

Revision of the State Aid Guidelines for Environmental Protection and Energy and exemption rules

Making the EEAG and GBER fit for Europe's
carbon neutrality

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Acronyms

| | |
|-----------------|--|
| CCS / CCU | Carbon Capture and Storage / Carbon Capture and Usage |
| CEC | Citizen Energy Community |
| CEP | Clean Energy Package for All Europeans |
| CHP | Combined Heat and Power |
| CJEU | Court of Justice of the European Union |
| CRM | Capacity Remuneration Mechanism |
| EEAG | State Aid Guidelines for Environmental Protection and Energy |
| EED | Energy Efficiency Directive (EU) 2018/2002 |
| EE1st principle | Energy Efficiency First Principle |
| EIU | Energy Intensive User |
| EMD | Electricity Market Directive (EU) 2019/944 |
| EMR | Electricity Market Regulation (EU) 2019/943 |
| EU | European Union |
| GBER | General Block Exemption Regulation |
| PPA | Power Purchase Agreement |
| REC | Renewable Energy Community |
| REDII | Renewable Energy Directive (EU) 2018/2001 |
| RES | Renewable Energy Sources |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| WFD | Waste Framework Directive 2008/98/EC |
| ZEEV | Zero Emission Electric Vehicles |

For several years, ClientEarth has been advocating for State aid rules to align with environment and climate protection objectives that are now contained in the Green Deal and for an effective internalisation of pollution costs.¹

We welcome the Commission's ambition to revise the EEAG and GBER to align them with recent legislation and policies including the Green Deal², which must drive and frame in particular (but not only) environmental protection and energy aid measures. This is a matter of fundamental rights and of consistency and coherence of the Union's and its member states' actions.

Whilst ClientEarth generally finds that the consultation is covering a large range of topics, some of which technical, it also has some gaps and lacks clarity, on which we comment in dedicated sections below:

- **Capacity mechanisms and energy communities are not mentioned**, even though revising relevant State aid rules (on resource adequacy measures and on support for RES) is required in light of the EMR and REDII – as mentioned in the Fitness Check Report of 30 October 2020;
- **Clean (renewable) and low-carbon hydrogen are not treated distinctly**, which suggests that they should be (by the respondents) and could be (by the Commission) assessed in the same manner. This cannot be the case, based on the recognised different environmental impacts and sustainability of these two types of hydrogen - that are well differentiated in the EU Hydrogen Strategy.
- **The direction of travel for reductions for electro-intensive users (EIUs) is unclear**: whilst the Fitness Check Report pointed to the lack of evidence, and doubts, that such reductions were really needed, effective to prevent carbon leakage and increase public acceptance of RES support schemes, the roadmap and consultation (questions 130 *et seq.*) suggest that such reductions could be maintained and aligned on the regime of compensation for indirect emissions costs in the ETS State Aid Guidelines post-2021. Not only is this incoherent with the findings (or lack of evidence found) in the Fitness Check, but this would prolong schemes that have proved detrimental to reducing energy consumption and increased energy costs of smaller consumers.

This Annex first makes general recommendations relating to making the EEAG true instruments of sustainability and environmental protection while preventing market distortions. It also addresses several questions in the consultation that require more elaborated comments.

¹ We understand that the ongoing consultation is not replacing, but shall complement the one organised in 2019, building on the findings of the Fitness Check of October 2020. We therefore refer to [our previous observations and proposals of July 2019](#), in addition to the present ones.

² *Inter alia* legislation stemming from the Clean Energy for all Europeans Package, the European Green Deal and Sustainable Investment Plan, the objective to reduce greenhouse gas emissions by at least 55% by 2030 and to reach climate-neutrality by 2050 and the Zero Pollution Action Plan.

1 General recommendations

The EEAG are perceived by many as a burden and obstacle to the deployment of effective decarbonisation measures, be it because of the dogma of technology-neutral tenders, difficulties for citizen-led projects to participate, or lack of clarity of rules on energy efficiency measures. This makes some Member States and undertakings to wish to extract fiscal measures from the scope of State aid rules as a whole.³ It does not need to be the case if the rules are clear and enabling - which does not mean weakened. Conversely, the EEAG have facilitated support to clearly unsustainable sectors such as CHP, fossil fuels, small hydropower and forest biomass.

This can be prevented in future by **transforming the EEAG into sustainability aid guidelines**. This would entail: performing effective control of the compliance of activities with their legal obligations, especially under relevant environmental and energy laws⁴; and integrating an assessment of sustainability of those activities (including their alignment with the 2030 and 2050 targets); and thus rejection of aid measures that harm the achievement of the objectives (or more generally, environmental protection). Consequently, **only activities that are sustainable and that directly contribute to the achievement of the 2030 and 2050 targets and Green Deal objectives can be found compatible with the internal market which, we recall, shall pursue the Union's objectives of sustainable development in its three economic, social and environmental dimensions.**

Lastly, the EEAG are also perceived as incomplete or partly outdated as decarbonisation solutions evolve and the need to prevent and mitigate climate change is more pressing than ever. This can be remedied by, on the one hand, including assessment rules on innovative sustainable decarbonisation technologies or environmental protection methods, as well as on climate mitigation measures; and, on the other hand, providing for clear and strong principles that would guide Member States in designing more innovative aid measures that may not be specifically mentioned in the guidelines but would be enabled nonetheless. **It is only at all those conditions that the EEAG can be truly future-proof.**

1.1 Transform the EEAG into true instruments of environmental protection

ClientEarth calls for a rethinking of State aid policy and rules on the basis of the principles and direction of travel of the Green Deal.⁵ There is a need for mainstreaming environmental and climate protection objectives, that are part of EU's constitutional principles, in member states' decisions to grant aid, and in the Commission's control thereof. As demonstrated extensively in a previous report⁶, State aid policy should be entirely consistent with, and actively support Article 37 EU Charter of Fundamental Rights and Article 11 TFEU (integration of environmental protection principles into Union's policies), Article 3(3) TEU

³ In this respect, we welcome the guiding templates released by the Commission on 21 December 2020 for aid granted under the Recovery and Resilience Facility, which usefully recall instances when a measure may not qualify as State aid or need not be notified.

⁴ See judgement of 22 September 2020, *Austria v. Commission*, C-594/18 P, ECLI:EU:C:2020:742

⁵ See developments in our contribution to the Commission's call on [how competition policy can support the Green Deal](#) of 20 November 2020.

⁶ See our analysis in our joint [Report on A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law](#).

(act towards sustainable development) and Article 9 TFEU (high level of protection of human health).⁷
Explicit references to these Treaty provisions in the preamble of the EEAG is recommended.

As the Commission is well aware⁸, systematically controlling that activities (in all sectors) benefitting from (any type of) **aid comply with all their environmental law obligations is a basic prerequisite** for ensuring that aid measures contribute to environmental protection. Although this applies to any compatibility assessment under Article 107(3) TFEU, the EEAG would be the ideal place for providing for the first time in guidelines, **as a general rule**, that *“aid, granted individually or pursuant to a scheme, to an activity [or undertaking] that does not comply with all its EU environmental law obligations cannot be found compatible with the internal market. When notifying an aid measure or scheme, Member States must provide all relevant justification of compliance of the potential beneficiaries with their EU environmental law obligations. Breach of EU environmental law by the beneficiary after aid was granted will constitute a misuse of aid.”*⁹ Such general rule would also eliminate the risk of insufficient assessments associated with partial lists of environmental legislation such as the Water Framework Directive and the Waste Framework Directive in paragraphs (117) and (118) EEAG; even if relevant, these are far from being the only frameworks applicable to waste or hydropower projects¹⁰ and do not address other projects. A similar provision should be included by reference to energy legislation, for aid in the energy sector.¹¹

A second prerequisite is to **eliminate aid for harmful activities**.¹² As ClientEarth repeatedly advocates, an increased environmental protection and efforts to combat climate change require both support to those measures that have the potential to protect the environment and to **end public support to polluting and harmful activities**. Not only is it the only logical solution from an environmental protection perspective, it is also the most rational and **cost-effective** use of public funds. The Green Deal, this consultation as well as other consultations on environmental policy, still only focus on enabling more aid for less-polluting activities. For instance, in the consultation on the EU Action Plan Towards a Zero Pollution Ambition for

⁷ As the roadmap on the revision of the EEAG merely referred to impacts on Article 37 CFR, we would like to add that State aid rules on environmental protection engage not only the Union’s (and, when they are applying them, Member States’) obligations under Article 37 (environmental protection), but also, given the human health impacts of pollution, climate change and the nature crisis, under Article 2 (right to life), Article 7 (right to respect for private and family life), Article 24 (the rights of the child), and Article 35 (health care – including the requirement to ensure a high level of human health protection). State aid rules also have implications for citizens’ rights to receive and impart information (Article 11). It goes without saying that, as a result, the right to an effective remedy (Article 47) is also affected, particularly in relation to the way citizens can or cannot challenge State aid rules that threaten our rights. The Commission has committed in its Strategy to strengthen the application of the Charter of Fundamental Rights in the EU⁷ to ensuring Member States spend EU funds in accordance with the Charter. This obligation – which stems from Article 51(1) of the Charter (*“The provisions of this Charter are addressed to... the Member States only when they are implementing Union law”*) – applies equally to how Member States spend funds which fall within the ambit of State aid rules. In such cases, Member States are necessarily implementing Union law, making the Charter (including the articles mentioned above) applicable. The Commission must, in order to fulfil its own obligations under the Charter, help Member States ensure that design their schemes in a way that respects the Charter.

⁸ Judgement in C-594/18 P, *Austria v. Commission*, 22 September 2020, ECLI:EU:C:2020:742, para. 44-45 and 100

⁹ The Code of Best Practices for the conduct of State aid control procedures could also be amended (in accordance with its para. 93) in both sections relating to information to be provided by Member States and monitoring of aid, to indicate what type of information would be required by which Member States, whom of granting authorities or the Commission should identify all relevant EU environmental law obligations applying to the activity etc.

¹⁰ The Habitats Directive (and in particular its article 6.4) is just one example of legislation of particular importance for the assessment of hydropower projects, given their harmful impacts on natural habitats.

¹¹ This is particularly important for compliance with the Energy Efficiency First principle, support for renewable energy sources, energy efficiency measures, energy infrastructure, energy systems and resource adequacy measures.

¹² We refer to pages 20-26 of our contribution to the call on how competition policy can support the Green Deal for a developed reasoning, examples and recommendations in the field of energy (coal, gas, production and infrastructure), electro-intensive users, fisheries, petrochemicals and plastics.

air, water and soil¹³, the Commission asks whether "*Financial incentives to address pollution (e.g. taxes and subsidies favouring less-polluting activities by industry and consumers)*" would be one effective way to tackle pollution. This question does not clearly propose to phase-out public support for polluting activities as a necessary condition to reduce pollution. Similarly, maintaining free emissions allowances and indirect cost compensation under the ETS Directive and the ETS State aid guidelines without effective conditionality dis-incentivises the eligible industries - that generally have polluting production processes and are intensive energy consumers – to align their practices with energy and climate-neutrality targets.

Concretely, for the EEAG to become an effective instrument for controlling that aid contributes to environmental protection, the EEAG should:

- (i) provide that "***aid to fossil fuels, be it for electricity or heat generation or for any other purpose, will not be considered compatible with the internal market as investments in those sectors are not in line with the European Green Deal objectives, nor with the target to reduce greenhouse gas emissions by at least 55% by 2030 provided in the European Climate Law.***"
- (ii) require an **environmental impact assessment of aid measures**, whereby notifying Member States demonstrate that there are no less-harmful alternative activities to support and if such is not the case, condition the grant of aid to the alignment of the activities with the Green Deal objectives and binding energy and climate targets for 2030 and 2050.

1.2 Place aid in the energy sector under the overarching EE1st principle

The EE1st principle is one key pillar of the Energy Union, aiming to ensure secure, sustainable, competitive and affordable energy supply in the EU.¹⁴ The Commission recognised it as a horizontal guiding principle of European climate and energy governance and beyond, to ensure we only produce the energy we really need.¹⁵ It must be, as per the Governance of the Energy Union Regulation, driving the EU institutions' decisions and legislation as well as Member States' energy planning, policy and investment decisions (notably for energy security, energy infrastructure and market integration decisions).¹⁶ In the same vein, the European Climate Law, in the version adopted by the European Parliament on 8 October 2020, places the EE1st principle as a mandatory criterion to be taken into account by the Commission when revising the trajectory to achieve climate neutrality by 2050.¹⁷ The Energy System Integration Strategy released in July 2020 also insists on applying the EE1st principle consistently across the whole energy system.¹⁸

¹³ Consultation on the [EU Action Plan Towards a Zero Pollution Ambition for air, water and soil](#). In this respect, we remind the Commission of its intention to align the EEAG with this new policy and we call for a high level of ambition in both the Zero Pollution action plan and the EEAG to make Member States shift aid support to only those activities that have the least harmful impact.

