

New Guidelines on Environmental and Energy State Aid for 2014–2020

Energy

Legal Analysis

Justice and Environment 2014

New Guidelines on environmental and energy state aid for 2014–2020

Legal Analysis

Association Justice and Environment (J&E) is a European network of environmental law organisations that strives to protect the environment and nature by improving environmental legislation and enhancing the enforcement thereof. J&E has been working on energy and climate change related issues for five years tackling and analysing the matter from different legal perspectives.

The previous year, in the Member States where it is active, J&E collected information on the existing national regulation on the utilization of renewable energy sources, and this year – in order to deepen its knowledge in the field of support schemes of renewable energy sources – J&E prepared the following overview on the European Commission’s new Guidelines on environmental and energy state aid for 2014–2020.

Table of contents

| | |
|--|----|
| Introduction | 4 |
| I. Main objectives | 5 |
| II. Scope of the EEA Guidelines | 5 |
| Notifiable environmental and energy aid | 7 |
| III. Common assessment principles and general compatibility provisions | 8 |
| IV. Aid to energy from renewable sources | 9 |
| IV.1. General conditions for investment and operating aid | 9 |
| IV.2. Operating aid granted to energy from renewable sources | 10 |
| IV.2.1. Aid for electricity from renewable energy sources..... | 10 |
| <i>Market premiums instead of feed-in tariffs</i> | 11 |
| <i>Competitive bidding processes</i> | 11 |
| IV.2.2. Aid for energy from renewable sources other than electricity..... | 12 |
| IV.2.3. Aid for existing biomass plants after plant depreciation..... | 13 |
| IV.2.4. Aid granted by way of certificates | 13 |
| V. Energy efficiency measures | 14 |
| VI. Resource efficiency measures – waste management | 14 |
| VII. Carbon capture and storage (CCS) | 14 |
| VIII. Aid in the form of reductions in or exemptions from environmental taxes and in the form of reductions in funding support for electricity from renewable sources | 15 |
| VIII.1. Aid in the form of reductions in or exemptions from environmental taxes | 15 |
| <i>Harmonised environmental taxes</i> | 16 |
| <i>Non-harmonised environmental taxes and specific situations of harmonised taxes</i> | 16 |
| VIII.2. Aid in the form of reductions in the funding of support for energy from renewable sources | 17 |
| VIII.3. Transitional rules and adjustment plans | 19 |
| IX. Infrastructure – Projects of Common Interest | 19 |
| X. Generation adequacy - capacity remuneration mechanisms | 20 |
| XI. Application of the EEA Guidelines | 21 |
| Outlook | 22 |

Introduction

In April of 2014, the European Commission (EC) adopted its new Guidelines on environmental and energy state aid for 2014–2020 (hereinafter referred as EEA Guidelines) which was published by the Communication No. C(2014)2322. The EEA Guidelines replace the EC's 2008 Guidelines on state aid for environmental protection, and also include detailed rules regarding state aid in the energy sector. The EEA Guidelines set out the conditions under which State aid in the field of environmental protection and energy can be declared compatible with the EU internal market on the basis of Article 107(3) of the Treaty on the Functioning of the European Union (hereinafter referred as "TFEU") and contain new rules on public support for projects in the field of environmental protection and energy in order to support Member States in reaching their 2020 climate targets. The new guidelines promote a gradual move to market-based support for renewable energy and address the market distortions resulting from subsidies granted to renewable energy sources.

In essence, the Guidelines represent the EU Commission's view on environment-related and energy-related national support schemes and their compatibility with ensuring fair competition on the EU's Single Market. The objectives are - in line with the Europe 2020 strategy - to foster sustainable, smart and inclusive growth in a competitive internal market, to allow the EC to focus its enforcement on the cases with the biggest impact on the internal market and to streamline the rules and provide for faster decisions. The EEA Guidelines - affecting new as well as existing support schemes - do not apply directly to plants generating electricity from renewable sources.

The EEA Guidelines designate limits for the design of Member States' national support schemes for renewables and lay down the principles that the EC will apply when assessing whether state aid granted by Member States is compatible with the internal market. They provide criteria on how Member States can support energy intensive companies that are particularly exposed to international competition from charges levied for the support of renewables.

Basically, Member States are free to design their support schemes but they must notify state aid that does not benefit from an exemption or approval to the EC for approval, otherwise such aid cannot be granted. State aid granted without EC's approval is unlawful and subject to recovery with interest for 10 years.

EEA Guidelines provide new and detailed clarifications on state support to energy-related activities and, in particular, to various electricity generation technologies, with the exception of nuclear.

I. Main objectives

On the one hand, in the EEA Guidelines the EC points out that "well-designed public support measures can make a key contribution to achieving the EU's energy and climate objectives for 2020 and strengthening cross-border energy flows, thus ensuring that European companies and consumers have access to more affordable energy." On the other hand, it is also taken into account that public support measures, which largely induced growth in renewable energy over recent years, has caused serious market distortions and increased energy costs for consumers. From these considerations the EC concluded that "it is time for renewables to join the market" through "more efficient public support measures that reflect market conditions, in a gradual and pragmatic way."

