



Mr Joaquín Almunia
Vice-President
European Commission
200 Rue de la Loi
BE-1049 Bruxelles

20 February 2014

Dear Vice-President,

I am pleased to send you at annex BUSINESSEUROPE's position on the revision of the Environmental and Energy Aid Guidelines.

The future guidelines need to ensure that distortions of competition are minimised, since national policies such as energy taxes, support schemes, exemption rules and grid regulation may all create tensions within the single market.

Decarbonisation programmes across the EU are impacting severely on the global competitiveness of European industries by creating costs that are not borne by competitors. Providing the right framework for European companies to be competitive vis-à-vis other main global players is therefore decisive

These programmes are creating distortions, especially due to the cumulative impact of various EU and national policy measures adopted in many Member States. The guidelines need to permit measures that fully offset the cost impacts of decarbonisation policies on energy intensive sectors.

The current draft makes steps in the right direction on the need to reform the most costly national support schemes for renewable energy sources. However, in its current formulation it would exacerbate the loss of competitiveness and would lead to a significant increase of energy prices for a number of sectors.

The link between the State aid guidelines and existing tax rules needs clarification. In particular, reduction and exemption schemes in line with the Energy Tax Directive should be considered compatible under State Aid rules.

These are essential aspects in the Environmental and Energy Aid Guidelines that need to be adjusted to ensure Member States are enabled to help addressing Europe's energy and industrial policy challenges.

Yours sincerely,

Markus J. Beyrer



20 February 2014

BUSINESSEUROPE VIEWS ON THE REVISION OF THE ENVIRONMENTAL AND ENERGY STATE AID GUIDELINES

1. INTRODUCTION

BUSINESSEUROPE appreciates the opportunity to contribute to the ongoing discussion on the revision of the Environmental and Energy Aid Guidelines (EEAG).

We need to stress the decisiveness of providing the right framework for European companies to be competitive vis-à-vis their main global competitors.

On 22 January, the Commission adopted a strategy for an industrial renaissance together with an energy and climate package acknowledging the challenge of high energy prices for EU's competitiveness.

New investments in energy intensive sectors increasingly taking place outside the EU, most notably because of high cost impacts of energy and climate policies.

The decisions to be taken under the State aid framework therefore go well beyond the impact in terms of distortions of competition.

There are essential aspects in the Environmental and Energy Aid Guidelines that need to be adjusted to ensure Member States are enabled to address the additional costs that certain EU policy objectives can induce.

On the one hand, the draft under consultation makes steps in the right direction on the need to reform the most costly national support schemes for renewable energy sources.

On the other hand, in its current formulation it would exacerbate the loss of competitiveness for a number of sectors and would lead to a significant increase of energy prices for many energy intensive sectors.

In the comments that follow, we will point out the central points that in BUSINESSEUROPE's view should be reviewed imperatively in order to improve the functioning of energy markets - and thereby Europe's competitiveness -, minimise distortions of competition within the single market and facilitate jobs and growth creation.



2. GENERAL COMMENTS

1. BUSINESSEUROPE supports the initiative to present guidelines clarifying how State aid rules apply to aid measures for energy and environmental purposes. In particular the inclusion of energy aid will enable the Commission to take a more holistic view of climate and energy policies.

This is an appropriate reflection of the way EU policies have developed over the years and should in principle make it easier for actors to adhere to the relevant rules in a fundamental field for European competitiveness.

2. National legislation and policies applied by different Member States may result in distortions of competition. While different national energy mixes (and prices) can be explained by differences in the resource base or demand, national policies such as energy taxes, support schemes, exemption rules and grid regulation may all create distortions within the single market.
3. In addition, decarbonisation programmes across the EU are impacting severely on the global **competitiveness of energy intensive industries** by creating costs not borne by competitors. These programmes are creating distortions, especially due to the cumulative impact of various EU and national policy measures adopted in many Member States.

The guidelines need to permit measures that fully offset the cost impacts of decarbonisation policies on energy intensive sectors.

4. It is also crucial to increase overall efficiency in renewable energies' promotion in order to reduce the costs of these schemes to energy consumers and to avoid disruptions on the energy markets.

This should be achieved by streamlining and greater coordination at EU level of national support schemes, in particular by improving the effectiveness and cost efficiency of aid measures for low-carbon technologies by including clear criteria in the guidelines, so to ensure more technology-neutral and market-oriented measures. BUSINESSEUROPE believes that the guidelines can be crucial in this regard.

