The Legal Helpdesk
Understanding State aid in European law

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What is State aid?

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) introduces the notion of State aid as follows:

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

The term "State aid" thus generally refers to a competitive advantage (1) selectively conferred to one undertaking or group of undertakings (2) by the State or through State resources (3) which distorts or threatens to distort competition (4) and affects trade between the Member States (5).

For the **first criterion**, the **advantage**, the European Courts consider whether an undertaking obtains an economic advantage which it would not have received under "*normal market conditions*".[1] The reason for granting the aid is not relevant at this stage, neither is the form of the aid, so that all kinds of grants or exemptions can be covered.[2]

The **second criterion, selectivity**, is given when certain undertakings or the production of certain goods are treated different when compared to others. Renewable energy support schemes may be an example of such selective treatment, as they favour undertakings producing renewable energy over others active in energy generation.[3]
The **third criterion** requires that the **State is somehow involved** in the decision to grant the advantage. From some more recent judgments of the European Court of Justice it seems that despite the wording of Article 107(1) TFEU, the condition that the

[1] E.g. ECJ, Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, par. 60; ECJ, Case T-46/97 *SIC v Commission* [2000] ECR II-2125, par. 78.

[2] E.g. ECJ, Case C-251/07 *France v Commission* [1999] ECR I-6639.

[3] Compare also e.g. ECJ, Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

grant is "*by the State or through State resources*" is cumulative, not alternative.[4] Thus both must be fulfilled and the aid must stem **from State resources and be attributable to the State**.

In the context of renewable energy, no general answer exists as to whether the criterion *"by the State or through State resources"* is met. Rather, it will depend on the features of the support measures in question. However, a distinction can be made based on the ways to administer the scheme: For example, the German Feed-In Tariff system has been held not to be State aid, since it was not the State allocating the money to the recipients, but the German system operators themselves as they first paid the minimum prices and then equalized their costs among themselves in the market.[5] The Flemish quota system did not constitute State aid either, because there was no financial sanction for failure to meet the quota obligation, and thus logically there was nobody administrating and re-distributing such payments. Rather, the obligation existed and the certificates were in place as a means to meet the obligation, but no allocation of costs took place and the State did not direct the resources in any way.[6] However, many other renewable energy support schemes have been found to meet the criterion, since they often use specific fund-like institutions for the administration of the cash flows, i.e. the support being paid to producers of renewable energy and the money collected to cover the costs of such support.[7]

As regards the **last two criteria**, the European Court of Justice has held that when it comes to the question of a **potential distortion of competition**, it does not matter that the aid is justified by higher production costs of the recipient[8] or because other Member States have similar schemes in place.[9] As long as the position of the recipient is improved compared to the situation he/she would be in without the measure, this criterion will be met. Similarly, an **effect on inter-State trade** is normally given as aid

[4] ECJ, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, par. 58-62.

[5] ECJ, Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

[6] Compare: European Commission, Letter to the Member State, State aid N 254/06 – Belgium 'Panneaux photovoltaïques', par. 13.

[7] For an example of the considerations the European Commission, compare e.g. Commission Decision of 8 March 2011 on State aid measure C 24/09 (ex N 446/08), OJ L235/42, par. 60ff.

[8] ECJ, Case 173/73 *Italy v Commission* [1974] ECR 709, par. 73.

[9] ECJ, Case 78/76 *Steinike and Weinlig* [1977] ECR 595, par. 109.

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to one undertaking or one group of undertakings will give those an advantage that other participants in the EU internal market do not have.[10] Further, the Court has held that it is not necessary that there is a real effect on trade, but it suffices to constitute that trade may be affected.[11]

What if something a measure is State aid?

Not all measures constituting State aid are prohibited. Rather, according to Article 108 TFEU, all new State aid measures according to the five criteria set out in Article 107 TFEU have to be **notified to the European Commission**. If they are not, they are in principle **unlawful**.[12] However, that does not mean that the measure is prohibited per se. Instead, it means that the measure may not be put into effect prior to any decision by the Commission explicitly authorising it, by finding it **compatible with the internal market.**[13] Thus one has to distinguish between "unlawful", meaning non-notified, and "incompatible" aid.

In practice, a Member State wanting to adopt a State aid measure first has to submit its plans to the Commission and await authorization.[14] The same applies whenever changes are made to existing and approved aid measures.

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[10] ECJ, Case 730/79 *Philip Morris Holland BV v. Commission* [1980] ECR 2671; CFI, Cases T-81, 82 and 83/07 *Maas v. Commission* [2009] ECR II-2411.

