

# Luxembourg contribution to the public consultation of the revision of the guidelines (CEEAG)

## 1. Introduction

Luxembourg generally welcomes the draft guidelines, in particular the introduction of new aid measures for circular economy and clean mobility. Given the ambitious targets set on the national and European level, Luxembourg however believes that some modifications are necessary (see sections below).

As the European Commission (hereinafter the “Commission”) has pointed out during the multilateral meetings, the draft guidelines are complementary to the GBER revision. Luxembourg therefore regrets that the Commission hasn’t submitted in parallel the revision of the respective chapters of the GBER to the Member States.

## 2. General remarks:

- **Transparency:** Luxembourg joins other Member States in stressing the need to keep the transparency obligation at 500 000 euros as the administrative burden will be too high otherwise. In addition, a threshold of 100 000 euros is not in line with the *de minimis* regulation stating that aid measures below 200 000 euros over three years do not have any impact on trade and competition.
- **Widening the definition of “environmental protection”:** Luxembourg welcomes the increased scope of the draft guidelines. It remains however important to broaden the definition of environmental protection by allowing Member States to award aid (i) to companies planning to implement a resource efficiency measure, for example to reduce its water consumption (not clear whether this is covered by paragraph 192) and (ii) to companies where the environmental protection will not take place at the level of the beneficiary’s activities but on downstream activities of other companies.
- **Counterfactual analysis:** Luxembourg welcomes the clarification provided on how to apply the counterfactual in case of maintenance costs or early replacement. However, deducting a counterfactual scenario from the investment costs to determine the eligible

costs can be cumbersome and sometimes lacks legal certainty. To this end, Luxembourg suggests to set up a non-exhaustive catalogue of counterfactual scenarios on which case handlers can rely on.

- ***Undertaking in difficulty***: Even if the Commission plans on revising certain general criteria after 2021, it is important to stress that their revision is key for the effectiveness of the state aid rules, including the energy and environmental protection rules. Indeed, Luxembourg would invite the Commission to foresee a derogation of the undertaking in difficulty criterion for aid in relation to climate, renewable energy and environmental protection.
- ***Notion of undertaking***: Based on our recent experience and exchange with other Member States, many granting authorities have difficulties in determining the notion of “undertaking”. This is not only due to different terms being used in different regulations and communications, such as “undertaking, enterprise, business, company, single economic entity, single undertaking, beneficiary, etc.”, but also to incoherencies regarding the scope of these notions. When it comes to the SME analysis, partner undertakings are taken into account. Yet, when looking at the undertaking in difficulty criteria, one has to look at the single economic entity (including links via natural persons). The single undertaking notion from the *de minimis* regulation however ignores the natural person dimension (although case law of the EUCJ included them<sup>1</sup>). Last but not least, it is not always clear at what level one has to verify whether the conditions are fulfilled. For example, does one check the Deggendorf principle at the level of the aid applicant, the single undertaking or the single economic entity? The same goes, for instance, for the age limit for start-ups, which should not be higher than five years under the GBER.
- ***SME Definition***: Luxembourg stresses that it has already contributed to the public consultation on the SME definition (12 page paper) and that it is important that the DG Competition takes these considerations into account. The analysis of the SME definition puts immense administrative burden on the granting authority without guaranteeing a legal certainty, due to numerous doubts when it comes to its application.

