PKEE
Polski Komitet Energii Elektrycznej
Polish Electricity Association

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**PKEE's position on Climate, Energy and Environmental Aid Guidelines**

Polish Electricity Association (PKEE) welcomes the opportunity given by the European Commission to comment on the proposed Climate, Energy and Environmental Aid Guidelines (CEEAG). Below please find our observations which we believe can further improve the prospective guidelines.

## 1 Definitions (section 2 of the CEEAG)

1. We propose to delete the last sentence from the definition of "start of works" in point 18 (71) of the CEEAG:

> *'Start of works' means the first firm commitment (for example, to order equipment or start construction) that makes an investment irreversible. The buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works.* ~~***For take-overs, 'start of works' means the moment of acquiring the assets directly linked to the acquired establishment;***~~

In our opinion, the fragment proposed for deletion is not adequate to projects within the scope of the CEEAG. Asset acquisition projects are type of '*initial investment*' under regional aid (see point 19 (13b) of the RAG). Our proposal is coherent with other horizontal guidelines which do not refer to take overs[1].

## 2 Compatibility assessment under Article 107(3), point (c), of the Treaty (section 3 of the CEEAG)

2. As regards '*identification of the economic activity which is being facilitated by the measure, its positive effects for society at large and, where applicable, its relevance for specific policies of the Union*' (section 3.1.1 of the CEEAG), we consider that points 23 and 24 should refer not only to climate and environmental objectives, but should also explicitly mention the need to ensure security of energy supply. This seems increasingly important, considering expected energy market stresses resulting from the increased penetration of intermittent RES, growing role of prosumers and the phase-out of fossil fuels in the energy sector with respect of all activities for post-COVID-19 recovery.

3. As regards the requirement that aid must have an incentive effect (section 3.1.2 of the CEEAG), introduction of point 30 concerning existence of an incentive effect even with regard to projects, which started before the application for aid, is a positive development and constitutes a welcome codification of the Commission's decision making practice.It should be emphasized that we also expect similar changes in the revised GBER.

   As regards point 231 CEEAG, we propose that aid should be considered to have an incentive effect if the investment is carried out and completed at least 12 months before the EU standards come into force, and not 18 months as currently proposed. Our experience shows that early adaptation to the standards is associated with a significant increase in operating costs, which may discourage the use of this type of support.

4. As regards the necessity of the aid, it should be emphasized that the assessment of the compatibility of the aid with the internal market by the Commission should also take into account the different situation of Member States. In this context, it is not reasonable to assume that, where State aid is awarded for

[1] Please refer to point 15 (ii) of the current Communication from the Commission – Framework for State aid for research and development and innovation and point 17 (jj) of the draft Communication from the Commission Framework for State aid for research and development and innovation (https://ec.europa.eu/competition-policy/public-consultations/2021-rdi_en).

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projects or activities which, with respect to their technological content, level of risk and size, are similar to those already delivered within the Union at market conditions, in principle, there is no market failure to justify the granting of the aid (point 36). Although it is obvious that aid should not be granted in those cases where market mechanisms enable the implementation of a given type of investment or project, it should be noted that it is not justified to establish a benchmark at the EU level – each Member State represents different level of economic development and market maturity. Hence, the fact that a given type of project is successfully implemented on a purely market basis in a more developed MS should not mean that it is inadmissible to grant aid for this type of project in another less developed MS.

5. We appreciate additional guidance provided by the Commission in respect of the desired design of a competitive bidding process. Whereas the EEAG introduced the general requirement that the amount of operating aid should have been determined through a competitive bidding procedure, the proposed guidelines in principle allow that such method to ensure proportionality of aid is in general accepted instead of the funding gap method. Therefore, such approach, which relates to competitive bidding process, applies to investment aid.

   While operating aid is financed from purely national resources (either directly from state budget resources or from dedicated levies imposed on consumers of energy), investment aid is often financed from different sources (e.g. the European Structural and Investment Funds – ESI Funds, the Modernisation Fund set up based on the ETS Directive and the Recovery and Resilience Facility).

