of the undertaking receiving it.[44] The implemented measures can also result in the situation of the undertaking getting worse or remaining unchanged.[45] Micheau goes on to write about how a measure can be considered selective even though its beneficiaries, or the ability to determine the sectors concerned, are not possible to identify, or that the measure is allegedly based on mere objective criteria.[46]

The choice of words used is interesting, namely the word 'beneficiaries' which, much like aid, is generally associated with something positive such as deriving advantage from a situation, or in this case the implementation of a measure. Furthermore, as measures can result in a net positive, negative, or neutral change for the undertaking, the word beneficiaries may be misleading, unless read in conjunction with the fact that the sectors concerned cannot necessarily be determined. In light of that, it is possible to come to the conclusion that by imposing special charges onto select undertakings, the undertakings which are not subject to these special charges are the beneficiaries of aid by proxy, who cannot necessarily be determined.

The Court has similarly held that it is irrelevant whether the situation of the recipient has improved, deteriorated, or even remained unaltered after the enforcement of the measure.[47]

2.4.5 Methods of interpretation

The linguistic, or literal, method of interpretation is widely considered the weakest method of interpretation due to the 24 official languages of the EU, and the ECJ has gone as far as to state that the linguistic method of interpretation should be used in conjunction with either the contextual or teleological methods of interpretation.

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[43] Case C-308/01, *GIL Insurance and Others,* AG's Opinion, para. 64.
[44] Supra. n. 9.
[45] Ibid.
[46] Ibid.
[47] Case C-57/86, *Hellenic Republic v Commission of the European Communities.*

2.4.6 AG Geelhoed's Opinion continued

In paragraph 73 of his Opinion, AG Geelhoed states that considering the non-application of special charges as a form of State aid for those who are not burdened by the special charge, incorrect in principle, on legal, economic, and policy grounds.

Firstly, the AG holds that it is incorrect on legal grounds as such an interpretation would lead to an extension of the substantive scope of the prohibition on State aid far beyond the limits which the framers of the Treaty intended it to have, while also encroaching on the scope of Articles 96 and 97 TEC (nowadays 116 and 117 TFEU).[48]

Secondly, he held that it is incorrect on economic grounds as the grant of aid of a national measure, which is general in nature and purpose, may have consequences which are undesirable, as the level of burden brought onto market participants receiving the general rule, would have to be brought up to the level of burden laid on market participants affected by the specific measure.[49]

Lastly, he held that it was also incorrect on policy grounds as it could consequently limit Member States opportunities to apply selective taxes as a policy instrument, and if such application were justified, then Articles 116 and 117 TFEU would never be applicable.[50]

AG Geelhoed continues on by giving an example of applying special charges to a car manufacturer who produces environmentally unfriendly cars, and if they could constitute a form of mirror image State aid, then other producers producing environmentally friendly cars would have to have their tax increased to the same level as the environmentally unfriendly competitor. What is interesting in the example brought up by the AG, is that it regards an environmentally unfriendly competitor versus an environmentally friendly competitor, and raises the question of whether the same logic applies to two environmentally friendly competitors, such as two different types of producers of renewable energy.

3. The Green Deal and updated environmental policies

3.1 Background

As previously explored, State aid rules in their current iteration may be outdated and hindering the progress which the EU wants to achieve, such as 'fit for 55', which makes reducing greenhouse gas emissions by 2030 by 55%, compared to the greenhouse gas emission levels of 1990,[51] a legal obligation.[52] Furthermore, the EU has a goal of achieving complete climate neutrality in Europe by 2050, which means that greenhouse gas emissions would need to be reduced by 100% by that time.

[48] Supra n. 43, para. 74.
[49] Ibid., para. 75.
[50] Ibid., para. 76.
[51] EU Green Deal, section 2.1.1
[52] European Council, *Fit for 55*.

However, drastic measures are required in order to meet these goals, as current policies will only result in greenhouse gas emission reductions of 60% by 2050.[53] Among the required changes are changes to relevant State aid guidelines, which includes the environmental and energy State aid guidelines, which were supposed to be revised by 2021 in order to “reflect the policy objectives of the European Green Deal”,[54] in ways such as ensuring that transitions towards climate neutrality were cost-effective, whilst also phasing out the most polluting fossil fuels and ensuring a level-playing field in the market.[55]

There are, or have been, a handful of different measures implemented in order to achieve these goals, and so it is important to explore what rights, in the form of derogations from the general State aid rules, these measures confer onto Member States in regards to environmental protection and energy taxation of renewable energy sources. Among these measures are the aforementioned European Green Deal and the fit for 55 package, as well as GBER, the EEAG and the Recovery and Resilience Facility.

