Renewables incentive schemes, Commission intervention and state aid: new issues for Europe

Nigel Howorth and Michael Coxall
Clifford Chance LLP

The last few years have seen a turbulent time for the renewable energy sector, with falling investment levels, continuing global economic problems and uncertainty over renewable policy frameworks in key countries. Over the years, a number of different types of subsidy mechanism have developed. The European Commission (Commission) has recently taken a more interventionist approach to renewable subsidies, particularly in relation to state aid rules. This could have a significant impact on existing national renewable schemes and ultimately lead to increased harmonisation across the EU.

Against this background, this article examines:

- Recent trends in the renewable energy sector.
- Intervention by the European Commission into financial support for renewables.
- The importance of following state aid rules.
- Updated state aid guidelines and their impact on renewables support schemes.
- Shielding energy intensive industries and competitive conflicts.
- Opening up national renewable incentive mechanisms to other EU countries.
- Further challenges ahead.

RECENT TRENDS IN THE RENEWABLE ENERGY SECTOR

Investment levels

The last few years have seen a turbulent time for the renewable energy sector:

- 2013 figures show that global investment in renewables fell significantly in both 2012 and 2013.
- Continuing global economic problems and uncertainty over renewable policy frameworks in key countries take a significant share of the blame. In particular, retroactive reductions in incentives in a number of European countries (in the solar sector) have caused investors to be extremely cautious about the stability of financial support mechanisms.

Interestingly, part of the reason for the declining value of investment in 2012/13 has been the reduction in technology costs, especially in solar and wind markets:

- This reduction in costs has helped deployment of renewables to continue rising despite the recent falling value of investment, and deployment is projected to grow strongly at least up to 2020.

- In 2012, total renewable electricity generation capacity hit 1,579GW, and the International Energy Agency expects renewable electricity production to be 60% of the increase in power generation across the OECD between 2012 and 2018 (see box, Growth in global renewables investment and global renewable electricity capacity and projection).

CAPACITY LEVELS AND CLIMATE CHANGE TARGETS

Is renewable generation becoming cost-effective without subsidies? In some cases, for example Turkey and New Zealand, onshore wind can compete effectively in the wholesale electricity markets. However, in the main, renewable generation capacity still needs financial subsidies to ensure continued growth in capacity. How does this fit with achieving targets?

In Europe, there are some encouraging signs of progress on meeting 2020 climate change targets. The European Commission (Commission) expects that the 20% carbon reduction and renewable targets will be achieved across the EU, although around half the member states need to make increased efforts.

However, while the Commission seeks increased carbon reductions and renewable targets in its new 2030 climate package, a number of member states are resisting binding renewable targets as they look to other potential medium-term ways of reducing emissions. These include possibly using shale gas as an interim measure to take over from coal capacity. It remains to be seen how the potential for a shale gas bonanza in Europe will affect national policy on renewables, particularly in light of geo-political conflict in Eastern Europe, and the desirability of reducing reliance on uncertain fuel supplies. Already the UK government has sought to push the EU to expand shale gas development to improve EU energy security.

Subsidy mechanisms for renewables

Over the years, a number of different types of subsidy mechanism have developed:

- Recently, Feed-in Tariff (FIT)/Feed-in Premium (FIP) schemes and, to a lesser degree, Green Certificate-type schemes have become the pre-dominant support mechanisms. For example, REN 21 (Renewable Energy Policy Network for the 21st Century, in their Renewables 2013 Global Status Report) notes that five FIT schemes alone were adopted in Africa and the Middle East in 2012.
- These are joined by a wide range of other ways of encouraging the growth of renewable energy, including tax advantages, levies and grid connection advantages (see box, Common types of renewable incentive mechanism for electricity generation).
GROWTH IN GLOBAL RENEWABLES INVESTMENT AND GLOBAL RENEWABLE ELECTRICITY CAPACITY AND PROJECTION

Growth in Global Renewables Investment


Global Renewable Electricity Capacity and Projection

Incentive schemes each have advantages and disadvantages in terms of:

• Encouraging production of new capacity.
• Ensuring flexibility faced with rising or falling costs.
• Achieving renewables targets.
• Providing certainty for investors.
• Their impacts on electricity markets.

Experience of such schemes in Europe has led to one of the most significant recent developments: a new push by the European Commission to regulate the forms of financial support for renewable electricity generation on offer in member states.

