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Policy Briefing

Retroactive and retrospective changes and moratoria to RES support

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Dr. Dörte Fouquet, Rechtsanwältin, Partner, BBH

Jana Viktoria Nysten, LL.M., Advocaat, Attorney at law, BBH

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A. Legal Assessment

I. Definitions: retroactivity, retrospectivity, moratorium

The terms retroactivity and retrospectivity are difficult to define. In some jurisdictions they are even used interchangeably and no distinction is made between their legal consequences. Other jurisdictions, such as for example Germany, distinguish between "unechte Rückwirkung" as retrospectivity and "echte Rückwirkung" as real retroactivity and attach different legal consequences to those concepts.[1] Under European Union law, it seems that a distinction is indeed made at least as regards the legal consequences, though not in so many words and the terms are regularly mixed up.[2] However, for the purposes of this paper, and in order to be able to indicate what legal protection might exist, we will separate the two concepts. To have a common understanding of what is meant by retroactivity and retrospectivity, we will briefly define the terms in the following. For sake of completion, a definition of moratorium will be included.

When speaking about **retrospective** application of laws, then we generally mean laws which alter the future legal consequences of past actions or events, by taking away or impairing vested rights acquired under existing laws, creating new obligations, imposing new duties or attaching new disabilities.[3] Thus, the laws apply only from their date of entry into force onwards, but also to actions or events that started in the past.[4] Such retrospective application of laws often comes into play when the legislator realizes that the legislation in force needs to be corrected, for example because there is new evidence showing that the assumptions on which the legislation was based are not correct, or because of changes in the political environment.

Applied to changes in RES support schemes, this would mean that the law would enter into force on a given date and from that date on e.g. the support also for RES installations existing and operating already prior to the entry into force of the law would be changed. For example, the reduction of the level of support also for existing plants such as in Italy may count as retrospective change. Under certain circumstances the introduction of a new fee RES producers may have to pay and which effectively lowers their expected income could count as a retrospective change as well, in particular when the RES producers – different from other energy producers - cannot pass on the fee, as was the case with the introduction of the 7% flat rate tax introduced in 2013 already in Spain. Those changes

[1] This terminology is used since Judgment of May 14, 1986, Berge 72, p. 200, 242, by the Second Senate of the Constitutional Court.

[2] The European Commission for example generally using the term "retroactive". See e.g. Communication from the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Renewable Energy: A major player in the European Energy Market, COM (2012) 271.

[3] E.g. D. Greenberg, Crazies on Legislation, Sweet and Maxwell 2008, p. 432.

[4] See e.g. Charles Sampford, Retrospectivity and the Rule of Law, Oxford University Press 2006, p. 22.

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apply to the future but change the status of already made investments. They may thereby affect what an economic operator, such as a RES producer, may have legitimately expected in terms of return on investments and seriously challenge the business case, based on which he applied for and received financing. Inability to pay back on financing agreements can easily be the consequence, leading to bankruptcy as has been the case in the past years e.g. in Spain or the Czech Republic.

The difference with **retroactive** application of laws is that such laws apply back before their publication and to facts that have occurred entirely in the past and change the legal consequences of those "completed" transactions. Such retroactive application of laws is rather rare, the more as they are considered in violation of the principle of the rule of law and in particular legal certainty in most jurisdictions. This is certainly the case in criminal law, where the internationally recognized principle "nulla poena sine lege" applies,[5] prohibiting punishment for something which at the time the crime was committed was not a crime at all. However, sometimes legislators do opt for retroactive application of laws, for example to validate activities which at the time they were performed had no legal basis, or to correct practices that have later found to be illegal.

Applied to changes in RES support schemes, the discussion arises of when the transaction – i.e. the support – can be considered "completed". For RES support schemes involving operation support, i.e. support over the time while the plant is operating and e.g. based on the energy produced, it may be difficult to argue that the transaction was already completed at the time the plant started operation. Rather, one would say that with the production of the energy, the transaction for paying the support corresponding to the amount of the energy produced would have to be performed. As most RES support schemes function this way, and thus involve a number of transactions, some in the past, some in the future, most changes to those schemes are – if at all – to be considered retrospective rather than retroactive, as they apply only to the future, after entry into force of the law. However, should the support be granted for building – not operating - a RES plant, i.e. irrespective of whether and how much energy is produced, one might find that if after the plant is built the legislator changes what was promised to the RES producer before this to be a real retroactive change, rather than a retrospective one. Similarly, cases where RES producers would have to pay back what they received in the past could be considered retroactive, as might be the case for some RES producers in Spain.

The term **moratorium** then refers to the suspension of activity or an authorized period of delay. In the context of support to renewable energy, it means the suspension of support. Moratoria can be introduced by law or in fact, for definite or indefinite time. The Spanish law of January 2012 would be an example of a moratorium introduced by law. Not holding any new tenders in a tendering scheme or refusing any licensing or grid connection for new RES installations where this is needed to get the financial support would be de facto a moratorium. The introduction of a moratorium entails major damage to the industry by abruptly stopping all support to the sector and letting the industry without market and therefore leading to massive bankruptcy and job losses.

[5] Art. 11(2) Universal Charter of Human Rights.

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II. Legislative Framework

Generally, in most jurisdictions, laws are not considered to apply retrospectively nor retroactively, unless there are very clear words to the contrary.[6] However, there are – outside the field of criminal law – certain circumstances under which it is considered acceptable to legislate retrospectively or even retroactively. As the conflict between the principles of the rules of law and legal certainty and retroactive application of laws is even more imminent than with retrospective application (as with the former the transaction is already completed while with the latter it is still running so that it is rather a question of whether and to what extent one can rely on the situation not to change until completion), laws to apply retroactively normally have to meet higher standards concerning their justification.

II.1 National Law

Whether and to what extent retrospective or retroactive laws are prohibited is often dealt with in the constitution of a given country and/or by the constitutional courts. Thus, there may be vast differences between the Member States. However, all Member States offer some kind of protection against retrospective or retroactive changes.