[11] Compare: CFI, Cases T-298, 312, 313, 315, 600-607/97, 1, 3-6 and 23/98 *Alzetta Mauro v. Commission* [2000] ECR II-2319, ECJ; C-310/99 *Italy v Commission* [2002] ECR I-2289; ECJ Case C-211/05 *Italy v Commission* [2009] ECR II-2777.

[12] There are certain exemptions thought, e.g. for aid remaining below a certain "de minimis" treshold, that is aid in the form of direct payments below 200.000 EUR granted over any three-year period or for aid falling under one of the provisions of the General Block Exemption Regulation. See Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ L 379/1; Commission Regulation 2008/800/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L214/3.

[13] Council Regulation 659/1999/EC laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 3.

[14] This is often referred to as the "standstill" clause, compare: Council Regulation 659/1999/EC laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 3.

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Thus, all existing aid that has not been notified and authorized by the European Commission is in principle unlawful. Therefore, anyone can bring a **complaint** against such measures, upon which the Commission may examine whether this is indeed a case of unlawful State aid, or not. Alternatively, one may turn to a national court which has to apply the European State aid rules as well. However, while a national court can find that a measure constitutes State aid according to Article 107 TFEU, the European Commission has exclusive competence on the decision whether aid is compatible or not with the internal market. So normally only the Commission can give or refuse authorization.[15]

Which procedures will be followed?

The procedures for State aid notification and authorization process are regulated quite strictly[16] and nowadays an interactive platform for State aid notifications exists.[17] Overall, the procedure involves a more or less intense **dialogue between the Commission and the Member State** notifying.

Generally, the Commission has to take decisions within a certain timeframe; if not, the aid will be deemed compatible. The time limits are intended to provide an incentive to the Member States to notify the aid: for non-notified, unlawful aid no time limits apply. There is a simplified procedure for certain cases, which includes shorter timeframes, such as cases under the Environmental Aid Guidelines.[18]

The **first step** in the procedure is the so-called **pre-notification phase**. This phase is not directly based on the provisions of the Treaties and is not "officially" part of the notification procedure under Article 108 TFEU yet, but has emerged from Commission practice: All Member States are invited to submit a draft notification of their plans for State aid measures. The Commission will examine them and will – within two weeks – get back to the Member State in question. Through teleconferences, emails and pos-

[15] In exceptional cases, the Council may decide according to Art. 108(2) TFEU.

[16] See: Article 108 TFEU, also: Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1.

[17] See: https://webgate.ec.europa.eu/competition/sani/login/index.cfm.

[18] Notice from the Commission on a simplified procedure for certain types of State Aid, COM 2009/C 136/03, OJ C136/3, par. 5(a)(ii).

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sibly even meetings, it will be discussed whether the case qualifies prima facie for a simplified procedure. The latest five days after the last contact, the Commission will communicate to the Member State whether a simplified procedure can be followed.[19]
If the Commission has informed the Member State that a **simplified procedure** may be followed, then no later than two months the Member State shall submit the final and thus the official notification. The Commission will publish a summary of the notification, including a notice that the measure may go through the simplified procedure, and ask interested parties for comments within ten working days. However, if the comments reveal that the case is more complex than originally thought and therefore not eligible for simplified proceedings, it will be reverted to the normal procedure.
If from the notification and the comments, the Commission is sufficiently convinced that there is no aid or that the aid is compatible with the internal market, a **short-form decision** ("decision not to raise objections") will be issued possibly within 20 working days.[20] The decision will be published on the Commission's website, but it need not necessarily include any reasons.[21]

If the case is **too complex** for simplified proceedings, the **normal procedure** will be followed:
After notification, a **preliminary examination** will be done and the Commission has to take a decision within two months. Such a decision may constitute that the measure is no aid or that there are no doubts as to its compatibility with the internal market ("decision not to raise objections"). In other cases, the Commission may find that there are doubts regarding its compatibility ("decision to initiate the formal investigation procedure"). The **two months period** will start running only after receipt of **a complete application**, which means from the point that the Commission does not request any further information deemed necessary to come to a decision. When requesting information, the Commission sets the Member State a deadline for answering the request and if no answer is received in time, it will send a reminder. If the requested information is not submitted within the time periods granted for that and the reminder did

[19] Notice from the Commission on a simplified procedure for certain types of State Aid, COM 2009/C 136/03, OJ C136/3, par. 13f.

