

## **EURACOAL response to Targeted Public Consultation on Climate, Energy and Environmental State aid Guidelines (CEEAG)**

### **Background**

The current *Guidelines on State aid for environmental protection and energy 2014-2020* (EEAG), intended to be in place only until 2020, remain valid to 31 December 2021.<sup>1</sup> Before then, the European Commission plans to introduce new guidelines with the intention that they enter into force on 1 January 2022. European Commission Executive Vice-President Margrethe Vestager declared when launching a draft of the new guidelines on 7 June 2021: “The revised rules will enable member states to fulfil the EU’s ambitious environmental objectives of the European Green Deal, while keeping possible competition distortions to a minimum.”

The existing guidelines set out when State aid for energy and environmental protection may be considered compatible with the EU single market. In particular, the guidelines promote a gradual move to market-based support for renewable energy sources (RES) and introduce provisions on aid for energy infrastructure and generation capacity to strengthen the internal market and ensure energy security. The guidelines also provide criteria on how member states can relieve energy-intensive industry from the high costs of RES, such as relief from green tariffs added to the cost of electricity. The guidelines complement the General Block Exemption Regulation (GBER) which lays down *ex-ante* compatibility conditions for State aid without prior notification to the Commission. The GBER is also undergoing a partial revision and a public consultation on the proposal for those revised provisions is expected to take place in summer 2021.

The draft CEEAG takes into account the results of an October 2020 “fitness check” review, other evidence and data, including State aid case practice, an external study and input from stakeholders. The Commission collected views via a public consultation in 2020.

### **General remarks**

A revision of the existing guidelines has been expected for some time and the draft Guidelines are in principle welcomed by EURACOAL. It is only natural that the European Commission wishes to better align the Guidelines with the European Green Deal, the EU’s new, all-encompassing policy framework. Allowing targeted State aid to reach this political objective is justified. The Commission should however bear in mind that the choice of national energy mixes is a key competence of member states. In this respect, it has become clear to the coal industry that the Commission wishes to prohibit, through various legislative measures, the use of coal in the EU. This in itself calls for further analysis, as it may not be compatible with provisions of the Energy Charter Treaty on investment protection. More generally, any exit from fossil fuels, such as coal and lignite for power generation, must be inextricably linked to the deployment of new energy technologies. State aid for phasing out old technologies must be flexible and sufficiently predictable for industry to make the necessary investment decisions.

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<sup>1</sup> *Guidelines on State aid for environmental protection and energy 2014-2020*, 2014/C 200/01, Communication from the European Commission (OJ C 200, 28.6.2014, p. 1).

## **EURACOAL response**

The 2014 guidelines include **hard coal mining** (NACE code 05.10) in Annex 3 as an “eligible sector” under Section 3.7.2. EURACOAL welcomes the Commission’s proposal to maintain this provision which allows member states to provide relief from green tariffs for electricity used at hard coal mines. This is justified because it enables member states to ensure a level playing field for EU coal mining companies when competing against hard coal imports from the global market. However, this aid is rarely, if ever available. More important today is the aid related to coal mine closures resulting from the high costs of complying with EU climate and energy policy.

### **Greater flexibility for reaching European Green Deal objectives**

EURACOAL welcomes the statement that “Competition policy, and State aid rules in particular, has an important role to play in enabling and supporting the Union in fulfilling its Green Deal policy objectives” (§1, para. 4). The draft Guidelines envisage (§4.5.3, para. 231) “Aid for the adaptation to Union standards adopted but not yet in force will be considered to have an incentive effect if the investment is implemented and finalised at least 18 months before the Union standards enter into force.” While we agree that incentives are necessary to reach the European Green Deal objectives, the stipulated time period should be shortened from 18 months to 3 months. This would give industry more time to adapt, ahead of the rapid introduction of the new EU standards needed to meet policy objectives.

### **Closure aid for coal mines and coal power plants**

EURACOAL welcomes in principle the European Commission proposal to allow support for the early closure of hard coal and lignite activities (§4.12.1), subject to such support being sufficient. Although coal mining in the EU is declining and will eventually end, it is still important to **allow existing coal mines to operate and compete fairly without being undercut by coal imports from non-EU countries** that provide direct or indirect state subsidies through subsidised rail rates or lower environmental and social standards.

