Dickson Poon School of Law
King's College London

Competition Policy supporting the Green Deal
Some observations on state aid control.
Centre of European Law, Kings College London

1. INTRODUCTION.

1.1. The European Commission initiative to solicit comments and contributions in relation to the aspects of competition policy — which could be of support to the pursuit of the European Green Deal's objectives — should be warmly welcomed and is especially timely. The observations above will focus on the interactions between State aid control with the 2030 EU climate & energy targets, the EU's objective of climate neutrality by 2050 and the forthcoming EU Climate Law.

1.2. They are intended to provide an overview of the main aspects that should, in our view, be addressed in the revision of the EEAG and of the GBER and could hopefully enhance the effectiveness of State aid policy in the support of the European Green Deal.

2. ROLE OF THE INCENTIVE EFFECT IN PROMOTING ENVIRONMENTAL BENEFITS. (Question 1 and 4).

2.1. The Environmental Guidelines (EEAG)[1] require that environmental and energy aid can only be found compatible with the internal market if it has an incentive effect capable of inducing the beneficiary to change its behavior to increase the level of environmental protection or to improve the functioning of a secure, affordable and sustainable energy market. Therefore, it must be proven that the environmental benefit would not be achieved unless the aid is granted[2].

2.2. The Guidelines further specify that, for environmental aid that is not granted through a competitive tendering procedure, Member States need to demonstrate such an incentive effect providing a comparison between the aided project and the counterfactual scenario, showing the profitability of the project without the environmental aid.

2.3. However, in the light of the more ambitious and urgent targets of the Green Deal, it may be desirable to revise the Guidelines and the GBER[3] to ensure that such an incentive effect is subject to

[1] Guidelines on State Aid for environmental protection and energy 2014-2020 OJ C200/1;
[2] Environmental Guidelines, para 58;
[3] Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 26.6.2014, p. 1.

stricter eligibility criteria, making sure that not every instance of aid with possible beneficial effects are considered compatible under the environmental protection objective, but only those that are able to achieve a higher degree of environmental protection. In other words, the incentive effect should be assessed also in the light of the adequacy of the change of the behavior induced and whether the latter is in line with the targets and the increased levels of environmental protection introduced by the Green Deal.

2.4. The criteria adopted by Article 3 of the Regulation (EU) 2020/852 ("EU Taxonomy Regulation")[4] for the definition of environmentally sustainable economic activity therefore represents a useful benchmark for the higher standard of environmental protection that applicants could be subject to in the assessment of the compatibility of environmental aid measures.

2.5. This is especially true with regard to the first two criteria laid out in Article 3 (letters a) and b))[5]. Ideally, if a certain environmental objective can be achieved through a series of equally effective measures, only the measures with the least environmental impact, but still capable of fulfilling the objective, would be deemed compatible with the internal market. Therefore, a measure would not only need to have an environmental benefit, but it should also need to avoid potentially causing significant harm to other environmentally relevant objectives; further, it should avoid any harm that could be prevented by using a different and equally effective measure.

2.6. The above considerations would however need to be coordinated with those outlined in Paragraph 4, relating to the necessity of a framework for environmental protection standards and requirements for it be implemented in the compliance assessment procedure for non-environmental aid.

3. REDUCTION IN AND EXEMPTION FROM ENVIRONMENTAL TAXES. (Question 1 and 3)

3.1. The above considerations imply that the Environmental Guidelines should no longer include any aid scheme whose actual beneficial effects are not clearly demonstrated by the Member States or verifiable by the Commission. A representative example could be aid granted in the form of a reduction/exemption from environmental taxes.

[4] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088;

[5] Article 3 of Regulation (EU) 2020/852 of 18 June 2020: "*For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity: a) contributes substantially to one or more of the environmental objectives set out in Article 9 in accordance with Articles 10 to 16; b) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17; c) is carried out in compliance with the minimum safeguards laid down in Article 18; and d) complies with technical screening criteria that have been established by the Commission in accordance with Article 10(3), 11(3), 12(2), 13(2), 14(2) or 15(2)*".