[20] Notice from the Commission on a simplified procedure for certain types of State Aid, COM 2009/C 136/03, OJ C136/3, par. 21.

[21] For various examples, see the State aid register: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_sa_by_date.

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not help, the Commission will normally deem the notification to be withdrawn, meaning that if the measure does constitute State aid meeting the criteria of Article 107 TFEU, it is non-notified and thus unlawful State aid. The notification will be considered complete if within two months the Commission has not asked for any such additional information, [22] and the two months period for the preliminary examination will start to run. Furthermore, the two months period may be extended in case both the Commission and the Member State consent.[23] Notably, the Commission is under **no obligation to consult** with the Member States, beneficiaries of the aid or any other interested party during the preliminary investigation.[24] It must however examine the facts brought to its attention.[25]

If the Commission starts a **formal investigation procedure**, a final decision normally has to be taken within 18 months.[26] At the beginning of the formal investigation procedure and with the publication of the decision to initiate it, the Commission **asks the Member State and interested parties for their comments**, each of them being normally given a month to respond.[27]

The term **"interested party"** in this regard has to be understood as any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations. The complainant itself will not per definition be considered interested party, but will have to prove its legitimate interest in the assessment of the aid, for example the protection of its competitive position in the mar-

[22] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 5(5).

[23] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 4(4).

[24] E.g. ECJ, Joined Cases 91/83 and 127/83 *Heineken Brouwerijen BV v. Inspecteur der Vennootschapsbelasting (Heineken)* [1984] ECR 3435, par. 22.

[25] See ECJ Case C-204/97, *Portugal v. Commission* [2001] ECR I-3175.

[26] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 7(6).

[27] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 6.

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ket.[28] However, the role of interested parties is **rather limited** and they do not have to be heard as to their (legal) assessment of the measure, neither does the Commission need to respond to their arguments. Rather, interested parties largely serve as sources of information for the Commission. They cannot debate the case in the same way as the Member State granting the aid.[29]

The comments received are submitted to the **Member State** in question who is again normally given a month to reply to the comments. Generally, the procedure is only between the Commission and the Member State and can result in a decision addressed solely to that Member State. Being the addressee of the decision, the Member State will thus have certain rights of defence, among which most importantly the right to be heard.[30]

At the end of the formal investigation procedure, the Commission can adopt a **positive decision** (declaring that the measure does not constitute aid or that it is compatible with the internal market), it can adopt **conditional decisions** (imposing certain conditions on the measure in order to make it compatible with the internal market) or a **negative decision** (meaning that the measure is incompatible and may not be put into effect or – in case of existing non-notified aid - has to be recovered).[31]
In case the aid had not been notified, but the Commission learns about it through some other ways such as for example a complaint, then normally no time limits apply[32] while in principle the same procedural steps will be taken as in the course of a notification procedure. The only exception to this is the case in which recovery of the

[28] Compare D. Grespan, Recovery of unlawful and incompatible aid, in: W. Mederer et al. (eds.) EU Competition Law, Volume IV State Aid Book One, Claeys & Casteels, Leuven 2008, p. 688 (incl. case law).

[29] Compare D. Grespan, Recovery of unlawful and incompatible aid, in: W. Mederer et al. (eds.) EU Competition Law, Volume IV State Aid Book One, Claeys & Casteels, Leuven 2008, p. 688f (incl. case law).

[30] See e.g. Joined Cases T-228/99 and T-223/99 *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435, par. 122ff.

[31] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 7.

[32] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 13(2)

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unlawful (as non-notified) aid has already been effectuated, such as in case a national court has ordered such a measure: Then the time limits as in the course of a notification procedure apply.[33]

Unlawful and incompatible – what then?

When the Commission finds that an aid measure - no matter whether notified or not - is not compatible (negative decision), the Commission will decide that the measure **may not be effected** or in case the aid has already been granted that the Member State definitely has to take all measures necessary to **recover** it.[34] Thus all the aid granted **must be actually paid back**.[35] Only in exceptional, duly reasoned cases, where it would be in conflict with principles of European law, no recovery shall be ordered.[36] The implementation of the Commission's decision and thus the recovery procedure itself will be governed by national law and procedures in place in the Member States.[37]

As unlawful aid per definition has already been paid and in most cases continues to be paid while the Commission is examining the case, it is possible, **by means of injunction**, that the Commission orders **suspension or provisional recovery** before a final decision is taken. While suspension is less problematic to effect, and would be similar to the "standstill clause" for notification, recovery is quite a difficult exercise. Accordingly, the Commission may only take such a decision in case that "*according to an established practice there are no doubts about the aid character of the measure concerned*

[33] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 11(2).