5. The Guidelines need to ensure that European industry maintains its global competitiveness, while at the same time minimising distortions of competition within the Union. Europe cannot afford to focus only on intra-EU competition.
6. In this context, BUSINESSEUROPE would like to point out to a number of specific aspects which are decisive to support the Union's growth agenda and its 2020 target for manufacturing to comprise 20% of Union GDP.



3. SCOPE

7. The notion of aid is independent from the content of the draft EEAG, and is currently treated by a separate communication. We urge however the Commission to take the PreussenElektra doctrine in consideration in the context of the guidelines. **The guidelines should not implicitly or explicitly expand the scope of the notion of aid in a way contrary to the existing case law.**

In particular, EEAG section 5.2 paragraphs 127-131 (Aid granted by way of certificates) rests upon the premise that market mechanisms, such as certificates, are to be regarded as state aid. However, it clearly follows from PreussenElektra, that this is not necessarily the case. We therefore believe that paragraph 127 should emphasise that certificates "may or may not constitute state aid". The same holds true for energy infrastructure measures and any measure aimed at sheltering energy intensive industries from the costs associated to policies targeted at stimulating investment in low carbon energy.

8. Section 5.7 refers only to aid in the form of reductions in funding support for energy from renewable sources. However, Member States are adopting a wide range of other measures to stimulate investment in low carbon energy other than renewables. When any such measures result in additional cost burdens, Member States should have the option to provide support to Energy-Intensive Industries (EIIs) to shield them also from those costs.
9. BUSINESSEUROPE therefore proposes that section 5.7 be amended to refer consistently to aid in the form of reductions in funding support for the decarbonisation of energy supplies.
10. The guidelines should serve as a tool to promote convergence of the national generation adequacy. The development of a low-carbon energy system with a high level of renewable penetration requires a review of the market design to identify the answers for tackling the current challenges related to generation adequacy and security of supply.

We believe that capacity mechanisms need to be considered as part of such market design. **Capacity mechanisms should be technology-neutral, market-based and non-discriminatory.** They should be open to both existing and future generation and storage as well as demand response. Fossil fuels are needed to ensure security of supply, particularly in light of growing variable renewable generation, and should not be excluded.

11. In addition, BUSINESSEUROPE notes that there are other legitimate and valid reasons, not related to decarbonisation, for having a capacity mechanism integrated into an electricity market structure. Therefore, **when these measures do not create distortions of competition, they do not constitute State aid** and should therefore remain fully under Member States' competence.



4. TAX REDUCTIONS AND EXEMPTIONS

12. An important problem in relation to the proposed provisions on tax measures is the interaction between the provisions in the Energy Tax Directive (ETD), which may admit certain tax reductions and exceptions, and the guidelines, which may not – we would propose that consistent positions are taken and definitions used in both documents to aid interpretation and for the avoidance of legal uncertainty and further fragmentation of the European energy and electricity tax framework.
13. Regarding the interaction between ETD and the state aid framework, it must initially be clear which national energy tax provisions actually qualify as a state aid measure. Relating to this, the Commission has recently issued a draft guidance paper on the definition of state aid measures along with a separate consultation¹. This paper states in particular that a measure which derogates from the respective reference system (prima facie selectivity) may still be found to be non-selective – as thus also **not be considered as a state aid measure** - if it is justified by the nature or general scheme of that system. Within the context of the ETD, this includes in particular the exclusion from taxation for certain uses of energy products and electricity under Art. 2(4) ETD. We would welcome an explicit confirmation on this point.
14. Paragraph 174 should state that **any energy tax reductions allowed by the ETD and not going beyond the stated minimum rates is automatically considered in line with state aid rules** and fall under the revised General Block Exemption Regulation. This would avoid unnecessary additional burdens in terms of notification and demonstration of necessity and proportionality of the aid/tax reduction in question.
15. In addition, the Guidelines should clearly state that **any exercise of the options for reductions or exemptions granted to the Member States, as set forth within the ETD from article 14 onwards as currently applicable will be considered compatible state aid** and that no further requirements shall be imposed upon the Member States to make use of such optional reductions or exemptions, even if such reductions are – in accordance with the Energy Tax Directive – granted below minimum tax levels.
16. In many countries a substantial part of policies affecting industry are being determined and implemented through the annual budget process. Granting support in the form of tax reductions or exemptions is hence an integral part of this process. For industry however, with investment horizons up to 30 years, securing long-term and predictable framework conditions is of key importance and we do fully support the proposal in paragraph 171 for aid being authorized for periods of at least ten years, with the possibility of re-notification.

