

NEW EU GUIDELINES ON STATE AID FOR CLIMATE, ENVIRONMENTAL PROTECTION AND ENERGY: WHICH SECTORS COULD BENEFIT

On 1 January 2022, the revised Guidelines of the European Commission on State aid for climate, environmental protection and energy (**CEEAG**) entered into force, extending the scope of the previous Guidelines to new areas in order to achieve the goal of reaching climate neutrality by 2050.

EXPANDING SCOPE OF EEAG TO DECARBONISATION / CLEAN TECHNOLOGIES

In 2014, the European Commission (**the Commission**) adopted the guidelines on State aid for environmental protection and energy measures (**EEAG**) as part of its modernisation agenda, which facilitated the adoption of State aid to support energy efficiency and environmental protection oriented projects across the EU. However, since the adoption of the EEAG, the energy and climate policy landscape has changed radically. In 2019, the EU adopted the "Clean Energy for all Europeans" package to move away from fossil fuels and deliver on its Paris Agreement commitments to reduce greenhouse gas emissions (**GHG**), while in July 2021 the Commission presented the "Fit for 55" package, a set of legislative proposals to revise the entire EU 2030 climate and energy framework in line with the EU Green Deal 2050 carbon neutrality goals. In light of these developments, the CEEAG adapt the conditions which must be met and the processes which must be followed for the Commission to consider state support compatible with EU State aid rules.

In this briefing, we focus on the simplified assessment provided by the CEEAG, when reviewing the compatibility of State aid measures, and the extended scope of the Guidelines, looking at the new areas covered under the CEEAG as potential State aid- compatible categories, such as hydrogen, clean mobility, energy efficiency in buildings, circularity and biodiversity.

COMPATIBILITY ASSESSMENT: POSITIVE AND NEGATIVE CONDITIONS

The Commission will assess the compatibility of the proposed aid measures by firstly considering whether the aid facilitates the development of certain economic activities within the Union (positive condition), and then ensuring that the measure does not adversely affect trading conditions to an extent contrary to the common interest (negative condition). As a final step, the Commission

Key issues

- **Extending the scope of the EEAG to new areas** such as hydrogen, clean mobility, circularity, energy efficiency and biodiversity
- **Competitive bidding** as the default mechanism to allocate aid and determine the aid level
- **Excluding natural gas** from "most polluting fossil fuels" but requirement for clear pathway to decarbonisation
- **Ex ante public consultation** required for certain types of aid (e.g., renewable energy and recharging / refuelling infrastructure)
- **Carbon contracts for difference** as an aid to decarbonisation and a useful tool for bringing breakthrough technologies to market
- Refuelling infrastructure of **non-exclusive supply of renewable / low-carbon hydrogen** eligible for aid until 2035
- Reductions from electricity levies for **energy-intensive users**

will balance any identified negative effects of the aid measure with the relevant positive effects.

Positive condition

The aid measure will have to:

- i. **facilitate economic activities.** It will have to be demonstrated how the development of those activities is supported, its positive effects for the society at large – Member States must describe the expected benefits of the aid in terms of its material contribution to environmental protection, including climate change mitigation, or the efficient functioning of the internal energy market;
- ii. **have an incentive effect,** i.e. the aid will have to induce the beneficiary to change its behaviour, to engage in additional economic activity or in more environmentally-friendly economic activity, which it would not carry out without the aid or would carry out in a restricted or different manner. This entails the identification of the factual scenario and the likely counterfactual scenario in the absence of aid;
- iii. **not breach any relevant provision of Union law.**

Negative condition

The aid measure **must not unduly affect trading conditions** to an extent contrary to the common interest, considering the below points:

- i. **Necessity of the aid** – there are market failures preventing the achievement of a sufficient level of environmental protection or an efficient internal energy market.
- ii. **Appropriateness of the aid** – the aid measure must be the only and least distortive policy instrument to achieve the objective sought.
- iii. **Proportionality of the aid** – as a general principle, aid will be considered as limited to the minimum needed for carrying out the project or activity if the aid corresponds to the net extra cost (i.e. the relevant **funding gap**). The net extra cost is the difference between the economic revenues and costs of the aided project and those of the alternative project which the beneficiary would credibly carry out in the absence of aid (counterfactual scenario). A detailed assessment of the net extra cost will not be required, if the aid amounts are determined through a competitive bidding process, given that it provides a reliable estimate of the minimum aid required by potential beneficiaries. Such process would have to be open, clear, transparent, non-discriminatory and based on objective criteria.

