EURACOAL

European Association for Coal and Lignite AISBL

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EURACOAL Response to Public Consultation

on the Draft Community Guidelines on State Aid for Environmental Protection and Energy for 2014-2020 (ref. HT 359)

The European Commission published a draft of its proposed new guidelines on energy and environmental aid on 18 December 2013 and launched a public consultation. The existing *State Aid Guidelines on Environmental Protection* (2008/C82/01) entered into force in 2008 and cover the period to the end of 2014.

The proposed guidelines are of considerable importance for the European coal industry. Although they do not directly concern coal industry aid, which will end in 2018,[1] and do not include any legally binding instruments, they do outline the main principles which the Commission intends to use when examining State interventions to promote renewable energy sources and State aid for environmental protection and in the energy sector. As such, they are crucial for the future enforcement of EU rules on State aid and hence will influence a substantial part of EU energy policy. EURACOAL welcomes the Commission's aim for greater competition between mature renewable technologies in a market where renewable generators are subject to standard balancing responsibilities.

It should be mentioned here that there is currently no legal or political consensus that all aspects related to renewable energy support meet the legal definition of State aid. Thus, the German federal government considers that the German Renewable Energy Act (EEG) and its special relief measures for energy-intensive companies do not constitute State aid, based on custom and practice and previous case law. According to this interpretation of the law, the new guidelines would not apply to the EEG and similar schemes elsewhere. Recognising this legal opinion, EURACOAL addresses here the key elements of the draft Commission proposal.

I. General Remarks

The Commission proposes significant changes and extensions to the current guidelines on State aid for environmental protection. Given the existing close relationship between climate and energy policy, the energy sector is more likely to fall within the regulatory scope of these guidelines. Thus, the Commission intends to extend the guidelines to the complex area of energy subsidies. However, there is a real danger that the extension of the regulatory scope of the guidelines will lead to conflicts between the competencies of the Commission and

[1] See Council Decision 2010/787/EU which includes a provision for the repayment of past State aid that EURACOAL considers to be unduly onerous for those undertakings that are striving to achieve a competitive market position without subsidy by 2018 and aim to continue mining beyond 2018.

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Member States in the field of energy. This is true, for example, in actions on energy infrastructure or in the case of capacity mechanisms in the electricity sector.

The Commission's proposal to extend the scope of existing environmental aid guidelines to cover aid in the energy sector and to specify common requirements for State aid assessments would contribute to achieving the EU energy and climate targets for 2020 and to strengthening cross-border competition in the energy sector. In any case, the goal to ensure access to affordable energy for European businesses and consumers is to be welcomed. The Commission is right to point out that the financing of support measures for renewable energy in many Member States has led in recent years to an increase in electricity costs – placing burdens on consumers and reducing the competitiveness of energy-intensive companies. The resulting negative consequences on the economic strength and employment in sectors and regions particularly affected have had a negative impact on the acceptance of expanding the renewable energy sector. In addition, the Commission notes the risk of CO_2 emission displacement as a result of industrial relocation to countries outside the EU (so-called "carbon leakage").

For these reasons, it is in principle justified for the Commission to consider options that allow energy-intensive businesses, which include coal mining in some Member States, continued relief from charges that have a clear impact on cross-border competiveness.[2] Moreover, not every selective support measure causes distortions to competition, provided that they are designed to compensate special burdens. In the case of assisted areas, EURACOAL welcomes the Commission's proposal that the aid intensity for projects in the fields of environmental protection and energy can be increased (paras. 32 and 82).

On the subject of rising energy price premiums to finance the promotion of energy and climate policy measures, these place substantial additional cost burdens on companies with high energy intensities. These additional costs may be a competitive disadvantage both compared with non-European competitors and with competitors in the single European market, where they have no comparable fees.