¹ http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html



17. With regard to aid in the form of non-harmonised environmental taxes, paragraph 176 introduces an extra possibility for compensation of indirect costs, from passed on environmental taxes. However, it allows for aid only if trade intensity with third countries is above [10%] and the tax increases production costs to at least [5%] of gross value added. The same criteria apply to aid in the form of reductions in funding support for electricity from renewable resources (paragraph 184). These eligibility criteria are inspired from the ETS related legislation. It must however be taken into account that the ETS is an EU-wide system while RES support schemes are developed at national level and may be very different across the EU. **The proposed eligibility criteria need therefore to be revised:**

- With regard to the introduction of the **trade intensity** criterion in para 176 (a) (as well as para 184), we suggest setting trade intensity as an additional but not mandatory criterion, and calculating trade intensity **based on both extra- and intra-EU trade**. The reasons for this are, firstly that low trade intensities do not rule out an exposure of a company to international competition. The trade intensity indicator is a snapshot based on historical data which has limited value for evaluating the consequences of a cost escalation on future trade flows. Secondly, indirect tax and levy costs can substantially increase production costs of sub-sectors with trade intensity with third countries less than 10%, but which supply sectors with trade intensity with third countries above 10% (supply chain added value). Finally, intra-EU trade has to be included as long as the burden of funding renewables is not harmonized EU-wide and leads to extremely different burdens in different Member states.
- In relation to the impact on energy/production costs (**energy intensity**), BUSINESSEUROPE proposes that this section is amended to require Member States to use alternative methodologies for assessing the necessity of aid. It is unnecessary for the guidelines to adopt such a prescriptive approach, particularly as the energy intensity threshold proposed is arbitrary, with GVA fluctuating according to market conditions and the financial viability of individual undertakings, and could lead to intra-sectoral discrimination. The use of GVA can also discriminate against sectors that are both energy intensive and relatively labour intensive. Instead, BUSINESSEUROPE proposes that the Commission should assess notified aid on a case by case basis, satisfying itself that Member State proposals are restricted to redressing genuine need. In case the Commission nevertheless proposes a threshold calculated on the basis of GVA, this has to be set well below the proposed 5% for a sufficient number of affected sectors to qualify.

18. Furthermore, the Commission's current proposal entails an eligibility assessment for each tax individually. This may lead to discrimination as it can be fulfilled more easily by undertakings subject to few taxes with a high rate. On the contrary, firms that are subject to more taxes with lower rates would be disadvantaged, even though they would be exposed to a similar competitive pressure. The Commission should therefore explicitly allow Member States to assess the necessity of aid based on the **cumulative impact of all taxes and similar cost burdens**, even if a Member State does not propose to offset or compensate the full cumulative burden.



19. As an alternative to the proposed energy intensity criterion, we suggest referring to the total energy intensity of the sector, as do the current (2008) Guidelines and article 17.1 (a) of the Energy tax Directive.
20. In para 179, in order to maintain coherence with the Energy Tax Directive, we would propose that the proportionality criterion should either be 20% of national environmental tax as currently proposed or (instead of option (b)) complying with the criteria in Art 17.1 (b) of that Directive – i.e. aid of up to 100% can be granted “where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency”.

With regard to para 179 (a) we also note that the current 2008 guidelines (para 159 (b)), refer to the condition of paying 20% of the national tax “unless a lower rate can be justified in view of a limited distortion of competition”. We believe this last adjustment should be retained in the new guidelines.

21. The guidelines express a preference for tax credits paid as **lump sums**. This requirement would invalidate schemes where aid is paid in the form of an exemption from RES charges. **BUSINESSEUROPE can see no justification for banning such schemes, which are in principle no more distortive than aid paid in the form of compensation.**

5. AID INTENSITIES

22. Paragraphs 176(b) and 186(b) in effect would cap any aid at 80%-85%, as being “proportionate”. According to para 74, “aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection or energy objective aimed for”.
23. However, in the case of the types of aid addressed in the above paragraphs, there is no market failure being addressed. The aid is not intended to motivate a behaviour by the beneficiary EII or to promote a particular environmental outcome. Instead, this type of aid aims to protect EIIs from distortions of global competition resulting from the Union’s decarbonisation programme.
24. Thus **capping the aid achieves no environmental objective**. Furthermore, in Member States where there are multiple decarbonisation measures in place, the cumulative impact of multiple 20% residual costs can of itself seriously damage EII competitiveness.
25. BUSINESSEUROPE therefore proposes that exceptionally in this instance, **aid intensities of up to 100% should be permitted**.



