Response by Linklaters LLP to the Commission's Consultation on the revised Climate, Energy and Environmental Aid Guidelines (CEEAG)

Linklaters LLP welcomes the opportunity to participate in the public consultation (the "**Consultation**") launched by the European Commission (the "**Commission**") on the revised Climate, Energy and Environmental Aid Guidelines (the "**CEEAG**").

This Response is structured in three parts. The first part provides our general comments to the CEEAG, the second part focuses on some of the specific categories of aid discussed in Section 4 of the CEEAG, and the third part addresses the suggested *ex post* evaluation in Section 5 of the CEEAG. To the extent possible, we have included examples to support our reflections on how the CEEAG may contribute to Europe's goals to fight climate change and protect the environment.

1 General comments

1.1 Introduction

Aid schemes designed in line with the General Block Exemption Regulation (the "**GBER**") and the Guidelines on State aid for environmental protection and energy 2014-2020 (the "**EEAG**") have been enabling private investments in renewable energy, and the share of energy from renewable sources has increased dramatically over the last 10 years. This has helped to create a virtuous circle in which the cost reductions[1] brought about by increased demand for renewable technologies and R&D efforts mean that subsidies can be greatly reduced with a view to their phasing out, in line with the EEAG's objectives.[2]

We believe that a contemporary, streamlined and fit-for-purpose State aid framework, with clear and unambiguous guidelines, can serve as a roadmap for Member States and help them steer their investments towards areas where public funding can make a genuine difference while catalysing private sector investment. As such, the CEEAG will accelerate the support to different types of technologies to fight climate change, and contribute to the aims of the Green Deal, in a context where the Commission itself has estimated that achieving the newly increased 2030 climate, energy and transport targets will require EUR 350 billion of additional annual investment compared to the levels in 2011-2020 (with a further EUR 130 billion a year for the other environmental objectives, i.e. beyond climate).[3]

1.2 Overall remarks

The CEEAG are, in our view, well-suited to deliver (i) an enlargement of the scope of the Guidelines to new areas (e.g. clean mobility) and all technologies that can deliver the Green Deal (e.g. hydrogen); and (ii) increased flexibility regarding the rules on compatibility with a simplified assessment of cross-cutting measures.[4] We therefore welcome the detailed

[1] IRENA, Renewable power generation costs in 2020 (available at: https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/Jun/IRENA_Power_Generation_Costs_2020); and IEA, World Energy Outlook 2020 (available at https://www.iea.org/reports/world-energy-outlook-2020).

[2] EEAG, para. 109.

[3] CEEAG, para. 3 and 2020 Commission Staff Working Document Identifying Europe's recovery needs, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0098&from=EN.

[4] We welcome that the CEEAG have developed further the relevant criteria for assessing compatibility of environmental aid. In particular, the Commission has clarified the twofold requirement of having the positive and the negative conditions set out in Article 107(3)(c) TFEU. As such, the Commission brings the CEEAG on this point in line with recent case law on the compatibility assessment (e.g. Case C-594/18 P, *Austria v Commission (Hinkley Point C)*). The CEEAG also provide further guidance as regards the balancing exercise and the factors the Commission will consider when performing such exercise, which is an improvement compared to the EEAG.

guidance on each type of instrument, as well as the framing of the individual criteria as being as technology neutral as possible.

We note, however, that State aid for nuclear energy is not covered by the CEEAG, whose overall focus seems to have shifted towards environmental (including climate) protection, leaving less space to low carbon energy.[5] It would be helpful to clarify that the compatibility of aid in the excluded areas (e.g. nuclear energy) will be assessed based on Article 107(3)(c) TFEU directly, and that there is no negative presumption as regards such measures.

We also note, in relation to Section 1, that the focus on zero greenhouse gas emissions is understandable, but aid for energy and environmental aid can have other important aims, as recognised in the CEEAG (Section 2.2), and we would welcome this to be reflected also in the introduction of the CEEAG.

1.3 Scope and definitions

We note that the interpretation of some of the terms defined in the CEEAG is likely to raise issues. Various notions include subjective concepts, such as demonstration projects, nature-based solutions, etc. Similarly, the lack of guidance (i) on the methodologies to assess the efficiency and beneficial impact of a measure (e.g. decarbonisation)[6] as well as on the displacement effects for (less polluting) technologies; and (ii) on the Member States' procedural requirements in public consultations (e.g. which stakeholders are to be involved) and transparency obligations (e.g. clarity over which measures will be published on the Commission's website or at a national or even regional level) may result in an inconsistent application of the CEEAG. Although these aspects will be clearer in a few years' time, we believe it is important for the Commission to give clear guidance on some of these aspects (and its expectations relating to them) when approving the CEEAG.