[34] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 14(1).

[35] Compare e.g. Case C-415/03 *Commission v. Greece* [2005] ECR I-3875, par. 44.

[36] Compare Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 14, also e.g. Commission Decision 93/329/EC of July 1990 concerning aid granted by the Italian Government to a manufacturer of ophthalmic lenses, 1992, OJ L 183 (a case in which the Commission found recovery disproportionate, due to the long time between the moment the aid had become known to the Commission and the final decision).

[37] Compare D. Grespan, Recovery of unlawful and incompatible aid, in: W. Mederer et al. (eds.) EU Competition Law, Volume IV State Aid Book One, Claeys & Casteels, Leuven 2008, p. 656.

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and there is an urgency to act and there is a serious risk of substantial and irreparable damage to a competitor".[38] In the absence of Commission practice, it is unclear which could be such cases of urgency. Literature suggests that there is urgency to act when the Commission has to fear that other Member States will grant unlawful State aid as well[39] or when the interest in recovery exceeds the interests of the Member State and the recipient by far.[40] Serious risk of substantial and irreparable damage to a competitor is further hard to prove. Though the damage must not be certain but only reach a decent grade of probability, it must reach certain intensity and may not be considered merely marginal. Also the damage has to be irreparable, i.e. it must have effects which cannot be compensated with any form of damages.[41]

In addition, according to the case-law by the Court, if the Commission has established beyond doubt e.g. in its decision to open the formal investigation procedure that a measure is non-notified State aid, the **Member State itself may have to stop it**, at least until the European Commission has cleared it as being compatible in the course of the running procedure.[42]

What can national courts do?

As mentioned above, while the Commission has exclusive competence on the question whether aid is compatible with the internal market or not,[43] **national courts have to enforce the State aid rules** as well. They can thus determine whether a measure constitutes aid and whether it should have been notified. Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion or request

[38] Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999, OJ L83/1, Art. 11 (2).

[39] G. von Wallenberg, M. Schütte, in: E. Grabitz et al (eds.), Das Recht der Europäischen Union, C.H. Beck, München, 2011, Art 108 par. 91

[40] U. Ehricke, in: U. Immenga, E.-J. Mestmäcker (eds.), Wettbewerbsrecht: EG 2007, Pt II, C.H. Beck, München 2007, Art. 88, par. 125.

[41] A. Sinnaeve, § 32 Procedure regarding unlawful aid, in: M. Heidenhain (eds.), European State Aid Law, C.H. Beck, München, 2010, par. 9.

[42] ECJ, Case C-400/99 *Tirrenia* [2001] ECR I-7303, par.57f.

[43] For examples: ECJ Case C-354/90 *Federation Nationale du Commerce Exterieur des Produits Alimentaires v. France* [1991] ECR I-5505 ; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, par. 103. However, in exceptional cases, the Council may decide, see Art. 108(2) TFEU.

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a preliminary ruling from the European Court of Justice according to the procedure set out in Article 267 TFEU.[44] As article 108(3) TFEU and the notification obligation have direct effect,[45] national courts can take on all cases where there is no question of incompatibility yet or anymore. Such may be complaints about non-notified, thus unlawful aid, or actions against aid granted despite the fact that the Commission had declared it incompatible. According to the Commission Notice on the enforcement of State aid law by national courts, national courts can **order remedies** including (a) preventing the payment of unlawful aid, (b) recovery of unlawful aid (regardless of compatibility), (c) recovery of illegality interest, (d) damages for competitors and other third parties and (e) interim measures against unlawful aid.[46]
However, as the national courts cannot decide on the question of compatibility, it is possible that the European Commission later decides that the measure was unlawful but not incompatible.

State aid for renewable energy - a problem?
While not all Member States have designed their national renewable energy support schemes in a way that they constitute State aid according to Article 107 TFEU, some have. By itself, there is nothing wrong with this. As mentioned above, State aid is only prohibited in case and so far the aid is incompatible with the common market. When the aid is justified, it can be **authorized by the European Commission** in the course of the notification procedure.[47] And even non-notified aid can – in case for example it has been brought to the attention of the Commission by a complaint – still be authorized ex post, so that aid already paid need not be recovered.