In Germany for example, according to the Constitutional Court retroactivity is principally prohibited, while retrospectivity is generally allowed. Retrospective changes are only prohibited if the claimant can convince the Court that his interest of continuity of the legal situation outweighs the public interest of changing the law, which certainly is not a test easy to meet. Under German law and the interpretation accorded to it by the Constitutional Court, one can also identify the concept of expropriation, e.g. though retroactive changes to laws, which is understood as the intentional physical confiscation of property for the fulfillment of a public task by or pursuant to a law. The constitutional guarantee of the German Grundgesetz therefore only applies to so-called direct expropriations. So-called regulatory expropriations, such as the imposition of environmental standards under the EU Water Framework Directive or greenhouse gas emission reduction commitments are thus not covered by the definition of expropriation. At the same time, certain types of interferences with property, though not amounting to expropriation strictu sensu might still trigger an obligation for the state to compensate losses ("Ausgleichspflicht"). However, because German law defines property in light of its value to society, the obligation of the State to compensate

[6] E.g. D. Greenberg, A. Millbrook, Stroud's Judicial Dictionary of Words and Phrases, Thomson & Reuters 200, p. 2315.

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remains limited. This is a consequence of the fact that under the Grundgesetz each owner is expected to use his or her property in a way that takes due account of public interest.[7]

The principal prohibition of retroactivity however is also subject to two exceptions: First, where the existing legal situation is very unclear anyways (intended to be used in the course of the reorganization after World War II) or confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively.[8] Thus, in Germany the legal principle of "ne bis in idem" is leitmotiv, also outside the criminal law, for which however it is codified in Art. 103(3) of the Grundgesetz.

In the UK, a similar balancing test as in German law is applied, although no distinction between retrospective and retroactive changes is made. Here, the legislator looks whether the general public interest in the law not being changed retrospectively is outweighed by any competing public interest, paying due respect in particular to the protection of human rights.[9]

II.2 EU Law

First of all, while the European Court of Justice (CJEU) does to some extent distinguish between retrospective and retroactive application of laws, this is not done in so many words. Often the word "retroactive" is used, also for measures which according to the terminology established in this paper would be considered rather "retrospective" (the transactions in question not having been completed yet).

However, the CJEU has from early on held that in the field of criminal law, retroactive application of laws is not to be tolerated thus following the established "ne bis in idem" rule .[10]

In other areas however, **retroactive application of laws is not prohibited,** but needs to meet **certain requirements**. First, such retroactive changes must be justified based on pressing objectives demanding this temporal dimension. Second, the legitimate expectations of those affected must be duly respected.[11] The reasons for the retroactive application further need to be properly presented and published, whereby the retroactivity must be unequivocal from the wording, the rationale and the general structure of the law in question[12].

As regards **retrospective application of laws**, i.e. application of laws to transactions that started in the past but have not been completed yet, the CJEU is more lenient, it seems. Those are more or less

[7] E.g. (in view of Vattenfall v. Germany before the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC.)Nathalie Bernasconi, Background paper on Vattenfall v. Germany arbitration; IISD 2009.
[8] See e.g. BVerfG v. 3. 12. 1997 – 2 BvR 882/97, BVerfGE 97, 67, par. 81f.
[9] Statement of the Solicitor-General Harriet Hartman, HC Deb 6 March 2002, Vol 381, c409 – 10W.
[10] E.g. CJEU, Case 63/83 The Queen v. Kent Kirk (1984) ECR 2689, par. 22.
[11] E.g. CJEU, Case C-459/02 Gerekens (2004) ECR I-7315, par. 26ff.
[12] E.g. CJEU, Case C-293/04 Beemsterboer (2006) ECR I-2263, par. 24.

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dealt with under the principle of the **protection of legitimate expectations**. With regards to those, in a recent judgment a **three-staged test** has been established, first asking whether there are legitimate expectations, followed by whether the new legislation is less advantageous than the existing one (thus asking basically whether there is damage done), and finally weighting the interests in changing the legislation against the interests in keeping it. When applying this test, one would have to pay particular attention to the first question. The CJEU has in this regard held that the applicable standard is whether "*prudent and circumspect economic operator could have foreseen*"[13] changes to the legislation. In particular, according to the CJEU, "*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*".[14]

There are currently no cases before the CJEU on whether the latest cuts and reforms of RES support schemes in the Member States conform with EU law or not. However, the CJEU has recently, in particular referring to recital 25 of the Renewable Energy Directive 2009/28/EC, expressly confirmed the **discretion of the Member States as regards their RES support schemes** and reiterated that "*it is essential that Member States be able to control the effect and costs of their national support schemes*"[15]. With that, it seems that it might be difficult, in cases of retrospective changes, to establish that there had been legitimate expectations in the continuance of a certain RES support scheme without changes during the lifetime of a RES installation. Often there have been months of discussions in public and extensive media coverage (at least in specialist publications) preceding the changes, making it harder for a RES producer to argue that a "*prudent and circumspect economic operator*" could not have foreseen any changes to the existing situation.[16]

II.3 Bi- and multilateral investment treaties

Bi- and multilateral investment treaties generally contain provisions which could prevent legislators from introducing legislation with retrospective or retroactive application. At least, they could potentially be used to offer some **form of (financial) relief** in case a country introduces retrospective or retroactive legislation.

Such treaties are concluded between States in order to ensure that companies with their seat in their own territory will not be treated different than companies with their seat in the State wherein they invest, and that they can conduct their business over there being subject to **fair and equitable treatment** by the host State. Further, those treaties generally include a clause providing that a State party to the treaty will have to pay **compensation in case of expropriation**. For the investors to be able to enforce their rights under the treaties, they **include investor-state dispute settlement mechanisms**, i.e. recourse to international arbitration tribunals which over the State's behaviour when exercising its sovereign rights as provided for either by law, treaty or contract, in light of the

[13] CJEU, Case C-201/08 Plantanol (2009) ECR I-08343, par. 53.
[14] CJEU, Joined Cases C-37/02 and C-38/02 Di Leonardo and Dilexport(2004) ECR I-06911, par. 70.
[15] CJEU, Joined Cases C-204/12 to C-208/12, Essent Belgium NV (2014), not yet published, par. 102.
[16] Compare also ECJ, Case C-201/08 Plantanol (2009) ECR I-08343, par. 60f.