## Decarbonisation of the economy:

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<sup>1</sup> C-222/04 Cassa di Risparmio di Firenze, in particular para. 112

- Luxembourg deeply regrets the establishment of a general category on greenhouse gas emission reductions (section 4.1) and calls the Commission to re-install dedicated sections for specific technologies, including renewable energy sources. The EU set itself ambitious targets for the deployment of renewables, translated into equally ambitious national contribution in Luxembourg. In this context, it is of utmost importance to ensure that adequate aid can be awarded to the sector. Diluting renewable energy sources into a general category related to decarbonisation puts at risk the achievement of these objectives. Furthermore, Luxembourg raises serious concerns around the general orientation of the document and the change in philosophy from a framework dedicated to promote energy efficiency and renewable energy sources towards a framework opening the door for fossil gas or nuclear energy. Paragraph 73 should mention all 2030 targets, including those related to energy efficiency and renewable energy sources. Exemptions foreseen in paragraph 83 should rather be the basic rule.
- Given the ambitious targets, Luxembourg believes that it is important that state aid is limited to renewable hydrogen. As a result, any reference to “low carbon technology” should be replaced by “renewable energy”.
- Public support should however have a neutral approach to other parts of the hydrogen value chain. Transport infrastructure, hydrogen consuming processes or R&D projects should for instance be allowed to benefit from public support. Where renewable hydrogen is not available or not competitive after support, the use of other sources of hydrogen could be supported for a limited period of time provided that the technology allows for a switch to renewable hydrogen as soon as it is available and competitive.
- Besides promoting the increased use of renewable hydrogen, Luxembourg stresses the importance of constructing cross-border infrastructure for pure hydrogen. To ensure a successful market development, State aid rules must be adapted to allow for investment in conversion and in the construction of both direct lines and public hydrogen networks. A top-up should be given to cross-border projects.
- In addition, Luxembourg invites the Commission to exclude state aid for fossil fuels in compliance with the objective of achieving climate neutrality by 2050. Paragraph 110 is not in line with this objective.
- Support to nuclear energy production should also be excluded. Luxembourg considers that nuclear is a neither safe nor sustainable technology.

### **Public consultation and competitive bidding:**

The obligation for public consultation will unnecessarily delay an already cumbersome process of setting up a new aid scheme. As Luxembourg, most Member States have already a consultation process in place imposed by its Constitution. Besides the informal exchange during the elaboration of the draft scheme, the legal framework in Luxembourg obliges the Government to ask a written opinion by the business chambers on the draft scheme before the Parliament takes a position. Even though this process generally takes place once the Commission has declared the future aid scheme compatible with the internal market, it should suffice to comply with the new obligation to put in place a public consultation. If the Commission believes that this is not sufficient, Luxembourg invites the Commission to consider that an independent market study by a third party, as already foreseen in section 4.3, point 171, of the draft guidelines and in article 36a of the MMF GBER regarding the new aid for recharging and refueling infrastructure, should be enough to demonstrate that an aid scheme is justified.

Furthermore, as acknowledged by the Commission, small Member States generally face a lack of potential supply. No obligation should thus exist for small countries to generalize the operating aid by implementing tendering processes as is currently the case for our operating aid schemes for renewable energy. The current exceptions to provide operating aid in form of feed-in tariffs or market premiums shall be kept for areas where there is a lack of competition. This will lead to higher investor certainty and ensure effective support when promoting all forms of renewable energies. Additionally, point 92, paragraph b, of the draft guidelines should define small projects with a minimum threshold of 1MW rather than 400kW (ii and iii). In other words, the existing thresholds should remain. This change is fundamental to allow Member States establish the enabling framework for self-consumption and citizen energy communities which they are bound to establish as provided by articles 20 and 21 of the renewable energy directive.

As regards the concept of technology-neutral tendering, Luxembourg joins other Member States in inviting the Commission to allow for technology specific competitive bidding. Especially for smaller Member States, such an approach would be more effective.

### **Energy performance:**

➤ **Section 4.1.:**

Luxembourg welcomes that chapter 4.2. (energy performance of *buildings*) clearly defines special rules for aid in the form of loans, endowments, equity or guarantees (de-risking) related to energy performance contracting (EPC) for ESCOs/EPCs.

However, Luxembourg strongly regrets that this possibility is not foreseen under section 4.1. The exchanges with industry representatives during the last years showed that major barriers for energy efficiency investments still exist. Those barriers may be related to insufficient return of investments, limited budgets to realize energy efficiency investments and lack of internal skills to realize and manage an energy-efficiency investment. In addition, energy efficiency investments are often qualified as non-core business investments, making the investment decision more complex and less important at the board level.

