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Maintaining support for community energy in Denmark after 2016: legal recommendations



Contents

Executive Summary	3
Key Recommendations	5
1 Do the State aid guidelines allow Denmark to improve renewables support schemes for citizens post-2016?	7
1.1 Support for renewable energy under the State aid guidelines 2014-2020.....	7
1.2 The role of the internal energy market in promoting decarbonisation and fair competition..	8
1.2.1 The requirement to integrate environmental protection into the internal market.....	8
1.2.2 A right to a level playing field for citizens and communities.....	9
1.3 Options for post-2016 reforms.....	10
1.3.1 The need to enhance participation under the annual pool for solar PV	11
1.3.2 Recommendations to enhance participation under the annual pool for solar PV.....	12
1.3.3 The need to maintain support for community-owned wind	12
1.3.4 Recommendations for maintaining support for community-owned wind.....	13
2 Do EU rules allow the Danish Government to continue supporting self-consumption and common ownership through funds collected under the PSO levy after 2016?	14
2.1 PSOs under EU law	15
2.2 The importance of PSOs in Denmark	16
2.3 Post-2016 options for supporting self-consumption and collective ownership through the PSO levy.....	16
2.3.1 Options for maintaining support to installations for self-consumption.....	17
2.3.2 Options for maintaining support to commonly-owned community installations.....	17
About the Community Power Project.....	19

Executive Summary

Community energy and the achievement of climate objectives in Denmark

Denmark has established very ambitious short- and long-term goals for climate and energy. Under the Renewable Energy Directive, Denmark is obligated to meet at least 30% of final energy consumption through renewable energy sources by 2020. Government objectives include expansion of solar up to 800 MW and onshore wind by 1,800 MW by 2020. Denmark also aims to have an energy system 100% based on renewables by 2050.

Community participation in the ownership of renewable energy production is essential to Denmark's - and the EU's - clean and low carbon energy transition, providing a number of environmental, social and economic benefits. In Denmark, as in other Member States, citizens have been the driving force for advancing sustainable development, as well as growth of awareness and public acceptance of renewable energy technologies.¹ In these countries, community energy has helped to build social capital, create local employment opportunities, generate revenue to address community development needs, and combat fuel poverty.² In Denmark, individual consumer households, as well as community and consumer-owned enterprises, e.g. wind turbine guilds (I/S), community foundations, co-operative limited companies (A.m.b.A.), housing associations and municipality owned companies (ApS or A/S) play a strong role in helping deliver these benefits.

The Government supports a number of renewable energy technologies, including wind and solar photovoltaics (PV), to incentivise their further development in line with stated public interest objectives. These technologies - solar PV in particular - are particularly suited for community and individual consumer ownership. To incentivise installation of solar PV systems, the Government exempts consumers with eligible installations from paying national Public Service Obligation (PSO) levies via net metering arrangements. Common owned PV and wind development is supported by a combination of fixed premium subsidy price added to the market price, which reduces as the market price rises; and a fixed feed-in tariff for electricity. Wind development is also subject to a 20% local ownership requirement, among other things.

Due to pressure from the European Commission based on their views on the implementation of internal energy market rules and concern over long-term cost effectiveness, there are changes on the horizon (after 2016) to the supportive measures that make citizen involvement possible. The challenge will be to balance market integration, cost-effectiveness and democratic

¹ See Agentur für Erneuerbare Energien (AEE) (2013). *Renewable Energy in the Hands of the People*. Available at <http://www.unendlich-viel-energie.de/media-library/charts-and-data>; and Kingsley, P (2012). "Windfarms: is Community Ownership the Way Ahead?" *The Guardian* (5 November 2012). Available at <http://www.theguardian.com/environment/2012/nov/05/windfarms-community-ownership>.

² See e.g. Friends of the Earth Scotland (2014). *From Remote Island Grids to Urban Solar Co-operatives: Community Power Scotland* (FoE Scotland: Edinburgh), available at <http://www.foe-scotland.org.uk/sites/files/CommunityPower%202.pdf>; and REScoop 20-20-20 (2014). *Best Practices Report: Part II*, available at www.rescoop.eu; and EESC (2015). *The role of civil society in the implementation of the EU Renewable Energy Directive: An impact study across six Member States*. Available at <http://www.eesc.europa.eu/?i=portal.en.sdo-observatory-red>.

participation in the energy system. Maintaining adequate support for consumer and collective ownership of wind and PV installations after 2016 can contribute to each of these objectives.

Potential changes on the horizon for renewable energy support schemes

In 2012 the Danish Government revised its support scheme for PV and other renewable technologies. Because these measures involved State aid their implementation was delayed until approval from the European Commission could be obtained.

