



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR ENERGY

Directorate C - Renewables, Research and Innovation, Energy Efficiency
The Director

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Chief Executive Officer
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Silkeborgvej 2
8000 Aarhus C
Denmark

By email: [redacted]

Subject: Italy's retroactive changes to support schemes for solar power

Dear [redacted],

Thank you for your letter dated 7th June 2017 to Commissioner Margrethe Vestager, regarding Italy's retroactive changes to support schemes for solar power. I was asked to reply on her behalf.

We understand and share your concerns regarding the negative impacts of retroactive changes to support schemes. The Commission has repeatedly expressed that renewables support policies should be stable and avoid frequent or retroactive changes. The regulatory risk that comes with such changes has a direct impact on capital financing costs, the costs of project development and investors' confidence. The Commission, in its 2013 communication on guidance for the design of renewable support schemes, sought to avoid this kind of changes.

In order to improve investor security, in the revision of the Renewable Energy Directive proposed by the Commission last November, the Commission has included a provision to prevent Member States from amending their existing support schemes in a way that retroactively impacts existing projects negatively in as far as support has been given in line with state aid requirements.

However, we cannot find a specific breach of the current Renewable Energy Directive. The reason is that the Renewable Energy Directive enables the use of support schemes, but does not prescribe their design, the relevant levels of remuneration (which are in any event subject to State aid rules) and the relationship between the Member States and the beneficiaries of support.

Under the Directive, Member States have the obligation to meet their national target for renewable energy consumption in 2020 and the obligation to introduce measures

effectively designed to ensure that the share of energy from renewable sources equals or exceeds their indicative trajectory, but there is no obligation to apply support schemes.

Pursuant to Article 3(3) of the Directive, support schemes are just one instrument that can be chosen by Member States to achieve the binding national targets established by the Directive for the share of renewable energy in gross final energy consumption and transport in 2020. Member States retain full discretion over whether they use support schemes or not and, should they use them, over their design, including both the structure and the level of support.

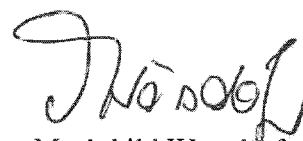
A further question is whether the modifications of the Italian support schemes violate the general principle of legitimate expectations under Union law. According to the ECJ case-law (*Industrie du bois*¹), this kind of principle cannot be interpreted on its own, with no link to the EU legislation behind the application of the national measure. Therefore, the Commission has to interpret the principle of protection of legitimate interest in this case according to what has been established in Directive 2009/28/EC.

As explained earlier, this Directive does not oblige Member States to establish support schemes and does not regulate their design (type and level of support, duration etc). It just gives Member States the possibility to use them, but they can apply other measures in order to meet their targets. The Directive does not contain provisions which, when implemented by Member States, could have created a legitimate expectation that a Member State could not change its support schemes, for example, to avoid over-compensation or to address unforeseen developments such as a particularly rapid expansion of a specific RES technology in a given sector.

The Directive does not oblige Member States to create support schemes or to keep a certain level of support. In addition, the EU Court of Justice has explained that economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary power will be maintained (*Plantanol*²). Hence, the Renewable Energy Directive has not created any legitimate expectations.

Regarding your mention of international arbitration proceedings for breach of the Energy Charter Treaty, the Commission's view is that arbitration tribunals should decline jurisdiction in cases brought by investors from EU Member States, because investor-state arbitration under the Energy Charter Treaty does not apply to disputes between an investor from one EU Member State and another EU Member State (so-called intra-EU dispute). There is no place for investment arbitration inside the Union, because protection of investments within the European Union is governed by Union law and investment arbitration is not compatible with the principle of mutual trust.

Yours sincerely,



Mechthild Wörsdörfer

¹ Case C-195/12 *Industrie du bois de Vielsalm & Cie IBV SA v Région wallonne*

² Case C-201/08 *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*