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provisions of the treaty and customary international law. However, for them to be applicable, certainly the investor needs to be from a different country than the host country and there needs to be a valid treaty between the Member State where the investor is seated and the host State where the investor is doing business, i.e. they do not apply to investments within the own State.

Retrospective or retroactive changes could be in conflict in particular with clauses in such treaties protecting investors from expropriation, understood as the confiscation of a foreign asset by the host State with no or minimal payment, thus depriving the foreign investor of his reasonable expectations of profits and returns. Similarly, such changes could be seen as in violation of fair and equitable treatment clauses, as it requires States to maintain stable and predictable environments consistent with reasonable investor expectations. However, in particular the latter concept is very broad and the exact coverage may vary considerably depending on the exact wording of the clause, but also the former concept is certainly not absolute.[17] Further, as the international arbitration tribunals are normally – and different from courts - not bound by any case law, they have a wide discretion as regards the interpretation of those provisions and the outcome of the proceedings. Their findings are by the way often not even published.

Within the EU, one can distinguish between two major "kinds" of treaties which could form a basis for investment protection: the bilateral investment treaties between the Member States on the one side and the Energy Charter Treaty on the other side.

However, in both cases the European Commission seems to take a rather restricted view as to what extent they can offer relief to an investor from one Member State in the course of arbitration proceedings against another Member State.

III.3.1 Intra EU-Bilataral Investment Treaties

In the 1990s, most of the EU Member States (back then mostly Western European countries) signed bilateral investment treaties (BITs) with Central and Eastern European and Mediterranean governments. While they were originally "just" international treaties with third States, things changed with the accession of many Central and Eastern European countries to the EU. Taking the example of the Czech Republic: Before the accession, there were over 70 ratified BITs. After the accession, 18 of those became so-called "intra – EU BITs". [18]

[17] Compare Art. 13(1) of the Energy Charter Treaty, cited above.

[18] Cecilia Olivet, A test for European solidarity;The case of intra-EU Bilateral Investment Treaties, Transnational Institute, 2013, available at: http://www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf.

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All those BIT treaties have detailed investment protection clauses typical for such treaties, and in fact, nowadays, so far more than 65 % international arbitration cases against Central- and Eastern European Countries are based on intra-EU BITs.[19]

EU Member State from Central/ Eastern Europe	Known investor-state cases*	From total known cases, how many based on intra-EU BIT	EU Member State from Western Europe	Known investor-state cases*	From total known cases, how many based on intra-EU BIT
Czech Republic	18	14	Germany	2	0
Poland	15	9	Spain	2	0
Slovakia	10	7	Belgium	1	0
Hungary	10	6	Portugal	1	1
Romania	8	5	UK	1	0
Lithuania	5	1	Finland	0	0
Estonia	3	2	France	0	0
Latvia	3	2	Ireland	0	0
Bulgaria	3	3	Italy	0	0
Slovenia	2	1	Luxembourg	0	0
			Netherlands	0	0
			Denmark	0	0
			Sweden	0	0
			Austria	0	0
TOTAL	77	50	TOTAL	7	1

Source: See annex A
* based on bilateral investment treaties (not counting contract cases)

Source: Cecilia Olivet, A test for European solidarity; the case of intra-EU Bilateral Investment Treaties, Transnational Institute, 2013.

Not only the number of cases is impressing, but also the amounts of damages as well as costs for example for counsel in the course of the proceedings are impressive. [20] The European Commission has been intervening in Intra-EUBIT cases in the past, arguing that those treaties would no longer be applicable between Member States, so that inter alia the arbitration tribunals would no longer be competent. The Commission instead wants those cases to be referred to the CJEU.

[19] The Czech government seems to keep the record of times of being sued by international investors has been sued by investors at international tribunals with at least 18 times (and likely many more since most cases remain unknown). See Cecilia Olivet, A test for European solidarity; The case of intra-EU Bilateral Investment Treaties, Transnational Institute, 2013.

[20] For example, it seems the Czech Republic is said to have already paid about € 950 million to investors, either as a result of tribunal decisions or settlement agreements, although most cases have been won by the government. Those payments come in addition to the costs of arbitrators, witnesses, experts, as well as legal counsel. To give an idea of those cost, only the lawyers' fees amounted to about € 88 million to be paid by Czech Republic for defending itself in arbitration proceedings between 1999 and 2008. See Cecilia Olivet, A test for European solidarity; The case of intra-EU Bilateral Investment Treaties, Transnational Institute, 2013.

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However, such arbitration tribunals may not always follow the Commission's line of argument. For example, it was held that

> *"262. Thus, EU law does not provide substantive rights for investors that extend as far as those provided by the BIT. There are rights that may be asserted under the BIT that are not secured by EU law. Consequently, it cannot be said that it is implicit in the text of the EC Treaties that Respondent and the Netherlands intended that it should supplant the BIT.*
>
> *263. Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.*
>
> *264. The third main reason for rejecting the jurisdictional challenge based … may be stated simply. An essential characteristic of an investor's rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state; and, moreover, the locus standi of an investor under the BIT, with its broad definition of "indirect" investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State…."*[21]

Thus, unless the European Commission would succeed in putting an end to the use of intra- EUBITs, by convincing the Member States to resign from them, they seem to remain the foundation for current and upcoming arbitration cases to enforce investment protection provisions..

III.3.2 The Energy Charter Treaty

Many cases in the field of energy are filed under the **Energy Charter – the international treaty regulating trans-border investment in the energy sector**. The Energy Charter Treaty contains clauses for protection to foreign investors in the energy sector, of which in particular the following are relevant.

> Art. 10(1) Energy Charter Treaty: *"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the*

[21] See PCA Case No. 2008-13 EUREKO B.V. v. The Slovak Republic, 26 October 2010, available at; http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

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most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations."