Although it approved the scheme,³ the European Commission raised concerns over how the Danish PSO levy is obtained from consumers and used to support specific producers. Specifically, the PSO levy only supports producers of renewable energy located in Denmark, while being imposed on all electricity consumption including electricity supplied by generators from other Member States. It is possible that this situation constitutes discriminatory charges or taxation in contravention of the Treaty on the Functioning of the EU (TFEU). To address these concerns Denmark has officially committed to, among other things:

1. organise pilot tender schemes open to producers from other States within the European Economic Area (EEA) up to a share of 6% of capacity; and
2. revisit the support schemes for renewable energy (in light of the PSO levy issue) by the end of 2016 in line with the '*Guidelines on State aid for environmental protection and energy 2014-2020*'⁴ (State aid guidelines).

The inevitable revision of support schemes for PV and other renewable energy technologies presents both opportunities and risks. On one hand, scope exists to improve eligibility to participate in the scheme to support self-consumption from PV and collective ownership, which is currently overly restrictive. However, there is also a perceived risk that in order to comport with the State aid guidelines, the Danish Government will need to make revisions to the support schemes that will make it even harder for citizens and smaller collectively-owned community enterprises to access incentives to produce renewable energy from solar PV or wind.

The aim of this briefing

In this briefing, we assess the State aid guidelines and its impact on the revision of support schemes for renewable energy after 2016 - particularly solar PV and wind. Specifically, this briefing responds to two questions:

1. Do the State aid guidelines allow the Danish Government to improve and maintain support schemes for PV and other technologies in order to promote participation of citizens, without subjecting them to EU-wide competitive bidding processes?

³ European Commission, State aid Decision No SA.36204 2013/N Denmark – Aid to photovoltaic installations and other renewable energy installations, 24.10.2014, C(2014) 8004 corr.

⁴ European Commission, Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), OJ 28.6.2014 (hereinafter referred to as the 'State aid guidelines').

2. Do EU rules allow the Government to maintain support to individual household self-consumption and common community-owned installations through funds collected under the PSO levy?

Summary of conclusions

We conclude that **under the State aid guidelines, the Danish Government is not prohibited from maintaining and/or enhancing support arrangements for individual consumers and common community-owned installations after 2016.**

Specifically, there is scope for the Danish Government to:

1. Enhance eligibility for individual household consumers, and commonly owned installations (up to 1 MW of installed electric capacity) to participate in support schemes for PV; and
2. Maintain current feed-in premiums for common community-owned wind farms (up to 36 MW of installed electric capacity) after 2016.

There is no requirement under the State aid guidelines to subject installations under the thresholds stated above to EU-wide competitive bidding processes.

Moreover, **Denmark maintains flexibility under the State aid guidelines - and arguably a commitment - to extend support schemes beyond the thresholds articulated above, if doing so is needed to ensure public support and level the playing field for competition** so that it can effectively meet its common interest objectives of promoting the deployment of renewable energy and combating climate change.

Second, **this briefing concludes that the Danish Government may maintain and/or enhance support arrangements for community energy after 2016 through funding provided by the PSO levy.** Net metering arrangements for supporting self-consumption under the 20 MW pool can be maintained. Furthermore, as long as the community energy sector is sufficiently defined and time limitations for support are established, it is possible for the Danish Government to maintain feed-in premium arrangements for common community-owned wind and solar PV installations through the PSO levy.

Key Recommendations

1. To promote more competition, existing rules under the annual pool for PV should be expanded to allow for more participation from individual households and common community-owned projects.
 - o The geographical limitation for participation in common ownership of solar PV installations should be considerably expanded.

- The limitation on individual household ownership of 6 kW or less should be relaxed so that individuals with household PV installations are not prohibited from participating in common PV ownership.
 - Application procedures for participating in the pool should be revisited for commonly-owned PV installations to make it easier for them to participate.
2. The possibility of including self-consumed or commonly owned solar PV installations (at the very least for installations with less than 1 MW of installed electric capacity) in an auctioning or tendering scheme open to operators throughout the EU after 2016 should be foreclosed. If such a scheme is envisioned for after 2016, it must be established separately in order to ensure sufficient local participation and ownership from local citizens.
3. Post-2016 support for renewable energy sources must not make it harder for community initiatives to realise new projects from wind.
- Commonly-owned community renewable energy installations should be explicitly defined under the law as a distinct class of market actors in the energy system. Such a definition should include collective, democratically-governed entities, promoting a sufficiently wide range of models for citizen ownership and participation, including - but not necessarily limited to - wind turbine guilds (I/S), community foundations, housing associations and municipality owned companies (ApS and A/S).
 - Due to the complexity and financial uncertainty around participation in competitive bidding processes, feed-in premiums for commonly-owned onshore wind projects (up to 36 MW of installed electric capacity) should be maintained post-2016. If the Danish Government decides to revise support towards tendering after 2016, it should exclude commonly-owned community installations as defined under the law.
 - Alternatively, separate tenders should be organized for eligible commonly-owned community enterprises such as wind turbine guilds (I/S), community foundations and housing associations so that they can compete on an equal playing field.
 - Bidding rules and procedures for nearshore and offshore projects should be revised in order to promote common ownership and competition by community-based enterprises.
4. In the interest - and need - to maintain incentives for individual consumers (both households and enterprises) to reduce consumption of electricity from the public grid and to self-produce their own green energy, the Government should maintain PSO-funded support to renewable energy produced from PV for self-consumption. Likewise, the Government should maintain funding for feed-in premiums after 2016 through the current PSO levy scheme, at least to support common ownership of community wind (up to 36 MW of installed electric capacity) and solar PV (at least up to 1 MW of installed electric capacity) installations.