The EEA Guidelines aim at supporting Member States' efforts in reaching their 2020 climate targets, while addressing the market distortions that may result from subsidies granted to renewable energy sources. They promote a gradual move to market-based support for renewable energy and aim at better integrating renewables into the EU electricity market on a gradual basis, limiting State aid to what is strictly necessary. They promote also the progressive introduction of auctioning or competitive bidding processes for allocating public support, as well as the gradual replacement of feed-in tariffs by feed-in premiums (a top-up on the market price), thereby exposing renewable energy sources to market signals.

II. Scope of the EEA Guidelines

The 2008 Guidelines which was replaced by the EEA Guidelines already contained rules on energy issues that are closely linked to climate policy such as aid for energy saving, renewable energy sources (RES) and cogeneration and energy-efficient district heating. The EEA Guidelines deal with some other specific energy issues such as carbon capture and storage (CCS), energy infrastructure and generation adequacy as well. They integrate environmental protection measures with the public financing of energy sector.

Aid to nuclear energy sources however has not been included in the final version of the EEA Guidelines. Although the EC initially included specific rules in the Guidelines permitting state aid to nuclear energy under certain conditions, these were left out. Any nuclear support measure involving state aid would be assessed under the EC's general rules case by case.

The EEA Guidelines apply to State aid granted for environmental protection or energy objectives in all sectors governed by the TFEU, including those sectors subject to specific EU State aid rules (e.g., transport, coal, agriculture, forestry, fisheries and agriculture), unless provided otherwise.

For agriculture and fisheries and aquaculture, they apply to aid for environmental protection in favour of undertakings active in the processing and marketing of products and, under certain conditions, to undertakings active in primary production.

Aid measures that may be compatible with Article 107(3)(c) TFEU under certain conditions and are covered by the EEA Guidelines are the followings:

- aid for exceeding EU standards or increasing the level of environmental protection in the absence of EU standards;
- aid for early adaptation to future EU standards;
- investment and operating aid for energy from renewable sources (i.e., renewable non-fossil energy sources);
- aid for environmental studies;
- energy efficiency measures, including cogeneration and district heating and district cooling;
- aid for resource efficiency and waste management;
- aid for the remediation of contaminated sites;
- aid for relocation of undertakings;
- aid in the form of tradable permits;
- aid for CO₂ capture, transport and storage ("CCS");
- operating aid in the form of reductions in or exemptions from environmental taxes;
- operating aid in the form of reductions in funding support for electricity from renewable sources;
- aid for energy infrastructure;
- aid for generation adequacy measures.

However, the EEA Guidelines do not apply to

- the design and manufacture of environmentally friendly products,
- the financing of environmental protection measures relating to transport infrastructure,
- stranded costs (which remain subject to the regime set out in the EC's 2001 Communication),
- State aid for research, development and innovation (which are subject to the 2006 Framework for State aid for research and development and innovation, as currently under review by the EC),
- State aid for biodiversity measures (which usually fall within the scope of the rules set out for Services of General Economic Interest).

Furthermore, environmental and energy aid may not be awarded to firms in difficulties, as defined by the Guidelines on State aid for rescue and restructuring undertakings in difficulty¹.

Notifiable environmental and energy aid

Individual aid granted on the basis of an aid scheme is subject to the notification obligation pursuant to Article 108(3) of the TFEU, if the aid exceeds the notification thresholds laid down in the EEA Guidelines and is not granted on the basis of a competitive bidding process.

The following thresholds apply in this regard:

- investment aid: where the aid amount exceeds EUR 15 million for one undertaking;
- operating aid for the production of renewable electricity and/or combined production of renewable heat: where the aid is granted to renewable electricity installations at sites where the resulting renewable electricity generation capacity per site exceeds 250 megawatts ('MW');
- operating aid for the production of biofuel: where the aid is granted to a biofuel production installation at sites where the resulting production exceeds 150 000 tonnes ('t') per year;
- operating aid for cogeneration: where aid is granted to cogeneration installation with the resulting cogeneration electricity capacity exceeding 300 MW;
- aid for energy infrastructure: where the aid amount exceeds EUR 50 million for one undertaking, per investment project;
- aid for Carbon Capture and Storage: where the aid amount exceeds EUR 50 million per investment project;
- aid in the form of a generation adequacy measure: where the aid amount exceeds EUR 15 million per project per undertaking.

The EEA Guidelines provide the compatibility criteria for aid schemes and individual aid for environmental protection and energy objectives which are subject to the notification obligation pursuant to Article 108(3) of the TFEU.

¹ http://ec.europa.eu/competition/state_aid/legislation/rescue_resctructuring_communication_en.pdf

III. Common assessment principles and general compatibility provisions

The EEA Guidelines do not explain which measures are state aid². They only set out the criteria which will be used by the EC in assessing environmental and energy aid measures which amount to state aid and which must be notified. Governments are free to structure their measures in such a way that those do not constitute state aid.

