



The Federal Ministry
for the Environment,
Nature Conservation
and Nuclear Safety

Legal and economic impacts of the proposed GO trade between persons

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Questions to be examined

1. How does the proposed GO trade between persons affect national support schemes?
2. Does the proposed GO trade between persons lead to cost-effectiveness?
3. Can Member States restrict GO trade between persons?



Private GO trading in COM proposal

- Article 9 (3) establishes GO trade between private persons **as a rule**.

„Subject to the provisions adopted pursuant to para. 2, **guarantees of origin may be transferred between persons** in different MS...”
- Exemptions are only allowed within the limits of Article 9 (2).



Question no. 1

How does the proposed GO trade between persons affect national support schemes?

Commissioner Piebalgs, Energy Council, 28 Feb 2008:

„On trading of guarantees of origin, it was two goals we have tried to achieve... the use of flexibility for Member Countries that would like it and at the same time I really say **the political goal is not to undermine any existing scheme.**“



Situation with Directive 2001/77

- National support schemes are only open for national RE electricity.
- This constitutes a restriction of trade in electricity.
- Directive 2001/77/EC explicitly permits national support schemes which may restrict trade.

Art. 4 (1): Without prejudice to Articles 87 and 88 of the Treaty, the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which **could have the effect of restricting trade**, on the basis that these contribute to the objectives set out in Articles 6 and 174 of the Treaty.



Situation with the COM proposal

- A similar provision is missing in the COM proposal.
- Consequences:
 - National support schemes might have to be opened for foreign production.
 - Operators may choose if they want to benefit from a national support systems or a GO.



Question no. 2

Does the proposed GO trade between persons lead to cost-effectiveness?

„**To ensure cost-effectiveness**, (the Renewables Directive) proposes a trading system in Guarantees of Origin.“

(Council of the European Union, Brussels, 4 April 2008 – 8085/08 – Note from the Presidency of the Council to the Council Members)



- Exploitation of the best RE potentials in the EU
- Consequence: Flexibility through transfers
- In the absence of harmonised support schemes, we must avoid windfall profits occurring from the parallel existence of national support schemes and European private GO trade.



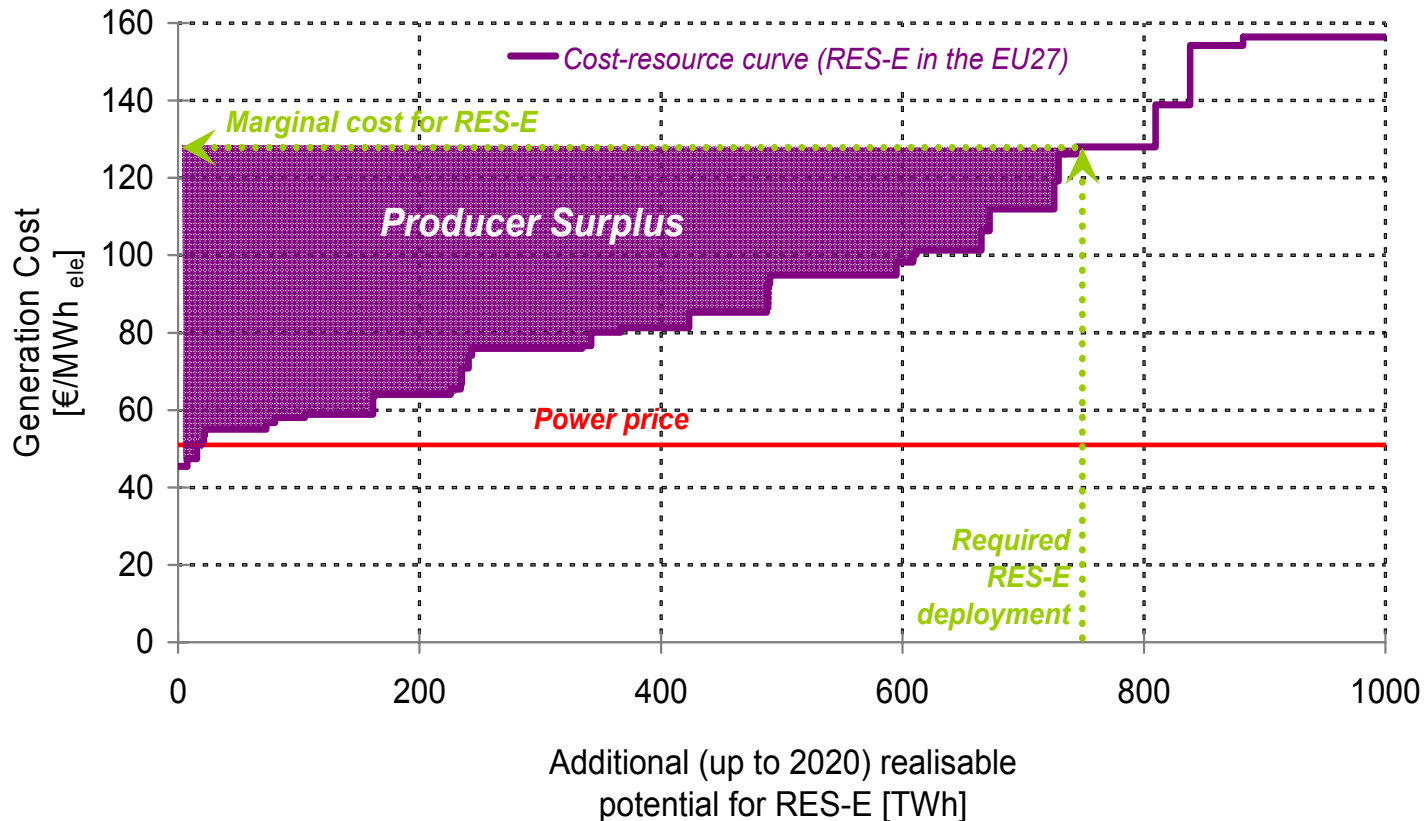
Economic consequences of the proposed GO trading scheme