¹⁴ See [Factsheet on energy efficiency](#).

¹⁵ As outlined in the European Green Deal, the EU strategy on Energy System Integration, and the EU Renovation Wave. See Communication from the Commission, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, COM/2020/662 final

¹⁶ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1–77, recital (64) and Article 2(18)

¹⁷ Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD))(1), Article 3.

¹⁸ Communication from the Commission, Powering a climate-neutral economy: An EU Strategy for Energy System Integration, COM(2020) 299 final, page 5.

The EU is likely to meet its 2020 energy efficiency target only because of the covid-19 pandemic¹⁹ and risks not reaching the 2030 target in the context of the proposed new climate ambition of the EU. The proper and systematic implementation of the EE1st principle is necessary to reduce that gap.

As the revision of the State aid framework should reflect the new provisions of the CEP and the objectives of the Green Deal and provide a fully updated enabling framework for a cost-effective deployment of clean energy, the EEAG should contribute to strengthen this principle and its full implementation by Member States and the EU institutions.

Member States must therefore consider, before taking energy planning, policy and investment decisions, (including State aid schemes) whether cost-efficient, technically, economically and environmentally sound alternative energy efficiency and/or demand-response measures could replace in whole or in part the envisaged measures, whilst still achieving the objectives of the respective decisions. This includes, in particular, the treatment of energy efficiency and demand-response as a key consideration in future investment decisions on energy infrastructure and in decisions on measures to ensure security of supply. Such cost-efficient alternatives include measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy.

Member States should also clearly demonstrate the reasons why cost-efficient, technically, economically and environmentally sound alternative energy efficiency measures cannot be expected to replace in whole or in part the envisaged measure, by taking account of on-going market and technology developments.

ClientEarth therefore recommends that:

- (i) the **EEAG define in the recitals and in the core paragraphs what the EE1st principle implies for Member States** in terms of comparison between alternative energy measures and obligations to justify why energy efficiency and demand response measures cannot apply;
- (ii) The **EE1st principle be used as a priority baseline** for assessing whether a measure in the energy sector is necessary, in particular aid measures for resource adequacy and energy infrastructure.

1.3 Making the EEAG future-proof

The inception impact assessment suggests that the revised EEAG could adopt a structure “*around broader policy objectives, such as environmental protection (including climate neutrality and other Green Deal objectives), security of supply and the prevention of relocation risk due to energy related charges, making scope for further technological and market innovations.*”

Firstly, **environmental protection (including climate neutrality and the Green Deal objectives) must not be a separate pillar but must overarch the whole EEAG including its sections on energy and prevention of carbon leakage.**

Indeed, rules for aid in the energy sector must not be disconnected but rather fully consider the environmental impact of energy (re)sources. This is notably the case when revising rules for support to CHP, biomass, hydropower or security of supply. For the latter in particular, the deployment of clean resources such as RES, energy efficiency, storage and demand response, do and will increasingly contribute to security of supply. Conversely, security of supply must be ensured in priority by clean resources so as not to undermine the achievement of the 2030 and 2050 climate targets. In this respect,

¹⁹ Communication from the Commission, Stepping up Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, COM/2020/562 final

the Fitness Check found that the EEAG have not been able to limit aid to fossil fuels in measures aiming at ensuring security of supply e.g. resource adequacy measures (capacity mechanisms) or energy infrastructure (e.g. for fossil gas).

In addition, the Green Deal objectives also contain social objectives and the principle to put citizens at the centre of the transition, which is in clear contrast with maintaining a regime of reductions for electro-intensive users (at least the current one).

Secondly, for the EEAG to effectively “contribute to a recovery strategy for the European economy that meets the important green and digital twin transitions in line with EU and national objectives.”²⁰, they need to be “future-proof”. As technology, loss of biodiversity and climate change evolve fast, overarching and strong principles must be provided rather than addressing each and every technology or form of aid in separate sections. “Further technological and market innovations” do need to be addressed specifically to the extent they are foreseeable but the rules in the guidelines must allow new developments arising in the next 5 or 6 years that were not necessarily anticipated. **Being “future-proof” also means not facilitating support to those technologies that are not sustainable and not in line with the 2030 and 2050 targets** (such as coal and fossil gas combustion and infrastructure).

2 Response to the Questionnaire

2.1 Comments on the introduction

The reference to an effectiveness criteria in the introduction of the consultation is not usual. In the inception impact assessment, the Commission refers to effectiveness in connection with controlling trade and competition distortions and ensuring that the aid is well-directed where it is needed (e.g. no greenwashing).²¹

Although it is unclear whether this would be a new assessment criterion (and whether the one of appropriateness would be kept), we see it as an opportunity to require Member States to **justify the expected impact of their measures** to meet decarbonisation and/or environmental targets. If the aid does not appear to have been effective to meet the target after a given time, the scheme would need to stop or be amended. For implementing this criterion, monitoring of progress will be needed; it could be based on the quantified approach of environmental costs protection suggested by the Commission under questions 65-69 – for which we nevertheless express several reservations. This criterion could ensure that aid measures are well-directed and greenwashing avoided.

As to the Fitness Check Report findings, the need to **broaden the scope of the EEAG** to make them more future proof (point a) requires them to direct aid measures to achieve environmental protection, the EE1st principle and the Green Deal objectives. As confirmed by the report, the compatibility rules on environmental protection are currently not well suited to face the 2050 climate neutrality objective (point b). For instance, allowing State aid to low carbon hydrogen will not help in making the EEAG more consistent with this target. We refer here to the sections by technology below.

²⁰ Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C/2020/3156, §15.

²¹ Inception impact assessment, Revision of the Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), point B, page 2

Moreover, we agree with the finding of the Fitness Check Report (point b) on **incompatible assessment rules**. It clearly stems from the case law that the Commission does not consider decarbonisation and/or environmental objectives in its decisions, the security of supply objective often pursued in the energy sector having become sort of a ticking box (especially for PCI projects). The recent CJEU ruling in *Austria v. Commission*²² will allow the Commission to rethink its assessment of national schemes and we hope that it will increase environmental protection as required by the Treaties.

2.2 Question 23: should aid be allowed for the following areas?

2.2.1 Renewable electricity

General remarks

According to the Fitness Check Report, the EEAG would have been effective for the deployment of RES at lower costs in Europe, in particular for wind and solar. Although there is an overall decline in prices for renewables, not all renewable electricity technology have seen the same reduction in prices²³, which also depend on the country.²⁴ Given the urgent need to reduce GHG emissions by at least 55% by 2030, there will be a significant need for renewable electricity production, for both energy supply and the production of clean hydrogen as anticipated by the Hydrogen Strategy.²⁵ ClientEarth thus recommends that the new EEAG **maintain the presumptions** in para. 115 and 116 that support to RES is necessary in light of market failures, is appropriate and creates only limited distortive effects on competition.

Whilst solar and wind power developed particularly well under the EEAG 2014-2020 (with some operators placing “zero bids”²⁶), continuing to support RES technologies would allow for less-developed technologies (such as geothermal, thermal solar, or floating wind turbines) to reach market competitiveness faster. This would unlock the benefits of diversifying RES, i.e. reducing their overall environmental impacts if included in hybrid plants (i.e. by sharing sites, reducing land occupation, or by sharing grid connection, which would defer new grid development²⁷), and mitigating the power variability of intermittent technologies.²⁸ Moreover, maintaining support to renewable energy, while also fostering energy efficiency, will also allow harnessing the synergies between the two that are key for climate change mitigation.²⁹

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

²³ The Fitness Check Report states that “prices paid per unit of renewable energy vary significantly depending on the different types of technology, some of which can cost as twice as much”. See Commission Staff Working Document of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, PART 3/4, page 85.

²⁴ For example, in France, Germany, Poland and Slovenia bioenergy was the most expensive technology, while in the Netherlands and Greece it was solar and in Denmark it was wind. See Retrospective evaluation support study on State aid rules for environmental protection and energy, “EEAG external study”, p. 50.

²⁵ This is without prejudice of ClientEarth’s position on the level of hydrogen that is actually necessary in the energy mix in future.

²⁶ Nevertheless, it does not imply that these RES operators are not otherwise supported. The Fitness Check Report (p. 85) notes that some benefit from subsidisation of their cost of connection to the grid.

²⁷ These benefits have already been clearly identified for solar-wind hybrid plants: Wind Europe, Renewable Hybrid Power Plant – Exploring the benefits and market opportunities, July 2019.

²⁸ G. R.G. Hoste et al, Matching Hourly and Peak Demand by Combinig Different Renewable Energy Sources – A case study for California in 2020, Stanford University.

²⁹ International Renewable Energy Agency, Synergies between renewable energy and energy efficiency, A working paper based on remap 2030, August 2015.

The principle of support by feed-in premiums (either fixed or floating, or contracts for difference) seems generally adequate and is supported by the REDII, according to which “*support schemes for renewable electricity shall be designed so as to maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues*” (we underline).³⁰ This does not preclude designing specific rules for particular operators such as energy communities, as detailed below.

This must however not be at the expense of the participation of smaller operators who have a tremendous role to play in the energy transition. Feed-in tariffs for small-scale operators should thus also be maintained. Besides energy communities, we highlight the increasing role of prosumers: the CEP has put consumers at the centre of energy systems and created new opportunities for them to participate in the markets, also they should also be duly considered in the EEAG and benefit from a favourable aid regime.

Conversely, not all energy sources that qualify as RES under REDII should be supported due to their harmful environmental effects, such as forest biomass and small hydropower plants.

Biomass

The current EU energy and State aid frameworks qualify biomass as a renewable and carbon-neutral energy source, which even the biomass industry itself challenges.³¹ Under the EEAG, biomass can benefit from a more favourable regime than other RES, since aid can be granted after depreciation of the plant.³² Biomass power plants (even when co-fired by fossil fuels!) can receive additional investment aid for the installation of CCS equipment which, as detailed below in the section on CCS, needs to stop.³³ Certain categories of smaller aid to biomass may also be exempted from notification requirement under the GBER and the ABER.³⁴

This lenient approach towards biomass has clearly helped its significant deployment in the EU in the past years.³⁵ Biomass is today the most important source of renewable energy in the EU, with **forests being the main feedstock**.³⁶

This however **conflicts** with the EU climate and energy targets and the 2050 climate neutrality objective. The EU State aid framework (as well as the EU energy policy framework as a whole) does not take into account the **external environmental costs of biomass**. The biomass sustainability criteria in REDII are not sufficiently protective of the environment, as they do not consider the full carbon lifecycle nor the limited supply of truly-sustainable feedstock.³⁷ Scientific evidence shows that burning forest biomass leads to greenhouse gas emissions – in addition to deforestation – which contributes to increasing global

³⁰ Article 4 §3 of the Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

³¹ Climate Home News, “Not all biomass is carbon neutral, industry admits as EU reviews policy”.

³² See EEAG, para.129 and 132 and seq.

³³ See EEAG, para. 164.

³⁴ See e.g. ABER, Article 41

³⁵ Between 2005 and 2017, the use of wood and other solid biomass for heat and electricity in the EU28 increased by 43% from 66.2 Mtoe (Million tonnes of oil equivalent) to 94.4 Mtoe. See Linde Zuidema, “State Aid for solid biomass: the case for improved scrutiny”, EUI working paper, LAW 2020/13 Department of Law

³⁶ European Commission, Brief on biomass for energy in the European Union.

³⁷ In addition, the applicability of these criteria is limited to installations with a total rated thermal input equal to or exceeding 20 MW in the case of solid biomass fuels, and with a total rated thermal input equal to or exceeding 2 MW in the case of gaseous biomass fuels (Article 29(1)(c) of REDII). See M. S. Booth, B. Mitchell, “Why the EU’s RED II biomass sustainability criteria fail forests and the climate”, 2020.

temperature and climate change.³⁸ Worse, there is evidence that carbon emissions per unit of electricity generated from forest biomass are higher than from coal.³⁹ Additionally, the increased demand for biomass drives biodiversity degradation worldwide⁴⁰ and has been linked with illegal logging within the EU.⁴¹ Moreover, burning wood also creates significant air pollution and emission of fine particles (i.e. NO_x, PM₁₀, PM_{2.5} and VOC) particularly toxic for human health.⁴² Finally, biomass creates **market distortions**, since aid granted to biomass are not used for the development of cleaner renewable alternatives more able to achieve decarbonisation in the long term.⁴³

Moreover, there is a high risk of widespread conversion of coal plants to fire biomass.⁴⁴ Such conversions, as well as new large-scale biomass projects, typically rely on State aid.