The EEA Guidelines clarify how the EC will apply the common assessment principles set out in Section 3.1 when assessing aid measures and, where applicable, lays down specific conditions for individual aid (either provided on the basis of a scheme or ad hoc).

Certain measures that are state aid do not need to be notified (i.e., measures that are block exempted). The relevant block exemption regulation was also revised. It includes for example funding for cleaning up contaminated sites and the promoting of district heating, as well as public loans to improve the energy efficiency in buildings. These measures will not need to be notified and assessed under the EEA Guidelines. The same applies for measures that are block exempted by virtue of their minor importance (support of max. €200,000 per company over three years).

As the overall framework of the 2008 Guidelines was redesigned, the EEA Guidelines first outline the criteria – as common assessment principles - against which the EC assess the compatibility of any environmental and energy State aid measure based on the Art 107 (3) of the TFEU.

These principles describe that it will be assessed whether the given aid/measure

- contributes to a well-defined objective of common interest;
- is needed in order to remedy a well-defined market failure;
- is appropriate to address the objective of common interest;
- incentivises market players to behave differently from how they would if the measure were not implemented;
- is proportionate (the aid amount is limited to the minimum needed to incentivise the additional investment or activity in the area concerned);
- avoids major negative effects on competition and interstate trade;

² State aid is defined as „measures containing a selective advantage granted through Member State resources which threatens to distort competition within the internal market and affects trade between Member States”.

- is transparent as to both its form (all relevant acts) and its implementation (information on the aid awarded).

EEA Guidelines apply this general framework to several specific types of environmental and energy aid measures. The EEA Guidelines contain for the first time specific state aid guidance on some energy-related activities (carbon capture and storage, reduction of charges to fund energy from renewable sources, investments in infrastructure for interconnections and cross-border networks, and generation adequacy).

The principles listed above will be evaluated under the regulation of **Section 3.2 containing the General Compatibility Conditions which** are applicable to all aid measures falling within the scope of these Guidelines, unless the more specific sections of Chapter 3 specify or amend these general compatibility conditions.

Accordingly, Section 3.2 applies in particular to the following measures which are not part of the more specific sections of Chapter 3, such as aid for environmental studies; for the remediation of contaminated sites; for undertakings going beyond Union standards or increasing environmental protection in the absence of Union standards; and for the early adaptation to future Union standards.

To assess whether a notified aid measure can be considered compatible with the internal market, the EC generally analyses whether the design of the aid measure ensures that the positive impact of the aid towards an objective of common interest exceeds its potential negative effects on trade and competition.

MSs intending to grant environmental or energy aid will have to define precisely the objective pursued and explain what the expected contribution of the measure towards that objective is. In case of individually notifiable aid, in order to demonstrate the contribution of an individually notifiable aid towards an increased level of environmental protection, the MS may use, as much as possible in quantifiable terms, a variety of indicators, in particular: abatement technologies, existing Union standards, future EU standards.

IV. Aid to energy from renewable sources

IV.1. General conditions for investment and operating aid

In accordance with the EU 2020 Strategy, the EEA Guidelines support State aid for RES in general. EC, however, also took the view that public support of RES may lead to overcompensation, increased consumer prices, and to inefficiently functioning energy markets.

Aid to energy from renewable sources can be granted as investment or operating aid. For investment aid schemes and individually notified investment aid, the conditions set out in Section 3.2 apply (General Compatibility Conditions).

The EC will consider investment aid in new and existing capacity for food-based biofuel not to be justified. However, investment aid to convert food-based biofuel plants into advanced biofuel plants is allowed to cover the costs of such conversion. Other than in this particular case, investment aid to biofuels can only be granted in favour of advanced biofuels.

Whilst investment aid to support food-based biofuel will cease from the date of application of these Guidelines, operating aid to food-based biofuels can only be granted until 2020. Therefore, such aid can only be granted to plants that started operation before 31 December 2013 until the plant is fully depreciated but in any event no later than 2020.

For operating aid schemes, the general provision of Section 3.2 will be applied as modified by the specific provisions as set in Section 3.3. For individually notified operating aid, the conditions set out in Section 3.2 apply, where relevant taking into account the modifications made by Section 3.3. for operating aid schemes.

An aid scheme can be authorised for maximum 10 years. If the measure will be maintained, such measure should be re-notified after such period. Concerning food-based biofuel, existing and newly notified schemes should be limited to 2020.

IV.2. Operating aid granted to energy from renewable sources

IV.2.1. Aid for electricity from renewable energy sources

From 1st January 2016, public support can only be provided in the form of market-oriented mechanisms, such as premiums (a top-up on the market price) or tradable certificates. The EEA Guidelines require RE generators to sell the electricity in the market and be subject to balancing responsibilities (i.e., an obligation on producers to compensate for short-term deviations from their previous delivery commitments).

The EEA Guidelines gradually introduces competitive bidding processes for the allocation of public support. Bidding processes will be required for a small share of new electricity capacity but, as of 2017, such processes will apply to the award of all public support for renewables.