The proposed guidelines state that relief from renewable energy levies can be allowed only where Member States clearly demonstrate that particular sectors would otherwise be at risk of transfer to third countries outside of the EU. However, it should be noted that the growth of renewable energy in EU Member States takes place at different rates. Consequently, the financial impact on EU economies varies greatly. Against this background, the assessment of the risk of relocation should be limited to the Member State concerned – irrespective of

[2] Whilst the mining of chemical and fertiliser minerals and the mining of iron ores are classified as energy-intensive, the mining of coal is not listed as energy-intensive in the ETS Directive. As such, producers of indigenous coal in Member States are put at a competitive disadvantage *vis-à-vis* coal imported from outside the EU. In Germany, coal mining along with many other sectors is considered to be energy-intensive in so far as it is granted relief from the EEG levy.

whether the relocation would be to a state within or outside of the EU. If not, then those Member States who pursue the most ambitious targets under the Renewable Energy Directive would carry the greatest economic burdens.

In many Member States, rising energy costs have resulted in declining investment by many industrial sectors in recent years. To maintain the competitiveness of EU industry, protection measures are therefore required for those businesses which cannot absorb tax- and duty-related energy price increases whilst remaining internationally competitive. Similarly, measures are needed to prevent internal market distortions within the EU. Therefore, Member States should be able to relieve such companies from having to pay unreasonable energy and environmental taxes, as well as levies and taxes on energy prices to finance renewable energy, cogeneration or other energy and environmental goals. Relief may be in the form of energy and environmental tax exemptions or reductions and exemptions from other taxes and levies.

In order to prevent disparities between corporate requirements and political goals, any mechanisms to protect industry should, on the one hand, preserve the profitability of enterprises and, on the other hand, secure the overall energy policy objectives.

II. Detailed Comments

1. Environmental Aid

The current guidelines on State aid for environmental protection already include assessment criteria for measures in twelve areas. These concern, among other measures, those which go beyond EU standards or apply in the absence of such standards to improve environmental protection. Member States have applied the existing guidelines to promote, for example, the remediation of contaminated sites and to improve the level of environmental protection beyond that required by EU law. This scope has proved itself and should therefore be retained and updated in the new guidelines.

2. Transparency (Section 5.1.7)

Transparency is important, however it should not result in unnecessary administrative burdens. Hence, for example, if the information on particular State aid is normally already published, as is the case with projects supported by European Structural and Investment funds, then the duplication called for in the guidelines would create an unnecessary burden. EURACOAL fully supports transparency, but the proposed central website in each Member State (para. 109) would not contribute to greater transparency. Instead, it would add costs to perform a function that is better carried out by commercial search engines.

3. Aid to Energy from Renewable Energy Sources (Section 5.2)

EURACOAL welcomes the call by the Commission for the cost-efficient promotion of renewable energy sources. To this end, the Commission should revise the eligibility criteria for aid to promote the expansion of renewable energy sources and anchor the principles of technology neutrality and cost effectiveness. The Commission is right not to propose any retroactive changes that would affect the funding mechanisms used by Member States to support existing installations. Otherwise the investment climate would have become less secure because plant operators would have sought legal redress for their losses and damages.

It should again be noted that not all support schemes for renewable energy are classified *per se* as State aid within the meaning of Article 107 of the TFEU.

In any case, government support mechanisms must take into account the market maturity of the technology as well as creating incentives for efficiency. Also, producers of electricity from renewable energy sources should be subject to the same conditions as conventional providers – grid connection charges, for example. The promotion should be done only via market mechanisms, such as a market premium or tendering procedures.

In addition, the promotion of renewable energy in electricity production should not be directed only at the displacement of coal-fired power plants. It must be combined with measures that provide sufficient conventional balancing and reserve capacity to ensure the security of the power system at all times. This means that the policy framework should recognise the importance of conventional generation and the need to invest in its modernisation and eventual renewal.

Finally, the Commission notes that forcing all consumers to fund renewable energy sources via charges, levies or green certificates does not directly target any particular negative externality. For this reason, EURACOAL disagrees that, "all energy consumers should bear the cost of financing renewable energy support" (para. 181). This goes against the principle of technology neutrality in achieving the aim of a low-emission future. In a more targeted approach, other low-emission options would be eligible for similar support, such as fossil fuel-fired power plants equipped with CCS or nuclear power plants in those Member States that choose this option.