1 Do the State aid guidelines allow Denmark to improve renewables support schemes for citizens post-2016?

Under Article 194 of the Treaty on the Functioning of the European Union (TFEU), Member States retain a large amount of discretion in the type of national support they provide to renewable energy. However, the development of such schemes is still influenced by EU objectives, chiefly the promotion of competition and completion of the internal energy market (IEM). These rules are also contained in the TFEU, prohibiting for instance barriers to trade across Member States and discriminatory duties or taxes on imports.

1.1 Support for renewable energy under the State aid guidelines 2014-2020

Under Article 107(1) TFEU, State aid is in principle prohibited as being incompatible with the internal market. However, on the basis of Article 107(3) TFEU, certain aid for renewable energy may be compatible with the internal market.

Reflecting the European Commission's steer towards market-based approaches, and ultimately to end subsidies for renewable energy, last year it finalised new "*Guidelines on State Aid for Environmental Protection and Energy*" (State aid guidelines).

Under the State aid guidelines, Member States will be expected to transition towards more competitive forms of support for renewable energy. From 1 January 2016, only projects with an installed capacity of less than 500 kW, or wind projects with an installed capacity of 3 MW or 3 generation units will be able to receive fixed-priced feed-in tariffs (FiTs). Projects exceeding these thresholds will be required to participate in a feed-in premium system.⁵ Furthermore, between 2015 and 2016, aid for at least 5% of planned new electricity capacity should be granted through clear, transparent and non-discriminatory competitive bidding processes.

From 1 January 2017, Member States will be expected to transition towards competitive bidding processes open to all generators based on non-discrimination and technology neutrality.⁶ Exemptions will apply only to installations with an installed capacity of less than 1 MW, demonstration projects, or wind installations with an installed capacity of up to 6 MW or 6 generation units, which may be eligible for feed-in premiums.

However, the State aid guidelines recognise that market integration, and more specifically auctioning or competitive bidding processes, is not appropriate for all actors. Therefore, it provides exemptions for small types of installations "for which it cannot be presumed that a bidding process is appropriate."⁷ Specifically, the State aid guidelines exempt Member State from holding competitive bidding processes if they can 'demonstrate' that:

1. only a limited number of projects or sites could be eligible;

⁵ Coincidentally, this already exists in Denmark with regard to collective solar PV and wind installations.

⁶ State aid guidelines, para 127.

⁷ State aid guidelines, paras 111 and 123.

2. a competitive bidding process would lead to higher support levels (e.g. to avoid strategic bidding); or
3. a competitive bidding process would result in low project realisation rates (avoid underbidding).

In effect, this means that if a Member State can demonstrate that at least one of the above scenarios would result from competitive bidding, the Member State can implement another scheme while still maintaining consistency with the State aid guidelines.

Bidding processes should also be open to all technologies, although Member States may get around this where the bidding process would lead to a suboptimal result which cannot be addressed in the process design in view of, in particular:

1. The longer-term potential of a given new and innovative technology; or
2. The need to achieve diversification; or
3. Network constraints and grid stability; or
4. System (integration) costs; or
5. The need to avoid distortions on the raw material markets from biomass support.

In conclusion, there are a number of exceptions whereby Member States maintain the prerogative to maintain FITs or premium support schemes for renewable energy without overstepping the State aid guidelines. However, it is currently unclear 'how' these exceptions might be demonstrated.

1.2 The role of the internal energy market in promoting decarbonisation and fair competition

A fully operational IEM can result in better efficiency, competitive prices, security of supply and environmental sustainability, but only if IEM completion is pursued in line with decarbonisation objectives. As mentioned above, community participation in the energy system can drive uptake, develop public awareness and acceptance and enhance competition for clean low carbon energy sources. In order to realise these public interest objectives, however, citizens must be able to compete on a level playing field - not just as active consumers but also as members and owners of enterprises that produce or supply renewable energy.

1.2.1 The requirement to integrate environmental protection into the internal market

EU law requires internal market objectives to be balanced with other important EU objectives such as protection of the environment. The TFEU commits the EU to work for sustainable

development and a “high level” of protection and improvement of the European environment. It also requires integration of environmental considerations into the definition and implementation of all EU policies.⁸ Furthermore, under Article 194(1) TFEU, energy policy should be adopted with regard for the need to preserve and improve the environment, including action on climate change.