According to the European Commission, “The shift away from power generation based on coal, peat and oil shale is one of the most important drivers of decarbonisation in the power sector in the Union. This shift is largely driven by market forces such as the effects of carbon prices and competition from renewables with low marginal costs.” EURACOAL notes that **this shift has not been predominately driven by market forces**, but rather by amendments to the EU ETS Directive made by the Commission itself that have resulted in a ten-fold increase in ETS allowance prices, thus making coal-fired power generation uncompetitive.

The Commission invites member states to prohibit coal-fired power generation as of a certain date (§4.12.1.1, para. 370), suggesting that the draft Guidelines are in some way contingent on a member state’s willingness to exit coal. This is **a clear violation of the EU Treaty’s provision** that allows member states to choose their own national energy mixes (Article 194 TFEU).

If political decisions are now taken to close coal mines or coal power plants before the end of their economic lives, this will result in expropriation losses. Thus, it is entirely justified to allow member states to offer compensation for the impacts of such political choices to ensure a smooth and just transition. However, **it is simply unworkable to demand activities end no later than one year from the award of compensation**, as stated in the draft Guidelines (§4.12.1.3, para. 373). Developing closure plans with viable solutions for new, environmentally friendly activities for displaced workers can take several years. With this strict, one-year time condition, the Commission risks allowing only hastily prepared, but ultimately ineffective closure plans. Moreover, the Territorial Just Transition Plans in which member states might declare coal phase outs are not legal acts, so provide no legal basis.

From a political perspective, coal phase-out decisions require consultation and negotiation, followed by careful planning with a schedule that avoids economic shocks in the regions affected. Note also that the Territorial Just Transition Plans submitted by member states to the European Commission include coal mine closure plans that extend well beyond one year, so would be incompatible with the draft Guidelines.

EURACOAL agrees that member states should offer State aid or compensation for the consequences of political decisions to close coal mines and coal power plants. Here, it should be noted that the draft Guidelines concern only a very specific situation when State aid would be permissible: namely, where a member state prohibits the production of electricity from coal, thus necessitating the rapid closure of coal mines and compensation payments. In the case of Poland, for example, the timetable for coal mine closures by 2049 has been agreed under a social agreement signed between the government and trade unions. However, this agreement concerns the closure of majority state-owned mines, not private mines or coal-fired power plants. **The Guidelines need to accommodate such agreements which extend to many years.** Looking at the history of the Western European coal industry, all available support measures were used in the long process that led eventually to the closure of all hard coal mines. For decades, mines received State aid approved by the Commission and benefitted from the EU funds available at the time. In contrast, mines in Central and Eastern European countries are now expected to be closed within just one year, with compensation paid by member states. This is not just.

EURACOAL welcomes the Commission proposal to allow aid for “**exceptional costs**” such as significant social and environmental costs following the closure of uncompetitive coal, peat and oil shale activities. This is in line with the EU’s just transition strategy to support the coal and carbon-intensive regions and so enable companies to build on the existing value chains in their regions.

The planned closure of coal and lignite power plants and associated mines will entail significant social and environmental costs. Recently profitable power plants that are rendered uncompetitive need an appropriate period for a socially acceptable closure. Regional plans and mine approvals must be amended and site restorations financed. All this takes time. For these reasons, the word “potentially” should be deleted from §4.12 (para. 367) to clarify that, with each closure, **not only a power plant but also an associated mine** must be taken into account as they are inextricably linked, especially in the case of lignite mines and power plants where closure of a power plant must include the associated dismantling and aftercare of an opencast mine (unless the measure falls under the Council Decision 2010/787/EU on State aid to facilitate the closure of uncompetitive coal mines (para. 383).

In general, the conditions for exceptional costs are not clear from the draft Guidelines, being **too vague to ensure that closures can be undertaken with predictability and legal certainty**. Terms like “counterfactual scenario” (para. 373), “correction mechanism” (para. 373), “exceptional circumstances” (paras. 373 & 377), “additional costs” (para. 377), “profitable” (paras. 370, 371 & 374), “exceptional costs” (§4.12.2) and “uncompetitive” (§4.12.2) need to be precisely defined. This is further explored in Box 1.

