

Much has changed since 2014, and although the European Commission extended the validity of the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 until the end of 2021, they are now quite out of date. The Guidelines brought significant changes to the way that public money supports the EU's energy sector, particularly renewable energy. The Guidelines, which lay out the rules on how the European Commission assesses Member States' planned subsidies for the energy and environment sectors, ensured a switch from feed-in tariffs to premiums awarded via a competitive bidding procedure, thus helping to greatly reduce the cost of renewable energy incentives. The Guidelines brought positive changes that limited incentives to build additional small hydropower plants in EU countries, but they have not proven successful in halting state aid for existing hydropower projects which breach EU environmental law, nor for preventing aid for the Sofia incinerator, fossil gas Projects of Common Interest, or capacity mechanisms that enable back-door fossil fuel subsidies. Last week saw the end of a public consultation on plans for the new Guidelines, to which Bankwatch contributed with a range of ideas on how to end environmentally harmful subsidies.

Even within the existing rules, much more could be done to ensure environmental compliance and policy coherence. The Guidelines already state that Member States must ensure compliance with EU environmental legislation, carry out an environmental impact assessment when it is required by EU law and ensure all relevant permits. They also specifically point out that hydropower plants must comply with the Water Framework Directive and waste projects with the waste hierarchy laid out in the Waste Framework Directive. The European Court of Justice confirmed in September 2020 that aid to an activity that breaches EU environmental law cannot be found compatible with the internal market. But in reality, the Commission needs to take more care in assessing environmental compliance. It is unclear how the Commission currently checks this, but from its decisions on renewable energy support schemes, it appears that it asks the Member State to confirm that it will ensure compliance, rather than looking at the country's actual compliance record. In reality, support schemes - some of which awarded aid before the current Guidelines entered into force - have approved subsidies for projects that later turned out to be non-compliant. For example, the Commission in 2015 opened a case against Romania for failure to apply the environmental acquis to small hydropower plants. The 2019 Commission letter of formal notice to Croatia on inadequate application of the Habitats Directive in the case of wind farms and the experience with the Kaliakra wind farm in Bulgaria show that environmental breaches also apply to other subsidised renewable energy projects. But apart from the general principle that non-compliant projects are not allowed to receive aid, there

is no clear mechanism in the Guidelines to systematically halt or prevent state aid for illegally permitted projects. So, the new rules need to make more explicit how both the Commission and Member States need to check compliance when approving aid, and what happens when a project is found to be non-compliant only later.

It is surely easier to prevent aid being granted than to recover it later, so a precautionary approach needs to be taken, especially in countries where environmental breaches are known to be a problem. Just as Article 3 of the Renewable Energy Directive prohibits Member States from granting subsidies for energy from the incineration of waste if the State has not complied with the separate collection obligations laid down in the Waste Framework Directive, the Guidelines also need to clearly stipulate that no incentives for hydropower – even for very small plants – may be provided in countries which have not achieved the goals of the Water Framework Directive. Likewise, to make sure that energy projects developed in breach of the Environmental Impact Assessment, Birds or Habitats Directives, do not receive incentives, the Guidelines need to clearly state that any energy/environment projects or sectors subject to infringement procedures, investigations or court cases may not receive incentive payments until the issue is resolved.

There is – unfortunately – a difference between being illegal and being environmentally damaging, and too often the Commission has accepted planned subsidies which may or may not be legal, but which certainly do not represent the best use of public money. Gas infrastructure and highly-efficient cogeneration are just two examples where the Guidelines fail to prevent state aid for projects which contradict the EU's decarbonisation and circular economy agendas.

For years, under the TEN-E Regulation, the EU has used public money to support new gas infrastructure such as pipelines and LNG terminals, while at the same time promoting decarbonisation. The TEN-E Regulation is currently under revision and the Guidelines will need revising in line with the new version. We expect that this will lead to an end to direct support for new fossil gas infrastructure. However, concerns remain about hydrogen. Renewable hydrogen may play a role in sectors which are difficult to decarbonise, but caution is needed. Hydrogen needs large amounts of energy to produce, and even if generated by renewable energy, can put pressure on ecosystems. There is also a serious danger of boosting fossil gas hydrogen by overestimating the future availability of renewable hydrogen. Shaping policies and infrastructure around renewable hydrogen that may or may not materialise is likely to result in extending and expanding the use of fossil hydrogen instead. Currently, less than 0.1 percent of hydrogen capacity is for 'green hydrogen', and the availability of renewable hydrogen in the future has yet to be proven.

Therefore, direct or indirect support for hydrogen must be limited to strictly renewable hydrogen, to be used only for hard-to-decarbonise sectors, and must exclude any support that relies on fossil fuels and unproven technologies such as carbon capture and storage. In 2019, the Commission decided to allow subsidies for the Sofia waste incinerator, despite Bulgaria's appalling record on recycling. This makes it highly likely that recyclable materials will be burnt. This decision is the result of the fact that the current Guidelines allow operating aid for highly efficient cogeneration plants as defined in Annex II of the Energy Efficiency Directive. In practice, this has proven to be a loophole allowing subsidies for fossil fuels, as well as incineration of waste that is not biodegradable and would therefore not qualify for renewable energy operating aid, as in the Sofia case. It is no longer acceptable to provide state aid for fossil fuels in any form, efficient or not, nor for other unsustainable energy forms such as waste incineration. The Commission needs to review the definition of cogeneration which can receive aid under the Guidelines and stop linking it to the current definition from the Energy Efficiency Directive. It should also, at a minimum, update the Guidelines to prevent any subsidies for waste incineration in countries that have not met their separate waste collection targets, in line with Article 3 of the Renewable Energy Directive. But it should also be taken into account that the Commission's 2017 Communication on the role of waste-to energy in the circular economy advises Member States to phase out public support for energy from incineration, because quantities of mixed waste as a feedstock for waste-to-energy processes are expected to fall as a result of separate collection obligations and increasingly ambitious EU recycling targets. So, it is questionable whether any new aid should be allowed for waste incineration at all. One of the most interesting parts of the Commission's consultation questionnaire included a proposal to initiate public consultations on proposed aid schemes. Considering that state aid decisions have until now been one of the most difficult areas of EU decision-making for the public to influence, this would be highly welcome as a step forward to increase state aid transparency and effectiveness. State aid has traditionally been seen as something mainly affecting market competitors of beneficiary companies, so the general public and non-governmental organisations (NGOs) have had little involvement. It is often hard to find out when the Commission initially examines cases, as they are announced only when a decision is made to open an investigation. So, it is hard to provide timely input, and neither the general public nor NGOs are allowed to challenge the Commission's state aid decisions. The Aarhus Convention stipulates the need to involve the public in environmental decision-making, so it is only logical that state aid schemes with a potential impact on the environment - positive or negative - be consulted. Similarly, the public needs to be able to

challenge the Commission's decisions to approve state aid, which is one of the issues being raised in another current EU policy process, the review of the Aarhus Regulation, which is still ongoing. The European Commission has made strong commitments in its Green Deal to ensure that the environment is at the top of its agenda and that European citizens have a voice in this process. State aid policy can only make a difference when implemented together with ambitious legislation in all fields. But it is clear that the use of public funds will strongly influence the Green Deal's outcomes, and that there is no time to lose. The new Guidelines on State Aid for Environmental Protection and Energy must do more to not only ensure that the projects supported by state aid are compliant with EU environmental legislation, but that they also represent the very best use of public money. State aid must look beyond what is legal, to what is clearly desirable.

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