



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.



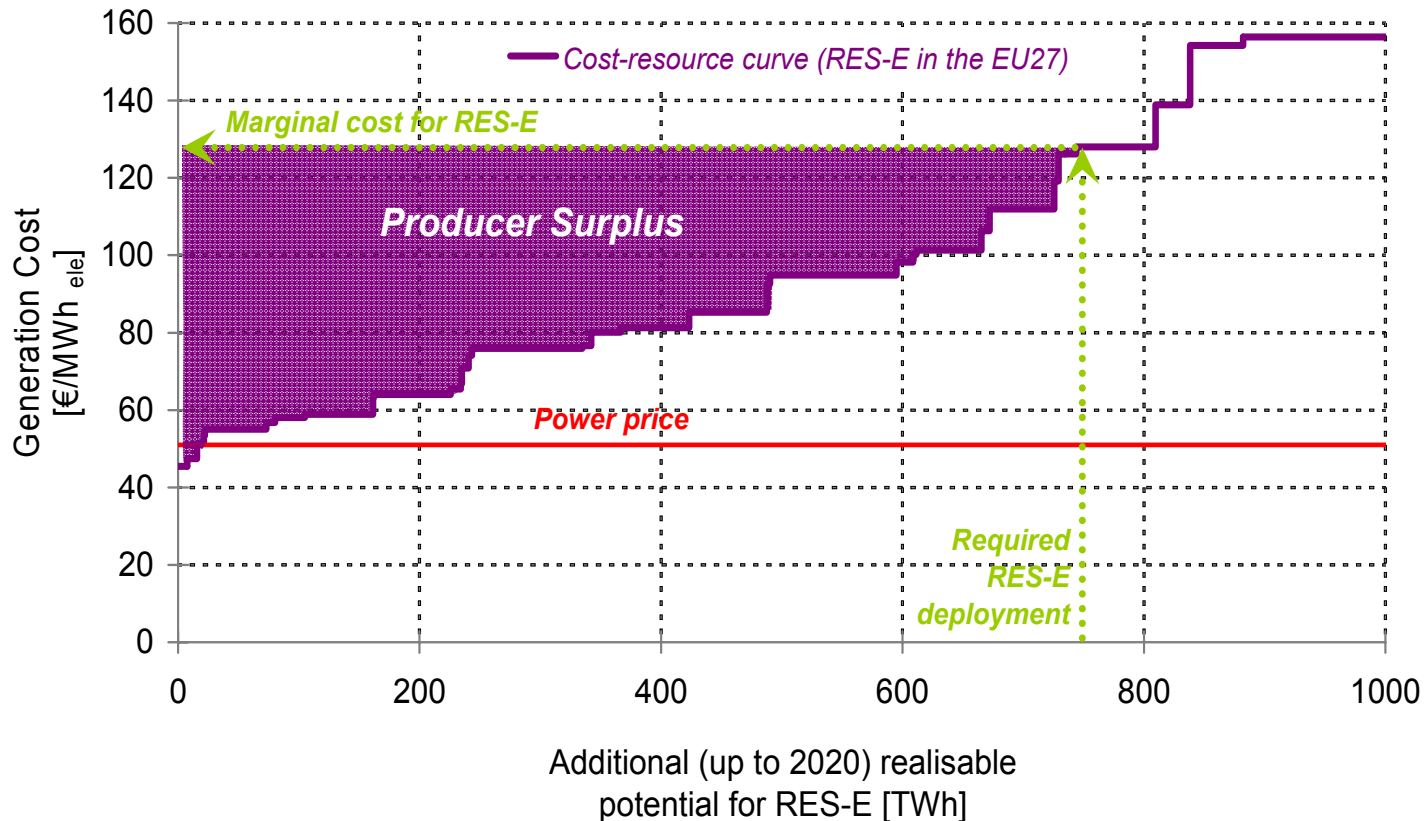
# Economic consequences of the proposed GO trading scheme