As has been demonstrated by numerous examples in various Member States,⁹ community energy is proven to contribute towards combatting climate change and to support local development and economic resilience. Directive 2009/28/EC (the Renewable Energy Directive)¹⁰ states that renewable energy development should take into account positive impacts on regional and local development and employment opportunities.¹¹ Directive 2009/72/EC (the Third IEM Directive on Electricity) requires Member States to “implement measures to achieve the objectives of social and economic cohesion and environmental protection,” including “means to combat climate change.”¹² Case law of the Court of Justice of the EU (CJEU) has also long recognised the need to balance internal market and environmental protection objectives.¹³

As meaningful climate action requires fundamental shifts in human behaviour, market objectives such as integration and market completion must be balanced by the need to incentivise participation and ownership by individual consumers and other local actors - primarily by creating a level playing field.

1.2.2 A right to a level playing field for citizens and communities

Because individual consumer and commonly-owned community enterprises are different from more established market participants, IEM rules may require different treatment in certain circumstances to support an equal playing field.

The community energy sector is different from traditional market actors for several reasons. First, community projects tend to form under legal ownership models that are more democratic and do not fit traditional structures of commercial enterprises. Furthermore, the aims and objectives of these projects differ from traditional commercial enterprises in that they incorporate non-profit and/or community aims into their objectives. They are also composed mainly of local members of the community that often lack prior experience in the sector, and as startups they often rely on volunteer support with little paid staff.

⁸ Article 11, Treaty on the Functioning of the EU (TFEU).

⁹ Roberts, J *et al* (2014). *Community Power: Model legal frameworks for citizen-owned renewable energy*. (ClientEarth: London). See also examples provided above, *supra* note 2.

¹⁰ Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Renewable Energy Directive) OJ L 140, 5.6.2009, p 16.

¹¹ Renewable Energy Directive, recital 4.

¹² Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Third IEM Directive on Electricity) OJ L 211, 14.8.2009, p 55, Article 3(10).

¹³ See *PreussenElektra v Schleswag* (Case C-379/98) [2001] ECR I-2099; *Ålands Vindkraft AB v Energimyndigheten* (Case C-573/12) OJ C 38 9.2.2013; and *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* (Cases C-204/12 to C-208/12).

In Denmark, a number of entities potentially fit the characteristics described above. First, common projects may be established as general partnerships (*Interessentskab – I/S*), also known as wind turbine guilds (*Vindmøllelaug*). Community (or Commercial) Foundations, which largely resemble a trust fund, are also becoming popular as a way to ensure benefits from renewable energy projects are distributed throughout the community. Furthermore, non-profit customer-owned co-operative limited companies (*Andelsselskaber med begrænset ansvar – A.m.b.A.’s*) play a significant role in meeting communities’ energy needs. Housing associations now make it possible for citizens in social housing to benefit from renewable energy technologies. Finally, municipalities can complement citizen action, either through a Public Limited Liability Company (*Akieselskab – A/S*) or a Private Limited Liability Company (*Anpartsselskab – ApS*).

From our experience working with community energy in Denmark and six other Member States, we see that the community energy sector experiences distinct issues that differentiate them from larger market incumbents. These issues include disproportionate impacts from costs and administrative barriers associated with the preparatory phase of projects, lack of experience compared to larger firms, risks related to upfront costs, and asymmetry of information and capacity between community enterprises and bigger and more established undertakings.

The distinct characteristics of community enterprises, and the unique issues that they experience warrant special consideration in terms of regulation. Under the principle of equality, only similar network users should be treated similarly. The CJEU has ruled that the general principle of equality prohibits “treating similar situations differently and treating different situations in the same way, unless there are objective reasons to do so.”¹⁴ It is intended to make sure groups or companies cannot block the entrance of competitors through indirect discrimination.¹⁵ It follows that under the legal principle of non-discrimination, to treat different network users similarly could constitute discrimination in itself. Likewise, where actors are in sufficiently different positions or situations, different treatment is not discriminatory.¹⁶ The State aid guidelines acknowledge this to some extent by allowing Member States to create different arrangements to support smaller undertakings.

1.3 Options for post-2016 reforms

The State aid guidelines provide the Danish Government with significant scope to maintain, and indeed improve, support schemes to incentivise citizen participation in uptake of both PV and wind installations. Specifically, there is a strong argument that post-2016 renewables support schemes should exempt small – and even larger – community projects from a requirement to participate in competitive bidding/auction processes. Alternatively, competitive bidding/auction processes must include provisions to ensure that community projects are able to compete on ‘equal footing’ with other participants in order to avoid discrimination.

