

DRAFT GUIDELINES ON ENVIRONMENTAL AND ENERGY AID FOR 2014-2020 POSITION PAPER

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INTRODUCTORY REMARKS

In the context of modernising state aid, the European Commission is revising the Community Guidelines on State Aid for Environmental Protection (2008/C 82/01). To this purpose, DG Competition launched a consultation on the draft of the new Guidelines on environmental and energy aid for 2014-2020 (EEAG) in December 2013. This document outlines the views of the German Renewable Energy Federation on the draft EEAG.

The draft Guidelines should have limited relevance for Germany, because we share the German Government's opinion that our national support mechanism - the German Renewable Energy Sources Act (EEG) - does not constitute state aid. We believe that this assessment will be confirmed by the Commission at the end of its ongoing investigation or eventually by the European Court of Justice. However, in the light of the current investigation and based on our conviction that policy frameworks for renewables should be as instrumental as possible in ensuring a swift and smooth transition towards a sustainable, renewables-based energy supply, we wish to share our views on the draft Guidelines.

We would first like to welcome this review as an opportunity to strengthen European competitiveness by ensuring that support mechanisms are stable and well-designed and allow 2020 renewable energy targets to be implemented cost-effectively. However, the draft version of the Guidelines fails to seize this opportunity. It also fails to increase transparency and ensure stability for investors. On the contrary, it constitutes an excess of power, as the Commission exceeds its discretion pursuant to Article 107(3) TFEU and limits the rights of Member States pursuant to Article 194(2) TFEU. It further contradicts the Renewable Energy Directive 2009/28/EC (RED).

The RED recognises that there is an imbalance in the energy market and encourages Member States to introduce support mechanisms tailored to their potential and energy policy priorities in order to achieve their binding national targets. It also introduces a number of voluntary cooperation mechanisms to be applied by Member States if they deem these useful. The Guidelines should streamline rules and facilitate faster decisions based on existing practice, but instead the draft takes a prescriptive approach by imposing new instruments rather than enabling the Member States to apply policies based on good practice. The draft Guidelines are not in line with existing legislation and should therefore be revised. Even extending the existing Environmental Aid Guidelines would be preferable to the present draft.

The prescriptive approach of the draft Guidelines is even more of a problem because they are intended to apply for the period 2014-2020 and as such would pose a serious threat to achieving the binding national and European renewable energy targets for 2020.

Due to this narrow and prescriptive approach, DG Competition exceeds the discretion conferred to it by Article 107(3) TFEU. The Commission has a unique and significant responsibility to safeguard the creation and operation of the internal market by monitoring and limiting state aid. However, the current version of the draft Guidelines goes far beyond this responsibility and restricts the rights and obligations of Member States.

By imposing a technology-neutral support mechanism which is open to producers from all Member States, the draft Guidelines contravene the sovereignty of the Member States over their energy mix, as stated in Article 194(2) TFEU.

They also contradict Article 3 and Article 2 lit. k RED, which give Member States the flexibility of choosing any support scheme they deem necessary to achieve their binding national targets.

The renewable energy sector's objective is to be competitive in fair and liberalised functioning markets. Unfortunately, a level playing field does not exist between renewables and heavily subsidised fossil

fuels and nuclear energy. The draft Guidelines seem to ignore this reality and attribute market distortions almost exclusively to the regulatory frameworks for promoting renewables, which is not appropriate in markets without a relevant price for carbon (and with heavily subsidised fossil fuels and nuclear energy). The German Renewable Energy Federation would welcome concrete steps towards creating a level playing field by phasing out these subsidies.

The industry is committed to continuing its positive track record in bringing down the cost of energy. Investments made possible by binding and ambitious long-term targets supported by well-designed support mechanisms help drive down costs and will enable on-going reduction (for example via automatic tariff degressions).

A good example of how this can be achieved is the German Renewable Energy Sources Act, a feed-in tariff (FIT) support mechanism for the development of various renewables. In its in-depth country review¹, the International Energy Agency emphasises that the EEG has not only proved very effective in introducing renewable energy, but also in bringing costs down. This success was possible because Member States could decide for themselves which energy mix they wanted and how to establish and design the support mechanisms to achieve this. We believe it is very important - as laid down in the TFEU - that the Commission's energy competence is limited and that the Member States' right to define their energy mix should not be undermined by the Commission.