Market premiums instead of feed-in tariffs

Feed-in tariffs can only continue for small installations. Feed-in tariffs must be replaced by market premium-based support schemes by 2016³; from 1 January 2016, all new operating aid for generation from renewables must be granted as a premium on top of the market price, with electricity generators being required to sell their electricity directly in the market. Exceptions are specified only for small-scale installations with an installed capacity of less than 500 kW (wind energy up to 3 MW or 3 generation units) and for demonstration projects.

Beneficiaries must be subject to standard balancing responsibilities, unless no liquid intraday markets exist. Furthermore, measures must be put in place to ensure that generators have no incentive to generate electricity at negative prices.

An aid scheme can be authorised for maximum 10 years, after which it should be re-notified. In spite of the earlier drafts, the EEA Guidelines do not require MSs to open their national support schemes to generators from other countries.

Competitive bidding processes

New operating aid for electricity from RES has to be granted as a premium in addition to the market price, or through a system of certificates with a price determined by market supply and demand. According to the EEA Guidelines, competitive bidding processes will determine who is eligible and what amount of funding is available, thus replacing market premiums defined by statute or otherwise.

In 2015 and 2016, at least 5 % of the planned new electricity capacity from renewable energy sources must be granted in competitive bidding processes. These procedures shall be based on clear, transparent and non-discriminatory criteria. The bidding process must be open to all generators producing electricity from renewable energy sources.

From 1 January 2017, in principle, all aid granted must be awarded using such processes, except where the Member State can demonstrate that

- only one or a very limited number of projects or sites could be eligible,
- a competitive bidding process would lead to higher support levels, or
- a competitive bidding process would result in low project realization rates.

³ According to Par (250) of the EEA Guidelines Member States should amend, where necessary, such schemes in order to bring them into line with these Guidelines no later than 1 January 2016, with the following exceptions: Where necessary, existing aid schemes within the meaning of Article 1(b) of Council Regulation (EC) No 659/1999 concerning operating aid in support of energy from renewable sources and cogeneration only need to be adapted to these Guidelines when Member States prolong their existing schemes, have to re-notify them after expiry of the 10 years-period or after expiry of the validity of the Commission decision or change them.

Installations with capacity of less than 1 MW, wind installations with an installed capacity of up to 6 MW or 6 generation units, and demonstration projects are generally exempt from the bidding requirements.

An aid need not be open to generators from other MSs, unless a cooperation mechanism exists between the two countries, ensuring that renewable energy produced in one MS can count toward the renewable target of the other.

In contrast to earlier drafts, the EEA Guidelines provides freedom to MSs to organize technology specific tenders. These are permitted where a process open to all generators would lead to a suboptimal result which cannot be addressed in the process design, in particular in view of:

- the longer-term potential of a given new and innovative technology,
- the need to achieve diversification,
- network constraints and grid stability,
- system (integration) costs, or
- the need to avoid distortions on the raw material markets from biomass support.

The transitional provisions regarding to the introduction of bidding mechanisms provide that installations which started works (including any firm commitment that makes the investment irreversible) before 1 January 2017 and have received confirmation of the aid by the Member State before that date can be granted aid on the basis of the scheme in force at the time of confirmation.

IV.2.2. Aid for energy from renewable sources other than electricity

For energy from renewable sources other than electricity, operating aid will be considered being compatible with the internal market if:

- the aid per unit of energy does not exceed the difference between the total levelized costs of producing energy ('LCOE') from the particular technology in question and the market price of the form of energy concerned;
- the LCOE may include a normal return on capital. Investment aid is deducted from the total investment amount in calculating the LCOE;
- the production costs are updated regularly, at least every year; and
- aid is only granted until the plant has been fully depreciated according to normal accounting rules in order to avoid that operating aid based on LCOE exceeds the depreciation of the investment.

In this case, support can be justified when it does not exceed the difference between the total levelized costs of producing energy from a specific technology and the market price of the form of energy concerned. Public support to renewables can only be approved until the plant has been fully depreciated. Exceptions exist for biomass and biogas plants.

The EC will apply the new rules after 1 July 2014 to all new schemes and individual measures on which it must decide. In principle, the EEA Guidelines will not affect aid granted to the owners of existing installations, these installations will continue to receive aid based on existing approved state aid schemes. If, however, a MS wishes to prolong or modify an existing scheme in the future, the EEA Guidelines must be complied with.

IV.2.3. Aid for existing biomass plants after plant depreciation

As regards food-based biofuels, operating aid can only be granted to plants that started operation before 31 December 2013 until the plant is depreciated, but no later than 2020. If biofuels are subject to a legally binding supply or blending obligation, no operating aid is allowed.

Operating aid for renewables may only be granted until the plant has been fully depreciated according to normal accounting rules. For biomass, however, operating aid may be compatible with the internal market even after plant depreciation, due to the relatively low investment costs and higher operating costs.