   Some of these funds (including ESI Funds) are subject of the State aid control as they constitute state resources within the meaning of Article 107(1) of the TFEU. Hence, the CEEAG may be of application. At the same time however, disbursement of those funds may be subject of other rules adopted at the EU level governing *inter alia* specific awarding procedures or at the national level in the framework of shared management. Therefore, the design of the selection criteria may depart from the proposed point 49 of the CEEAG.

   In order to exclude doubts or inconsistencies between regimes which govern granting of aid from these mentioned funds, and CEEAG, it would be desirable if the CEEAG included instruction that if aid is awarded in line with competitive procedures for which the requirements are set at the EU level (e.g. article 73 of the Regulation (EU) 2021/1060 of The European Parliament And Of The Council or article 6 and 7 of Commission Implementing Regulation (EU) 2020/1001), such procedures are deemed to be in line with the requirements of the CEEAG, irrespective of whether the non-price selection criteria account for more than 25% of the weighting of all the selection criteria, as specified by point 49 of the CEEAG.

   Finally, we propose to introduce more flexibility as regards application of non-price criteria and increase admissible weighting of such criteria from 25% to 35%.

6. In point 69 of the CEEAG the Commission communicates that it '*will pay particular attention to Article 3 of Regulation (EU) 2020/852 of the European Parliament and of the Council, including the 'do no significant harm' principle, or other comparable methodologies*'.

   The EU taxonomy aims to facilitate sustainable finance mechanisms: it helps to gather funding for projects contributing to the final net-zero decarbonisation targets more easily, and ideally at a lower cost (for the investors and ultimately for the consumers). However, in the short to medium term (during the transitional phase), it is in our view premature to link the State aid guidelines with the taxonomy regulation. For instance, the latter does not take a system-wide perspective when recognizing the

complementarity of different decarbonisation options and does not sufficiently appreciate the contribution of transition technologies needed to achieve climate neutrality in 2050 (including power plants fired with natural gas and natural gas-fired CHP).

Thus, we propose to delete point 69 or at least that the first sentence in point 69 of the CEEAG takes the following wording: '*In that balancing exercise, the Commission will take into consideration Article 3 of Regulation (EU) 2020/852 of the European Parliament and of the Council, including the 'do no significant harm' principle, or other comparable methodologies*'.

7. In point 71 of the CCEAG the Commission explains that '*Measures that directly or indirectly involve support to fossil fuels, in particular the most polluting fossil fuels, are unlikely to create positive environmental effects and often have important negative effects because they can increase the negative environmental externalities in the market. The same applies for measures involving new investments in natural gas, unless it is demonstrated that there is no lock-in effect*'. This approach is replicated in a number of sections across the CEEAG (for instance in point 326 in relation to aid for the security of electricity supply). It should be noted that not all types of aid covered by the CEEAG are environmental protection measures within the meaning of point 18 (38) CEEAG. Indeed, the Guidelines also cover types of aid with a different primary objective, as is clear from points 11, 15, 19 or 21 (b), which distinguish between environmental protection and activities in the energy sector. Meanwhile, point 71 was worded as if each aid was to achieve only environmental objectives. In our opinion balancing test should take into account also other objectives. The Guidelines should therefore ensure a balanced approached towards the completion of the 3 objectives of energy policy: sustainability, security of supply and competitiveness.

8. We believe that the role of natural gas as transition fuel will be particularly important to ensure power capacity in the system in the context of energy sector transformation. Natural gas is a key transition fuel, important for district heating based on cogeneration and securing heat supplies for small markets as well as for ensuring the flexibility and efficiency of the power system with a significant share of RES and this perspective should be also reflected in the CEEAG. Additionally, verification in practice of absence of lock-in can impose an unnecessary burden on the Member States, thus leading to the consequence that indeed a positive balancing for such measures becomes unlikely. The criterion of absence of lock-in seems in any case too strict, as it may prevent companies from investing in hydrogen-ready solutions.