The draft Guidelines impose on Member States a very limited choice of support mechanisms and are very prescriptive with regard to most key design features. Not only do they suggest a so-called technology-neutral approach as a rule, with limited exceptions requiring extensive justification, but they even seek to rule out most of the existing successful policies.

The attempted differentiation between so-called "deployed" and "less deployed" technologies raises more questions than it answers. It greatly restricts the options available to projects owned by individuals, cooperatives or small and medium enterprises to benefit from support mechanisms and risks reducing diversity of ownership and public acceptance of the energy transition.

The German FIT has been instrumental in expanding decentralised energy systems, which have become essential to the energy transition. 47% of renewable power systems are community energy projects (*Bürgerenergieprojekte*)². Undermining the viability of these projects would deprive Member States of economic growth and of significant public participation in the energy transition process.

The German Renewable Energy Federation is open to dialogue about the development of support mechanisms in the medium term and the future of renewables in the electricity, heating and cooling and transport sectors. We are currently working with experts to develop and design an energy system - including market design - fit for the future, with fluctuating renewable energy at the heart of the system³. We would be happy to share the results of our work.

We believe that the right approach is as outlined by the Commission in the Communication "Delivering the internal electricity market and making the most of public intervention"⁴ and the accompanying guidance paper on the design of renewables support schemes⁵ - binding national targets and national measures, with increased convergence whilst allowing for varying national circumstances, such as grid access and administrative costs.

¹ International Energy Agency, Energy Policies of IEA Countries. Germany 2013 Review, 2013

² Agentur für Erneuerbare Energien, Bürgerenergie: Eigentümerstruktur und installierte Leistungen der Anlagen, 2013

³ See Leprich et al., Kompassstudie Marktdesign. Leitideen für ein Design eines Stromsystems mit hohem Anteil fluktuierender Erneuerbarer Energien, 2012

⁴ DG Energy, Communication "Delivering the internal electricity market and making the most of public intervention", 2013

⁵ DG Energy, European Commission guidance for the design of renewables support schemes, 2013

The draft Guidelines include a number of ambiguous key points and missing definitions, all left open to interpretation.

They are critical with regard to the following aspects:

1. They do not offer any more transparency or ensure investment stability.
2. DG Competition exceeds the discretion conferred to it by Article 107(3) TFEU. We believe DG Competition is given a unique and significant responsibility to safeguard the creation and operation of the internal market by monitoring and limiting state aid. However, the current version of the draft Guidelines goes far beyond this responsibility and restricts the rights and obligations of Member States.
3. By imposing a technology-neutral support mechanism which is open to producers from all Member States, the draft Guidelines contravene the sovereignty of the Member States over their energy mix, as stated in Article 194(2) TFEU.
4. They are also contradict Article 2 lit. k and Article 3 RED, which give Member States the flexibility of choosing any support scheme they deem necessary to achieve their binding national targets.

DETAILED COMMENTS

Article 16 Authorised duration of aid schemes

According to the draft Guidelines, the Commission will authorise aid schemes for a maximum period of ten years, after which the scheme, if it still exists, will need to be re-notified. It is not clear what “re-notification” means. We propose introducing a simplified procedure for those schemes which have not changed.

We also cannot see why it should be within the Commission’s powers to limit the right of Member States to decide on the timeframe for their support scheme, which usually ranges from 10 to 25 years.

Article 118 Opening of support schemes to other EEA or Energy Community countries

Since all EU Member States have to achieve their own binding targets and since all companies can operate in the renewable energy sector of each of the 28 Member States, there is no obstacle to investors benefiting from various support schemes. The proposed cross-border support would only be cost-effective if all parameters (grid costs and their capacity to represent congestion, capital costs, administrative costs, electricity prices) were the same in all Member States. This is not the case in today’s energy markets. Furthermore, the RED already balances the need for cross-border trade on the one hand, with the need for all countries to meet their national targets and their sovereign right to introduce the support mechanisms they consider necessary to achieve their targets on the other hand.

The approach set out in the draft Guidelines - forcing Member States to use cooperation mechanisms unless they provide convincing reasons to the contrary - is an obvious violation of the RED. The Directive offers cooperation mechanisms as a voluntary option, which Member States may or may not use to achieve their binding targets.