Further, para. 32 of the CEEAG, relating to no breach of any relevant provision of Union law, provides that:

"If the supported activity or aid measure or the conditions attached to it, including its financing method when it forms an integral part of the measure, entail a violation of relevant Union law, the aid cannot be declared compatible with the internal market. This may be the case, for instance, where the aid is subject to clauses conditioning it directly or indirectly on the

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Compared to the EEAG, the Commission did not include strict thresholds for individual notifications, as were previously set out in para. 20 EEAG. The CEEAG do allow the Commission to request individual notification in various circumstances, where the Commission may take into account further factors in such cases. It is positive that the CEEAG offer added flexibility and may be helpful to clarify which of these factors may deserve the priority of the Commission over others.

Furthermore, the general conditions on the incentive effect appear more focused on contributing to economic activity, instead of environmentally friendly activity. Perhaps the Commission may consider emphasising the importance of environmentally friendly activity in these provisions. Finally, we welcome the clarification of the additional exceptions to the standard rule that no aid may be provided for projects that have already commenced, which provides a higher degree of legal certainty.

[5] The 2014 Impact Assessment (available at: https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2014/swd_2014_0139_en.pdf) noted that the views on the inclusion of nuclear energy in the Guidelines on State aid for environmental protection and energy 2014-2020 were mixed. The Court of Justice also recently confirmed that aid to support the activity of a nuclear power station is not covered by those guidelines (Case C-594/18 P – *Austria v Commission (Hinkley Point C)*).

[6] Member States have increasingly taken action to secure electricity supplies and preclude black-outs by the introduction of capacity mechanisms. To this end, they have taken divergent approaches in the past and have often failed adequately to assess the need for cost-effectiveness of a capacity mechanism before introducing it. In particular, the introduction of capacity mechanisms may risk locking in dependence on fossil fuel power plants, thereby undermining decarbonisation objectives. See e.g. www.europarl.europa.eu/RegData/etudes/BRIE/2017/603949/EPRS_BRI(2017)603949_EN.pdf. As such, clarifications on the methodologies to assess the beneficial impact of a measure (including e.g. CO_2 emission limits), would be welcomed.

origin of products or equipment, such as requirements for the beneficiary to purchase domestically produced products."

It would be helpful to clarify that *"integral part of"* means "*hypothecation*" of the method of financing and the aid with reference to relevant case-law.

In addition, it would be helpful to make a general reference to sector legislation that contains express provisions regarding specific support schemes (e.g. the Renewables Directive (EU) 2018/2001 and the Electricity Regulation (EU) 2019/943).

1.4 New procedural requirements for Member States

We understand that the CEEAG need to be accompanied by safeguards to ensure that aid is effectively directed where it is needed to improve environmental protection and that it is necessary and proportionate to this goal. To this end, the CEEAG include many new requirements for Member States, including (as mentioned above) on (i) public consultations (Sections 4.1.3.4 and 4.8.4.4); (ii) transparency (Section 3.2.1.4); (iii) reviews or *ex post* evaluations for aid schemes (Sections 4.1.3.1 and Section 5). These may be very onerous in practice, given the climate change revolution that is anticipated in the next few years to bring us to net zero. For our comments on the public consultation in Section 4.1, please see 2.1.2 below. Further:

- The CEEAG are silent on the consequences for the (potential) breach of such procedural requirements. For example, could the legality of the aid be undermined by the lack of a public consultation or publication?
- Some of these procedural requirements will likely bring about significant costs for public authorities. This is the case, for example, for the review under Section 4.1.3.1, requiring Member States to update their analysis of relevant costs and revenues annually. This entails complex economic assessments, to be carried out at the time of the notification of the aid measure. We would suggest that the Commission considers extending these conditions to two-yearly requirements or to consider on a case by case basis, when approving a scheme or measure, the correct timeframe for such assessments, to avoid red tape as well as significant monetary burdens on the part of Member States.

1.5 Transparency and publication requirements

We note that the CEEAG provide, for a number of aid instruments, a requirement of consultation and publication on websites.[7] We consider that the Commission should require publication at least in a single website on an EU wide basis even if it allows Member States to choose a national website as well (para. 56 of the CEEAG). This is because it is important for EU market players and authorities to have a single port of call to check measures consulted on, without having to familiarise themselves with each national database which may be in a different language, etc. We would encourage the creation of a single EU-wide database of these measures which is easily accessible to every interested party. Such EU-wide databases already operate with success, e.g. in relation to public procurement offers.