Although we appreciate that the Commission is currently seeking to introduce sustainability criteria for bioenergy in the revision of REDII, we insist that the EEAG should take a negative approach on public support to biomass, in particular on forest biomass, by:

- (i) **finding aid to forest biomass incompatible** with the internal market for not being consistent with the Green Deal objective and legal climate targets the Union and Member States are bound by; at the very least;
- (ii) **removing the favourable regime for biomass** under para. 132-134 EEAG, including the objective to “*preserve the use of biomass*” (para. 132);
- (iii) **restricting aid to conversions from coal to biomass plants** and operation of biomass installations;
- (iv) controlling external costs (i.e. greenhouse gas emissions) and potential distortive market effects of support to biomass in light of the 2050 climate neutrality objective;
- (v) increasing monitoring of the various supports to biomass based on different instruments to avoid distortion on the renewable energy market.

The prohibition of operating and investment **aid to food-based biofuels** must be maintained for environmental and climate purposes, but also as a matter of compliance with the REDII.⁴⁵

³⁸ Duncan Brack, Chatham House, *Woody Biomass for Power and Heat: Impacts on the Global Climate*, 2017; and Serman, et al., *Does Replacing Coal with Wood Lower CO₂ Emissions? Dynamic Lifecycle Analysis of Wood Bioenergy* (2018). See also an article on “*When will the biomass bubble burst?*”.

³⁹ European Academies Science Advisory Council “*Commentary on Forest Bioenergy and Carbon Neutrality*”, June 2018; Duncan Brack, Chatham House, *Woody Biomass for Power and Heat: Impacts on the Global Climate*, 2017.

⁴⁰ Cary Institute of Ecosystem Studies, *Wood pellets: Renewable, but not carbon neutral: Turning forests into fuel comes at an environmental cost*, 2018.

⁴¹ Environmental Investigation Agency, *Stealing the last forest: Austria’s largest timber company, land rights, and corruption in Romania*, 2015.

⁴² Capizzi, Das, et al. (2019). Renewable energy in Europe – 2019, recent growth and knock-on effects. (European Topic Centre on Climate Change Mitigation and Energy, 2019/8)

⁴³ Linde Zuidema, State Aid for solid biomass: the case for improved scrutiny, EUI working paper, Department of Law, LAW 2020/13

⁴⁴ This is also because biomass is not in the scope of the ETS and thus has become more attractive than coal.

⁴⁵ EEAG, para. 113

Hydropower

The EEAG prescribe that environmentally harmful subsidies must be phased out. Since ClientEarth expects (and recommends) that this principle be reinforced in the revised EEAG with a view to make it truly operational, the regime of aid to hydropower must be revised. Hydropower has impacts not only on habitats and species⁴⁶ but also on population and health through human displacement and resettlement; restrictions of the right to access to water and/or land; effects on water quality and ultimately on health; employment patterns; impairment of property rights and so on.⁴⁷

In addition, small hydropower plants (like other renewable small installations) benefit from the small-scale installations thresholds under para. 125 and 127 EEAG. These exemptions have fuelled the development of micro-hydropower plants, which have a poor cost-benefit and funding efficiency and contribute insignificantly to energy production and security of supply, but lead to even more fragmentation of European rivers. It is precisely because of the risk of fragmentation of rivers that the Technical Expert Group on Sustainable Finance recommends to avoid the construction of hydropower projects below 10MW.⁴⁸

More generally, although the EEAG currently prescribe that hydropower projects shall be compliant with the Water Framework Directive, which is clearly relevant but not the only environmental legal framework applying to those projects. Compliance with Article 6.4 Habitats Directive (for projects that have a proven impact on the water status and habitats and species), *inter alia*, is also directly relevant. As recommended above, the EEAG should rather include a general provision according to which an activity that breaches any of its environmental law obligations is not eligible to aid.

Hence, we recommend to:

- (i) find **any aid to small hydropower plants incompatible** with the internal market since their contribution to the decarbonisation objective is negligible compared to the important damages created to the environment and the people⁴⁹;
- (ii) require the **mandatory compliance of hydropower plants** projects with all relevant environmental and technical standards and provisions including **the Habitats Directive**; and
- (iii) when they are compliant, to only allow **investment aid for improving the level of environmental protection and/or technical efficiencies of existing hydropower plants** under the EEAG.

Should the Commission decide not to exclude all aid to small hydropower projects – which again, are not cost-effective solutions to decarbonise energy markets or enhance security of supply, in addition to their

⁴⁶ Due to river fragmentation, severe modification of river flow and temperature regimes, and dramatic reductions in sediment transport.

⁴⁷For instance, small plants are usually derivation-type plants, involving rivers and streams being dammed and put into pipes to increase the water velocity and therefore the efficiency of the plant. However, this can severely impact access to and quality of water for local people in remote areas, whilst deforestation for the construction of access roads and pipelines can lead to erosions and impact access to land and disrupt kilometres after kilometres of river banks. These are only examples of negative effects. See also for a detailed analysis, [Policy Guidelines by the Energy Community Secretariat on small hydropower projects in the Energy Community PG 02/2020 / 17 September 2020.](#)

⁴⁸ [Technical annex to the TEG final report on the EU taxonomy](#), p. 465

⁴⁹ Some Energy Community countries such as Bosnia and Herzegovina will cease granting feed-in tariffs as of January 2021, and Montenegro is planning to reassess concessions and aid support for small hydropower projects for these reasons. For more on this, please consult press articles on [Bosnia Herzegovina](#) and [Montenegro](#).

harmful environmental impacts – it should at least have a special consideration to abuses. We refer to our reply to question 129 in this respect.

2.2.2 Renewable and low carbon hydrogen production

Conflation of low-carbon and renewable hydrogen

Despite major differences between the two forms of energy production, the questions in the consultation regarding whether low-carbon and clean (renewable) hydrogen should receive aid, or under what conditions, only allows a collective response (without distinguishing between the two). These two types of hydrogen use different fuels and technologies, have different emissions profiles, and should have different applications and timelines of use (as low-carbon hydrogen is presented as, and should at most be, a transitional solution in the Hydrogen Strategy). They should thus be treated separately.

Incompatibility of low-carbon hydrogen with the Union's climate targets and commitments

The EEAG are an important framework to ensure that any energy developments in Europe align with the EU's decarbonisation agenda. The EU Hydrogen Strategy released in July 2020 presents the revision of the EEAG as an “*opportunity to create a comprehensive enabling framework to advance the European Green Deal and in particular decarbonisation, including with respect to hydrogen*”.⁵⁰ The Commission also announced significant financial support for both renewable and low-carbon hydrogen⁵¹ and some projects may be granted State aid and EU funds under the revised TEN-E Regulation⁵² and in accordance with the revised IPCEI Communication.⁵³

Allowing State aid to fossil gas-based hydrogen would however be inconsistent with the Paris Agreement, the 2050-climate neutrality objective, or the pledge of “do not harm” set out in the Green Deal. Fossil gas-based hydrogen production emits large volumes of carbon dioxide. In addition, commercially viable carbon capture and storage for hydrogen is very unlikely to be available at scale until the 2030s.⁵⁴

Whilst the Commission is considering the introduction of certificates of guarantees of origins to support low-carbon hydrogen, it is still unclear whether such schemes efficiently attracted significant investments in the renewable energy sector.⁵⁵

⁵⁰ Communication from the Commission, A hydrogen strategy for a climate-neutral Europe, COM(2020) 301 final

⁵¹ The Commission announced amounts reaching respectively 180 to 400 billion EUR and 3 to 18 billion EUR. *Ibid*, p. 2

⁵² Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824.

⁵³ See ClientEarth's [reply to the roadmap on the revision of the IPCEI Communication, 21 December 2020](#).

⁵⁴ See Friends of the Earth's report “[The Role of hydrogen in our low-carbon transition](#)” and the Global Witness report “[Why blue hydrogen is fossil fuel industry greenwash and won't fix the climate](#)”.

⁵⁵ See e.g. Jaap Jansen, “Does the EU renewable energy sector still need a guarantees of origin market?”, Policy insights, No 2017-27, July 2017, page 5; Ákos Hamburger, “Is guarantee of origin really an effective energy policy tool in Europe? A critical approach”, Society and Economy; December 2019, 41(4):487-507.

Member States also have legitimate concerns about greenwashing risks, whereby producers could connect an electrolyser to the electricity grid while purchasing fossil-fuel-based electricity from the local grid and buy renewable guarantees of origin to sell “low-carbon” hydrogen on the market.⁵⁶

Even if all new hydrogen investment is contingent on legally binding CCS requirements (it should be as a minimum requirement), low-carbon hydrogen derived from fossil gas would not be low in emissions. Independent studies of the fossil gas sector show that large amounts of methane leak and are vented and flared throughout the gas lifecycle. While the EU has indicated an intention to improve methane regulation, there are currently no binding performance standards for this sector.

Issues with renewable hydrogen production

Although clean (renewable) hydrogen is a promising solution for sectors and activities that are not easy to decarbonise in the short term (e.g. cement, steel, shipping and aviation) and as a renewable energy carrier, it presents notable inefficiencies⁵⁷ and high costs when compared to direct (renewables-based) electrification. At this stage, the future availability at scale of renewable hydrogen is not guaranteed. By overestimating the potential future volume of renewable hydrogen and investing in hydrogen infrastructure while not investing in renewable energy capacity at the same time, there would not be sufficient RES capacity and the door would be wide open for the continued use of fossil gas to make low-carbon hydrogen. In any event, reaching the Hydrogen Strategy objectives⁵⁸ will require significant additional renewable energy production capacity dedicated only to hydrogen. This is why some Member States are calling for “additionality” in the renewable hydrogen production whereby renewable hydrogen is only produced “*when the average of renewable electricity on the national grid is above a baseline or when renewable electricity production exceeds demand*”.⁵⁹ In this respect, we are *not* recommending to have a regime of support for RES dedicated to hydrogen production that would be separate and more favourable than the general regime of support for RES for electricity production. This would distort the level playing field and would not be justified by any higher objective.

Necessary requirements for aid to hydrogen to be compatible with the internal market

In light of the above, we call on the Commission to:

- (i) control that Member States duly prioritise efficiency measures, in compliance with the **Energy Efficiency First Principle**⁶⁰;
- (ii) **exclude any direct or indirect support to hydrogen that is not fully renewable**. Indeed, given the financial and environmental risks of commercialising and scaling non-renewable hydrogen, the latter should not be subsidised with public money. Such support would redirect

⁵⁶ See “Additionality in renewable hydrogen production”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published)

⁵⁷ For instance, regarding the role of hydrogen to provide long-term buffer storage i.e. converting electricity through electrolysis into hydrogen and then hydrogen back into electricity (so called round-trip), this would come with a loss of around 60% of the original electricity. See IEA, The Future of Hydrogen, June 2019, p. 158

⁵⁸ 40 GW of renewable hydrogen electrolysers by 2030.

⁵⁹ See “Additionality in renewable hydrogen production”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published)

⁶⁰ We refer to our developments introduction.

aid towards fossil-based energy and create lock-in effects of gas, whereas support could be granted to the deployment of renewable energy capacity and technology;

- (iii) require that any direct or indirect support to renewable hydrogen be based on an **assessment of projected demand and supply**, and allocated based on **priority sectors** such as chemicals and steel for which other cleaner alternatives such as electrification and energy efficiency measures are not currently available;
- (iv) in the regrettable event that direct or indirect support to non-renewable hydrogen would nevertheless be allowed, such should only be a last resort measure and make **contingent on requirements** for projects to limit their adverse effect on the EU's climate and energy targets:
 - a. Use CCS technologies to ensure overall carbon dioxide emissions of the beneficiary are limited taking into account the EU and national greenhouse emission reduction objectives as well as the 2050 objective of climate neutrality⁶¹;
 - b. Where hydrogen is to be produced from fossil gas, ensure lifecycle methane emissions for gas do not exceed 3% of gas extracted at the wellhead⁶², or, if the EU has introduced methane performance standards or import standards which are in line with the 2050 carbon neutrality objective, ensure the fossil gas complies with those standards;
 - c. Set a binding date for the project to fully transition to renewable hydrogen.