3.2. Environmental taxes are those imposed to increase the costs related to environmentally harmful behavior, thereby discouraging the said behavior. Despite the fact that reductions in or exemptions from environmental taxes may adversely impact this objective, the Guidelines state that such measures are needed where the beneficiaries would otherwise be placed at such a competitive disadvantage that it would not be feasible to introduce the environmental tax in the first place[6]. A higher level of environmental taxes could be facilitated by granting more favorable tax treatment to some undertakings. The Guidelines do not fully clarify the reasons why it would not be feasible to levy an environmental tax in the first place if exemptions or reductions were not introduced, nor how these exemptions can facilitate higher taxes. This assumption seems to stem from the confusion between the feasibility of environmental taxes and the environmental impact of such taxes. The rationale behind this reasoning is the following: if high uniform taxes on all polluting activities are not feasible, granting a tax reduction to some industries could allow the imposition of higher counter balancing taxes on other industries so that the overall impact on the environment is as beneficial as in a situation with uniform taxes.

3.3. However, this mechanism would only be beneficial to the environment if the output increase of the exempted sector is less than the decrease in output of the levied sector.

3.4. This is a necessary condition in judging if the tax reduction would be a better environmental policy than a uniform tax, yet the Guidelines do not require Member States to prove that their tax reduction would achieve this counterbalancing effect, nor that a higher tax would not be feasible.

3.5. Furthermore, the definition of "*environmental tax*" adopted by the GBER and the Guidelines includes both taxes with a polluting tax base and taxes with environmental effects. Energy taxes in general, due to their tax base, are automatically considered environmental, whereas there is not a causal link between the choice of a polluting tax base and the environmental outcome of the measure. The harmonized rates within the Energy Taxation Directive (ETD)[7] are based on the volume of the energy products consumed rather than the energy content or on the CO2 emissions[8]. However, Article 44 of the GBER does not require the measure to foster environmental protection, presuming that the compatibility of aid in the form of reduction in taxes would comply with ETD.

[6] Environmental Guidelines, para 168;
[7] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity;
[8] See Antón, A. and Ezcurra, M.V., 'Inherent logic of EU energy taxes: toward a balance between market protection and environment protection' in: L. Kreiser, "Environmental Taxation and Green Fiscal Reform. Theory and Impact", Edward E. Publishing 2014;

3.6. A definition including only taxes with an actual environmental effect is necessary and would also be consistent with the EU case law on the selectivity criterion ex Article 107(1)[9]. Arguably, aid only granted through a genuinely environmental tax would be able to identify a particular category of undertakings, which are distinguished by reason of specific properties peculiar and characteristic to them (i.e. their capacity of attaining a higher environmental performance), whereas an energy tax whose tax base is the volume of energy products consumed, is effectively a measure open to all undertakings and thus non selective[10].

3.7. The thresholds and conditions regulating energy taxes are not *per se* capable of defining the selectivity of the advantages granted through the tax system. It is only when the measure is likely to distribute benefits for purposes other than those of the tax system, for example achieving a certain environmental object, that a measure will be selective aid. The application of such reasoning, in the design of an aid measure, is capable of affecting the level of environmental benefits that the Member State intends to attain by adopting it. Therefore, in the case of environmental aid, the eligibility criteria should identify — through the lenses of the higher incentive effect standard above described — activities capable of achieving a (*ex ante*) well defined environmental outcome, ensuring that the measure truly goes beyond "*normal practice*"[11].

3.8. The enhanced and targeted understanding of the incentive effect, described in Paragraph 2 and 4, should inform the criteria for the assessment of green bonuses, allowing governments to use more State aid for projects that make a genuine contribution to green goals.

4. ENVIRONMENTAL CONSIDERATIONS FOR NON ENVIRONMENTAL AID. (Question 1 and 2).

4.1. As stated above, the EEAG should be revised in the light of a stricter exam of the level of environmental benefits required for an aid to be considered compatible This should not mean that aid which is not environmental in nature but which, by virtue of its close connection with those aspects may nevertheless play a key role in the pursuit of the objectives of the Green Deal, should fail its compatibility assessment in light of it being unsuitable to attain environmental goals.