We also consider that the threshold for publication of individual aid in such websites may be too low (currently set at EUR 100,000) especially where the *de minimis* threshold is set at a higher level (para. 56(b) of the CEEAG).

[7] See the CEEAG, Chapter 4.1 (Aid for the reduction and removal of greenhouse gas emissions including through support for renewable energy) and Chapter 4.8 (Aid for energy infrastructure).

1.6 Proportionality of the aid

According to Section 3.2.1.3 of the CEEAG, as a general principle, aid will be considered as limited to the minimum necessary if it corresponds to the net extra cost (funding gap) necessary to meet the objective of the aid measure, compared to the counterfactual scenario in the absence of aid. A detailed assessment of the net extra cost will not be required if the aid amounts are determined through a competitive bidding process. We fully support the competitive bidding process as a standard for aid proportionality, which seems to depart from maximum aid intensities compared to the EEAG. However, in our view it would be helpful to include an *ex post* mechanism for the Commission to verify that the auctions have been performed correctly, and that the aid is indeed necessary, appropriate and proportional.

Such mechanism should include a Commission-led review, rather than a new obligation on Member States (given the extensive requirements with respect to consultation and publication the CEEAG already impose on Member States). One possibility for such *ex post* mechanism is to introduce a "sample" review by the Commission of a pre-determined number of tenders per year. Where a competitive bidding process is not used and future developments in costs and revenues are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the Member State may be required to introduce *ex post* claw-back mechanisms. While such a mechanism may be helpful to preserve the proportionality of the aid, it can also distort market signals and incentives for investors. We therefore encourage the Commission to define clearly the need for and application of any such claw-back mechanisms. In particular, while we appreciate that claw-back provisions might sometimes be useful, we think it is important that a claw-back mechanism remains a tool to be used only in exceptional circumstances and on a case by case basis.

If a positive margin over a certain limit can be clawed back by the public authorities, arguably the aid beneficiary must also be protected against losses. This can easily lead to a situation which is analogous to the rate of return regulation of the past. The risk that this distorts price signals and dampens incentives to become more efficient and to invest is significant.

1.7 Consequences of transparency obligations

We welcome the new transparency obligations for Member States (Section 3.2.1.4). However, it is important to clarify the consequences of a breach of this requirement for the aid beneficiaries. It would be impractical, create legal uncertainty and be disproportionate to require aid beneficiaries to verify compliance with this type of information obligation.

We note that Article 26 of the Procedural Regulation 2015/1589 provides that the breach of a reporting obligation allows the Commission to take measures under Article 22, if the Member State has failed to take measures after a reminder. However, the aid is not automatically deemed unlawful, which in our view would be a manifestly disproportionate remedy. Case-law provides that it is important to protect the legitimate expectations and legal certainty of aid beneficiaries that receive aid under an approved aid scheme.[8]

[8] See Case C-278/95 P – *Siemens*, para. 31.

1.8 Consistency with other instruments

We believe it is important to align the CEAAG with the corresponding GBER provisions as well as other sectoral guidelines.

- The GBER[9] will need to work in close interaction with the CEEAG, as it currently does with the EEAG, which has been shown to be effective. The GBER section on aid for environmental protection will need to be adapted in light of the CEEAG (with new conditions and exemptions). In addition, the Commission may consider an increase in the thresholds to facilitate greater flexibility for measures enabling the Green Deal and the goals set out in the CEEAG. Finally, the GBER requires alignment with the CEEAG in terms of flexibility with regard to aid intensities.
- This alignment should be extended to other State aid Guidelines, such as the revised Regional Aid Guidelines, EU ETS State Aid Guidelines, Guidelines on State aid to airports and airlines and the Guidelines on State aid to promote important projects of Common European Interest. Also, these Guidelines will need to build in the core objectives of delivering the Green Deal. This is particularly the case for aid intensities and types of aid.
- Finally, the CEEAG explicitly preclude that aid can be declared compatible if the supported activity or the aid measure entails a violation of Union law.[10] We believe this addition is valuable, and it should be made clear that this will be in accordance with application of EU case law on this topic.

2 Categories of aid

In this section we provide our views on some of the specific categories of aid discussed in Chapter 4 of the CEEAG.

