

Competition Policy supporting the Green Deal

CEE Bankwatch Network consultation input

Introduction

Article 3 of the TEU, Articles 7, 9 and 11 of the TFEU and Article 37 EU Charter of Fundamental Rights require the European Union, including its institutions, to pursue policies ensuring a high level of environmental protection. So far, the opportunities of this approach have not always been maximised in the case of State aid rules and decision-making practice. CEE Bankwatch Network therefore welcomes the European Commission's consultation on how better to align competition policy with the Green Deal. In line with our experience, we provide input below on current issues we see with State aid, in response to the Commission's questions.

Question 1. What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

Although the EU State aid rules do contain several provisions relating to environmental protection, Bankwatch would like to see improvements in State aid rules in several areas in order to ensure the proper implementation of the Green Deal. Some of these relate to the type of activities which should not be supported, while others relate to the need to ensure a joined up approach towards compliance with EU law.

1) An end to State aid for fossil fuels

The Green Deal emphasises the need to end subsidies for fossil fuels and the EU's aim to achieve climate neutrality by 2050. Both of these mean that State aid for fossil fuels has to stop. Currently there are a number of ways in which fossil fuels are still able to benefit from State aid, and these loopholes need to be closed.

- **Article 10(c) of the ETS Directive** still allows free allowances in the power sector under certain circumstances until 2030, and is being used by Bulgaria, Hungary and Romania. Yet in the case of Romania, even this measure did not prevent the government having to provide [Rescue and Restructuring Aid to the Oltenia Energy Complex](#) to buy the remainder of its ETS allowances. Free allowances in the power sector should be phased out much earlier than 2030.
- **Compensation for indirect emissions costs** under the ETS State aid Guidelines aim at addressing risks of carbon leakage for industries but they also exempt them from internalising their emissions costs and from shifting to cleaner energy supply – maintaining a market safety net for fossil fuels.

- **The Projects of Community Interest** Regulation is currently under revision but so far allows gas projects to receive large amounts of State aid, despite the EU's climate neutrality goal. Speculation about the potential use of such infrastructure for so-called "green gas" in the future cannot be an excuse to continue the lock-in to gas infrastructure, as it is highly unlikely that so much green gas will be available or economically viable. State aid decisions must be taken based on the current state of knowledge without overoptimistic speculation about potential future development, and must clearly exclude all fossil fuels.
- **Highly-efficient cogeneration** as defined in Annex II of the Energy Efficiency Directive has proven to be a loophole allowing State aid for fossil fuels as well as incineration of waste that is not only biodegradable and would therefore not qualify for renewable energy State aid (eg. [Sofia incinerator](#)). It is no longer acceptable to provide State aid for fossil fuels in any form, efficient or not.
- **Capacity mechanisms** often, by design, support fossil fuels "to a great extent", as the Commission itself stated about coal in its decision to authorise the Polish capacity mechanism. That capacity mechanisms have been supporting fossil fuels is acknowledged in the Fitness Check of State aid rules of 30 October 2020. The British, Italian and planned Belgian capacity mechanisms leave a large share of capacity contracts to gas, including new gas capacity with contracts as long as 15 years in some instances. Whilst the Commission seemed to want to balance security of supply objectives with the need to remove harmful environmental subsidies in paragraph 220 of the EEAG, this provision has not been enforced effectively to disfavour environmentally harmful subsidies - instead, technology-neutrality has been prioritised, which can result in environmentally less favourable outcomes.

All EU State aid guidelines or notices need to include an explicit note that aid for fossil fuels is not to be granted due to its incompatibility with the EU Green Deal and achieving carbon neutrality by 2050.