For most of the various aid measures provided by the CEEAG, competitive bidding processes are the default mechanisms to allocate aid and determine the aid level.

Balancing test

Under the CEEAG, the Commission will consider an aid measure compatible with the internal market only where the positive effects outweigh the negative effects. When assessing the positive and negative conditions, the Commission will pay particular attention to criteria for environmentally sustainable economic activities provided for in the Taxonomy Regulation 2020/852, including the 'do no significant harm' principle. For example, measures involving support to fossil fuels are unlikely to create positive environmental effects and often have significant negative effects because they can increase the negative

environmental externalities in the market. In the case of natural gas, it will be treated as a bridge fuel, i.e., Member States will have to demonstrate that there is no lock-in effect into this polluting energy by showing a clear pathway to decarbonisation through replacement of natural gas with renewable or low-carbon gas or closure of plants on a timeline consistent with the Union's climate targets

SUBSTANTIVE CHANGES TO AID COMPATIBLE CATEGORIES

REMOVAL OF GREEN HOUSE GAS EMISSIONS – IN PARTICULAR THROUGH RENEWABLE ENERGY

The revised Guidelines are generally technology-agnostic but they continue to endorse renewable energy and energy efficiency support schemes under an overarching category of aid referred to as aid for the reduction and removal of greenhouse gas emissions. Aid for nuclear energy has been explicitly excluded from the scope of CEEAG.

The Guidelines cover energy generation from renewable energy sources in line with the Renewable Energy Directive 2018/2001 (**RED II**) including support for biofuels, bioliquids, biogas and biomass fuels, renewable / low-carbon hydrogen and energy produced from waste. They also address aid to support electrification using renewable or low-carbon electricity as well as all technologies that contribute to the reduction of GHG emissions such as aid for carbon capture and storage or use.

As of 1 July 2023, for renewable energy projects or reforms, Member States must organise, prior to any aid notification, a **public consultation** on the competition impact and proportionality of the proposed measures. The duration of this consultation must be of at least six weeks for aid exceeding EUR 150 million per year and of at least four weeks if the aid is less than EUR 150 million per year and no competitive bidding processes are used.

As explained above, competitive bidding should be the default mechanism for the granting of aid. This will not be required only if: (i) there is insufficient potential supply or number of potential bidders to ensure competition; (ii) the beneficiaries are small projects (e.g., less than 1MW of installed capacity); or (iii) the project has been selected following an open call to form part of a large integrated cross-border project and either it applies an innovative technology or it is amongst the early adopters of an innovative technology in its sector.

In the absence of a bidding process, the net extra cost must be determined by comparing the profitability of the factual and counterfactual scenarios.

The Commission for the first time makes explicit reference to "contracts for difference" as a form of aid for decarbonisation specifying that they may be a *"useful tool for bringing to market breakthrough technologies that may be necessary to achieve industrial decarbonisation."* These contracts entitle the beneficiary to a payment equal to the difference between a fixed 'strike' price and a reference price – such as a market price, per unit of output.

CLEAN MOBILITY

Clean mobility is one of the new sectors covered by the CEEAG comprising aid for the acquisition or leasing of clean vehicles, retrofitting, refitting and adaptation of vehicles or mobile service equipment especially where it is necessary to allow vessels and aircraft to use or increase the share of biofuels and synthetic fuels. The revised Guidelines make specific reference to zero-emission aircraft as eligible for aid giving the Commission the right to require

that the aid beneficiary decommissions an equivalent number of less environmentally-friendly aircraft of a similar take-off mass as the aircraft acquired or leased with State aid.

In addition, aid may be granted for the construction, installation, upgrade or extension of recharging or refuelling infrastructure and in particular new recharging infrastructure allowing the transfer of electricity with a power output of up to 22kW that support smart recharging functionalities.

For aid granted without competitive bidding, the aid may be considered proportionate, if it does not exceed 40% of the eligible costs. The aid intensity may be increased by 10% for zero-emission vehicles or for medium-sized enterprises or by 20% for small enterprises.

At the same time, although alternatives to fossil-based fuels are already available, the Commission recognises that as regards heavy-duty vehicles or hydrogen refuelling infrastructure, LNG or blended fossil-based hydrogen may be eligible for aid if granted until 2025 and 2035 respectively and provided that the relevant Member State has put forward a strategy to phase out fossil fuels.