Luxembourg identified an added value in off-balance sheet treatment for industrial clients, translating into an opportunity for unlocking a large untapped energy efficiency potential. To this end, Luxembourg has signed an agreement with the European Investment Advisory Hub (EIH) for assistance with the structuration of an “Investment Platform” to promote a standardized process (“keep it simple for the client!”) and mobilize investments in energy efficiency in industries, SME’s and the building sector.

The “Investment Platform” will focus on ESCO market development activities, EPC de-risking tools, such as loans, guarantees, refinancing tools for ESCOs (forfeiting, factoring), off-balance sheet EPC under international accounting rules (IFRS) and others, where it is crucial that these different tools are compliant with the future EU state aid rules. As a result, Luxembourg strongly invites the Commission to extend this type of aid to industrial processes under section 4.1., similar to the one specified in the current draft of section 4.2. for buildings with the exception regarding the eligible ESCOs explained below.

Furthermore, Luxembourg pleads in favor of extending the possibility to award a state guarantee not only on a loan but also on a business transaction. Indeed, besides the financial issues that may arise with an energy efficiency project, several companies simply do not commit over a longer

period of time (eg. 10 years). Indeed, a company that would like to switch its industrial process from fossil fuel to hydrogen or oxygen, will ask a third company, specialized in the production and/or supply of such an energy source on site. The latter however does not undertake the substantial investment unless it has the guarantee that the industrial company will commit to buy the hydrogen/oxygen over the 10 year period. As a consequence, the project will not take place despite its enormous energy efficiency reduction potential. A state guarantee on such a transaction rather than a loan should thus also be allowed for by the new guidelines.

➤ **Section 4.2:**

As regards point 119, Luxembourg is against the proposed limitation to “SMEs and small mid-caps that are providers of energy performance improvement measures for the facilitation of energy performance contracting”.

The ESCO market in Luxembourg is currently very limited and the restricted scope to SMEs and small mid-caps would strongly hamper Luxembourg’s efforts to develop ESCO market activities as it limits the access to the Luxembourgish market for experienced players from other Member States and non-SMEs and non-small mid-caps already active in Luxembourg. First contacts with potential ESCOs in Luxembourg have shown that today, mainly non-SMEs and non-small mid-caps are interested in the Luxembourgish market.

**Circular economy:**

Luxembourg welcomes the introduction of the circular economy aid but regrets that **it** has a strong focus on recycling.

- ***Abolishing the notion of waste:*** Luxembourg suggests to change the definition of “waste” into “(secondary) resources” to stress the economic value of those items.
- ***Promoting increased use of services:*** A new type of aid should be introduced to incentivize companies to change their business model towards a more circular economy. Instead of simply selling certain goods, companies should offer services, helping to prolong the economic value of our limited resources.

- ***Operational changes:*** Companies moving towards circular business models will have to make changes at an operational level inside the company. Implementing new standards, generating, managing and providing new data or reorganizing production lines are a few examples of such changes that will come at a certain cost. In order to incentivize companies to engage in this internal transformation, state aid should be allowed.
- ***Top-up bonus:*** To help Member States make the transition and incentivize companies to adapt their projects in order to be in line with a circular economy, Luxembourg suggests to introduce a top-up to all types of aid foreseen in the guidelines and the upcoming GBER revision.

### Environmental studies

- Luxembourg welcomes the clarification under section 4.12. that a study must not necessarily be followed up by a project foreseen in the guidelines in order to be eligible for aid. Nonetheless, Luxembourg is of the opinion that any study which may help the company to identify new ways to reduce its impact on the environment should be eligible for aid. In such a case, the aid intensity should be higher than the normal “consultancy aid” foreseen for SMEs.