18 July 2019

ClientEarth's response to the Targeted Consultation for the Evaluation of the Guidelines on State aid for Environmental protection and Energy 2014-2020 (EEAG)

ClientEarth

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Introduction

Presentation of ClientEarth

1. ClientEarth is a non-profit European environmental organisation based in London, with offices in Brussels, Madrid, Berlin and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

   ClientEarth brings legal expertise to protect the environment in the EU and beyond, creating innovative solutions to environmental problems. Many of our lawyers have interdisciplinary expertise in the policy and scientific areas on which our programmes are based. We work on legislation, advise NGOs, law- and policy-makers, and use the courts where necessary to enforce environmental law. We strive to bring a dynamic approach to effecting environmental change by harnessing the power of the law.

   As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, health and environment, protection of oceans, biodiversity and tropical forests, and environmental justice.

Relevance of State aid rules for ClientEarth

2. We use State aid rules as a tool to drive decarbonisation of the energy markets and the implementation of less environmentally harmful solutions than power generation from fossil fuels. Well-designed State aid measures can help achieve important policies in the Member States and in the EU such as reaching the 2030 targets while ensuring that the energy markets are affordable, flexible and secure while contributing to the highest level of environmental protection. This is specifically to:

   - Promote financial investment in and the use of renewable energy, demand-response, energy efficiency, interconnected capacity, etc.; and

   - Prevent the granting of aid that promotes carbon lock-in through investments in unsustainable projects and energy intensive infrastructure.

3. Our strategy focuses on:

   - Achieving a new set of EEAG that are aligned with the EU's commitment to create a clean, low-carbon and sustainable energy market;

   - Providing legal advice to market players and building capacity within our networks at EU, Member State, Energy Community and regional levels.

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Description of the nature of our understanding and involvement in matters related to State aid rules

4. In respect of the above, our work has been consisting in, notably:

   - contributing to the public consultation on the adoption of the 2014 EEAG[1];
   - contributing to the public consultation on the prolongation of the State aid rules[2];
   - analysing the interaction between State aid rules and EU climate and energy policy[3];
   - contributing to the adoption of the Clean Energy Package through various analysis pieces[4];
   - lodging complaints to DG Competition in matters of unlawful aid in the energy sector[5];
   - filing observations to DG Competition in the course of examination of State aid measures[6];
   - analysing how Commission's State aid decisions in the energy sector have contributed to the decarbonisation objective, under a grant from BMUB/EUKI;
   - organising conferences and providing trainings on State aid rules and procedures, including on the EEAG.[7]

1 ClientEarth's contribution of 14 February 2014 is available at: https://www.documents.clientearth.org/library/download-info/clientearth-consultation-response-to-paper-of-the-services-of-dg-competition-containing-draft-guidelines-on-environmental-and-energy-aid-for-2014-2020/
2 ClientEarth's contribution of 16 May 2019 is available at: https://www.documents.clientearth.org/library/download-info/clientearths-response-to-the-european-commissions-consultation-on-the-prolongation-of-state-aid-rules/
3 ClientEarth's paper on "The effect of state aid governance on EU climate and energy policy" of August 2015 is available at: https://www.documents.clientearth.org/library/download-info/the-effect-of-state-aid-governance-on-eu-climate-and-energy-policy/
4 For an example, see: https://www.documents.clientearth.org/library/download-info/the-market-design-initiative-towards-better-governance-of-euenergy-markets-2/ ; ClientEarth's response to the Commission's public consultation on a New Market Design available at: https://www.documents.clientearth.org/library/download-info/clientearths-response-to-the-commissions-public-consultation-on-a-new-market-design/
5 For two recent examples of complaints against unlawful aid granted to the fossil fuel sector in Bulgaria and Romania, see https://www.clientearth.org/clientearth-reports-bulgarian-capacity-mechanism-to-european-commission/; and https://www.clientearth.org/press/lawyers-report-romanian-energy-subsidies-to-european-commission/
6 For recent examples of contributions to the Commission's examination of:
the GB capacity mechanism: https://www.documents.clientearth.org/library/download-info/clientearths-observations-to-the-commission-on-the-compatibility-of-great-britains-capacitymechanism-with-state-aid-rules-23-april-2019/; For previous observations to the Commission, see ClientEarth and RAP's joint observations in 2014 (https://www.documents.clientearth.org/library/download-info/the-regulatory-assistance-projects-rap-and-clientearths-concerns-with-uk-capacitymechanisms-state-aid-conformity/) and follow-up observations (https://www.documents.clientearth.org/library/download-info/the-regulatory-assistanceprojects-rap-and-clientearths-concerns-with-uk-capacity-mechanisms-state-aid-conformity-follow-up/);