4. Aid to Carbon Capture and Storage (Section 5.5)

Carbon capture and storage technology offers significant potential for mitigating greenhouse gas emissions and to set Europe as a global leader for a prosperous, clean and green economy. Despite the best intentions of the EU, renewables will not reduce the significant carbon emission increases from the emerging economies who will only pay what they can afford. The US and Canada are pioneering the first commercial CCS plants this year, ahead of the EU. EURACOAL, therefore, welcomes the focus on CCS and urges the Commission and Member States to regard CCS support not as a "complementary" measure (para. 161), but as a fundamental measure in EU climate policy.

5. Aid in the Form of Reductions or Exemptions from Environmental Taxes (Section 5.6)

The guidelines must be designed in such a way that they do not subsequently limit the application of Directive 2003/96/EC on the taxation of energy products and electricity. The Commission must ensure that exemptions and reductions granted by Member States in accordance with Directive 2003/96/EC are compatible with rules on State aid.

The same goes for State exemptions from and reductions of taxes on electricity prices. The justification for relief is to maintain the competitiveness of European companies and should not only apply to charges for the financing of renewable energy, but also to other energy and environmental taxes, since it is ultimately not the specific purpose of the charge, but the level of exposure that matters to a company in relation to its intra- and extra-EU competitors.

The following comments on relief from the cost of renewable energy support therefore apply equally to relief from environmental taxes.

6. Aid in the Form of Reductions in Funding Support for Electricity from Renewable Energy Sources (Section 5.7)

The justification for relief from such tariffs is to maintain the competitiveness of European companies and should not only apply to levies to finance renewable energy sources, but also to other energy and environmental taxes. In addition, the assessment of carbon leakage risk by the two criteria below appears to be too limited. Additional criteria, such as "price elasticity", should be taken into account as shown by a study by the Ifo Institute in Munich on behalf of the German Federal Ministry for Economic Affairs.[3] Indeed, "price elasticity" provides a further definition, rather than focusing solely on the proposed EU-wide criteria of "trade intensity" and "gross value added".

■ Sector intensity of trade criterion

In Section 5.7 (para. 184) of the draft, the Commission calls for a sector intensity of trade with third countries of at least 10% to be used as a threshold.

The Commission's proposal is based on provisions in the ETS and obviously assumes that a high trade-intensity is an indication that an industry is exposed to competition. In sectors with a high trade intensity, but with a lower level of energy intensity, companies can still be subject to significant price pressures. For example, the EU hard coal mining

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[3] *Entwicklung eines Maßes für die Intensität des internationalen Wettbewerbs auf Unternehmens- oder Sektorebene*, ifo Institut, München, 2013 (www.ifo.de/de/w/3GvXWDdYU)

sector faces a trade intensity of 64% and sales contracts are won and lost on the smallest price differences.[4]

However, there is no minimum industry-specific trade intensity that would eliminate the threat of rising energy costs to the competitiveness of companies. EURACOAL therefore advocates lower thresholds of trade intensity, based on an overall assessment of the risks to competitiveness at the national level.

The proposed classification for energy-intensive products fails to properly differentiate. A classification that focuses on those energy-intensive products which face international competition would be more appropriate. Otherwise, there is a real risk that energy-intensive production and related sectors would gradually disappear from a Member State as products are sourced from less heavily burdened countries within Europe as well as elsewhere.

The Commission should therefore assess all sectors as part of inter-linked value chains. Producers of energy-intensive products should be allowed to demonstrate that the criteria for trade intensity and gross value added are met by the final product at the end of a particular value chain. On this basis, the Commission could define products and production processes which would be eligible for relief. Only the energy actually used for the production of the energy-intensive end product would be relieved from the renewable energy levy.

■ Gross value added criterion

As a second criterion, the Commission proposes in Section 5.7 (para. 184) of the draft that the full renewable energy levy should be at least a share of 5% of gross value added.

