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Greenpeace contribution to the consultation on the draft Guidelines on State aid for climate, environmental protection and energy 2022.

Introduction

Greenpeace welcomes the opportunity to submit comments on the draft "*Guidelines on State aid for climate, environmental protection and energy 2022*" (the Draft Guidelines).

In our contribution to the consultation on "*Competition policy and the Green Deal*", of 8 December 2020, we submitted that competition policy can play a pivotal role in the success of the European Green Deal (the EGD), by ensuring that both interventions of public authorities, via State aid, and the behaviour of undertakings, cooperating or merging in the internal market, remain coherent with its objectives.

The review of the current Environmental and Energy Aid guidelines is a first, yet unique, opportunity for the Commission to align competition with EU environmental and climate policies, in particular with a view to preventing the use of public money in ways, or for purposes, that may jeopardise the objectives set out in the EGD: the achievement of carbon neutrality for the whole economy by 2050 via a supply of clean, affordable and secure energy and energy efficiency, the transition into a clean circular economy, the shift towards sustainable mobility, the transformation of the food system, the preservation and restoration of ecosystems and biodiversity, and the fulfilment of a zero pollution ambition.

To ensure that this opportunity translates into a successful achievement, we believe that the Commission should amend the Draft Guidelines to reflect, at least, the following principles:

1. State aid approval must be subject to evidence of compliance with primary and secondary EU environmental law;
2. Subsidies to fossil fuels must end;
3. State aid to mobility must produce a real shift towards sustainable transport modes;
4. Compensation for coal closures must not unduly reward harmful investments;
5. State aid to renewables should continue to be subject to a specific regime, supporting the achievement of the Union's energy policy objectives.

These principles, and their inclusion in the future guidelines, are discussed in the following sections.

1. Evidence of compliance with EU environmental law must be a precondition for the approval of State aid

The Commission must fully acknowledge the status of environmental protection goals within EU primary law and, accordingly, rethink and update its approach to the objective of

ensuring "*good functioning of the internal market*", and to competition policy as an instrument to achieve it. In particular, it should be noted that:

- In accordance with the first paragraph of Article 3(3) TEU, the internal market "*shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress,* ***and a high level of protection and improvement of the quality of the environment****. It shall promote scientific and technological advance*."
- Article 37 of the EU Charter of Fundamental Rights provides that "***A high level of environmental protection*** *and* ***the improvement of the quality of the environment must be integrated*** *into the policies of the Union and ensured in accordance with the principle of sustainable development*."
- Article 11 prescribes that "*Environmental protection requirements* ***must be integrated*** *into the* ***definition and implementation*** *of the Union's policies and activities, in particular with a view to promoting sustainable development*".

Accordingly, EU State aid policy and the future guidelines must ensure that no public intervention is authorised when its object and effects may encroach with the achievement of the EU environmental objectives, irrespective of the guidelines or regimes used for the assessment.[1]

For this purpose, it is useful to recall that the Court of Justice has recently confirmed the need to ensure consistency between EU State aid policy and environmental protection, providing clear guidance to the Commission in the exercise of its exclusive competencies to review aid measures.

In its judgement of 22 September 2020, the Court clearly stated that "*State aid for an economic activity (...) that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to (Article 107(3)(c))*" and that "*when the Commission checks whether State aid for an economic activity (...) meets the first condition laid down in Article 107(3)(c) TFEU (...) it must (...) check that that activity does not infringe rules of EU law on the environment. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination*."[2]

In terms of approach, it follows from the Court's judgement that the Commission's Directorate-General for Competition has the power to, and therefore must, consider environmental law compliance (with primary and secondary EU sources) as a precondition for the approval of State aid.

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[1] Whereas the future guidelines should clearly state and develop the principle that activities supported with State aid should comply with environmental law, they should also make clear that this principle applies beyond the scope of the said guidelines. Allowing other categories of aid (e.g. rescue and restructuring aid) to be granted in violation of EU environmental law would create a fragmented and inconsistent framework and jeopardise the objective of the integration principle defined in Article 11 TFEU and impair the impact of the Court's jurisprudence, recalled in this section.

[2] Judgement of the Court of 22 September 2020, Case C-594/18 P, Paras 45 and 100.

For the purpose of this consultation, this means that the Commission should amend section 3.1.3 of the Draft Guidelines (which currently contains only a generic reference to clauses hindering free movement of goods) and introduce a clear requirement that any notified aid measures (whether individual or part of a scheme) comply with relevant EU environmental law provisions. Member States should be obliged to provide adequate evidence of compliance.