Article 119 Distinction between “deployed” and “less deployed technologies”

The notion of technology maturity, as it was described in earlier unpublished drafts, has been replaced by an unclear distinction between so-called “deployed” and “less deployed technologies”, for which a different set of rules apply.

This distinction is both artificial and unclear. It therefore cannot provide clear guidance. First of all, it is not clear what is meant by “technology”. One could, for example, consider onshore and offshore wind as two separate technologies. Then again, different types of turbines, which all have their particular features, could be defined as different technologies. The same is true for other renewable energy sources. For example, solar energy for the production of electricity can be divided into concentrated solar power (CSP) and photovoltaics (PV). The former can be subdivided into parabolic troughs, central receivers, parabolic dishes, etc., while the latter can be subdivided into polycrystalline, monocrystalline, crystalline silicon, etc.

Secondly, the methodology based on an EU-wide electricity consumption/production threshold (it is unclear which of the two is meant, given that both terms are used) is overly simplistic. There are a number of reasons for this claim:

- The European dimension of market penetration is not a suitable benchmark.
 - The aim of state aid is to create a level playing field for renewables by compensating for market distortions. These cannot be aggregated at European level, as they vary from one country to another and are a function of national circumstances, such as grid access, administrative barriers and costs, capital costs, etc., and not merely of changes in the cost component.
 - The proposed methodology would lead to unjustified barriers to new market entrants. It would force investors in later-developing markets to rely on a limited set of support mechanisms, because the technology has experienced market growth elsewhere.
 - The penetration level alone does not take into account an overall view of the system and its future development.
- The methodology for measuring the penetration level is not defined.
- A technology could cross the threshold to be defined as “deployed” when consumption/demand for electricity falls, and then be defined as “less deployed” as electricity consumption/demand rises. This could lead to significant investment uncertainty.

To conclude, this differentiation is detrimental to innovation and the further development of renewables in Europe and should be removed from the Guidelines. What is important is ensuring a system-relevant energy mix.

Article 120 (a) Competitive bidding process

In providing a narrow definition of operating aid, the draft Guidelines actually limit renewable energy support mechanisms which can be regarded as compatible state aid.

Combining tenders with fixed feed-in premiums is declared to be the sole appropriate support mechanism for deployed technologies. The facts on which this assessment is based are unclear, given that there is very limited experience of this model and any experience to date has been disappointing (in Ireland or the Netherlands, for example). Moreover, a number of European countries have stopped using tenders: Portugal, Luxembourg, UK. The Commission likewise does not provide any arguments as to why state aid compatibility is guaranteed by using this instrument, but not any other instruments.

Tenders have a number of disadvantages when it comes to supporting renewables effectively and efficiently. For example:

- They involve significant risks for the timely development of renewables, since projects which bid too low might not be realised on time, if at all;
- They create batches of parallel projects and give rise to a perceived 'rush' on the best sites;

- They increase capital costs and transaction costs;
- They favour investors with large administrative capacities and budgets that allow them to submit more economically advantageous bids and provide the high upfront financial guarantees that are often required.

In addition, combining tenders with feed-in premiums can increase market risks and the related financing costs, especially for small and medium companies. In Germany, where 47% of renewable power systems are community energy projects (*Bürgerenergieprojekte*)⁶, introducing such a mechanism would bring the development of renewable energy to an abrupt halt and throw the *Energiewende*, or energy transition, off course.

Given the lack of positive experience and significant risks, particularly for small and medium investors, it is certainly premature to impose this instrument. More experience with various support mechanisms needs to be gained and evaluated. The European Commission should promote further development and ensure that support policies are designed properly in line with the best practice examples summarised in its 2013 guidance paper⁷.

Article 120 (b) Technology neutrality of renewables

Article 194(2) TFEU clearly states that the measures necessary to achieve the objectives of the European Union's energy policy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply". By introducing the notion of technology neutrality - 'allowing' Member States to require a number of different renewable energy sources to receive support without pre-defining technologies - the draft Guidelines are clearly in breach of a fundamental regulation of the TFEU.

Generally speaking, the meaning of this notion is not at all clear-cut. Technology neutrality actually entails technology selection, because it leads to a 'monoculture' of the cheapest technology, ignoring aspects such as innovation potential, which are essential for optimum system development.