¹⁴ *VEWM and Others* (Case C-17/03) [2005] ECR I-4983, paras 42-46; and *Citiworks AG* (Case C-439/06) [2008] ECR I-3913, para 42.

¹⁵ Kruimer, H (2014), *The Non-discrimination Obligation of Energy Network Operators: European Rules and Regulatory Practice*, p 68 (Intersentia: Cambridge); and Tobler, C. (2005). *Indirect Discrimination. A case study into the development of the legal concept of indirect discrimination under EC law*, p 35 (Intersentia: Antwerp).

¹⁶ Kruimer, H (2014), *supra* note 15 at p 275.

1.3.1 The need to enhance participation under the annual pool for solar PV

The eligibility rules under the Danish support scheme for solar PV should be relaxed after 2016 to allow more participation in the common ownership of solar PV installations. It is possible to make these changes without breaching the State aid guidelines.

Under the current 'Net Settlement' arrangement approved by the Commission, the owners of eligible PV installations are exempted completely or partially from paying some of the charges related to power that is produced for self-consumption (e.g. the network, system and PSO tariff, and the electricity duty).

Under the new system, an annual pool of 20 MW was established.¹⁷ The annual pool is further divided into four 'sub-pools', each one representing a different set of eligible participants:

1. Individual households (12 MW for 2015);
2. Housing/rental associations (18 MW for 2015);
3. Solar co-operatives (15 MW for 2015); and
4. Municipally owned installations (15 MW for 2015).

Participants can choose from six different 'net settlement groups', each one with different rules, conditions and calculation of incentives. Participation in a particular settlement group will often depend on the participant, based their specific characteristics (e.g. commonly-owned installations export directly to the grid instead of being eligible for net metering).

The application window for the pool and sub-pools opened on 16 March 2015. Despite wide participation from individual households, housing/rental associations and municipalities, there were only four applications submitted by commonly-owned projects.¹⁸ Weak participation of this group is blamed on overly restrictive rules for the eligibility of individuals to participate in the support scheme through common ownership.

Rules for common ownership of solar PV installations were established by a 2012 Executive Order.¹⁹ Under Section three of the Order, common solar PV installations may be owned by several individuals together in equal shares, equal influence and equal liability or of a separate legal entity. However, ownership is limited to installed capacity amounts of 6 kW or less per household. Furthermore, individuals that are participants of another pool (e.g. individual households) are prohibited from participating in co-ownership. Finally, co-owners must have a

¹⁷ Because of the two year delay in State aid approval from the Commission, the annual pool for 2015 was 60 MW.

¹⁸ See Energinet.dk (2015). "Energinet.dk has drawn for solar PV," *Energinet.dk news* (6 July 2015). Available <http://www.energinet.dk/DA/EI/Nyheder/Sider/Energinet-dk-har-trukket-lod-om-solcelleanlaeg.aspx>.

¹⁹ Danish Energy Agency, Order on subsidies for electricity produced by certain solar PV grid connected November 20, 2012 or later.

residence from the installation that is not more than 2km from the point where the installation is connected to the grid.

The above rules have resulted in the restriction of solar co-operatives from participating in the pool. Even despite the existence of some solar common ownership entities, there were very few applications submitted, implying that the pool application procedures and/or rules for eligibility were too stringent.

1.3.2 Recommendations to enhance participation under the annual pool for solar PV

In order to promote more competition, existing rules laid out under the 2012 Executive Order should be expanded to allow more participation from individual consumer households and common ownership schemes. First, the geographical limitation for participation in common ownership of solar PV installations should be considerably expanded. Second, the limitation on individual ownership of 6 kW or less per household should be relaxed so that individuals with household PV installations are not prohibited from participating in common PV ownership. Third, application procedures for participating in the pool should be revisited for commonly-owned installations. The possibility of including self-consumed or commonly owned solar PV installations (at the very least for installations under 1 MW of installed electric capacity) in an auctioning or tendering scheme open to operators throughout the EU after 2016 should be foreclosed. If such a scheme is envisioned for post-2016, it should be established separately in order to ensure local participation and ownership.

The above changes can be made in a way that is consistent with the State aid guidelines. First, at least for installations with an installed capacity of less than 1 MW, after 2016 competitive bidding processes need not apply under the State aid guidelines.²⁰ More importantly, however, based on experience thus far there is an argument that under the annual pool only a limited number of projects or sites are eligible and currently resulting in low project realisation rates - at least for commonly-owned PV installations. Where the Danish Government can demonstrate either of the above, it should be able to elect for an alternative to competitive bidding.

1.3.3 The need to maintain support for community-owned wind

There is currently a strong trend among Member States towards the introduction of competitive tenders/auctions for the awarding of the installation of new capacity from renewable energy sources. Even the Danish Government has committed to open up pilot tenders organised for 2015 and 2016 to renewable energy producers from other EEA States, up to a share of 6% of the tendered capacity. Where a more competitive bidding process is foreseen after 2016 the Danish Government should come up with alternative arrangements for commonly-owned community projects with a preference for maintaining current support.

