

Energy Policy, Industrial Policy and State Aid

Pablo Ibanez Colomo
LSE & College of Europe

Université Paris-Dauphine, 24 November 2017

Energy policy
Industrial policy
State aid

Complements

Substitutes



Summary

- **Powers**
- Instruments
- Scope

Powers

- In accordance with Article 194 TFEU:

‘1. 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 a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) [...].

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice [...]

Powers

- In accordance with Article 108 TFEU:

‘If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid.

[...]

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision’.

Powers

	Competence	Nature	Actors
<i>EU State Aid Law</i>	Exclusive (EU)	Horizontal	Commission (mostly)
<i>EU Energy Policy</i>	Shared	Vertical	Council and Parliament (mostly)
<i>Industrial Policy</i>	Support	Hybrid?	Various

Powers

- There are discrepancies between EU Energy Policy and State aid, pertaining to the actors involved and the nature of the competences
- Insofar as there is an substantive overlap between them, this issue could give rise to tensions
 - The same outcome can potentially be achieved through different routes
 - There is a risk of conflicting outcomes being achieved through the various routes
 - Concerns have also been raised about the risk of circumvention of the legislative procedure

Summary

- Powers
- **Instruments**
- Scope

Instruments

	Timing of intervention	Nature of intervention	Reach of intervention
<i>EU State Aid</i>	Ex ante/Ex post	Case-by-case	Case-specific
<i>Ordinary legislative procedure</i>	Ex ante	General	General

Instruments

- There are various ways in which intervention under EU State Aid Law can replicate the nature and operation of legislation
 - The precedent-setting nature of intervention in individual cases
 - The launch of a Sector Inquiry allows the Commission to outline its preferred approach to a given issue
 - Block Exemption Regulations and Guidelines may very well function like a legislative instrument

Instruments

- In the context of its sector inquiry into capacity mechanisms, the Commission announced the following conclusions:
 - ‘Capacity mechanisms must be accompanied by appropriate market reforms’
 - ‘The need for a capacity mechanism must be demonstrated’
 - ‘Capacity mechanisms must be fit for purpose and open to all capacity providers’

Instruments

‘Having regard to the legal effects actually produced by the Banking Communication, and given that the European Union has exclusive competence in the State aid sector, in accordance with Article 3(1)(b) [TFEU], and the Commission has competence to give decisions relating to the State aid sector, pursuant to Article 108 TFEU, must the Banking Communication be regarded as binding on Member States seeking to remedy a serious disturbance in the economy by granting State aid to credit institutions where such aid is intended to be permanent and cannot easily be revoked?’

Case C-526/14, Kotnik and Others

Instruments

'36. [...] [I]n this field the Commission has no general legislative power. Only the Council is empowered, under Article 109 TFEU, to adopt any appropriate regulations for the application of Articles 107 and 108 TFEU, on a proposal from the Commission and after consulting the European Parliament. In that context, the Council may delegate certain regulatory powers to the Commission'

Opinion of AG Wahl in Case C-526/14, *Kotnik and Others*

Summary

- Powers
- Instruments
- **Scope**

Scope

- The relative overlap between instruments would not be problematic, in practice, if the substantive overlap were limited in relation to:
 - The range of measures that are potentially caught by each of the instruments, which depends on what triggers intervention
 - The sort of regulatory outcomes that can be achieved as a result of intervention

Scope

- From a superficial standpoint, it looks like the scope of intervention under EU State Aid Law is limited:
 - Action under Articles 107 and 108 TFEU requires the use of State resources and the existence of a selective advantage
 - In principle, one would assume that remedies should be confined to minimising distortions of competition (or restoring competition)
- In practice, it would seem that these theoretical constraints are less important than it may appear

Scope

- The *PreussenElektra* doctrine appeared to be an important constraint on intervention in energy markets
 - As its scope has been progressively clarified, however, it looks like it is not as important a constraint as once thought
 - *Essent* and *Vent de Colere* are some of the milestones that may be interpreted as suggesting this conclusion
- An overview of the Guidelines and Frameworks suggests that the Commission makes regular use of regulatory solutions