Art. 13(1) of the Energy Charter Treaty: "*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment."*

Thus the basic concepts for investment protections as classically found in bilateral investment treaties have been taken up in the Energy Charter Treaty as well: ,

- The host State must treat foreign investors of the home State no less favorably than its own investors;
- The host State must treat the foreign investor of the home State no less favorably than it treats investors from other states;
- The host State must compensate for expropriation ; and
- The host State must at all times treat the foreign investor of the home State in a —fair and equitable manner.

The Energy Charter Treaty does not have its own tribunal or court and is thus different than especially the World Trade Organization (WTO). But the Energy Charter Treaty foresees and established the path towards ad hoc arbitration under UN Rules without any institutional framework, towards the World Bank's International Center on the Settlement of Investment Disputes, or the Arbitration Institute of the Stockholm Chamber of Commerce to settle the arbitration case.

Especially the third and fourth points have been bases for challenges also in the field of changes to RES support schemes. Investors in those countries are this way trying to get an award ordering the respective host State to compensate them for their losses resulting from the retrospective or retroactive changes to the RES support schemes. Many of them consider this as "their last and only chance" as e.g. in Spain courts refused to offer them any relief, and at the same time block the access

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to the European courts. The cases are still pending in front of the respective international arbitration tribunals.

The European Commission is intervening at least in some of these cases, and has done so in the past already. For example, in the case of the French electricity supplier EDF against Hungary, which had taken back certain subsidies to private electricity companies introduced in the context of the privatization of the sector, the Commission intervened with a written statement explaining to the respective tribunals that what Hungary had done was in order to comply with EU law, and would thus not be in breach of the investment treaties applicable.

It appears, the Commission is generally of the opinion that the Energy Charter Treaty cannot provide a basis for arbitration of intra-EU disputes because the treaty in the context of the EU law is to be interpreted as not applying between the various EU Member States. The Commission seems to entertain the legal argument that the Energy Charter Treaty in its relation to the EU law contains an implicit disconnection clause.

Even though not only the various EU Member States, as well as the European Union itself, have signed and ratified the Energy Charter Treaty, the Commission seems to be of the opinion that the treaty cannot trigger obligations between the Member States of the EU, but only between the Union and its Member States on one hand and each of the other non-EU contracting parties to the treaty on the other. The "implicit disconnection is thus substantive provisions of the treaty, as well as its investor-state arbitration mechanism, inapplicable between the Member States of the EU[22]

Insofar the Commission seems coherent what has happened in the past in relation for examples to procedures under the UN Convention of the Law of the Seas. Under the provisions of that Convention, and without going too much into the details of this case, Ireland had requested provisional measures against the emissions from the UK MOX plant. The Tribunal asked to decide over those measures however rejected the request "*Considering that the United Kingdom has further stated that certain aspects of the complaints of Ireland are governed by the Treaty establishing the European Community (hereinafter "the EC Treaty") or the Treaty establishing the European Atomic Energy Community (hereinafter "the Euratom Treaty") and the Directives issued thereunder and that States Parties to those Treaties have agreed to invest the Court of Justice of the European Communities with exclusive jurisdiction to resolve disputes between them concerning alleged failures to comply with such Treaties and Directives*"."[23]

However, to rely on implicit interpretation is in this regard a bit astonishing since the European Union could have introduced an explicit disconnection clause in the Energy Charter Treaty as it had done in

[22] See Luke Eric Peterson , Brussels' Latest Intervention casts shadow over Investment Treaty Arbitrations brought by jilted solar energy investors, available at: http://www.iareporter.com/categories/20090724_5.

[23] See, Order of the International Tribunal for the Law of the Sea,2001, 3 December 2001 , Case No. 10 The Mox Plant Case (Ireland v. United Kingdom), Request for provisional measures, par. 41.

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at least 20 international treaties since 1998 the European Union has concluded . It is moreover remarkable that the European Commission seems to use this argument of the implicit disconnection clause only in cases on changes to RES support schemes. It is not known that such arguments were presented or that in fact any intervention has occurred at all from the side of the Commission in the now closed case of the Swedish electricity supplier Vattenfall against Germany concerning tightened emission regulation in German law for coal power plants,[24] neither in the current arbitration case of Vattenfall against Germany concerning the phase out of nuclear power plants in Germany.

III. Short note on moratoria

Moratoria are **not strictly speaking prohibited**, it appears, provided that they are introduced in a way that meets the requirements all legislation has to meet, i.e. stemming from the principle of the rule of law and legal certainty. For example, moratoria introduced retroactively could thus be challengeable, under national, European as well as international law. However, considering that under the Renewable Energy Directive 2009/28/EC, "*it is essential that Member States be able to control the effect and costs of their national support schemes*"[25], it is rather likely that a "properly" introduced moratorium only applying to new RES installations which could not have had legitimate expectations yet – while certainly not helping that Member State in question to reach the binding national renewable energy target – will fall under that discretion. However, here a lot depends on the concrete situation and moving closer to 2020, the European Commission might become more willing to act against the Member State.

IV. Conclusions: Possibilities for Action and Relief

As seen above, national, European and international law may all offer some possibilities for action and relief in case of retrospective or retroactive changes.

A first stop **would certainly be national courts**. Those proceedings are likely to be faster and less expensive than other solutions. Further, they can form a basis for action in front of the European Courts, to which private individuals cannot directly turn for actions against Member States. Rather,

[24] In April 2009, Vattenfall brought an action against the German government before the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC. The company is charging Germany with violating the Energy Charter Treaty. The arbitration challenged environmental restrictions imposed on a €2.6 billion coal-fired power plant being under construction along the banks of the Elbe River. In the public domain it was published that Vattenfall asked Germany for several millions of Euros under Energy Charter Treaty rules, the exact amount and reasons for the challenge were not known because the arbitration is proceeding entirely in secret, at the choice of the parties.

[25] CJEU, Joined Cases C-204/12 to C-208/12, Essent Belgium NV (2014), not yet published, par. 102.

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one can only ask a national court to put questions of European law and in particular on whether a Member State is in violation of such law before the European Court of Justice in the course of Art. 267 TFEU proceedings (reference for a preliminary ruling).

