

Targeted revision of the General Block Exemption Regulation

Alignment with the Green Deal

ClientEarth is a not-for-profit environmental law organisation comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges. 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 European Green Deal and for an effective internalisation of pollution costs.

We welcome the opportunity to comment on the draft revised GBER (hereafter “draft GBER”) aiming at taking into account the European Green Deal and the EU Climate Law objectives. Our response to the consultation will mainly focus on Chapters I, II and III, section 7 “aid for environmental protection”. We replied to the roadmap and consultation on the CEEAG¹ and to the roadmap on the GBER in April 2021², so that our position on several of the points below is well-known to the Commission. Nevertheless, this response to the GBER consultation addresses the draft GBER so there are specific elements to be taken into consideration.

Unless provided otherwise, all references to Articles in this document refer to the draft GBER submitted to public consultation.

¹ ClientEarth’s reply to the public consultation on the [draft CEEAG](#) and on [the roadmap](#).

² ClientEarth’s reply to the [roadmap on the GBER](#).

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1. General remarks on the GBER

In this first section, ClientEarth wishes to set out its remarks regarding Chapters I (Common Provisions) and II (Monitoring) of the draft GBER, as well as the general remarks which apply horizontally to Chapter III, Section 7 (aid for environmental protection).

1.1. Call for consistency

Revising the GBER in light of the European Green Deal and European Climate Law objectives is both welcome and necessary.

In order to be **consistent** with other policy and regulatory objectives, as well as truly **future-proof**, the GBER must also integrate (i) the Energy Efficiency First principle (see section 1.7 below), (ii) the Union's renewable energy sources and energy efficiency targets for 2030, (iii) the objective to phase out fossil fuels and other environmentally harmful subsidies, as well as (iv) the increased level of ambition proposed in the Fit for 55 package presented on 14 July 2021, including increased targets for energy efficiency and strengthened emissions reductions targets in the Effort Sharing Regulation for buildings, road and domestic maritime transport, agriculture, waste and small industries.

Aid measures under the GBER must be consistent with and actively contribute to reaching these principles, targets and objectives. No aid measure should allow a Member State to slow down its own and the Union's trajectory towards meeting them, according to their obligations of sincere cooperation and solidarity. When trade-offs need to be made to take into account different areas and policies, environmental and human health protection requirements must prevail in the assessment.

Besides, as a matter of completeness, Article 1(3) GBER should *exclude from the scope of the GBER* aid for the closure of power plants using coal, peat or oil shale and of mining operations relating to coal, peat or oil shale extraction; similar to the exclusion of aid for the closure of uncompetitive coal mines by subparagraph (d).

Finally, we suggest to horizontally add the implementation of a claw-back mechanism as one of the eligibility conditions to grant aid.³

1.2. Need for a straightforward tool based on decision-making practice

Firstly, we stress that the GBER is generally deemed to release Member States from *ex ante* State aid control **based on sufficient decision-making practice** that enables to better define the conditions under which aid measures can be considered less distortive of competition.⁴ We are therefore sceptical of including investment and operating aid for **hydrogen projects** in the GBER since many projects are at inception stage and only a few State aid decisions have been adopted which nearly all concern R&D.⁵ The same reasoning applies for including investment aid for **CCUS** in the GBER.

³ Similar to what the Commission adopted in its IPCEI Communication in point 36 and in the draft CEEAG in points 53 and 78.

⁴ Point 4 GBER preamble.

⁵ Conversely, the new regime of exemptions for low-carbon and zero-emissions vehicles and recharging/refuelling stations does not appear problematic since there is extensive case practice of notified and authorised aid schemes under Article 107(3)(c) TFEU that it makes sense to systematise in the GBER.

Secondly, due to the lack of notification and *ex ante* control, the GBER must be a **straightforward and clear instrument** that national and local authorities can easily use. It should not be subject to various interpretations. This would create difficulties in application and lead to legal uncertainty for the grantors of aid and beneficiaries alike, or worse, leave loopholes for aid measures which are inconsistent with the Green Deal. This was one of the criticisms raised against the 2014 GBER in the Fitness Check.⁶

For this reason, ClientEarth is worried about the Commission's **vaguely formulated conditions for aid measures supporting fossil gas**. Notions such as "*compliant with the 2030 and 2050 climate targets*" or "*mainly used for the transport of hydrogen and renewable gases*" are rather new in Union legislation and not fully defined in State aid practice. By the time the GBER enters into force, the CEEAG will have applied for a very short time (expectedly since January 2022) and it is uncertain whether there will be an important enough volume of Commission decisions by then.

Besides our remarks on these conditions (or safeguards) as such (see below under section 2), we do not believe that they are operational and can be readily used in practice by granting authorities without great risks of conflicting interpretations and administrative complications. Different standards for the granting of aid across the EU in combination with the higher notification threshold could lead to serious distortions of competition and an unequal level playing field. That would be **diametrically opposed to the very objective of the GBER and State aid rules in general**.

Ultimately, it will be for the aid beneficiaries to prove that they meet the relevant conditions or make relevant commitments. Hence, the granting authorities will be responsible to collect this evidence and commitments and monitor compliance. It is uncertain whether all granting authorities will perform this monitoring adequately and consistently. Given the importance of the climate commitments and the trajectory to reach it, the Commission should not leave provisions that are vague and subject to interpretation in the GBER.

1.3. Compliance with Union law

Article 1(5) of the 2014 GBER provides that the aid must not entail a non-severable violation of Union law. Based on the CJEU's ruling in *Austria v. Commission*⁷ and for consistency, we recommend to amend this clause in line with point 32 of the draft CEEAG (*based on the final version thereof*), at least.

Absent the possibility to rely on a Commission's *ex ante* assessment of Union law compliance, Article 1(5) GBER should also include that aid for climate, energy and regional development must comply with and contribute to National Energy and Climate Plans (NECPs) and Territorial Just Transition Plans (TJTP) for the regions concerned⁸, both as approved by the Commission.

Member States are primarily responsible for the assessment of Union law compliance under the GBER, subject to the Commission's and the CJEU's control. We thus reiterate our practical recommendations for the implementation of this obligation⁹:

⁶ Fitness Check Report, PART 1/4, pages 98, 106 and 123.

⁷ Judgement of 22 September 2020, Republic of Austria v European Commission, C-594/18 P, ECLI:EU:C:2020:742, para. 44-45 and 100.

⁸ This does not depend on whether the GBER will contain specific rules for aid paid with the Just Transition Fund. Just Transition Plans, where applicable, will define Member States' commitments for the relevant regions and projects and will be binding on Member States.

⁹ ClientEarth, "[Why the Hinkley Point C ruling obliges to implement the Green Deal in State aid practice](#)", 4 May 2021.

- a) The GBER summary information form should contain a field (or multiple) on the conformity of the aid measure with Union law and, for aid for climate and energy, Union law on the environment and climate.¹⁸ Member States should collect all relevant documentation evidencing that the supported activities comply with all EU law on the environment (for the protection of air, soil, water, biodiversity, etc.) and climate (contribution of the activity to climate neutrality); prove that relevant permits have been granted or confirm that holding adequate permits are a condition for the grant of aid.¹⁹
- b) Aid schemes for a very large number of beneficiaries or (yet) unknown beneficiaries, must be subject to a **condition precedent** that the Member State is satisfactorily convinced that the activity does not breach Union law.
- c) For all aid measures, the payment of aid under a scheme must also be subject to a resolutive condition, thus to **recovery**, should the activity actually breach Union law.

1.4. The definitions (Article 2)

a. Alignment of the GBER and CEEAG definitions

Point 6 of the preamble advocates for consistency between the CEEAG and the GBER. However, some definitions in Article 2 have been amended but differ from the draft CEEAG of June 2021.¹⁰ For the sake of consistency and to ensure that granting authorities do not apply State aid rules in a different manner from the CEEAG, **the definitions should be identical** in the two frameworks, notably:

- “**environmental protection**” in point (101) should be amended pursuant to the definition to be adopted in the CEEAG; currently the definitions in the draft GBER and draft CEEAG differ. The same goes for the definition of “**restoration**” in point (123c).¹¹
- “**Union standards**” in point (102b) should be aligned with the new CEEAG, by reference to “emissions levels” instead of “emission performance levels”. In line with our observations on the CEEAG, we maintain that the Union standards must be based on the most ambitious levels of environmental protection so that when emissions levels are expressed as a range, the most ambitious limit constitute the relevant Union standard for the purpose of the CEEAG and GBER.
- “**low-carbon hydrogen**” in point (102e) should be aligned with the new CEEAG and the definitions of upcoming Gas Market Reform.¹² Similarly, for the sake of completeness, we recommend to include definitions by reference to sectoral legislation for “low-carbon” and “renewable” gases and fuels more broadly.
- “**energy efficiency**” in point (103), “**energy savings**” in point (103e), **cogeneration** in point (108) and the definitions relating to **district heating and cooling** in point (124a) should either refer to the ones in the recast EED after it is reviewed or meanwhile, to the definitions in the CEEAG.

¹⁰ And in some respect, from the leaked draft CEEAG as published by Euractiv on December 1st, 2021 (hereafter “leaked draft”).

¹¹ See leaked draft CEEAG.

¹² NGO [letter on the hydrogen and gas decarbonisation package](#) and [attached briefing](#) (7 December 2021) calling for more ambitious thresholds to exclude the most unsustainable production routes of low-carbon hydrogen.

- “**CCS**” in point (131a) and “**CCU**” in point (131b) should be amended to narrow down the scope to industrial plants in hard-to-abate sectors and exclude power plants. The definitions should at the very least be the same as the ones in the CEEAG and contain clear wording to be able to determine its scope.¹³

b. Confusing definition of renewable electricity released after storage

The draft GBER excludes from the definition of energy from renewable sources (RES) (Article 2, para. 109) electricity produced from renewable energy sources stored in a battery storage behind the meter and later reinjected behind the meter or in the grid.

This differs from the definition of energy storage in the Electricity Market Design Directive (EU) 2019/944, under which energy storage allows the consumption of the same energy to be postponed to a later point - without the energy losing its renewable nature.¹⁴

We assume that by excluding electricity reinjected after storage from point (109), the GBER in fact aims at excluding that such electricity be supported twice, in particular if the stored energy has already received aid for its production (under Article 42 notably). ClientEarth agrees with the need to avoid overcompensation.

Nevertheless, the mismatch between the legislative definition and the GBER definition of RES is confusing and can have unintended negative consequences that need to be avoided. Indeed should one consider that electricity released after storage no longer qualifies as RES, there is a risk that this electricity may lose its right for non-State aid types of support and traceability, notably through guarantees of origin. This exclusion risks limiting support for storage coupled with renewable energy, whereas storage is and will become even more important in the future to face intermittency of renewables and thus the deployment scale of renewable energy projects. Revenues from flexibility markets are currently limited given that they are not yet fully developed in all Member States, especially for residential customers.¹⁵

For the sake of clarity and coherence, we recommend that the draft GBER (and the future CEEAG) **align with the definition of energy from renewable sources in secondary legislation, while explicitly prohibiting the granting of State aid for the electricity that is released after storage.**

c. Problematic definition of “green cogeneration”

In Article 2 (108b), the Commission introduced a new definition for “green cogeneration” (allowing a 15% aid intensity increase) per which “‘green cogeneration’ means cogeneration using 100 % renewable energy sources as an input for the production of heat and power”. To the best of our knowledge, this notion is not defined anywhere in legislation, not even in the proposal for a recast EED that is under discussion.

The most likely renewable energy sources input for cogeneration are waste and biomass, including forest biomass. None of these fuels is sustainable; cogeneration from waste or forest biomass should neither be

¹³ The definition in the more recent draft CEEAG published by Euractiv on December 1st, 2021 contains an amended definition which does not longer explicitly refer to power plants. However, the wording “*industrial plants, including process-inherent emissions*” would not exclude power plants *per se*.

