

PARTICIPATION IN PUBLIC CONSULTATION LAUNCHED BY THE EUROPEAN COMMISSION ON THE REVISED CLIMATE, ENERGY AND ENVIRONMENTAL AID GUIDELINES DRAFT.

The Instituto Internacional de Derecho y Medio Ambiente (IIDMA) is a non-profit organization based in Madrid (Spain) and founded in 1996 with the purpose of contributing to the protection of the environment and sustainable development through the development, application, and enforcement of Law from an international and multidisciplinary perspective. Specifically, it has been working to promote the energy transition and the fight against climate change.

IIDMA is aware of the importance that the revised Climate, Energy and Environmental Aid Guidelines (CEEAG) will have in the coming years to carry out the European Green Deal¹ and, particularly, to comply with targets assumed by Europe and by Member states for the 2030 and 2050 horizons with regards to climate neutrality².

Indeed, meeting such challenges will require the mobilization not only of resources coming from the private sector but also public funds. State aid rules will consequently play an essential role in the transition of Europe towards a fair and prosperous society based on a modern, resource-efficient and competitive economy with no net emissions of greenhouse gases.

Attending to the above, through the present writing, IIDMA formulates, within the period granted by the European Commission for this purpose, the following

CONSIDERATIONS

FIRST.- STRATEGIC IMPORTANCE OF CITIZENS ACTIVATION FOR THE ENERGY TRANSITION. SPECIAL REFERENCE TO RENEWABLE ENERGY COMMUNITIES.

Putting citizens at the heart of energy transition is one of the fundamental premises that, according to the European Union, has to guide its transformation into a prosperous, modern, competitive and climate-neutral economy by 2050. Such principle has not only been recognized in various communications adopted by the Commission but has also been normatively enshrined by the European Legislator.

Among others, can be mentioned the following statements made by the European Commission:

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "A Framework Strategy for a	<i>Most importantly, <u>our vision is of an Energy Union with citizens at its core</u>, where citizens take ownership of the energy transition, benefit from new technologies to reduce</i>
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¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank The European Green Deal - COM/2019/640 final.

² Europe is committed to reach minimum binding targets by 2030 with regards to the reduction of greenhouse gas emissions, the participation of renewable energy on the total gross final energy consumption, the improvement of energy efficiency and the interconnection capacity existing between Member States. By 2050, the European Union has set out to achieve a prosperous, modern, competitive and climate-neutral economy.

Resilient Energy Union with a Forward-Looking Climate Change Policy"- COM/2015/080 final	<i>their bills, participate actively in the market, and where vulnerable consumers are protected.</i>
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, "A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy" - COM/2018/773	<p><i>In this context, <u>citizens play a central role. Climate change can only be tackled if people actively engage, as consumers and as citizens.</u></i></p> <p><i>The future energy system will integrate electricity, gas, heating/cooling and mobility systems and markets, with smart networks <u>placing citizens at the centre.</u></i></p>
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "The European Green Deal" - COM/2019/640 final	<p><i>This transition must be just and inclusive. It must put people first, and pay attention to the regions, industries and workers who will face the greatest challenges. Since it will bring substantial change, <u>active public participation and confidence in the transition is paramount if policies are to work and be accepted</u></i></p> <p><i>The <u>clean energy transition should involve and benefit consumers</u></i></p>

At the regulatory level, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (hereinafter, the Renewable Energy Directive) and Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (hereinafter, the Electricity Directive) stand out. Both regulations make clear references to citizens as potential actors in the energy transition and regulate new specific agents to allow and conduct such participation.