3.2 The European Green Deal and fit for 55

As previously mentioned, the European Green Deal is the EU’s vision for how to achieve climate neutrality by 2050, and the fit for 55 package is a part of that vision. Notably, the objective of the European Green Deal is focused on setting out clear conditions for an effective and fair transition, which also needs to be irreversible, towards greener energy. Again, as previously mentioned, the fit for 55 package is an important aspect of that vision, insofar as it creates a legal obligation to pursue this vision, allowing for more drastic measures to be made. However, and quite logically, it seems that the majority of the focus is laid on two aspects, namely ensuring the fair and irreversible transition away from fossil fuels, as well as reaching the goal of a reduction of 55% of greenhouse gas emissions by 2030.[56] In other words, there seems to be very little focus, if any at all, placed on aiding the countries which are not currently struggling to reach their 2030 target, or are not in a position where they need to transition away from their energy production mostly relying on non-renewable energy sources, such as Sweden who have already surpassed the 2030 goal.

As the fit for 55 package is a result of the European Green Deal, and a tool in order to help the EU achieve its goals, its focus is of a similar nature, namely to ensure a just and socially fair transition from environmentally unfriendly sources of energy production. However, the package also makes mention of CBAM, the purpose of which is to ensure that the efforts of the EU are not thwarted by companies relocating outside of the EU, by targeting imports of products in high carbon-intensive industries.[57]

[53] Supra n. 51, para. 2.
[54] Supra n. 51, section 2.2.2, para. 3.
[55] Ibid.
[56] Ibid.
[57] Supra n. 52.

3.3 GBER

Article 5(d) of the GBER[58] states that the Regulation shall only apply to aid which is transparent, and in the form of tax advantages, there needs to be a measure which provides for a cap, ensuring that the applicable threshold is not exceeded.

Section 7 of the Regulation is about aid for environmental protection. Article 36(1) of the Regulation states that investment aid which enables undertakings to go beyond Union standards for environmental protection, or to increase their level of environmental protection in the absence of Union standards, shall be compatible with the internal market, thereby constituting a derogation from the general State aid rules. However, Article 36(5) clarifies that eligible costs covered by the Article are to be extra investment costs required to increase the level of environmental protection.

Article 41 of the Regulation focuses on 'investment aid for the promotion of energy from renewable sources'. Article 41(1), similarly to 36(1), creates a derogation from the general rules of State aid for the aforementioned investment aid. Article 41(5) goes on to clarify that this investment aid should only be granted to new installations and it should be independent of output from the facility. Additionally, Article 41(6) states that the eligible costs which may receive the aid should only be the extra investment costs required to promote the production.

Article 42 of the Regulation is similar in fashion to Article 41, being about operating aid rather than investment aid. As such, Article 42(1) is the same as Article 41(1), with the only difference that it regards operating aid instead. Article 42(4) of the Regulation states that the aid shall be granted to new and innovative renewable energy technologies.

3.4 EEAG

Section 3.3 of the EEAG[59] is titled 'aid to energy from renewable sources'. Paragraph 107 of the guidelines mentions the ambitious climate change and energy sustainability goals set out by the EU, and that as a result Directives, such as 'the Renewable Energy Directive' and 'the Fuel Quality Directive' have been implemented. However, since their implementation is not guaranteed to result in the most efficient market outcome, State aid may be an appropriate measure to implement in order to contribute towards the goals set by the Union.

Paragraph 108 states that the Guidelines apply until 2020, despite the European Green Deal setting goals for 2030. The reasoning for this is that the Union deemed that established renewable energy sources would be grid-competitive between 2020 and 2030, and that subsidies and exemptions should be phased out in a degressive way as a result. Finally, paragraph 123 states that, in principle, aid granted to electricity from renewable energy sources should contribute to integrating renewable electricity in the market.

[58] 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.
[59] Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01).