### **Box 1 – Seeking further clarity on the scope of the Climate, Energy and Environmental State aid Guidelines**

To avoid socio-economic and even political disruptions in the coal regions affected by any premature coal phase-outs, member states have agreed or are agreeing phase-out plans with stakeholders. The resulting forced, premature closures of authorised and licenced activities, namely coal mines and coal power plants, will inevitably lead to compensation claims as they represent an infringement of property rights legitimately acquired by companies and impose additional costs on operators.

EURACOAL therefore welcomes the European Commission's inclusion in the draft Guidelines of a section dedicated to the regulatory decommissioning of coal mines and coal-fired power plants. However, we see a need to further elaborate this section in order to provide the predictability and legal certainty that the Guidelines are intended to provide (paras. 372 & 374):

*Comparison with “counterfactual scenario” (para. 373)*

In order to verify the incentive effect of any State aid, the mandated early closure of a coal activity is to be compared with a “counterfactual scenario” in which there is no mandated closure. This counterfactual scenario should be based on “justified assumptions in line with projected developments” and take into account the “projected revenues and costs” of the activity. However, the stated criteria are vague, with no indication of the period for which revenues and costs should be estimated or the basis for such forecasts. In view of the length of State aid investigations and the evolution of energy markets, the timing of a member state's compensation decision must be taken into account. This was recognised by the European Commission in its decision on State aid for the closure of German lignite power plants (SA.42536).

*New “correction mechanism” (paras. 373 & 377)*

EURACOAL welcomes the European Commission's recognition that compensation payments must be examined on a case-by-case basis, taking into account the lost profits and additional costs for operators. In contrast, the introduction of a “correction mechanism” to be set up by member states in cases where the mandated closure of an activity takes place later than one year after receipt of the compensation is not compatible with the desired principle of predictability and legal certainty.

Firstly, the 12-month period appears arbitrary and without objectivity. The mandated closure of coal activities not only interferes with the economic basis of the companies concerned, but also has fundamental socio-economic impacts in the regions affected, especially in regions where coal mining and power generation dominate the economic value chain. Compensation determined *ex ante* is the only way to give the affected companies a solid financial basis for the future, and this must be examined in advance by the European Commission and approved in a way that is legally secure to allow companies to realign their activities and establish new business models. Equally, member states need predictability and legal certainty for their budgetary planning.

Secondly, the aim of avoiding excessive competition distortion through overcompensation must be balanced against the interests of the affected companies who seek planning and investment security. The trigger here for State aid is not, as is typically the case, a company's desire to receive normal investment aid for business expansion, but instead compensation aid for the state's expropriation of property rights. This fact cannot be ignored through the use of a “correction mechanism” or in “exceptional circumstances” as proposed by the European Commission, the aid must be authorised on a long term basis to compensate for lost property rights.

*Clarification of “extraordinary costs” and “uncompetitive activities” (§4.12.2)*

It is unclear whether compensation for “exceptional costs” should be limited to uncompetitive coal activities. This applies to all categories of eligible costs in Annex 2, but especially to social and environmental costs. It is also unclear what the European Commission means by an “uncompetitive activity” as the reason and justification for financial compensation is not a question of competitiveness, but solely of compensation for damages and to cushion the impact of mandated closures. In addition to the environmental costs detailed in Annex 2, this includes social costs for early retirements, worker retraining, *etc.*, none of which would have been incurred without the early closure. If these costs can

be reimbursed in cases where activities are uncompetitive, *i.e.* in cases where closures are triggered by market-based mechanisms such as the ET ETS, then this must apply all the more in cases where closures are triggered by targeted regulatory intervention by the state.

In the case of environmental costs, the approach called for by EURACOAL does not contradict the polluter-pays principle under EU environmental law as the compensation covers only those additional costs caused by mandated early closures. These additional costs would not have been incurred if the activities – mines and power plants – had been allowed to reach the end of their economic lives.

### **Coal mine methane**

In our response to the EU Methane Strategy (April 2021), EURACOAL proposes to include projects using **methane from coal deposits (CMM, VAM, AMM and CBM)** in the Guidelines. Methane is a powerful greenhouse gas with a global warming potential (GWP) of 25 or 28 times that of carbon dioxide (CO<sub>2</sub>), and with a global temperature potential (GTP) of 4.<sup>2,3</sup> Utilising methane from active and abandoned coal mines for power and heat generation reduces emissions significantly. In Germany alone, it is estimated that existing support schemes will avoid around 4 MtCO<sub>2</sub>e of GHG emissions in 2021 alone, while producing around 650 GWh of useful electricity. Including methane utilisation projects in the Guidelines would provide legal clarity to existing projects in member states (Czechia, France and Germany), and send a strong signal that the European Commission supports and promotes methane mitigation and use. Looking ahead, specific, long-term support for abandoned mine methane (AMM) projects can be justified given the GHG reductions they deliver by destroying fugitive methane.