In addition, the Commission should make clear that the environmental compliance requirement described above applies, without limitation, to the whole spectrum of State aid policy.

The relevant environmental law provisions should include, at the very least:

1. The environmental principles incorporated in Article 191(2) TFEU, with particular regard to the polluter pays principle;
2. Horizontal environmental rules, such as Directives 2011/92/EU and 2001/42/EU (respectively on environmental impact assessments and strategic environmental assessments) and Directive 2003/4/EC on on public access to environmental information;
3. The EU Birds and Habitats Directives as well as the Water Framework Directive;
4. Sectoral instruments, such as Directive 2010/75/EU (the Industrial Emissions Directive) and Directive 2003/87/EC, as amended (the ETS Directive).

However, this list should be considered non exhaustive, and should not preclude the Commission from carrying out an assessment of compliance with other legislation, if relevant for the specific case.

2. Fossil fuel subsidies must be phased out

Greenpeace restates its call for an immediate end to all State aid supporting the extraction or use of fossil fuels, including for energy generation and mobility purposes, since they conflict with the objectives of the Paris Agreement, of the European Green Deal and of the newly adopted (yet insufficiently ambitious) "Fit for 55" package.[3]

The European Green Deal alludes several times to the need to end fossil fuel subsidies: it does so in the context of the shift to sustainable mobility (section 2.1.5), of the greening of national budgets (section 2.2.2) and of international cooperation (section 3). The Draft Guidelines themselves acknowledge (para. 4) that State aid policy should "*facilitate the phasing out of fossil fuels*".

Yet, disappointingly, the same Draft Guidelines foresee in several instances the possibility for Member States to submit individual aid and schemes involving State aid to fossil gas and other fossil fuels. This is notably the case for sections 4.1 (aid for the reduction and removal

[3] For an outline of Greenpeace's reaction to the "Fit for 55" package see: https://www.greenpeace.org/eu-unit/issues/climate-energy/45795/eu-commission-fit-for-55-package-unfit-to-contain-climate-crisis/

of greenhouse gasses emissions including through the support for renewable energy) and 4.8 (aid for the security of electricity supply).[4]

2.1. On section 4.1 (aid for the reduction and removal of greenhouse gasses emissions including through the support for renewable energy)

This section allows aid for unspecified "low carbon energy", "high efficiency cogeneration" and "aid for carbon capture, storage and use" (CCS/CCU) (para. 74). It also encompasses aid for dedicated infrastructure projects, including for hydrogen (without specification of the hydrogen source), for "other low-carbon gases" and for CCS /CCU (para. 75).

The section starts from the premise that Member States may, on the basis of a technology-neutral approach, choose to use and support any technology that could be seen, in the short term, as reducing emissions. Thereby, it allows investment in natural gas generation,industrial production and infrastructure (para 85) and other fossil fuel generation and industrial production (para 86). However, the section fails to properly consider the long-term implications of allowing Member States to continue subsidising fossil fuels.

There are several problems with the Commission's proposal:

1. First of all, it is inconsistent with the Treaty: Article 194 TFEU clearly indicates that the Union's energy policy, having regard to the need to preserve and improve the environment, shall aim to "*promote energy efficiency and energy saving and the development of new and renewable forms of energy*". There is no indication in Article 194 TFEU that an unqualified support for "*low carbon*" or, worse, "*less carbon*" sources would be consistent with the EU objectives on energy. Accordingly, the Draft Guidelines should not depart from the letter of the Treaty and surreptitiously create and implement a technology neutral approach to promote allegedly "low carbon" fossil fuels at the expense of the necessary support for energy efficiency and renewables.
2. Secondly, it encourages Member States to misuse and deplete precious public resources that are needed for the long term transition towards a system fully based on renewable energy. According to the Commission's own assessment, "*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 further EUR 130 billion a year for the other environmental objectives estimated earlier*".[5] Against this background, Member States should not be allowed or, worse, encouraged to direct public spending towards fossil fuels, thereby subtracting resources from the promotion of energy efficiency, energy savings and renewables.
3. Thirdly, it does not make the admissibility of State aid to "low carbon" sources conditional upon the demonstration of clear and measurable environmental and economic benefits. Paradoxically, the Draft Guidelines recognise (Para.71) 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*

[4] The same is true for the section on State aid for mobility, which is discussed in section 3 of this submission.
[5] ttps://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0098&from=EN

often have important negative effects because they can increase the negative environmental externalities in the market." Yet, they fail to clearly state that, precisely for this reason, support for fossil fuels should be prohibited as incompatible with the Treaty. In the case of aid to investments in natural gas, the Commission suggests that the consequent negative effects could be accepted if "*it is demonstrated that there is no lock-in effect*". However, the Draft Guidelines do provide only generic indications as to how the "*absence of lock-in*" would be assessed or as to the circumstances or the share of fossil gas that would be considered as generating a lock-in (Para. 110).