The EEA Guidelines includes detailed criteria for permissible operating aid to biomass plants after plant depreciation. These establish monitoring mechanisms also in order to avoid overcompensation.

The EEA Guidelines will affect existing support schemes and aid granted under renewables support schemes. They apply from 1 July 2014 until 31 December 2020 and to all notified aid measures on which the EC takes a decision after 1 July 2014, even if the measure was notified before that date. The EEA Guidelines limit the authorization of operating aid schemes to a maximum period of 10 years.

IV.2.4. Aid granted by way of certificates

Member States may grant renewables support in the form of green certificates as well. In levels of support through green certificates differentiation is not allowed, unless the MS demonstrates a need for differentiation on the basis of the justifications acceptable for technology specific bidding processes. The already mentioned and general conditions which are applicable to market premiums apply also to certificate mechanisms.

V. Energy efficiency measures

The EU 2020 Strategy committed to save 20% in energy consumption as well. Financing the energy-efficient renovation of buildings, including for district heating, district cooling and cogeneration of heat and electricity are considered important to achieve that target.

In order to ensure that aid contributes to a higher level of environmental protection, aid for district heating and district cooling and cogeneration of heat and electricity ('CHP') will only be considered compatible with the internal market if granted for investment, including upgrades, to high-efficient CHP and energy-efficient district heating and district cooling.

To demonstrate the contribution of the aid towards an increased level of environmental protection, the MS may use, as much as possible in quantifiable terms, a variety of indicators, in particular the amount of energy saved due to better, lower energy performance and higher energy productivity or the efficiency gains by reduced energy consumption and reduced fuel input.

VI. Resource efficiency measures – waste management

As the EEA Guidelines describes, market failures are particularly relevant for resource efficiency. In addition, market failures in that area are not often addressed by other policies and measures, such as taxation or regulation, thus, state aid may in such cases be necessary. For individual measures, Member States need to demonstrate quantifiable benefits in this policy area, particularly the amount of resources saved or the resource efficiency gains.

The EEA Guidelines further specifically address any measures promoting resource efficiency, and more specifically the prevention, re-use and recycling of waste. In order to serve an objective of common interest as required by the overall framework, the EC will consider aid for waste management following two key principles: the waste hierarchy as well as the polluter pays principle.

VII. Carbon capture and storage (CCS)

The EEA Guidelines recognise the potential contribution of CCS to mitigating climate change, and the high costs of the technology.

As the EEA Guidelines lay down, in the transition to a fully low-carbon economy, CCS technology can reconcile the demand for fossil fuels, with the need to reduce greenhouse gas emissions. In some industrial sectors, CCS may currently represent the only technology option able to reduce process-related emissions at the scale needed in the long term. Given that the cost of capture, transport and storage is an important barrier to the uptake of CCS, State aid can contribute to fostering the development of this technology.

Aid to CCS is therefore considered to address market failure, to contribute to the common objective of environmental protection, to be appropriate, and the counterfactual would be that the project is not carried out. Thus, the EEA Guidelines accept that the eligible costs are defined as the total funding gap for the CCS technology. In that field, both operating and investment aid is permitted. The aid may be provided to support fossil fuel and, or biomass power plants (including co-fired power plants with fossil fuels and biomass) or other industrial installations equipped with CO₂ capture, transport and storage facilities, or individual elements of the CCS chain. However, aid to support CCS projects does not include aid for the CO₂ emitting installation (industrial installations or power plants) as such, but aid for the costs resulting from the CCS project.). The aid is limited to the additional costs for capture, transport and storage of the CO₂ emitted.

The EC assesses the distortive effects of the aid on the basis of the criteria laid down in Section 3.2.6, in order to avoid undue negative effects on competition and trade, and taking into account whether any knowledge sharing arrangements are in place, whether the infrastructure is open to third parties and whether the support to individual elements of the CCS chain has a positive impact on other fossil fuel installations owned by the beneficiary.

VIII. Aid in the form of reductions in or exemptions from environmental taxes and in the form of reductions in funding support for electricity from renewable sources

VIII.1. Aid in the form of reductions in or exemptions from environmental taxes

Reductions in the funding of support for energy from RES already received attention in the 2008 Guidelines, and this issue has been further developed in the EEA Guidelines. These reductions are introduced to ensure that the most energy intensive investments would not disproportionately be burdened by taxes or charges, which would cause disadvantage towards competitors that are not exposed to such taxes or charges.

The EEA Guidelines allow the grant of such reductions or exemptions, but under very strict conditions. As regards reductions or exemptions from environmental taxes, there is distinction made between harmonised and non-harmonised taxes. In the first scenario, the measure will be compatible if the beneficiaries pay at least the EU minimum tax level set by the relevant Directive⁴, and the measure is granted in an objective, transparent and non-discriminatory manner. In the second scenario, the EC will review in detail the necessity and proportionality of the measure.

⁴ Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity

As regards reductions or exemptions from funding support charges for electricity from RES, situations, and therefore the relevant rules, are somewhat different. The EEA Guidelines thus include specific compatibility criteria and only permit such measures in certain specified sectors. Reductions or exemptions can be granted only in a limited number of industrial sectors.