Currently, onshore wind is supported through a combination of fixed premium subsidy price added to the market price, which reduces as the market price rises; and a fixed feed-in tariff for

²⁰ Conditions elaborated in paragraphs 128 and 131 of the State aid guidelines are still applicable.

electricity.²¹ To promote local ownership, incentives are supported by a requirement in the Promotion of Renewable Energy Act, which among other things requires developers to offer 20% of overall ownership of onshore wind projects larger than 25 metres (in height) and non-tendered offshore projects to eligible persons in the local community.²²

The current support scheme to support community ownership of onshore and offshore wind projects clearly provides an incentive for investment and uptake in such technologies. It is well understood by national and local lending institutions and provides investor certainty, even for smaller community projects. Furthermore, right-to buy provisions pursue a legitimate objective of environmental protection by promoting public participation and acceptance through guaranteeing ownership of renewable energy installations.

However, community enterprises increasingly find it very hard to compete against larger wind developers in Denmark, and therefore rely more and more on a right-to buy in order to participate. Furthermore, right-to buy requirements do not always guarantee public acceptance by local citizens. This is evidenced in Thisted Kommune, which has not seen any windmills developed in 10 years despite having some of the best wind conditions in Denmark. Furthermore, there are not always enough citizens interested in participating in right-to buy schemes, and the system has experienced abuse.

The framework for incentivising new onshore and offshore wind projects needs to be reformed in order to provide community initiatives with an equal playing field. This will require revisiting planning and consenting regimes for onshore and offshore wind projects to ensure that community projects are no longer crowded out by larger developers. In the meantime, post-2016 support for wind must not make it harder for community initiatives to realise new projects.

1.3.4 Recommendations for maintaining support for community-owned wind

Feed-in premiums for onshore wind should be maintained post-2016. Auctioning and tendering processes are not well suited to support community ownership. First, they introduce more uncertainty for project realisation. Depending on how procedures are designed, planning for participation is too complex or difficult for community projects that have limited expert capacity. Furthermore, depending on the revenue stream available from winning the contract, there is a higher risk premium for the project. Second, auctions are subject to collusion and underbidding. This not only shuts out smaller less organised participants, but it also results in higher overall costs as shortfalls in the realisation of projects occur. Third, participation in auctions requires sunken transaction costs, as do obtaining necessary regulatory permits. This is funding that most community projects simply do not have.

There is evidence from offshore bidding tendering procedures in Denmark, which are run by *Energistyrelsen* (the Danish Energy Agency). Despite proven capabilities by community initiatives to realise offshore wind projects, current tendering criteria all but prohibit community-

²¹ See Energistyrelsen (2013). *Outline of the Danish Support Schemes for Electricity Generation Based on Renewables, Memorandum* (22 April 2013), p 3.

²² Promotion of Renewable Energy Act 2008, Act no. 1392 of 27 December 2008, Part 1, section 13.

owned enterprises from competing against other developers.²³ This prevents competition and potentially discriminates against smaller or emerging actors.²⁴

The above challenges provide sufficient reasons to keep smaller scale and community-owned onshore wind development from competitive bidding/auctions post-2016. Under the State aid guidelines, installations with an installed capacity of up to 6 MW or 6 generation units may be eligible for feed-in premiums. This means that the State aid guidelines will allow wind projects with a total installed capacity of up to 36 MW to be supported outside of competitive tenders or auctions after 2016 without needing to provide a justification. As the Government already provides this type of support to common ownership of wind - and indeed even solar PV - installations, no change is needed.

Furthermore, based on the above, it should be possible to demonstrate that under competitive tenders or auctions, only a limited number of projects or sites above 36 MW would be eligible and would also result in low project realisation rates. This is because with less opportunity for ownership/participation, communities are less likely to support new projects.

2 Do EU rules allow the Danish Government to continue supporting self-consumption and common ownership through funds collected under the PSO levy after 2016?

In the EU, energy is considered an 'essential good'. As such, national governments may define a number of public service requirements (or public service obligations, PSOs) to protect consumers in ways that the free market cannot guarantee.

PSOs vary depending on national context. PSOs can be imposed on various energy market actors, such as TSOs, DSOs, utilities and suppliers. They can also be relied on by other actors such as businesses and consumers. PSOs can be achieved through regulatory standards, measures or requirements and may vary in scope - they relate to security of supply, regularity, quality and price of supply, and environmental protection (e.g. energy efficiency, renewable energy and climate protection).

Because of their aim to pursue specified public service objectives, PSOs may operate as derogations from generally applicable EU rules, for instance on competition and the internal market (e.g. free movement). However, they must also strike a balance. Below we will assess whether it is possible to maintain funding of support for community PV and wind under the current PSO levy while observing relevant competition and internal market rules.