¹⁴ The definition of energy storage under the Electricity Market Design Directive (EU) 2019/944 is as follows: “(59) ‘energy storage’ means, in the electricity system, **deferring the final use of electricity to a moment later than when it was generated**, or the conversion of electrical energy into a form of energy which can be stored, the storing of such energy, and the subsequent reconversion of such energy into electrical energy or use as another energy carrier;”.

¹⁵ We refer here to SolarPower’s contribution to the present consultation. See e.g. Dominique Fenon « Le besoin des marchés de la flexibilité : l’adaptation du design des marchés électriques aux productions d’énergies renouvelables » (paper 2015).

promoted not facilitated, in general and particularly not under the GBER without a Commission's *ex ante* control of the objectives pursued by the granting authorities.

In any case, such cogeneration cannot qualify as "green". At most, based on the current definition of renewable energy sources, it could qualify as "renewable cogeneration", taking inspiration of the notion of "renewable hydrogen".

1.5. Transparency, reporting and monitoring are key and need to be increased (Articles 5 and 12)

First, under Article 5(2)(h) of the 2014 GBER (that is not amended by the proposal), aid for energy efficiency is considered 'transparent' if the conditions in Article 39 GBER are fulfilled. For the sake of clarity, we propose to also refer to Article 38 – even if the aid would generally take the form of grants, loans or guarantees that are covered by sub-paragraphs (a) to (c).

Likewise, sub-paragraph (i) should include feed-in tariffs.

Second, although we welcome lowering the publication threshold at €100,000, the draft GBER does not address some key transparency issues. The public should be enabled to monitor the planned aid measures not only after the aid is granted and the Commission publishes the information on its State Aid Transparency Public Search. Moreover, beyond the fact that the information provided by Member States on their websites is often incomplete or simply not accessible (and therefore in violation of Article 9(4)), the deadline for publication by Member States is too long to enable close monitoring and unjustified given the much shorter deadline to report similar information to the Commission (Article 11a).

Hence, to increase transparency and effective monitoring, we remain convinced that:

- (i) Member States should be required to report and publish their commitment to grant aid before it is granted and to confirm it in due form once the aid is granted;
- (ii) Member States should publish the information on the national/regional website at the same time as they report similar information to the Commission, i.e within 20 working days following the entry into force of the aid measures;
- (iii) The Commission should publish the information on the aid measures as reported by the granting authorities within one month upon receipt thereof;
- (iv) The summary of the text of the aid measures should also be published in English;
- (v) The Commission should actively monitor the Member States transparency and reporting obligations and, if need be, withdraw the benefit of the block exemption in case of recurring violations.

More generally and albeit in the context of the CEEAG, the European Parliament recently also shared our concern on the lack of transparency around the State aid procedure and called upon the Commission to address this issue at different levels.¹⁶

¹⁶ European Parliament resolution of 21 October 2021 on the CEEAG (2021/2923(RSP)), para. 29.

1.6. Public consultations should be organised beyond certain thresholds

ClientEarth strongly welcomes in principle the new requirement for Member States to organise public consultations on decarbonisation measures and security of supply measures in the draft CEEAG. As mentioned in our reply to the consultation on the CEEAG, we would like this requirement to be extended to other types of aid measures regardless of the amount of aid involved.¹⁷

Article 36a (8) contains an obligation on Member States to *either* conduct an independent market study or a public consultation for investment aid for clean vehicles recharging or refuelling infrastructure. This is the only reference to public consultations and this requirement applies only if the infrastructure will be open to the public. Our comments are the following:

- a) If Member States have the choice to replace a public consultation by a market study, there is no doubt they will elect the second option because it is less burdensome from an administrative point of view. Even more so that the draft GBER does not require them to commission a specific study each time they set out a scheme: as we read it, the draft seems to allow granting authorities to rely on general studies and draw their own consequences for their specific aid measures.
- b) The Commission's rationale under the CEEAG to require public consultations on certain aid schemes is a good one, in our opinion. We fail to see why it would not be equally valid under the GBER. On the contrary, the lack of *ex ante* assessment of exempted schemes is an argument for Member States to collect more information from the market at their level before planning a scheme that may end up being wrongfully designed.
- c) Public consultations on exempted schemes would also contribute to transparency on compliance of planned schemes with the GBER: given the recovery risks for aid beneficiaries should the GBER not be complied with¹⁸, consultations could be an opportunity to double check compliance.

We recommend to introduce a requirement to organise public consultations on aid measures under the GBER similar to under the CEEAG, beyond certain thresholds of aid amounts.¹⁹ Below the thresholds, granting authorities could either organise public consultations or rely on independent market studies that are no older than twelve months old.

1.7. Energy Efficiency First should be an overarching guiding principle

The Energy Efficiency First (EE1st) principle is a key pillar of the Energy Union²⁰ and has been recognised by the Commission as a horizontal guiding principle of European climate and energy governance and beyond, to ensure we only produce the energy we really need.²¹ **Surprisingly, the EE1st principle is not mentioned anywhere in the draft GBER.** The current context of surge in gas prices makes the application

¹⁷ See ClientEarth [response to the consultation on the CEEAG](#), August 2021, section 1.5.

¹⁸ Judgment of 5 March 2019, *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, C-349/17, ECLI:EU:C:2019:172, para. 105.

¹⁹ For instance the upper third of the aid notification threshold.

²⁰ See [Factsheet on energy efficiency](#).

²¹ 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.

of this principle by the granting authorities even more crucial to move away from fossil fuels and achieve the EU and national climate and energy targets.

The Governance of the Energy Union Regulation²², as well as the Commission’s proposal for a recast EED²³ require Member States to apply this principle in their energy planning, policy and investment decisions (notably for energy security, energy infrastructure and market integration decisions). Furthermore, Article 3 of the Recast EED states that the principle also applies to non-energy sectors, where those sectors have an impact on energy consumption and energy efficiency. According to the annexed guidelines to the European Commission’s recommendation on “Energy Efficiency First: from principles to practice” (“EE1st Recommendation”), those sectors are the following: Information and Communications Technology (ICT), transport, agriculture and water sectors. This is therefore not optional for them to consider this principle when designing State aid schemes that impact energy demand and/or supply.

The EE1st Recommendation, which also apply to the EU institutions, refer to the principle of the leading role of public bodies (page 22, point 3.5.7). The guidelines also recommend removing legal barriers and providing an enabling framework for applying the principle (page 9), as well as ensuring “*energy efficiency is eligible, and even preferable, for public support and financing*” (page 17).

In its recent resolution²⁴, the European Parliament called upon the Commission to include the EE1st principle in the CEEAG, in particular in the assessment of the necessity of State aid schemes designed by Member States (where it is relevant).

Based on all these policy and legislative developments, we recommend that the future GBER also reflects the EE1st principle as follows:

- (i) **the GBER should define the “EE1st principle” in Article 2**, in line with Article 2(18) Governance of the Energy Union Regulation and the Commission’s EE1st Recommendation. In particular, the GBER must specify 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 (in line with Article 2(18) of the Governance Regulation and the Commission’s EE1st Recommendation);
- (ii) **the GBER, mainly through the aid categories “environmental protection”²⁵, should contribute to strengthening this principle and its full implementation by Member States.** The latter must therefore consider (and justify having considered) 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. **The EE1st principle shall be used as a priority baseline** for assessing whether a measure in the energy sector or which has an impact on energy supply and/or demand where it is relevant **is necessary**, in particular:
 - a. Investment aid for environmental protection, including climate protection (Article 36);

²² Regulation 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).

²³ Proposal for a Directive of the European Parliament and of the Council on energy efficiency (recast), COM(2021) 558 final, 14 July 2021.

²⁴ European Parliament resolution of 21 October 2021 on the CEEAG (2021/2923(RSP)), para. 20-21.

²⁵ Chapter III, Section 7 draft GBER.

- b. Investment aid for the promotion of energy from renewable sources, renewable hydrogen and high-efficiency cogeneration (Article 41);
 - c. Operating aid for the promotion of electricity from renewable sources (Article 42);
 - d. Operating aid for the promotion of energy from renewable sources and renewable hydrogen in small scale installations and for the promotion of renewable energy communities (Article 43);
 - e. Investment aid for energy infrastructure (Article 48);
 - f. Investment aid for local infrastructures where it is relevant, i.e. for local energy infrastructures (Article 49);
- (iii) The EE1st principle should also be integrated into the rationale of measures for:
- a. the acquisition of clean vehicles or zero-emission vehicles and for the retrofitting of vehicles (Article 36b),
 - b. energy efficiency (Article 38 and 39),
 - c. energy efficient district heating and cooling (Article 46),
 - d. local infrastructures (Article 49).

This would imply that Member States would consider the least energy-intensive option when granting State aid within these categories.

Studies and consultancy services on energy matters (Article 49) supported by State aid must consider the EE1st principle in their analysis and conclusions.

This integration of the EE1st principle would imply that the electronic notification form provided for in Article 11 current GBER contains a field on the compliance of the aid measure with this principle.

2. Aid to environmental protection should not encompass support to fossil gas

Fossil gas receives support throughout different aid categories of Chapter III, section 7 of the draft GBER, both directly or indirectly. The comments set out in this section apply across all those aid categories.

2.1. Aid for fossil gas is incompatible with the internal market

The International Energy Agency (IEA) has clearly signaled that the net-zero by 2050 pathway requires the immediate and massive deployment of renewables and no more investments in fossil fuels.²⁶ Similarly, in the framework of the 8th Environmental Action Program agreed on 2 December 2021, the Union and the Member States agreed to phase out fossil fuel subsidies, despite the absence of deadline for doing so. The Union's aspiration to phase out fossil fuel subsidies has been present in State aid rules for more than a decade. Ending fossil fuel subsidies would free up resources to be invested in energy efficiency measures and renewable energy, which can help address spikes in energy prices, as recently stressed by the European Parliament in its Resolution on the CEEAG.²⁷

Yet, throughout the draft GBER (like in the draft CEEAG), **fossil gas is being treated more favourably than the so-called “most polluting fossil fuels”**. The draft GBER keeps supporting fossil gas directly as an energy efficiency measure in buildings, in high-efficient cogeneration, in district heating/cooling and energy infrastructure, as well as indirectly through CCUS and low-carbon hydrogen.

There is **no sound scientific justification nor legal basis to give fossil gas this preferential treatment**. State aid rules for environmental protection should support aid for activities that actively contribute to the achievement of EU policies and EU goals to reach at least a 55% reduction of GHG emissions in 2030 and carbon neutrality in 2050 - which simply is not the case for fossil gas. Although ClientEarth considers that these EU targets will be insufficient to limit global temperature rise to 1.5°C (Paris Agreement) and that the EU should rather aim to phase out fossil gas completely by 2035²⁸, meeting the EU targets will nonetheless require a reduction of 22-37% of the EU's consumption of fossil gas by 2030 (compared to 2015) and a continued decline to negligible levels by 2050.²⁹ **Including aid measures to fossil gas in the GBER will strongly undermine the Union's targets.**

The assumption that fossil gas can help reduce GHG emissions in the short term is **based on a completely flawed notion of the role of fossil gas in climate change mitigation**. While the CO₂ emissions associated with gas-fueled energy are readily discernible, the EU itself acknowledges that it lacks reliable data on methane emissions, which occur throughout the fossil gas supply chain. Fugitive methane emissions from extraction and transportation of fossil gas are often sufficient to undermine any CO₂ emissions reductions (compared to coal) at the point of combustion. The most recent scientific studies are showing that global methane emissions have been underestimated and that fossil gas does not necessarily constitute a cleaner source of energy than coal due to its combined emissions of CO₂ and

²⁶ IEA report of May 2021, “[Net Zero by 2050: a roadmap for the Global Energy Sector](#)”.

²⁷ European Parliament resolution of 21 October 2021 on the CEEAG (2021/2923(RSP)), para. 7.

²⁸ [European Civil Society Gas Manifesto](#), EU climate and energy policies must deliver a fossil gas phase out in Europe by 2035 (June 2021).

²⁹ [2030 Climate Target Plan Impact Assessment](#), Figures 6 and 37.

leaked methane.³⁰ A lack of data must not be used as a justification to support fossil gas investments through State aid – this would constitute a fundamental failure to apply the precautionary principle (Article 191(2) TFEU), on a mass scale.