Moreover, it runs contrary to the notion of compatible state aid, which is to remove the barriers faced by less competitive technologies and help them to develop. The concept of technology neutrality is the argument used when trying to force renewables into a market in which they have to compete with technologies that have benefitted and still benefit from massive support. Newer, as yet unestablished technologies stand no chance in such a distorted market.

When applied to renewables support mechanisms, the concept of technology neutrality means favouring cheaper and more mature renewables. More expensive emerging technologies are not given the opportunity to develop successfully. Windfall profits, locking in certain technologies and falling behind in global competition due to a lack of innovation are among the major negative consequences of such an approach.

Another critical aspect of this article is the recommendation to Member States to "exclude electricity from specific renewable sources in certain geographical areas if necessary to secure grid stability". This jeopardises the construction of new renewable power plants in areas where the grid has not been developed to allow for a higher penetration of renewables, as stated in Article 16(1) RED. This is also clearly at odds with Article 16(2) lit. b RED, which sets a principle of priority access to the grid for renewables. This principle is "subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria" (Article 16(2) RED). In the absence of justificatory criteria, grid access may thus not be limited to renewable energy producers.

More fundamentally, DG Competition's wording fails to acknowledge the other key aspect of Article 16(1) RED, whereby Member States should develop the grid to allow for a higher penetration of renewables.

⁶ Agentur für Erneuerbare Energien, *Bürgerenergie: Eigentümerstruktur und installierte Leistungen der Anlagen*, 2013

⁷ DG Energy, *European Commission guidance for the design of renewables support schemes*, 2013

We therefore believe that this recommendation should be removed from the EEAG.

As far as the recommendation on biomass is concerned - excluding it from the scheme in order to limit the effects on raw material markets - DG Competition takes it for granted that biomass will always be competing with other industries, which might not always be the case. Secondly, it considers all types of biomass to be the same, which is again overly simplistic, given that there are many sorts of biomass raw material, each with its own material and market characteristics.

Finally, this recommendation discriminates against biomass, since there is competition in other markets as well, for example in the case of fossil fuels between the oil industry and the chemical industry.

Articles 120 (c) and 121 (b) Feed-in premiums replace feed-in tariffs

The German Renewable Energy Federation encourages a transition to dynamic support systems in fully-developed markets, especially in the post-2020 period. We consider the attempt by the draft Guidelines to phase-out feed-in tariffs as ill-conceived and certainly premature, and in open conflict with the TFEU and the RED. Feed-in tariffs create a strong investment signal by providing a revenue stream for a given period, thereby minimising risk premiums and keeping costs low.

At global level, feed-in tariffs are the most widely used policy type in the electricity sector⁸. In Germany, the Renewable Energy Sources Act has led to renewables having an impressive 25% share of gross electricity consumption in 2013⁹, from only 10.2% in 2005¹⁰. This instrument has not only been effective in increasing market penetration, but has also helped to reduce costs, according to the in-depth country review¹¹ by the International Energy Agency.

The Commission provides no evidence that feed-in tariffs distort the creation of the internal energy market. Instead of focusing on phasing-out this mechanism, the Commission should look at addressing the failure of energy-only markets, where an increasing share of renewables reduces prices, thus making it difficult to finance projects. In a power system based on fluctuating energy, a fair and stable remuneration mechanism for renewables is the key to reaching the deployment objectives set by the RED and hopefully also an ambitious energy and climate framework for 2030.

In an effort to phase out feed-in tariffs, DG Competition has already deleted their definition from the definitions section.

Articles 120 (d) and 121 (c) Standard balancing responsibilities

The draft Guidelines propose imposing standard balancing responsibilities on renewables if competitive intra-day balancing markets are already in existence. Despite welcoming the statement that balancing responsibility can be only borne under certain conditions, we believe that these conditions should first be clearly specified:

- Renewable energy producers and aggregators can bid in the balancing market;
- State-of-the-art forecasting tools are in place;
- Liquid intra-day markets with intra-hour gate closure times exist;
- Fair access to spot markets for intermediaries is ensured;
- Technical and regulatory frameworks for aggregation are in place;

⁸ REN21, Renewables 2013 Global Status Report, 2013

⁹ BDEW, Entwicklungen in der deutschen Strom- und Gaswirtschaft 2013, 2014

¹⁰ BMUB, Erneuerbare Energien in Zahlen, 2014

¹¹ International Energy Agency, Energy Policies of IEA Countries. Germany 2013 Review, 2013

- Fair and harmonised rules for imbalance settlement are in place;
- Small installations of below 30 kWp are exempt from bearing balancing responsibility.