**COMMISSION INTERVENTION INTO FINANCIAL SUPPORT FOR RENEWABLES**

**Reasons for Increased intervention**

The Commission has recently taken a more interventionist approach to renewable subsidies. It has looked not only at whether support should be provided, but also at the forms of support on offer. This responds to a number of concerns. In particular:

• The Commission is worried that member states are not considering suitable alternatives (such as expanding inter-connection capacity) before introducing support schemes.
• The lack of flexibility of schemes to deal with changing market conditions and falling costs of technology have led to the controversial retroactive changes to a number of support schemes in recent years. These retroactive changes are still continuing (see, for example, the recent proposals in Romania).

The renewables sector now has significant market share, and there is greater recognition that incentive schemes can impact on:

• Grids and system stability.
• Competition, not only between renewable and traditional generators, but also between member states, given a European electricity market which is set to become more integrated over the next few years.

Conflict can exist not only over the level of aid that can be given to renewable generators but also over the extent to which domestic industries can be protected by the rises in prices that this will cause.

The Commission's new intervention has broadly taken two forms:

• Adoption in principle of new updated Guidelines on environmental and energy aid published in April 2014 (New Guidelines). These will be of great interest to developers, as they set out the parameters for when the Commission will consider new subsidy mechanisms as being compliant with EU law.
• Publication of a Communication on the internal electricity market with accompanying working document setting out best practice on renewable subsidies (Best Practice Guidance). This is a more prescriptive document, setting out not only the best way to design schemes, but also the process to follow to determine whether they are needed in the first place, and whether alternative options might suffice. However, the Commission will also look to the Best Practice Guidance when applying the New Guidelines, so these documents should be read in conjunction with each other.

**WHAT IS STATE AID?**

Under EU law:

• State aid potentially arises whenever state resources are used to provide assistance and that assistance gives some organisations an advantage over other organisations.
• It will be State aid if the aid is liable to distort competition in a relevant market and would be sufficient to affect trade between member states.
• The advantage may, for example, be a grant, loan or tax break or the use of a state asset at below market price.
• Member states must notify proposed State aid measures to the Commission.
• While there is a general prohibition on State aid, the Commission can give clearance for specific instances of State aid as a result of the notification procedure.
• The Commission will only grant clearance where the State aid is considered compatible with relevant policy objectives.

The sting in the tail is the Commission's announcement that it is considering the extent to which renewables incentives could be harmonised at European level. Harmonisation would be a radical shift which is likely to be very unpopular at national level.

**The Commission's general approach to support mechanisms**

The Commission recognises that the various forms of support mechanism have different advantages and impacts. In particular:

• FITs/FIPs tend to protect producers better from revenue risk but do not provide the efficiency benefits of exposure to market pricing.
• Green Certificate mechanisms, on the other hand, introduce market exposure but can, as a result, increase the capital cost of projects.

The Commission does not favour either tariff mechanisms or Green Certificate mechanisms. However:

• As far as tariff mechanisms are concerned, the Commission comes down in favour of FIPs rather than FITs, and suggests that FITs should be phased out, due to their adverse impact on the development of liquid electricity markets as the renewables market grows.
• It is in favour of increasing competition in awarding support for all types of incentive schemes. The Commission recommends greater co-operation between national support schemes which, although permitted under Directive 2009/28/EC on the promotion of the use of energy from renewable sources (Renewable Energy Directive), has never taken off.
• The Commission wants to see renewable energy produced in the most efficient locations across the EU, and for national renewable energy schemes to recognise this. Ultimately, harmonisation of support may be the only way to realise this goal.
• The importance of following state aid rules. The application of state aid rules (see box, What is state aid?) to renewable energy support mechanisms is not new. A number of European cases in the past have considered the extent to which particular forms
of support constitute state aid in the first place. This question arises as such mechanisms often do not use government funds:

- In the case of Essent Network Noord and Others [2008], a levy on consumers was put in place in The Netherlands to refund power companies for certain infrastructure investments. The Court of Justice of the EU (CJEU) determined that this "price surcharge scheme" would amount to state aid where (as in this case) the relevant member state is in control at any time of the funds raised by the levy.

- This contrasts with the PreussenElektra case in 2001, where the Court held that an obligation on suppliers to purchase renewable electricity at minimum prices, funded directly from their own resources, did not amount to state aid.

