
Legal Framework of existing RES Retroactive measures and regulatory risk

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- **European Law**
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- I. Directive 2009/28/EC and Retroactive Changes
Justification of national support schemes by
Member States
- II. State Aid Guidelines and Retrospective Changes


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- The Directive 2009/28/EC sets an EU-wide 20% target for the share of energy from renewable sources in final energy consumption by 2020.
- This EU-wide target is translated into binding and considerably varying national targets imposed on the Member States.



- Flexible Mechanisms under Directive 2009/28/EC:
 - the Directive introduces so-called “*flexible mechanisms*”, which allow Member States to cooperate in target achievement on a voluntary basis.
 1. *Statistical Transfers*: MSs may agree on a transfer of a specified amount of RES-E.
 2. *Joint projects between MSs or between MSs and third countries*: MSs may cooperate with each other or with third states on “all types of joint projects” relating to the production of electricity and heating and cooling from RES.
 3. *Joint support schemes*: MSs may set up joint support schemes.

- However, the Directive itself does not prescribe in detail how the Member States shall support renewable energy, neither does it impose any specific support system or any fixed level of support.
- There is nothing in the Directive that would speak against changing support schemes or levels of support.
- How about Retroactive Changes?

- “*Retroactive changes*” is the expression widely used to designate abrupt changes impacting past investment.
 - However, from a legal perspective, retroactivity means that a law is applied to facts that have occurred before the publication of the law.
 - Thus, a certain transaction has been completed before the new law was published and thus the legal consequences of the law applicable at the time of the transaction are invalidated.
-  The appropriate legal terminology to describe most the changes renewables support schemes are facing is “retrospective changes”.

- In those cases, where there is no retroactivity *strictu sensu*, the principle of the **protection of legitimate interests** comes into play.
- A three-staged test can be applied:
 - Whether **there are legitimate expectations** of individuals which come under the protection of EU law;
 - Whether the newly proposed measure is **less advantageous** for than the previous arrangement;
 - The **weighting** exercise of the producers' legitimate expectations against the government's reasons for introducing the new scheme has to be performed.

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- On Dec.18th.2013, EC launched consultation on environmental and energy state aid guidelines.

European Commission

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Public consultations

Draft Guidelines on environmental and energy State aid for 2014-2020

Policy field

Competition: State aid

Target group

Public authorities, citizens, companies and organisations are welcome to contribute to this consultation. Cor from the national authorities dealing with state aid rules.

*(228) The Commission will apply these Guidelines to all notified aid measures in respect of which it is called upon to take a decision after their entry into force, **even where the projects were notified prior to that date**. This includes individual aid granted under approved aid schemes and notified to the Commission pursuant to an obligation to notify such aid individually.*

*(229) Unlawful environmental aid or energy aid will be assessed in accordance with the rules **in force at the date on which the aid was granted** in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid with the following exception:*

unlawful aid in the form of reductions in funding support for energy from renewable sources will be assessed in accordance with the provisions of section 5.7 as from 5 December 2010, such date being the deadline for bringing into force the transposition measures for Directive 2009/28/EC.

(230) *The Commission herewith **proposes** to Member States, on the basis of Article 108(1) of the Treaty, the following appropriate measures concerning their respective existing environmental or energy aid schemes:*

*Member States should amend, where necessary, such schemes in order to bring them into line with these Guidelines **within [12] months after their publication**, with the following exceptions:*

*Where necessary, schemes concerning **operating aid in support of energy from renewable sources** only need to be amended when Member States **change their existing schemes**. If such change occurs **within 12 months after the publication** of these Guidelines, Member States only need to bring such schemes into line with these Guidelines **within [12] months after their publication**.*

*However, whenever a beneficiary has **received confirmation** from a Member State that it will benefit from State aid under such a scheme for a predetermined period, **such aid can be granted** under the entire period under the conditions laid down in the **scheme at the time of the confirmation**.*

Thank you for your attention!

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