9. The draft Guidelines do not provide information on the level of thresholds, exceeding of which will result in the obligation to individually notify the planned aid. Point 72 (b) merely indicates that the requirement to individually notify support would apply to projects of a certain size or presenting certain characteristics. In this context, we would like to point out that the definition of such thresholds should be unambiguous. The currently proposed general clause, namely '*projects of a certain size or presenting certain characteristics*' does not satisfy this standard. Thus, the CEEAG should explicitly state that individual notification of aid is not required if aid is granted on the basis of a competitive bidding process (as is the case under the current EEAG). In other cases, the notification thresholds should be higher than those set out so far in point 20 of the EEAG, in particular with regard to investment aid - as a rule, individual notification should apply to projects in which investment aid exceeds the ceiling of EUR 50 million, not EUR 15 million.

## 3 Aid for the reduction and removal of greenhouse gas emissions including through support for renewable energy (section 4.1 of the CEEAG)

10. In respect of points 82-83 of the CEEAG we would like to emphasize that while in theory it is desirable to open aid measures to all technologies and projects that are in competition and can contribute to the reduction and removal of greenhouse gas emissions, in practical terms it is very difficult to implement such measures. Thus, we propose that point 83(a) of the CEEAG includes reference not only to a specific sectoral or technology based target established in Union law, but also to targets established by the national authorities.

    As regards point 83 (d) and (e), a mix of technologies is essential for the secure operation of the power system. Under the current wording of point 83, it seems that renewable technologies such as onshore wind and solar might have to compete against each other. However, this would mean that where one technology is substantially more competitive than others, an efficient and resilient grid mix cannot be guaranteed and bid caps will not be a satisfactory remedy (please refer to point 12 below).

11. As regards all subsections of the CEEAG referring to public consultation, we consider that the obligation to consult could be smoothly incorporated in the broader public consultation of legislative proposals carried out by the relevant authorities within the framework of the general legislative procedure, provided that interested parties are given sufficient time to respond (as required by the CEEAG).

    Consequently, in all cases where a new aid scheme is put in place or an existing aid scheme is amended and adoption of new legislation is required, public consultation open for a period required by the CEEAG and on elements stipulated therein should be considered sufficient and no further State aid-specific consultation should be mandatory.

12. In point 91 of the CEEAG the Commission mentions the possibility to introduce bid caps as a potential remedy to avoid overcompensation in multi-technology auctions. It seems that bid caps are perceived as a potential alternative to technology-specific auctions. We believe that in some cases bid caps might not be sufficient to achieve the objective of avoiding overcompensation as it also depends on the auction design. In fact, bid caps might provoke that some bids are fixed at the level of the cap. Technology-specific auctions are a good measure to avoid overcompensation provided that sufficient competitive pressure is ensured.

13. In reference to point 98 of the CEEAG, it is our understanding that the subsidy per tonne of CO2 equivalent emissions avoided does not constitute the obligatory award criterion, but is one of information that needs to be presented by the Member States. In this respect, please note that the calculation of avoided GHG emissions can be complex and subject of certain bias depending on the sector concerned and on type of (life cycle) the methodology used.

14. In point 107 of the CEEAG the Commission emphasizes the need to avoid undermining the objective of the measures introduced or other Union environmental protection objectives and explains that incentives must not be provided for the generation of energy that would displace less polluting forms of energy. In this respect we would like to submit that as long as biomass is considered renewable source of energy, it should not be treated less favourably than other RES. This may also lead to shorter operation times for gas-fired CHP if there are two competing sources of heat in a system - small biomass installation and large gas-fired CHP. Adapting the operation profile of both units is very difficult given that the demand occurs at similar times.