In view of the above, **any support to fossil gas does not have its place in the GBER**. The draft GBER should be amended to take into account that aid measures which directly or indirectly support any fossil fuels, including fossil gas, are **unlikely to create positive effects for society at large, have significant negative environmental effects because they are premised on denial of the latest scientific knowledge and increase the negative externalities in the market**.

2.2. Supporting fossil gas in the GBER will lead to unbridled support

In the alternative, as a subordinate position, since the Commission believes that fossil gas has a role to play in the coming years as a transition fuel, it is paramount that the Commission keeps an overview of Member States' support to fossil gas, notably to avoid further lock-in and stranded assets. Leaving it up to Member States to grant aid for fossil gas throughout different aid categories, whether directly or indirectly, **without any *ex ante* control by the Commission, will lead to unbridled support to fossil gas**. Such control cannot be tackled by the Commission's *ex post* monitoring powers under the GBER. An *ex post* monitoring exercise is limited to verifying the conditions under which aid has been granted by a Member State, whereas compliance with climate targets, where time is really of essence, needs to be assessed *before* granting aid and starting a project in order to avoid lock-in and stranded assets.

Leaving it up to the Member States to assess if a project complies with the 2030 and 2050 climate targets as a condition to grant aid is unrealistic and will undermine the Green Deal objectives. "*Compliance with the 2030 and 2050 climate targets*" is not clearly defined in the draft GBER nor in any other EU legislation for the time being, meaning that Member States will be giving it their own interpretation, potentially (or likely) to the detriment of the scientific understanding on how to reach those climate targets. Beyond such specific definitions, the GBER does also not allow for inserting general considerations on how the Commission sees compliance with the climate targets³¹ due to the fact that it is a Commission regulation, and not a set of guidelines like the CEEAG. This safeguard will also not be shaped in future decision-making, as it may be the case for the CEEAG, given the lack of *ex ante* control by the Commission. Such complete lack of guidance will lead to diverging interpretations amongst Member States and legal uncertainty, which do not only form a threat to the climate targets but also to the level playing field of the internal market.

Hence, we **strongly urge the Commission to exclude aid measures for fossil gas in the GBER altogether and keep these assessments within the Commission's *ex ante* control and assessment under the CEEAG or directly under the Treaty**.

³⁰ International Energy Agency, [The Role of Gas in Today's Energy Transitions \(2019\)](#), p. 41; Oil Change International, [Burning the Gas 'Bridge Fuel' Myth: Why Gas is not Clean, Cheap or Necessary \(2019\)](#), p. 4; Ramon Alvarez et al, [Greater focus needed on methane leakage from natural gas infrastructure' \(2012\)](#).

³¹ Such as in point 65 of the draft CEEAG that states that "*the closer the aided investment is in time to the relevant target date, the greater the likelihood that its transitory benefits may be outweighed by the possible disincentives for cleaner technologies*", which is highly relevant for the assessment of any aid measure relating to fossil gas.

2.3. Safeguard regarding aid for fossil gas

In the further alternative and regrettable event that the Commission would decide to allow the continued propping up of fossil gas in the draft GBER, it is of utmost importance to set clear guidance for aid for fossil gas. This means that the proposed safeguard needs to be strengthened to reduce climate and economic risks as much as possible. ClientEarth makes the following comments and suggestions in this respect:

a) Lack of definitions of “low-carbon” and “renewable” gases/fuels creates undesired loopholes

We welcome the inclusion of definitions for low-carbon and renewable hydrogen, but regret the absence of definitions for “low-carbon” and “renewable” gases and fuels more broadly. This may create confusion and open the door to greenwashing. Hence, it is important to include clear definitions and methodologies for greenhouse gas accounting to determine when a gas is renewable or low-carbon.³²

Moreover, **these gases should not be placed on an equal footing**, as is currently the case in the draft GBER. This is because the climate impact and technology-readiness of the energy sources for the production of low-carbon versus renewable gas differ greatly, making the first clearly less suitable for decarbonisation. The lack of clear delineation between renewable and low-carbon gases could lead to disproportionate and distortive competition advantages for gases with a higher carbon intensity (the externalities for which are not costed into their fuel price) at the expense of lower intensity gases. In turn, this would keep stimulating the development of fossil-based gases and hamper the development of cleaner alternatives.

b) Lack of nuance implies a too permissive draft GBER

The draft GBER allows direct support to fossil gas in case of high-efficiency cogeneration, energy efficient heating/cooling equipment inside buildings, district heating/cooling and energy infrastructure without any nuance on how likely the positive effects of a measure can outweigh the negative effects on competition, such as it is the case for certain aid categories in the CEEAG. For instance, for measures to improve energy efficiency in buildings, support for gas-fired equipment seems more permissive in the draft GBER (Article 38, para. 3d) than in the draft CEEAG (para. 134). This **lack of nuance implies that the draft GBER is more permissive for fossil gas in those aid categories than the CEEAG, which cannot be the purpose.**

c) The proposed safeguard is too weak and unrealistic

The proposed safeguard “compliance with the 2030 and 2050 climate targets” is too weak, not operational and unrealistic to limit and provide stringent guidance for aid for fossil gas. In light of the already existing gas infrastructure lock-in in the EU, new fossil gas projects will very likely undermine the achievement of the climate targets. There should therefore be a **very strong presumption that fossil gas projects will not contribute to the targets.**

³² For more on the definition of low-carbon and renewable gases and fuels: Bellona, “[Briefing, Defining low-carbon and renewable gases and fuels](#)” (June 2021); A similar [greenwashing situation exists for the revision of the TEN-E regulation](#) where the gas industry clearly uses the terms “low-carbon”, “decarbonized” and “renewable” as a creative way to justify the development of fossil gas infrastructure. For more on greenhouse gas accounting of CO₂ use: Bellona, “[The net-zero compatibility test: a simple guide for GHG accounting of CO₂ use](#)” (July 2021).

It would be unreasonable for climate-target compliance to be assessed based on comparisons with other highly polluting fossil fuels – rather, the assessment should be based on consistency with emissions targets. Given growing scientific evidence of the climate impact of methane emissions, one should certainly not be able to rely on any assumption that gas is cleaner than coal. Indeed, if all lifecycle climate impacts were accounted for (which is not the case under current reporting requirements), any relative benefits of fossil gas could very well be nullified.³³

Granting authorities (and aid beneficiaries) must be required to demonstrate how any fossil gas project complies with the Union’s climate targets including through **a detailed assessment of its greenhouse gas and efficiency impacts, and the emissions intensity of energy produced within the Member State and emissions related to the relevant infrastructure.**

Although the draft GBER surprisingly does not refer to the notion of **avoiding “lock-in”**³⁴, the interpretation of this notion will be highly relevant to assess compliance with the climate targets and therefore needs to be comprehensive. An investment supported by State aid should be considered as contributing to “lock-in” if such investment is likely to:

- (i) limit clean alternative solutions entering the market and therefore have a **distortive effect on competition, and**
- (ii) either:
 - a. cause or contribute to the Member State **failing to meet its emissions reduction targets because of the emissions-intensity of the asset, or**
 - b. become a **stranded asset**, whereby the asset is retired before its intended economic lifetime due to its distortive effect on the market or its incompatibility with climate targets.³⁵

In assessing whether an asset is likely to lead to lock-in, regard should be given to the **committed emissions**, *i.e.* the cumulative emissions that would occur over the operational lifetime of an asset.

The greater the lock-in, the less chance and the more it will cost to achieve, the climate targets.³⁶ The factors to assess potential lock-in should therefore be: the lifetime of the equipment, the scale of emissions increase, the financial barriers to subsequent replacement with cleaner alternatives and the institutional mechanisms that strengthen the high-carbon technologies at the expense of cleaner alternatives.³⁷

Lock-in can be discerned through different **indicators**. Lock-in can cause distortions in competition that favour incumbent technologies over clean alternatives, and **limit users’ ability to switch to** (locking them in) a cleaner technology at a reasonable cost.³⁸

³³ In case 1991/2019/KR (17 November 2020) on the Commission’s action concerning the sustainability assessment for gas projects on the current PCI, the EU Ombudsman noted that climate impact assessments of gas projects should take into account the level of greenhouse gas emissions and efficiency impacts, as well as the impact on the overall greenhouse gas intensity of energy production in EU Member States and the emissions related to the functioning of the infrastructure itself. It was emphasised that such emissions assessment should encompass not just carbon dioxide emissions, but methane as well.

³⁴ We note however that the Explanatory note accompanying the proposal for the targeted GBER revision does so.

³⁵ In its Report “Transforming the EU power sector: avoiding a carbon lock-in” (No 22/2016), the EEA described “lock-in” in energy as “a large (fossil fuel-based) technological overcapacity in the power sector, compared with its optimal configuration. It conveys a certain risk of path dependency and inertia in large fossil fuel-based energy systems that inhibit attempts to introduce alternative energy technologies and energy efficiency measures designed to reduce GHG emissions. (...)”.

³⁶ IEA 2013 Redrawing the Energy-Climate Map: World Energy Outlook Special Report.

³⁷ Peter Erickson et al, Assessing carbon lock-in, 2015 Environmental Research Letters 10 084023.

³⁸ For instance, this could occur where housing and buildings which are being equipped with fossil gas cannot switch to cleaner technologies (such as heat pumps) at a reasonable cost. Using fossil gas infrastructure to heat homes with renewable and low-

The existence of **stranded assets**³⁹ is another **indicator of lock-in**. Projects should not receive State aid if their level of emissions over their economic lifetime (not merely their amortization period) is not consistent with the Union climate targets. For this assessment, the residual period of an average economic lifetime of the relevant type of project should be taken into account in assessing overall climate target compatibility. For most fossil gas projects with a long economic lifetime, compliance with the climate targets will mean that their lifetime will need to be reduced. Hence, **taking into account such potential reduction of the economic lifetime, an investment project should not receive State aid if its economic viability is negative or uncertain.**

Finally, it must be stressed that lock-in does not only happen in 2030, or worse, 2050. Rather, **“lock-in” must be avoided pre-emptively and assessed on a rolling basis from now on. This means, if one is to be consistent and forward-looking, not exempting any gas projects from notification under the GBER.** There is already existing carbon lock-in in the EU that must not be further aggravated through additional investments in fossil fuels.⁴⁰

In light of the above, avoidance of lock-in should mean that Member States cannot grant State aid for fossil gas-based projects if, demonstrated by an independent expert:

- more sustainable, non-fossil based alternatives are readily available or could be available with a reasonable time⁴¹;
- the comparison between on the one hand, the amortization period and economic lifetime of a project and, on the other hand, the Union and national climate targets make the project economically unviable or uncertain.

Since the GBER does not refer to notion of “lock-in”, it does also not refer to the examples of binding commitments to prevent lock-in as described in the draft CEEAG, *i.e.* implementation of decarbonisation technologies like CCUS, the substitution of natural gas with renewable or low-carbon gas and plant closure on a timeline consistent with the Union’s climate targets. In this respect, we refer in full to our comments on the draft CEEAG.⁴²

carbon hydrogen is highly undesirable and unrealistic due to the energy intensity of the hydrogen production process (compared to direct electrification) and the scarcity of low-carbon and renewable hydrogen. But if households continue to be connected to gas (and possibly hydrogen-blended gas) instead of being provided with incentives to electrify, they could become locked in to relying on a harmful source of energy that is likely to be far more expensive in the longer-term.

³⁹ A “stranded asset” is to be understood as an economic asset that becomes non-performing before the end of its useful lifetime (premature retirement), regardless of whether that is the result of changes in legislation, market forces, disruptive innovation, societal norms or environmental risks. Stranded assets should be distinguished from stranded resources which are resources which are considered uneconomic or cannot be developed or extracted due to technological, spatial, regulatory, political or market limitations or changes in social or environmental norms (for instance, oil and gas fields which will be left untouched, forests which are not converted in biomass, etc.). As long as a resource is not commercially invested in and used, it is not a stranded asset. For more: Generation Foundation, Stranded Carbon Assets: Why and How Carbon Risks should be incorporated, in Investment Analysis, The Generation foundation, London, 2013, Appendix A.