- the Greek capacity mechanism: https://www.documents.clientearth.org/library/download-info/clientearths-observations-to-the-commission-on-the-compatibility-of-great-britains-capacity-mechanism-with-state-aid-rules-23-april-2019/; and https://www.documents.clientearth.org/library/download-info/observations-on-the-proposed-greek-capacity-mechanism/;

- the Polish capacity mechanism: : https://www.documents.clientearth.org/library/downloadinfo/assessment-of-the-polish-act-on-the-capacity-market/ ; The Polish Draft Act on the Capacity Market in light of EU law, available at: https://www.documents.clientearth.org/library/download-info/the-polish-draft-act-on-the-capacity-market-in-light-of-eu-law/ ; The Polish capacity market under EU State aid law - ClientEarth Winter Package presentation, available at: https://www.documents.clientearth.org/wp-content/uploads/library/201703-01-case-study-the-polish-capacity-market-under-eu-state-aid-law-ce-en.pdf

- Polish exemptions from capacity mechanism charge for energy intensive users: https://www.documents.clientearth.org/library/download-info/observations-on-reductions-from-a-capacity-mechanism-levy-for-energy-intensive-users-in-poland/
7 For a recent conference dedicated to the EEAG, see https://www.lexxion.eu/en/events/3589/ (27-28 June 2019)

1 Based on your experience, to what extent have the EEAG and the corresponding GBER provisions (e.g. tendering, technological neutrality, market integration) been effective in:

	To a large extent	To some extent	Not at all	I don't know
- enabling the deployment of renewables while lowering societal costs and reducing the amount of aid needed?	○	◉	○	○
- facilitating the integration of renewable energy into the electricity market?	○	◉	○	○
- ensuring financing of support schemes to renewable energy sources, while limiting negative impacts on the competitiveness of EU firms?	○	◉	○	○
- ensuring that capacity mechanisms were necessary and cost-effective in providing security of supply and least-distortive to competition and intra-EU trade?	○	○	◉	○
- ensuring that capacity mechanisms did not negatively impact the objective of phasing out environmentally harmful subsidies including for fossil fuels?	○	○	◉	○

	To a large extent	To some extent	Not at all	I don't know
- ensuring that in cogeneration and district heating the most cost-efficient projects could be realised?	○	○	○	◉

1.1 Support to renewable energy sources

5. The State aid framework for support to renewable energy sources ('RES') has largely contributed to the deployment of RES in the Member States where support schemes are in place. The progressive shift from feed-in tariffs to market-based premiums (para. 124 EEAG) and the award of those through competitive bidding processes (para. 126 EEAG) has facilitated the integration of RES into the electricity market for a number of operators.

6. However, the EEAG have not fully met these objectives. In particular:

7. **Societal costs** have not decreased or been sufficiently limited in many of the Member States that have a RES support scheme in place. This is notably due to passing on the costs of funding support to consumers (residential and non-residential). While such increases of the costs of energy bills may be justified when they remain reasonable, public acceptance of funding those schemes - and thus of the energy transition as a whole - is severely affected by both the **lack of transparency on the additional costs** that support to RES involve for consumers and the **reductions granted to energy intensive users** (para. 181-192 EEAG). Societal acceptance of the energy transition is hindered by the lack of knowledge of consumers (mainly residential) who understand that funding RES has a cost whereas not being aware that costs of funding support to fossil fuels, e.g. through capacity mechanism levies, are also passed on. In this respect, we recommend that grant of subsidies (to RES and fossil fuels) **should be linked to a transparency requirement that any costs passed onto consumers are clearly set out in bills**. This would build on the requirements of Para 1.1 and Para 3 of Annex 1 to Energy Market Directive 2019/244.

8. Societal acceptance of aid schemes is also strongly impacted by the increase of the financial burden that consumers have to pay as a result of the shift of funding support to RES consequent to reductions granted to energy intensive users (see more on this below).