²³ See Windpeople and their recommendations for rules on establishing offshore wind farms. Available at <http://www.windpeople.org/wind-peoples-samlede-anbefalinger-til-fremtidig-vindmoelleplanlaegning/>.

²⁴ See for example, the legal challenge recently brought by Wind & Welfare against the Danish Energy Agency for the adoption of disproportionate tendering criteria that prevents Wind & Welfare from competing on a bid to develop a 350 MW nearshore wind project. Available at <http://www.theenergycollective.com/greenwell-future/2262413/crowdfunders-threaten-cozy-world-largescale-renewable-energy-provision>.

2.1 PSOs under EU law

Under Article 3(2) of the Third IEM Directive on Electricity, Member States may impose PSOs on undertakings operating in the electricity sector, in the general economic interest, as long as they are clearly defined, transparent, non-discriminatory and verifiable (in addition to further criteria that is stated below). Member States are required to implement measures to achieve social and economic cohesion and environmental protection objectives, including means to combat climate change through, inter alia, adequate economic incentives.²⁵ These incentives must, however, comply with State aid rules.²⁶

The State aid guidelines state that any levy that has the aim of financing a State aid measure needs to comply with Articles 30 and 110 TFEU.²⁷ Otherwise, it is not compatible with the internal market within the meaning of Article 107(3)c TFEU.

Under Article 30 TFEU, “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.”

Under Article 110 TFEU:

“No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”

According to case law of the CJEU, a charge imposed on domestic and imported products according to the same criteria may nevertheless be prohibited by TFEU if the revenue from such a charge is intended to support activities that specifically benefit the taxed domestic products. If the advantages that those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect contrary to Article 30 TFEU. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 TFEU.²⁸

Nevertheless, PSOs may operate as derogations from otherwise generally applicable EU rules on competition and the internal market. The CJEU has ruled that PSOs may be enacted in order to protect final consumers, as part of “the reconciliation which MS must make ... between the objectives of liberalization and ... the necessary protection of final consumers.”²⁹ However, the

²⁵ Third IEM Directive on Electricity, Article 3(10).

²⁶ Third IEM Directive on Electricity, recital 49.

²⁷ State aid guidelines, paragraph 29.

²⁸ *AEM SpA v Autorità per l'energia elettrica e per il gas and Others* (Joined Cases C-128/03 and C-129/03) [2005] ECR I-02861, paras 44 to 47; and *Essent Netwerk Noord and Others v Staat der Nederlanden* (Case C-206/06) [2008] ECR I-05497, para 42.

²⁹ *Federutility and Others v Autorità per l'energia elettrica e il gas* (Case C-265/08) [2010] ECR I-03377, para 32.

PSO must be positively justified by the Member State. The PSO must also comply with specific criteria: 1) the PSO must be limited in duration (i.e. transitional in nature - not permanent); 2) the PSO must be proportionate; and 3) the PSO must respect requirements contained in Article 3(2) of the Third IEM Directive on Electricity. If a measure has the potential to amount to discrimination, the Member State can take positive measures to remedy the situation. Lastly, Member States have an obligation to notify the Commission.³⁰

2.2 The importance of PSOs in Denmark

In Denmark, PSOs are characterised as obligations imposed on certain types of licensed companies. Under the Danish Electricity Supply Act, all consumers must pay a proportionate part of expenses related to collective performance of PSOs imposed by the Electricity Supply Act and other legislation, secondary legislation and decisions pursuant to the Act. This is done by assessing a PSO levy on consumers' energy bills based on the amount of consumption.

The PSO levy finances many of the measures aimed at promoting green energy production. The PSO levy finances hourly net metering for self-production (including solar PV and wind), which allows owners of installations to self-consume the electricity they produce while at the same time avoiding to pay any PSO (Energinet.dk's network, system or PSO tariff) or energy taxes (duty on electricity – either partially or completely). Market premiums that commonly-owned wind and PV installations receive for exporting electricity to the grid are also financed by the PSO levy.³¹

2.3 Post-2016 options for supporting self-consumption and collective ownership through the PSO levy

When the Danish Government notified State aid to the commission for solar and wind, the Commission questioned the legality of Denmark's PSO levy arrangements with regard to treatment of foreign-produced electricity. In particular:

- There is a PSO fee imposed on domestic consumption of electricity regardless of whether the production took place in DK; and
- Some schemes are funded which foreign power generation does not have access to.

Based on the above, the Commission limited State aid clearance until the end of 2016. Furthermore, Denmark has officially committed to, among other things, organise pilot tender schemes open to producers from other EEA States up to a share of 6% of capacity; and revisit the support schemes for renewable energy in light of the State aid guidelines and to further alleviate potential concerns relating to compatibility with Articles 30 and 110 (on discriminatory taxes) by the end of 2016.