⁴⁰ It must also be kept in mind that the current carbon lock in is not due to the demand for fossil fuels as in reality there is mainly a demand for energy, not fossil fuels in particular.

⁴¹ For instance, the draft GBER supports aid for the installation of gas-fired heaters in buildings in the event they are substituting previously installed oil- or coal-fired equipment (Article 39(3d.)) whereas non-fossil based alternatives are readily available on the market and be widely deployed (ex. heat pumps).

⁴² ClientEarth’s reply to the CEEAG consultation, pp.22-23. In any event, any commitments made by Member States need to be binding, implemented at the same time as the State aid measure is granted to the beneficiary and subject to accountability.

3. Aid categories for environmental protection (Chapter III Section 7)

3.1. Support to hydrogen (Articles 36, 36a&b, 38, 41, 43, 48)

Renewable and low-carbon hydrogen is supported throughout several aid categories of the draft GBER. The use of both types of hydrogen are equally supported as an environmental protection measure (Article 36), in low-emission transport (Article 36 a&b), as an energy efficiency measure (replacement of gas heating by renewable fuels; Article 38) and in energy infrastructure (Article 48). In addition, renewable hydrogen is eligible for investment aid and small-scale hydrogen installations are eligible for operating aid.

The comments in this section apply for all aid categories in which hydrogen can be supported. Additional specific comments are set out in the sections addressing certain aid categories (below).

First of all, as set out above, **including support to hydrogen in the GBER appears to go against the rationale of the GBER whereby Member States are exempted from *ex ante* control if the conditions, which are based on prior decision-making practice, are fulfilled. Given the lack of such decisions and the fact that many projects are only at inception stage, we are sceptical of supporting hydrogen projects in the draft GBER.**

If aid for hydrogen is to be facilitated under the GBER nonetheless, ClientEarth reiterates its call for the Commission to only support aid for renewable hydrogen.⁴³

a. Aid should be limited to renewable hydrogen and subject to conditions

Due to its notable inefficiencies⁴⁴ and high costs compared to direct (renewables-based) electrification, renewable hydrogen can only be a solution for hard-to-abate sectors.⁴⁵ There is a great deal of hype from vested interests around hydrogen, but independent experts are emphasising that it is not a silver bullet for the energy transition and risks diverting limited resources away from where they are most needed.⁴⁶ **Any State aid for hydrogen should be heavily conditioned and handled with extreme caution.**

Supporting low-carbon hydrogen, even if not with direct investment or operating aid for the production but through supporting its use or enabling infrastructure, would be a mistake, economically and climatically. Such aid would raise similar problems to that for low-carbon gas, namely (i) the EU has a proven pattern of overinvesting in the nominal fuel source for low-carbon hydrogen, fossil gas, (ii) there are economic and climate advantages of bypassing fossil gas-based hydrogen and moving straight to green hydrogen⁴⁷ and

⁴³ See also ClientEarth's responses to, amongst others: [the IPCEI Communication](#) (April 2021), [the EEAG consultation](#) (January 2021), [the IPCEI roadmap](#) (December 2020), the [REDII Inception Impact Assessment](#) (September 2020).

⁴⁴ For instance, regarding the role of hydrogen to provide long-term buffer (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

⁴⁵ For industry which need hydrogen as a feedstock or reaction agents, in the transport sector for long-haul aviation and maritime shipping and in the power sector to back-up renewable energy. See Agora Energiewende, [12 insights on hydrogen](#), point 1, (November 2021). The list of sectors might be reduced overtime as technologies evolve, so the GBER should allow for that.

⁴⁶ We also refer to E3G factsheets on hydrogen (April 2021) outlining science-based approaches to the debates on this topic.

⁴⁷ Agora states that the investment window for fossil-based hydrogen with CCS is open today, but will be closing soon, likely by the end of the 2020's or early 2030's, See Agora Energiewende, ['No-regret hydrogen: Charting early steps for H2 infrastructure in Europe'](#), pp.15-17. BloombergNEF is drawing similar conclusions in its 2021 Hydrogen Levelized Cost Update and confirms that renewable hydrogen will cost less than hydrogen made from fossil gas with CCS in all 28-modelled markets by 2030. This clearly shows the risks of asset stranding of gas-based hydrogen as confirmed by BloombergNEF: *"By 2030, it will make little*

(iii) further fossil gas lock-in would have adverse consequences on future governments' budgets (and therefore future taxpayers), on energy prices and on the climate.⁴⁸

In terms of aid for renewable hydrogen, **additionality**⁴⁹ will be a crucial consideration to guarantee the availability of renewable hydrogen at scale – as rightfully called for by several Member States⁵⁰, NGO's⁵¹ and required by the Commission in its guidance on the assessment of the “do no significant harm” principle in the national recovery plans⁵². Also, for instances where the electrolyser is grid-connected, an emissions assessment of the electricity used in the electrolyser is necessary to ensure that renewable hydrogen is truly renewable.⁵³ Such assessment underlines the importance of properly accounting for the GHG emissions intensity (covering both lifecycle methane and carbon dioxide) of grid electricity to prevent greenwashing.⁵⁴

Hence, we urge the Commission to amend the draft GBER to:

- (i) **Exclude any direct or indirect support to hydrogen that is not renewable**, including infrastructure which should not serve to transport or store low-carbon hydrogen.
- (ii) **Allow aid for renewable hydrogen subject to the following cumulative binding requirements (i.e. aid-granting conditions for eligibility):**
 - a) Hydrogen will only be for use in hard-to-abate priority sectors where alternatives are not readily available;
 - b) Support to electrolysed hydrogen should be matched with additional renewable energy (“additionality”), which should either be available when the project launches or available within a very short binding timeframe;⁵⁵ and
 - c) An emissions assessment shall be provided to ensure that the electricity to produce hydrogen will be renewable in accordance with the additionality requirement.

economic sense to build 'blue' hydrogen production facilities in most countries, unless space constraints are an issue for renewables. (...). Eventually those assets will be undercut, like what is happening with coal in the power sector today.”

⁴⁸ Global Witness, ‘[EU companies burn fossil gas and taxpayer cash](#)’ (22 February 2021).

⁴⁹ Investment in renewable hydrogen should be matched to an equal extent (at least) with renewable energy.

⁵⁰ “[Additionality in renewable hydrogen production](#)”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020. This view has also been repeated in the context of the Hydrogen IPCEI in the ‘[Manifesto for the development of a European “Hydrogen Technologies and Systems” value chain](#)’: “*this initiative should exclusively refer to hydrogen from renewable energy sources since we consider this technology as the only long-term sustainable solution to achieve climate neutrality by 2050.*” as well as at the High Level Conference on Hydrogen “Hydrogen in Society - Bridging the Gaps” organised by the Portuguese Presidency on 7 April 2021. “[Additionality in renewable hydrogen production](#)”.

⁵¹ Joint letter to the Commission, [Hydrogen production for industry and efuels for transport need to come from truly additional renewable electricity](#) (November 2021).

⁵² The Commission’s Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, 2021/C 58/01, p.6 and Annex III.

⁵³ The emissions intensity of hydrogen depends on the efficiency of the electrolyser and the emissions intensity of the electricity powering the electrolyser. Hence, a formula should be used that calculates the emissions intensity (covering both carbon dioxide and methane) of hydrogen ($tCO_2\text{-e}/tH_2$) = (emissions intensity of the electricity * efficiency of the electrolysers) / 30. This is adapted from Bellona, [Electrolysis Hydrogen Production in Europe](#) (April 2021), pp.5-6.

⁵⁴ Bellona, “[Cannibalising the Energiewende? 27 shades of Green Hydrogen](#)” (June 2021), p.3: “*European grids are overall still in a transitional phase, where running an electrolyser inevitably leads to an increase of demand that will be covered by ramping up the available dispatchable generation, namely gas and coal electricity generation. Without the necessary safeguards in place, producing hydrogen today on the majority of the European grids will result in the cannibalisation of the renewable energy production that was deployed to decarbonise other parts of our economies(...).*”

⁵⁵ For instance, for the production of renewable hydrogen, the additional renewable energy needs to be available/in operation at the moment the aid is being granted, or within a very short timeframe thereafter (ex. Permits have been granted and the construction has started). The purpose is to avoid situations where a beneficiary receives aid for renewable hydrogen based on a non-binding promise to invest in additional renewable energy whereas the electrolyser remains connected to the grid in the

b. At least, aid for low-carbon hydrogen should be subject to stringent requirements

As a subordinate position, if the Commission would maintain its support for both low-carbon and renewable hydrogen, ClientEarth wishes to make several comments and suggestions.

It must be stressed that these two types of hydrogen should not be placed on equal footing as is currently the case in the draft GBER. First, the climate impact of the energy sources for the production of low-carbon and renewable hydrogen obviously differs greatly, making the former clearly less suitable for decarbonisation. Second, this equal treatment contradicts the EU's Hydrogen Strategy⁵⁶ and the Energy System Integration Strategy⁵⁷ that clearly indicate that the EU's priority is to develop renewable hydrogen. Hence, absolute aid amounts (such as through the eligible costs for the funding gap or aid intensities), be commensurately higher for renewable hydrogen than for low-carbon hydrogen.

In any event, direct or indirect support to low-carbon hydrogen should only be granted subject to cumulative binding conditions to limit the climate and economic risks as much as possible⁵⁸ (**i.e. aid-granting conditions for eligibility**):

1. Only for use in **hard-to-abate priority sectors** where alternatives are not readily available;
2. The use of the **best available CCS technologies** should be mandatory from the outset for all generation and upstream extraction facilities associated with the project to ensure overall CO₂ emissions are limited in line with the EU's and relevant national emissions reductions targets⁵⁹;
3. The beneficiary shall provide **a plan regarding the captured CO₂** showing⁶⁰:
 - (i) that captured CO₂ waste from the project will be stored or utilised in a safe manner for the time required for CO₂ to break down (see also on the CCS/CCU below in section 3.2.b),
 - (ii) the lifecycle emissions from this storage or utilisation would not cause or contribute to any exceedance of the EU's climate targets;
 - (iii) the estimated lifetime economic costs of CO₂ management including comprehensive analysis of economic liabilities associated with the ongoing CO₂ management can be managed on an ongoing basis by the relevant project proponent or Member State;
 - (iv) the entities which would be responsible for insuring against those costs are adequately resourced to do so on an ongoing basis and cover all reasonably likely environmental and economic contingencies in accordance with sound risk management; and

meantime. Given the fact that European grid contain mainly gas and coal electricity generation, this would make such hydrogen very carbon intensive. For more, Bellona, [Electrolysis hydrogen production in Europe](#) (April 2021).

⁵⁶ Commission Communication, Hydrogen Strategy for a climate-neutral Europe (COM(2020) 301 final), p.5.

⁵⁷ Commission Communication, Powering a climate-neutral economy: an EU Strategy for Energy System Integration (COM (2020) 299 final).

⁵⁸ Not being duped into the notion of "low-carbon hydrogen", as occurred with "low emission coal" (which was meant to incorporate CCS), should be the overriding purpose of such conditions.

⁵⁹ A way to implement this would be to ensure overall carbon dioxide emissions are capped. Agora Energiewende proposes to set a capture rate of minimum 90% for retrofits of existing facilities and of minimum 98% for new/additional capture capacity as from 2025. See Agora Energiewende, "[12 insights on Hydrogen](#)" (November 2021), p.45.

⁶⁰ This plan must be independently assessed using a science-based approach for the purposes of determining its feasibility, and any economic, environmental (including climate) and social risks associated with it. This assessment should be conducted by a party with the requisite expertise that is proven to have no conflict of interest associated with the project or broader industrial strategy associated with the project. If, by the time the assessment is undertaken, the European Scientific Advisory Board on Climate Change has produced reports or other materials relevant to the assessment, the assessment should at least be consistent with them.