9. **Integration of small-scale operators** and of non-conventional, decentralised business models such as **citizen/renewable energy communities** has not been fully enabled by the EEAG either. The exemption rules laid down under para. 125 and 127 EEAG were

and remain necessary for ensuring deployment of these indispensable market operators. However, as these smaller stakeholders are still deploying and as many face barriers for integrating into concentrated energy markets dominated by incumbents, the level of thresholds could be adapted so as not to hinder those market operators that are exceeding the thresholds, but are still too small to effectively bid in competitive processes, from receiving support. In particular, **special conditions for citizen/renewable energy communities** could enhance the deployment of this business model and contribute to the objective to **empower citizens** pursued by the Clean Energy for all Europeans Package.

10. The quasi-systematic use of the provisions on **reduction in funding support for RES for energy intensive users** ('EIUs') has had an impact on financing of this support (that is shifted to other consumers including smaller businesses and households) and thus on public acceptance of these schemes. Indeed, Member States that have put in place support schemes for RES have almost systematically made use of the rules providing for reductions for energy intensive industries, with a 100% rate of Commission's decisions not to raise objections. As clearly stated in recent Commission's decisions (on SA.52615, on SA.51502) though, the **redistributive effect of such reductions in funding support for RES shifts the burden of the costs of support to other consumers including households**. The degree of risk of relocation outside the EU of some of the sectors listed in Annexes 3 and 5 of the EEAG can be questioned. Such list does contribute to ensuring legal certainty for market operators and ensures a non-discriminatory treatment of exemptions/reductions by the Member States. Nevertheless, it appears that the Member States have used the provisions of para. 181-192 EEAG quite systematically, without having to establish that the increase of energy costs resulting from their support schemes to RES actually had, due to the particular design of the scheme and characteristics of the energy market at stake, an unbearable impact of those undertakings' competitiveness. The absence of case-by-case approach has been a given, a *carte blanche* in many instances for the Member States to favour energy intensive users while removing their incentive to reduce their energy consumption (and contribute to the targets to reduction of greenhouse gas emissions and increase of energy efficiency).

1.2 Capacity mechanisms

11. The Commission's track record of decisions authorising capacity mechanisms under the EEAG demonstrates that the objective of "*not negatively impacting the objective of phasing out environmentally harmful subsidies, including for fossil fuels*" (para. 220 EEAG) **has not been effectively enforced**. As Great Britain's and Poland's capacity markets have evidenced – and as the proposed Belgian and Greek market-wide capacity mechanisms could also result in – capacity mechanisms may be designed in such a manner as to "lock-in" conventional, fossil-fuel based generation in contradiction with the objective of para. 220 EEAG. **Reliance of capacity mechanisms on coal** is acknowledged by the

Commission.[8] This is notably the case of measures granting long-term contracts to new capacity providers that incur a high level of capital expenditure (CAPEX) that *de facto* corresponds only to the larger investments to build new generation capacity.

12. Regrettably, the current wording of this paragraph 220 EEAG ("which do not have a negative impact on the objective…") is rather weak. Instead, the Member States should have the obligation to demonstrate (and the Commission should have the obligation to verify) that they have "**primarily** consider[ed] alternative ways of achieving [**resource**] adequacy which have **a positive impact** on the objective of phasing out environmentally or economically harmful subsidies, such as **prioritising** demand side management **and energy efficiency measures**, increasing interconnection capacity and opening the scheme to RES". This would not contradict any of the new rules in Chapter 4 of the recast Electricity Market Regulation. On the inclusion of energy efficiency measures in this paragraph to achieve the concrete implementation of the "energy efficiency first" principle, see below section 18.1.

13. The EEAG and their application by the Commission and the Member States have poorly enforced the recommendations of para. 220 (facilitating demand side management and increasing interconnection capacity); para. 232 (technology neutrality) and para. 233 (e) (give preference to low-carbon generators) – for detail of our concerns, please see our various contributions to national and Commission's consultations or investigations on capacity mechanisms listed above.

2 Have Member States created a level playing field for imported and domestically produced biofuels and/or biomass energy when providing support?

[I don't know]

2.1 Food-based biofuels

14. The next EEAG must respect the provisions of revised Renewable Energy Directive ('REDII') as the main legislation regulating the use of biofuels in the EU. REDII foresees a limitation and, in some cases, a phase-out in the use of food based biofuels. Aid shall not be granted to food-based biofuels not only for environmental and climate purposes, but also for compliance with RED and REDII.