2) Stricter rules on State aid for biomass

Bankwatch's 2019 analysis of draft NECPs shows that Central and Eastern European (CEE) countries overall plan logging and the use of biomass above sustainable levels. Estonia cuts down 30% more forests than grow back for biomass use, while in Bulgaria 40% of households are inefficiently using wood for heating. Similar issues happen in Czechia and Poland where projected increase of biomass use will lead to imports of wood, and in Slovakia where logging grew by at least 75 per cent from 1990 to 2015 (6% loss of forest cover). This means both an increase in CO₂ emissions from biomass, and a decline in CO₂ storage by forests.¹

Regarding the sustainability criteria for biomass specified in Article 29 of the Renewable Energy Directive, it is crucial for the Commission to make sure that such criteria are both enforceable and properly enforced, which has not been the case so far in CEE. Enforcement of EU environmental legislation in CEE is decisive in order to implement the EU Green Deal objectives, as already shown by Bankwatch.²

1 <https://bankwatch.org/wp-content/uploads/2019/06/biomass3.pdf>

2 <https://bankwatch.org/cautionary-tales>

Moreover, even in cases where forest is regenerated, given the uncertainties and new evidence on greenhouse gas emissions from biomass combustion and the long period between cutting and regeneration, **we call on the Commission to re-examine whether forest biomass should be counted as renewable energy at all, and if so, under what conditions. State aid guidelines should therefore be adjusted accordingly.**

3) Compliance with EU legislation as a condition for State aid

Renewable energy

There is a need for more coherence between the EU environmental acquis, whose implementation is lagging in many countries, and the EU's provisions on support mechanisms, both in the Renewable Energy Directive (RED) and in EU State aid rules. While the EU's environmental acquis is in any case binding for renewable projects, support schemes still award support for projects which contravene the acquis. This particularly applies to hydropower. For example, the [EC in 2015 opened a case against Romania for failure to apply the environmental acquis to small hydropower plants](#), but there is no mechanism in place to ensure that the affected plants do not receive incentives. The recent [EC letter of formal notice to Croatia on inadequate application of the Habitats Directive in the case of wind farms](#) shows that this also applies to other renewables. **There is no systematic mechanism by which State aid for illegally permitted projects is halted or prevented, and this needs to be changed.**

The Energy and Environment Aid Guidelines contain a welcome provision that only hydropower compliant with the Water Framework Directive (WFD) may be supported through incentive schemes. However in reality, the exemptions in Art. 4 of the WFD are over-applied and endanger the achievement of the Directive's goals. As the EC's 5th WFD implementation report put it in February 2019:

"The exemptions foreseen in Article 4 of the WFD currently cover around half of Europe's water bodies. This mainly concerns natural water bodies, but increasingly also heavily modified and artificial water bodies, next to new physical modifications. Whilst the justifications for such exemptions have overall improved, their persistent wide use is an indicator of the significant efforts still needed to achieve good status or potential by 2027."

An examination of DG COMP's State aid decisions for incentive schemes shows that it does not look deeply into whether countries properly apply eg. Article 4(7). It appears to mainly rely on pledges from the countries themselves. While incentives for hydropower have declined in many EU Member States, they are still encouraging overdevelopment of small hydropower plants in some countries, particularly Italy, and also in the EU accession countries. This issue is seriously affecting public acceptance of renewable energy per se.

Just as Art. 3 of the RED rightly states that *"Member States shall grant no support for renewable energy produced from the incineration of waste if the separate collection obligations laid down in that Directive have not been complied with"*, it also needs to be clearly stipulated in the Directive, and in accompanying State aid rules, that no incentives for hydropower may be provided in countries which have not achieved the goals of the WFD, even for very small plants.

Likewise, in order to ensure joined-up legislation, and to make sure that renewable energy projects developed in breach of the EIA Directive, and Birds and Habitats Directives, do not receive

incentives, **EU State aid rules and the revised RED need to clearly state that any renewable projects or sectors subject to EC infringement procedures, ongoing investigations that may lead to infringement procedures, or national level court cases related to the above Directives may not receive incentive payments until the issue is resolved.**

This would be further strengthened by excluding hydropower from the current exceptions that allow small renewable plants to receive feed-in tariffs without auctions. Even the smallest hydropower plants must be subject to tendering and premiums, as it has proven in practice that providing feed-in tariffs incentivises overdevelopment of small plants, with high cumulative impacts and without the adequate application of the environmental acquis. An example of a very small plant causing damage in a Natura 2000 area is the [Dabrova Dolina hydropower plant](#) in Croatia, with an installed capacity of only 250 kW.