Renewable Energy Directive	<p>It recalls that <i>The Energy Union strategy also recognised the <u>role of the citizen in the energy transition, where citizens take ownership of the energy transition, benefit from new technologies to reduce their bills, and participate actively in the market</u></i> (previous considerations).</p> <p>It defines and regulates "<u>renewables self-consumer</u>", "<u>jointly acting renewables self-consumers</u>", and "<u>renewable energy community</u>" as citizens acting within the energetic sector (articles 2, 21 and 22).</p>
Electricity Directive	<p>It assumes that <u>Consumers should be able to consume, to store and to sell self-generated electricity to the market and to participate in all electricity markets</u> by providing flexibility to the system, for instance through energy storage, such as storage using electric vehicles, through demand response or through energy efficiency schemes (previous considerations).</p> <p>It admits that <u>Consumers have an essential role</u> to play in achieving the flexibility necessary to adapt the electricity system to variable and distributed renewable electricity generation, declares that By empowering consumers and providing them with the tools to participate more in the energy market, including participating in new ways, <u>it is intended that citizens in the Union benefit from the internal market for electricity and that the Union's renewable energy targets are attained</u> (previous considerations).</p> <p>Its aim is <i>creating truly integrated competitive, <u>consumer-centred</u>, flexible, fair and transparent electricity markets in the Union</i> (previous considerations).</p> <p>It regulates <u>active customers and citizen energy community</u> as citizens acting within the energetic sector (articles 2, 15 y 16). It also defines <u>aggregation</u> and <u>demand response</u> as instruments of citizens participation in the sector (article 2).</p>

Consequently, the "putting citizens at the heart of energy transition" principle has not only to be respected but also integrated and promoted in all policies and regulations adopted by the European Union and Member States. This **includes, of course, State aid rule, and, particularly, with regards to renewable energy communities** (hereinafter, RECs). Indeed, article 22.7 of the Renewable Energy Directive establishes a **normative mandate** in that sense calling Member States, *Without prejudice to Articles 107 and 108 TFEU, (...) to take into account specificities of RECs when designing support schemes in order to allow them to compete for support on an equal footing with other market participants.*

Potential benefits of RECs to the energy transition are more than evident. By enabling citizens participation in the energy sector, consumers become actors who make conscious decisions in order to move towards greater energy efficiency and a better and greater use of renewable energies. This

allows to enhance local acceptance of new renewables projects and to mobilize financial resources at a local level in favour of renewable projects. RECs would also facilitate the transition from a centralized to a decentralized electrical system, bringing production installations closer to consumption centres and benefiting efficiency and the security of supply. Finally, they would allow progress towards energy sovereignty and a less dependence of prices fixed in the energy markets, would favour universal access to energy and help to combat energy poverty.

Authorities' commitment to RECs must be total, immediate, and unequivocal in order to promote their rapid proliferation and to enable them to fulfil their role as essential pillars of the transformation process of Europe. **Their consideration in the State Aid rule is not only adequate and convenient but also imposed by the European Legislator** himself by means of article 22.7 of the Renewable Energy Directive.

SECOND.- FORESEEABLE NEGATIVE IMPACTS OF THE CEEAG PROPOSED BY THE EUROPEAN COMMISSION IN RECS DEPLOYMENT.

Despite the path outlined by the European Commission itself to move towards climate neutrality and a just and prosperous society based on a modern, resource-efficient and competitive economy, and clearly obviating the necessary submission of such institution to the European standards, **not a single mention is made of RECs** in its CEEAG Draft. **Much less can be found in it a particular regime for this new legal figure.**

This means that **CEEAG proposed by the European Commission fails to create a competitive playing field for non-commercial actors in the renewable energy field in general and with respect to RECs in particular.** In general terms, can be made the following considerations:

- CEEAG Draft does not recognize the factual situation of non-commercial market actors and, in particular, of RECs. It does not mention either benefits that could arise from the generalization of such actors and that could be considered by Member states while deciding whether or not to grant state aids.
- CEEAG Draft does not identify existing or potential obstacles to the non-commercial market actor's participation in the energy sector and to the proliferation of energy communities in the extent needed to comply with objectives assumed by Europe and Member states within the energy transition.
- CEEAG Draft does not recognize market failures that may be causing that non-commercial actors and RECs in particular are almost non-existent in most Member states and preventing them to take more ownership in the renewable sector.
- CEEAG Draft does not balance cost-efficiency and other socioeconomic criteria whose consideration would however facilitate the energy transition.