A **referral to the CJEU under Art. 267 TFEU** may be requested by one of the parties involved in the dispute at any time. However, the decision to refer rests with the national court. Art. 267 TFEU requires only national courts which act as a final resort, thus against whose decisions there is no judicial remedy, are obliged to refer for a preliminary ruling if one of the parties requests it. A court not doing so – while there is a question on the validity or the interpretation of a provision of EU law which has not been dealt with before by the European Courts and which is decisive for the solution of the case at hand – might be found in violation of EU law itself.

However, another option would be putting the case before **the European Commission, in the course of a complaint procedure.** The Commission is however not required to take up the complaint and start infringement actions against a Member State, but enjoys discretion in this regard. As regards the enforcement of the Renewable Energy Directive, and in particular as regards retrospective or retroactive changes to RES support schemes, it appears that the European Commission will accept that the Member States can amend their RES support schemes. However, repeatedly, the Commission has stated that retroactive changes[26] are to be avoided when doing so. So far, however, no infringement actions have been started against Member States changing their RES support schemes retrospectively or retroactively.

Still, the European Commission had in the negotiations on the Renewable Energy Directive 2009/28/EC suggested that when it becomes too obvious that a Member States based on the policies in place **cannot reach their binding renewable energy target until 2020**, they will take action and bring this Member State before the CJEU in the course of infringement proceedings. With 2020 getting closer, we might thus see action in this regard.

Bi-lateral investment treaties as they may still exist between the Member States could offer some relief as well. However, the European Commission and to some extent also the CJEU it seems, challenge the validity of those treaties where they cover areas within the competence of the EU. So far not international arbitration tribunal has ruled in a way so as not to reconcile the award with EU law, however, one will have to see what happens when this should be the case.

[26] Note that the Commission generally only refers to „retroactive changes“. See e.g. Communication from the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Renewable Energy: A major player in the European Energy Market, COM (2012) 271. In a letter to the European Renewable Energies Federation, EREF, from 08.07.2013, former Energy Commissioner Oettinger referred to “*any measures that change the economic conditions of existing renewable energy investments*” in this regard, stating that he was concerned about those as “*they threaten to undermined investor confidence well beyond the time-span of the measure itself*”.

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Action under the **Energy Charter** may in this regard be a better option, as it is a multi-lateral treaty applying between all the Member States and as the EU itself is a party to the Energy Charter, so that both the Commission and the CJEU attach a different value to it. As mentioned, cases are already pending and one will have to see about the success, as well as about the impact of the European Commission's rather "reserved" position towards such awards.

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B. Reports from the Member States

I Bulgaria

Bulgaria is one of the Member States in which **retrospective and retroactive changes have been successfully challenged in national courts.** In December 2013, the government had introduced a 20% tax on the income of renewable energy producers. The tax applied only to wind and PV installations and left some producers with "preferential" prices (i.e. supported through the support scheme) in fact at lower prices than average market prices for electricity. The fee had to be paid on a quarterly basis and according to the State Energy and Water Regulatory Commission (SEWRC) generated receipts of BGN 36 mio. (€ 18,5 mio.) by end-March 2014. However, the Bulgarian Constitutional Court ruled that the tax was unconstitutional so that its application had to be terminated in summer 2014. As the judgments of the Constitutional Court have no retroactive application, the sums collected so far will however not be restored to the companies.

However, there is **still a moratorium on new grid connections for RES plants** in place and a new fee for PV and wind installations **has retroactively** been introduced:

Moratorium on all new grid connection for RES plants still in place. The moratorium on all new RES projects until 2016 continues to be in force and there will be no new grid connections until then. The grid connection fees (amounting to about 25 000 € per installed MW) already paid by investors have not been reimbursed yet, either.

Retroactive introduction of permanent grid access fee for PV and wind: After the Supreme Administrative Court had revoked the provisional grid access fee for all RES producers introduced in 2012 as being discriminatory, the SEWRC had to decide on a new system by April 2014. The SEWRC now has approved a permanent grid access fee only for wind and PV producers. The price for it amounts to 2.45 BGN/MWh (1,25 €/MWh) and has to be paid to the Transmission System Operator. It will be applied retroactively as of September 18th 2012.

II Czech Republic

In June 2014, the European Commission granted approval for the Czech RES support scheme under the State aid rules. The Czech government had notified the scheme in the beginning of 2013 already, but the procedure during which the Commission demanded certain changes and commitments from the government lasted about 1,5 years. During 2013, however, and contrary to the "stand-still" clause of Art. 108 TFEU, the RES support scheme in the Czech Republic was already operational. With the Commission's decision of June 2014, the financial support to RES producers already paid in 2013 was thus retroactively approved, i.e. the Commission declared that although it was originally in violation of State aid law, this initial unlawfulness would now be cured after all.

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Mechanism to retrospectively shorten the period of support: The approval of the European Commission was not unconditional, and in particular the Czech government was asked to introduce a certain monitoring mechanism for installations launched into operation until 31 December 2013 (and, under certain conditions, for installations based on wind, geothermal and biomass energy until 31 December 2015) in order to take into account the cumulated overall amount of State aid RES producers receive. This was due to the fact that the law as it originally entered into force did not cumulate investment and operating aid, and it referred to indexation rates fixed in advance and applied automatically. The review mechanism thus aims to avoid overcompensation in each individual case. The income of each RES producer will be assessed t after 10 years since the start of operation of the plant. The outcome of the review is crucial with regards to the assessment of the level of support for the future years: In case the RES producer has already received overall more than what was planned under the support scheme, i.e. the return on investment notified and approved by the Commission, remaining support period will be shortened from that date on. If not, it will remain.

Retrospective levy on income of existing installations: Since 2014, the Czech government applies a 10% levy on income for solar power plants with installed capacity up to 30 kW that were put into operation in 2010. The levy is not applied retroactively, but applies to the income as of entry into force of the law. This law replaced 26% levy that applied between 2011-2013 for solar plants that were put into operation between 2009 and 2010.