We are of the view that it is for the Commission to assess the compliance of the measure with those criteria.

2.2.3 Alternative transport fuel (other than hydrogen)

The current REDII framework sets a target for the use of renewable energy sources in transport and sets a specific target for advanced biofuels produced from feedstock listed in Annex IX REDII. Because they are supported by regulatory measures, aid is not needed for advanced biofuels.

Operating and investment aid for food based biofuels should not be authorised beyond 2020 as originally foreseen. Indeed, food based biofuels do not represent a solution to decarbonise transport on the basis of their direct and indirect impacts, such as deforestation, greenhouse gas emissions and biodiversity loss.

2.2.4 Combined Heat and Power (CHP)

The promotion of high efficient CHP – also called cogeneration – is clearly encouraged by the Energy and State aid frameworks. The EED promotes the development of high-efficiency cogeneration, regardless of the energy source, in particular with “any available support” in compliance with State aid rules.⁶³ Energy production from cogeneration contributes to the EU and national energy efficiency targets.⁶⁴ Cogeneration

⁶¹ A way to implement this would be to ensure overall carbon dioxide emissions are capped.

⁶² On the assessment of a 3% cap, see the following articles: Renew Economy, [IEEFA says burning LNG “worse than coal” for climate](#) ; PNAS, [Greater focus needed on methane leakage from natural gas infrastructure.](#) and <https://www.pnas.org/content/pnas/109/17/6435.full.pdf>.

⁶³ Energy Efficiency Directive, Article 14 para. 11.

⁶⁴ In their annual monitoring report to assess their progress toward EE target, MS shall analyse various indicators including electricity and heat generation from CHP. See Article 24 para. 1 of the Energy Efficiency Directive.

is also indirectly supported by the Renewable Energy Directive since energy from biomass can be taken into account for achieving the EU and national renewable targets under certain conditions.⁶⁵

As for the State aid perspective, the GBER states that to reach the EU energy efficiency target, “*measures supporting energy efficiency, high-efficiency cogeneration as well as energy efficient district heating and cooling should be covered by the block exemption.*”⁶⁶ Investment aid for high-efficiency cogeneration falls within the scope of GBER⁶⁷, while the EEAG allows operating aid for high energy efficient CHP.⁶⁸

This approach towards CHP, which is linked to the EED, is clearly outdated and not consistent with the new climate ambition of the EU. Indeed, it supports high efficient CHP irrespective of the type of fuels fired. However, CHP is mainly a fossil fuel based technology which must thus cease to be supported for the Union to achieve its pledge to phase out fossil fuel subsidies and more broadly, to eliminate environmentally harmful subsidies. In addition of this currently favourable State aid framework, CHP plants still receive other benefits e.g. in the form of free allocation of emission allowances under the EU Emissions Trading Scheme, creating significant competitive advantage to CHP over renewable heat generation.

On the other hand, conversion from coal CHP plants to biomass is not a sustainable solution either; wood biomass – *a fortiori* sustainable forest biomass - is a scarce resource that is sorely needed for capturing carbon emission⁶⁹ (see our section on biomass above).

Furthermore, although the State aid regime for CHP is based on the definition of high-efficient CHP set in the EED, some studies demonstrate that high efficient CHP **are not in practice as efficient as they should be**. For instance, CHP plants in Germany are only around 12% more efficient than plants with separate energy generation without even considering grid losses which amount to around 10%⁷⁰. The calculation method of efficiency in the Energy Efficiency Directive is also highly questionable.⁷¹ The legal requirement for receiving aid to large CHP plants is to save 10% of primary energy compared to the separate production of electricity and heat⁷². However, the choice of comparative plants to assess this energy saving is not adequate and technically obsolete⁷³. No efficiency minimum requirement applies to small CHP⁷⁴, which means that any “primary energy savings” qualify them as highly efficient and alternative energy production that emits less carbon is also not considered.

⁶⁵ Provided that it fulfils sustainability and GHG emission saving criteria. Other specific criteria apply on electricity from biomass fuels. See Article 29 of the Renewable Energy Directive.

⁶⁶ GBER, para. 58.

⁶⁷ GBER, Article 40.

⁶⁸ EEAG, para. 51.

⁶⁹ See section under biomass.

⁷⁰ See the reports from Prognos AG, Fraunhofer IFAM, Öko-Institut e.V, BHKW-Consult “Evaluierung der Kraft-wärme-Kopplung, Analysen zur Entwicklung der Kraft-WärmeKopplung in einem Energiesystem mit hohem Anteil erneuerbarer Energien”, 25 April 2019; DPG, “Energie Forschung und Perspektiven”, Prognos AG, Fraunhofer IFAM, Öko-Institut e.V, BHKW-Consult, 25 April 2019; DPG, “Energie Forschung und Perspektiven”, March 2016.

⁷¹ *Ibidem*.

⁷² See EED, Annex II.

⁷³ E.g. as a comparison for separate electricity generation, a gas-fired power plant with an electrical efficiency of 53% is stipulated, although gas and steam power plant technology with electrical efficiencies of at least 60% has been state of the art for years. The heat pump, which has been well established for years, is not mentioned as a comparative system for separate heat generation (not even in the new edition for 2016 and subsequent years).

See for further details: Gerhard Luther, Wärmepumpe oder KWK – was passt zur Wärmewende?, pp. 123 and seq.; See also Commission Delegated Regulation (EU) 2015/2402 of 12 October 2015 reviewing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2012/27/EU of the European Parliament and of the Council and repealing Commission Implementing Decision 2011/877/EU, Annex I

⁷⁴ See EED, Annex II.

For these reasons, ClientEarth calls on the Commission to:

- (i) **remove the regime of aid to high efficient CHP** as defined in the EED⁷⁵ since this technology uses either fossil fuels or scarce raw materials and its high efficient nature is disputable in practice;
- (ii) remove Article 40 GBER and require that all aid to cogeneration be notified under the EEAG;
- (iii) allow **State aid to renewable heat technologies only**, with the exception of those using forest biomass.⁷⁶

2.2.5 Renewable heating

The EEAG and the GBER should better support renewable heat technologies with the exception of those using forest biomass.⁷⁷ Because of their reliance on natural energy (i.e. heat produced comes from the sun, the air and the ground) and not on fossil fuels, they are sustainable and have great potential for decarbonising our energy system. Renewable heating technologies are thus more environmental friendly and flexible than CHP, whose general operation usually depends on the production of heat because of the coupling of heat and power production. To leverage investments in such technologies and encourage industry and households to use them, the State aid framework must **provide for a scheme on renewable heating technologies that is more competitive than the one granted to fossil fuel-based technology** such as CHP plants, which must be anyway phased out. We recall that only technologies relying on heat from the sun, the air, or extracted from the ground such as heat pumps, solar thermal system, geothermal heating, must be supported – to the exception of biomass and particularly forest biomass.

2.2.6 District heating/cooling

Current district heating and cooling systems mainly generate heat from fossil fuels. As the Commission clearly stated in its opening decision on so-called upgrades of district heating networks with coal-fired and gas-fired boilers in Poland, such systems are inefficient, pollute heavily and lock in fossil fuels. Hence supporting these goes “against any environmental protection objective”.⁷⁸ **The EEAG should state that the incompatibility of aid for fossil fuels extends to district heating/cooling relying on these fuels.** Moreover, the EEAG and the GBER should set an enabling framework for their upgrading or the creation of new systems to use renewable energy sources only, with the exception of forest biomass⁷⁹ and biofuels.

Should the Commission decide to adopt more flexible rules to allow state aid to non-efficient district heating *networks* as suggested in the Sustainable Europe Investment Plan, this should (i) not be allowed under the GBER⁸⁰ and (ii) only be for an actual modernisation of networks (or the creation of a network when there is none), available only once for a relevant geographical area or network zone and be accompanied

⁷⁵ The definition provided for in the EED must be reviewed within the ongoing EED revision in particular to address the issues exposed above (e.g. improving comparison methodology to define what is high-efficiency, adding efficiency minimum requirement for small CHP, etc)

⁷⁶ We refer to our developments under the biomass section.

⁷⁷ We refer to our developments under the biomass section.

⁷⁸ Commission decision of 25 October 2019 on State Aid SA.51987 (2018/N) – District heating network – Tarnobrzeg; SA.52084 (2018/N) – District heating network – Ropczyce; SA.52238 (2018/N) – District heating network – Lesko; SA.54236 (2019/N) – District heating network – Dębica; and SA.55273 (2019/N) – District heating network – Ustrzyki Dolne

⁷⁹ We refer to our developments under the biomass section.

⁸⁰ The Commission’s Recovery and Resilience Facility Guiding template: District heating/cooling generation and distribution infrastructure, para. 49 suggest that the GBER already allows “staggered” investment in district heating networks that are not energy efficient if the upgrade to an efficient system is made within three years – which is not currently explicitly allowed under Article 46 GBER. Given that investing in non-efficient district heating systems is not ambitious enough to meet the Union’s energy and climate targets, the Commission should retain full control and the competence to authorise such aid measures.

by clear, binding and measurable commitments by Member States to undertake the appropriate modernisation to an efficient system at the earliest possible and with an adequate completion date.

2.2.7 Energy efficiency in buildings

Energy efficiency is certainly the most cost-efficient way to achieve carbon neutrality, but also the only target that will be failed at EU level by 2020 (omitting the particular effects of the COVID-19 pandemic⁸¹). The EEAG should be reviewed to provide the best conditions for attracting private investment in this sector, which is key for the energy transition together with the promotion of renewable energy production. This is particularly true in the context of the Renovation Wave Strategy which notably calls for doubling annual energy renovation rates in the next ten years.⁸²

Both the EEAG and the GBER lay down regimes for operating and investment aid for energy-efficiency measures, but these did not lead to the investments required to tap the savings potentials, in particular in the building sector. We therefore advocate for an **increase in aid intensity for energy efficiency measures including in buildings** to (at least) the same level as those provided for aid to renewable energies under the EEAG, i.e. 65% for small enterprises, 55% for medium-sized enterprises and 45% for large enterprises, or 100% for all when the aid is allocated pursuant to a bidding process.

While Article 39 of the GBER specifically provides investment aid to energy efficiency in buildings through financial instruments, the Fitness Check Report concludes that it was little used by Member States because of its complexity.⁸³ For example, the methodology to assess eligible costs is not suitable for complex ownership and contracting models including professional landlords, commercial real estate owners and Energy Service Companies (ESCO). This is due to funding ceilings (total sums and/or percentage) and because only “additional costs” are eligible, while private homeowners get funding based on total costs of project.⁸⁴ It is also our understanding that the financial instruments listed in para. 4 of Article 39 do not represent the full scope of financial instruments suitable for all the different energy efficiency projects in buildings. **The list may therefore need to be broadened** so as to enhance the possibilities of developing energy efficiency schemes and not preclude opportunities of using innovative business models for building renovations. We thus recommend that the Commission draws the conclusions from this by **clarifying Article 39 of GBER itself and by providing guidance** to Member States and sharing best practices on how to interpret and implement it in a very practical way.

Finally, ClientEarth **welcomes the clarification in the Commission’s guiding template on energy efficiency in buildings**, under the Recovery and Resilience Facility, that “*When the building is used for*

⁸¹ Commission Report from 14 October 2020, 2020 assessment of the progress made by Member States towards the implementation of the Energy Efficiency Directive 2012/27/EU and towards the deployment of nearly zero energy buildings and cost-optimal minimum energy performance requirements in the EU in accordance with the Energy Performance of Buildings Directive 2010/31/EU, p. 2: “*The partial and preliminary data for 2020 indicate that the impact of the COVID-19 crisis has significantly affected energy demand. As a result, the 2020 energy efficiency targets may be met even though there were **insufficient measures in place before the crisis**. However, this is expected to be **a temporary situation**, because the reduction of energy consumption **has not been driven by structural measures**. Without targeted climate-measures, **the economic recovery is likely bring energy consumption back towards pre-COVID-19 crisis levels**.”; and p. 12: “*The level of energy-saving effort made in 2018, when not considering the impacts of COVID-19, would most likely **not be enough to reach the 2020 targets**.*”*

⁸² Communication, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, COM/2020/662 final

⁸³ Commission Staff Working Document, Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, PART 1/4, page 66

⁸⁴ We refer here to the recommendations for the revision of State Aid rules in order to boost energy efficiency building renovation from the European Alliance to Save Energy.