- (v) an evaluation that, taking into account the information submitting under above requirements, it is still preferable for the gas-derived hydrogen project to be developed instead of clean alternatives.
4. **Lifecycle methane leakage** relating to any gas used to produce hydrogen associated with the relevant plant or infrastructure shall, by the start of 2025, be no higher than 0.20% for upstream emissions⁶¹, 0.12% for distribution-level emission⁶², and a commensurate level for midstream emissions. Alternatively, if the EU has adopted a methane performance standard or import standard which is in line with the 2050 carbon neutrality objective, the methane emissions for hydrogen shall comply with the future EU standard⁶³;
 5. For any low-carbon hydrogen, **a binding date shall be set for the project to fully transition to renewable hydrogen**;
 6. An independent assessment plan (with the same standards as described under (3)) shall be provided showing **that the project's conversion to renewable hydrogen within the required timeframe** is reasonably **viable and cost-effective**, including details of the renewable fuel source and its proven additionality to the energy system.
 7. In order to ensure the implementation of the polluter pays principle, a **guarantee by a financial institution** shall be provided which covers the beneficiary's environmental liability.

Finally, any need for State aid to low-carbon hydrogen should be very strictly assessed given the increasing carbon price in the EU and the fact that low-carbon hydrogen benefits from free allocations under the EU ETS. Low-carbon hydrogen is competitive with fossil unabated hydrogen when the carbon price enters the range of 50 to 100 euro/tCO₂, meaning that State aid is already or soon will be unnecessary.⁶⁴

3.2. Investment aid for environmental protection, including climate protection (Article 36)

a. General comments

In addition to our specific comments regards CCUS and hydrogen below, we would like to stress the following in respect of this aid category:

- It is unclear whether the scope of application in para. 1a excludes power plants when it mentions "*investments in equipment, machinery and industrial production*", an exclusion we would strongly support, whereas para. 2a on CCUS unfortunately explicitly includes power plants.

⁶¹ As committed by the key global and national-level gas industry companies through the Oil and Gas Climate Initiative and with the goals of decreasing the threshold to 0,05% in the long run – see '[Methodological note for OGCI methane intensity target and ambition](#)'.

⁶² GIE and Marcogaz, '[Potential ways the gas industry can contribute to the reduction of methane emissions](#)' (5-6 June 2019).

⁶³ On the EU standard proposed by ClientEarth, see our [Response to the Roadmap / Inception Impact Assessment on the Hydrogen and gas markets decarbonisation package](#) (March 2021).

⁶⁴ On December 3rd, 2021, the daily carbon price was at 78,25 euro/tCO₂ (source: [Ember Carbon Price Viewer](#)); See Agora Energiewende, "[12 insights on Hydrogen](#)" (November 2021), pp.44-46.

- The assessment of environmental protection under para.2 should, as the definition requires, take a broad holistic approach and not only focus on climate protection and emission reduction. Some measures may tackle GHG emissions while having disproportionate detrimental effects on biodiversity, against some of the Green Deal objectives. Given the nature of the GBER, the condition to “increase the level of environmental protection” is too vague and unspecific to allow a harmonious implementation across Member States. We therefore suggest to provide Member States with guiding principles in the GBER.
- It is unclear whether competitive bidding processes would need to be technology-neutral or whether technology-specific tenders, such as for CCS only, could be organized.

b. CCUS

Beyond the fact that ClientEarth believes that there is too little experience regarding State aid for CCUS to be able to set the right conditions in the GBER already (see section 1.2, investment aid for CCUS requires a **cautious and selective approach** given the high failure rate of carbon capture projects so far⁶⁵ despite decades of public funding.

CCUS is expensive due to high deployment and energy costs, only 85% is captured for combustion-point capture and extraction-point emissions capture is highly unreliable. Moreover, CCUS does not tackle other air pollutants nor the greenhouse gases emitted in the supply chain and the environmental risks relating to leakage from geological sequestration are real.⁶⁶ It may allow aid beneficiaries to rely on what is currently highly speculative, un-commercialised emissions abatement instead of renewable energy, and refrains users from implementing other structural sustainable solutions.

Yet, the current draft GBER wrongly presumes that *any* CCUS is compliant with the 2030 and 2050 climate targets. Instead, support to CCUS can only be a last resort measure in targeted situations and provided it does not undermine the climate targets. To translate this cautious and selective approach, Article 36(2) should be amended to reflect the following:

1. The eligibility for aid for CCUS should be **limited to hard to abate industrial applications**, where more sustainable alternatives are not readily available. Generally, CCS/CCUS for fossil fuel energy production should not be eligible as such support would incentivise use of unsustainable fuel sources (fossil and forest biomass) and be detrimental to alternative investments in non-emitting technologies. We therefore suggest to narrow down the definition. down
2. The Commission should **only allow the best available CCS (capture) technologies** to be eligible for support to ensure overall CO₂ emissions are limited in accordance with the EU's and relevant national emissions reductions targets.⁶⁷
3. The first condition of Article 36 para 2a point (a) should be elaborated to require a comprehensive plan regarding the captured CO₂ showing that:

⁶⁵ A 2009 roadmap from the International Energy Agency projected that 22GW and 170 million tonnes of CCS would be installed by 2020, but only 13% of that was delivered. IEA, '[CCUS in Clean Energy Transitions](#)' (September 2020); See also: Conor Sullivan, '[Carbon capture eyes renewed backing despite past failures](#)' (FT - 26 April 2021); A recent US study found a failure rate over 80%: A. Abdulla et al, "Explaining successful and failed investments in U.S. carbon capture and storage using empirical and expert assessments" (2021) Environmental Research Letters 16:014036.

⁶⁶ See also: Friends of the Earth Scotland, Carbon Capture and Storage (CCS) technologies (July 2020).

⁶⁷ A way to implement this would be to ensure overall carbon dioxide emissions are capped. Agora Energiewende proposes to set a capture rate of minimum 90% for retrofits of existing facilities and of minimum 98% for new/additional capture capacity as from 2025, See, "12 insights on Hydrogen" (November 2021), p.45.

- (i) captured CO₂ will be stored in a safe manner for the time required for CO₂ to break down;
 - (ii) the lifecycle emissions from this storage or utilisation would not cause or contribute to any exceedance of the EU's climate targets;
 - (iii) the estimated lifetime economic costs of CO₂ management including comprehensive analysis of economic liabilities associated with this management can be managed on an ongoing basis by the relevant project proponent or Member State;
 - (iv) the entities which would be responsible for insuring against those costs are adequately resourced to do so on an ongoing basis and that the term of such proposed insurance covers all reasonably likely environmental and economic contingencies in accordance with sound risk management.
4. A residual market failure for CCUS can never be presumed and the necessity of State aid should be duly demonstrated, especially given the expected rising carbon prices in the near future and increasing requirements for emitting installations to reduce their emissions under regulation or their permits.
5. Adding on to the selective approach and conditions above, **State aid to implement CCU as a so-called environmental protection measure should trigger additional caution.** Using CO₂ does not by definition lead to decarbonisation but simply leads to a postponement of emissions and thus does not have a positive climate impact. For instance, when captured CO₂ is combined with low-carbon hydrogen to make synthetic fuels, which is a highly energy intensive process, it is subsequently released in the atmosphere. Captured CO₂ is also used to keep environmentally harmful activities afloat, such as in enhanced oil recovery. State aid for CCU should therefore be dependent on the actual use of the CO₂, and subject to an independent life-cycle emission assessment and storage plan to ensure that supported CCU projects effectively contribute to decarbonisation (and not only to circularity).

c. Use of low-carbon or renewable hydrogen and dedicated infrastructure

The Commission presumes that supporting the use of renewable hydrogen or low-carbon hydrogen during the entire lifetime of the investments is in line with the 2030 and 2050 climate targets. However, as set out in above (section 3.1), these types of hydrogen should not be put on equal footing and any use of low-carbon hydrogen should be replaced by renewable hydrogen to be in line with the climate targets. In the same logic, if the economic lifetime of the investment goes beyond 2050, the use of low-carbon hydrogen cannot be deemed compatible with the climate targets.

Moreover, qualifying the production of low-carbon hydrogen as an industrial production activity eligible for aid in this category circumvents the principle that only the production of renewable hydrogen is eligible for aid under in Articles 41 and 43. This unjustified loophole is exacerbated by the fact that the aid intensity for the production of low-carbon hydrogen in Article 36 is limited at 40% of the eligible costs whereas the production of renewable hydrogen in Article 41 is limited at 35% of the eligible costs (or 100% in both cases if subject to a competitive tender).

Also, if power plants fall within the scope of Article 36 (this is unclear, see our comment under point a. above), this would mean that they have the option to choose how to produce hydrogen to be used as an energy carrier (since Article 36 does not limit its use as a feedstock only), either with low-carbon electricity

under Article 36 or with renewable electricity under Article 41. **Including such a loophole in Article 36 whereas point 8 of the preamble states that “Aid for the promotion of hydrogen should be considered compatible with the internal market and be exempted from the notification requirement of Article 108(3) of the Treaty, *only insofar as exclusively renewable hydrogen is produced*”, is not acceptable.**

We therefore recommend the Commission **to narrow down the scope of application of Article 36 and set stringent conditions for aid for hydrogen more generally across aid categories** (see section 3.1).

In addition, the main risk of granting aid for **dedicated hydrogen infrastructure** and storage facilities is overinvestment (as for gas infrastructure), which is exacerbated by the lack of *ex ante* control by the Commission. Before supporting dedicated infrastructure, granting authorities must justify the need for it and its cost-effectiveness, based on the EE1st principle (see above section 1.7) and potential electrification alternatives. The development of dedicated infrastructure is also receiving strong support by the gas industry as it will be the stepping-stone for an EU-wide hydrogen backbone⁶⁸, although the need to develop the latter has not been established. Hence, potential clusters need to be very carefully and strategically planned in a cost-effective way to avoid further carbon lock-in and future stranded assets.⁶⁹

Finally, by allowing aid for dedicated infrastructure for low-carbon and renewable hydrogen under Article 36 whereas Article 41(3) only allows aid for similar infrastructure for renewable hydrogen, Article 36 provides a loophole for the more restrictive Article 41. Hence, **any aid for dedicated infrastructure should, if proven necessary, be limited to renewable hydrogen** in Article 36.

3.3. Investment aid for cleaner mobility

a. Recharging or refuelling infrastructure (Article 36a)

The scope of the new section (from July 2021) on recharging and refuelling infrastructure has been widened in the draft GBER to include low-carbon hydrogen, although a harmonized definition of low-carbon hydrogen has not been adopted by the legislator.⁷⁰ ClientEarth considers this broadening of the scope a mistake, for the reasons set out above. State aid to refuelling infrastructure should be limited to renewable hydrogen, throughout the economic lifetime of the infrastructure.

We support the obligation to have an *ex ante* public consultation (that we think should be mandatory if the aid reaches a certain threshold) or an independent market study to establish the necessity of aid (para. 8). However, no such consultations or studies are required where electric vehicles or fuel cell electric vehicles represent less than 2% of vehicles in a Member State. That threshold is very unlikely to ever be achieved, especially for passenger cars, light-duty commercial vehicles and short-haul trucks.

The absence of requirement of conducting a proper market analysis in a sector that is relatively new, innovative and complex may result in granting authorities disbursing aid for projects that are far from

⁶⁸ The European Hydrogen Backbone initiative consists of European gas infrastructure companies.

⁶⁹ Agora Energiewende carried out an in-depth study based on EU-wide modeling with concrete recommendations for policy makers. Its key conclusion “A no-regret vision for hydrogen infrastructure needs to reduce the risk of oversizing by focusing on indispensable demand, robust green hydrogen corridors and storage.”. See, Agora Energiewende, “No-regret hydrogen. Charting early steps for H2 infrastructure in Europe” (February 2021); See also Agora, “12 insights on hydrogen”, p.16 (November 2021).