Articles 120 (e) and 121 (e) Depreciation according to normal accounting rules

It is unclear what is meant by “normal accounting rules”. It is highly probable that accounting rules may differ from one Member State to the other, which would lead to discrimination against some renewable projects.

Article 121 (a) Update of production costs

The thresholds proposed by the draft Guidelines, i.e. updating production costs every [6 months] or each [1 GW] of installed new capacity, are arbitrary. A technology-specific approach, including a clear methodology, would be more appropriate.

Article 123 Aid to installations of first commercial scale and small installations

We welcome the fact that small installations would be exempt from the requirement to participate in a tendering process. This would be impossible for small producers in practice and would lead to them disappearing from the market.

However, the threshold of [1] MW (or [5 MW or 3 generation units] for wind) is an arbitrary one-size-fits-all approach. First of all, average project size is not the same in every Member State. In Germany, for example, community energy projects (*Bürgerenergieprojekte*) vary significantly in size - which makes setting a threshold difficult - and most of them are larger than similar types of projects in other Member States. Secondly, project size varies according to technology. We would thus suggest an approach which offers Member States flexibility in setting their own technology-specific threshold.

The draft Guidelines also include a provision regarding small installations with a common connection point to the electricity grid, whereby these are to be regarded as one installation. This recommendation may pose problems, given that these small installations might all have different owners.

Furthermore, it is not clear what is meant by “installations of first commercial scale”.

Articles 114, 117, 132 ff. Aid for biofuels

We welcome the recommendation of DG Competition that aid shall only be granted to sustainable biofuels. However, we disagree with the general exclusion of biofuels produced from cereal and other starch-rich crops, sugars and oil crops, preventing them receiving support. To date, existing legislation does not distinguish between feedstock from agriculture and other raw materials for biofuel production. The draft Guidelines propose a differentiation which refers to draft legislation by the European Commission, on which agreement has not yet been reached and which is based on highly controversial scientific research.

The Guidelines should not discriminate against certain types of biofuels. We therefore propose that this distinction be removed (Article 114, 133, 134, 137).

We also suggest removing the proposed end of support for first-generation biofuels in the post-2020 period (Article 117). According to existing legislation, all types of biofuels that fulfil the sustainability criteria are eligible to receive aid. The Guidelines are explicitly designed for the period up to 2020, not beyond.

The draft Guidelines propose introducing a competitive bidding process for biofuels produced from cereal and other starch-rich crops, sugars and oil crops. In order to guarantee a competitive process, the Commission requires the participation of a “sufficient number of undertakings”. Given that the biofuels market is small, it is not clear what is meant by this requirement. We suggest a clarification (Article 134 Footnote 65).

Articles 228, 229, 230 Applicability of the Guidelines

We welcome the provision whereby the new Guidelines would not apply retroactively. To ensure this, Article 230 should be maintained. The relevant footnote (100) should, however, be removed or revised so that a change is understood as a relevant, substantial change to the structure of the support mechanism.

The footnote states that “any adjustment to an already existing scheme other than the publication of new support tariffs according to an already existing and approved methodology” would be considered as a change. The fact that any technical adjustment or tweaks to the tariff calculation methodology would in practice lead to a complete change in the mechanism seriously diminishes investor confidence.

WHO ARE WE?

Founded in 1991, the German Renewable Energy Federation (BEE) is the umbrella organisation for the renewable energy sector in Germany. Our mission is to improve the regulatory and legal framework for renewables and to promote a shift to renewable energy in the electricity, heating & cooling and transport sectors.

We are the voice of 26 industry associations in the hydro power, wind energy, solar energy, bioenergy, geothermal power and ambient energy sectors, comprising more than 30,000 individual members and companies.

Our primary objective is to develop policy by providing input to relevant stakeholders. Our activities address a broad public, including politicians, business leaders, citizens and the media. Our services include expert studies, thematic working groups, policy projects, conferences and workshops, expert hearings, networking possibilities and position papers.

For more information, please refer to www.bee-ev.de or contact us directly.

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