As regards the circumstances under which an aid measure is to be considered compatible with the common market, the Treaty itself offers some **possible exemptions**:

[44] ECJ Case C-39/94, *SFEI/La Poste* [1996] ECR I-3547/3592, par. 49 ff

[45] For examples: ECJ Case 120/73 *Lorenz* [1973] ECR 1471 , par. 147; Joined Cases 91/83 and 127/83 *Heineken Brouwerijen BV v. Inspecteur der Vennootschapsbelasting (Heineken)* [1984] ECR 3435, par. 147; Case C-345/02, *Pearle BV and Others v Hoofdbedrijfschap Ambachten* [2004] ECR I-7139, par. 106.

[46] Commission Notice on the enforcement of State aid law by national courts, 2009, OJ C 85/1, par. 22 ff.

[47] In exceptional cases and upon application by the Member State, the Council can declare compatibility as well. See Article 108(2) TFEU.

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According to Article 107(2) TFEU aid is deemed compatible when it has a social character, is granted to individual consumers or constitutes aid to make good damage from natural disaster as well as certain aid to compensate the new Bundesländer in Germany for the damage of the past division of the country. Those exemptions apply automatically and although the measures concerned still have to be notified in accordance with Article 108 TFEU, the Commission has no discretion and must declare them compatible.[48]

The following paragraph, Article 107(3) TFEU, sets out some **possible justifications for aid**, the application of which is discretionary so that the Commission can or cannot declare those measures compatible. Accordingly, measures falling within the scope of this provision have to be notified. Article 107(3) TFEU states that aid to areas where the standard of living is abnormally low, for projects of common European interests or remedies against serious disturbances in the economy of a Member State, as well as for regional and cultural aid may be considered compatible. The Commission has adopted several so-called block exemption regulations based on this provision, such as most importantly the General Block Exemption Regulation, Commission Regulation 800/2008/EC. With those instruments, the Commission even **exempts certain categories of aid from the notification requirement**, thus declaring them per se compatible with the internal market. The categories of aid which can be exempted from the notification requirement have to be defined by a regulation adopted in the Council in accordance with 109 TFEU.[49]

In this regard, the European Commission adopted a **new General Block Exemption Regulation in June 2014,**[50] which – as its predecessor, Commission Regulation

[48] See e.g. CFI Case T-268/06 *Olympiaki Aerooproia Ypiresies (Olympic Airways) v. Commission* [2008] ECR II-01091, par. 53.

[49] Art. 108(4) TFEU; See also e.g. K. Bacon, European Community Law of State Aid, Oxford University Press, Oxford, 2008, p. 117.

[50] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L187/1.

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800/2008/EC[51] - includes specific provisions on aid for renewable energy: As regards investment aid, Art. 41 provides that investment aid may be granted for **up to 45% of the eligible costs,** *"where the costs of investing in the production of energy from renewable sources can be identified in the total investment cost as a separate investment, for instance as a readily identifiable add-on component to a pre-existing facility, this renewable energy-related cost shall constitute the eligible costs"* or *"where the costs of investing in the production of energy from renewable sources can be identified by reference to a similar, less environmentally friendly investment that would have been credibly carried out without the aid, this difference between the costs of both investments identifies the renewable energy-related cost and constitutes the eligible costs"*. Where *"for certain small installations where a less environmentally friendly investment cannot be established as plants of a limited size do not exist, the total investment costs to achieve a higher level of environmental protection shall constitute the eligible costs"* the aid intensity shall however **not exceed 30% of the eligible costs**. For small undertakings, the aid intensity may be increased by 20%, for medium-sized undertakings, it may be raised by 10%, and it is possible depending on where the project is located, to increase the intensities by 5-15% as well. Most interestingly, Art. 41(10) provides for the possibility for investment aid up to the full costs: *"Where aid is granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, the aid intensity may reach 100 % of the eligible costs. Such a bidding process shall be non-discriminatory and provide for the participation of all interested undertakings. The budget related to the bidding process shall be a binding constraint in the sense that not all participants can receive aid and the aid shall be granted on the basis of the initial bid submitted by the bidder, therefore excluding subsequent negotiations."*

In **contrast to the previous General Block Exemption Regulation,** and for the first time, Regulation 651/2014 now also allows for operating aid to renewable energy. And here something similar to Art. 41(10) seems to be envisioned, as Art. 42(2) reads as follows: *"Aid shall be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria which shall be open to all generators producing electricity from renewable energy sources on a non-discriminatory basis."*

[51] Commission Regulation 2008/800/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L214/3.

