

New Rules on the State Aid in the Energy Sector

Background

The European Commission plans new Guidelines on environmental and energy aid (the Guidelines) to enter into force by 1 July 2014. By replacing the existing 2008 guidelines on environmental aid and extending its application to energy aid, the Guidelines will provide a new regulatory framework for public support measures the EU Member States may implement in the energy sector. The Guidelines are likely to prove of particular importance to energy adequacy measures and renewable energy support schemes. This note considers comments of industry organisations such as RECS International, EFET and Eurelectric against the backdrop of the Guidelines' text that entered the consultation process late last year.

The Guidelines reflect the application of State aid assessment principles outlined in, and identify a number of measures for which State aid may be compatible with, Article 107(2) and (3) of TFEU. They are part of a larger project of the Commission's modernization of State aid rules, which also includes a parallel activity of amending the General Block Exemption for State aid. The Guidelines' consultation process, which ended on 14 February 2014, demonstrated rather controversial nature of some of its aspects, in particular those related to the national support schemes for renewable energy generation.

Compatibility Assessment - Common Principles and Specific Requirements

Compatibility of an EU Member State support measure in the energy sector with the internal market will be assessed on the basis of both the common assessment principles and the specific compatibility requirements. The common assessment principles require that aid must:

- ensure a competitive, sustainable and secure energy market,
- respond to a genuine market failure preventing or discouraging investment,
- be the appropriate way of responding to the market failure,
- incentivise investment that would not otherwise be made, and
- be proportionate and avoid undue negative effects on competition and trade.

Further on, the level of public support (as compared to the level of private investment) must fall within the permitted aid intensity levels, which vary depending on the size of beneficiary (small - 65%, medium - 55%, and large enterprises 45%). If the aid is a fixed amount distributed based on beneficiaries' bids in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, then it may even reach 100% of eligible cost.

The new proposed rules offer a number of specific compatibility requirements, with focus on aid to energy from renewable sources, energy infrastructure, generation adequacy, and carbon capture and storage. The Guidelines also regulate aid for other types of projects, such as cogeneration, district heating and cooling, resource efficiency and waste management, exemptions from environmental taxes.

Energy Infrastructure, Generation Adequacy, and Carbon Capture and Storage

Public support has to be channelled to energy infrastructure projects that have positive cross-border effect, enhance the security of energy supplies, contribute to competition and market integration, and are in line with low carbon / emissions reduction objectives. As a rule, aid cannot be provided to electricity and gas infrastructure projects that are exempt from EU internal market legislation.

Capacity payments to ensure sufficient generation capacity are permitted only if there are not more suitable market-based alternatives. Aid should not be provided to fossil generation, unless there are no less harmful alternatives to ensure sufficient capacity.

The Commission will approve aid only for the capture, transport and storage of CO₂ (and not for the generating facility itself). In such case, aid can be provided only for the net funding gap that prevents investment on a commercial basis; approval may be conditional upon whether the carbon capture and storage infrastructure is

open to third parties. The proposed notification thresholds are EUR 20 million per recipient per project (in case of energy infrastructure project), EUR 7.5 million per recipient per project (for capacity payments), and EUR 20 million per project (in case of carbon capture and storage project).

Renewables

The focal point of the new Guidelines that attracted most comments are detailed rules on assessing compatibility of State aid for the production of energy from renewable sources. Aid to energy from renewable sources may take two forms - investment aid or operating aid. Investment aid is assessed on the basis of the common assessment principles. Forms of operating aid that are considered compatible are feed-in premiums (or comparable measures involving the direct marketing of produced electricity) and tradable green certificates. The Commission's move away from feed-in tariffs resulted in them being permitted only in case of projects of first commercial scale and small installations having the prescribed level generation capacity.

The aid schemes may be authorised for up to 10 years (with the right to re-notify). Even if aid is based on a notified aid scheme, Member States must notify operating aid where the resulting renewable electricity generation capacity exceeds 125 MW and investment aid higher than EUR 7.5 million for one undertaking.

The Guidelines distinguish between deployed and less deployed technologies, with less restrictive requirements applying to the latter, but the prospective that, given the criteria delineating them, the majority of technologies would qualify as deployed.