It might be thought that the question of whether or not schemes involved state aid should be settled now, but these debates still continue. The potentially dire consequences of getting state aid questions wrong are illustrated by the case of the French FIT scheme for wind power.

- Under the initial version of the scheme established in 2000, the costs of the FIT scheme were imposed on producers, suppliers and distributors (as in PreussenElektra) and the French administrative courts found that this did not constitute State aid.

- A change to the scheme was made in 2003 to pass these costs onto domestic consumers, with the amount to be paid calculated in proportion to the quantity of electricity consumed, and the funds to be held by the Caisse des dépôts et consignations, a French public body (similarly to the Essent Network Noord case).

- When adopting a new order setting out conditions for the purchase of electricity from wind sources in 2008, the French government did not consider this change to the funding of the scheme to constitute state aid either and did not seek clearance.

- Following a challenge to the 2008 order by activist group Association Vent de Colère, the CJEU in December 2013 held that the scheme did indeed constitute state aid in respect of onshore wind tariffs, and subsequently required immediate implementation of its decision. The consequences are that the scheme has been found to be unlawful by the French Conseil d’État and annulled in respect of onshore wind tariffs.

Many wind farm projects in France have been put on hold over recent years while sponsors and lenders waited to see how this crisis would be resolved. Fortunately for the French wind industry, the French government’s urgent application made recently for state aid clearance for onshore wind tariffs was successful, and it is expected to take steps to legislate retroactively to ensure that generators’ previous tariff payments and entitlements to future tariff payments are protected. It is possible, however, that tariffs for other technologies will be challenged, and the French government is now mulling over making further notifications to the Commission.

The New Guidelines, on the other hand, adopt a much more interventionist approach in the design of support schemes (see box, Key aspects of the new state aid guidelines). The New Guidelines are supposed to be aligned with the Best Practice Guidance (although the fit is not perfect) and provide a default minimum position for mechanisms to be considered acceptable.

Particular consideration is given to FIP and Green Certificate (or quota obligation) mechanisms. For the first time, the Commission is contemplating that supported generators under FIPs and Green Certificate mechanisms take on responsibilities for balancing the electricity system (that is, ensuring that electricity supply always meets demand) where competitive intra-day markets exist. Currently, balancing operations are mainly the preserve of baseload generators and large industrial consumers. Schemes will be approved for ten years and re-approval must be sought after such time if they continue to operate. Beyond this requirement, the criteria depend on whether technologies are supported by tariff schemes or Green Certificates.

The end of FIT schemes?

It appears that support for small scale renewable capacity (up to 3MW or 3 generation units for wind installations, and up to 500kW for other technologies) will still be possible using FITs. For all other installations, the guidelines provide that support through tariff-based schemes should only be provided through FIPs (leading to the general phasing out of FITs).

Bidding requirements

After difficult negotiations, the Commission strengthened its original proposal, which placed competitive bidding requirements only on specified technologies with a significant share in the electricity market (deployed technologies). In the final version, a “genuinely competitive bidding process” with “clear, transparent and non-discriminatory criteria” to allocate support must apply to all FIP schemes (subject to a small scheme exception) unless either of the following justifications are made out:

- Only a few projects or sites would be involved.
- There are fears that using bidding processes would lead to higher support levels or low project realisation rates.

Specific technologies can in future only be exempted from bidding where this is necessary due to one of the following:

- The potential of the technology.
- The need to diversify supply.
- Network or system issues.
- Reasons relating to the biomass market.

Bidding mechanisms will need to be fully in place for all technologies from 1 January 2017, with 5% of capacity being subject to bidding during 2015/2016.

These proposals have been met with a mixed reaction:

- Some, such as the UK Renewable Energy Association, believe that FIT schemes should continue to be allowed, more broadly, as they are shown to be effective in encouraging more generation capacity; relying on untested competitive bidding mechanisms is a big risk.
- Others, such as Eurelectric, the European electrical power sector association, welcome the introduction of more market-based rules to ensure a level playing field.

State aid Guidelines are published as a guide to how the Commission will assess clearance requests and the factors it will use in approving or declining them:

- Current guidelines are fairly non-prescriptive, broadly aiming to ensure that generators are not over-compensated and, for certificate schemes, that generators remain competitive.

- The New Guidelines, on the other hand, adopt a much more interventionist approach in the design of support schemes (see box, Key aspects of the new state aid guidelines). The New Guidelines are supposed to be aligned with the Best Practice Guidance (although the fit is not perfect) and provide a default minimum position for mechanisms to be considered acceptable.