These issues should also be reflected in provisions affecting adjustments in State aid regimes. Adjustments based on environmental considerations must explicitly be allowed, for example in Article 6 of the RED on Stability of Financial Support. We agree with the need for predictable and stable support regimes, but it must be made clear that not only “adaptations necessary to comply with Articles 107 and 108 TFEU” are permitted grounds for revisions of support schemes, but also those necessary to ensure compliance with the EU environmental acquis.

As well as environmental acquis, it is important for State aid to be granted only to projects complying also with other EU rules. For example, [in 2019 the European Commission called on eight Member States to comply with EU concessions law regarding hydropower](#). Given the potential for lack of transparency in the award of concessions to lead to nepotism or corruption, projects whose concessions were awarded through non-compliant processes should not be allowed to be granted State aid.

Waste incineration

Art. 3 of the RED rightly states that *“Member States shall grant no support for renewable energy produced from the incineration of waste if the separate collection obligations laid down in that Directive have not been complied with”*, which is a welcome example of policy coherence. Yet we are unclear how this is being assessed, apart from asking the Member State.

For example [in the Sofia incinerator case](#) the EC in 2019 decided not to raise objections. The Decision included a section in which Bulgaria had assured the EC that *“Bulgaria confirmed that the project complies with the Directive 2008/98/EC on waste (“Waste Directive”) and in particular with the waste hierarchy set out therein. As stated by Bulgaria, the waste that will be subject to energy recovery in the CHP installation has been subject to preliminary treatment in the MBT facility in order to extract recyclable materials and cannot be further subject to recycling. If the RDF is not subject to energy recovery, it would be landfilled and this would be contrary to the waste hierarchy, which favours waste recovery over disposal. Finally, Bulgaria confirmed having introduced separate collection in line with the obligations applicable in accordance with the Waste Directive, and stated that the project will not prevent it from meeting the 2025, 2030 and 2035 targets for the recycling of municipal waste set out in the Waste Directive.”*

This explanation did not address the question of whether any separate collection had been applied to the waste before MBT treatment, which would have yielded more and better quality recyclables. Nor did it address the fact that Bulgaria was one of the countries that in 2018 received an [early](#)

[warning from the EC](#) about missing its 2020 recycling target, as it had a municipal waste recycling rate of only 32 % in 2016 - far from the required 50% by 2020.

While it is technically true that the Sofia incinerator alone will not singlehandedly prevent the country from meeting its targets, directing limited resources towards incineration instead of prevention and recycling increases the likelihood of failure to achieve them. By 2023, Bulgaria must separately collect biowaste, under the 2018 Waste Framework Directive, and no analysis was given of how this would affect the amount of RDF available. In fact, in our understanding of Article 3 of the RED, the State aid will actually have to be stopped in 2023 if Bulgaria does not fulfil its separate collection obligations.

State aid rules therefore need to stipulate how exactly to assess compliance with separate collection and recycling obligations - some of which may still be in the future at the time the aid is approved - and what should be done in the case of countries not complying with them.

Fossil fuels

There is still a disconnect between the general obligation for undertakings receiving State aid to comply with EU environmental rules, and the situation on the ground. The aforementioned [2020 Decision](#) by the EC not to raise objections on Romania's aid for the Oltenia Energy Complex, for example, does not examine the company's environmental compliance at all. Had it done so, it would reveal that Oltenia is subject to ongoing court cases regarding failure to properly carry out Environmental Impact Assessment procedures when expanding open-cast lignite mines. Withholding State aid for non-compliant companies would be a powerful incentive to speed up compliance.