⁷⁰ Commission Regulation 2021/1237 of 23 July 2021 amending Regulation 651/2014, recital (15): “The Commission will consider extending the scope (...) to also include low-carbon hydrogen once a harmonised definition is adopted”

necessary, notably if electrification options and the impact of the inclusion of road transport in the ETS system are not adequately explored.

b. Acquisition of clean vehicles or zero-emission vehicles and retrofitting (Article 36b)

The scope of the notion of “clean vehicle” is too broad as it includes plug-in hybrid vehicles that run mostly on fossil fuels and emit far more CO₂ than advertised.⁷¹ To meet the increased climate and health ambition for road transport whereby average emission of new cars should come down by 55% by 2030, **State aid should be limited to zero tailpipe emission vehicles**. At the very least, the difference in aid intensity between zero-emission vehicles and “clean vehicles” should be large enough to truly stimulate the first over the latter.

We welcome the change of approach compared to the draft CEEAG for the eligible costs whereby the investment costs of the vehicle are taken into account instead of the total cost of ownership (para. 3).

Concerning shipping, the draft definition of “clean vehicle” also allows support to fossil gas-fuelled waterborne vessels, which will undermine long-term sustainable shipping solutions. The support for LNG is based on the wrong premise that fossil gas is less polluting than other fossil fuels, which is also not the case for shipping where the use of LNG has an equal or even worse climate impact than the fuels it seeks to replace (marine gas oil), especially given the upstream unreported methane leakages.⁷²

3.4. Investment aid for energy efficiency (Articles 38 and 39)

As highlighted by the Commission in the EU-wide assessment of National Energy and Climate Plans, Member States’ contributions failed to meet the EU energy efficiency target⁷³, while the Union’s renewable energy and ETS objectives have been achieved by 2020. The State aid framework has a major role to play in supporting national and EU targets. To this end, it should send a strong signal to granting authorities to increase support to the energy efficiency sector.

This is particularly important in the building sector, which accounts for almost 40% of final energy consumption⁷⁴, making it the largest energy consumer in the Union. 75% of the Union’s buildings are reported as energy inefficient.⁷⁵ A refurbished building stock is therefore needed for the transition to a flexible, renewable-based and decarbonised energy system. The Commission underlines the role of energy efficiency and of the building sector in achieving the Union’s energy and climate targets, as well as

⁷¹ Transport & Environment, “[Plug-in hybrids: Is Europe heading for a new dieselgate?](#)” (November 2020).

⁷² Transport & Environment, “[CNG and LNG for vehicles and ships - the facts](#)” (October 2018).

⁷³ The [Commission’s 2020 assessment of the cumulative impact of the 27 NECPs](#) shows that they fall short of the 32.5% target, generating reductions of 29.4% for final energy consumption and 29.7% for primary energy consumption.

⁷⁴ Commission Recommendation (EU) 2019/1019 of 7 June 2019 on building modernisation, C/2019/4135, OJ L 165, 21.6.2019, p. 70–128.

⁷⁵ European Commission, [Driving energy efficiency in the European building stock: New recommendations on the modernisation of buildings](#).

a climate neutral economy by 2050.⁷⁶ The Renovation Wave Strategy sets the ambition to at least double renovation rates in the next ten years.⁷⁷

The draft GBER proposes to amend Articles 38 and 39 related to investment aid for energy efficiency. **We welcome the increase of the notification thresholds** for aid granted under those provisions.

However, we see room for improvement in order to facilitate State aid toward this sector and help achieving the EU's and national energy efficiency targets. Our recommendations are the following:

1. **Provide guidance on the definition of 'Union standard' (Article 2 (102))** to help Member States interpret the incentive effect condition of designed schemes. This concept creates some confusion among stakeholders, e.g. in connection with the possible inclusion of a minimum energy performance standard (MEPS) in the Energy Performance of Buildings Directive 2010/31/EU currently under revision. A clarification would also help understand what type of investments can be eligible to aid 18 months before the entry into force of a Union standard (Article 38(2a)).

If MEPS ultimately qualifies as a Union standard, we recommend to allow State aid for meeting the MEPS **until it becomes mandatory for the aid beneficiary**.⁷⁸

2. **Clarify and simplify the methodology to assess eligible costs under Article 38.** The provision specifies counterfactual scenarios that remain complex to apply for Member States. It is still unclear why under Article 38, only "additional costs" necessary to achieve the higher level of energy efficiency are eligible, while aid for renewable energy projects correspond to the total investment cost. Most of the proposed counterfactuals imply that the renovation would have been undertaken even without public support (see Article 38(3)), whereas it is known that buildings renovation do not happen at the pace required to meet energy efficiency and greenhouse gas emissions reduction targets.

It is also methodologically complicated to separate parts of an investment that do not improve energy performance *per se* but are a necessary part of such investments, such as implementation costs of the energy efficiency equipment.⁷⁹ Those include the activities enabling the implementation of the equipment, such as scaffolding to a building to prepare the surface in order to attach thermal insulation.

The draft GBER sometimes allows to cover more than only the "additional costs" necessary to achieve a higher level of energy efficiency. However, the conditions for the application of these exceptions are very stringent and difficult to meet. Pursuant to Article 38(3)(f), the total costs related

⁷⁶ Impact Assessment accompanying the document Communication from the Commission to the European Parliament and the Council Energy Efficiency and its contribution to energy security and the 2030 Framework for climate and energy policy (SWD(2014) 255 final); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (COM(2015) 80 final); Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank 'A Clean Planet for all — a European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy' (COM(2018) 773 final).

⁷⁷ Communication from the Commission, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, COM(2020) 662 final.

⁷⁸ See point 137 of the leaked draft CEEAG, *ibid*. This provision adds that "*The Member State must ensure that beneficiaries provide a precise renovation plan and timetable demonstrating that the aided renovation is at least sufficient to bring the building to comply with those minimum energy performance requirements.*"

⁷⁹ This equipment could be one component or an overall energy efficiency solution (including different components such as new windows, thermal insulation of walls and roofs).

to environmental protection could be covered, provided that there is “*no less environmentally-friendly counterfactual investment*”⁸⁰, which remains broad and could be defined more clearly. The other exception where the entire investment costs necessary to achieve a higher level of energy efficiency are eligible is also restrictive by being limited to non-commercial buildings.⁸¹

We therefore suggest the following:

- i. **Make a simple and clear definition of eligible costs, which covers** all costs in direct relation of the design, purchase and implementation of an energy efficiency equipment or solution:
 - for the renovation of buildings: **the counterfactual should be a no-renovation scenario** (instead of e.g. a less energy efficient investment); and
 - for the construction of highly efficient new building: **the entire investment costs necessary** to achieve a higher level of energy efficiency should be eligible under Article 38 GBER, in the same way as under Article 39; or
 - ii. at least, exceptions to the definition of eligible costs pursuant to Article 38(3(f)) and (3a) should be **more flexible and operational** for Member States, e.g. the exception laid down in Article 38(3a), should be open to commercial buildings; and
 - iii. provide more guidance to Member States on how to assess eligible costs under Article 38.
- 3. Extend the scope of Article 38(7) to other types of aid, commercial buildings and energy services in compliance with the objectives of the EED, the EPBD and the REDII, for the following reasons:**
- i. **The possibility to combine aid for energy efficiency with other types of aid** (such as for integrated on-site renewable energy installations or storage equipment⁸²) is currently limited to certain non-commercial buildings. **A holistic approach to buildings renovation and decarbonisation is necessary and we do not see a reason in principle to limit this regime to non-commercial buildings under the GBER** – whereas the draft CEEAG do allow commercial buildings to combine several types of aid.
 - ii. **Article 38(7) proposes to include energy performance contracting services into the scope of the GBER, which would be a positive development.** Indeed, aid to energy services providers has great potential to contribute to achieving the Union and national energy efficiency targets.⁸³ However, focussing merely on energy performance contracting risks creating the perception amongst granting authorities that it is the sole or the best energy efficiency service available on the market, whereas it may not be the case. Indeed, there are other types of contractual arrangements that also deserve support, notably those that are

⁸⁰ Pursuant to Article 3, f) of the draft GBER: “*Where the investment consists in a clearly identifiable investment solely aimed at improving energy efficiency in the building, for which there is no less environmentally-friendly counterfactual investment, the eligible costs shall be the total costs related to environmental protection.*”

⁸¹ See Article 38(3b) read in conjunction with Article 38(3a).

⁸² Article 38(3b) and Article 39(2) of the draft GBER.

⁸³ E.g. energy service companies (ESCO) have the ability to offer energy services ‘off balance’ as ‘asset-based solutions’. They make the investment and sell a service to consumers, with no up-front capital expenditure on the consumer’s side. This way companies can invest in environmental protection measures in a way that does not affect their balance sheet, ensuring a better return on total invested capital and thus better financing conditions. These services are particularly useful for large-scale renovation projects (e.g. hospitals) and having direct access to financial support is key for such business models.

capable of correcting risks related to volatile consumer behaviours more than energy performance contracting do⁸⁴; and therefore ensure a better return on investment for the service providers. Pursuing a logic of non-discrimination and a level playing field between all solutions and business models that can contribute to reaching the objectives set by the Union and the granting authorities, **the GBER should be open to any form of energy efficiency services, by providing a non-exhaustive list of examples of such services (also in order to be future-proof as innovative services may develop).**

4. **Simplify the application of Article 39** that allows investment aid for energy efficiency in buildings through financial instruments; or, at least, provide more guidance to Member States to make this provision more practical. The Fitness Check Report concluded that this provision was little used by Member States because of its complexity⁸⁵ and the changes in the draft GBER are not substantial.
5. **Broaden the list of financial instruments required by Article 39(4)** as to enhance the possibilities of developing energy efficiency schemes and not preclude opportunities of using innovative business models for building renovations. This restrictive list does not represent the full scope of financial instruments suitable for all the different energy efficiency projects in buildings.

3.5. Investment and operating aid for renewables, renewable hydrogen and high-efficiency cogeneration (Articles 41 and 42)

a. Investment aid for high-efficiency cogeneration

Until now, high efficiency cogeneration has been clearly encouraged by the State aid rules and the Energy Efficiency Directive (EED), regardless of the type of energy source. We do not welcome this lenient approach since this technology uses either fossil fuels (including gas) or scarce raw materials (i.e. forest biomass⁸⁶). The approach taken to limit the scope of the GBER to investment aid for non-fossil fuel cogeneration only, except for fossil gas, is not satisfactory.

In this regard, we refer to our comments above (Sections 2.2 and 2.3), in which we set out (i) why support for fossil gas projects should be kept out of the GBER and (ii) that the condition “*compliance with the 2030 and 2050 climate targets*” is not an effective safeguard.

The draft GBER also requires that the installations provide overall primary energy savings compared to separate production of heat and electricity as laid down by the EED (Article 41(4)). However, the calculation method of high efficiency in the EED is highly questionable.⁸⁷ The recast EED⁸⁸ still requires saving of at least 10% of primary energy compared to the separate production of electricity and heat.⁸⁹ However, the choice of comparative plants to assess this energy saving is not adequate and technically obsolete.⁹⁰ No efficiency minimum requirement applies to small cogeneration, which means that any

⁸⁴ Market experience for energy consumers in buildings such as universities, health care sector, multi usage commercial buildings show that EPC in the sense of the definition of the EED may not be a practical approach. EPC need a reliable energy consumption and cost baseline to calculate the energy savings appropriately, which is the basis of the remuneration model of the ESCO. This is a highly sensitive topic for this type of contracts. Experience shows that the risk of miscalculation and contractual disputes is much more likely for volatile consumers.

⁸⁵ Fitness Check Report, PART 1/4, page 66.

⁸⁶ See our position on forest biomass below.

⁸⁷ See our [response to the public consultation on the EED recast](#).

⁸⁸ [Proposal for a Directive on energy efficiency \(recast\), COM/2021/558 final](#).

⁸⁹ See Annex III of the recast EED.

⁹⁰ For example, 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

“primary energy savings” qualify them as highly efficient. Although the new legal requirements in Annex III of the recast EED limits the quantity of direct emissions of the carbon dioxide from cogeneration production to less than 270 gCO₂ per 1 kWh of energy output from the combined generation, fossil based cogenerations are nevertheless supported and alternative clean energy production not considered.