Particular consideration is given to FIP and Green Certificate (or quota obligation) mechanisms. For the first time, the Commission is contemplating that supported generators under FIPs and Green Certificate mechanisms take on responsibilities for balancing the electricity system (that is, ensuring that electricity supply always meets demand) where competitive intra-day markets exist. Currently, balancing operations are mainly the preserve of baseload generators and large industrial consumers. Schemes will be approved for ten years and re-approval must be sought after such time if they continue to operate. Beyond this requirement, the criteria depend on whether technologies are supported by tariff schemes or Green Certificates.

The end of FIT schemes?

It appears that support for small scale renewable capacity (up to 3MW or 3 generation units for wind installations, and up to 500kW for other technologies) will still be possible using FITs. For all other installations, the guidelines provide that support through tariff-based schemes should only be provided through FIPs (leading to the general phasing out of FITs).

Bidding requirements

After difficult negotiations, the Commission strengthened its original proposal, which placed competitive bidding requirements only on specified technologies with a significant share in the electricity market (deployed technologies). In the final version, a “genuinely competitive bidding process” with “clear, transparent and non-discriminatory criteria” to allocate support must apply to all FIP schemes (subject to a small scheme exception) unless either of the following justifications are made out:

- Only a few projects or sites would be involved.
- There are fears that using bidding processes would lead to higher support levels or low project realisation rates.

Specific technologies can in future only be exempted from bidding where this is necessary due to one of the following:

- The potential of the technology.
- The need to diversify supply.
- Network or system issues.
- Reasons relating to the biomass market.

Bidding mechanisms will need to be fully in place for all technologies from 1 January 2017, with 5% of capacity being subject to bidding during 2015/2016.

These proposals have been met with a mixed reaction:

- Some, such as the UK Renewable Energy Association, believe that FIT schemes should continue to be allowed, more broadly, as they are shown to be effective in encouraging more generation capacity; relying on untested competitive bidding mechanisms is a big risk.
- Others, such as Eurelectric, the European electrical power sector association, welcome the introduction of more market-based rules to ensure a level playing field.
The UK is currently implementing a new FIT scheme for renewable generation to take over from its Green Certificate scheme (the Renewables Obligation). As a result of publication of the draft guidelines, the UK government decided to change the scheme to subject the more established technologies to immediate competition, in order to improve its prospects for securing state aid clearance. Whether the Commission will be happy to accept a FIT scheme remains to be seen, in particular given that some newer technologies would not be subject to competitive bidding.

Germany is also moving to a FIP model for larger installations. Spain is currently in the process of legislating for a FIP-type model which may be retroactively applied back to July 2013 (the kind of step the Commission is trying to avoid through its Best Practice Guidance).

Green Certificate schemes
The major change in the updated guidelines for Green Certificate schemes is that, in principle, there should be no differentiation in support between technologies. Differentiation would only be allowed where justified, using the same grounds for excluding FIP schemes from competitive bidding.

The new rules could provide problems for Green Certificate schemes, for example, of the type found in Romania and the UK, where differentiation of support between technologies applies. Although Poland plans to introduce a FIP scheme, it will retain a modified version of its Green Certificate scheme for projects commissioned before the new FIP scheme comes into force, and some modifications of the proposals are likely to be necessary as a result of the New Guidelines, in particular in relation to its differentiation for technologies such as co-firing.

Only relevant to new schemes?
In principle, the New Guidelines are only relevant for schemes for which approval is sought after 1 July 2014. However, significantly, where a relevant change is made to a scheme, the competent member state will be required to bring the scheme in line with the guidelines. Any adjustment to the scheme which is not purely formal or administrative or which increases the scheme's budget by over 20% will constitute a relevant change for these purposes. What will amount to a formal or administrative adjustment is uncertain and there will be concern that existing schemes could well be caught by the New Guidelines, especially where member states seek to make structural changes to schemes or alter support outside of a scheme's pre-published methodology.

Indeed, the French government is concerned that these new stricter guidelines might be applied to its current FIT schemes (rather than the guidelines that applied at the time in 2008) if they decide to notify them to the Commission following the Association Vent de Colère case.