2.1 Section 4.1 – Aid for the reduction and removal of greenhouse gas emissions including through support for renewable energy

2.1.1 Necessity of the aid

We consider that the requirement set out at para. 80 of the CEEAG to update analysis of costs and revenues annually or before the granting of any aid in schemes could potentially be very onerous for Member States and create a lot of unnecessary costs and administrative burdens. It would also give rise to uncertainty for aid beneficiaries; they would not always know where they stand. We note that the Commission conducts very thorough economic assessments when looking to approve schemes (e.g. capacity mechanisms, schemes for renewables) and individual aid for energy projects. We consider that such detailed assessments should not need to be re-done in such short intervals of time as a matter of course. To the extent the Commission is unsure about how a particular scheme will pan out or its incentive effects, *ex post* review mechanisms could be built into the scheme itself rather than introduced as a general rule for all Member States to follow.

Para. 80 of the CEEAG further provides that Member States should ensure that aid remains necessary for the duration of a scheme and should remove any category "*where aid is no*

[9] With respect to the GBER, we note the Commission's intention of partially revising the relevant provisions complementing those set out in the CEEAG. We look forward to responding to the public consultation that is expected to take place during this summer 2021 (see https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Explanatory_Note_EN.pdf).

[10] This is again in line with recent case law, i.e. Case C-594/18, *Austria v Commission (Hinkley Point C)*).

longer required". It is important to clarify that the failure to remove such a category does not affect the lawfulness of aid granted to aid beneficiaries in the category in question. The duty of the aid beneficiary must be limited to verifying that aid is covered by transparent and objective criteria set out in the Commission's approval decision. It would create an unacceptable level of legal uncertainty to claim that the aid beneficiary must self-assess, on a recurring basis, whether aid under an approved aid scheme remains "*necessary*" within the meaning of the CEEAG.

Footnote 52 states that such a review *"would not affect the entitlement to receive aid already granted (e.g. under a 10 year contract)"*. This might suggest however that the entitlement to *pending aid* is affected and that such aid, if paid, is unlawful, which is precisely the problem.

A more appropriate tool, in our view, for addressing situations where the Commission fears that the "*necessity*" might change over time is to introduce a time limitation pursuant to para. 72(c) CEEAG. That is a transparent and clear limit which is easy for the aid beneficiaries to assess.

Moreover, we believe it is equally important for the Commission to have the power to require that the Member States (i) address "regulatory failures" that prevent the growth of the merchant market for renewable energy sources ("**RES**") projects; and (ii) adopt other measures to develop the merchant market. Otherwise Member States can invoke their own shortcomings as a justification for granting State aid. In this sense, paras. 34 and 35 CEEAG hold that aid is, in principle, not necessary if the alleged market failure is the result of a regulatory failure that could be addressed, and Section 3.2.1.2 states that Member State must consider other less intrusive policy instruments as an alternative to aid. These are important principles, but we note that paras. 72 and 78 of the CEEAG disapply paras. 34 and 35, as well as Section 3.2.1.2, to aid granted under Section 4.1. It is not clear to us the rationale behind this exclusion of important principles.

2.1.2 Public consultation

We welcome the introduction of a consultation process which will be consistent across Member States. This is an important part of ensuring transparency and that feedback from all relevant stakeholders is taken into account. In addition, in cases where the Commission may not have opened an in-depth investigation, it may ensure that there are no concerns about views from third parties not being taken into account as part of the design of a particular scheme or measure.[11] However, a balance needs to be struck between access to information and creating a too onerous process for Member States which may end up in delaying the implementation and/or approval of important measures for the delivery of the Green Deal within a manageable timeframe.

Para. 85 of the CEEAG provides that Member States must consult publicly on measures to be notified under Section 4.1 other than in duly justified exceptional circumstances.

– While we generally support public consultations, we query whether it is necessary to make them mandatory or quasi-mandatory for all Section 4.1 aid schemes. For example, it is interesting to make a comparison with *ex post* evaluations which, according to para. 400, are only required for schemes *"with large aid budgets, or containing **novel characteristics**, or when significant market, technology or regulatory changes are foreseen"* (own emphasis). The reference to "*novel*

[11] See e.g. Case T-793/14 – *Tempus Energy v Commission*, where the General Court found that the Commission should have initiated a formal investigation procedure.

characteristics" in particular is arguably relevant also to public consultations, since it is less likely that a time-tested aid scheme design will benefit from public consultation.

