

Summary Meeting Minutes

Working Group 3 'Funding Instruments and Double Funding'

15.02.2023, 2 p.m. – 3:30 p.m.

I. Background and Goal¹:

This meeting within the framework of the working group 3 "Funding Instruments and Double Funding" was organised to showcase the legal dimensions of involving developing and emerging countries in a PtX market ramp-up. The results of the "Legal analysis of specific variants for financing PtX CfD funding windows" were presented by external experts Dr. Clemens Holtmann and Prof. Dr. Jörg Philipp Terhechte.

II. Presentation:

1. EU State Aid Law (Dr. Clemens Holtmann):

- Article 107 (1) of Treaty on the Functioning of the European Union (TFEU) prohibits state aid in situations where it distorts or threatens to distort competition and trade between EU member states. Elements of Article 107 (1) TFEU include rules on selective advantage, state origin, the beneficiary, and the potential to distort competition within the internal market. State aid laws do not apply when funding comes from non-EU states or international financial institutions. The exception to this rule is when an EU member state is among the financiers of international projects and has an important role in determining who will be the final beneficiary.
 - State aid can be present at several levels when it comes to Contracts for Difference (CfD) – for producers with whom Hydrogen Purchase Agreements (HPAs) are signed, and for consumers with whom Hydrogen Supply Agreements (HSAs) are signed.

¹ The working groups' primary goal is to provide knowledge and recommendations to the public and, within the framework of its statutory purposes, to policy makers in order to support a rapid market ramp-up of green hydrogen and its derivatives. For compliance reasons, the accumulated knowledge will be published on our website and papers will be prepared in order to place the results in a broader context.

- Selective advantage is typically when the HPAs enable beneficial owners to sell hydrogen products at an above-market price. On the other hand, selective advantage does not apply with regards to HSAs because, as in the case of Germany, the purchasers are offering the highest achievable price within the internal market.
- However, Articles 107 (2) / (3) and 108 (4) TFEU provide provisions for where state aid is acceptable.
- Assessment in terms of state aid law is typically performed by first evaluating the aid in accordance with Article 107 (1) TFEU and then an evaluation of the compatibility of the aid with the internal market.
- State aid has to be notified to the European Commission and state aid measures cannot be implemented before the Commission approves it. Rules governing exemptions to the notification rule are laid out in the General Block Exemption Regulation No. 651/2014 (GBER).
- If state aid does not fall within the purview of the GBER, then the Climate, Environmental protection and Energy aid Guidelines (CEEAG 2022) apply.
- Future projects related to hydrogen and derivatives must be in conformity with the CEEAG.
 - Section 3 of the CEEAG lays out the general principles for all measures under the CEEAG.
 - Section 4.1 includes specific assessment principles for aid for the reduction and removal of greenhouse gas emissions, which includes green hydrogen projects.
- The compatibility assessment of state aid is sometimes a balancing act for the commission. The compatibility assessment includes the following elements:
 - Positive condition: *“The aid must facilitate the development of an economic activity”*.
 - Negative condition: *“Aid measure must not unduly affect trading conditions to an extent contrary to the common interest”*.
 - Weighing the positive effects of the aid on climate protection against the negative effects on competition and trade.

- Compatibility under CEEAG is determined by i) proportionality of the aid i.e., the minimum necessary to carry out the project; ii) the aid is limited to fill a funding gap.

2. World Trade Organisation (WTO) Law (Prof. Dr. Philipp Terhechte):

- Subsidies under the World Trade Organisation (WTO) law are governed by the General Agreement on Tariffs and Trade (GATT) Article XVI and Agreement on Subsidies and Countervailing Measures (ASCM). Today, all forms of energy subsidies are potentially covered by WTO law. WTO law contains special provisions for developing countries and international financial institutions are not directly bound by WTO law.
- According to GATT Article XVI: *“If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory...”* then it must notify all relevant parties about the extent and nature of the subsidies, as well as reasons why those subsidies are necessary.
- The ASCM defines subsidies in Art. 1 as *“(T)here is a financial contribution by a government or any public body within the territory of a Member (...) a benefit is thereby conferred.”* Other relevant provisions for subsidies are covered by the following articles:
 - Specificity (Art. 2 ASCM)
 - Export subsidies (Art. 3 ASCM)
 - Actionable subsidies (Art. 5 & Art. 6 ASCM)
 - Special rules for developing countries (Art. 27 ASCM)
- Foreign subsidies are not covered under WTO law in general in accordance with the territoriality principle of the ASCM.
- Article 27 of the ASCM makes provisions for subsidies to the developing countries.

3. Foreign Subsidies Regulation (FSR) (Dr. Clemens Holtmann):

- FSR of the EU entered into force on 12 January 2023, and applies from 12 July 2023. The FSR enables the EU Commission to assess subsidies granted by a third country to undertakings carrying out economic activities e.g., public procurement procedure, within the EU.
- The three new instruments of the regulation are:

- A notification-based instrument for subsidy control in the context of mergers and acquisitions (M&A) (Article 21). The thresholds for this instrument are:
 - At least one of the merging undertakings, the acquired undertaking, or the joint venture, is established in the union and generates an aggregate turnover in the union of at least EUR 500 million;
 - That the companies involved in the merger/acquisition have received a total of at least EUR 50 million from third countries in the last three years preceding the agreement.
- A notification-based instrument for the review of bids in public procurement procedures (Article 29). The thresholds for this instrument are:
 - The value of awarded contract is equal to or higher than EUR 250 million;
 - The bidder was granted equal to or more than EUR 4 million per third country subsidy in the last three years prior to the notification.
- An instrument enabling the EU to carry out ad-hoc investigations (Article 9).
- Article 6 of the FSR enables the Commission to assess the positive effects of the subsidy against the negative ones as in state aid control rules. Merger / award of contract can be stopped by the Commission if there are more negative effects than positive ones.
- The Commission holds extensive investigative powers during this assessment, including on-site investigations in third countries.
- Heavy fines can be imposed if the notification obligations under Article 21 and Article 29 are not followed.

4. FSR and PtX CfD windows (Dr. Clemens Holtmann):

- HPAs with a volume equal to or more than EUR 250 million fall within the scope of the “public procurement” instrument of FSR if the intermediary is considered as a contracting authority.
- If a third country participates in the financing of a PtX CfD window, this contribution may be considered a third-country subsidy in the meaning of FSR. A notification obligation applies, and the commission performs an assessment to weigh the benefits and costs.

- Producers of PtX products who receive an investment subsidy from a third country in addition to the CfD subsidy must be aware of FSR as it may fall within the purview of the FSR.

III. **Comments, Questions, and Answers:**

- Could a production project benefit from the IRA in the USA and apply to the tender process for H2Global and then benefit from both?
 - That is an interesting question. It can do so in theory, but it is ensured in the HPA bidding process that double subsidization cannot take place. This is because every bidder must submit a financing plan over the lifetime of the production facilities, and taxes are a part of this. This information is reflected in the data provided by the bidder.

IV. **Further procedure**

If there are ideas for speakers or desirable input for the upcoming session from among the participants, participants are asked to provide feedback on them to the team of H2Global Stiftung.