- Massive increase of costs of reaching national targets due to high windfall profits.
Costs are increased by up to 30 billion €.
- Destabilization of feed-in systems
 - Sell-out of low-cost potentials
 - Race for the highest support between MS
- Impact on quota systems
- Lack of support for innovative technologies



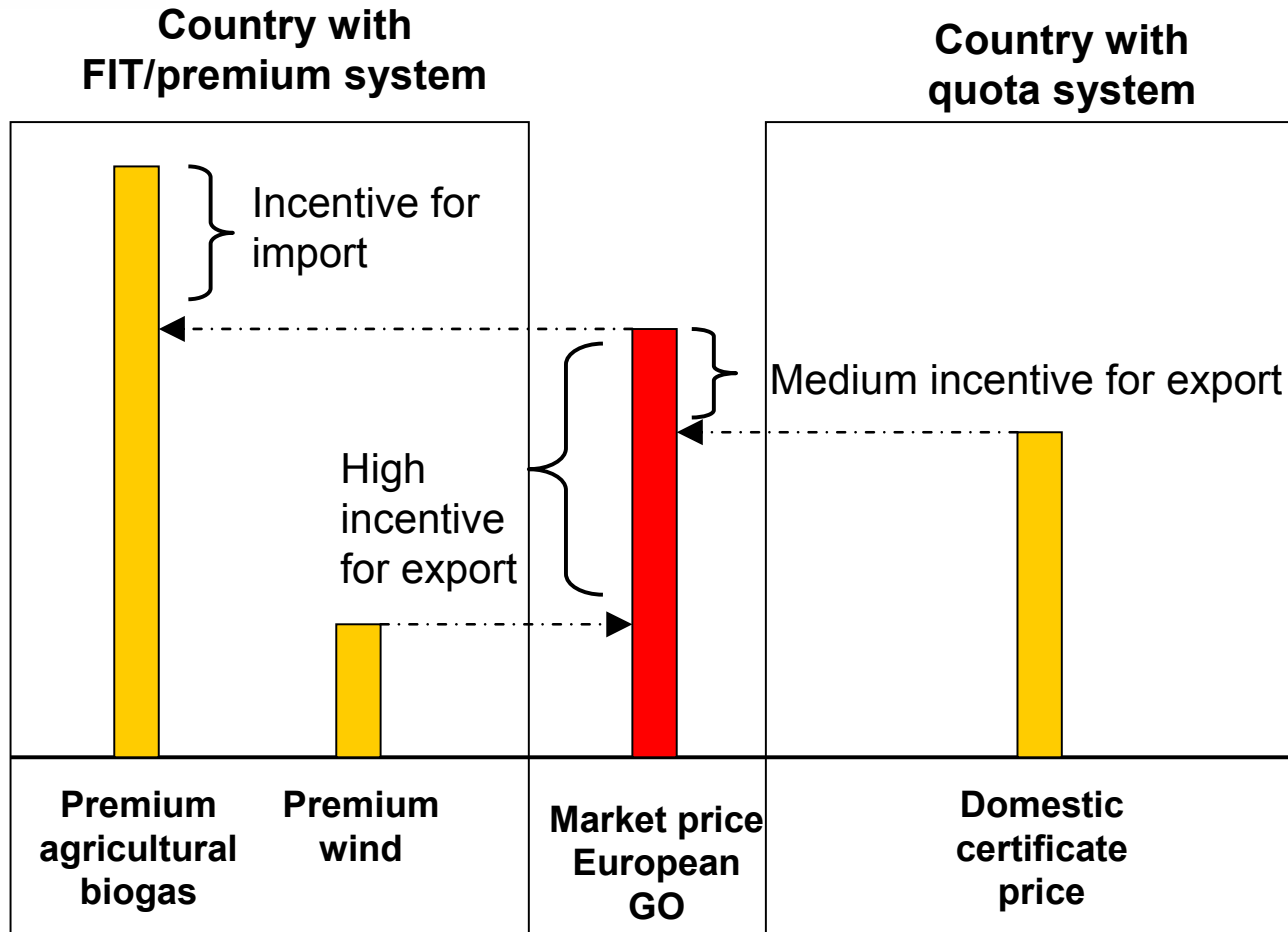
Windfall profits resulting from private GO trade

Producer surplus arising from technology-neutral GO trade





Impact of GO trade on feed-in systems





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Thank you for
your attention!



Question no. 3

Can Member States restrict GO trade between persons?



Consequences of COM proposal

- GO = tradeable good in the meaning of Art. 28 EC, subject to the free movement of goods
- Article 9 (3) establishes GO trade between private persons **as a rule.**

„Subject to the provisions adopted pursuant to para. 2, **guarantees of origin may be transferred between persons** in different MS...”
- Consequences:
 - Any restriction of GO trade constitutes a violation of Article 28 and has to be justified.
 - The risk of the ECJ deciding that a national restriction is not justified is borne by the MS.



Scope for national restrictions

- Option of complete opt-out of private GO trading?
- Systems of prior authorisation are only allowed within the limits of the specific exemptions in Article 9 (2).
- No recourse to grounds for justification in Art. 30 EC possible



General rules for justification

According to ECJ jurisprudence,

- Justifications must always be construed narrowly.
 - e.g. ECJ C-399/93, C-86/03
- Restrictions must always be proportionate and may not constitute means of arbitrary discrimination.



Practical applicability of Art. 9 (2) - 1

- Security of supply
 - Grid stability
 - Situations where the transfer of (merely virtual!) GOs endangers the security of supply are hardly conceivable.



- Environmental objectives underlying the national support scheme
 - Problem: Environmental objectives of national support schemes and the Directive overlap as both aim to promote renewables.
 - Other environmental objectives hardly conceivable



- National target achievement
 - Note: may only justify restrictions of GO exports
 - („transfer of GOs **to** persons in other MS“)
 - Probably only applicable in extreme cases (as justifications have to be construed narrowly!)



Practical applicability of Art. 9 (2) - Conclusion

- The practical scope of applicability of Art. 9 (2) is very restricted.
 - > Art. 9 (2) = „empty box“
- The burden of proof will always be on the Member State.
- Conclusion: Private GO trade should be made optional (opt-in).



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