Reductions in or exemptions from environmental taxes, including tax refunds, can at least indirectly contribute to a higher level of environmental protection. However, as the EEA Guidelines lay down, the overall objective of the environmental tax to discourage environmentally harmful behaviour should not be undermined. The tax reductions should be necessary and based on objective, transparent and non-discriminatory criteria, and the undertakings concerned should make a contribution towards increasing environmental protection.

Harmonised environmental taxes

Member States can grant the aid in the form of a reduction of the tax rate or as a fixed annual compensation amount (tax refund), or as a combination of the two. The EC considers aid in the form of tax reductions necessary and proportional provided

- a. the beneficiaries pay at least the Union minimum tax level set by the relevant applicable Directive;
- b. the choice of beneficiaries is based on objective and transparent criteria; and
- c. the aid is granted in principle in the same way for all competitors in the same sector, if they are in a similar factual situation.

Non-harmonised environmental taxes and specific situations of harmonised taxes

If the beneficiaries pay less than the EU minimum tax level set by the relevant applicable Directive⁵, the aid will be assessed on the basis of the conditions for non-harmonised environmental taxes.

For all other non-harmonised environmental taxes and in the case of harmonised taxes below the Union minimum levels of the ETD (see paragraph (172)) and in order to demonstrate the necessity and proportionality of the aid, a MS should clearly define the scope of the tax reductions.

⁵ Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity

In this case the aid is considered being necessary, if

- the choice of beneficiaries is based on objective and transparent criteria, and the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation,
- the environmental tax without the reduction leads to a substantial increase in production costs calculated as a proportion of the gross value added for each sector or category of individual beneficiaries; and
- the substantial increase in production costs could not be passed on to customers without leading to significant sales reductions.

The aid will be considered being proportionate, if

- aid beneficiaries pay at least 20 % of the national environmental tax; or
- the tax reduction is conditional on the conclusion of agreements between the Member State and the beneficiaries or associations of beneficiaries whereby the beneficiaries or associations of beneficiaries commit themselves to achieve environmental protection objectives which have the same effect as if beneficiaries pay at least 20 % of the national tax or, in the circumstances foreseen in paragraph (173), if the Union minimum tax level were applied. Such agreements or commitments may relate, among other things, to a reduction in energy consumption, a reduction in emissions, or any other environmental measure.
- Such agreements must satisfy the following cumulative conditions
 - o the substance of the agreements is negotiated by the Member State, specifies the targets and fixes a time schedule for reaching the targets
 - o the Member State ensures independent and timely monitoring of the commitments concluded in the agreements; and
 - o the agreements are revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met.

VIII.2. Aid in the form of reductions in the funding of support for energy from renewable sources

In recent years, the financing of renewable support measures has led to an increase in electricity costs. Such additional costs affect the competitiveness of energy-intensive industries, in particular those exposed to strong international competition, and raises the risk of so-called "carbon leakage," whereby industries relocate outside of the EU to escape excessive environmental costs of operating within the EU.

Therefore, the EEA Guidelines allow MSs to partially relieve cost burdens for a limited number of energy-intensive sectors (listed in Annex 3. - such as the manufacturing of chemicals, paper, ceramics or metals) In addition, according to par. 186, a MS can also exempt companies from a sector that is not listed in Annex 3.

The EC will approve the aid that is:

- limited to beneficiaries who are exposed to a competitive risk, i.e. companies belonging to a predefined list of eligible sectors (as set out in Annex 3) or, alternatively, companies with a high "electro-intensity" (electricity costs accounting for at least 20% of gross-value added) and that are active in a sector exposed to international trade (4% of trade intensity, calculated as the total trade of the sector with third countries, relative to the market size in the EU);
- non-discriminatory: the aid should be granted in the same way to all competitors in the same sector if they are in a similar factual situation; and
- proportionate: the aid beneficiaries must pay at least 15% of full renewable surcharge, provided that Member States will have the possibility to further limit the amount of the renewable surcharges to be paid under certain circumstances.

Given the significant increase of renewable surcharges in recent years, an own contribution of 15 % of the full renewable surcharge might go beyond what undertakings particularly affected by the burden can bear. Therefore, when needed, Member States have the possibility to further limit the amount of the costs resulting from financing aid to renewable energy to be paid at undertaking level to 4 % of the gross value added of the undertaking concerned.

For undertakings having an electro-intensity of at least 20 %, Member States can limit the overall amount to be paid to 0,5 % of the gross value added of the undertaking concerned.

When MSs decide to adopt the limitations of respectively 4 % and 0,5 % of gross value added, these limitations must apply to all eligible undertakings.

In any event, companies eligible for an exemption must still pay a certain share of the renewable surcharge (costs of the renewable energy system distributed to electricity consumers) themselves (at least 15 percent of the surcharge, which may be reduced by the MS to 0.5 percent of the gross value added of the beneficiary). If a MS decides to grant an exemption from renewable energy surcharges to one of the eligible sectors (either listed or not in the EEA Guidelines), this exemption must apply in an objective and non-discriminatory way to all competitors in the sector if they are in a similar factual situation.