For the Green Deal to become a reality, each and every State aid case needs to be examined by the EC taking into account both the target undertaking's compliance with the EU environmental acquis, and the national government's record in enforcing the acquis. **This requirement needs to be mainstreamed throughout the EU's State aid rules, not only in the Energy and Environment Guidelines.**

4) State aid within the Green Agenda for the Western Balkans and Energy Community Treaty

On 10 November Western Balkans leaders signed the [Sofia Declaration on the Green Agenda for the Western Balkans](#), thus bringing to life one of the Green Deal's action points. With this, they pledged to phase out subsidies for coal and adhere to EU State aid rules, as well as to adopt the EU Climate Law.

While this is very welcome, the countries have for years already had obligations to apply EU State aid rules under their Stabilisation and Association Agreements, and also - in the energy sector - under the Energy Community Treaty. Implementation and enforcement are sorely lacking and in practice the national State aid authorities are not functionally independent. Some lack structural independence, while others lack capacity, political will, or enforcement tools. The increasingly infamous case of the [Federal guarantee for a loan from China Exim Bank for the Tuzla 7 coal plant](#) in Bosnia and Herzegovina shows how brazen the authorities in the countries can be in their breach of the State aid rules.

The Green Deal includes the very welcome move to introduce a carbon border tax which could, if applied to the electricity sector, send a very strong message in favour of decarbonisation to the Western Balkans, but **this needs to be accompanied by stronger measures for the enforcement of**

EU State aid rules in the accession countries. One way to do this would be to introduce ex ante notification and investigation by the Energy Community Secretariat under the Energy Community Treaty, in order to address breaches before they occur, at least in the energy sector where the countries clearly count on participating in the EU market.

5) Access to justice and transparency of aid notifications

Civil society organisations cannot currently meaningfully participate in EC decision-making on State aid as they are often not aware that a measure is being analysed, and the EC is under no obligation to take their inputs into consideration.

The Commission's State aid register is currently updated only when the Commission makes a decision on a particular case, which is too late for the public to provide relevant inputs. Enabling the public to find out when an aid measure is planned by a Member State and investigated by the Commission would improve the transparency of aid, and would make the Commission's investigations more effective as it may receive relevant input from the public that could aid in decision-making. **The EC should therefore at least publish summary information about notifications by Member States on planned aid measures.**

Furthermore, CSOs cannot challenge EC decisions on State aid, even when there is a clear impact on the environment. In our opinion, this is not only in conflict with the Aarhus Convention's provisions on access to justice, but also limits the policy coherence of the Green Deal. **CSOs need to be explicitly given the status of interested parties under Article 1(h) of Procedural Regulation 2015/1589. This is particularly the case given that aid to an activity that breaches EU environmental law cannot be found compatible with the internal market,**³ and CSOs are often among the best informed organisations about potential breaches.

We welcome the EC's recent proposals to amend the Aarhus Regulation but note that this would still not cover State aid cases, which we consider unacceptable in terms of the Aarhus Convention, given that the Commission is accountable for checking that a beneficiary of aid complies with environmental laws (since aid to an activity that breaches environmental laws cannot be found compatible with the internal market) and more generally, the decisive role that State aid can play in environmentally harmful activities. However lack of access to justice is not only a legal issue, but an issue of the overall effectiveness of the Green Deal, as CSOs play a vital role in ensuring policy coherence and legal implementation. **Therefore the proposal needs to be revised to delete Article 2(2)(a) of the Aarhus Regulation, in order to bring the regulation in compliance with Article 9(3) of the Aarhus Convention.**

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

- a. **For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects?** (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

³ Judgement of 22 September 2020, *Austria v. Commission*, C-594/18 P.

Negative environmental impacts of infrastructure projects have two aspects:

Project-level compliance with EU environmental legislation such as the EIA Directive, Birds and Habitats Directives and the Water Framework Directive, so in this sense the project development is either compliant or not, although non-compliance may be formally established only at a late stage.

