
Yesterday, 9 April 2014, the European Commission adopted its new Guidelines on environmental and energy State aid for 2014–2020.\(^1\) The adoption followed intense stakeholder consultation and – unusually – even led the Commissioners to a vote, in which one commissioner voted against and three abstained. The new Guidelines replace the Commission’s 2008 Guidelines on State aid for environmental protection, but now also include detailed rules regarding State aid in the energy sector. They are part of the Commission’s State Aid Modernisation initiative, launched in 2012, in which it proposed to rewrite many of the existing State aid rules and guidelines.\(^2\) The objective is to enhance the Commission’s State aid powers to foster sustainable, smart and inclusive growth in a competitive internal market in line with the Europe 2020 strategy, and to allow the Commission to focus its enforcement on the cases with the biggest impact on the internal market.

Increased scope – but aid for nuclear energy not included

The new Guidelines now fully integrate environmental protection measures with the public financing of energy. The 2008 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 new Guidelines now also deal with some specific energy issues such as carbon capture and storage (CCS), energy infrastructure and generation adequacy. On these issues, the new Guidelines follow up in the State aid arena on the Commission’s Communication on “Delivering the internal electricity market and making the most of public intervention”, published in November 2013.\(^3\) What has not been included in the final draft of the new Guidelines is aid to nuclear energy sources. While

---

1. The final version of the Guidelines is available [here](#). See [here](#) and [here](#) for the Commission’s press release and FAQs, and [here](#) for Vice President Almunia’s related speech.
2. See [here](#) for the Commission’s State Aid Modernisation Communication.
3. See [here](#) for the Commission’s Communication and [here](#) for our client alert.
the Commission initially envisaged including specific rules in the Guidelines permitting nuclear aid under certain conditions, these were ultimately left out.\(^4\)

**Compatibility rules – not all measures are notifiable aid**

As usual for State aid guidelines, the new Guidelines only set out the criteria that the Commission will use for assessing environmental and energy aid measures which amount to State aid and which must be notified.

The new Guidelines do not explain which measures are State aid (i.e., 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).\(^5\) Governments thus remain free to structure measures in such a way that they do not constitute State aid.

Also, certain measures that amount to State aid do not need to be notified (i.e., measures that are block exempted). The relevant block exemption regulation is currently also being revised. It will include 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 new Guidelines. The same holds true for measures that are block exempted by virtue of their minor importance (support of max. €200,000 per company over three years).

**A redesigned overall framework – more targeted approach**

The new Guidelines first outline the criteria against which the Commission will assess the compatibility of any environmental and energy State aid measure.

- It contributes to a well-defined objective of common interest;
- it is needed in order to remedy a well-defined market failure;
- it is appropriate to address the objective of common interest;
- it incentivises market players to behave differently from how they would if the measure were not implemented;
- it is proportionate (what is needed to carry the incentive effect);
- it avoids major negative effects on competition and interstate trade;
- it is transparent as to both its form and its implementation.

The new Guidelines explain these “common assessment principles” in detail.

---

\(^4\) Any nuclear support measure that contains State aid would be assessed case by case under the Commission’s general rules. This will for example be the case for its investigation into the UK’s current plans to build a nuclear power plant with EDF (see here).

\(^5\) See here for the draft Commission Notice on the notion of State aid which is currently in consultation.
Specific rules

More importantly, the new Guidelines apply this general framework to several specific types of environmental and energy aid measures. Some of these types were already present in the 2008 Guidelines and have been reformed. For other types, the new Guidelines contain for the first time specific State aid guidance (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 key new principles for each of these types are briefly discussed below.