– In addition, para. 86 of the CEEAG contains an important exception in practice to the rule in para. 85 ("*No public consultation is required for measures falling under point 85(b) where competitive bidding processes are used and the measure does not support investments in fossil-fuel based energy generation or industrial production*"). Since competitive bidding is the rule rather than the exception, and Section 4.1 aid will typically not be granted to fossil-fuel based activities, this will exclude a large part of the aid granted under this section from the consultation requirement. It is difficult however to understand the rationale behind this rule, since the added value of a prior public consultation is arguably more related to the novelty of the scheme than to the type of activity that is supported. In addition, receiving input on the design of a competitive bidding process can be particularly useful for Member States.

2.1.3 Merchant projects, PPAs and CO_2 costs

The CEEAG, like the current EEAG[12] regarding aid to energy for renewable sources, contain especially advantageous rules for aid falling within the scope of Section 4.1.

While we do not disagree in principle with this approach, it is nevertheless important to recall that aid should be the exception and that the goal must be that aid can be phased out. See e.g. para. 109 of the EEAG:

"Market instruments, such as auctioning or competitive bidding process open to all generators producing electricity from renewable energy sources competing on equal footing at EEA level, should normally ensure that subsidies are reduced to a minimum ***in view of their complete phasing out****."* (own emphasis)

In this respect, it is well-known that costs for technology for generating electricity from renewable sources have reduced dramatically over the last 10 years (in particular solar PV and onshore wind), and is often cost-competitive or even cheaper than fossil-fuel generating technology, even without support (see e.g. IRENA's 2020 report on renewable power generation costs).

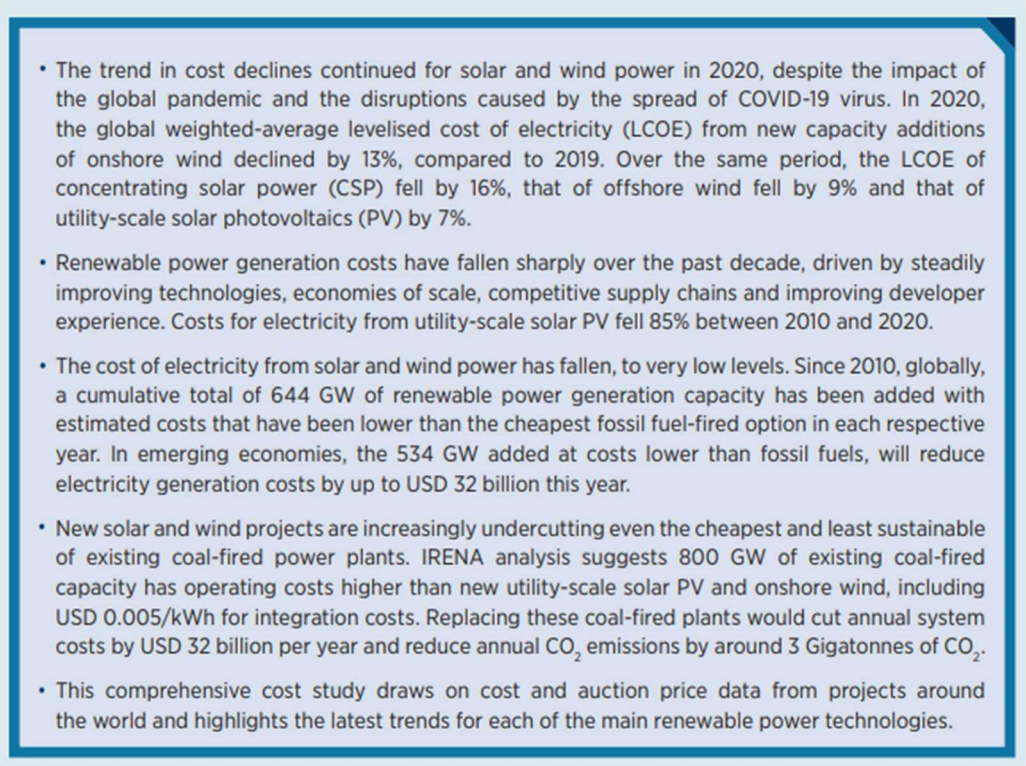
Table 1 - Total installed cost, capacity factor and levelised cost of electricity trends by technology, 2010 and 2020[13]

	Total installed costs (2020 USD/kW)			Capacity factor (%)			Levelised cost of electricity (2020 USD/kWh)		
	2010	2020	Percent change	2010	2020	Percent change	2010	2020	Percent change
Bioenergy	2 619	2 543	-3%	72	70	-2%	0.076	0.076	0%
Geothermal	2 620	4 468	71%	87	83	-5%	0.049	0.071	45%
Hydropower	1 269	1 870	47%	44	46	4%	0.038	0.044	18%
Solar PV	4 731	883	-81%	14	16	17%	0.381	0.057	-85%
CSP	9 095	4 581	-50%	30	42	40%	0.340	0.108	-68%
Onshore wind	1 971	1 355	-31%	27	36	31%	0.089	0.039	-56%
Offshore wind	4 706	3 185	-32%	38	40	6%	0.162	0.084	-48%

[12] See CEEAG, paras. 78 to 79, 91 and 97, in comparison to EEAG, Section 3.3, paras. 109 and 115.