15. In the meantime, the prohibition of operating aid to food-based biofuels must be maintained at the end of 2020 (para 113 EEAG) regardless of a prolongation of the EEAG as a whole. In this respect, amending paragraphs 113 and 121 EEAG would be a substantive

[8] Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of The Regions, "Energy Prices And Costs In Europe", Com(2019) 1 final of 9 January 2019, p. 212

amendment to the rules, opposite to what the Commission had consulted on and announced in its draft communication; besides, legal certainty calls for maintaining that end date that is known since 2014.

2.2 Biomass

16. REDII assumes that biomass combustion emits zero CO2. However, this assumption is demonstrably false and is based on flawed carbon accounting assumptions. Moreover, despite the sustainability requirements in REDII for use of biomass, there is strong evidence that large-scale biomass projects can nonetheless have serious detrimental impacts on biodiversity and the carbon storage potential of land used to source the fuel.[9] There is a high risk of widespread conversion of coal plants (closed in principle to meet decarbonisation objectives) to run on biomass (which will often fail to achieve these decarbonisation objectives in real-world terms, due to the flawed carbon accounting). Such conversions, as well as new large-scale biomass projects, typically rely on State aid and so it is crucial that the next EEAG provide for the strictest criteria for such conversions / operation of biomass installations, including with respect to environmental compliance and demonstration of real-world contributions to decarbonisation objectives.

3 To what extent has the GBER ensured public support for waste recycling…?

[I don't know]

17. The provision that aid to waste recovery operations other than recycling shall not be covered by the GBER is very important. Any capacity increase in the thermal treatment of residual waste shall be in line with the Waste Framework Directive principles and objectives. Existing overcapacities in neighbouring countries should be considered before approving any new capacity. The Commission's Communication on the role of waste-to-energy in the circular economy of 26 January 2017 has clearly recognised the threat of aid conflicting with the circular economy: "*Public funding should also avoid creating overcapacity for non-recyclable waste treatment such as incinerators. In this respect it should be borne in mind that mixed waste as a feedstock for waste-to-energy processes is expected to fall as a result of separate collection obligations and more ambitious EU recycling targets. For these reasons, Member States are advised to gradually phase-out public support for the recovery of energy from mixed waste."* This suggests that new aid for incineration with or without energy recovery should be avoided and it should not be exempted under the GBER.

[9] Duncan Brack, Chatham House, Woody Biomass for Power and Heat: Impacts on the Global Climate (2017), https://www.chathamhouse.org/publication/woody-biomass-power-and-heat-impacts-global-climate; and Sterman, et al., Does Replacing Coal with Wood Lower CO2 Emissions? Dynamic Lifecycle Analysis of Wood Bioenergy (2018), http://iopscience.iop.org/article/10.1088/1748-9326/aaa512/meta

4 To what extent has Article 39 GBER allowed aid through financial instruments for energy efficiency measures in buildings…?

[I don't know]

18. As the GBER exempts Member States from notifying State aid measures and establishes a presumption of compatibility of these measures with the internal market, it is crucial that it provides the **highest level of legal certainty** to, altogether, the Commission, the Member States, market operators and the public. Legal certainty can only be achieved by the utmost clarity of the compatibility conditions: they must leave no room to interpretation and be easy to understand and to use for the Member States and beneficiaries alike (see in this respect the ruling in C-349/17, para. 120 inter alia). While it is **very difficult for the public to gather evidence on the use of state aid** (amount of aid, type of aid, achievements) for achieving national energy efficiency policies, we recommend that the Commission gather the views of the Member States, at all relevant administrative levels managing energy efficiency programmes, and beneficiaries of the schemes on (i) the clarity of the rules, (ii) their ease of use and (iii) whether the type of aid is appropriate.

19. It is our understanding that the financial instruments listed in para. 4 of Article 39 do not represent the full scope of financial instruments suitable for all the different energy efficiency projects in buildings and therefore the list may need to be broadened so as to enhance the possibilities to develop energy efficiency schemes.

5 Has State aid granted under the EEAG or the GBER generally achieved the relevant climate and environmental protection objectives…?