3.5 Recovery and Resilience Facility

There is a working document named The Recovery and Resilience Facility[60], known as the 'Facility', the objective of which was to ensure convergence and a sustainable economic recovery after the coronavirus pandemic. Furthermore, the paragraph 3 of the document states that State aid rules apply within the framework of the Facility, and as much Member States have to ensure that all their investments comply with those rules, as well as any regular rules and procedures. Paragraph 8, found under the second chapter titled 'description of the investment', states that the guiding template covers investment and operating aid and in the accompanying footnote, mentions that, in accordance with the Commission Staff working document,[61] the focus of Member States should be placed on covering costs which are not recurrent in nature, with the exception of the Member States being able to show that doing so will produce longer-term effects which are in line with the objectives of the Facility.[62] Furthermore, paragraph 9 points towards the ambitious goals of the EU and how these goals will require additional investments into renewable energy and renewable-sourced hydrogen.

Chapter 4 of the second Part of the Facility, named 'Green and digital dimensions of the component', states the following: "… As further detailed in the guidance, Member States should also explain how each investment and reform contributes to the 37% climate mainstreaming target. … When explaining to what extent the proposed measures contribute to the green transition or the challenges resulting from it… They are also invited to explain and provide evidence how the component will contribute to reaching the EU's 2030 climate target and climate neutrality by 2050…"[63]

These parts of the section were emphasised for specific reasons. Firstly, the first sentence of the quote lays out the objective focus of the guidelines to investment and reform contributing towards the 37% climate mainstreaming target. The second sentence further specifies that the proposed measures should contribute to the green transition and challenges resulting from it, with the last sentence further iterating on it by stating that the measures should contribute towards reaching the EU's 2030 goals.

3.6 Chapter conclusion

All of these aforementioned measures have something in common, namely that they are derogations from the general rules of State aid, as well as that their objective focus is focused on aid which is not tied to the economic status of undertakings, in other words, the measures are focused on non-recurring costs which are generally investment costs or some form of improvement of the facility in question. Additionally, the measures are focused on the Member States that are likely to have the most amount of difficulty in transitioning to green energy, and as a result have the farthest left to go to reach the legal objectives of the EU.

[60] Recovery and Resilience Facility – State aid, Guiding template: Investment/operating aid for energy from renewable sources, including renewably sourced hydrogen production.
[61] Council of the European Union, *Commission Staff working document guidance to Member States Recovery and Resilience Plans*, SWD(2020) 205 final.
[62] Supra n. 60, page 2, footnote 4.
[63] Supra n. 61, page 7.

4. What happened in Sweden?

4.1 Background

The Swedish energy market underwent reform in 1996, which separated the production and sale of electricity from the network operation of electricity through transmission of electricity.[64] The State Property Tax Act (1984:1052)[65] is the national legislation which sets forth the property tax levels to be levied onto various properties, inter alia, windmills and hydropower plants. When the legislation was amended as per the workings of Prop. 1996/97:1,[66] windmills and hydropower plants were subject to a property tax, rather than a production tax based on the amount of produced kWh, which was set at a general level of 0.5%.

However, the legislation was changed in 2007 in accordance with Prop. 2005/06:143,[67] which regards measures being implemented in order to bolster the production environmentally friendly electricity through windmills. The Prop. implemented an exception for windmills to the general property tax rule of 0.5% levied on production of renewable energy, by instead lowering the tax they were liable to pay down to 0.2%. The main reason given by the government for proposing the exception for windmills, was that windmills cannot continuously produce electricity in the same way as other sources of production[68] and are reliant upon the external and uncontrollable factor of wind in order to produce any electricity.

The government further stated that, as such, windmills are at an inherent disadvantage in comparison to other sources of production, which can continuously produce electricity, such as hydropower plants, and therefore do not possess the same ability to pay the property tax as, for example, hydropower plants do.[69]

Furthermore, an exception aimed at hydropower plants was also created, meaning they were not beholden to the general rule of 0.5% property either. The tax rate of hydropower plants was, however, increased several times up to the rate of 2.8% by 2011.[70] The property tax on hydropower plants has since been reduced back down to 0.5%, which happened between the years 2017 and 2020.[71]