[13] Source: IRENA, Renewable power generation costs in 2020 (available at: https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/Jun/IRENA_Power_Generation_Costs_2020).

Figure 1 - Highlights, IRENA's 2020 report on renewable power generation costs[14]



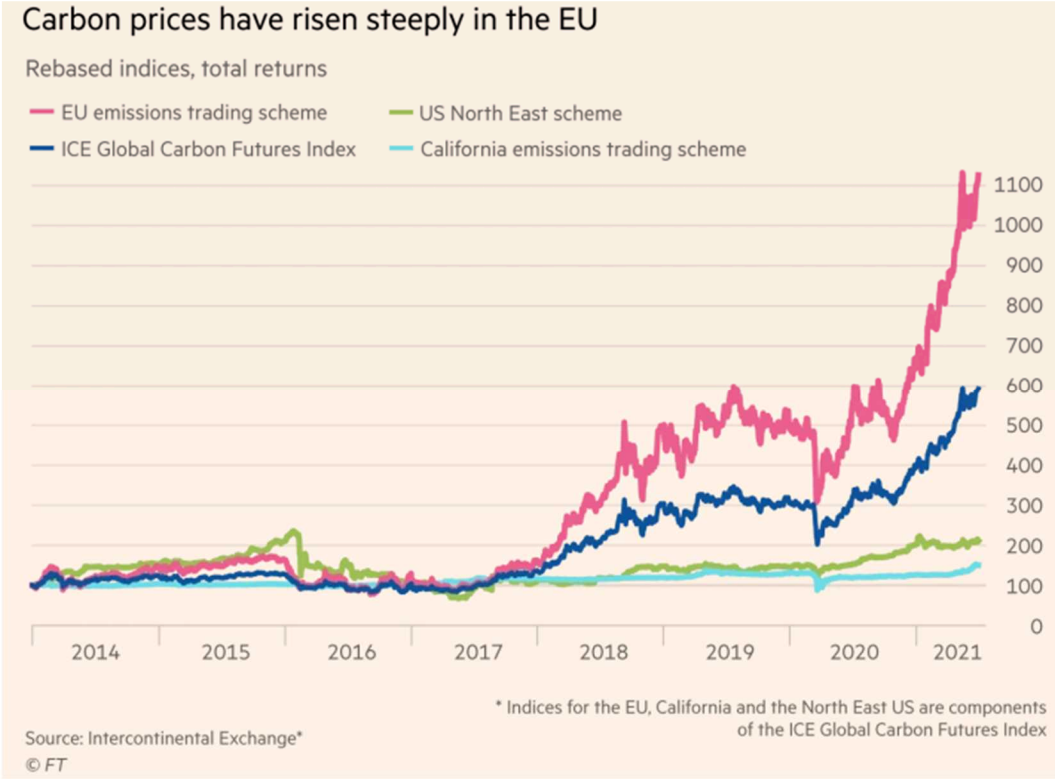
There is also a growing market for merchant RES projects based on long-term Power Purchase Agreements ("**PPA**"), and it is important that State aid schemes and the applicable regulatory framework are designed in a manner that does not distort or prevent the continued development of this market.

A common justification for RES support is the lack of internalisation of the externalities caused by greenhouse gas emissions, and the cost advantage this leads to for CO_2-emitting technologies. This is also mentioned in para. 72 of the CEEAG (*"However, while the Union's ETS and related policies and measures internalise some of the costs of greenhouse gas emissions, they may not yet fully internalise those costs"*).

Nevertheless, the price of CO_2 emission rights in the EU has increased very considerably in 2020 and 2021 (as illustrated by Figure 2 below), and it is doubtful to what extent it is still correct to claim that the CO_2 costs are inadequately internalised.

[14] Ibid.

Figure 2 - Carbon prices 2014 to 2021[15]



Accordingly, it is important to keep the design and justification of the RES support schemes under review.