ENERGY INFRASTRUCTURE – HYDROGEN

Aid for energy infrastructure is another area covered by the CEEAG. Eligible investments may include digitalisation, smartening of energy infrastructure, e.g. in order to enable integration of renewable or low-carbon energy, as well as upgrades on grounds of climate resilience. The CEEAG contain a clear set of definitions of the various types of energy infrastructure, including for the first time also hydrogen infrastructure. The latter comprises either repurposed or newly constructed (cross-border) transmission pipelines; storage facilities; dispatch, reception, regasification or decompression facilities; terminals; and any equipment or installation essential for the hydrogen system including compressor stations.

FOSSIL FUEL POWER PLANTS DECOMMISSIONING

Under the CEEAG, in the context of accelerating the energy transition in Member States with very low income per capita, aid can be granted for the closure of coal / peat / oil shale power plants and / or mining operations with a simultaneous investment in more environmentally-friendly generation. The Commission explicitly refers to natural gas as a transitional and less polluting energy source. Certain projects are exempted from the scope of the CEEAG until 31 December 2023 provided that they: i) are located in Member States with real GDP at or below 35% of the 2019 EU average; ii) involve simultaneous closure of the coal / peat / oil shale power plants of the same capacity as the new generation covered by the investment, by no later than 2026; iii) concern Member States without a capacity mechanism in place committing to undertake market reforms ensuring security of supply; and iv) are part of a credible and ambitious decarbonisation strategy.

AID TO LARGE AIRPORTS

In derogation to point 17(b) of the 2014 Guidelines on State aid to airports and airlines (Aviation Guidelines), the CEEAG explicitly provides that large airports with a passenger volume of over 5 million per annum, would be eligible for aid to decarbonise their infrastructure, operations and systems, assuming they meet the criteria described above.

OTHER SECTORS

Further noteworthy developments in the CEEAG include:

- aid for the rehabilitation of nature and ecosystems, and for the protection and restoration of biodiversity, (in addition to aid for decontamination already covered under the EEAG) is provided under the CEEAG; aid intensity may reach up to 100% of eligible costs;
- selective reductions in the payment of levies for energy-intensive users are foreseen to avoid carbon leakage, i.e. avoiding that EU businesses move their production to countries outside the EU, where environmental targets are absent or less ambitious, and therefore the production costs lower. Eligibility is determined on the basis of electro-intensity and trade-intensity thresholds at sector level;
- the Guidelines promote also greener security of supply measures by setting strict national emission thresholds or incorporating other environmental criteria into their security of supply measures.

KEY CONCLUSIONS

The CEEAG bring the 2014 Guidelines in line with the recent developments in the EU's climate and energy policy and the Green Deal objectives. The revised Guidelines set out in detail the compatibility criteria for aid in several sectors that are expected to contribute to the 2030 and 2050 decarbonisation targets such as the production of renewable and low-carbon hydrogen, clean mobility and energy efficiency. The Commission has decided to significantly widen the scope of the Guidelines, while it gives a particular weight to the assessment of the necessity and proportionality of the aid, rendering competitive bidding processes the default mechanism for awarding aid and determining the aid level.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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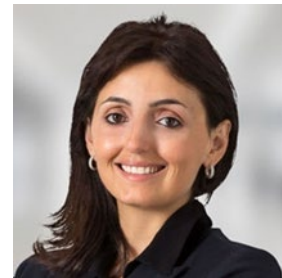
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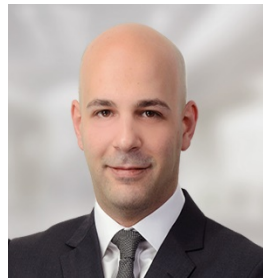
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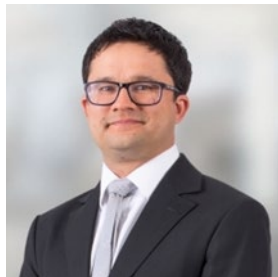
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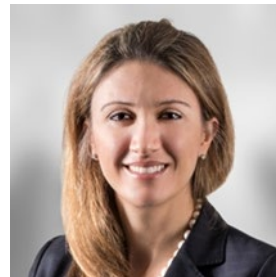
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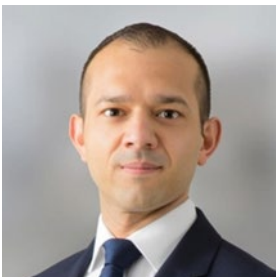
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