15. In point 112 (as well as in 327), we propose to remove the condition that the application of the aid measure '*will not lead to increased market power*' in the case of an '*an incumbent beneficiary*'. We therefore propose the following:

> *For individual aid measures or schemes benefitting a limited number of beneficiaries or an incumbent beneficiary, Member States should in addition demonstrate that the proposed aid measure will not lead to* ***substantial*** *market power.*

The proposed wording is in line with point 66 of the Guidelines, referring to '*substantial market power*' and not to the '*increased market power*'. The emphasis shouldn't be placed on all cases when the market power of the beneficiary of the support increase.

## 4 Aid for resource efficiency and for supporting the transition towards a circular economy

16. In line with point 204, '*the aided investment must not correspond to an economically profitable practice. Therefore, the process or processes by which waste or other products, materials or substances are prepared for re-use or recycling or are recycled must not correspond to economically profitable or established commercial practice. Where appropriate, this must be verified from the perspective of practices generally applied throughout the Union and across technologies*'.

In our opinion, there should be no obstacle for granting aid as part of an economically profitable practice provided that such aid leads to positive environmental effects. Moreover, criteria to determine whether a practice is economically viable have not been defined and this area may pose interpretative doubts, e.g. in the area of determining the relevant market for profitability assessment. Finally, the beneficiary is anyway obliged to demonstrate existence of an incentive effect on an individual basis, thus it seems that point 204 is superfluous and we propose to delete it.

## 5 Aid for the security of electricity supply (section 4.8 of the CEEAG)

17. We appreciate that in respect of the aid for the security of electricity supply, the CEEAG codify previous Commission's decision practice and explicitly allow for a combination of different measure, if properly justified. In addition, we consider it a positive development that rules concerning network reserves and interruptibility schemes have been included in the guidelines.

18. In order to ensure neutrality of different measures and to avoid competition distortions, we consider that point 321 of the CEEAG should explicitly state whether it applies to network reserves. In addition, it needs to be clearly confirmed that emission performance standards established in the Regulation (EU) 2019/943 apply also to network reserves.

## 6 Aid for energy infrastructure (section 4.9 of the CEEAG)

19. As regards the scope of supported projects, we note that in line with point 18(35) of the CEEAG only those off-shore electricity grids are considered to fall within the scope of the definition of '*energy infrastructure*' which have dual functionality: interconnection and transmission or distribution of offshore renewable electricity from the offshore generation sites to two or more countries.

We believe that with respect of off-shore electricity grids the requirement regarding interconnection of at least two countries constitutes an unnecessary restriction. Off-shore electricity grids are indispensable for the development of capital intensive off-shore installations. Considering ambitions to materially increase off-shore capacity in the EU set put in '*An EU Strategy to harness the potential of*

*offshore renewable energy for a climate neutral future*' (COM(2020) 741 final), such restrictions should be removed.

20. In our opinion, in cases where Article 36 of the Directive (EU) 2019/944 applies, electricity storage should be considered as energy infrastructure. In other words, electricity storage, if they are fully integrated network components should be covered by section 4.9 of CEEAG. In order for this issue to be clear, we propose that electricity storage should be recognized as energy infrastructure explicitly in the definition in point 18 (35)(a) of CEEAG.

    In our view, in cases of fully network integrated storage facilities, points 331-333 should apply as well.

21. In reference to the criterion of necessity of aid for energy infrastructure, we invite the Commission to maintain in point 337 of the CEEAG currently applicable presumption stemming from point 206 of the EEAG that for infrastructure investments in assisted areas, the market failures in terms of positive externalities and coordination problems are such that financing by means of tariffs may not be sufficient and State aid may be granted.

22. In point 338 it is proposed that claw-back mechanisms are necessary when there is a significant risk of windfall profits, for example when the aid is close to the maximum allowable amount, while maintaining incentives for beneficiaries to minimize costs and develop their activities more efficiently over time. The guidelines should clarify how to interpret the provision that '*the aid is close to the maximum allowable amount*'.