It is specially worrying that, for accessing to aids granted by Member states to reduce or remove greenhouse gas emissions (first aid category corresponding to section 4.1 of the CEEAG Draft), **RECs will normally have to participate in competitive bidding processes opened to all possible eligible beneficiaries and exclusively based in price criteria, being consequently placed at a clear disadvantage situation** (paragraphs 49, 89 and 90 of the CEEAG Draft). This is precisely what the Renewable Energy Directive refers to when it states that *The specific characteristics of local renewable energy communities in terms of size, ownership structure and the number of projects can hamper their competition on an equal footing with large-scale players, namely competitors with larger projects or portfolios* (general consideration 71). Remember that competition distortion can also be caused by

discouraging the entry of new competitors and strengthening consequently the market power of the existing ones.

Participating in these competitive bidding processes will not only make RECs compete with actors of different sizes and with a diversity of portfolios allowing them to take advantage of economies of scale in order to reduce as much as possible their prices, but also with all technologies that might imply reduction or removal of greenhouse gas emissions (paragraph 82). Taking into account that the resolution of these processes will be normally based on the price variable with no consideration to potential socio-economic contributions for which the energy communities would be optimal, their inequality and the low probability of being awarded is guaranteed.

If CEEAG are adopted in the terms proposed by European Commission, **State Aid rule would be applying to RECs with no differences, no exceptions, no nuances that would permit Member states taking into consideration their specific characteristics** in terms of their size, ownership structure and the number of projects. **Such treatment would not be accurate neither to criteriums previously set by the European Commission in various of its communications nor to the previsions included in the Renewable Energy Directive.**

THIRD.- RECOMMENDATIONS TO IMPROVE CEEAG IN ORDER TO REALLY HELP THE RENEWABLE ENERGY COMMUNITY'S DEPLOYMENT.

In order to really facilitate and promote the RECs deployment, **we consider essential that CEEAG include a specific section dedicated to state aids to be granted to these entities** in accordance with the following recommendations:

- Section 4.1 entitled "Aid for reduction and removal of greenhouse gas emissions including through support to renewable energy" should comprise two subsections³. While the first one would be exclusively dedicated to renewable energies, the second one would be referred to all other technologies capable to reduce or eliminate greenhouse gas emissions.

This structure would be more consistent to the potential contribution of renewable energies (non-greenhouse gases emitters) to the fight against climate change and the energy transition towards a decarbonized economy compared to any other technology. Specially, renewable energies cannot be compared and less treated the same (by directly competing with them in bidding processes) with low carbon energy.

- Section referred to RECs should be included in subsection dedicated to renewable energies.
- Section referred to RECs should recognize their specific factual situation, inherent benefits and barriers to their deployment.

Their non-commercial purpose and other unique characteristics place them at a distinct competitive disadvantage in the market, specially, in accessing to renewable support schemes. An evident asymmetry exists between large commercial market actors and small new comers that are often inexperienced and have less resources.

RECs have positive socioeconomic impacts that CEEAG fails to mention although they are recognized in the Renewable Energy Directive. To be specially considered:

General Consideration 63	It says that <i>When favouring the development of the market for energy from renewable sources, it is necessary to take into account the positive impact on regional and local development opportunities,</i>
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³ This structure is already adopted for other aid categories, as for example, categories 4.3 or 4.7.