4.2. To stick to fiscal aid, for instance, certain energy taxes considered environmental and falling within the scope of the EEAG, may actually pursue other objectives. These include those of facilitating

[9] See Case C-233/16 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Cataluny* ECLI:EU:C:2018:280 ; See also Case C-524/14 P *Commission v Hansestadt Lübeck* [2016], ECLI:EU:C:2016:971 para 40.

[10] See AG Kokott Opinion, paras 45 and 46 in Case C-66/14 *Finanzamt Linz* ECLI:EU:C:2015:242 paras 45 and 46. See also Case C-66/16 *Comunidad Autónoma del País Vasco and Itelazpi v Commission* ECLI:EU:C:2017:999.

[11] Environmental Guidelines, para 167;

transport, agriculture policies, or those of production, storage and distribution of electricity. Such aid measures have their own autonomy and represent a key feature in the functioning and development of an efficient Union Energy Market, despite not being strictly of an environmental nature. Therefore, they should be assessed in their own right, raising their efficiency in the pursuit of the objective to which they aim to achieve.

4.3. As to the specific weight environmental considerations should have in the assessment of the aid that is not *per se* environmental, it may be worth restating that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market[12]. The ECJ has repeatedly reaffirmed the relevance of the integration of environmental protection into the definition and implementation of Union's policies and activities pursuant to Article 11 and Article 194 TFEU[13].

4.4. In the light of the above considerations, a significant turning point could be reached through the identification of a set of environmental protection standards and requirements that should be implemented in the compliance assessment procedure additionally for non-environmental aid[14]. In other words, if environmental protection policies have to comply with aid to be compatible, it may be useful to devise a clearer framework of requirements and conditions ensuring environmental protection for different types of aid (or at least guiding the relative evaluation process), especially for aid that is likely to have detrimental environmental effects (such as transport infrastructures and other invasive projects).

4.5. This would, on the one hand, grant the possibility to assess such measures in their own right, especially if they are tightly linked with climate and environmental policies (such as aids ensuring a competitive and secure energy system or transport for agricultural purposes) and, on the other hand, it would reinforce the effectiveness of a higher standard of incentive effect, described above. An overall higher level of environmental protection in State aid Policy will ensure that the process of ensuring compliance for genuine environmental aid would not entail an excessive burden on applicants that are required to go "*beyond normal practice*", considering that other operators would be subject to an equivalent standard of environmental protection.

4.6. Within this framework, grant green bonuses should be granted only to those projects that, — given the overarching obligation for State aid measures to raise to a certain standard of environmental protection — have an outcome which fosters a further level of environmental benefits in respect to

[12]See Case C-594/18 P, *Austria v Commission* ECLI: EU: C: 2020:742. See further C-390/06, *Nuova Agricast*, ECLI:EU:C:2008:224 para 50 and 51; See also Commission Decision (EU) (2015) 2014/1585 of 25 November 2014.
[13] Case C-626/15, *Commission v Council* ECLI:EU:C:2018:925.
[14] Client Earth; "A State Aid Framework for a Green Recovery; Mainstreaming climate protection in EU State aid law" September 2020, https://www.clientearth.org/latest/documents/a-state-aid-framework-for-a-green-recovery-mainstreaming-climate-protection-in-eu-state-aid-law/;

comparable projects which do not bring the same benefits, despite still ensuring a level of environmental protection consistent with the objectives of the Green Deal.

5. THE TEST APPLIED TO THE CASE OF CAPACITY MARKETS.

5.1. Another field where the incentive effect, in the understanding outlined above, could inform the assessment of the compatibility of State aid relating to the objectives pursued by the European Green Deal is aid for the integration of the Internal Energy Market, especially in relation to capacity markets.

5.2. The integration of a growing share of renewable energy in the internal electricity market is a key objective of Directive (EU) 2019/944[15]. The completion of the internal energy market through the effective integration of renewable energy could contribute to the effective delivering of the objectives of the Energy Union and the 2030 climate and energy framework. Electricity systems should therefore make use of all available sources of flexibility, particularly demand-side solutions and energy storage, and should make use of digitalization and integration of innovative technologies with the electricity system[16].