As mentioned above, a mechanism needs to be developed in all EU State aid guidelines and decisional practice that stipulates an automatic halt to State aid in cases where a project or sector is under formal investigation or has been established as non-compliant with EU environmental legislation.

We do not see much scope for a graded approach, as a project is either compliant or not. Halting aid for non-compliant projects or sectors is simpler for operating aid as it is generally disbursed continuously during a project's lifetime, even if the breach is established after construction, and can therefore be halted at any point. For this reason, a precautionary approach should be exercised regarding entire sectors for which breaches of EU environmental law are under investigation or have been established, for example in the case mentioned above of Croatia's failure to properly apply the Habitats Directive in wind farm development, or several countries' failure to properly apply the Article 4 exceptions from the Water Framework Directives.

For investment aid, potential beneficiaries of aid should be required to justify having conducted the environmental impact assessments (or equivalent) they are subject to prior to being granted any aid; if a breach of environmental law obligations is identified after the aid was granted, this should trigger recovery of aid and prohibition of future payments until the breach is remedied.

Policy incoherence. There are numerous types of investments which are not illegal but which do not contribute to the Green Deal. For example, investments in carbon-intensive projects such as gas pipelines, new motorways (particularly in the context of underinvestment in rail, such as in central and eastern Member States), and fossil fuel power plants make greenhouse gas emissions reductions targets harder to reach; waste incinerators make circular economy targets harder to reach by locking in financial and material resources; and hydropower plants and the use of forest biomass damage biodiversity.

EU legislation and State aid guidelines have started to better align policy objectives, for example the RED II's prohibition of support for waste-to-energy incineration if separate collection targets have not been met, and the requirement for hydropower projects to be WFD-compliant under the Energy and Environment Aid Guidelines. However as mentioned above, there are a number of loopholes which allow projects to receive State aid that are not in line with the EU's 2050 climate neutrality target, with the circular economy legislation, or with the EU's Biodiversity Strategy.

Clearly such EU policies should not be primarily regulated by State aid rules, but policy coherence requires that **projects that are not in line with the Green Deal objectives should not receive State aid at all, even if they are not in breach of the EU environmental acquis individually.**

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

- a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?***

Halting aid for environmentally unsustainable projects and sectors should be the key priority that would bring the EU significantly closer to its Green Deal objectives and steer resources in the right direction. However there may also be a case for specifically prioritising certain forms of environmentally beneficial projects beyond what is currently the case, particularly small-scale projects which may have difficulty in accessing financing.

- b. ***Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.***

Criteria for any green bonus should be defined in EU strategy documents developed as part of the Green Deal. However we are cautious about this approach because **all State aid needs to be aligned with the EU's Green Deal objectives**, so it is not clear how many types of projects would be "greener-than-green". They would need to substantially improve the state of the art and be expected to bring **significant** environmental benefits, not just to be relatively harmless. Among the few examples that springs to mind are renewable energy communities and self-consumption, because they encompass not only the aspect of increasing renewable energy, which other projects could also do, but also bringing specific benefits for people and small companies, while increasing public acceptability of renewable energy.

On the other hand, a green bonus would not be justified for regular renewable energy projects, or other sectors when the sustainability of an activity is not clearly determined. Sectors or projects would need to be subject to lifecycle assessments that demonstrate clear environmental benefits throughout their lifecycle, including regarding raw materials and disposal.

4. How should we define positive environmental benefits?

- a. ***Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?***

As the Regulations defining the EU taxonomy criteria have not been adopted yet, we would be able to have a final opinion only once the delegated acts have been approved. The Technical Expert Group's report containing climate adaptation and mitigation criteria for sustainable investment are so far the most comprehensive set of such criteria available, though some concerns remain regarding possible loopholes for gas. It is crucial that in solving one problem, investments do not create another, so they would **need to follow all the taxonomy's sustainability criteria** in order to ensure that they do no substantial harm, while bringing specific environmental benefits.