4. Fourth, the Draft Guidelines suggest that Member States could prove the absence of lock-in risks by requiring binding commitments by the beneficiary to "*implement decarbonisation technologies such as CCS/CCU*". However, there is no indication that this technology is safe and readily available at commercial scale and the Draft Guidelines do not even require the implementation of CCS/CCU to take place as soon as the aid is granted. This means that the Draft Guidelines may be effectively promoting the creation of a "real problem" (the continuation of subsidies to fossil fuels) that can only be mitigated via a "false solution".[6]

2.2 On section 4.8 (aid for the security of electricity supply)

Like section 4.1, section 4.8 of the Draft Guidelines opens the possibility for Member States to provide additional subsidies to fossil fuels, notably to natural gas generation, in the form of capacity mechanisms.[7]

The conditions and safeguards designed in the Draft Guidelines to prevent capacity mechanisms from translating into additional climate and environmentally harmful subsidies are not sufficiently robust and, if maintained in the future guidelines, are bound to make the Commission's scrutiny of State aid measures ineffective.

In particular:

- Para. 286 provides for the possibility (not for the obligation, as would be appropriate) for Member States to design capacity mechanisms in a way that would exclude the more polluting capacity or prioritize the more environmentally beneficial capacity in the selection process. Greenpeace believes that demand-side measures, such as interruptibility schemes, should in principle take priority over the funding of generation capacity, and that, when capacity payments are found to be necessary, they should be allocated on the basis of the environmental performance of the recipients. The more polluting capacity should be excluded by default.

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[6] CCS is an end-of-the-pipeline approach which does not reduce emissions at the source. Furthermore, there are just 26 operational CCS plants in the world, with 81% of carbon captured to date used to extract more oil via the process of Enhanced Oil Recovery [EOR], and at this stage CCS planned deployment remains dominated by EOR.
https://foe.scot/wp-content/uploads/2021/01/CCS-Research-Summary-Briefing.pdf

[7] These subsidies have harmful effects, in that they offer undue support for fossil fuels and nuclear based generation, without real justification in terms of security of supply but with considerable costs for taxpayers.
https://www.greenpeace.org/eu-unit/issues/climate-energy/1519/exposed-e58-billion-in-hidden-subsidies-for-coal-gas-and-nuclear/

- Para. 301 does not require Member States to provide a clear demonstration of the appropriateness of aid and to ensure that support to generation adequacy is used as a last resort.

- Para. 302 relies once again on a technology neutral approach, providing that aid measures should be open to "*all beneficiaries or projects technically capable of contributing efficiently to the achievement of the security of supply objectives*". This means that the creation of generation capacity may take priority, for instance, over storage and demand response. The future guidelines should address this shortcoming and ensure that the least energy demanding (and therefore polluting) solution is prioritised.

- Para. 325 recognises that "*certain aid measures have negative effects on competition and trade that are unlikely to be offset*" and correctly includes in this category measures "*that do not respect the emission threshold applicable to capacity mechanisms set out in Article 22 of Regulation (EU) 2019/943 and that may incentivise news investment in energy based on the most polluting fossil fuels*". However, it fails to clearly state the incompatibility of those aid measures with the Treaty.
- Para. 326 admits measures that incentivise investments in generation based on natural gas, despite recognising that such investments aggravate negative environmental externalities in the longer term. As in the case of Para. 110, Member States are under a generic requirement to demonstrate how they plan to avoid a lock-in of gas-fired generation. However, the Draft Guidelines do not provide a sufficiently clear definition of "lock-in" or a sufficiently strict set of conditions for avoiding it. Commitments to implement CCS/CCU, even when binding, are extremely unlikely to have any mitigating effect, in light of the fact that this technology is, in reality, unsafe and unavailable.

3. State aid to mobility must produce a real shift towards sustainable transport modes

The transport sector is one of the biggest contributors to rising emissions and global warming. While most sources of greenhouse gas emissions have been slowing or dropping off, emissions from transport have continued to climb at an accelerated pace in the EU, up to 28% compared to 1990 levels. International aviation, international shipping and road transport have been the fastest growing sources of transport emissions in the EU since 1990. As a result, 27% of EU greenhouse gas emissions came from transport in 2017.[8]

In order for the transport sector to align with what is needed to tackle the climate emergency and safeguard human health, Europe needs to urgently revolutionize the way people and goods move.