2.2 Section 4.3 – Aid for clean mobility (specifically, aid for the deployment of recharging or refuelling infrastructure)

There has been a fast-growing interest in clean mobility and aid for recharging stations. For example, at the EU level we note a recent announcement made by a Commission official on the amendment of the GBER to take into account public investment into electric car charging points.[16] At the level of Member States, we observe various recent decisions to support recharging stations. See for example a German scheme of EUR 500 million approved to support publicly accessible recharging infrastructure for electric vehicles on 28 June 2021.[17] Given that Member States will be looking to support aid for clean mobility in their respective jurisdictions, there is a need to ensure consistency between Member States granting aid. In this respect, Section 4.3 of the CEEAG is very welcome, as it provides a common framework for all Member States.

There is also a need to ensure consistency between the different rules adopted in the EU on clean mobility. Rules should be co-ordinated between the GBER and CEEAG and any other

[15] Source: https://www.ft.com/content/eef4872c-e52b-4cf6-9853-fb2bf19889a1.

[16] Keynote, State Aid, Informa Connect, online, 7 July 2021 (available at https://informaconnect.com/state-aid/agenda/1/)

[17] See Decision of the Commission of 28 June 2021 in case SA.60775 – *Publicly accessible charging infrastructure for electric vehicles in Germany*. See also a Danish scheme to support installation of publicly accessible electric charging stations along road networks (Decision of the Commission of 27 November 2020 in case SA.58035) and a Romanian support scheme for a network of electric-vehicle charging stations (Decision of the Commission of 10 February 2020 in case SA.49276). A UK market study on electric vehicle charging was also launched in December 2020 (see https://www.gov.uk/cma-cases/electric-vehicle-charging-market-study).

instrument. On one hand, the clean mobility and refuelling infrastructure market is a new and very costly market. As such, it is important to provide guidelines for Member States to adopt State aid with sufficient aid intensity when needed. On the other hand, as the Commission notes, there is a need to ensure that there is no negative effect on competition, for example through the creation or strengthening of market power positions when granting aid. That will be the case if a Member State grants aid without taking into consideration already existing alternative solutions on the market. State aid should only focus on those areas where there is a clear market failure, the market is not competitive and there are no private actors that can intervene in the market without State aid.

In this regard, two novelties in the draft CEEAG are welcome. First, we welcome the requirement of an open public consultation on such novel area of aid, which will avoid Member States favouring some market players and will ensure that any State intervention is aimed at solving a market failure. Although it may be a burdensome process for Member States, it is already being used in other contexts by some Member States and it provides adequate safeguards to make sure that the aid is necessary.

The second requirement that is welcomed is the requirement of a competitive bidding process. This requirement is in line with the German scheme that has been recently approved[18] and it is essential to make sure that the aid is proportionate, and there is no negative effect / distortion of competition. We believe it is important that the Commission monitors that this obligation is interpreted strictly and only waived when objectively justified by Member States.

2.3 Section 4.7 – Aid in the form of reductions in taxes or parafiscal levies

We welcome that the CEEAG set out targeted compatibility criteria for aid in the form of reduction in taxes or parafiscal levies. We have three remarks in relation to this Section:

- Para. 261 notes that the Commission will consider reductions not to undermine the general objective pursued and contribute, at least indirectly, to an increased level of environmental protection, provided that two conditions are fulfilled: "*(a) the reductions are well targeted at those undertakings most affected by a higher tax; (b) a tax rate, which is generally applicable, is higher than would be the case without the reduction".* The relevance of the second condition is however not clear to us. Indeed, in a scenario where the general tax rate is not higher than the reduced levy, there would be no advantage and, as such, no State aid. We would therefore welcome further clarification on this point.
- Pursuant to para. 267 Member States can choose from a reduction of the tax or levy rate or refund approach. We note that the refund approach will be much more complex and burdensome for both Member States and taxpayers to apply and verify in practice. It will also take much longer for the beneficiaries to receive compensation. The option of reducing the tax/levy therefore has clear benefits and should be kept.
- Para. 269 provides details of when the Commission will consider aid to be proportionate. Two points could benefit from further clarification. Pursuant to point (a) the measure is proportionate if the beneficiary pays at least 20 % of the national environmental tax or parafiscal levy. We would welcome clarification of whether this relates to the levy in question or all levies in the Member States. The condition also

[18] See footnote above.

appears to encourage the application of a broader reduction, which may not be aligned with the Commission's purpose. Pursuant to point (b), aid will be proportionate where agreements have been concluded, whereby beneficiaries or associations of beneficiaries have committed to achieve environmental protection objectives which have the same effect as if the beneficiaries paid at least 20% of the national tax or levy. We note that it appears difficult to define accurately in practice what the situation would have been had 20% of the tax been paid and we would therefore recommend replacing this by a more general criterion of contribution to environmental protection objectives.