Moratorium e.g. on new PV installations: The Czech Republic ended renewable energy support for certain types of new projects, including PV, as from 1 January 2014. The exemption was granted to hydropower projects up to 10 MW that can be put into operation even after 1 January 2014. With regards to bioliquids, the support applies only to electricity produced until 31 December 2013, including power plants which were put into service until 31 December 2013. Furthermore, wind, geothermal, water and biomass projects that secured construction permits in 2013 and were/will be completed by 31 December 2015 are also eligible for further support.

III Estonia

On 28.10.2014 Estonian government finally received the approval by the European Commission for the reform of the RES support scheme under the State aid. The Ministry of Economic Affairs thus prepared the draft law introducing changes to both the structure and the level of the previous support scheme. However, the Parliament on its 11.02.2015 plenary meeting decided to postpone the adoption of the scheme until after the general elections which take place on 1.03.2015. At the

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moment it is unclear when the changes in the scheme will be adopted and whether there will be any further amendments proposed by the parliamentarians in addition to the ones suggested by the government and notified to the Commission. However, the new RES support scheme as notified would already entail the retrospective introduction of a new regime for existing installations and until the new regime is in force, there continues to be a moratorium on all RES support.

Actual moratorium until legislation is in force: Currently thus, Estonia is still facing a de facto moratorium on RES support.

Retrospective change to the design of the support scheme for existing RES installations: Estonia notified a planned change to its support scheme to the European Commission in order to get approval under the rules on State aid and in the course of this procedure transformed the entire scheme so as to correspond to the new Guidelines for Environmental and Energy Aid. Accordingly, for new RES installations, a technology neutral tendering scheme wherein support is being paid out in the form of certain capped market premiums is foreseen. For existing installations, the support will be fixed at a certain level (an average electricity price of – based on 2012 data – 39,3 €/MWh and what was received as market premium added to the actual electricity price before, i.e. 53,7 €/MWh), with the understanding that if the electricity prices increase, support will be reduced. This retrospective change may be to the disadvantage e.g. of RES producers able to strategically sell on the market and obtain better prices there in addition to the previously existing fixed premium, as this is no longer possible with a fixed overall price they will get. In addition, the new support scheme – following the provisions of the Guidelines – foresees that electricity produced at times of negative prices will be deducted from the overall production, and no payments will be made for that. With those changes to the support retrospectively introduced to the legislative framework for existing RES installations in Estonia, some RES producers – in particular those with wind parks - may be negatively affected to a considerable extent.

IV Greece

In May 2014 a revised support framework for RES was approved by the Greek Parliament and is in effect since then.

Retrospective/retroactive reduction of support in exchange for extension of the PPA: The new Law, known also as “New Deal”, imposed permanent retrospective/retroactive reductions in the tariffs of operating RES projects spanning

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all major commercial technologies (wind, PV, small hydro and biomass) in exchange for the extension of the duration of the original PPAs.

Also, the new framework lifted a previously imposed moratorium on the implementation of PV projects.

V Italy

Italy reformed its RES support scheme by the end of 2014. However, the previous support schemes had already been terminated before, in fact putting moratoria on all RES support. Those temporal moratoria have however now be terminated, and the new support scheme entered into force. The new support scheme, the so-called "Spalma-Incentivi" first applied only to PV plants, **retrospectively reducing the support rates for existing installations**. Now it applies to all technologies and leaves RES producers with existing installations the choice **between different changes to the support they originally expected to receive under the old support scheme**. Each option is detailed in a single ad hoc decree that ministries have delayed to issue causing to operators further uncertainty: by 30 November 2014 in fact operators were required to communicate to the GSE (System Operator) the preferred option. The measures can be summed up as follows:

"Spalma-Incentivi" - retrospective reduction of the rates of support for RES plants: The Law 116/2014, entered into force on 11 August 2014 transposing the requirements of the Decree 145/2013 – the so called "Spalmai-Incentivi". It introduces retrospective reductions to the existing financial incentives for all RES technologies and including existing installations, with significant effect on investments initiated until now.

"Spalma-Incentivi" - retroactive changes in the design of the support scheme for all existing RES installations (other than PV): The measure applies to all RES technologies other than PV not regulated with the Decree 6th July 2012.The Decree containing detailed prescriptions for RES plants other than PV, according to Law 116/2014, has been published on 6th November 2014. The Decree imposes the two alternatives below:

1) Maintaining the existing support scheme without receiving any additional support for O&M intervention for the 10 years following the end of the entitlement period.

2) Reducing the incentive amount by a percentage and extending it up to 7 years longer the entitlement period for which the support is provided.

"Spalma-Incentivi" - retroactive changes in the design of the support scheme for existing PV plants: This measure establishes that starting from the 01/01/2015, all PV

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plants >200kW (except those whose incentive period expires on 31st December 2014) are subject to a reduction in the rate following one of 3 alternative options:

a) Reduction of the yearly incentive amount and spreading it on 24 (instead of 20) years;

b) Redefinition "double time": the entitlement period remains unchanged at 20 years and incentive amount will be reduced in a first period (to be still quantified/defined) and increased at a later time.

c) Reduction of the incentive of 6/7/8% (depending on size), for the remaining incentive period while maintaining the entitlement period on 20 years.

In addition, the new RES support comes with a list of measures likewise **retrospectively affecting also existing plants:**

Possibility to increase the fees to Municipalities Consortia for all hydro plants of more than 220kW of installed capacity: With the Environmental Annex to the Law 27th December 2013 n.147, the Council of Ministries proposes a set of measures to promote green economy. Among them the increase of the fees due to Municipalities Consortia (BIM – Bacini Imbriferi Montani) for all hydro plants greater than 220kW up the maximum amount currently due only by those of more than 3MW. Those are however not mandatory, but could be applied to existing installations, i.e. retrospectively reducing the amount of income they expected to generate, as they cannot be passed on to consumers under the RES support scheme.