[8] Greenpeace Belgium has commissioned and published a study for a new roadmap to decarbonise European transport by 2040.
https://www.greenpeace.org/eu-unit/issues/climate-energy/45014/new-roadmap-to-decarbonise-european-transport-by-2040-2/

To be both sustainable and cost-efficient, government policies should aim to simultaneously reduce transport needs and shift mobility patterns to more climate-friendly and renewable modes. At the same time, technology needs to improve as quickly as possible. Policies that reduce the need for transport while shifting to more environmentally friendly transport modes have been the object of significantly less attention and a lack of coordination from European political leaders, which will need to change quickly. Europe can no longer afford to rule out any real solutions; they need all of them deployed together, and fast.

In particular, and as far as aviation is concerned, assuming a sufficient production of renewable-based synthetic aircraft fuel at commercial scale, it will be necessary to decrease total passengers-kilometres flown by 33% by 2040.[9] However, since "E-fuels" are far from being available at scale, it is arguable that passenger air travel would very likely need to decrease much further: indeed, biofuels are not an effective solution for the climate, because of their environmental impact and land use. Yet, without new policies and measures, air travel demand is expected to grow significantly.

Against this background, the measures proposed and promoted in Section 4.3 of the Draft Guidelines are manifestly inadequate to achieve the alignment of the transport sector, and in particular of aviation, with the trajectory towards climate neutrality.

In particular:

- The Draft Guidelines do not propose or foresee any strategy to achieve modal shift in passenger transport, in particular by favouring the development of rail transport services suitable to compete with infra-EU flights;
- The proposed policies are limited to aid for the acquisition and leasing of "*clean transport vehicles*" and "*clean service equipment*". They do not address the structural obstacles to the decarbonisation of transport, notably the need to reduce the total passengers-kilometres in air transport; on the contrary, they promote the use of public money to maintain the status quo (facilitating the fleet renewal for which air companies should pay), instead of aiming at necessary downsizing of the aircraft fleet;
- Fleet renewal should be imposed via new legislation aligned with the goals of the Paris Agreement, in order to appropriately allocate negative externalities in accordance with the polluter pays principle, rather than using State aid.
- Furthermore, in light of the definition used in Para. 20(h), it is clear that aid for the acquisition of leasing of airplanes in not going to yield any improvement in the status quo that justifies the use of public funds (the Draft guidelines consider a 10% increase in environmental protection standards as sufficient for the eligibility of an aircraft). This 10% increase might prove entirely irrelevant if air transport continues to grow.
- Finally, it should be remembered that aviation has already benefited from direct and indirect subsidies, including via exemptions from taxations, bailouts and aid to infrastructures. The continued use of public funds in support of the aviation industry

[9] Greenpeace Belgium, "The time for radical movement", page 8. https://storage.googleapis.com/planet4-belgium-stateless/2020/09/817a91c4-radical-movement-media-report-v3.6.pdf

raises fundamental questions as to the overall sustainability (social, economic and environmental) of the current model of mobility.

For the reasons set out above, aviation should be excluded from the future guidelines. Furthermore, the Commission should consider the need to phase out State aid to airports and airlines and adopt a structural approach to the reduction of transport emissions.

Indeed, the 2014 Guidelines on State aid to airports and airlines have provided EU Member States with a ten-year time frame to wind down operating aid to airports. Airlines departing from airports with fewer than 3 million passengers per year have been eligible to receive start-up aid for up to three years.[10]

However, the environmental and climate impact of this form of public support was not taken into account when the policy was designed and enacted. Therefore, the Commission should consider phasing out these guidelines and avoid extending their period or scope of application.

Extending the period or the scope of eligible state aid to airports and airlines would be incompatible with the climate goals of the Paris Agreement, as this would lead once again to unsustainable air traffic levels, making the necessary degrowth of the aviation sector more costly.

State aid to support airport investments and operations, or for airlines to create new routes, should be phased out, unless absolutely necessary for safety reasons. It will allow more sustainable modes to compete for passengers, while ensuring connections between European regions and mobility for EU citizens.

It should be borne in mind, in this regard, that the current amount of air traffic is not simply the result of the market liberalisation that followed the EU aviation packages, but was made possible by several State aid measures benefiting airlines and airports as well as by an unfair regime of fuel taxation, which does not account for the negative externalities of this transport mode.