*non-economic activities, the integration of renewable electricity or heat generation and related storage on-site the building will also remain non-economic (and thus out of the scope of State aid rules)” if the installation is used and has been dimensioned for self-consumption, still allowing “the possibility to sell up to maximum 20% of the production to the grid or a third party”.*⁸⁵ The flexibility to sell a percentage of self-production without falling under the notion of an economic activity, is already a helpful encouragement for energy prosumers that could be further exploited to enhance decentralised renewable energy production.

2.2.8 (Solid) Waste recycling

According to the Fitness Check Report, the EEAG and the GBER would have been overall effective in allowing aid *“to foster sustainable and smart growth in re-use and recycling of waste while avoiding disproportionate distortions of competition”*.⁸⁶ However, some Member States seem to have faced issues in understanding the scope of Article 47 of the GBER and the definition of eligible costs under this article. As a consequence, this article has not been used sufficiently. Member States would be more likely to grant *de minimis* aid instead with then *“more fragile projects being implemented; rejection of projects related to own waste while they could in fact have been covered by 36 GBER of which the granting authorities were not always aware”*.⁸⁷ The Fitness Check Report further states that aid intensity of 35% might have been too low for the development of certain projects. The provisions on aid to waste treatment activities would be slightly easier to implement than compatibility conditions for aid for recycling, which goes against the waste hierarchy core principle of the WFD.

Given the above, we are of the view that:

- (i) the Commission should **clarify the scope of Article 47 of the GBER** together with the definition of eligible costs under this article;
- (ii) The provision that aid to waste recovery operations other than preparing for re-use and recycling shall not be covered by the GBER is very important. Any capacity increase in the thermal treatment of residual waste shall be in line with the Waste Framework Directive principles and objectives. Existing overcapacities in neighbouring countries should be considered before approving any new capacity. The Commission’s Communication on the role of waste-to energy in the circular economy has clearly recognised the threat of aid conflicting with the circular economy objectives: *“Public funding should also avoid creating overcapacity for non-recyclable waste treatment such as incinerators. In this respect it should be borne in mind that mixed waste as a feedstock for waste-to-energy processes is expected to fall as a result of separate collection obligations and more ambitious EU recycling targets. For these reasons, Member States are advised to gradually phase-out public support for the recovery of energy from mixed waste.”*⁸⁸ This suggests that **new aid for incineration with or without energy recovery should be avoided** and it should certainly not be exempted under the GBER;

⁸⁵ Commission’s Recovery and Resilience Facility Guiding template: District heating/cooling generation and distribution infrastructure, para. 16.

⁸⁶ Commission Staff Working Document, Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, PART 1/4, page 94

⁸⁷ *Ibidem*, page 95

⁸⁸ Communication from the Commission, The role of waste-to-energy in the circular economy, COM/2017/034 final, 26 January 2017

- (iii) The **waste-to-energy provisions in the EEAG also need to be complemented** by the new provisions from the REDII and Waste Framework Directive amendments. In particular, the wording of Article 3 para. 3 REDII – that prohibits support to incineration of waste if separate collection obligations are not complied with – is stronger than that in the EEAG and needs to be introduced also into the next guidelines. Since it enters force on 30 June 2021, all assessments made before this date also need to take this requirement into account.

Article 22 Directive (EU) 2018/851 of 30 May 2018 amending the WFD states: “1. Member States shall ensure that, by 31 December 2023 and subject to Article 10(2) and (3), bio-waste is either separated and recycled at source, or is collected separately and is not mixed with other types of waste.” This needs to be introduced also into the updated EEAG, but since this cannot be implemented overnight, all assessments made before this date also need to take this requirement into account.

2.2.9 Waste heat

Although the recovery and valorisation of waste heat has great sustainable energy saving potential, it is not sufficiently supported by the current State aid framework.

The assessment of waste heat recovery cases would also not always fit easily in the categories of the EEAG.

ClientEarth therefore recommends that **aid to waste heat be explicitly allowed under the State aid framework** in strict compliance with the waste hierarchy principle set out in the WFD and our call for the prohibition of any types of direct or indirect aids to fossil based technology such as CHP plants

2.2.10 Low/zero emission road vehicles and charging infrastructures

The EEAG (para. 54) give a legal basis to aid for the acquisition of new vehicles that were meeting Union standards, or for retrofitting schemes for vehicles not meeting new Union standards. A number of Member States have supported the renewal of public transport fleets by electric vehicles under the pursuit of the objective of reducing carbon emissions. Those schemes, as well as the ones for deploying charging infrastructure have systematically been authorised by the Commission – and rightly so because they pursue a clear environmental objective, are necessary for the transition to a zero emission transport system and provide a range of associated health, environmental and economic benefits. The need for ZEEV (that should be prioritised over low-emissions vehicles) and charging infrastructures has rapidly grown. The Green Deal sets an objective of reaching about 1 million public recharging and refuelling stations for the 13 million zero- and low-emission vehicles expected on European roads by 2025. The deployment of zero and low-emissions vehicles and charging stations are a priority under the Recovery and Resilience Facility. In this respect, ClientEarth generally welcomes the guiding templates (in both their release and content) relating to zero-and low-emissions vehicles and charging infrastructures released by the Commission on 21 December 2020.

When State aid rules apply⁸⁹, the baseline for compatibility of aid for the purchase of zero- or low-emissions vehicles shall remain that the supported vehicles purchases **increase the level of environmental protection** in comparison with the Union standards.⁹⁰ ClientEarth welcomes the Commission’s suggestion that aid intensities can be increased by an “eco-bonus” in relation to aid granted under the Recovery and Resilience Facility, but the **type and level of such “eco-bonus” would need to be clarified** in the GBER and EEAG, if different from the existing “eco-innovation bonus”.⁹¹ We also support **including aid for publicly accessible infrastructure** for zero- and low-emission vehicles in the EEAG, which would give clarity on the applicable regime, since these are most in need of deployment with State support.⁹² Lastly, we recommend that aid relating zero-and low-emissions vehicles and charging stations exclusively fall under a **unique section** in the GBER and EEAG, in order to rationalise them (rather than using either the EEAG, Risk Finance Guidelines, Regional Aid Guidelines etc.).

In addition, ClientEarth advocates for the following, to be put in priority in the GBER and, beyond high thresholds if any, in the EEAG⁹³:

- (i) **Aid to electric bicycles and cargo bicycles as well as the renewal of public transport fleets to lower-emissions vehicles should be explicitly enabled, and prioritised, under the EEAG and the GBER.** They indeed contribute to limiting the number of vehicles on the road and have lower costs compared to a motor vehicle; they therefore contribute to the triple objective of decarbonising transportation, increasing people’s well-being⁹⁴ (in cities particularly) and making the transition socially acceptable for Union citizens.
- (ii) **Investment aid to support SMEs who are developing innovative technologies for a zero emission transport system.** Significantly increase funding available to organisations who are developing innovative technologies that will be part of a zero emission transport system, in particular small and micro businesses.
- (iii) With regard to **aid to charging infrastructure**:
 - a. **more explicit rules**, and particularly **sufficient aid intensity** to help **financing the installation of charging points in residential** condominiums and workplaces.
 - b. an ubiquitous, interoperable and convenient coverage of public charging infrastructure along highways and suburban/urban roads, with a focus on areas not served by the market i.e. with lower utilization rates. **Incentivising gas stations operators** along motorways to install charging points could also be necessary, albeit playing on the concessions tenders scoring and concession contracts requirements is also a possibility for new concessions.
- (iv) **Aid to scrappage schemes allowing the acquisition of ZEEV.** Although European Automobile Manufacturers' Association and car lobby groups across Europe are calling for scrappage to be linked to new diesel vehicles, there are still remaining issues arising from

⁸⁹ They have a marginal role to play in this field, as well-indicated by the Commission’s Recovery and Resilience Facility Guiding template: District heating/cooling generation and distribution infrastructure, paras. 11-28 and Guiding template: Electric recharging stations and hydrogen stations for road vehicles, paras. 8-40.

⁹⁰ Commission’s Recovery and Resilience Facility, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles, para. 46.

⁹¹ Commission’s Recovery and Resilience Facility, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles, para. 46(v).

⁹² Guiding template: Electric recharging stations and hydrogen stations for road vehicles, para. 61

⁹³ To the extent these measures constitute State aid.

⁹⁴ This includes health benefits such as noise reduction and physical exercise, in addition to reduction of air pollution; and increased road safety due to reduction of traffic.

diesel vehicles emissions.⁹⁵ **Only scrappage schemes that allow the purchase of ZEEV** are consistent with the net-zero objective, the taking into account of environmental protection in EU policies and people's right to breathe clean air. Eligibility of the vehicles shall be **based on the best and cleanest technology available on the market** and shall be defined dynamically as technology and emissions standards evolve. This would also drive innovation from car manufacturers.

- (v) A more enabling regime for **aid to ZEEV acquisition and retrofitting by increasing aid intensities**.⁹⁶

2.2.11 Carbon Capture and Storage (CCS) and Carbon Capture and Use (CCU)

CCS can contribute to climate mitigation in limited and specific situations. With its long history of big promises and meagre results⁹⁷, the implementation of CCS requires a cautious and selective approach for a number of reasons: it is expensive due to high deployment and energy costs (highly energy intensive process), it only partly captures CO₂ (around 85%) and does not capture other air pollutants, the geological sequestration of CO₂ is not without environmental risks (leakage), CO₂ is emitted during the transport of the captured CO₂ (for instance when CO₂ is transported by ships), etc.⁹⁸

Hence, at the outset, public resources should primarily be allocated to measures that result in less CO₂ being produced and emitted. State aid for certain CCS projects could be contrary to the precautionary principle and the polluter pays principle set out in article 191(2)TFEU. Indeed, aid to support CCS projects of fossil fuel and biomass power plants should no longer be considered eligible for State aid (para. 164 EEAG). For electricity generation, the focus should lie on supporting the deployment of renewables, instead of giving the wrong incentives to fossil fuel and biomass plants by subsidizing CCS projects. However, for hard to abate industries with unavoidable CO₂ emissions such as agriculture and the cement industry, CCS projects can constitute a valid decarbonisation solution.

In addition, aid for CCS projects should in principle be **investment aid** (para. 163 EEAG). The principle that operating aid is normally not compatible with the internal market should apply for CCS projects.

The current EEAG envisage **CCS projects as integrated projects eligible for State aid**, whereas a distinction could be made between the capture, transport and storage stages since alternative business models with disaggregated value chains exist. In particular, CO₂ transport, especially by ship, is likely to be subject to competitive market conditions, making aid to shipping unnecessary.

Furthermore, the Commission **should not presume that aid for CCS addresses a residual market failure** (para. 162 EEAG). As CCS can be applied in a diverse range of quickly evolving industries with increasing environmental norms, it should be on the notifying Member State to demonstrate the existence

⁹⁵ These are related to conformity factors, diesel particle filters (DPFs) Transport & Environment research in Jan 2020 shows DPFs have to be cleaned regularly ('regenerated') which causes diesel vehicles to 'spill out' large amounts of pollution roughly every 480km, deteriorating Efficiency over time, particulate Matter (PM) from Internal Combustion Engine Vehicles (ICEVs) vs. EVs. Studies looking at the PM reduction from regenerative braking in EVs vs ICEVs put the figure between 50%-95%.

⁹⁶ At national level, governments could require a programme of mandatory vehicle recall, retrofit, upgrade. This programme would work best if targeted at those on low incomes and small to medium enterprises (SMEs), and would ensure that older, more polluting vehicles are cleaned up by the manufacturers. It could also target specialised Heavy Duty Vehicles, where retrofit could be more cost-effective than buying a replacement, e.g. refuse vehicles. This would support the creation of new technologies and an upskilling programme.

⁹⁷ Although the CCS technology has been around for decades, the [Global CCS Institute reports in August 2020](#) that there are only 21 operating commercial CCS facilities worldwide with a total capacity of 40Mtpa CO₂, three more are in construction, 16 are in advanced development and approximately another 20 are in early development.

⁹⁸ Friends of the Earth, [Carbon Capture and Storage Briefing](#) and [The role of hydrogen in our low-carbon transition](#).

of concrete market failures making aid necessary. Indeed, the industry recognizes that CCS failed to live up to its potential so far, but states that new CCS projects are different as the business models have shifted away from single emission sources to industrial clusters linked to CCS hubs (and calls for an adaptation of the EEAG in this respect); arguably allowing a better spread of risks and investment as well as economies of scale.⁹⁹ This business shift in combination with an expected rising carbon price over the coming years, would increase the commercial and competitive scale up of CCS and thus would reduce market failures.