	<i>export prospects, social cohesion and employment opportunities, in particular as concerns SMEs and independent energy producers, including renewables self-consumers and RECs.</i>
General Consideration 67	<i>It indicates that Empowering jointly acting renewables self-consumers also provides opportunities for RECs to advance energy efficiency at household level and helps fight energy poverty through reduced consumption and lower supply tariffs. Member States should take appropriate advantage of that opportunity by, inter alia, assessing the possibility to enable participation by households that might otherwise not be able to participate, including vulnerable consumers and tenants.</i>
General Consideration 70	<i>It settles that the participation of local citizens and local authorities in renewable energy projects through RECs has resulted in substantial added value in terms of local acceptance of renewable energy and access to additional private capital which results in local investment, more choice for consumers and greater participation by citizens in the energy transition. Such local involvement is all the more crucial in a context of increasing renewable energy capacity. Measures to allow RECs to compete on an equal footing with other producers also aim to increase the participation of local citizens in renewable energy projects and therefore increase acceptance of renewable energy.</i>

- Section referred to RECs should establish a much more flexible regime than the one that would apply as general rule. Member states should be allowed to choose whether or not to grant the aid through a competitive bidding process, to base the aid on a price criteria and to call all potential beneficiaries instead of limiting it to renewable energies. Decision of Member state should be based in the need to promote socioeconomic impacts within the transition of Europe into a fair and prosperous society, with a modern, resource-efficient and competitive economy with no net emissions of greenhouse gases.

Subsidiarily, in the event that the European Commission maintains its decision to not incorporate a particular section dedicated to RECs in the CEEAG, **we consider it essential to include express references to these entities among the possible exceptions that can be alleged by Member states to not apply general rules**. At the same time, **the applicability of such exceptions should be simplified and facilitated** (at least insofar as they pertain to RECs). Modifications of the CEEAG Draft should be done according to the following considerations:

Exception to the “competitive bidding process” general rule

- While paragraph 89 of the CEEAG Draft says that *Aid for reducing greenhouse gas emissions should in general be granted through a competitive bidding process*, paragraph 92 indicates that *Exceptions from the requirement to allocate aid and determine the aid level through a competitive bidding process can be justified where evidence, including that gathered in the public consultation, is provided that one of the following applies: (a) there is insufficient potential supply to ensure competition; in that case, the Member State must demonstrate that it is not possible to increase competition by reducing the budget or expanding the eligibility of the scheme; (b) beneficiaries are small projects, defined as follows: (i) for electricity generation or storage projects – projects below the threshold in Article 5 of Regulation (EU) 2019/943 (ii) for electricity consumption – projects with a maximum demand less than 400kW; (iii) for heat generation and gas production technologies – projects below 400kW installed capacity.*
- **We consider essential that a third exception expressly referred to RECs is added in the following terms: Exceptions from the requirement to allocate aid and determine the aid level through a competitive bidding process can be justified where evidence, including that gathered in the public consultation, is provided that one of the following applies (...) c) beneficiaries are RECs as defined in art. 2. 16 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.**

- This exception would be justified by considering the factual situation of RECs, the existing barriers for their deployment and their socioeconomic benefits and potential contributions to the transformation of our society in one fair and prosperous, based in a modern, resource-efficient and competitive economy with no net emissions of greenhouse gases. An explanation of such circumstances should, therefore, be included in the CEEAG Draft.
- The applicability of this new exception should be eased for Member States by removing or simplifying the obligations to be fulfilled when they are willing to not apply the “competitive bidding process” general rule, specifically, the need to calculate and justify the net extra cost as established in paragraph 50, the need to introduce, when required, compensation models that are not entirely ex ante as said in paragraph 53, the obligation to launch a public consultation as settled in paragraph 86 or the obligation to justify the proposed aid levels based on an individual business plan in accordance to paragraph 93. Instead of being discouraged from approving state aid that takes into account the characteristics of RECs (by excessive and disproportionate bureaucratic burdens), Member states have to be pushed to guarantee their participation in state aid on an equal footing with other participants.