5.3. The EEAG currently pursues the objective of integrating the Internal Energy Market, participating in the provision of market signals to distributed energy resources. The revision of the EEAG in light of recent legislation on the Internal Energy Market design should guarantee a consistent implementation of the rules laid out therein. Deviations from the common rules for energy market design should therefore be assessed on a restrictive basis, as an exception to the principles for energy market design and notably the energy-only market. This, for example, is the case of capacity remuneration mechanisms.

5.4. Capacity markets are likely to give priority to generation over Demand Side Response (DSR) and this can put renewably-produced energy at a disadvantage, ultimately hindering their participation in the market, as they are not able to operate through reliable market signals. However, capacity markets are also an essential tool in addressing energy-generation adequacy problems in cases of capacity shortage during high demand periods.

5.5. As recently highlighted in the *Tempus Energy* case[17], when assessing capacity markets, the Commission should ensure that the aid scheme is designed to allow DSR to participate alongside energy-generation, because their respective capacities provide an effective solution to the capacity adequacy problem. However, it is worth mentioning that participation of DSR in the capacity

[15] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU;
[16] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity;
[17] T-973/2014 *Tempus Energy and Tempus Energy Technology*, ECLI: EU: T: 2018:790.

market should be imposed through the design of a capacity market not only because they are fit for the purpose of combating generation adequacy problems — which justify the introduction of a capacity market in the first place — but mostly because integration of renewable energy on the market is an objective of EU Environmental Policies and Internal Energy Market Policies.

5.6. If one were to apply the reasoning outlined above, in the scenario of *Tempus Energy Case*, it should be considered that capacity mechanisms are not environmental in nature, therefore they should be assessed in their own right through the evaluation of their role, which is that of ensuring security of supply and of the energy system in general. However, given that environmental protection should be implemented in the Union's policies, non-environmental aid should also be assessed in light of environmental considerations. This is all the more true if the measure at stake has a direct effect on fields that have a key role in the pursuit of the objectives of the Green Deal, such as the energy market design. This should require the Commission to assess whether the measure ensures a degree of environmental protection that is compliant and proportionate with the objectives of the Green New Deal, thus ensuring that the capacity mechanism does not prevent or significantly harm the participation of DSR on the market, regardless of the non-environmental nature of the measure.

5.7. On the other hand, in this context a green bonus could instead be justified as an aid measure aimed at promoting and boosting the participation of DSR on the market, going beyond "*the normal practices*" which still significantly rely on energy generation, in view of the fact that, as held by Tempus in the judicial proceedings, "*the bigger DSR becomes, the smaller the need for a capacity market will become*".

6. CONCLUSIONS.

6.1. The Environmental Guidelines should be revised in light of a stricter understanding of the incentive effect, ensuring a higher standard of environmental protection. If a certain environmental objective can be achieved through a series of equally effective measures, not all of them would be deemed compatible with the internal market — only the ones capable of attaining the objective with the lowest potential impacts upon the environment. Therefore, a measure would not only need to just have an environmental benefit, but it should also need to avoid potentially causing significant harm to other environmentally relevant objectives and this could be prevented by using an equally effective measure.

6.2. Therefore, the eligibility criteria for green bonuses should identify — through the lens of the higher incentive effect standard as described above — activities capable of achieving an (*ex ante*) well defined environmental outcome, ensuring that the measure truly goes beyond "*normal practice*".

6.3. A significant turning point could be in the identification of a set of environmental protection standards and requirements implemented in the compliance assessment procedure also for non-environmental aid. An overall higher level of environmental protection in State aid Policy will ensure that the compliance of genuine environmental aid would not entail an excessive burden on applicants that are required to go "*beyond normal practice*", considering that also other operators would be subject to a certain standard of environmental protection.

6.4. In this framework, it would be fair to grant green bonuses only to those projects that, given the overarching obligation for State aid measures to raise to a certain standard of environmental protection, have an outcome that grants a further level of environmental benefit in respect to comparable projects which do not bring the same benefits, despite still ensuring a level of environmental protection consistent with the objectives of the Green Deal.

Prof. Andrea Biondi – Professor of EU Law and Director of CEL, King's College London.
Ms Vittoria Musardo – LLM in Environmetal Law, King's College London.

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