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However, the Regulation foresees the possibility to **limit the bidding process** to specific technologies, if a bidding process does not seem to be able to deliver the optimal results, for example when it comes to the need to diversify the renewable energy portfolio or network constraints. Generally, however, **all technologies shall participate, the aid shall be paid as a premium, it shall not be paid in times of negative prices and the beneficiaries shall be subject to standard balancing responsibilities**. New and innovative renewable energy technologies may be granted aid in the course of a special bidding process, open to at least one of those technologies, but only up to 5% of the overall planned renewable energy capacity to be built within one year.[52] **Small plants, up to 1 MW** (6 MW or 6 turbines for wind) shall receive aid under the conditions mentioned (market premiums, no payments in times of negative prices, standard balancing obligations) without having to bid in the bidding process. Even smaller plants, **up to 500 kW** (3 MW or 3 turbines for wind) may receive aid even without those conditions to apply.

Similar to the new General Block Exemption Regulation, the European Commission adopted **new Guidelines on State aid for environmental protection and energy 2014-2020** to follow up the expired Guidelines on Environmental Aid.[53] Again, the old Guidelines already contained some provisions on renewable energy, and they also allowed operating aid – in contrast to the old General Block Exemption Regulation. However, the new Guidelines brought some changes and now the two instruments are **much more in line:**

According to par. 125ff, operating aid to renewable energy shall **normally also be paid in the course of a competitive bidding procedure** with the aid paid as market premiums, not at times of negative prices and the obligation to take on standard balancing responsibilities, unless it can be shown that there are insufficient suitable sites or projects or that it would lead to over- or underbidding. Again, and as under the Regulation 651/2014, Member States may for some reasons exclude certain technologies, and again, smaller plants need not participate. For aid to renewable energy other than electricity, no bidding procedure is required and special rules apply to biomass plants

[52] Note that special rules apply for biomass and biofuels, as the European Commission is trying to take into consideration the rules on sustainability for such sources, and for example support to food-based, first generation biofuels is supposed to be phased out.

[53] Community guidelines on State aid for environmental protection, 2008, OJ C 82/1.

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after plant depreciation (while for all other plants, the aid may normally only be paid until full depreciation in accordance with normal balancing rules). In the alternative, operating aid may be granted by **using market mechanisms (i.e. green certificates, the price of which may not be fixed in advance).** Here the European Commission requires sufficient evidence that the aid *"(i) is essential to ensure the viability of the renewable energy sources concerned; (ii) does not, for the scheme in the aggregate, result in overcompensation over time and across technologies, or in overcompensation for individual less deployed technologies in so far as differentiated levels of certificates per unit of output are introduced; and (iii) does not dissuade renewable energy producers from becoming more competitive."*[54]

The Guidelines also allow for **investment aid,** and here again the same aid intensities as under the General Block Exemption Regulation apply, including the possibility to cover 100% of the eligible costs where the aid is granted in the course of a competitive bidding process.

As under the system aid that falls within the scope of the General Block Exemption Regulation need not be notified to the European Commission while aid under the Guidelines still needs approval, it appears that wherever the Member States want to maintain or introduce support schemes which do not take the form of competitive bidding procedures, they need to get approval for them under the Guidelines. There, proving that the bidding procedure is not appropriate at all is possible, as are market mechanisms. However, in case the aid measure is neither covered by the General Block Exemption Regulation nor the Guidelines,[55] then the Commission will apply Article 107(3) TFEU on a **case by case** basis.

Most national renewable energy support schemes designed as State aid measures have been authorized in accordance with those Guidelines. So far, thus, it has **not**

[54] Communication from the Commission Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C, OJ 200/01, par. 136.

[55] Note that there are several other instruments with similar regimes, not discussed here, such as the de minimis Regulation (applying to certain aid measures which stay below a certain threshold), Commission Regulation 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L352/1.

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been a real problem for a national renewable energy support scheme if it was found to constitute State aid, as **authorization by the Commission the aid could always be granted in the end.**

However, one may note that the dialogue between the Commission and the Member States in the course of the **authorization procedures – after notification or not – may take years**. This can have severe negative consequences for investors' confidence and can delay the development and deployment of renewable energy. Examples from Austria, Slovenia or Luxembourg have shown that discussions between the Member State and the Commission can take years, during which there is no certainty for the industry as regards what the financial support available with look like so that informed business decisions are very difficult to take if not impossible at all.

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