> Aid to energy from renewable energy sources

As did the 2008 Guidelines, and in line with the 2020 Strategy, the new Guidelines support State aid for RES. However, in recent years, there has also been an increasing awareness that heavy public support of RES may lead to overcompensation, increased consumer prices, and thus ultimately to inefficiently functioning energy markets. The new Guidelines aim to respond to that concern by imposing more stringent compatibility conditions for RES support measures, designed to make RES support more efficient and better market-integrated. New operating aid for electricity from RES should 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. As from 2017, any aid (with some exceptions) should be granted through a competitive bidding process in which all RES generators can participate. However, the Commission had to step back on technology neutrality. Member States can organise technology specific tenders under certain conditions. Operating aid should in principle (again with some exceptions) be open to other EEA countries and Energy Community Members. Furthermore, an aid scheme can be authorised for maximum ten years, after which it should be re-notified. For food-based biofuels, no more investment aid is possible, except for conversion. All operating aid for food-based biofuels should end by 2020.

> Energy efficiency measures

The EU 2020 Strategy committed not only to raise the share of energy consumption produced from RES to 20%, but also to save 20% in energy consumption. 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. The new Guidelines contain specific compatibility rules on this.

> Resource efficiency measures – waste management

The Guidelines further specifically address any measures promoting resource efficiency, and more specifically the prevention, re-use and recycling of waste. They stipulate that the Commission will consider aid for waste management, which follows two key principles (the so-called waste hierarchy as well as the polluter pays principle) to serve an objective of common interest as required by the overall framework.
Carbon capture and storage

The new Guidelines also explicitly recognise the potential contribution of CCS to mitigating climate change, and recognise the high costs involved. CCS is therefore considered to address a 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 new Guidelines accept that the eligible costs are defined as the total funding gap for the CCS technology (but not the CO₂ emitting installations).

Reductions or exemptions from environmental taxes and charges to fund energy from renewable sources

This issue already received attention in the 2008 Guidelines, and has been further developed in the new Guidelines. Such reductions or exemptions are introduced to ensure that the most energy intensive businesses would not disproportionately suffer from the taxes or charges, which would place them at a disadvantage towards competitors elsewhere that are not exposed to such taxes or charges. This may trigger delocalisation and thus so-called carbon leakage. To avoid this, the new Guidelines allow the grant of such reductions or exemptions, but only under very strict conditions.⁶

As regards reductions or exemptions from environmental taxes, a distinction is 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 Directive, and the measure is granted in an objective, transparent and non-discriminatory manner. In the second scenario, the Commission will review in detail the necessity and proportionality of the measure.

As regards reductions or exemptions from funding support charges for electricity from RES, situations, and therefore the relevant rules, are somewhat different. The 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.

⁶ Similar rules were also introduced in 2012 in order to allow Member States to support industry electricity costs in the context of the EU Emission Trading Scheme. See here.
Infrastructure: interconnections and cross-border networks

The new Guidelines refer to the Commission's estimation that the total investment needs in energy infrastructure of European importance up to 2020 amount to about €200 billion in order to complete the internal energy market, ensure security of supply and enable the integration of RES. The new Guidelines also acknowledge that State aid may sometimes be necessary to overcome market failures, in particular when the principle that the user pays through tariffs is not sufficient to recoup investments (in particular for infrastructure projects with a cross-border impact or being undertaken in underdeveloped areas).

The Commission will therefore consider aid measures for Projects of Common Interest as defined on the basis of Regulation 347/20137 and for infrastructure investment in assisted regions to be beneficial to the internal market and thus to fulfil an objective of common interest. The new 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.

Generation adequacy

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 Commission 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.

 Tradable permit schemes

Finally, the new Guidelines contain rules on tradable permit schemes, which will be found compatible if certain cumulative conditions are met. These are identical to the 2008 Guidelines.

7 See also our previous client alert on this topic here.
Implications

The new Guidelines will enter into force on 1 July 2014. They will apply to all notified aid measures on which the Commission will decide after that date, even where the projects were notified before. This means that, depending on when decisions are rendered, the new Guidelines may directly impact on pending high-profile investigations into for example Germany’s Renewable Energy Sources Act (see here) and France’s energy tax reductions for large energy consumers (see here). Moreover, subject to 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.