2.4 Section 4.9 – Aid for energy infrastructure

We welcome the recognition that support for energy infrastructure which does not operate in a contestable market is not State aid and the conditions for that to be the case. However, in a transition to a low carbon economy, where there is a shift from an existing gas infrastructure to a hydrogen one, it will be extremely important to establish if this new infrastructure (or repurposed infrastructure) will still be subject to monopoly regulation and controlled tariffs as opposed to operating in a competitive market. Further guidance or acknowledgement about the technological changes and conditions for different types of infrastructure would be helpful so that any potential owners of infrastructure and Member States alike understand the State aid implications of any public support relating to energy infrastructure that may be repurposed (e.g. to carry hydrogen as opposed to natural gas).

2.5 Section 4.12 – Aid for coal, peat and oil shale closure

We welcome the requirement for a competitive bidding process concerning aid for the early closure of power generation plants based on coal, peat and oil shale. This approach may serve as a safeguard to ensure the proportionality of this type of aid and the reduction of undue effects on competition and trade. The counterfactual scenario would be particularly challenging in this context, given the need to factor in the long-term financial perspective of the plants to be closed as well as multiple input factors that are subject to high volatility and uncertainty (e.g. coal prices). The competitive bidding process should also prevent Member States from favouring certain market players. It is also welcomed that the non-price selection criteria will be permitted beyond the 25% threshold as set out under the general rules.[19] Such criteria may make this measure more impactful in the broader socio-economic ecosystem of the power generation plant to be closed.

Para. 375 of the CEEAG seems to give Member States little flexibility to provide more targeted aid for the closure of coal, peat and oil shale power generation plants, in particular when matched with the one year closure deadline provided in para. 377 of the CEEAG. This could hamper more transformative power generation closures, in particular in Member States where the energy mix is to a significant extent based on coal, peat and oil shale and where it would take more time to replace such power generation plants with other, more environmentally friendly, plants. Accordingly, Member States should be permitted such a possibility in exceptional situations. Although both paras. mentioned allow for certain exceptions to the general rules, more clarity on applying them would be helpful.

Finally, we would welcome clarification of the notion of *uncompetitive* coal, peat and oil shale activities as a key qualifying criterion for this aid measure. It would be particularly helpful to

[19] CEEAG, para. 49.

understand whether the relevant power plant or mine should already be "uncompetitive" at the time of aid application or whether it suffices that it is "uncompetitive" within its lifecycle.

3 Section 5 – *Ex post* evaluation

Para. 400 of the CEEAG provides the following: *"Ex post evaluation will be required for schemes with large aid budgets, or containing novel characteristics, or when significant market, technology or regulatory changes are foreseen. In any event, ex post evaluation will be required for schemes when the State aid budget or accounted expenditures exceed EUR 150 million in any given year or EUR 750 million over the total duration of the schemes."*

Carrying out such *ex post* evaluations can be burdensome and costly for Member States and we believe it is a tool that should be used with caution. For example, it might be sufficient to say that the Commission "may" require an *ex post* evaluation under certain circumstances.

Para. 406 of the CEEAG states that the *ex post* evaluation must be carried out by an *"expert independent from the aid granting authority"*. We believe that it should be possible to remove this requirement, not only to save costs but also because the most knowledgeable experts will often be precisely those attached to the aid granting authority. In any event, it would be helpful to clarify that nothing prevents the independent expert from being a civil servant (for an analogy, see the Commission Communication on State aid elements in sales of land and buildings by public authorities).

Para. 408 of the CEEAG provides that the final evaluation report must be submitted at the latest nine months before the expiry of the aid scheme. If this report is *"not in compliance with the approved evaluation plan"* the aid scheme must, according to para. 402 be *"suspended with immediate effect"*. We think this is disproportionate as an automatic "penalty" for what might be a mere formal problem with the report as such but not with the underlying aid scheme, and refer, again, to the consequences foreseen in Article 22 of the Procedural Regulation (EU) 2015/1589 for a breach of a reporting obligation under Article 26 of the Regulation. In any event, such a breach must not affect the lawfulness of the aid for the beneficiary.