Finally, in the event the Commission decides to address CCU in the revised EEAG, the definition of “environmental protection” needs to be adapted to make undertakings eligible for aid when providing a service to another undertaking while not realizing an environmental effect by its own activities (e.g. CCU with CO₂ captured from an industry and used in a greenhouse). Also, the eligibility of CCU should refer to life-cycle emissions criteria to ensure that state funded CCU projects contribute to CO₂ emission reductions and not only circularity.

2.2.12 Energy storage

Energy storage technologies such as batteries will be increasingly needed in the future to face intermittency issues coming from the growing deployment of RES and will contribute to security of supply. They are key for the European Green Deal goals, the Zero Pollution ambition and will be necessary for low and zero emissions transport. The Fitness Check Report mentions that while this technology could fall under a category of aid measures that target a totally different objective such as generation adequacy provisions, the compatibility conditions would not be suitable for an aid scheme in which storage competes with other low-carbon technologies with the objective of reducing emissions instead of securing generation adequacy.¹⁰⁰

On the other hand, batteries raise environmental and safety questions arising from their production reliance on metals and leakage issues. In this regard, we welcome the proposal of the Commission for a new Battery Regulation which aims at modernising EU legislation on batteries and addressing the social, economic and environmental issues related to all types of batteries.¹⁰¹

In any case, energy storage should be better reflected in the EEAG and the GBER in line with the Green Deal objectives and the future Battery Regulation. We therefore call for the following:

- (i) **Aid should be limited to batteries which fulfil sustainability and transparency requirements** taking account of, for instance, the carbon footprint of battery manufacturing, ethical sourcing of raw materials. The future Battery Regulation may be used as a reference for such criteria in the EEAG since it is expected to lay down sustainability and safety, as well as labelling and information requirements;
- (ii) **No support for non-rechargeable, or otherwise not sustainable batteries**, with a view to phase them out as announced by the Commission in the new Circular Economy Action Plan¹⁰²

⁹⁹ International Association of Oil & Gas Producers, [New and old CCS projects in Europe: what's different this time?](#), April 2020.

¹⁰⁰ See Commission Staff Working Document of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, PART 3/4, page 113.

¹⁰¹ Proposal for a Regulation concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM(2020) 798/3, 2020/353 (COD).

¹⁰² Commission's [Circular Economy Action Plan](https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf).

and the future Battery Regulation. Support shall be targeted, and limited to, batteries that can be re-used, re-purposed or recycled (following the waste hierarchy principles);

- (iii) **Other types of energy storage** such as pump hydro, thermal and mechanical storage **should be supported** under the EEAG;
- (iv) Storage shall indeed be **eligible to, and favoured, in resource adequacy measures** for being a clean resource that, combined with RES production, effectively contributes to security of supply.

2.2.13 Demand response

DSR are explicitly addressed in the current EEAG only for their role in generation (or since the EMR, resources) adequacy measures. As highlighted by the *Tempus Energy* case (T-793/14), the EEAG and the Commission's application thereof have not prevented Member States from discriminating DSR to the benefit of generation providers in their capacity mechanisms. The potential for DSR to contribute to security of supply, reduce need for fossil fuel "peaking" and standby generation, reduce network imbalance risk and therefore improves system reliability and efficiency, avoiding congestion, increasing energy savings as well as flexibility of energy systems, is now well-established. As far as resource adequacy measures are concerned, the EEAG must obviously be brought in line with the EMR, in particular its Chapter IV, that clearly provide that capacity mechanisms must be a last resort measure after market reforms have been implemented. A proper regime for DSR at national level must therefore be a primary requirement before a MS can notify a capacity mechanism and the Commission must no longer concede delays in market reforms to MS, such as in Greece (see the second prolongation of the interruptibility scheme authorised in SA.56103).

When a resource adequacy measure is contemplated, the participation of DSR shall be facilitated and their characteristics taken into account; this is arguably required under para. 220 EEAG (*that we propose to rephrase in the section on resource adequacy measures*). Aggregation shall also always be permitted. Obviously, behind-the-meter diesel generators must be excluded, due to their harmful environmental impact.

2.2.14 Energy infrastructure

First of all, the definition of energy infrastructure in the EEAG needs to be updated to include the new categories of energy infrastructure listed in the Commission's proposal for the revised TEN-E Regulation.¹⁰³ This is a matter of consistency and would ensure that all State aid for energy infrastructure, is assessed pursuant to the same compatibility criteria.¹⁰⁴

Secondly, **aid to fossil fuel infrastructure should be qualified as incompatible with the internal market** since these investments are not in line with the European Green Deal, nor with the proposed target to reduce greenhouse gas emissions by at least 55% by 2030.

Thirdly, in the event the Commission decides to include hydrogen projects (i.e. the transmission pipelines, storage facilities, electrolysers and other equipment essential for the hydrogen system to operate) in the

¹⁰³ Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, article 1 and Annex 2; This is without prejudice to ClientEarth's position regarding the inclusion of certain energy infrastructure categories as proposed by the Commission.

¹⁰⁴ Correlatively, this entails that the definition of energy infrastructure should keep encompassing gas and oil infrastructure in order to make these categories of infrastructure fall within the scope of the EEAG.

section on energy infrastructure (instead of in a separate section), the eligibility requirements for hydrogen projects that we propose under Point b) above should be incorporated in this section.

Fourthly, in the event not all fossil fuel infrastructure are deemed incompatible (which again, would contradict the direction of travel towards climate-neutrality), the current presumption that oil infrastructure projects do not need State aid should at least be enlarged to gas.

Following the EU Ombudsman's finding that the current (4th) PCI list elaboration did not properly assess sustainability of projects, which the Commission admitted, the Commission's proposal for the revised TEN-E Regulation clearly states that "*natural gas infrastructure no longer needs support through the TEN-E policy*" for several reasons, notably "*the improvements in infrastructure connections, technological developments and market functioning achieved over the past years and in view of the expected decline in natural gas demand to fulfil our climate ambition and decarbonisation objectives.*"¹⁰⁵ Indeed, "*for gas, the infrastructure is now well connected and supply resilience has improved substantially since 2013. (...) Moreover, the Commission's climate target impact assessment expects the consumption of natural gas to be reduced significantly because its non-abated use is not compatible with carbon-neutrality.*"¹⁰⁶ Correlatively, there is no reason to assume that gas infrastructure needs support from Member States resources. For the sake of clarity, it should be added (also in the section on resource adequacy measures) that fossil gas infrastructure are by no means required for security of supply.¹⁰⁷

Furthermore, only investment aid for energy infrastructure should remain the principle.

With respect to the necessity of aid, the Commission should not only verify if other less distortive policy options are available to address market failures, but also whether the notifying Member State has duly implemented the Energy Efficiency First principle and considered non-infrastructure solutions before resorting to aid. No aid should be deemed necessary if this principle has not been fully and duly implemented.

In addition, given the challenges of the energy transition, every energy infrastructure project shall evidence that it is the most cost-effective. To avoid lock-in of new infrastructure, this would for instance mean that new transmission infrastructure for low-carbon gasses and hydrogen (provided the Commission would not declare it incompatible *per se*) could only be built if it is evidenced that existing fossil fuel infrastructure could by no means be retrofitted cost-effectively. The focus should thus lie on minimal transition costs.

In addition, a **sustainability criterion** should be added to the assessment criteria for all aid to energy infrastructure, similar to the sustainability criterion which has been suggested in the proposal for the revised TEN-E Regulation.¹⁰⁸ Such would entail that a project shall contribute significantly to sustainability and the EU decarbonisation and depollution objectives in order to be eligible for aid. In order for this criterion to materialise effectively, the Commission should perform a **thorough sustainability check of**

¹⁰⁵ Commission Questions and Answers: The revision of the TEN-E Regulation.

¹⁰⁶ Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, recitals 5 and 11.

¹⁰⁷ Just for quoting one relevant source, a 2020 report by consultants Artelys, "An updated analysis on gas supply security in the EU energy transition", found that "*the existing EU gas infrastructure is sufficiently capable of meeting a variety of future gas demand scenarios in the EU28, even in the event of extreme supply disruption cases*" (p.3). Also, for instance, although the EU has a huge overcapacity for LNG terminals (as indicated by the Commission itself in its decision SA 51983 regarding the terminal in Krk (Croatia), the capacity utilisation is in the order of 25% to 30% on average in the EU), aid is provided and authorised for the construction of new LNG terminals.

¹⁰⁸ The Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, articles 1, 4 §3, Annex IV and recital 16.

the project, based amongst others on detailed assessments made by notifying Member States, experience and analysis of previous comparable projects as well as sound scientific evidence.

On the proportionality of aid, an aid intensity of 100% of the funding gap should not apply to all energy infrastructure. Instead, the aid intensity should vary depending on the level of sustainability of the energy infrastructure at stake. The more sustainable the infrastructure, the higher the aid intensity. For example, electricity grid infrastructure that unlock the development of 100% renewable energy projects in congested areas should receive higher aid intensity than some interconnectors between Member States, which may also benefit non-renewable energies. The same should apply for hydrogen projects in the event the Commission decides to allow hydrogen for clean (renewable) and low-carbon hydrogen: the aid intensity for clean (renewable) hydrogen should be considerably higher than for low-carbon hydrogen (to which aid should anyways only be granted if the conditions set out in point b above are met). Such approach would be entirely in line with the Commission's¹⁰⁹ and Council's¹¹⁰ statements that priority for the EU is to develop renewable hydrogen.

2.2.15 Capacity mechanisms

Resource adequacy measures (capacity mechanisms) are surprisingly not addressed in the consultation, despite the need to completely revise section 3.9 EEAG to align it with the EMR, the “do no harm” principle and the EU climate and energy objectives for 2030 and 2050. Whilst we welcome the Commission's approach to focus less on specific categories of aid, security of supply remains a specific objective that, we believe, still deserves specific assessment rules in the EEAG.

The new EEAG shall explicitly mention that “*when granting aid for resource adequacy, Member States must respect Regulation 2019/943 and in particular Chapter IV thereof, which lays down criteria in relation to assessing the need for and design of resource adequacy measures*” (our drafting proposal). Obviously, a resource adequacy measure that would not strictly comply with any one of these legal criteria could not be found compatible with the internal market.¹¹¹

On the necessity of the scheme, besides the requirement for Member States to comply with Articles 21 and 24 EMR:

- (i) the EE1st principle must be an integrant part of the assessment for the need and design of these schemes, as provided for in the Governance of the Energy Union Regulation;
- (ii) adequacy measures shall not be authorised until the notifying Member State has adopted adequate market reforms to address identified regulatory or market failures – since the purpose of those reforms is to reduce the need for a capacity mechanism and is mandatory in the EMR.¹¹²

Member States must report on support schemes they have or will put in place to increase the level of resources they can rely on such as RES, energy efficiency, storage and demand response, apart from support through the planned resource adequacy measure. The Commission shall evaluate the interaction

¹⁰⁹ Communication from the Commission, A hydrogen strategy for a climate-neutral Europe, p.6.

¹¹⁰ Council Conclusions “Towards a hydrogen market for Europe”, 11 December 2020, para. 2.13.

¹¹¹ Compliance of the beneficiary projects with their environmental law obligations shall also be checked.

¹¹² For example, the transitory flexibility and interruptibility schemes in Greece have been adopted and prolonged in two instances whereas it is acknowledged that Greece has delayed the implementation of market reforms that would cancel the need for such schemes. See Commission's decisions on SA. 38968, SA. 48780, SA. 50152, SA. 56102 and SA.56103

of those schemes with the planned capacity mechanism to assess if, and to what extent, the latter is needed.

Para. 220 EEAG needs to be rephrased to align with the “do no harm” principle in the Green Deal and the EU and national targets for 2030 and 2050, so that the *design* of capacity mechanisms prioritises RES and clean resources such as energy efficiency (according to the EE1st principle), storage and demand response, over fossil fuels. As the Commission acknowledged in its Fitness Check report of 30 October 2020, the EEAG and application thereof to capacity mechanisms since 2014 have not prevented environmentally harmful subsidies, in that para. (220) EEAG so far has not discouraged Member States from providing long-term support to fossil fuels, in particular coal and gas; without giving enough space to demand response (see case T-818/14 *Tempus Energy v. Commission*), notably. We suggest that para. 220 be reworded as requiring Member States to demonstrate that they “**primarily** consider[ed] alternative ways of achieving [resource] adequacy which have **a positive impact** on the objective of phasing out environmentally or economically harmful subsidies, **such as prioritising demand side management and energy efficiency measures, increasing interconnection capacity and opening the scheme to RES**”.