The national legislation was amended in 2017 with Lag (2017:398), through the work of SFS 2017:398,[72] to clarify that the lower tax rate granted to windmills can constitute a form of *de minimis* aid being granted to windmills, in accordance with Commission Regulation (EU) No. 1407/2013. So far, there have been two cases where granting the lowered tax rate to windmills would exceed the ceiling of *de minimis* aid, which brings into question how Sweden handled

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[64] *The Swedish Electricity Market and the Role of Svenska Kraftnät*, (Svenska Kraftnät 2001), p. 1.
[65] *Lag (1984:1052) om statlig fastighetsskatt.*
[66] Prop. 1996/97:1, *Förslag till statsbudget för budgetåret 1997, m.m.*
[67] Proposition 2005/06:143, *Miljövänlig el med vindkraft – åtgärder för ett livskraftigt vindbruk.*
[68] Ibid.
[69] Ibid.
[70] Thornström E, Seppänen S, Westphal Rasmussen J, and Solberg I, *Nordic Tax Report 2022: Electricity Sector*, (Nordenergi WG Taxes and Levies 2022).
[71] Prop. 2016/17:142, *Skatteförslag med anledning av energiöverenskommelsen*.
[72] *Lag (2017:398) om ändring i lagen (1984:1052) om statlig fastighetsskatt.*

those cases, as well as if there is any flexibility granted regarding Member States granting aid measures to production of renewable energy.

4.2 The lowered tax levied onto windmills and State aid

4.2.1 First Swedish case

As previously mentioned, a derogation was created for windmills in Sweden, by lowering the tax levied onto them to 0.2%, and the national legislation was also amended in 2017 in order to reflect the possible characteristic of *de minimis* aid being granted to windmills. However, as has been explored regarding the application of *de minimis* aid (*section 2.3)* there are obligations which must be followed in order for measures to constitute a form of *de minimis* aid. First of all, Member States must ensure that the proposed aid measure will not exceed permissible ceiling, as well as set up the necessary tools to ensure that does not happen.

A matter was brought before Skatterättsnämnden (the Revenue Board) in Sweden in 2017 by Skatteverket (the Swedish Tax Agency) regarding two companies, X AB and Y AB, who produce renewable electricity through the use of windmills.[73] The two companies claimed that since there was no objective support laid out in the national legislation,[74] there could be no other result than taxing them at general rate for windmills of 0.2%. Furthermore, the companies stated that even if they were taxed at 0.2%, it would not result in them being taxed at a lower property tax rate per amount of kWh produced than other types of thermal power plants. Skatteverket claimed, however, that the companies should be taxed at 0.5%, as they deemed it irrelevant whether or not the companies paid more or less than other companies, since the lower level of taxation levied onto them would constitute a form of illegal State aid being granted by its very nature, as it would exceed the permissible *de minimis* ceiling.

Skatterättsnämnden eventually ruled on the matter, stating that in the matter at hand, the question referred to them was about how to interpret the fifth paragraph of 3 § of the national legislation.[75] In the ruling, Skatterättsnämnden mentioned that the aid measure could constitute a form of illegal State aid in accordance with Article 107(1) TFEU and that the notification obligation laid out in Article 108(3) TFEU would then also be applicable, but deemed those factors to be irrelevant in the case at hand, stating that by the letter of the national legislation, there was no option other than taxing the two companies at 0.2%.

In his dissenting opinion to the ruling, Mattias Dahlberg pointed out several reasons as to why the ruling should have been to tax the two companies at 0.5% instead, as taxing them at 0.2% would constitute an illegal form of State aid being granted to windmills, despite that being within the wording of the national legislation, thereby concurring with Skatteverket. Furthermore, Dahlberg points out that taxing the companies at 0.2% as per national legislation, would in fact constitute the granting of an illegal form of State aid, and thereby violate Article 107(1) TFEU as well as be under notification obligation in accordance with Article 108(3) TFEU, as Skatterättsnämnden pointed out but deemed irrelevant. Dahlberg goes on to mention

[73] *Fastighetsskatt: Vindkraftverk, statsstöd,* 2017-02-08 (dnr 28-16/D)
[74] 3 § femte stycket lagen om fastighetsskatt (1984:1052), FSL
[75] Ibid.