According to legal analysis commissioned by the German mine gas association (IVG – Interessenverband Grubengas e.V.), support for coal mine methane use is already within the scope of the current *Guidelines on State aid for environmental protection and energy 2014-2020*. The European Commission has also determined that financial measures open to producers of electricity from mine gas are generally compatible with the rules on State aid covering the single market, following from Article 107(3)(c) of the TFEU.<sup>4</sup> An explicit mention in Annex 3 of the new Guidelines would however positively influence the national political debate on support schemes for methane use. In Figure 1 below, we illustrate three different possible options to include coal mine methane mitigation projects under Annex 3 of the Guidelines.

### **CO<sub>2</sub> capture, use and storage (CCS/CCU) and CO<sub>2</sub> removal**

EURACOAL welcomes the continued inclusion of carbon capture, use and storage (CCS/CCU) projects, including their infrastructure as “supported activities” in the Guidelines. The full suite of **CCS/CCU technologies will be indispensable for reaching the EU’s net-zero target by 2050**. They offer Europe the potential to become a global leader in this secure, clean and economic energy solution: CCS/CCU projects allow targeted fossil fuel use in industrial activities and peaking power plants.

<sup>2</sup> IPCC (2007), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 996 pp.

<sup>3</sup> IPCC (2013), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, [Stocker, T.F., D. Qin, G.K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp.

<sup>4</sup> State aids SA.24642(N 708/2007) – DE – State aid for the closure of hard coal mines and SA.33766 – notification of aid to coal for 2011, C(2011) 8882, European Commission, Brussels, 7 December 2011 (p.12).

**Figure 1 – Three possible options to amend the Guidelines on State aid for environmental protection and energy 2014-2020 (European Commission Communication 2014/C 200/01)**

28.6.2014	EN	Official Journal of the European Union	C 200/1
<p>COMMUNICATION FROM THE COMMISSION</p> <p>Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01)</p> <p>ANNEX 3</p> <p>List <sup>(1)</sup> of eligible sectors <sup>(2)</sup> under Section 3.7.2</p>			
NACE code		Description	
510		Mining of hard coal	
<u>620</u>		<u>In so far as it applies to “the extraction of coal mine methane”</u>	
<u>3821</u>		<u>Disposal of non-hazardous waste by combustion or incineration or other methods, with or without the resulting production of electricity or steam, compost, substitute fuels, biogas, ashes or other by-products for further use etc.</u>	
<u>3900</u>		<u>Other specialised pollution-control activities</u>	

The draft Guidelines aim to cover the “reduction and removal of greenhouse gas emissions” (§4.1). According to the Guidelines’ definitions (§2.4), “(16) ‘CO<sub>2</sub> removal’ means anthropogenic activities removing CO<sub>2</sub> from the atmosphere and durably storing it in geological, terrestrial, or ocean reservoirs, or in products. It includes existing and potential anthropogenic enhancement of biological or geochemical sinks and direct air capture and storage, but excludes natural CO<sub>2</sub> uptake not directly caused by human activities.” No further consideration of anthropogenic GHG removals is given in the text of the draft Guidelines. The Commission should give **clearer guidance on GHG removals** and consider proposing **an international protocol on such removals** to ensure they are recognised under the Paris Agreement and other UN treaties.

**Duration**

Previous guidelines on State aid, published in 1994, 2001, 2008 and 2014, had clearly stated durations. In the draft Guidelines, the Commission proposes to review or amend the Guidelines at any time if this should be necessary for reasons associated with competition policy or to take account of other EU policies and international commitments or for any other justified reason. Such unrestrained power would lead to great uncertainty for businesses and the member states in which they operate. EURACOAL suggests that predictability and legal certainty is needed until 2030 for industry to invest in response to the Fit-for-55 package, hence the proposed new Guidelines should be **valid for a period of at least ten years**.

30 July 2021