Technology-neutrality of capacity mechanisms should not be a dogma when fossil fuels are locked in by long term contracts. Importantly for the interpretation of para. 220, if fossil fuel capacity cannot enter the market or keep operating without a capacity contract, arguably they cannot be considered an economically sustainable solution to ensure security of supply in a member state.

The EEAG shall also clarify that abatement technologies to meet Best Available Techniques requirements, or any other cost for the undertaking to meet a Union standard, shall not be eligible costs for capacity payments and on the contrary, shall be assessed under the rules applicable to aid for environmental protection (currently section 3.2 EEAG).¹¹³

2.3 Question 26: should aid covering operating costs (in particular energy costs and raw material costs) on top of investment costs be generally allowed for the following areas?

At first glance, the appropriateness of covering operating costs on top of investment costs depends on the type of technology at stake. What is more worrying is the suggestion by the Commission to make energy costs and raw material costs eligible to operating aid. In any event, those costs could only be partially covered, not fully, to be compatible with the internal market.¹¹⁴

Subsidising energy costs raises several market and State aid issues.

First, exempting operators from the categories listed under Question 26 from paying their energy price might create a risk of redistributive effect of energy price on other consumers (if cost of the measure is recovered on other consumers' bills) and exacerbate lack of public acceptance of the underlying public policy.

¹¹³ See in this respect Commission's decision on the Polish capacity mechanism (SA.46100), table 1 p. 13 and Commission's opening decision on the planned Belgian capacity mechanism (SA.54915), para. 103, where eligible costs (or CAPEX) include respectively, retrofitting to meet BAT requirements and “expenditure made necessary to enable the capacity to comply with environmental standards and thus to maintain it on the market”.

¹¹⁴ A full exemption could not be justified since the undertakings would be using electricity and still need to be exposed to some extent to energy prices. See by analogy Commission decision on SA.34045 Exemption from network charges for large electricity consumers (§19 StromNEV) in Germany, 28 May 2018.

From a market point of view, this might also not help creating an actual market for the energy concerned by not exposing neither the supply nor the demand sides to market prices.¹¹⁵ In this regard, we recall our recommendation above, based on REDII requirements, to maintain support for RES in a way that maximises their integration in the market and ensures responses of renewable energy producers to market price signals.

It could also go against other objectives of the EEAG and of the CEP such as decarbonisation and phasing out indirect subsidies to fossil fuels – since the Commission does not propose to discriminate between sources of energy which costs would be relieved – and, as is the case for other types of aid relieving undertaking from paying their energy costs, reduction of consumption and the EE1st principle. If not exposed to paying the cost of energy they consume, undertakings are dis-incentivised to reduce their consumption. This undermines the objectives to increase energy efficiency and demand response, as well as unduly increases the need for ancillary services or resource adequacy measures.¹¹⁶ They would also be dis-incentivised to electing RES providers based on costs, or enter into PPAs with RES providers, since the price would be indifferent. Where renewable electricity is cheaper than fossil fuels, the latter would maintain their base of consumers whereas consumers could have shifted to renewable energy sources providers were they exposed to energy costs – thus indirectly subsidising fossil fuels.

Subsidizing raw material costs would relieve undertakings from an important market risk that is having adequate access to raw materials for a production. ClientEarth does not believe this is cost-efficient for public finances and would simply make business start or keep operating under perfusion without exposing them to basic costs – especially so if they can cumulate this type of aid with other operating aid. This is for example already the case for coal operators who are exempted, in several Member States, from paying water fees (in breach of the Water Framework Directive and of Article 108 TFEU) whilst the use of water by, and pollution of waters resulting from, the operation of coal plants cause severe environmental damage.¹¹⁷ Furthermore, such type of aid appear inconsistent with the principles of circular economy and the Commission's proposals to regulate sustainability of products including batteries, since it risks increasing pressure on raw materials while they remain scarce. This is particularly the case for technology using forest biomass or lithium.

ClientEarth recommends that only certain types of operating aid e.g. to cover maintenance costs, or feed-in tariffs/premiums and only for technology which actually contribute to the decarbonisation and sustainability objectives should be allowed on top of investment aid. Any aid to raw materials and energy price must however be carefully allocated as they are highly problematic from an environmental and a market point of view.

¹¹⁵ All these considerations are assuming that by “energy costs”, the Commission refers to a relief from paying costs of energy supplied to a consumer undertaking by a third party producer or supplier – and that on-site supply is not covered.

¹¹⁶ See Commission opening decision on SA.51502 Reductions from a capacity mechanism levy for EIUs in Poland, 15 April 2019, para. 60

¹¹⁷ European Environmental Bureau, Mapping hidden subsidies for the coal and lignite industry - A snapshot report for Czech Republic, Germany and Poland, 11 December 2020

2.4 Question 64: Risks that State aid for environmental protection might pose on fair and equal competition, such as: overcompensation, crowding-out of private investment, greenwashing, lack of cost-effectiveness, deep pockets distortions)

On greenwashing specifically: As awareness of environmental issues increases, there is an increased demand from consumers for green products and services. In this sense, environmental or “green” claims evoking the minor or reduced environmental impact of the products or services offered, are becoming an important advertising tool for companies that can significantly impact consumers’ purchase choices. However, it is not often possible for consumers to verify the truthfulness of sustainability claims made by companies.¹¹⁸ False or misleading sustainability claims, so-called “**greenwashing**”¹¹⁹, harm the consumers’ confidence that the businesses’ claims are true. This also results in unfair competition with businesses that actually offer truly sustainable products or services, sometimes at a higher price since those products generally internalise a higher environmental cost. Until consumers are able to choose between real eco-friendly items and those which are not, businesses genuinely investing in going “green” cannot be properly rewarded by their customers and suffer a competitive disadvantage.¹²⁰

The notion of positive environmental benefits should at least be informed by the Green Deal, which sets out the different goals of the EU in its plan to make its economy sustainable. The goals of the Green Deal are further detailed in other Commission’s documents, as the Sustainable Europe Investment Plan, the “A Clean Planet for all” communication, the “Farm to Fork Strategy” communication, the EU strategies on hydrogen, biodiversity, adaptation to climate change¹²¹ and the reduction of methane emissions. The upcoming Zero Pollution Action plan should also inform on the relevant standards and acceptable practices and activities. A full life-cycle analysis of activities and products should be conducted.

Aid for environmental protection e.g. for new types of products or services should be carefully assessed against the actual sustainability and level of increased environmental protection expected from the activity; this should be informed by science. False claims, or at least “greenwashing”, should obviously not be eligible to a more favourable State aid regime, be it a green bonus or else.

The EEAG could contain a “**greenwashing test**” whereby beneficiaries of aid shall (i) substantiate their sustainability claims with sound updated science; (ii) make clear which sustainability benefits their products or services offer and be honest and specific about their efforts with regard to sustainability; and (iii) use of fair visual claims and labels that do not confuse consumers¹²² when comparing products or services.

Specifically for hydrogen, while the Commission is considering the introduction of certificates of guarantees of origins to support low-carbon hydrogen, it is still unclear whether this system was efficient to attract

¹¹⁸ ACM, “[ACM draws up rules of thumb for sustainability claims](#)”, 22.09.2020

¹¹⁹ ClientEarth article on [corporate greenwashing](#)

¹²⁰ CMA; “[CMA to examine of ‘eco-friendly’ claims are misleading](#)”, 2.11.2020.; The CMA recently announced that it will investigate descriptions and labels used to promote products and services claiming to be ‘eco-friendly’, and whether they could mislead consumers and that it intended “*to publish guidance for businesses next Summer to help them support the transition to a low carbon economy without misleading consumers*”.

¹²¹ The adoption of this EU strategy is planned for the first quarter of 2021, see [here](#).

¹²² For instance by using a certain type of packaging or logo implying that the product is sustainable whereas this is not the case.

significant investments in the renewable energy sector.¹²³ Some Member States also raised concerns over risks of greenwashing in the case where a producer connects an electrolyser to the electricity grid while purchasing fossil-fuel based electricity from the local grid and buying renewable guarantees of origin to sell hydrogen on the market.¹²⁴ An in-depth assessment of low-carbon hydrogen projects, if they are to receive any State aid, would therefore be necessary.

2.5 Question 96: Do you think that competitive bidding processes should be the general rule to allocate investment and operating aid for energy and environmental purposes?

We recommend that energy communities should be subject to a specific regime including higher thresholds for exceptions to tendering procedures or tailored bidding windows for them, so as to allow them to actually participate in the market, which is obviously not the case today.¹²⁵

Specificity of energy communities and their recognition by the CEP

The Green Deal puts **citizens at the heart of the energy transition**¹²⁶ and the CEP explicitly recognizes the specific characteristics of RECs¹²⁷ as well as their environmental, economic and social benefits.¹²⁸ As for CECs, which may also engage in renewable energy production, the EMD also considers they “constitute a new type of entity due to their membership structure, governance requirements and purpose”.¹²⁹ Both the REDII and the EMD require Member States to provide an enabling framework to promote and facilitate the development of RECs and CECs respectively.¹³⁰

Lack of access to bidding procedures and to the energy market

However the **current State aid framework does not allow their full development on the market**. In the Fitness Check Report, the Commission confirms that the EEAG need to be adjusted, fine-tuned or potentially aligned with new CEP rules, including treatment of self-consumption and energy communities in RES schemes.¹³¹

¹²³ See e.g. Jaap Jansen, “Does the EU renewable energy sector still need a guarantees of origin market?”, Policy insights, No 2017-27, July 2017, page 5; Ákos Hamburger, “Is guarantee of origin really an effective energy policy tool in Europe? A critical approach”, Society and Economy; December 2019, 41(4):487-507

¹²⁴ See “Additionality in renewable hydrogen production”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published)

¹²⁵ See e.g. [REScoop.eu’s response](#) to the present consultation.

¹²⁶ Communication from the Commission, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final

¹²⁷ As the REDII clearly underlines, “the specific characteristics of local renewable energy communities in terms of size, ownership structure and the number of projects can hamper their competition on an equal footing with large-scale players, namely competitors with larger projects or portfolios” (§ 71 of the REDII).

¹²⁸ See the REDII, §70 which acknowledges that renewable energy communities bring particular added-value on the energy market in terms of local acceptance of renewable energy project and access to additional private capital which results in local investment that traditional market players cannot provide. As the REDII stresses: “Such local involvement is all the more crucial in a context of increasing renewable energy capacity”

¹²⁹ See the EMD, §46

¹³⁰ See Article 22(4) REDII and Article 16 of the EMD.

¹³¹ Annex 8 of the Commission staff working document, Fitness check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, Annex SWD(2020) 257 final, 30.10.2020, page 104

The EEAG's shift from feed-in tariffs to feed-in premium with market-based auctions has made it much more difficult for RECs to finance their projects. Indeed, the EEAG's thresholds for small projects (para. 125 and 127) are not high enough as these projects develop.

As stressed by the Commission in the consultation, **bidding procedures increase the administrative burden and costs** in particular for smaller participants.¹³² This is particularly true for RECs, not only because of their size but also of their ownership structure.¹³³ In addition to the usual costs borne by applicants, RECs face additional costs related to the time and budget dedicated to local mobilisation and dialogue specific to democratic decision-making structures. Due to their unique characteristics, RECs do not have the same means to reduce risks for investors and thus access to capital financing compared to companies and profit-oriented market players. While the REDII defines primary purpose of RECs as to "*provide environmental, economic or social community benefits [...] rather than financial profits*" for their shareholders or members¹³⁴, bidding procedures focus on economic criteria without taking sufficient account of social or environmental aspects of projects, that are difficult to monetise; this issue would be exacerbated should the EEAG introduce a requirement for broadening schemes and to select the most cost-effective projects. This has the effect of restricting access to State aid almost exclusively to traditional economic market players.¹³⁵ The lack of certainty about success of bidding procedures (compared to feed-in tariffs) is also an obstacle to access finance for feasibility studies, permits and other administrative procedures. In short, RECs cannot generally compete on an equal footing with other producers¹³⁶ without more flexibility in the EEAG.

Recommendations

The EEAG need to be adapted to improve the integration of energy communities into the energy market and ensure a level-playing field for them, while contributing to the empowerment of citizens towards decarbonisation in accordance with the CEP (Article 22(4) REDII and Article 16 EMD). It is a requirement in the REDII in particular that RECs are promoted and that Member States can offer them specific types of support for them to compete on a level playing field with traditional undertakings (Article 22(7) REDII). The EEAG must thus recognise explicitly the existence and specific benefits and obstacles of energy communities, while explicitly allowing Member States to design schemes that leave them room to receive adequate support.