Article 3.2 of the *de minimis* aid Regulation, which lays out the ceiling for the aid at €200.000 over a three-year period, which was reached in a two-year period in this case. Finally, he brings up the general block exemption provided for in Articles 41 and 42 of GBER, although these as previously explored, relate more so to aid for new investments, rather than the output of a company. Dahlberg goes on to mention Article 5(d) of the GBER as well and mentions how there is seemingly no measure in place to provide for a cap, ensuring that the threshold is not exceeded.

By breaking down the reasons behind the dissenting opinion, it can be found that as previously stated the aid, if granted to the companies in the form of a lowered tax levied upon them, would exceed the threshold of the *de minimis* aid Regulation, and thereby be incompatible with the internal market, as per Article 107(1) TFEU. In the case of the Federal Republic of Germany v Commission of the European Communities,[76] the Court held, firstly, that the size of the aid granted or the undertaking receiving it is not a determining factor of whether the aid can, or cannot, be compatible with the internal market.[77] Secondly, the Court held that the aid in question in the proceedings was not compliant with the *de minimis* aid Regulation, as there were no guarantees that the ceiling would not be exceeded, as well as the provision implementing it not excluding the aid overlapping with other State aid. As such, the Court held that the aid which the provision in question wanted to provide, could not be implemented, as it was not within the framework of the *de minimis* aid Regulation.

The Court's ruling in this case brings up two relevant points in regard to granting an undertaking *de minimis* aid. Firstly, the concept of guaranteeing that any aid granted does not exceed the threshold laid out within the *de minimis* aid Regulation, and secondly, excluding that the granted aid overlaps with other forms of State aid. First of all, by looking into Article 6.1 of the *de minimis* aid Regulation, it is made clear that Member States who intend to grant an undertaking aid within the scope of the Regulation, must inform the undertaking in writing about the prospective amount they will be receiving, as well as of its characteristic as *de minimis* aid. Furthermore, as per Article 6.3, Member States may only grant aid in accordance with the Regulation after having checked that in doing so, the aid granted will not exceed the ceiling laid out within the Regulation, as well as all other conditions of the Regulation being complied with. Finally, as regards the exclusion of the granted aid overlapping with other State aid, the current legislation in Sweden makes no mention of how to proceed in cases where granting windmills aid, by taxing them at 0.2%, and thereby does not include any form of exclusion from the granting of the aid in cases where it is not compliant with the Regulation.

Furthermore, there are additional Articles of the *de minimis* Regulation which hold relevance in the case at hand. Namely, Article 3(1) which lays out that *de minimis* aid is a derogation from the general State aid rules, and that aid granted in accordance with the Regulation must comply with all conditions laid out. Article 3(5) states that the *de minimis* ceiling may not be exceeded, regardless of the form of the aid measure or the objective it pursues. Article 6(3) states that Member States shall only grant aid after having checked that the ceiling will not be exceeded, as well as that all conditions laid out in the Regulation are complied with.

[76] Case C-156/98 *Federal Republic of Germany v Commission of the European Communities,* para. 39-41
[77] See also Case C-142/87 – *Belgium v Commission ('Tubemeuse')* para. 43

Furthermore, paragraph (21) of the *de minimis* Regulation draft also lays out the principle of sincere cooperation enforced by Article 4(3) TEU.

As such, in accordance with settled case-law and the scope of the *de minimis* aid Regulation, it is clear that multiple conditions of the *de minimis* Regulation were not complied with in Skatterättsnämndens decision to disregard Skatteverket and Dahlberg's dissention opinion, when it was pointed out that doing so would result in non-compliance with the *de minimis* Regulation.

4.2.2 Second Swedish case

Högsta Förvaltningsdomstolen[78] (the Supreme Administrative Court) made a ruling on a case in 2019[79] regarding VindIn AB, a company which owned five windmills liable to property tax, in accordance with the Swedish legislation. VindIn AB disputed a decision by Skatteverket, which was to tax two of their five windmills at 0.2%, while taxing the other three at 0.5%. The reason given by Skatteverket was that if they were to tax all five windmills at 0.2%, then VindIn AB would be receiving an aid, the nature of which would exceed the *de minimis* ceiling.

HFD reached a ruling in the case, after exploring both State aid rules, as well as the *de minimis* Regulation, and found that the national legislation had to be understood in the sense that the lower property tax rate of 0.2% could only be applied in instances where the ceiling of the *de minimis* aid would not be exceeded, and as such VindIn AB would indeed be liable to the property tax rate of 0.5% for three of their windmills.