## 7 Aid for district heating or cooling (section 4.10 of the CEEAG)

23. We propose to modify wording of point 342, concerning scope of Aid for district heating and cooling, as put below:

    > *342. Such aid measures typically cover the construction or upgrade of the generation unit to use renewable energy, waste* ***~~heat~~, including waste heat, as input fuel***[2]*, or highly-efficient cogeneration including thermal storage solutions, or the* ***construction or*** *upgrade of the distribution network to reduce losses and increase efficiency, including through smart and digital solutions.*

    In our opinion proposed wording is consistent with points 341 and 344.

24. We welcome modifications introduced by the Commission following its communication '*Sustainable Europe Investment Plan*' (COM(2020) 21 final). However, as regards point 343 of the CEEAG we consider it necessary to explicitly confirm that the obligatory period to start of the works to meet the standard of energy efficiency start running from the moment of conclusion of the aided project.

    In addition, due to foreseen revision of the definition of energy efficient district heating and cooling systems (this definition is included in the EED), Member States should be allowed to grant State aid to district heating networks, which are not part of energy efficient district heating systems if investments that make the heat generation energy efficient will start within five years of the modernisation of the network, i.e. within five years of the conclusion of the aided project. The current proposal concerning three years period is insufficient, if definition of energy efficient system is about to change.

[2] See point 344

It should be also borne in mind that the definition of an energy-efficient district heating system is directly related to the source (generation facilities) supplying district heating networks, whereas the identity of the grid owners and the generation source is not always the same. In this context it should be stressed that distribution network owner not always has the possibility to commit to start the works on generation facilities.

In the context of changes planned in the definition of an efficient heating system, linking the possibility of granting aid to meeting criteria set in this definition will after 2035 significantly reduce investing possibilities in district heating networks, powered by heat produced from natural gas, while the introduction of a second heat source to meet the definition of an efficient heating system will result in lack of price competitiveness of network heating.

25. In section 4.3.3 of the '*Sustainable Europe Investment Plan*', as well as in the '*Guiding template: District heating / cooling generation and distribution infrastructure'* concerning Recovery and Resilience Facility the Commission explained that under certain circumstances support, which is limited to district heating distribution networks, can be considered to fall outside of State aid control as an infrastructure measure which does not affect competition and trade. Whereas this approach has been spelled out in section 4.9 of the CEEAG (cf. points 331-334) in respect of the energy infrastructure, it has not been replicated in section 4.10. We believe it would be useful if the Commission supplemented section 4.10 of the CEEAG with the relevant explanation.

    As it is stated in point 333, there is no State aid involved in investments where the energy infrastructure is run under a '*natural monopoly'*. In our opinion, reasoning presented in point 333 should apply to all network infrastructures, and therefore also to heating networks.

26. As regards conditions stipulated in point 347 of the CEEAG:

    a. eliminating the possibility of network expansion set out in point (a) will have negative environmental effects. The development of district heating networks (even those based on fossil fuels) contributes to the elimination of coal-fired boilers in buildings and thus reduces the total amount of greenhouse gases emitted to the atmosphere. We therefore believe that the construction of a distribution network should be allowed where the measure aims to address also air quality;

    b. point (c) does not seem justified, because even if the connection of new customers increases the source's emissions, it also reduces the total emissions as individual generation sources based on coal emit much more GHG and pollutants than generating units supplying heating networks. Finally, connecting additional customers does not in itself amount to an increase in generation.

    c. connecting additional consumers should not in itself be treated as an increase in generation, as it allows reducing emissions from individual heat sources;

    d. development of the network without increasing the emissions of the source is also possible through the modernization and better insulation of heating networks.

27. In reference to point 348 of the CEEAG, we propose that in case of aid for the construction of high-efficient gas-fired CHP installations, conditions set out in the last sentence of the point at hand should not apply.