SHIELDING ENERGY INTENSIVE INDUSTRIES AND COMPETITIVE CONFLICTS

Renewable support mechanisms typically lead to rises in the price of electricity, as levies are often placed on customers to fund the mechanisms. In recent years, member states have often sought to shield energy intensive industries from the impacts of such rises, to ensure that important national industries do not relocate to third countries where costs are lower.

COMMON TYPES OF RENEWABLE INCENTIVE MECHANISM FOR ELECTRICITY GENERATION

- Green Certificates (or Quota obligation mechanisms)
- Green Certificate schemes operate by awarding qualifying renewable energy generators with certificates equivalent to the amount of renewable energy generated.
- Some newer renewable energy technologies may receive a larger number of certificates than long-established technologies, to reflect the difference in deployment costs.
- Electricity suppliers are placed under an obligation to source a certain proportion of their electricity from renewables. They evidence satisfaction of their obligation by presenting Green Certificates to the regulator, which are bought from renewable generators.
- Penalties are payable if suppliers do not meet their obligation.

Feed-in Tariffs (FIT)/Feed-in Premiums (FIP)
FIT schemes:
- Are more numerous than Green Certificate schemes, as they are easier to administer and generally provide renewable energy generators with greater certainty of income.
- Pay a sum of money or tariff to generators on top of their electricity sales.
- The sum paid is often a variable amount to “top up” the sales income to an agreed level. This provides a high level of price guarantee to the generator.

FIPs:
- Are a more developed form of FIT scheme, which have been adopted by a number of countries.
- They often involve payment of a fixed amount, irrespective of the electricity sales price received by the generator, but they can be variable payments which respond in some degree to fluctuations in market pricing.
- They result in generators being still exposed to electricity market prices.

Other types of subsidy/incentive measure
A wide variety of policies and support measures exist, including:
- Carbon pricing and taxes on fossil fuels.
- Tax exemptions and deductions for energy saving investments.
- Priority rights to connect renewable to the grid.
- Tax-efficient loan finance for renewable investment.
- Guaranteed purchasers through “Supplier of last resort” mechanisms.
- Exemptions from licensing requirements or discount in fees.
The Commission has recently launched investigations against Germany and France in relation to exemptions for energy intensive businesses from green surcharges. Such support also brings state aid rules into play. It is important to note that issues regarding the structure of support given to renewable generation are intrinsically linked with those efforts to shield energy intensive users.

The debate on renewable energy support has developed beyond competition between technologies, into potential competition and conflict between member states. For example:

- Germany is keen to support its industry by heavily subsidising renewable energy given its move from nuclear generation, whereas Spain has recently complained that it does not have the funds to allow such protection and this disparity is therefore anti-competitive.
- In The Netherlands, the bankruptcy of Dutch aluminium producer Alged was blamed on high electricity costs. Producers in Germany could produce aluminium much cheaper, due to the exemptions from surcharges in Germany.

Influenced by pressure from the German government, the state aid guidelines have been revised to formalise the ability to shield heavy energy users from up to 85% of levies. While this appears to be a good result for heavy industry, it is likely to put up prices for other users to compensate. Romania is already planning a scheme based on this exemption, and there are concerns also that this may lead to insufficient demand for Green Certificates in Romania.

### OPENING UP NATIONAL RENEWABLE INCENTIVE MECHANISMS TO OTHER EU COUNTRIES

Currently, under Article 3 of the Renewable Energy Directive, member states are allowed to exclude electricity generated abroad from access to their renewable incentive schemes. In practice this severely restricts trade in renewable electricity between member states, a source of concern given increasing pressure by the Commission to improve the integration of the European electricity market for competition and energy security reasons.

---

### EUROPENCOMMISSION BEST PRACTICE GUIDANCE

#### Summary of additional general points

- Support schemes should use long-term legal commitments and be phased out when no longer needed.
- Schemes should have planned review periods and no unannounced interim changes. They should be subject to wide consultation on scheme design.
- FITs should be phased out so producers are exposed to market prices (use FIPs and quota obligations instead).
- Genuinely competitive allocation mechanisms such as tendering should be adopted (rather than administrative price-setting) to encourage competition between operators and between technologies.
- Duration of support: give consideration to limiting support in terms of “number of full-load hours supported”.

#### Auctions/tenders

Renewable energy support should be auctioned to secure competition among bidders and the lowest prices:

- Ideally, competition would apply between locations and technologies.
- It may not be suitable for smaller producers given the administrative burden.
- Auctions are particularly suitable for mature technologies such as wind power as technology costs reduce to general market levels.
- Given observed problems of generators not delivering capacity (for example, in the wind sector), sufficiently robust penalties are required.
- Auctioning/tendering could be used for the various types of support.