Although the ruling of the case was ultimately in line with the *de minimis* Regulation, the issue still remains that the Swedish legislation, which had been amended at this point to mention that the lower property tax rate could constitute a form of *de minimis* aid being granted, does in no way establish the tools necessary to ensure that the ceiling is not exceeded, nor provide any measures which can be taken if it is deemed that the ceiling would be exceeded. Instead, HFD had to reach a logical conclusion, in how the national legislation should be implemented, in order to avoid exceeding the permissible ceiling.

4.3 Hydropower plant taxation

4.3.1 Background

An exception to the general rule of 0.5% property tax on production of renewable energy was also set forth for hydropower plants. However, in the case of hydropower plants, this exception was instead to increase the level of taxation which was levied upon them, as opposed to lowering it like for windmills. The rate of tax levied upon hydropower plants was increased several times during the period of 2000-2011, during which it was increased by a total of 460%, taking it from the general level of 0.5% to 2.8%.

In a similar, albeit opposite way, the question of ability to pay is immediately raised, as the reason windmills were granted lower tax rates was due to ability to pay, so one would have to

[78] Hereafter HFD.
[79] Mål: 3873-18 HFD 2019 not. 12.

assume that the tax levied upon hydropower plants must have been raised for similar reasons of them instead being considered able to pay a far higher tax than windmills especially, as well as the other forms of production of renewable energy.

In a non-appealed Commission decision of 4 November 2016, a Hungarian retail tax and Health levy were found to be in breach of Article 107(1) TFEU and as such were never implemented, seeing how the Commission received complaints before they were implemented into law. The retail tax in question was a progressive system based on advertisement turnover, rather than profit, which placed larger companies at an inherent disadvantage as they naturally had higher advertisement turnover than smaller companies. However, a progressive tax based on profit could on the other hand be permissible, as a progressive tax based on profits has a direct correlation with ability to pay, and instead places a higher tax bearing burden on highly profitable companies, as opposed to those with high turnover, which may not necessarily result in profits.

A report from 2016 found that investments in hydropower plants were in fact not profitable in Sweden, whereas costs involved with investment in windmills kept dropping. Furthermore, the production capacity of hydropower plants is set at a level which was considered to be profitable when they were built, which involves weighing the investment costs of building hydropower plants, which is both expensive and a challenge due to the need to obtain environmental permits, against the risk of not using all the inflow of water, effectively letting the production or the inflow go to waste. As such, it would seem that the profitability margin of hydropower plants is quite a narrow one, and as it was calculated based on when the hydropower plant was built, it could result in the hydropower plant no longer being profitable after the property taxes associated with them were increased. As such, the question of whether the increased property tax levied on hydropower plants was in fact a progressive tax based on turnover, as opposed to profits, similarly to the aforementioned Hungarian retail tax, which was found to be in breach of Article 107(1) TFEU.

4.4 Two-fold increased level of taxation

In chapter 5.3.2 of Prop. 2005/06:1 the government explains the reasoning behind the increased hydropower plant tax from the general rate of 0.5%, firstly to 1.2%, and secondly on a temporary basis between the years 2007-2011 to 1.7%. Firstly, the reason for the general increase to 1.2% was due to the fact that Sweden's hydropower plants were on a large scale built between 1945 and 1980, which means that a majority of the plants were written off for tax purposes and had a low production cost. This, in conjunction with the higher price of electricity at the time, would mean a larger profit margin for hydropower produced electricity, whereas the increased tax would instead limit the profit margin of producers, without impacting the cost of consumers. Furthermore, the temporary increase from the new general rate of 1.2% to 1.7% was for the purpose of acting as investment support for the conversion from direct electric heating in residential buildings, as proposed in section 7.1.9 of the Prop., as well as partly as investment support for the conversion from oil heating of residential buildings as notified in section 7.1.10 of the Prop.

