



Short communication

Rethinking the scope and necessity of energy subsidies in the United Kingdom



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ABSTRACT

Energy subsidies have the potential to dominate the debate in the energy sector until at least 2020. This article aims to advance thinking and research in the area of energy subsidies from an interdisciplinary and comparative perspective. It covers the issues of: what energy subsidies are; what institutions are involved; what is the EU perspective on subsidies; and how they should be formulated as 2020 approaches. This short review on energy subsidies is in part based on the discussion and debate from an International Energy Law Conference held in February 2014 at Trinity Hall, University of Cambridge.

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1. Introduction

Energy subsidies have the potential to dominate the debate in the energy sector until 2020. A United Kingdom (UK) Government Committee, the Environmental Audit Committee, has just released a report on energy subsidies and has called for more clarity on the issue. The European Union (EU) also plans to release a report on energy subsidies in late 2014; indeed, in April 2014 the Commission adopted its Guidelines on State aid for Energy and Environmental purposes.¹ The effect of these reports on the development of the energy sector will be a topic of major research over the next decade.

This short review on energy subsidies is in part based on the discussion and debate from an International Energy Law Conference held in February 2014 at Trinity Hall, University of Cambridge.²

While the focus there was primarily legal in nature, there was a combination of interdisciplinary expertise on the issues arising in this area, with academics from economics, engineering and geography also involved. This interdisciplinary and comparative approach to analysing subsidies in the energy sector is also advocated by Sovacool [1] and is a key gap that the journal *Energy Research and Social Science* aims to fill.

This article aims to advance thinking and research in the area and determine: what energy subsidies are; what institutions are involved; what is the EU perspective on subsidies; and how they should be formulated as 2020 approaches.

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¹ See the Commission's Press Release IP/14/400 (9 April 2014; <http://europa.eu/rapid/press-release-IP-14-400-en.htm>).

² The conference was held on 7 February 2014 at Trinity Hall, Cambridge, UK. It involved organisers from: Stirling, Law School, University of Stirling; the Department of Geography and Sustainable Development, University of St. Andrews; the Department of Engineering, University of Cambridge; and Sussex Law School, University of Sussex. For more information please see the conference website: <http://www.stir.ac.uk/media/schools/artsandhumanities/documents/Energy%20Policy%20Conference%20Poster%20-%20February%202014.pdf>. The speakers were: **Liz Keenaghan-Clark**, Deputy Director, Head of Geological Disposal Facility Project,

Office for Nuclear Development, Department of Energy and Climate Change, UK; **Professor Kim Talus**, University of Eastern Finland, Finland; **Tony Roulstone**, Director for the MPhil in Nuclear Energy, Department of Engineering, University of Cambridge, UK; **Stephen Tromans QC**, Barrister in Energy, 39 Essex Street Chambers, London, UK; **Professor Benjamin Sovacool**, Aarhus University, Denmark, Director of the Danish Centre for Energy Technology, and Visiting Associate Professor at Vermont Law School; **Mr Angus Johnston**, Associate Professor and a Fellow in Law at University College, University of Oxford, UK, Author of EU Energy Law and Policy (OUP, 2012); **Professor David Newbery**, CBE, FBA, Emeritus Professor of Economics at the Faculty of Economics, University of Cambridge, UK; **Dr. Martin Goodfellow**, Advanced Concepts Engineer – Rolls-Royce Civil Nuclear and Visiting NNUMAN Academic – The University of Manchester; **Professor John Miles**, Royal Academy of Engineering Research Professor in Transitional Energy Strategies, Department of Engineering, University of Cambridge; **Shelagh Whitley**, Research Fellow, Overseas Development Institute, UK; **Roman Sidertov**, Scott Polar Institute, University of Cambridge; **David Powell**, Economics, Friends of the Earth, UK.

2. Key themes in energy subsidies

2.1. Purposes advanced by energy subsidies

The purpose and aims of energy subsidies provide a crucial link to fulfilling legal requirements that must be met if subsidies are to be justifiable and therefore granted. This is in part because the proportionality test involves a question of ‘necessity’, focusing upon the links between the restriction (e.g. of trade and competition) necessarily involved in adequately achieving the stated goal(s).

Consequently, it is necessary to clarify the goals pursued, and the duration of subsidies. In terms of the duration, sunset and/or review clauses are one response to ensuring the on-going justifiability of subsidies, as well as facilitating for example, monitoring, and learning. In addition, careful design of transitional measures is also likely to be very important. All of this highlights that we must remember the crucial role of stability, especially when requiring huge up-front capital investments, as with most energy projects, as this is key if we are to continue to rely upon markets, private investment, etc. for investment.