#### Feed-in Premium schemes (FIPs)

FIPs are preferred over FITs for almost mature technologies:

- They can be floating (with or without cap) premium or fixed depending on the desirable level to be placed on producers.
- There should be no premium payment for production when system prices are negative, or higher than necessary levels of remuneration.
- Premium reductions should be planned and volume based.
- Reviews of premiums for new installations should be regular, planned and subject to wide consultation.

#### Feed-in Tariff schemes (FITs)

FITs:

- Should be phased out except for small-scale activities or for non-developed technologies (where a pre-established capacity cap should be used).
- Reductions in tariff levels should be built in for new installations to reflect changes in costs.
- They may also vary over time for existing projects where capital costs can be adjusted.
- Like FIP schemes, tariff reductions should be planned and volume-based.

#### Quota obligation schemes

These schemes:

- Should either be technology neutral, or banded schemes, in order to avoid over-compensation of the cheapest technologies and to secure innovation and diversity of energy sources.
- Should be based on long-term quotas which are transparent and planned.
- Should have adequate penalties (for example, buy-out prices) to secure compliance.
- Market data should be made available to all stakeholders.
In a recent case, the European Court of Justice had to determine a challenge brought by Ålands Vindkraft against the Swedish Energy Agency in relation to the Swedish Green Certificates scheme:

- Ålands produced wind power in Finland and exported it to Sweden.
- The Swedish Energy Agency refused Ålands’ application to be granted renewable energy certificates under the Swedish scheme on the basis that, as permitted by the Renewable Energy Directive, power produced outside Sweden does not qualify for certificates.

Ålands challenged this decision in the Swedish courts on the basis that preventing overseas supply from qualifying for support is contrary to Article 34 of the EU Treaty guaranteeing freedom of movement of goods (and prohibiting “quantitative restrictions and all measures having equivalent effect” between member states).

In January 2014, Advocate General Bot, the appointed adviser to the CJEU, provided his formal Opinion on the case (such opinions are normally followed by the CJEU):

- In Bot’s view, excluding access to foreign schemes was in breach of Article 34 of the Treaty, and Article 3 of the Renewable Energy Directive is therefore unlawful.

**KEY ASPECTS OF THE NEW STATE AID GUIDELINES**

**Feed-in Premium schemes (FIPs)**

For all installations:

- Aid must only be granted until plant is depreciated (biomass may be exempted from this on the basis of specific control measures).
- Investment aid must be deducted from operating aid.

For all installations of 1MW or more, or for wind, over 6MW or 6 generation units:

- The following “general conditions” apply for new schemes as from 1 January 2016:
  - aid must be granted by a premium on top of the market price and involve direct marketing of electricity;
  - generators receiving support must be subject to standard balancing responsibilities where competitive intra-day balancing markets exist; and
  - generators must not be incentivised to generate electricity when prices are negative.
- From 1 January 2017, support must be allocated by a genuinely competitive bidding process with clear transparent and non-discriminatory criteria (biomass can be excluded from this), unless only a very limited number of sites would be eligible or if bidding processes would lead to higher support levels or low project realisation rates.
- All renewable generators must be able to bid, although member states may be able to exempt certain technologies due to their long-term potential, need for diversification, grid stability or other network issues or to avoid distortion to biomass markets.

For installations of less than 1MW, or for wind, up to 6MW or 6 generation units:

- The general conditions listed above apply.
- No competitive bidding process is required but “additional conditions” as to the aid intensity and updating of production costs apply. For example, the aid per unit of energy must not exceed the difference between market price and total levelised costs of producing energy from the specified technology.

For installations up to 500kW or, for wind, 3MW or 3 generation units:

- No competitive bidding process is required.

- Although the guidelines are confused on this point, it seems likely that neither the general conditions nor additional conditions mentioned above apply.
- While not specifically mentioned, it appears that FITs could be used for these installations (as confirmed by the Commission’s Q&A document).

**Certificate schemes for all technologies**:

- Aid must be essential to ensure the viability of the relevant renewable energy sources.
- It must not result in overcompensation or dissuade producers from becoming more competitive.
- Investment aid must be deducted from operating aid.
- No different levels of support may be applied unless justified (in the same terms that competitive bidding can be excluded for FIPs).
- The effect of this is somewhat uncertain but, where technically possible, the “general conditions” (as set out above in relation to FIPs) apply.