It should also be noted that cogeneration plants receive other benefits creating significant competitive advantage to this technology over renewable heat generation e.g. free allocation of emission allowances under the EU Emissions Trading Scheme.

For these reasons, ClientEarth calls on the Commission to **remove aid for cogeneration from the GBER**. Given the adverse impact on the climate targets and the Green Deal objectives, any aid for cogeneration shall be subject to an *ex ante* assessment by the Commission and thus be notified under the CEEAG. It should be for the Commission to assess on a case-by-case basis if such aid measure is compatible with the decarbonisation objectives and the Green Deal.

b. Renewable hydrogen

We welcome the fact that aid is restricted to renewable hydrogen in Article 41 (unlike the loophole left in Article 36 to support the production of low-carbon hydrogen; see section 3.2.c), provided the additional eligibility conditions as suggested above (see section 3.1.a), notably on additionality, are complied with. We understand that renewable hydrogen is eligible for an aid intensity of 45% based on the combined reading of para.7 that mentions 30% for the production of hydrogen and para.9 that indicates an increase by 15% for investments using only renewable energy sources. We suggest to amend the wording to clarify this.

c. Biomass

The current EU energy and State aid rules qualify biomass as a renewable and carbon-neutral energy source, which even the biomass industry itself challenges.⁹¹ Public support towards biomass has clearly helped its significant deployment in the EU, making it the most important source of renewable energy in the EU today, with **forests being the main feedstock**.

However, it **conflicts** with the EU climate and energy targets for 2030 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 current 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.⁹² Scientific evidence shows that burning forest biomass leads to greenhouse gas emissions – in addition to deforestation–, which contributes to increasing global temperature and climate change.⁹³ Worse, there is evidence that carbon emissions per unit of electricity generated from forest biomass are higher than from coal.⁹⁴ Additionally, the increased

years. The heat pump, which has been well established for years, is not mentioned as a comparative system for separate heat generation. 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.

⁹¹ Climate Home News, “[Not all biomass is carbon neutral, industry admits as EU reviews policy](#)”.

⁹² For our detailed view, see [ClientEarth’s feedback to the Renewable Energy Directive revision Inception Impact Assessment](#) as well as ClientEarth’s contribution to the Commission’s consultation (questionnaire) to the Renewable Energy Directive.

⁹³ Duncan Brack, Chatham House, *Woody Biomass for Power and Heat: Impacts on the Global Climate*, 2017.

⁹⁴ European Academies Science Advisory Council “[Commentary on Forest Bioenergy and Carbon Neutrality](#)”, 2018.

demand for biomass drives biodiversity degradation worldwide and has been linked with illegal logging within the EU. 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. Finally, biomass creates **market distortions**, since aid granted to biomass are not used for the development of cleaner renewable alternatives.⁹⁵

Whilst the revised REDII may contain sustainability criteria for bioenergy, we insist that the GBER should take a negative approach on support towards biomass, in particular on forest biomass, by **excluding conversions from coal to biomass plants and operation of biomass installations from the scope of the GBER**.

d. Investment aid for hydropower above 10MW

The draft GBER seems to allow aid **for the refurbishment of existing plants** to improve the level of environmental protection beyond Union standards and the technical efficiencies of the plant.

This is acceptable, subject to the plants being in full compliance with environmental law, including laws governing impacts on protected areas and species. The removal⁹⁶ in Article 41 of the requirement for hydropower projects to comply with the Water Framework Directive is puzzling since this requirement still applies when hydropower projects are co-financed by InvestEU, as provided in point (iii) of the new Article 56e(4)(b) – that was adopted last July 2021. Hence, we call on the Commission to adopt a consistent approach across aid categories.

Nevertheless, we maintain our previous call for extending the scope of review of environmental law compliance of hydropower projects beyond the Water Framework Directive – in particular given the importance of the Habitats Directive on the choice of projects location. It is therefore paramount to enhance the wording of Article 1(5) GBER to ensure that Member States verify that hydropower complies with all environmental law (and not only the Water Framework Directive) as a granting condition.

We address the issue of hydropower plants with a capacity lower than 10MW below under Section 3.6 relating to small-scale installations (Article 43).

⁹⁵ Linde Zuidema, State Aid for solid biomass: the case for improved scrutiny, EUI working paper, Department of Law, LAW 2020/13.

⁹⁶ See Article 41(4) of the 2014 GBER: “Aid shall not be granted for hydropower installations that do not comply with Directive 2000/60/EC of the European Parliament.”.

3.6. Operating aid for renewables and renewable hydrogen in small scale installations and renewable energy communities (Article 43)

a. Renewable energy communities

ClientEarth **welcomes the inclusion of a specific regime for renewable energy communities (RECs)** in the draft GBER, in line with the Renewable Energy Directive (REDII). This recognition of RECs shall also be reflected in the future CEEAG.

However, the inclusion of a 1MW threshold for exempting aid for RECs from notification would only exempt solar panels projects. Wind projects, which represent a significant part of RECs projects⁹⁷, are still excluded under this threshold and would be obliged to participate in competitive bidding to receive State aid.

This 1MW threshold is lower than what is envisioned in the CEEAG, that is 6 MW.⁹⁸ We recommend to:

- 1. align the thresholds in the GBER on the ones in the future CEEAG** – the notification threshold ensuring that the largest and potentially more distortive aid schemes be notified to the Commission in any case; or
- 2. at least, for wind projects: keep the thresholds of the 2014 EEAG** (point 127), i.e. installations with an installed electricity capacity of up to 6 MW or 6 generation units.

b. Small-scale renewable hydrogen installations

Article 43(2b.) mentions that operating aid for the production of hydrogen shall be exempted from the notification requirement “*only for installations producing exclusively renewable hydrogen*”. We understand that the threshold set in 2(b) for “renewable gas production technologies”, a concept which is not defined, also applies to the production of hydrogen. We recommend amending the wording so as to clarify that the threshold also applies to renewable hydrogen.

c. Hydropower installations below 10 MW

ClientEarth reaffirms its concerns regarding the possibility to grant operating aid for hydropower below 10MW. As recognized by the Commission⁹⁹, hydropower has many negative impacts¹⁰⁰ on habitats and species and small plants even more so as their small size allows them to be built in more remote areas. The contribution of small hydropower plants of a capacity of 10MW or less to the European energy

⁹⁷ According to a survey conducted among Rescoop.eu's members, the total installed generation capacity of wind projects developed by RECs is approximately 1,605.4 MW, compared to 1,719.506 MW for solar panel projects.

⁹⁸ See the draft CEEAG published by Euractiv on 1st December 2021, point 101.

⁹⁹ “Hydropower facilities are often concentrated in mountainous areas for technical reasons, but have major far reaching effects on both large and small rivers and lakes across all kinds of different regions. In smaller rivers, even a small flow depletion or disruption to natural ecological conditions can have major negative implications for the river.” in Commission Guidance on the requirements for hydropower in relation to EU nature legislation (C/2018/2619).

¹⁰⁰ The negative impacts are associated with changes to habitat, hydrological and hydrogeological regimes (water quality deterioration, disruption of sediment dynamics), water chemistry and interference with species migration pathways. For more on the environmental impacts: Hydropower pressure on European rivers, The story in numbers, WWF, Geota, RiverWatch, EuroNatur, 2019; European Environment Agency, European waters: Assessment of status and pressures, 2018.

production¹⁰¹, security of supply and CO₂ reduction is limited¹⁰², while their impact on the environment is disproportionately severe.

To address these kinds of negative impacts and to stop the further fragmentation of European rivers, the Commission's 2030 Biodiversity Strategy aims to restore at least 25,000 km of free-flowing rivers by 2030 through amongst others the removal of obsolete barriers, such as hydropower plants.¹⁰³ It is also for these reasons that the Technical Expert Group on Sustainable Finance recommends to prioritise refurbishment of existing hydropower plants and rehabilitation of existing barriers, and to avoid the construction of hydropower projects below 10MW.¹⁰⁴

Nonetheless, the GBER continues to support aid for small hydropower plants without any specific conditions. The exemptions for small hydropower projects below 400kW (200kW in 2026) to participate in competitive bidding process in combination with the feed-in tariffs will continue to contribute to the proliferation of small hydropower, despite the important environmental impacts and the Commission's clear acknowledgement of the need to restore free flowing rivers.

On this basis, we strongly urge the Commission to amend the draft GBER and **consider any aid for small hydropower plants below 10MW located in natural environments¹⁰⁵ as incompatible with the internal market** due to disproportional negative externalities compared with the positive environmental effects in terms of low GHG emissions.

Hydropower below 10MW should not be exempted under the GBER.

Alternatively, the current exemption for small installations in Article 43(2) should not apply to hydropower, that should be subject to competitive bidding processes in all instances.

In any case, compliance of hydropower projects with Union environmental law including (but not limited to) the Water Framework Directive and the Habitats Directive, is paramount and should be expressly required again.

¹⁰¹ 91% of hydropower is small (less than 10 MWh) but generates only 13% of all hydropower electricity, source [Commission Guidance on the requirements for hydropower in relation to EU nature legislation \(C/2018/2619\)](#).

¹⁰² Recommendations on small hydropower plants from the Federal Environmental Agency in Germany, in the Commission's [Guidance on the requirements for hydropower in relation to EU nature legislation \(2018\)](#): "(...) *in many cases, even in favourable circumstances, electricity can hardly be produced economically. Economic considerations show that a subsidy that covers the operating costs of small hydroelectric power plants — in particular plants with a capacity of under 100 kW — leads to high macro-economic costs for the avoidance of CO₂ emissions. Against the background of negative ecological effects, further exploitation of the potential of small hydroelectric power plants is not a priority for climate protection.*(...)" For these reasons, the German Agency recommends notably: "On account of their higher efficiency, large hydroelectric power plants are generally to be given preference to small and micro-installations for secondary use on waters already developed and impounded. When developing hydropower capacity attention should be focused on their optimisation (...)."; See also, [Policy Guidelines by the Energy Community Secretariat on small hydropower projects in the Energy Community PG02/2020/17](#) September 2020.

¹⁰³ See the Report of the EEA, [Tracking barriers and their impacts on European river ecosystems](#), February 2021.

¹⁰⁴ [Technical annex to the TEG final report on the EU taxonomy](#), p. 465.

¹⁰⁵ Such presumption should not apply to small hydropower plants in existing water infrastructure outside the natural environment and river basins where energy production is not the primary aim, such as municipal water systems (drinking water supply, sewage, treated wastewater, storm water) or industrial water use (hydraulic circulation systems in cooling and heating systems, desalination plants).

3.7. Exemptions from taxes for energy intensive businesses (Article 44)

Article 44(5) allows tax reduction for energy-intensive businesses defined in the Energy Taxation Directive 2003/96/EC. ClientEarth regrets that the Commission persists in maintaining this permissive regime.

The conditions under which such aid may be granted are very flexible and less restrictive than those applicable to aid in the form of electricity levy reductions for energy intensive users under the draft CEEAG (point 365)¹⁰⁶; under the draft GBER there are:

- No alternative requirement to reducing the carbon footprint of the beneficiaries' electricity consumption, as required by the draft CEEAG;
- No limit to aid intensity;
- No notification threshold although (i) there is one for all other aid categories and (ii) this type of aid is clearly not contributing to the Green Deal objectives. In comparison, notification thresholds for aid for the production of electricity from renewable energy or to energy efficiency are quite low, while those clearly aim at decarbonising our European energy system.

This very tolerant approach towards energy-intensive businesses is all the more unacceptable, given that such aid is not controlled by the Commission and that the recent draft CEEAG still grant a very favourable regime to energy-intensive users¹⁰⁷ without requiring the demonstration¹⁰⁸ of a real risk of carbon leakage.