However, it should also be possible for straight waivers or reductions to be granted for companies that have fallen into or may fall into loss or have a negative gross value added without relief.

Where the thresholds cannot be met, there should also be the possibility for Member States to deal individually with situations where tax-related costs cannot be passed on without loss of sales opportunities. Company-specific solutions are then preferable to a rigid sectoral focus.

The requirement for a degression or a progressive reduction in aid would run contrary to the specific purpose of balancing a competitive disadvantage.

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[4] "Trade intensity" means a sector's non-EU imports and non-EU exports as a share of the sector's total EU turnover plus non-EU exports and imports (SWD(2012) 130 final). Sectoral trade intensity = (X + M)/(M + Y), where: X = total value of non-EU exports; M = total value of non-EU imports; Y = total turnover of EU production. Using Eurostat data, the EU hard coal sector's trade intensity for 2011 was 64%.

7. Aid for Generation Adequacy (Section 5.9)

In most scenario forecasts, fossil fuels – notably coal and gas – will underpin secure electricity generation during those periods when there is no wind and no sun or other periods when there is an oversupply of renewable electricity. The latest coal-fired power plants that have been built in Europe are designed to be very flexible – matching the performance of the latest gas-fired plants and meeting the highest emission standards. EURACOAL calls on the Commission to redraft Section 5.9 of the guidelines to provide a more positive signal to those looking to invest in plant that may only run at low load factors. In particular, paras. 205 and 212 discriminate against fossil fuel-fired power plants which operate in compliance with EU law (*e.g.* Industrial Emissions Directive) and do not reflect the socio-economic value of fossil fuels, including their role in providing security of electricity supply. Para. 207 should refer to the back-up generation capacity required to cover diurnal and seasonal variations in the output from renewable energy sources and para. 211 should include a "non-discriminatory" requirement so that conventional generation capacity is not excluded.

Of particular concern is the deteriorating economic situation of conventional power plants given the increase of subsidised renewable generation. The introduction of capacity mechanisms could be a response that, if designed properly and market-orientated, might not be considered as State aid.

In any event, capacity mechanisms should be non-discriminatory, technology-neutral and cost-efficient. Only if all options to provide reliable capacity are eligible – from new as well as from existing capacities, from coal- as well as from gas-fired plants – can costs for consumers be kept low. In addition, capacity markets should be focussed only on security of supply. Other objectives, such as climate protection or flexibility, should be addressed by other instruments. It is neither meaningful nor efficient to muddle instruments; emission reductions are well addressed by the ETS while flexibility is incentivised in the electricity balancing market. Using multiple instruments to achieve a single objective only leads to higher costs without any additional CO_2 savings.

8. Promotion of the use of mine gas

In respect of feed-in tariffs, market premiums or other incentives available to producers of electricity from mine gas in some Member States, the guidelines should usefully provide legal clarification that:

a) although mine gas is not a renewable energy source, it should be treated as such in terms of environmental and energy aid; and

b) if the promotion of mine gas is considered to be aid, then this aid should be admissible pursuant to Article 107, paragraph 3(c) of the TFEU.

Such a clarification reflects the legal view explicitly expressed by the Commission.[5] Indeed, the Commission has considered the support offered for the production of electricity from mine gas and, in various official documents, unambiguously finds it to be admissible and reasonable from an energy policy perspective.[6]

The Commission has determined that the financial measures open to producers of electricity from mine gas are compatible with the rules on State aid covering the single common market.[5] According to the Commission, this follows from Article 107, paragraph 3(c) of the TFEU. The Commission is correct in finding that since the mine gas is not released into the atmosphere, its use has a positive climate impact, due to the reduction in greenhouse gas emissions, and also leads to primary energy savings. These positive impacts have been recognised in several decisions taken by the Commission.[6] Furthermore, the European Commission has confirmed that mine gas extraction without public incentives would not be feasible and concluded that, "the overall balance of the aid is positive".[7]

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[5] C(2011) 8882, p.12
[6] C(2011) 8882 and C(2013) 4424 final
[7] C(2013) 4424 final, p.44