Increased fees for all RES producers to cover System Operator services: On 24th December 2014 the Ministry of Economic Development published the Ministerial Decree with new increased fees for RES producers to pay. Those fees are supposed to be used to cover GSE (System Operator)the costs of the system operator GSE relating to the services (management, verification and control activities related to the support schemes for RES plants and energy efficiency. The increase of the rates may, applying also to existing plants, may be considered to retrospectively reduce the amount of income those plants can generate, as the system does not allow passing on those costs.

Retrospective introduction of a new fee for PV self-consumption systems to contribute to general system cost: The Law 116/2014 removes the exemption established with the Decree 115/2008, establishing for simple systems of production and consumption self- consumption systems (Sistemi Efficienti di Utenza) SEU, to pay from paying a fee for system general costs. Such systems – including existing plants - starting from 1st January 2015 have to pay a fee equivalent to 5% of the consumed

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energy amount consumed, thus face reduced income compared to their expectations.

Retrospective introduction of a guarantee fee for PV modules: In transposing the EU Directive 2012/19 into internal law, the Decree 49/2014 adds a further amount - not included in the Directive disposition- that System Operator -GSE- retains from the incentive that should be paid to PV plants for the residual 10 years of the existing entitlement period in order, i.e. the retainer decreases the overall income such plants were expected to generate from the RES support scheme over their life cycle. The retainer is supposed to leave a financial guarantee for the correct disposal of PV modules.

VI Poland

The first chamber of the Parliament adopted the new Renewable Energy Sources Act in January 2015 and passed it on to the second chamber of the Parliament. It is expected that the Act will enter into force in March 2015. So far, while overhauling the RES support scheme, the Act is **not expected to introduce retrospective or retroactive changes, nor any moratoria.**

The current support for RES-E based on a green certificates system will last till the end of 2015, existing installations after 2015 will be able to function under the green certificate scheme or may choose to go for a new support scheme, so that they **should be able to keep their current position and their expected income ensured.**

VII Portugal

Portugal **terminated the moratorium to RES production introduced in 2012.** However, new RES installations are currently paid only market prices for their production (except mini and micro units). The **retrospective changes** from 2013 for wind and small hydro power plants were challenged in court and during the political process, thereby trying to find a **suitable remedy.** Wind producers already settled an agreement, but small hydro power producers are still and during the political process, thereby trying to find a suitable remedy.

De facto moratorium as new RES support scheme not operational yet: The new self-consumption and RES support scheme regulation has been published in the end of 2014 (Decree Law 153/2014). It repealed the old scheme and defines rules for self-consumption systems with grid-connection, which had no regulation before, and new rules for a Feed-In Tariff (systems under 250 kW). However, the Feed-In Tariff is currently blocked as implementing measures are still missing. It remains unknown when the scheme will be fully operational.

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Licensing regime still acts as moratorium for new RES installations: The licensing regime introduced in 2013, practically blocking new RES installations due to heavy administrative burden, is also still in place, leaving a "quasi moratorium".

VIII Spain

In July 2013, the Spanish government approved Royal Decree-Law 9/2013 establishing urgent measures to ensure financial sustainability of the electricity system measures. Now two new laws have been finally approved: New Royal Decree Law 413/2014, of 6th June 2014, which establishes a new remuneration system for renewable energy, cogeneration and waste; and the Ministerial Order IET 1045/2014, which provides the type of facility and the corresponding remuneration parameters. The legislation entered into force the 11 June 2014 but it will apply retrospectively dating back to the approval of the Royal Decree Law 9/2013 which it is supposed to implement, thus to 14 July 2013. The legislation has several aspects leading to **retrospective reductions in the support to existing RES plants** to which it applies, and some might even be considered **retroactive.**

Retrospective introduction of a new formula for RES support calculation: RES producers will receive Capacity Payments (compensation for expenditures) depending on the installed power, and only those that have a higher cost of operation compared to the market price, will receive a payment for the energy generated. In both cases, remuneration is complementary to the price obtained in the wholesale electricity market, i.e. all RES producers have to sell on the market. The calculation of the remuneration can be simplified as: term per unit of installed capacity (R inv) + term per operation (Ro). For eligible installations, the remuneration per operation – Ro -, there now exists a maximum number of hours of operation. While the formula is in its full complexity rather hard to understand, it is expected to lead to a retrospective reduction of support for many existing RES plants.

Further, this "Reasonable Profitability" is only assured for a regulatory period of 6 years but with option to be changed. In addition, the parameters for the calculation of the capacity payments are open to be changed every half regulatory period (3 years) with the exception of the parameters "lifetime" and "profitability". This creates an additional retroactively introduced uncertainty for RES producers with existing plants, which may necessitate the provision of further securities to the banks and thus increase the cost of capital.

Retroactive introduction of a limit to rate of return: The new remuneration system is based on the type of the installation, and it is foreseen that they should get a pre-tax return of 7.39% over their lifetime. This number is considered as a "reasonable profitability". However, past earnings are taken into account in calculating future retribution. As an example, the wind farms built before 2005 will not receive any

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additional remuneration to the market price anymore, as the payments they have already received are considered sufficient to cover for that pre-tax return of 7.39% throughout their life time. Thus here one might even speak of a retroactive change, as the income the RES producers though they generated in the past will be counted towards and possibly deducted from future income.

Moratorium on new RES installations continued: In addition, the 7% flat rate tax on the gross revenues of electricity sales introduced in 2013 and the moratorium from 2012 on support all new RES plants continue to be in force.

However, the laws introduced in 2010 (that introduced cuts on remuneration for PV, wind and CSP electricity) and the 2013 Royal Decree Law (that abolished some remuneration options within the Spanish RES-E support scheme) have no longer application since they have been replaced by the more recent Royal Decree Law 413/2014, 6th June.

IX United Kingdom

In the UK no new cuts have been made as regards the support for RES lately, there have been changes in the legislative framework which may in fact be considered to **retrospectively change the position of RES producers with existing plants**. Similarly the introduction of the new Contracts for Difference scheme, with tendering, may act as **some kind of moratorium**.