6. RENEWABLES SUPPORT AND EXEMPTIONS FOR ENERGY-INTENSIVE INDUSTRIES

26. Support to renewables is dealt with in section 5.2, while section 5.7 provides possibilities to compensate energy-intensive industries that are particularly exposed to carbon leakage for their additional costs due to national renewable energy support schemes.
27. The increasing competitiveness and market penetration of many renewable energy sources underline the need of decreasing support to technologies having reached a mature stage (deployed technologies). **The focus of state aid should shift towards emerging new technologies throughout the innovation cycle.** Therefore, we would welcome a stronger push for phasing out renewable support schemes for mature technologies by 2020 (taking into account that existing schemes and contracts have to be respected).
28. We support the approach indicated by the Commission in paragraph 119, to differentiate in its assessment between deployed and less deployed technologies depending on their share in electricity consumption reached, and in particular the aim to expose renewables technologies more clearly to the market by requiring that deployed technologies compete for funding through a genuinely competitive bidding process (e.g. auctions) where all generators can bid. A robust, **clearer and more refined approach to the differentiation between deployed and less-deployed technologies is needed**, particularly whether the share refers to electricity consumption or production.

The Commission proposes the electricity production share to be calculated at EU level. This would lead to an assessment based on broader aggregate data which would avoid that technologies are treated as “less deployed” in Member States where they factually have less potential (e.g. solar in some North European countries), leading to the following considerations:

- on the one hand, this could avoid differentiated treatment of a certain technology in different Member States;
 - on the other hand, a “national consumption share” might ensure that each of these technologies receives tailored support where it is actually needed, and allow Member States to encourage diversification of national energy sources.
29. **It is imperative that support schemes are, as a matter of principle, technology-neutral.** While accepting that Member States may need to ensure a minimum technology mix, we recommend that paragraph 120(b) expressly forbids schemes that favour certain specific technologies. On the other hand, technology-specific support might still be needed for less mature / deployed technologies but support schemes should then follow strict cost-efficiency requirements and an upper threshold of support volumes.
30. The Commission considers operational aid for combined heat and power (CHP) only compatible with state aid under the same conditions applying to aid for



deployed RES (for new CHP) and for existing biomass (existing CHP). The respective conditions can hardly be applied to industrial CHP which receives operating aid in the form of a wide range of exemptions. All these different forms of exemptions must be taken into account when defining conditions for promoting highly efficient CHP. Accordingly, the conditions for aid for CHP cannot be covered by the respective chapters for promoting RES. Intermittent and non-intermittent technologies (such as CHP) have both a positive environmental impact. Aid for CHP however needs to be covered by a different chapter reflecting the above remarks.

31. As regards the exemptions for energy-intensive industries, we stress again the critical importance of our points above under the tax reductions chapter in relation to aid intensities, the eligibility criteria and the requirement that aid can only be paid as a lump sum, and which apply also to section 5.7.

7. INCLUSION OF ENERGY INFRASTRUCTURE MEASURES

32. Network development should be led by the private sector, with public aid limited to the minimum necessary to create the appropriate conditions for investment and to support projects that would not otherwise be economically viable or carry a particular general interest for society.
33. We welcome the extension of the scope of the guidelines to energy infrastructure and the inclusion of uniform compatibility criteria, under the following conditions:
 - Promotion of network development with public resources should be limited to cases where macro-economically worth-while network development would not produce a return with purely private-sector investments under favourable regulatory conditions.
 - The admissibility of infrastructure aid under EEAG should be limited to projects which are justified by a particular societal interest (e.g. links between energy islands, optimisation of network stability, increase in demand flexibility), have a cross-border benefit (e.g. interconnectors) or are open to potential aggregation of both demand and supply.
34. With specific reference to electricity networks, reference to tension levels in the definitions (point 18 (ff)(i)) should be eliminated. The network must be regarded as a whole independently from the different tension levels so to facilitate investments through the whole network. Moreover, even projects under 220kV can contribute to market integration, due to benefits to cross-border capacity exchanges.



8. APPLICABILITY OF THE GUIDELINES

35. The draft Guidelines contain a provision (paragraph 229) allowing for their retroactive application, starting from December 2010, for chapter 5.7 on the exemptions for energy intensive industries. BUSINESSEUROPE would appreciate some clarification for this provision.

36. The entry into force regarding RES operating aid for existing support schemes is linked to the change of the existing schemes (230). This might disincentivise reforms by Member States. A fixed and reasonable compliance date might avoid this and ensure that there are not two different sets of rules applicable throughout the single market at the same time, depending on whether a Member State has revised its scheme or not.

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