## 8 Aid for coal, peat and oil shale closure (section 4.12 of the CEEAG)

28. As regards aid for early closure covered by subsection 4.12.1 of the CEEAG, attention should be paid to the assessment of the 'profitability criterion', the fulfilment of which depends on the current market conditions, including in particular fuel prices and quotations of CO2 emission allowances, and as a result may change during the notification process of the aid measure. There are also significant differences in the operating costs of individual power plants, depending on the technology used and the age of the installation. At a time when some plants are on the verge of profitability, others may still generate income from electricity generation.

29. In addition, considering soaring EUA prices, it may prove unfeasible to demonstrate profitable operation of units fuelled with coal, peat and oil shale. This would mean that certain provisions of the CEEAG would be inapplicable in practice immediately from the entry into force of the guidelines.

    Even if the profitability requirement were to remain in the guidelines, we suggest to additionally introduce possibility of granting State aid for the closure of unprofitable power plants and mines, if it is proven that the avoided costs will be allocated to investments eligible under the CEEAG.

    The above proposal is in line with the logic of provisions of the Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines governing closure aid (Article 3 of this decision does not require that mines are profitable).

30. Also, it should not be required to cancel the EU ETS allowances corresponding to the emissions avoided from the closed plant if a Member State has less allowances than its actual emissions. In such case, cancellation of allowances would result in a disproportionate reduction of allowances for the remaining installations on the market.

    It has to be ensured that only a proportionate amount of EU ETS allowances is cancelled which corresponds to the surplus due to the cancellation but leaves the same amount to the other installations as before. An example for illustration: If a given country receives, for example, 100 million allowances and the demand is 200 million allowances, the allowances received cover only 50% of the needs. So for each installation there is 0.5 EUA it needs. If the installation consuming 10 million allowances is decommissioned, the demand will drop to 190 million allowances, but the supply to 90 million allowances. As a result, 0.47 EUA will remain for each remaining installation.

31. Pursuant to point 373 CEEAG, in principle the closure of the coal, peat and oil shale activities should occur no later than one year from the award of the compensation. The Commission should recognize that the processes of decommissioning mines and coal-fired power plants are complex and that all measures and decommissioning work take years to implement. Therefore, we believe that the proposed one-year deadline for plant closure after receiving compensation is unrealistic. The timetable should be significantly extended to take into account the time frames needed to negotiate, develop and implement appropriate closure programs and new activities that will foster a just transition and a gradual exit from coal. The Commission should also take into account the fact that Member States are in the process of adopting territorial Just Transition Plans. Such plans will last much longer than a year.

## 9 Applicability (section 7 of the CEEAG)

32. As regards appropriate measures proposed by the Commission in point 414 of the CEEAG, we consider that in respect to operating aid schemes for RES and cogeneration and measures aimed at increasing the security of electricity supply the Commission should consider maintaining the approach taken under

the current EEAG, i.e. existing aid schemes within the meaning of Article 1(b) of Council Regulation (EU) No 2015/1589 concerning operating aid in support of energy from renewable sources and cogeneration only need to be adapted to the CEEAG when Member States prolong their existing schemes, have to re-notify them after expiry of the 10 years-period or after expiry of the validity of the Commission decision or change them (within the meaning of Article 1(c) of Council Regulation (EU) No 2015/1589).

Adoption of the above arrangement will reduce administrative burden and uncertainty (for instance, as to whether further use of measures aiming at improvement of security of electricity supply should be made conditional upon additional adequacy analyses). At the same time we strongly believe that the proposed amendment will not compromise the objectives of the new guidelines.

Therefore, it shouldn't be assumed that the individual aid granted on the basis of schemes that requires modification in order to comply with the new Guidelines will need to be changed.

33. The new Guidelines are to replace the existing ones as of 1 January 2022. However, the document lacks clear information on the period for which the Commission plans to issue the Guidelines. The name of the document refers to the year 2022, but there is no designation of the end date of the document. In our opinion, the end date should be in line with the targets set for 2030, thus ensuring adequate regulatory stability.