Retrospective changes in sustainability criteria may make fuel already generated unsellable: Although sustainability criteria were always intended to be introduced for bioenergy technologies under the Renewable Heat Incentive scheme and were announced well ahead of the implementation date, the government has not detailed how to comply with especially the land criteria. This is problematic as fuel suppliers often have some fuel stock from the previous year, which was contracted for 2-3 years ago, making it problematic to only specify compliance details 9 months in advance. Potentially, some of the fuel stock will be unsellable under the new criteria, as fuel supplier won't be able to demonstrate compliance for fuel contracted 2-3 year ago. Furthermore, the RHI sustainability criteria are not grandfathered, and the criteria could be tightened for all RHI participants, even 19 years after purchase of boiler. There will therefore be an inherent risk for biomass fuel suppliers of the sustainability regulations being tightened. Thus, as when they were setting up their installations they did not expect and thus did not adapt to such criteria, RES producers of existing plants face new obligations retrospectively changing their legal – and economic – position.

New Solar PV above 5MW without chance under new RES support scheme: Solar PV above 5MW installed capacity: such projects have been excluded from accessing the

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Renewables Obligation (RO) scheme. While this is not a moratorium as such (they can still enter the new Contracts for Difference scheme), it will make it considerably more difficult to commission new 5MW+ solar PV projects due to the allocation risk involved with the new scheme.

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C. Political assessment and policy recommendations

As seen from the above, the RES sector still has to deal with retrospective and sometimes even retroactive changes to RES support schemes, as well as moratoria. While there seem to be less instances compared to the years before, when such changes happen the impact on the RES industry is always enormous and the danger of mass bankruptcies imminent. Considering that we are moving closer towards 2020 and for most Member States there is a big question mark anyways as to whether they will reach their binding national renewable energy target under the Renewable Energy Directive 2009/28/EC, the overall minimum 20% renewables target to which the EU committed is under threat.

As also explained in this paper, there are remedies available against retrospective and retroactive changes under national, European and international law. For example in Bulgaria, those have already shown some success and the Constitutional Court has forced the government to take back certain measures. In other Member States, such as in Spain, the situation is more difficult, as the courts refuse RES producers access to court. Here, international arbitration tribunals have been called on to offer relief to the industry, the success of which still has to be awaited.

As regards moratoria, which are not strictly speaking prohibited by their very nature but may rather fall under the Member States discretion as regards the design of their support schemes, no new legislative moratoria have been introduced. In Italy, for example, the temporal moratoria – used for the time of reform - on RES support have been removed with the introduction of the new support scheme. Still, several moratoria still have not been removed, thus blocking RES development in those Member States, such as e.g. Greece, and it is not clear if and when this is to happen. This insecurity to the RES sector and the lack of access to finance for new RES installations may similarly not only endanger achievement of the binding national renewable energy target of the respective Member State, but also the overall minimum 20% renewables target of the EU.

However, as also the European Commission keeps reiterating, the best option would always be not to change RES support schemes retrospectively or retroactively. From the experience in the Member States, when reforming RES support schemes, it seems that the following policy recommendations should be respected as much as possible:

1 ***Improve the information provided on RES, including the clarification of real costs and benefits, and explain energy statistics and consequences better in order to give the public the right picture***

The RES industry is in most Member States still struggling with "bad media" presenting numbers according to which RES would only be expensive and create lots of problems, as e.g. in Spain where the RES industry is blamed to have caused the tariff deficit in the electricity sector, but also for example in Germany. Advantages such as innovation, creation of hundreds of jobs and generally green growth are often forgotten and the numbers presented are – without explanations – often confusing or sometimes even simply wrong. Such a

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"hostile" environment detriments the reputation of the RES industry – which may eventually impact the political and ultimately legal environment.

2 ***Provide early information about planned reforms of RES support schemes and Involve the RES industry***

Information is crucially important for investors to set up or adapt their business plans accordingly. This applies even more to reforms to the investment environment. Further, too many Member States introduce retrospective changes without seeking prior discussion with the RES industry. Member States that involve the RES sector in the legislative process have a much better result often leading to sound compromise solutions.

While for example in Austria, the RES industry is working closely with the government, in countries such as Spain, the RES industry seems to be entirely ignored, despite the fact that from early on, the RES industry worked on constructive approaches towards a reform of the RES support scheme.

3 ***Create a stable legislative framework for RES support schemes taking due account of the dynamics of the RES sector in a predictable way***

Retroactive changes to RES support schemes should by all means be avoided and retrospective changes should be limited as far as possible. As shown in this paper, they destroy investment security and increase the cost of capital thus leading to an artificially higher cost of renewable energy technologies and therefore making the transition towards RES more expensive.

Further, experience with the design of RES support schemes has shown that there is no need for such drastic measures where the scheme is designed in a way so as to take account of the dynamic development and in particular of the "learning curves" RES technologies show from the beginning. Having annual digression rates or even special "corridors" for deployment, with support rates adapting to the actual development, as e.g. in Germany, allows the government to adapt to the actual development in both costs and deployment of RES technologies. When fixed in advance, they provide sufficient security for investors.

4 ***Introduce measures appropriately supporting small-scale, local RES production***

Local RES production, including self-consumption, has several advantages: for example, it increases security of supply without massive investment needs in infrastructure, it decreases inefficiencies due to transport of the energy and it can even allow RES producers to take on services to stabilize the supply system.

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However, many Member States do not think about or seriously struggle with implementing an appropriate framework for such production, thereby leaving all those potentials untapped. Close cooperation with the RES industry in this regard could help bringing about the system change the EU is aiming for.

5 ***Think system change and go beyond 2020***

The RES industry needs investment security – and this not only until 2020 when the Member States are supposed to reach their binding national renewable energy target under the Renewable Energy Directive 2009/28/EC, but also beyond. As RES projects – in particular bigger ones, e.g. in the heating and cooling sector – need some time for planning and development, the legislative framework in the member States should provide long-term investment security – and should not "stop" with the end of 2020.

National renewable energy laws, including ambitious targets and pathways for the time beyond 2020 with well-designed RES support schemes, are needed that allow investors to get the financing needed to continue the system change the EU is aiming for also in the years to come after 2020.

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