Operating aid (in the form of feed-in premiums) for installations using deployed technologies is considered compatible if granted via genuinely competitive bidding process opened to all generators on a non-discriminatory basis. For less deployed technologies, aid in the form of feed-in premiums does not have to be granted via bidding process.

Aid by way of green certificates requires the price not be fixed in advance, support to be essential and not dissuading producers from a higher level of competitiveness, and the scheme not in the aggregate to result in overcompensation. The level of support applied in case of aid by way of green certificates vary depending whether the technology is deployed (same level of support for all technologies is required) or less deployed (different levels of support is allowed). All generators can receive aid in the form of green certificates on a non-discriminatory basis.

However, in case of operating aid (be it by way of feed-in premiums or green certificates) to installations using deployed technologies, Member States may require a minimum number of different energy sources to receive support without pre-defining those technologies if needed to ensure a certain mix of electricity produced from renewable sources.

Irrespective of the form of operating aid and the level of technology deployment, beneficiaries are subject to standard balancing responsibilities where competitive intra-day balancing markets exist. Any investment aid is deducted from the operating aid.

The Guidelines require the renewable energy aid schemes generally to be open to other countries, thereby going beyond what the Renewables Directive imposes (the latest developments on that aspect were also discussed in our Insight Fuel No. 1). If not, the Guidelines go on, the Member State must justify why it has not entered into a cooperation mechanism allowing renewable energy produced in other Member States to count towards its own national target under the Renewables Directive. Further on, Member States will have to align national support schemes containing operating aid with the Guidelines (at the moment of Member State's changing of the existing scheme).

Implications

When compared to the 2008 ones, the Guidelines, if adopted substantially in the form that entered the consultation process, will tighten up the State aid assessment criteria generally and would appear to restrict a number of the support mechanisms that are currently in place or envisaged. A good example for this is the

restriction on feed-in schemes or the fixed price elements of certificate schemes. For instance, the recent proposal for converting Renewable Obligation Certificates into fixed price certificates as part of the British energy market reform grandfathering of Renewable Obligations certified projects would seem in conflict with the proposed Guidelines.

In this respect, the Guidelines appear rather progressive and seem to have only limited regard to the present *status quo* of national support schemes. This is clearly due to the fact that the process for the adoption of the Guidelines differs significantly from the one applicable to Directives or Regulations.

Here, it needs to be kept in mind that, whilst not applying retroactively to the approved schemes and approved individual aid (and arguably not applying to new individual aid under the approved schemes), the Guidelines would apply to the existing schemes undergoing changes following the entry of the Guidelines into force as well as to the existing individual aid and new individual aid implemented under such amended schemes.

And, in addition, it is the case that the majority of renewable energy support schemes do not constitute State aid because they oblige private entities to financially support the measures rather than such support being provided through "State resources". The Guidelines do not change this fundamental delineation brought about by the ECJ in *PreussenElektra* and subsequent case law. The applicability of the Guidelines' principles to those schemes that are not State aid has been raised in the consultation process and remains one of the areas where for structurally comparable schemes different conditions could apply by virtue of it involving only private or also public entities.

It also appeared from the submissions that significant effort needs to be undertaken to ensure that the concepts and definitions the Guidelines use correspond to the related EU legislation (for example, the Renewables Directive), so that there is sufficient clarity on the (key) criteria applicable in the process of assessing renewable energy schemes.

The impact of the consultation process on the final text is still to be seen. If the wording will remain largely unchanged, there will be a need for a careful assessment of application of the Guidelines on the support renewable energy generators receive, in particular in the context of their financing. The key questions such as

- is the measure State aid at all?
- is it scheme cleared?
- if it is scheme cleared, is it above the threshold(s) set for individual assessments?
- where some of the terms of support are negotiable, does it still fall under the scheme clearance?
- does the support fall under (different) categories (for example, in case of multiple source of support) and how common assessment principles and specific compatibility requirements apply to that?

will need to be answered. And the answers will come, one way or the other.

Questions or comments?

Andreas Gunst
Solicitor England and Wales
Partner, DLA Piper, Vienna & London
Mob. Vienna: 004367688881232 - Mob. London: 00447756968458 - Email: andreas.gunst@dlapiper.com

Dubravka Grujić
Counsel, DLA Piper Vienna
Mob. Vienna: 004367688881889 - - Email: dubravka.grujic@dlapiper.com