In line with its suggestion to introduce a "green bonus" in "*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*", the Commission should therefore consider the following options: (1) increasing the level of **thresholds** for exempting RECs and CECs developing RES projects from bidding procedures¹³⁷ or (2) dedicating a **special regime** for energy communities in the EEAG. This would be justified by the significant

¹³² This is also confirmed by the 2020 JRC Science for policy report. See Aura Caramizaru and Andreas Uihlein, Energy communities: an overview of energy and social innovation, Joint Research Center Science for policy report 2020, page 33.

¹³³ See Article 2 (16) (b) REDII: The shareholders or members of renewable energy communities shall be natural persons, SMEs or local authorities, including municipalities.

¹³⁴ Article 2 (16) (c) REDII

¹³⁵ For example, within the third tendering period for onshore wind energy in France only one project with participatory investment was selected out of the twenty-one selected projects.

¹³⁶ RED II, recital 71

¹³⁷ See EEAG, para. 127

environmental and grid benefits they provide¹³⁸ as well as their positive impact on regional and local development opportunities, on social cohesion and social acceptance of the transition.¹³⁹ Concretely, the EEAG could explicitly set specific auctions (i.e. reserving a certain quantity of capacity to be procured only from energy communities' projects, like in Ireland¹⁴⁰), relaxing the rules for participating in call for tenders e.g. in terms of the financial guarantees required or totally exempt them from bidding procedures. Similarly to the increase in the level of aid intensity permitted for SMEs, investments located in assisted areas and eco-innovation under paragraph 78 EEAG, an increase of aid intensity could also well apply to energy communities.

2.6 Question 117: When should a public consultation requirement apply?

ClientEarth would strongly welcome the increased transparency such public consultations would offer, as well as the greater possibility to assess the necessity of aid and its effect on trade and competition. Schemes falling under the GBER should ideally be included. As suggested by the Commission, consultations should preferably apply to “all measures regardless of their cost/complexity”¹⁴¹, “all areas as means to verify the necessity of an aid scheme” as well as to “all notifiable amendments”; this is particularly important when there is an adjustment of a scheme (for example in accordance with Article 6 REDII), including cancelling or non-prolongation/renewal of it.

If public consultations should be required only for certain schemes, criteria would need to be defined precisely. On the one hand, the amount of budget is an objective but inappropriate criterion since the necessity of aid, its effectiveness/appropriateness and its impact on competition and trade are not only relating to the budgeted amount of aid. On the other hand, the complexity of the scheme is a very vague and controversial criterion¹⁴² that cannot be left to Member States' interpretation; it would also be a weak legal basis to find that a scheme is incompatible (as proposed by the Commission), if a Member State “simply” omits to conduct a consultation but the scheme would otherwise be compatible with the other criteria in the EEAG.

In any event, it must be possible for participants to comment on all aspects of the scheme, also if the authorities rely on a questionnaire to gather input on specific points.

In order to be effective, relevant and fruitful, as well as to safeguard the public's rights, national granting authorities must, based on a harmonised methodology set in the EEAG (and GBER if applicable):

¹³⁸ Energy communities can contribute to the operability and affordability of electricity systems offering services and benefits such as flexibility, balancing, arbitrage, ancillary services such as frequency regulation, energy efficiency, or grid development deferral. See Bram Claeys, Energy communities with grid benefits: A quest for a blueprint, RAP, pages 7-8, available at: <https://www.raponline.org/knowledge-center/energy-communities-with-grid-benefits-a-quest-for-a-blueprint/>

¹³⁹ RED II, recitals 63 and 70. The role of renewable energy communities in associating consumers to improve energy efficiency of households and help them decrease their consumption, benefit from lower tariffs and reduce energy poverty, is also recognised in RED II recital 67.

¹⁴⁰ Commission decision of 20 July 2020 on SA.54683 (2020/N) – Ireland Renewable Electricity Support Scheme

¹⁴¹ If consultations are not applicable to schemes falling under GBER, then it should apply to all schemes in the EEAG since they are already more expensive and complex than those in the GBER.

¹⁴² See Judgement in T-793/14, *Tempus Energy v. Commission*, 15 November 2018, ECLI:EU:T:2018:790, para. 85

- (i) Conduct consultations as early as possible, when all options are still open. This means consultations must necessarily take place before the adoption of any new scheme or measure at national level (and thus not only before the measure is notified to the Commission), in order to have the potential to influence its adoption and design;
- (ii) Notify upcoming consultations on a national register in an adequate and effective manner sufficiently in advance of the consultation period. Such notification should inform about the possibilities to participate, including for foreign operators, as well as the content of the proposed scheme.¹⁴³ Given that aid schemes are deemed, by definition, to affect trade between member states and competition on the internal market, notification should be made in the national language(s) and two other EU languages. The notification should also be published on the State Aid Transparency register. Moreover, any national or EU platform should allow anyone to subscribe to email notifications when a new scheme pertaining to a specific area is published;
- (iii) Supporting documents such as draft legislation, impact assessments, economic and cost-benefit analysis, methodologies for selecting aid beneficiaries etc. used by national authorities to design the scheme shall be published in support of the consultation documents;¹⁴⁴
- (iv) Provide a possibility for any natural or legal person to submit comments for a reasonable period of at least one month. This period should be extended in case of particularly significant or complex schemes. The comments received should be made publicly available on the dedicated national and EU platforms;
- (v) Take the comments received into due account and take any necessary follow-up actions, such as making appropriate changes or even withdrawing the scheme, where necessary;
- (vi) Publish an explanation of how the authorities have taken the comments into account, as indeed proposed by the Commission. This explanation should set out how and why the received comments led to specific changes or why not.
- (vii) Publish the final text of the aid measure.

We acknowledge that it could increase the administrative burden on Member States who are not used to organise such consultations but others are already used to them (e.g. France, Belgium, Spain, the UK) and an alignment should be made on best practices. Moreover, all Member States have experience with organizing public consultations on local, regional and national plans/programmes and other strategy documents, which can be instructive.

Nonetheless, we stress that a public consultation held at national level does not dispense the Commission from opening a formal investigation procedure should it have any doubt on the compatibility of a scheme

¹⁴³ E.g. the public consultation launched by Greece on a market-wide capacity mechanism in May 2019 was not meaningfully allowing for participation: it was opened only for 14 business days, conducted by an authority which was not the competent one (limiting the possibility of stakeholders to get the information), on a webpage available in Greek only (although the consultation document was in English). See ClientEarth's observations to [the Commission](#) and [to Greece](#) on this consultation and on the capacity mechanism, 10 May 2019.

¹⁴⁴ The consultation and transparency process followed by the Belgian authorities for the adoption of the market-wide capacity mechanism (that is currently investigated by the Commission, SA.54915) is an example of good practices: see the [TSO's webpage](#) and the [Economy SPF's webpage](#). The UK also conducted regular consultations on the design and amendments to its market-wide capacity mechanism in Great-Britain, see the [UK Government's webpage](#)

with the internal market.¹⁴⁵ Besides, having participated in the national public consultation should not become a condition for an observant to qualify as an “interested party” under Article 1(h) Procedural Regulation 2015/1589 since (i) obstacles to participate in a national consultation may arise and (ii) the purpose of the national public consultation would (presumably) not primarily be the compatibility of the scheme with State aid law, whereas this is the purpose of complaints brought to the Commission.

2.7 Energy Intensive Users

The roadmap considers options ranging from a simple update of the list of eligible sectors to "an increased consistency" with the regime of indirect compensation costs in the ETS State aid guidelines. None of these options are satisfactory. Firstly, the Commission should also consider removing the regime of exemptions for EIUs from the scope of the EEAG.

Another criticism is that the EEAG have not limited the cumulation of exemptions from levies and taxes on energy bills for those eligible industries - thus greatly limiting their exposure to any price increase other than from market prices.

If some form of reductions for EIUs must remain in the EEAG, a much stronger regime should be provided. Individual aid granted under a scheme of tax exemptions, reductions from environmental taxes and exemptions from the financing of energy from renewable sources should be subject to notification requirements under para. 20 EEAG above a certain threshold and the regime of individually notifiable aid shall apply to their beneficiaries (para. 21 should be amended accordingly). The list of eligible sectors should obviously be reduced as per the recommendations of the expert report on the ETS state aid guidelines. Any reduction or exemption should be subject to strict conditions - going way beyond what is in the new ETS state aid guidelines.

The distributional effects of those exemptions, particularly when they cumulate, need to be assessed in detail for each scheme or individual measure by the Commission. It should become a requirement in the revised EEAG that member states must have in place effective safeguards against such distributional effects.

ClientEarth' replies to questions 130 to 141 are in the online form. We reply below on question 146 about conditioning reductions for EIUs, since it requires longer developments.

ClientEarth calls for conditioning the granting of reductions of any kind to EIUs (from support to RES/decarbonisation measures, from network charges, from environmental taxes etc.) to a requirement for EIUs to investing in efficiency and decarbonisation solutions. However, conditionality should be effective and to this end, the EEAG must go far beyond what is in section 5 of the ETS State Aid Guidelines post-2021. The draft ETS State Aid Guidelines of March 2020 were closer to setting adequate conditions.¹⁴⁶ We underline that the conditions for granting aid under the EEAG need not be the same as under the ETS State Aid Guidelines and the mere fact that it would be "easier" should not be driving a policy and the establishment of rules. If the rules are clear, legal certainty for MS and undertakings would be ensured.

¹⁴⁵ T-793/14 EU:T:2018:790, para. 99-100: "*it cannot be held [...] that a national consultation [that does not relate to the matter of compatibility of a capacity mechanism with the applicable rules on State aid] can be treated in the same way as a procedure allowing the interested parties to submit their observations, as would have been the case if the Commission had initiated the formal investigation procedure...*"

¹⁴⁶ See nonetheless our concerns in [our observations](#) on the draft ETS State Aid Guidelines, March 2020

Firstly, for being effective, a conditionality should leave no choice to the eligible undertakings to make new investments or change their practices. This should be assessed similarly to the incentive effect criteria: would the conditions have been complied with by the undertaking absent the "carrot" of being exempted from supporting RES/decarbonisation measures? Following this reasoning, the so-called conditions in the new ETS State Aid Guidelines reveal to be pointless: implementing energy audit recommendations is already compulsory in a number of member states; having a small share of 30% of low-carbon energy supply is relatively easy in member states that rely on nuclear power and is already met in many cases (the verification of this condition is also unclear: would it suffice for the beneficiary to prove it is now supplied by a greener electricity provider?); no direct investment in RES production is required whereas the draft guidelines proposed building on-site generation or the conclusion of PPAs.

Concluding PPAs with RES producers is particularly interesting in this respect, since the rationale for reducing the contribution of EIUs to support RES has its own logic: it is about increasing the possibility for a MS to support RES at a cost that would be acceptable to the broadest range of consumers, when that support is financed by a levy on energy bills. Preventing carbon leakage risks must not set aside the other, and main, objective of those aid measures that is ultimately to permit the increase in support for RES.. Thus we recommend to require that EIUs shift their energy supply to carbon-free RES-based energy supply¹⁴⁷ and make investments into, or enter into contracts that are directly supporting the increase of RES share. In this respect, PPAs help providing visibility for RES producers over revenues of their projects and thus encourages their commercial development, while reducing their dependency to state support.

For instance Spain just passed a decree¹⁴⁸ conditioning reductions for EIUs to having a predictable energy consumption (with obligations to report on it); having a system of energy management; the implementation of energy efficiency solutions; and the conclusion of long-term (at least five years) PPAs with RES producers for at least 10% of the EIUs' electricity consumption, in order to support both EIUs and energy producers in finding counterparts. Even though the Spanish decree provides for another State aid for EIUs (and indirectly to RES producers) in the form of a State guarantee backing EIUs' defaults under their PPAs, this should not become a necessary feature (nor benefit from an automatically favourable assessment) to be attached to the condition to conclude PPAs and should remain subject to Articles 107 and 108 TFEU.

Beijing **Berlin** **Brussels** **London** **Los Angeles** **Luxembourg** **Madrid** **Warsaw**

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¹⁴⁷ This excludes both forest biomass and nuclear power.

¹⁴⁸ Royal Decree 1106/2020, of December 15, regulating the Statute of electro-intensive consumers (Spanish Official State Gazette 328, 17.12.2020), Articles 10-12. <https://www.boe.es/eli/es/rd/2020/12/15/1106/con>