

# **EFELA: Beyond Energy Sector Reforms**

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Investment and economics session - the necessity of legal certainty for investment in the energy transition...

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# 1. Introduction and Context



EU targets...

Paris agreement

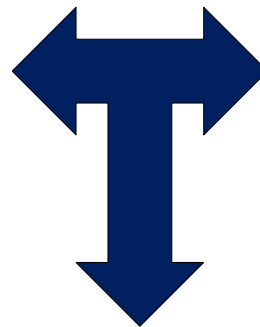
Source: Yale Climate Connections

Renewable energy



Reliable energy & flexible energy

Low carbon energy



Invest?

Yes

No

Uncertainty



Focus today = power sector

Europe

Irish perspective



# 2. Legal Uncertainty and Investment: Cause & Consequence – An EU Perspective

## Legal Uncertainty

- Energy Charter Treaty: “fair and equitable” treatment protection - basis
- Multi € awards (ICSID tribunals)
- EU: claims jurisdiction on such cases

EU jurisdiction vs. arbitration tribunals

Renewables (RES) support schemes: discretion

- Tariff based designs
- Exemptions from market participation
- Led to high costs for consumers
- Retroactive changes impacted investors...

- Premiums vs. tariffs (RES schemes)
- Competitive procurement required
- Market exposure required for RES
- !! Application to existing support schemes that “change”...

2014 State Aid Guidelines (SAG): compatibility

- Unilateral interests vs. Proportionality (discriminating non-domestic resources)
- Preussun Elektra, Essent Belgium (CJEU)

CJEU caselaw: evolution in views re cross-border participation

- Required to back-up intermittent renewables (security of supply...)
- Uncoordinated, disparate schemes
- 2014 SAG applicability also, but
- Sector Inquiry 2015-2016

Capacity Mechanisms: discretion



# 3. EU Legislative Developments – enablers for investment in the energy transition?

## A. Renewables (RES) Support Schemes under Clean Energy Package (RES directive, June 2018)

### Highlights >

#### Article 6:

- Revisions “shall not” retroactively negatively impact investments
- Use of “objective criteria” from original design decision for any adjustments
- Advance notice: allocation of support, tender frequency, expected eligible technologies

#### Article 4:

- Design to be market based and not “unnecessarily distort electricity markets”
- Market integration of RES
- Use of premiums instead of tariffs in schemes
- Grant supports in an open, transparent, competitive, non-discriminatory manner (may be limited to specific technologies when “suboptimal” results may outturn)

#### Article 5:

- “May” open schemes to cross-border participation (minimum limits ~5%-10% per year 2023-2030)

Open Qs?

- Unnecessary distortion of markets?
- Suboptimal results to justify limitation of technologies?
- Legal basis of RED (Article 194(2) TFEU)?
- Optionality to open schemes to cross border sources?



# 3. contd. EU Legislative Developments – enablers for investment in the energy transition?

## B. Capacity Mechanisms under Clean Energy Package (Electricity Regulation, Feb 2017)

### Highlights >

#### Article 23:

- Must prove necessity of mechanism for security of electricity supply (taking account of cross-border contributions)
- Must not create “unnecessary distortions”
- Subject to compatibility with state aid guidelines also