VIII.3. Transitional rules and adjustment plans

According to the transitional rules for aid granted to reduce the burden related to funding support for energy from renewable sources, MSs are to apply eligibility and proportionality criteria set out in Section 3.7.2 at the latest by 1 January 2019. Aid granted in respect of a period before that date will be considered compatible if it satisfies the same criteria.

In addition, the EC considers that all aid granted to reduce the burden related to funding support for electricity from renewable sources in respect of the years preceding 2019 can be declared compatible with the internal market to the extent that it complies with an adjustment plan.

The adjustment plan shall entail progressive adjustment to the aid levels resulting from the application of the eligibility and proportionality criteria set out in Section 3.7.2.

In case the aid was granted in respect of a period before the date of application of the EEA Guidelines, the plan shall also provide for a progressive application of the criteria for that period.

To the extent that aid in the form of reduction or exemption from the burden related to funding support for electricity from renewable sources was granted before the date of application of the EEA Guidelines to undertakings that are not eligible under Section 3.7.2, such aid can be declared compatible provided that the adjustment plan foresees a minimum own contribution of 20 % of the additional costs of the surcharge without reduction, to be established progressively and at the latest by 1 January 2019.

As the adjustment plan shall be approved by the EC, this document shall be notified to the EC at the latest 12 months after the date of application of the EEA Guidelines.

IX. Infrastructure – Projects of Common Interest

The EEA Guidelines mention that according to the EC's estimation the total investment needs in energy infrastructure of European importance up to 2020 amount to about €200 billion. This amount of investments is needed in order to complete the internal energy market, ensure security of supply and enable the integration of RES. As market operators lack incentives to carry out these investments, given that costs and benefits can occur asymmetrically among the different market participants and MSs, the EC enables MSs to finance investments in trans-European energy infrastructure projects and in energy infrastructure in underdeveloped regions. The EC consider aid measures for Projects of Common Interest (PCI) defined on the basis of Regulation 347/2013 and for infrastructure investment in assisted regions to be beneficial to the internal market and thus to fulfil an objective of common interest.

The aid may cover up to 100 percent of the funding gap, i.e., the portion of the discounted cost of the initial investment not covered by the discounted net revenues of the project. For other projects, the EC will assess on a case-by-case basis whether state aid is necessary.

The EEA Guidelines further explain how the other criteria (need for State intervention, appropriateness, incentive effect, proportionality and avoidance of negative effects on competition and trade) will be assessed specifically in the context of infrastructure aid.

X. Generation adequacy - capacity remuneration mechanisms

As the EEA Guidelines lay down, with the increasing share of RES, electricity generation is in many MSs shifting from a system of relatively stable and continuous supply towards a system with more numerous and small-scale supply of variable sources. Due to this tendency, new challenges for ensuring generation adequacy arise.

Some Member States consider the introduction of measures to ensure generation adequacy, typically by granting support to generators for the mere availability of generation capacity.

The EEA Guidelines require MSs to demonstrate that the market is not able to deliver adequate capacity in the absence of state intervention in order to ensure that the EC will allow public support for capacity remuneration mechanisms (CRMs). Before resorting to public support, MSs shall first consider alternative ways of achieving generation adequacy, such as facilitating demand-side management and increasing interconnection capacity.

In any event, public support should only compensate generators for the readiness to deliver electricity and should not include any remuneration for the sale of energy. The beneficiary is also entitled to a reasonable rate of return. Public support for CRMs should give preference to low-carbon generators if there are equivalent technical and economic parameters.

Member States should amend, where necessary, all related schemes to bring them into line with the EEA Guidelines by 1 January 2016. This deadline also applies to CRM schemes, which were adopted without notification to or clearance from the EC, raising significant legal certainty questions for beneficiaries of such CRMs. The EU shift towards more RES has led to a more dispersed and variable energy supply, which – together with limited incentives to invest in stable generation capacity – has left many Member States concerned about generation adequacy. Several Member States have therefore introduced so-called capacity remuneration mechanisms (CRMs), to ensure sufficient capacity at all times.

The EC is mainly concerned that such CRMs would favour national producers, and that they could prevent the phasing out of environmentally or economically harmful subsidies. It has therefore formulated strict compatibility conditions, including among others a thorough justification of why there are no alternatives to the CRM and the grant through a competitive bidding process.

XI. Application of the EEA Guidelines

The EEA Guidelines will be applied from 1 July 2014 and will be applicable until 31 December 2020.

The EC applies the EEA Guidelines to all notified aid measures in respect of which it is called upon to take a decision after their applicability, even where the projects were notified prior to that date. However, individual aid granted under approved aid schemes and notified to the EC pursuant to an obligation to notify such aid individually will be assessed under the Guidelines that apply to the approved aid scheme on which the individual aid is based.