Exception to the “price selection criteria” general rule

- Paragraph 49 of the CEEAG Draft establishes that *The selection criteria in the competitive bidding process should as a general rule be based on the aid amount requested by the applicant put in direct or indirect relation to the contribution to the objective of the measure (for example in terms of unit of environmental protection or unit of energy). In a few exceptional cases, it may be appropriate to include other non-price selection criteria (for instance additional environmental, technological or social criteria). In such cases, such other criteria must account for not more than 25 % of the weighting of all the selection criteria. The Member State must provide reasons for the proposed approach and ensure it is appropriate to the objective pursued.*
- We consider essential that an exception expressly referred to RECs is included in the following terms: In a few exceptional cases, it may be appropriate to include other non-price selection criteria (for instance additional environmental, technological or social criteria). This will be particularly applicable when beneficiaries are RECs as defined in art. 2. 16 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.
- A specific justification of this exception should be added by mentioning the factual situation of RECs, the existing barriers for their deployment and their socioeconomic benefits and potential contributions to the transformation of Europe society.
- Limit of the weighting to be given to alternative criteria should be remove when beneficiaries are RECs. In such cases, Member states should be free to ponder one and other criteria attending to the specific goals pursued through the state aid to be allocate.

Exception to the “admission of all possible technologies or projects capable to eliminate or reduce greenhouse gas emissions” general rule

- Paragraph 82 of the CEEAG Draft says that *Member States should give reasons for measures which do not include all technologies and projects that are in competition – for example all projects operating in the electricity market, or all undertakings producing substitutable products and which are technically capable of contributing efficiently to greenhouse gas emissions reductions. These reasons should be based on objective considerations linked, for example, to efficiency or costs or*

other relevant circumstances. Such reasons may draw on evidence gathered in the public consultation pursuant to Section 4.1.3.4 where applicable. However, paragraph 83 add that *The Commission will assess the reasons given as justification and will, for instance, consider that a more limited eligibility does not unduly distort competition where: (a) a measure targets a specific sectoral or technology based target established in Union law, such as a renewable energy or energy efficiency scheme; (b) a measure aims specifically to support demonstration projects; (c) a measure aims to address not only decarbonisation but also air quality or other pollution; (d) a Member State provides evidence that eligible sectors or innovative technologies have the potential to make an important contribution to environmental protection and deep decarbonisation in the longer term, particularly in terms of cost effectiveness; (e) a measure is required to achieve diversification necessary to avoid exacerbating issues related to network stability⁵⁵; (f) a more selective approach can be expected to lead to lower costs of achieving environmental protection (for example through reduced grid integration costs), and/or result in less distortion of competition.*

- We consider essential that a specific mention to RECs is included in paragraph 83 in the following terms: that *The Commission will assess the reasons given as justification and will, for instance, consider that a more limited eligibility does not unduly distort competition where: (...) a measure aims to foster RECs as defined in art. 2. 16 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, in order to facilitate the acceptance of renewable energy projects and the distributed generation deployment.*
- A specific justification of this exception should be added by mentioning the factual situation of RECs, the existing barriers for their deployment and their socioeconomic benefits and potential contributions to the transformation of Europe society.

The inclusion of a specific section dedicated to state aids to be granted to RECs or the introduction of expresses references to those entities among the possible exceptions that can be alleged by Member states to not apply general rules, perfectly fall under the European principle of equality that permits to give different treatments to unequal situations.

And what is more important, **not giving a special treatment to RECs in the state aid rule framework and, in particular, in the CEEAG, could be contrary to article 22.7 of the Renewable Energy Directive** without such omission can be considered rectified through the General Block Exemption Regulation (GBER). Indeed, as far as the distinction between CEEAG and GBER remains driven by aid budget thresholds, limiting the regulation of a specific regime for RECs to the second regulation would imply preventing these entities to access to state aid when promoting big or medium size projects which is perfectly possible according to their definition in art. 2.16 of the Renewable Energy Directive.