- 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



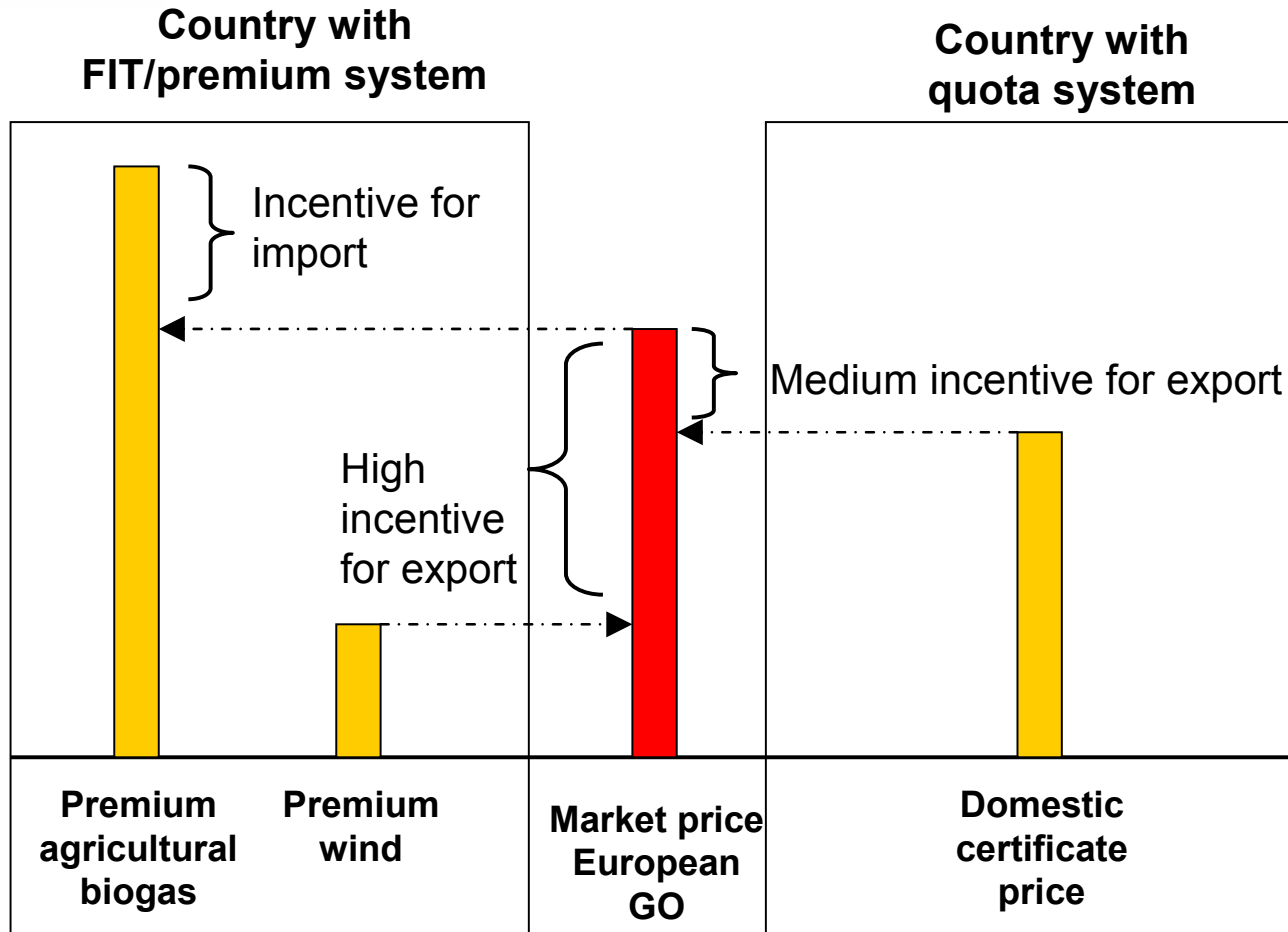
# Windfall profits resulting from private GO trade

## 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.



- 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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