However, as previously mentioned, these increases in levels of taxation do not take into account the fundamental way in which hydropower plants are set up, based on when they are built and in a way such that they remain profitable based on the conditions under which they were built. Furthermore, as can be seen in settled case-law, a requirement for a tax to be considered an integral part of an aid measure, is the tax must be hypothecated to the aid measure under the relevant national legislation. In this case, the temporary increase from 1.2% to 1.7% is hypothecated as an aid measure in support of the conversion of direct electric heating in residential buildings as well as the conversion from oil heating in residential buildings, and would thereby constitute a form of aid being granted at the expense of hydropower plants, by levying a higher tax on them on a temporary basis.

4.5 Level of tax further increased

The aforementioned Prop. was put into effect on the 1st of January 2006, with the temporary tax being put into effect only for the period for which it was made, namely 2007-2011. However, the tax base for hydropower plants was further increased to a base level of 1.7% in 2008 as a result of Prop. 2007:08:11,[80] which in turn means the tax would be 2.2% for the period of 2008-2011, whilst the temporary tax of 0.5% was still active. The government once again cited large profit margins as being the reason behind the tax as a result of the price of electricity rising, as well as the marginal production of electricity in hydropower plants, which controls the cost of electricity.

The level of tax on hydropower plants was once again increased in 2011, as a result of the work of Prop. 2009/10:206[81] where the general property tax level of hydropower plants was set at 2.8%, after the temporary period of an additional 0.5% expired, meaning that the level was set at permanent level of 2.8%. Statens energimyndighet (the state's energy authority) and Svensk Energi both submitted comments regarding the proposed change. Statens energimyndighet felt that the increased property tax levied on hydropower plants could be contrary to the goals set forth by the Parliament, of increasing production of electricity from renewable sources. Additionally, Svensk Energi felt that it was unreasonable that hydropower plants were being taxed at a higher rate in order to finance the expected tax revenue loss due to the proposal on abolished audit duty for smaller companies[82]

The opinion of Statens energimyndighet was shared by the previous government[83] in Prop. 2005/06:143, when the property tax levied on windmills was lowered. The government at the time stated, on page 28 of the Prop., that Sweden has to, due to the varying nature of production of windmills both over a 24-hour period and over seasons, place a high amount of reliability on electricity production from hydropower plants. Furthermore, the government went on to state that electricity generated using hydropower plants is an important resource which Sweden needs to rely on in order to balance variations in production and consumption of electricity, especially in times when windmill production is lower than anticipated.

[80] Prop. 2007/08:11, *Vissa punktskattefrågor m.m. med anledning av budgetpropositionen för 2008.*
[81] Prop. 2009/10:206, *Vissa fastighets- och stämpelskattsfrågor.*
[82] Ibid., p. 9-10.
[83] The Swedish government of 1996-2006

4.6 Hydropower property tax reduction

Starting in 2017, the property tax levied on hydropower plants was gradually lowered back down to 0.5%, which was finalised in 2020, through the work of Prop. 2016/17:142.[84] The reversion of the property tax levied onto hydropower plants was, in part, due to the three long-established objectives of EU energy policy, namely: security of supply, sustainability, and competitiveness.[85]

As previously mentioned, the opinions of both Statens energimyndighet and the government of 1996-2006, was that increasing the property tax rate levied onto hydropower plants to 2.8% could adversely affect their ability to produce electricity, which would negatively impact Sweden's supply of renewable energy in two ways. First, and the most direct, is that by potentially creating hinderance for hydropower plants to produce electricity, the amount they produce could have seen a decrease. Secondly, as Sweden relies quite heavily on electricity produced by hydropower plants, including to compensate for the gaps in production of windmills, a potential barrier to production for hydropower plants could also have resulted in a reduced ability to compensate when needed. As such, the security of supply of electricity could have been affected negatively in two ways. Conversely, reducing the property tax levied onto hydropower plants back to 0.5% should result in an increased security of supply, both directly and indirectly.

Lowering the tax on hydropower plants is also logical in the sense of sustainability, as increased rates of taxation on production of renewable energy could have the opposite effect of what the EU is pursuing, by making the production of non-renewable energy more lucrative. As previously explored, the CBAM intends to ensure this is not the case for imports from outside the EU, and therefore it would not be in line with the objectives of the EU if Member States adversely tax production of renewable energy, to the point of non-renewable sources becoming more lucrative.