In a context where energy prices are soaring everywhere in Europe, we recall that such reductions **shift the weight of the levies and taxes on other categories of consumers**, impacting their competitiveness or purchase power, and may undermine the social acceptance of the transition towards decarbonised energy systems. According to the Commission itself, *"Large industrial consumers generally pay around half the taxes paid by small industrial consumers. This spread has widened in recent years."*¹⁰⁹

Although we plead for removing this regime overall, we are strongly asking the Commission to at least **adopt a stricter approach by imposing stringent and cumulative conditions on beneficiaries of such aid**. The conditions set out under Article 44(5) must be drastically strengthened:

¹⁰⁶ See the more recent draft CEEAG published by Euractiv on 1st December 2021, point 400.

¹⁰⁷ The leaked CEEAG, as published by Euractiv on 1st December 2021, allows a wide enlargement of eligibility conditions by decreasing drastically trade and electricity intensity levels requirements, making the distinction between sectors at risk of relocation and sectors at significant risk of relocation (point 390).

¹⁰⁸ Point 387 of the leaked CEEAG indicates that the Commission *"has used appropriate measures to identify those sectors"* at risk of carbon leakage, without referencing any study, and whereas the impact assessment of the ETS State Aid Guidelines indicated there is no demonstrated risk of carbon leakage and that *"political considerations seem to remain the main driver for Member States"* to grant aid for ETS allowances (See Commission Staff Working Document, Evaluation accompanying the document Impact assessment on Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post 2021, SWD(2020) 194 final, pp. 23-24 and 31).

The Commission failed to demonstrate so far, including in the impact assessment on the ETS State aid guidelines, that there is a clear correlation between relocations of industries outside the EU and electricity costs. An increase of electricity costs does not necessarily affect the competitiveness of industries when they offer high quality or niche products or have an efficient business model, amongst others. We thus fail to understand on what legal and market basis these aid regimes should be maintained in the CEEAG. Rather, the Commission should first establish a methodology to assess the plausibility of undertakings being priced-out or moving to third countries in order to better target aid for those actually at risk.

¹⁰⁹ Commission Staff Working Document, Evaluation accompanying the document Impact assessment on Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post 2021, SWD(2020) 194 final, p. 25.

1. **The investments made under Art. 44(5) must be strict and binding**, requiring that the aid be reimbursed if the commitments are not met;
2. **The requirement of reducing the carbon footprint of electricity consumption**, shall be a **mandatory requirement** pursuant to Article 44(5). However, being supplied by carbon-free electricity at 30% as required by the draft CEEAG¹¹⁰ is far from ambitious and won't contribute enough to supporting the renewable energy targets. Carbon-free also does not exclude nuclear power, whereas it is clear that much more must be done to support the deployment of renewables. It is also unclear whether an undertaking may simply rely on a Member State's energy mix to pretend they fulfill the condition, or whether they would need to prove that they have renewable energy generation on-site or electricity supply contracts with renewable energy suppliers who guarantee to provide that amount of decarbonized electricity – we favour the latter option, since **that is the one that could trigger a shift in the aid beneficiary's consumption patterns**;
3. **These investments must be conducted by the aid beneficiary itself and reduce the negative externalities** of its own installations. Carbon offsetting (Art. 44(5), b, 2d subparagraph) or collective compliance through associations of beneficiaries, as it is allowed by the draft CEEAG (point 269(b))¹¹¹ are insufficient to ensure that the aid beneficiary contributes its fair share to reducing its energy consumption and to the decarbonisation efforts, whereas they greatly contribute at present to increase these externalities.
4. **Notification thresholds shall be imposed on aid granted under Article 44 in order to ensure Commission's scrutiny of the largest schemes**, especially as such aid is likely to undermine decarbonisation objectives;
5. We reiterate that **the so-called conditions under Article 44(5) are not ambitious and too easily met**. We refer to our comments on the ETS State Aid Guidelines¹¹² and on the draft CEEAG¹¹³:

It is still unclear whether an undertaking that meets the conditions prior to receiving State aid would be deemed to fulfill the conditions. We argue that, **for conditions to be true, they should be new**. If an undertaking already meets some of them, the Member State should impose higher requirements or other conditions that are not already met.

The possibility to receive State aid for making the required investments is a real concern¹¹⁴: **receiving aid for become eligible to receive another aid is a non-sense** and would simply **shift the full cost of the aid beneficiary's transition on the public**, in addition to the costs the public

¹¹⁰ See point 365 of the draft CEEAG released in June 2021 and point 400 of the leaked CEEAG published by Euractiv on 30 November 2021.

¹¹¹ The leaked draft CEEAG maintains this option (point 294).

¹¹² [ClientEarth's observations on the draft ETS State Aid Guidelines](#) (March 2020).

¹¹³ [ClientEarth's reply to the public consultation on the draft CEEAG](#) (August 2021).

¹¹⁴ Since the conditions under Article 44, para. 5 replicate partially those in the ETS State Aid Guidelines post-2021, referring to the documentation accompanying the ETS State Aid Guidelines is relevant. Annex 4 of the Commission Staff Working Document "Who is affected and how" (SWD(2020) 195 final) states that "*Large Undertakings will have to bear separate investment costs to fulfil the conditionality requirements, which will either be profitable investments or receive separate investment aid.*" See table II p. 6. The purpose of the conditions under Article 44 para. 5 should be to incentivise the beneficiaries to decarbonise and support renewable energy sources. Reducing their costs through various reductions from taxes and levies, and inducing them to reduce their energy costs by improving their efficiency and modifying their consumption patterns, already contributes to increase their profitability. The profitability of the investments imposed under Art. 44 para.5 should be irrelevant.

already bears due to the taxes or levies reductions. The draft GBER and the future CEEAG must therefore exclude the grant of aid for make the investments.

3.8. Investment aid for remediation of environmental damage and biodiversity (Article 45)

We certainly welcome the new aid category regarding biodiversity in the GBER (and the broadened scope compared to the draft CEEAG¹¹⁵) and wish to make the following comments:

- “Environmental damage” is not defined in the draft GBER whereas the previous notion of “contaminated sites” was defined. In order to set boundaries to the scope of application we recommend to add a definition.
- The differentiation in aid intensity between “*remediation of environmental damage or rehabilitation of natural habitats and ecosystems*” on the one hand, and “*protection or restoration of biodiversity and in nature-based solutions for climate change adaptation and mitigation*” on the other hand, seems artificial and unjustified. This is because remediation is often closely linked to both rehabilitation and restoration.
- Aid to implement nature-based solutions for climate change adaptation and mitigation should be limited to the “biodiversity-positive” and/or “biodiversity-neutral” nature-based solutions in order to avoid support only those which provide genuine and long term benefits for biodiversity, and avoid short term gains, or adverse impacts on existing habitats.

3.9. Investment aid for district heating and cooling (Article 46)

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”.¹¹⁶

However, to our surprise the proposal to revise the GBER *in line with the Green Deal and climate objectives* is a step backwards by explicitly (i) exempting aid to the upgrade of networks that *are not* energy efficient and (ii) allowing aid to network fed by fossil fuels. The significantly higher notification threshold (€50 million proposed against €20 million in 2014) would also enable granting authorities like the Polish cities in the cases referred to above, to simply make use of the GBER to pass their coal-based or gas-based district heating projects without Commission’s scrutiny.

As already mentioned in our response to the roadmap¹¹⁷, **aid to district heating or cooling systems that do not run 100% on RES must be removed from the GBER**. Given the adverse impact of fossil fuels on the climate targets and the Green Deal objectives, any aid to non-renewable district heating or cooling shall be subject to an *ex ante* assessment by the Commission and be thus notified under the EEAG. It should be for the Commission to assess on a case-by-case basis if such aid measure is compatible with the decarbonisation objectives and the Green Deal.

¹¹⁵ We understand that the leaked draft CEEAG adopts a similarly broadened scope.

¹¹⁶ 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.

¹¹⁷ ClientEarth’s reply to the public consultation [the GBER roadmap](#), Section 2.4.

The GBER should however set up an enabling framework for upgrading or creating new systems running on renewable energy sources only, with the exception of forest biomass and biofuels.

If fossil fuel-based district heating is nevertheless maintained in the GBER, at least paragraph 1c. should be limited to the eligibility of natural gas (the draft seems to allow any fossil fuels).

If other fossil fuels are allowed – again, against every statement of the Commission relating to the need to phase out fossil fuel subsidies especially the most polluting ones – then sub-paragraph (c) relating to the compliance of the investment with the 2030 and 2050 climate targets must apply even more strictly to the “most polluting fossil fuels”, not only to natural gas.

3.10. Investment aid for energy infrastructure (Article 47)

We welcome that aid for energy infrastructure is no longer restricted to assisted areas given the investments needed across the whole Union, notably in electricity infrastructure for the deployment of renewables.

Despite point 14 of the preamble and the fact that several studies indicate that the development of fossil gas infrastructure is no longer needed for the EU’s security of supply¹¹⁸, **supporting fossil gas infrastructure remains possible in the draft GBER**. As indicated above (section 1.7), the EE1st principle¹¹⁹ should, as a very first and overarching condition, be assessed by granting authorities to determine if there is any need for an infrastructure and therefore if aid is necessary.

Moreover, allowing aid for gas infrastructure only if it is “dedicated to the use for” or “mainly used for the transport” of hydrogen and renewable gases, will not exclude support to fossil gas for several reasons:

- The term “**dedicated**” is not a firm binding commitments (just as “fit for use” and “hydrogen ready”) that the infrastructure will be used for hydrogen and renewable gases from the outset. This means that it could keep transporting fossil gas under the false pretence of sustainability due to eligibility with hydrogen and renewable gases.
- The alternative option, that the infrastructure is “**mainly used**” for hydrogen, is equally unclear: it seems to allow blending of hydrogen and renewable gases with fossil gas, which entails that fossil gas will directly receive support and that the infrastructure and the aid will not comply with the Union’s decarbonisation objectives.
- Whereas the Article refers to renewable gases, it does **not differentiate the types of hydrogen** as it is done in other aid categories of the GBER. Here, any type of hydrogen could be used or transported in the infrastructure, i.e. low-carbon and unabated hydrogen¹²⁰ with very high levels of CO₂ and methane emissions. ClientEarth maintains that, especially under the GBER, only renewable hydrogen should be eligible (as one of the renewable gases) in order to make the energy infrastructure more climate-friendly and reduce the risk of lock-in.

¹¹⁸ See IEA report of May 2021, “[Net Zero by 2050: a roadmap for the Global Energy Sector](#)”, p.21; Artelys, [An updated analysis on gas supply security in the EU energy transition](#).

¹¹⁹ See our comments on the EE1st principle above. See also, by analogy with the conditions for the grant of EU funds, Commission Notice Technical guidance on the climate proofing of infrastructure in the period 2021-2027, 29 July 2021, C(2021) 5430 final, pp. 6, 10 and 11, in accordance to which the climate proofing requirements for projects financed by InvestEU and other funds include to “*firmly integrate the EE1st in the project design, options analysis and cost-benefits analysis*” and more generally into the project development cycle.

¹²⁰ Especially given the fact that 95% of hydrogen produced today is made using unabated fossil fuels.

4. Regional aid and Just Transition

ClientEarth regrets that the targeted revision of the GBER on regional aid does not refer to the Just Transition Mechanism, whereas this is an essential policy under the Green Deal.

We welcome the new GBER rules adopted in July 2021¹²¹ to increase consistency between aid falling under the scope of the GBER and funds stemming from InvestEU. Numerous projects financed by the Just Transition Mechanism should be able to benefit from these new rules. In this respect, the GBER should provide that by exception to the new Article 56e(4)(a) on aid for energy generation and energy infrastructure co-financed by InvestEU, no aid to gas generation or gas infrastructure can be eligible for aid if it stems from the Just Transition Fund Regulation.¹²² This should qualify as a non-severable matter of compliance with Union law under Article 1(5) GBER.

Moreover, the GBER should go further. Notably, the Regional Aid Guidelines for the period 2022-2027 provide for a bonus in regions identified in Territorial Just Transition Plans, in the form of an increase of 10% of the aid intensity for certain types of aid. **A similar bonus should be offered under the GBER.**

¹²¹ OJ 29.7.2021

¹²² Article 9(d) of the Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund, OJ L 231, 30.6.2021, p. 1

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