4. Compensation for coal, peat and oil shale closures must not reward misguided and harmful investments

The Draft Guidelines foresee a new kind of aid to facilitate coal, peat and oil shale closures. In particular, Para. 371 clarifies that such aid may consist of "*measures taken to compensate for the early closure of profitable coal, peat and oil shale activities*".

Greenpeace notes that, in principle, there is no justification for compensating fossil fuels companies for profits lost due to the early closure of their activities. The link between CO2 emissions and climate change has been understood for decades and no operator can claim that, at least for investments that took place after the entry into force of the Kyoto protocol, measures prohibiting fossil fuels extraction and generation were unpredictable.

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0404(01)&from=EN

As a matter of principle, fossil fuel operators should therefore suffer the consequences of regulatory changes necessary to halt climate change, without being entitled to bring claims based on legal certainty. On the contrary, as the evolution of national jurisprudence shows, operators should be prepared to be liable for claims brought by parties who have suffered damages as a result of the exploitation of fossil fuels.[11]

Even so, it is evident from Para. 374 that the proposed form of aid is aimed at protecting Member States from the risk of claims by fossil fuels companies (which are incentivised by the disgraceful permanence in force of the Energy Charter Treaty), facilitating the preemptive settlement of any lawsuit.

Consistently with this logic, the aid foreseen in section 4.12.1 should be subject to a number of strict conditions:

- Eligibility of investment for compensation should be subject to a reasonable cutoff date. It is unreasonable to consider that, after the entry into force of Kyoto protocol in 2002 (Council Decision 2002/358/EC) and the consequent adoption of the first EU climate measures, any company could have started investments in fossil fuels with the expectation of profiting from its activity without limitations deriving from climate policy;
- Aid should not be granted for closures taking place after 2030: no operator can reasonably make the claim that, in the current climate crisis, coal, peat and oil shale operations should not be forced to halt operations in the public interest;
- Aid should cover a fraction (maximum 20%) of the foregone profits and this intensity should progressively decrease between 2021 and 2030, in order to incentivise closures as early as possible;
- Estimates of foregone profits should be made by independent advisors and be based on the most conservative scenario. They should take into account the costs of negative externalities. Aid received as compensation for capacity payments should not be considered as profit;
- Aid recipients should waive all claims against Member State authorities for early closure, including before ECT investment courts;
- Aid recipients should commit to abstain to any further investment in fossil fuels extraction or generation. The commitment should apply at global and group level in order to prevent a simple displacement of emissions from one jurisdiction to the other;
- Member States should ensure that aid to early closure is accompanied by full and adequate protection of workers and of communities affected.

In addition, the Commission should make clear that this model of aid will not be extended beyond the future guidelines. EU state aid law should not create the expectation, in particular for natural gas operators, that companies are entitled to receive compensation in case Member States decide to completely phase out fossil fuels after 2030.

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https://www.greenpeace.org/nl/klimaatverandering/46358/historic-verdict-in-climate-case-against-shell

5. State aid to renewables should continue to be subject to a specific regime, supporting the achievement of the EU's energy policy objectives.

Greenpeace is seriously concerned about the approach taken by the Commission in the Draft Guidelines, which departs from specific support for renewable energy sources, conflating renewables with "low carbon" sources whose environmental benefits are at best questionable and at worst non existent.

As we have pointed out in section 2, this approach is not justified in light of Article 194 TFEU, which clearly expresses the fact that the EU legal system supports the transition towards renewable energy sources and energy saving, rather than a technology neutral "low carbon" approach.

Problematically, this risks misdirecting the public resources that are necessary to triple investments in renewables (in order to fulfill the objectives of the Paris Agreement and of the 2050 climate neutrality target) towards outright false solutions such as CCS/CCU or questionable ones, such as hydrogen.

The future guidelines should continue to foresee a specific chapter with rules aimed at promoting renewable energy sources, in view of facilitating the achievement of the Renewable Energy Directive's (RED) targets.

Such a chapter should, in particular, provide guidance for aid to renewable energy communities (RECs) and smaller RES actors. It should be pointed out, in this regard, that Article 22 (7) RED requires Member States to take into account the specificities of RECs when designing their support schemes. Therefore, specific State aid rules would have direct relevance and a positive impact on the correct implementation of the Directive.

Furthermore, the Commission should amend the Draft Guidelines to ensure that the rules on the obligation of competitive bidding are sufficiently flexible to accommodate the different needs of the public authorities and entities offering support for renewables, as well as facilitating the participation of small operators in the market for distributed generation.

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We trust that the Commission will take into account the comments and information provided for in this submission.We remain available for any necessary clarification and additional contribution.

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