Competitiveness, which is the final objective, also brings up interesting questions, both regarding the competitiveness of different types of producers of renewable energy, as well as their individual competitiveness on the market. As previously mentioned, one of the main reasons for Sweden lowering the property tax rate which it levied onto windmills was that Sweden deemed that they were at an inherent disadvantage as compared to other producers of renewable energy, which impacted their ability to pay, and by proxy would mean they are not as competitive on the market as hydropower plants. Furthermore, the principle of proportionality is brought into question, as the property tax hydropower plants were subjected to was raised, in a similar fashion as it was lowered for windmills, due to ability to pay. However, it seems as though Sweden may have overlooked the very fact that they deemed that windmills and hydropower plants were not in comparable situations, as one can continuously produce electricity, while the other cannot. As such, simply increasing the amount of tax levied onto a producer due, in part, to a higher ability to pay than another producer not in a comparable situation, is likely disproportionate. Furthermore, Sweden also recognised that their overall

[84] Prop. 2016/17:142, *Skatteförslag med anledning av energiöverenskommelsen.*
[85] European Council for an energy efficient economy, *Energy Union.*

production of renewable energy was contingent upon hydropower plants filling in any potential gaps left by windmills, during the times when their production was suboptimal.

5. Conclusion

As the general Rules of State aid laid out in Articles 107(1) and 108(3) TFEU prohibit State aid which is illegal, if it fulfils all the criterions laid out in Article 107(1), it is important to first explore what these criterions are and how the Commission applies them. Once State aid rules were explored in more depth and examples of what they prohibit looked into, it was then important to also delve deeper into the derogation from the general rules of State aid, conferred onto Member States by the *de minimis* Regulation.

As the *de minimis* Regulation is a derogation from the general State aid rules laid out in Articles 107(1) and 108(3) TFEU, and should as such be interpreted strictly, it is important to explore firstly what permissions the *de minimis* Regulation confers onto Member States. Some of the key Articles of the Regulation, which may have held some relevance to Sweden's energy taxation in one way or another, were explored in more depth, in order to then be able to deduce whether or not they held relevance to Sweden's energy taxation.

However, as these are derogations which must be interpreted strictly and the amount of aid granted by the *de minimis* Regulation is of a small size, it was also important to explore whether other measures had been adapted by the EU in regards to environmental protection and the bolstering of green energy. As such, several measures and proposals were explored, all of which had a common theme of having an objective focus on those Member States who have the farthest to go in order to reach these ambitious goals set by the EU, as well as those who have the worst underlying foundation in place currently, and therefore need the most help with their transition towards green energy.

Having explored all of these measures, it was then possible to apply them to the relevant cases in Sweden as well as the Swedish energy taxation, in order to explore whether the Swedish tax rules for electricity production were, in fact, in breach of EU law.

Taking everything that has been explored into account, it becomes quite apparent that the way in which Sweden's energy taxation is set up constitutes a breach of EU law on multiple fronts. Firstly, the *de minimis* Regulation is a derogation from the general rules of State aid meaning it should not be applied as the general rule. However, the Swedish energy tax system is set up in such a way that the aid is granted to all windmills as a baseline, while providing no tools for how to ensure the ceiling is not exceeded. Furthermore, Member States may not grant undertakings *de minimis* aid without first checking that the ceiling will not be exceeded and ensuring that all conditions of the Regulation are complied with.

However, since *de minimis* aid is granted to windmills as a baseline, without specific windmills requesting to receive the aid if, and when, they need it, it seems unlikely that all the administrative work, such as Member States sending undertakings they intend to grant *de minimis* aid information in writing about the prospective amount of aid they intend to grant the undertaking. In other words, Sweden would be required to inform all companies that produce electricity through windmills of the *de minimis* character of the aid they are receiving, every three years, while also ensuring that the ceiling is never exceeded.

It follows naturally that since one of the obligations of the *de minimis* Regulation is that all conditions laid out in the Regulation must be followed, in order for an aid measure to be deemed a for of *de minimis* aid, any aid measure in which all the obligations are not complied with, is in fact an aid measure not compatible with the internal market. As Sweden has had two separate occasions where aid was granted which could not be guaranteed to stay within the ceiling of the *de minimis* aid, all the obligations are not being complied with.

As such, Sweden's energy taxation is set up in such a way that it breaches EU law, whilst also making it extremely difficult to control by Sweden, and creating a tremendous amount of administrative work.

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