Unlawful environmental aid or energy aid will be assessed in accordance with the rules in force on the date on which the aid was granted in accordance with the EC notice on the determination of the applicable rules for the assessment of unlawful State aid with the exceptions below.

Unlawful aid in the form of reductions in funding support for energy from renewable sources will be assessed in accordance with the provisions of Section 3.7.2 (*on Aid in the form of reductions in the funding of support for energy from renewable sources*) and Section 3.7.3. (*on Transitional rules for aid granted to reduce the burden related to funding support for energy from renewable sources*).

As from 1 January 2011, the adjustment plan (see point VIII.3.) shall also foresee a progressive application of the criteria of section 3.7.2 and of the own contribution (par (197)). Prior to that date, the EC considers that all aid granted in the form of reductions in funding support for electricity from renewable sources can be declared compatible with the internal market.

- Existing and approved national aid schemes

As a rule, no later than 1 January 2016, MSs have to amend existing approved schemes in order to comply with the EEA Guidelines. Existing operating aid schemes for RES only need to be adapted to the EEA Guidelines when MSs

- (i) prolong their existing schemes,
- (ii) have to re-notify them after expiry of the validity of the initial approval or
- (iii) change their existing schemes.

If a generator has received confirmation from a MS that it will benefit from aid under an existing approved aid scheme for a predetermined period, the support can be granted over the entire period under the conditions laid down in the scheme at the time of the confirmation. Consequently, the rules of EEA Guidelines will not affect operators having already received such confirmation.

- *Existing but unlawful national aid schemes*

For the case that the aid is based on a support scheme that was not approved by the EC, the EEA Guidelines contains stricter rules. The aid which has been granted in the absence of an exemption or EC's approval will be assessed according to the rules in force on the date on which the aid was granted.

In case of a generator received confirmation from a MS that it will benefit from operating aid in support of renewable energy under an unlawful scheme for a given period, such aid can be granted over the entire period under the conditions laid down in the scheme at the time of the confirmation, but only to the extent that the aid is compatible with the rules applying at the time of the confirmation.

According to par (126), as regards operating aid for electricity from renewable energy sources, MSs have to start implementing competitive bidding procedures for a small share of their new capacity from renewables during 2015-2016. As from 2017, Member States shall set up tenders to grant support to all new installations. The aid is only granted until the plant has been fully depreciated according to normal accounting rules and any investment aid previously received must be deducted from the operating aid.

Small installations and technologies in an early stage of development can, however, be exempted from participating in competitive bidding processes. Small installations – as defined in the EEA Guidelines - are those producing less than 6 MW of wind power (or 6 generation units), or 1 MW of power from other renewable sources (solar or biomass).

In addition, small installations below 3 MW (or 3 generation units) for wind or 500 kW for other sources will be allowed to continue to benefit from any form of aid, including feed-in tariffs.

Outlook

The EEA Guidelines entered into force on 1 July 2014 and they are applicable until 2020 and mark a new era for the application of EU state aid rules in the energy sector. They apply to all notified aid measures on which the EC decides after that date, even where the projects were notified before.

The EC expects that established renewable energy sources will become grid-competitive, implying that subsidies and exemptions from balancing responsibilities should be phased out in a degressive way between 2020 and 2030. The EC's aim is to abolish all subsidies for established renewables in the longer term.

The EEA Guidelines introduce two fundamental shifts in energy policy. The transition from feed-in tariffs to market premiums and from statutory tariffs to competitive bidding processes will have a substantial impact on the future of renewables support schemes in the EU.

With some exceptions (in particular in respect of aid already granted under existing schemes), Member States should align existing aid schemes with the new Guidelines no later than 1 January 2016. At least to some extent, MSs support to RES must reflect the energy market and account for competition between technologies.

The EEA Guidelines aim to achieve climate change objectives and simultaneously lower retail prices for the benefit of consumers. To achieve this, energy cost increases must be contained, price signals for investments in electricity must resurge and the internal energy market must function without impediments.

However, given the controversial nature of these issues and the extensive negotiations before the adoption of the EEA Guidelines, much of the guidance is fairly vague and open ended.

MSs have finally significant discretion when designing their public support measures (e.g., the necessity of a bidding process can be disputed by the MS; trade- and electricity-intensity of non-listed sectors can be calculated ad hoc).

The EEA Guidelines will be further explained in the EC's future practice in decision-making, however as the number of complex cases probably will increase, additional delays to the already slow state aid decision-making process is also predictable.

The EEA Guidelines do not explain under what circumstances national support schemes for renewables constitute state aid. The application of the EEA Guidelines will be formed on the basis of the EC's case-by-case decisions, therefore additional guidance can be expected, e.g., on interpretation of common assessment principles, exemptions for energy-intensive industries etc.

Outside the scope of the EEA Guidelines, the EC will decide on how Member States can support new nuclear generation projects.

Contact information:

name: Ágnes Gajdics
organization: J&E
address: Garay u. 29-31., 1076 Budapest, Hungary
tel/fax: 36 1 3228462, 36 1 4130300
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