Energy subsidies should be viewed from within the framework for energy policy itself. In this context at the outset of law and policy formulation more connected and sustained policy-making and development is needed. A robust context to engage should be provided and in some cases, the lobbying from different interest groups, etc. should be resisted. Further, public participation should be developed in line with the Aarhus Convention and possibly include the integration of a range of ‘external’ perspectives into various aspects of design (as advanced in the presentation by Martin Goodfellow). Further, in this context, the presentations by Stephen Tromans QC and David Powell both noted the importance of transparency in the support offered across the energy sector as a necessary precondition for informed and well-organised policy- and law-making. Energy subsidies need to incorporate the core principles of the emerging theory on energy justice (as stated by Benjamin Sovacool), which includes distributive, procedural and cosmopolitan justice. Energy justice is an emerging area of scholarship that should in the longer-term contribute to new law and policy initiatives, and particularly so in relation to energy subsidies.

2.2. Role(s) of institutions

The roles played by institutions at various levels, in developing, adopting and monitoring subsidies is of crucial importance for the purpose and success of a subsidy regime. The role of institutions is significant at both national and EU levels.

2.2.1. The national level

At national level there are three major institutions. The *National Government* is responsible for overall co-ordination of the different government departments, legislative proposals, etc. *NRAs (National Regulatory Authority for Energy)* exercise their regulatory functions on various matters including: the operation of markets; security of supply issues; infrastructure and investment; and environment, safety and sustainability. These functions need to be considered in the context of EU legislation requiring NRAs to be independent from government (as well as industry). Finally, there is the role of *National courts*. In this context, since many EU law rules are directly effective they therefore can be enforced in national law and before national courts – for example, there is a direct link to EU level via references for a preliminary ruling which are sent by national courts to the Court of Justice.

2.2.2. The EU level

Both the role of Member States and recent Treaty changes are important here, for example, Article 194 of the Treaty of the Functioning of the European Union (TFEU) regarding EU competence to legislate in the energy field, and the Member State (MS) role in the Council.³ There are three parts to the EU system.

The first of these is the *Legislature* (typically the Council and the European Parliament (EP) jointly, although there are exceptions where this is the Council alone, after consulting the EP (e.g. Article 194(3) TFEU re fiscal matters)). Its duties include primarily adopting secondary legislation under the Treaties on various topics, for example, the Third Internal Energy Market package, and subsequent measures such as Trans-European Energy Networks and Security of Supply. It also is responsible for passing enabling legislation and empowering the Commission to adopt rules.

Second is the *Executive* that typically for most key energy purposes, is the Commission. The Commission is the sole holder of the legislative initiative and is a delegated legislator. Significantly for the energy sector, the Commission is the competition and State aid law enforcer and watchdog (and policy-maker thereunder): e.g. for adopting formal Decisions, and Guidelines.

Finally, there is the *Judiciary* that includes both the General Court and Court of Justice of the EU. The General Court is the court of first instance for private challenges to EU measures, for example if an undertaking is challenging a competition or State Aid Decision, and also some MS challenges too. The Court of Justice of the EU is for an appeal from the General Court, and also recipient of references for a preliminary ruling sent by national courts. There are criticisms of these courts for their interpretations which are perhaps sometimes fair, but it should be noted that the justice and quality of the *outputs* of the judicial process will be heavily influenced by the quality and clarity of the *inputs* into the system of legal adjudication (clear drafting, consistent measures, coherent goals, etc.).

2.3. EU law implications

The energy subsidy regime is currently under review in the EU, by the European Commission and the Court of Justice of the European Union (CJEU) in particular.

2.3.1. The European Commission

There are various energy subsidy issues on-going at the European Commission and these include legislative proposals, and State aid and related issues.

Regarding legislative proposals, the primary focus is on the EU renewables legislation post-2020 to deal with the period after the end of that covered by the current Directive 2009/28/EC. In addition, there are new proposals on the management and reform of the EU Emissions Trading System, and there are also proposals on longer-term emissions reduction targets.

There are numerous State aid and related issues. Investigations continue and decisions are expected during 2014 on the Hinkley Point nuclear energy project in the UK and the German renewables energy subsidy support. There have been various draft guidelines out for consultation, notably: the notion of aid; energy and environmental aid; and the design of renewables support mechanisms. These should in themselves provide greater clarity on how future decisions will be reached and should be watched closely by scholars in the area. The introduction of new delegated legislation (e.g.

³ For recent discussion of the difficulties in interpreting this provision, and its implications, see A. Johnston & E. van der Marel, ‘Ad lucem? Interpreting the New EU Energy Provision, and in particular the meaning of Article 194(2) TFEU’ (2013) 22(5) *EEELRev* 181.

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