#### Article 21:

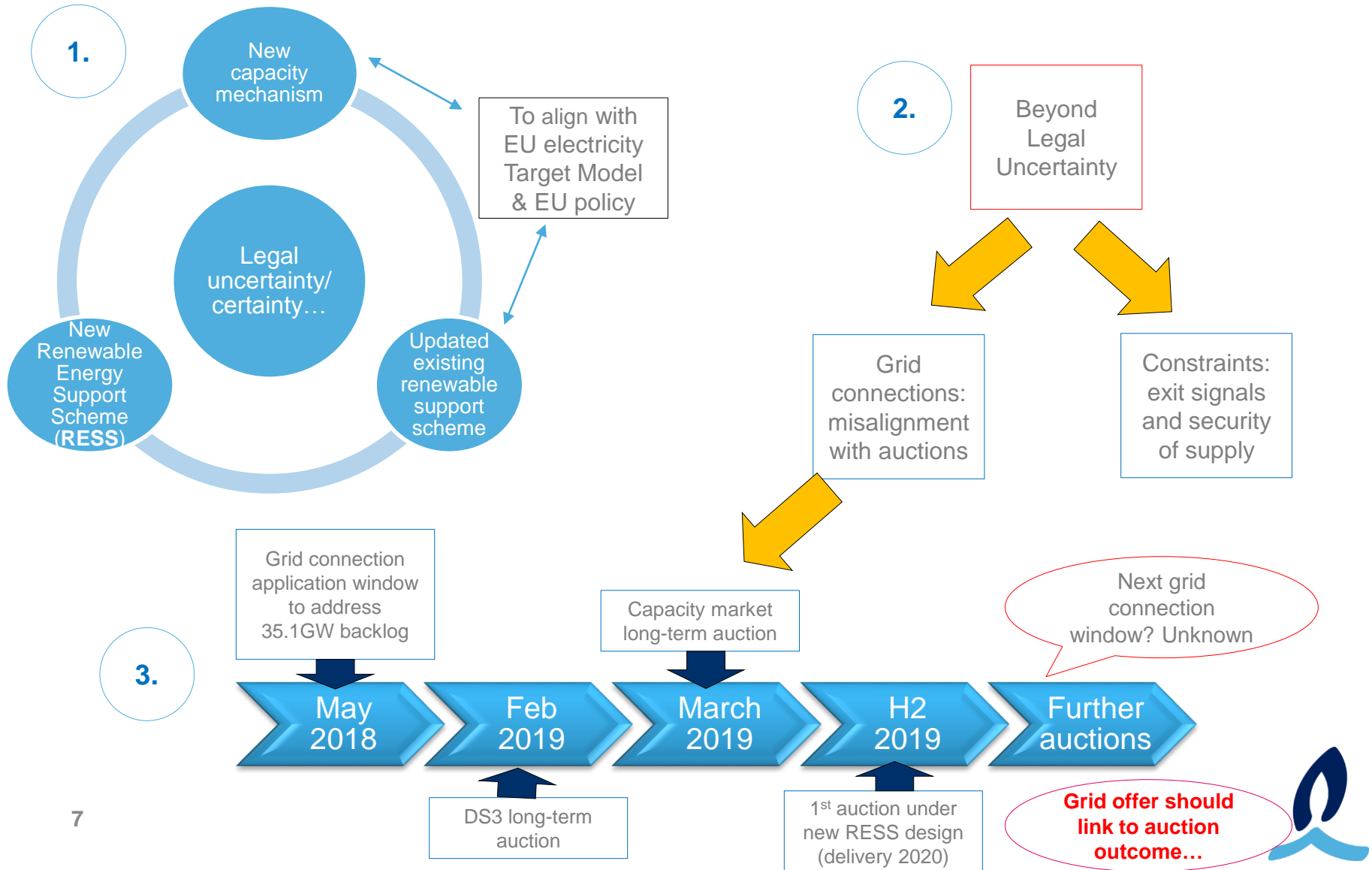
- Must open to cross-border participation

Open Qs?

- Unnecessary distortion of markets?
- Accuracy of Europe-wide assessment vs. security of supply?
- Continued support for high emitting fuels considering recent state aid decisions?



# 4. Beyond Legal Uncertainty: An Irish Perspective



# 5. Conclusion

! Scheme design discretion  
> unilateral member state views > uncoordinated EU-wide schemes > State aid guidelines > sector inquiry > CJEU vs. Arbitration... =



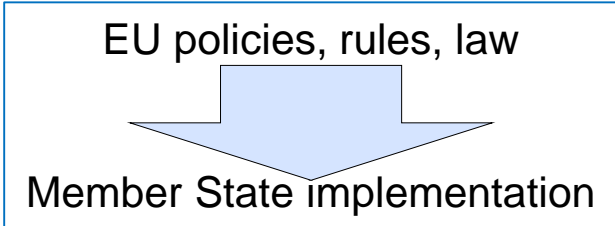
€ Uncertainty €



EU on the right trajectory but some way to go to achieve low carbon energy transition targets...



Clean Energy Package (CEP) positive steps ... but open questions remain



Not straightforward, e.g. Irish grid connection issue





# Questions?

Thank you.