³⁰ Third IEM Directive on Electricity, Article 3(15).

³¹ Denmark is not alone in this practice, as the same situation has existed in other Member States such as Germany.

Post-2016, the Danish government will need to demonstrate that support for renewable energy is consistent with the State aid guidelines, and in particular Articles 30 and 110 TFEU.

2.3.1 Options for maintaining support to installations for self-consumption

There are a number of reasons why the Danish Government should probably be able to maintain PSO-funded support to renewable energy produced for self-consumption under its current configuration.

PSO-funded support of self-consumption is justifiable

The PSO is clearly defined within the public interest to maintain incentives for individual consumers (both households and enterprises) to reduce consumption from the public grid, and to self-produce their own green electricity. Given the market conditions that are likely to exist into the near future, incentives are needed in order to promote investment in renewable energy at all levels of society, particularly individual consumers. Furthermore, the provision of support is necessary to help Denmark achieve its objectives for deployment of renewable energy generally, and for expansion of solar PV specifically. In the absence of aid, these installations will not be constructed.

The support is capable of being proportionate and limited

It can also be argued that the PSO levy exemption for self-consumption constitutes a proportionate economic incentive to combat climate change under Article 3(2) of the IEM Directive on Electricity.

While producers of renewable energy for self-consumption are technically undertakings for the purpose of competition law, they fundamentally differ from undertakings that produce renewable energy to sell to the grid. Therefore, it is arguable that allowing self-consumers - but not imported electricity - to benefit from the PSO levy is not discriminatory. Nevertheless, even if it were potentially discriminatory it would be proportionately justified for the public interest reasons stated above, as long as the Government provides a remedy by continuing to open up an increasing percentage of its tender capacity to outside operators.

Third, because the incentive is limited to individual consumers for what they self-consume, any potential for distortion of competition is limited. The only element that the Danish government would need to clarify is how long in time the specific scheme for incentivising self-consumption is needed, which is probably possible to do before the end of 2016.

2.3.2 Options for maintaining support to commonly-owned community installations

There is also an argument that feed-in premiums after 2016 to support commonly-owned community installations for wind and solar PV should be able to continue to be funded through the PSO levy.

PSO-funded support of commonly-owned community projects is justified

As with incentives for self-consumption, there is clearly a need to provide incentives to commonly-owned community installations if Denmark is going to be able to meet its energy goals. Furthermore, there is a clearly definable public interest of maintaining incentives for collectively-owned community enterprises to participate in the generation of renewable energy, which promotes public acceptance of such technologies, contributes to local economic development and furthers climate objectives generally.

The support is capable of being proportionate and limited

PSO-funded support to commonly-owned community installations for solar PV is not likely to lead to competitive distortions for several reasons. First, they are not likely to be large in size. Second, their overall contribution to the fuel mix is limited - mainly due to the limited availability of the resource in Denmark. Third, as long as reasonable limitations to participation based on geographical scope remain in place, such installations will be adequately restricted.

Because onshore wind projects tend to be larger than solar PV and other installations for self-consumption, there is a bigger risk that allowing common owned projects to benefit from PSO-funded subsidies - while generators outside Denmark cannot - could lead to competitive distortions. However, similar to commonly owned solar PV installations, as long as geographical limitations to participation remain in place it will be adequately restricted. It would also be justified in the public interest to maintain collective citizen participation in the achievement of climate and energy objectives. Furthermore, as long as the Government provides a remedy by continuing to expand the amount of overall capacity that is subject to tenders open to operators in other Member States, it can ensure non-discrimination and compliance with Articles 30 and 110 TFEU.³²

Moreover, because commonly-owned community installations are not like other undertakings, rather than distort competition, support would be aimed at levelling the playing field. Competitive distortions could also be further limited by explicitly defining which types of entities would be eligible to receive feed-in premiums funded by the PSO. While the definition of such a class should be left to the political process, it is recommended that at least wind turbine guilds (I/S), community foundations, housing associations and municipality owned companies (ApS and A/S) be eligible. Defining community energy actors would actually have the additional benefit of providing the sector with government visibility, recognition and support generally.

Again, the Government needs to clarify how long the scheme to incentivise commonly-owned community projects through feed-in premiums funded by the PSO is needed. Nevertheless, the Danish Government should be able to meet proportionality or limitation requirements mandated to be able to maintain support to commonly-owned community solar PV and wind installations through the PSO levy, in compliance with Articles 30 and 110 TFEU.

³² European Commission, State aid Decision No SA.38632 (2014/N) Germany EEG 2014 – Reform of the Renewable Energy Law, 23.07.2014, C(2014) 5081 final, para 330.

About the Community Power Project

These recommendations are a part of the Community Power project, a project in 12 European countries aiming to put people first at the heart of increased renewable energy. Check out the website of the project at www.communitypower.eu.

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