**Best practice guidance**

The New Guidelines need to be read in conjunction with the more detailed Best Practice Guidance. Key aspects include:

- Member states must identify whether other alternative options could be adopted, for example demand side response, smart metering or expanding inter-connection capacity; phasing out fossil fuel subsidies (required in any event by 2020).
- Member states should use the option in the Renewable Energy Directive to co-ordinate their schemes, for example allowing renewable energy generated in one state to count towards renewable targets and obligations in another.
- Investment aid should be preferred, since operating support can lead to generators unnecessarily producing excess energy.
- Flexibility in schemes to adapt to changing market conditions (changes in costs and technologies) is required, but retroactively changing schemes will undermine investment and should be avoided.
- For additional significant aspects, see box, European Commission best practice guidance.
In particular, Bot relied on Directive 2009/72/EC on the internal energy market which seeks to create a more integrated EU market in renewable electricity.

It was also significant that the Communication on the internal electricity market (see above, Commission intervention into financial support for receivables: Reasons for increased intervention) noted the benefits of cross-border arrangements (for example between Norway and Sweden) in facilitating competition between member states.

In an unusual turnaround in its recent judgement, the CJEU departed from the Advocate General’s opinion and declined to declare the Swedish scheme unlawful. While it agreed that the scheme could affect trade between member states, this was justified because it assisted in increasing production of renewable energy in Sweden (a permissible justification of barrier to trade) and was otherwise proportionate. The scheme might not have been proportionate if the fee for failure to produce sufficient renewable energy certificates was too high or if there were unreasonable restrictions on traders gaining access to certificates.

For the moment, therefore, national support schemes that exclude energy produced in other member states seem safe as long as they are proportionate. However, another similar case (Essent Belgium (C-204/12 to C-208/12)) is pending before the ECJ and the issues may linger on. Any further restrictions placed on national support schemes in this way could support arguments for full harmonisation of support schemes if the Commission decides to go down that route in the future.

**FURTHER CHALLENGES**

Like the plague of retroactive changes to renewables support schemes in the last few years, the prospect of state aid investigations against new or changed support schemes is likely to cause anxiety to investors. The intense negotiation of the New Guidelines has created some confusion in the drafting, which is not helpful for certainty, as stakeholders begin to test national schemes against them. From an investment perspective, it will also be preferable for the Commission to show its hand sooner rather than later as to whether it intends to seek harmonisation of national support schemes.

In addition, it is possible that more challenges to national support schemes might be expected, based on the Association Vent de Colère case. The possibility of schemes having to be remodelled, and even generators having to refund support payments already made, is likely to make investors incredibly nervous for those schemes that might be at risk.

We are currently entering a new phase in renewable incentives in the EU. The Commission expects that renewable energy generation will become competitive without subsidy by 2030 and that incentives should be withdrawn by then. The next few years are likely to see increasing pressure on national support schemes to be competitive, open and potentially harmonised as part of that journey.

---

**Practical Law Contributor Profiles**

**Nigel Howorth**
Clifford Chance LLP  
T +44 207 006 4076  
F +44 207 006 5555  
E nigel.howorth@cliffordchance.com  
W www.cliffordchance.com

**Areas of practice.** Environment; planning; energy and climate change; health and safety.

**Recent transactions**
- Advising an investor on the regulatory and licensing aspects of the acquisition of a stake in a developer of unconventional hydrocarbons including shale gas.
- Advising on liability for decommissioning expenses in relation to an acquisition of a minority interest in north sea oil assets.
- Advising a global oil company on health and safety and environmental risk assessment processes.

**Michael Coxall**
Clifford Chance LLP  
T +44 207 006 4315  
F +44 207 006 5555  
E michael.coxall@cliffordchance.com  
W www.cliffordchance.com

**Areas of practice.** Environment; health and safety; planning; energy regulation.

**Recent transactions**
- Advising various clients on the registration requirements of the CRC Energy Efficiency Scheme and ongoing operational and transactional implications.
- Advising an international chemical company on a data sharing dispute under the REACH chemical registration regime.

**Languages.** English (native speaker), French (advanced)

**Professional associations/memberships.** Member of the Law Society of England & Wales, Member of the UK Environmental Law Association.