[Partially]

20. The important number of State aid schemes and individual measures, along with the volume of aid granted by the Member States for completing the 2020 targets since the EEAG were adopted, show the **usefulness of the EEAG** for pursuing "*policies to support the shift towards a resource-efficient and low-carbon economy*" (para. 5 EEAG). This is particularly the case for aid to energy from renewable sources; aid for energy efficiency; and aid for electrification or reduction of greenhouse gas emissions of vehicles and the related infrastructure.

21. However, not all Member States have achieved their targets and, even though State aid is not the only instrument to this end, **it has not been used to its full potential** by some Member States.

22. Moreover, the amount of **aid granted to conventional, fossil fuel generators** under generation (or "resource") adequacy measures implemented since 2014 show that the **objective of phasing out environmentally harmful subsidies (para. 220 EEAG) has not been effectively enforced by the Commission.** In this regard, it cannot be concluded that the EEAG, their interpretation by the Commission and their application by the Member States, have achieved the climate and environmental protection objectives.

6 Has State aid granted under the EEAG or the GBER generally achieved the relevant energy objectives…?

[Partially]

23. Whereas the EEAG contain a number of rules that could support the development of a competitive, sustainable and secure energy market, their interpretation by the Commission and their application by the Member States have regularly demonstrated deficiencies. It is notably the case of capacity mechanisms where the **lack of effective level playing field** between capacity providers in terms of access to auctions or adequate lengths of contracts) is limiting the contribution of various resources (demand side response, storage, energy efficiency measures) to security of supply and flexibility of the energy markets.

24. Sustainability of the energy market has been increased by the development of energy from renewable sources, through important support measures, but there is room for improvement in terms of integrating small-scale operators, innovative stakeholders such as citizen/renewable energy communities and prosumers to the market while they have the potential to increase flexibility, sustainability and decentralisation.

25. Besides, we support an increase in the aid intensities for energy efficiency measures to the levels applicable for aid for renewable energies i.e. 65% for small enterprises, 55% for medium-sized enterprises and 45% for large enterprises, or 100% for all when the aid is allocated pursuant to a bidding process. The principle of a differentiation between small, medium and large enterprises should be maintained in principle (para. 78(b) EEAG).

7 Have there been any unexpected or unintended results from the implementation of the EEAG and the corresponding GBER provisions?

[Yes]

26. As mentioned above under Q1, para. 220 EEAG has not been adequately enforced by the Commission when authorising capacity mechanisms that lock in conventional, fossil fuel generation for a long term.

27. Likewise, as mentioned under Q1, the general use of para. 181-192 that allow Member States to reduce funding of support to RES for energy intensive users is undermining public acceptance of the financing of the energy transition by shifting the financial burden of this support to other consumers (including small undertakings and households).

8 Are there sectors and products which, were included in the list of eligible sectors and products for reductions under section 3.7.2. of the EEAG, but which, according to your experience, were not particularly affected by the financing costs of renewable energy support and therefore were not put at a significant competitive disadvantage?

[I don't know]

28. We do not support the reiteration of exemptions or reductions for EIUs in the next guidelines, be they the current ones from environmental taxes and funding support for RES, or the potential inclusion of new ones, such as reductions in funding of support to energy efficiency measures (see art. 7a[10] of the revised Energy Efficiency Directive 2018/2002); or reductions in funding of capacity mechanisms (see the Commission's decision on SA.51502[11] and our comments[12]). The rules set in the EEAG have proven effective in making the Member States quasi-systematically grant reductions in support to RES in a quite automatic manner: they do not have to establish that the EIUs are actually affected by the support schemes (it is presumed in the EEAG) and do not have to clearly establish that the reductions or exemptions would not raise the cost of the underlying support to RES and, eventually, the amount of that support. A case-by-case assessment

[10] "Member States shall assess and, if appropriate, take measures to minimise the impact of the direct and indirect costs of energy efficiency obligation schemes on the competitiveness of energy-intensive industries exposed to international competition."
[11] http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_51502
[12] https://www.documents.clientearth.org/library/download-info/observations-on-reductions-from-a-capacity-mechanism-levy-for-energy-intensive-users-in-poland/

under Article 107(3) TFEU would guarantee that only those exemptions that are strictly necessary, appropriate, proportional and have an incentive effect could be granted.

9 Are there sectors or products which were particularly affected by the financing costs of renewable energy support and therefore were put at a significant competitive disadvantage, but were not included in the list of eligible sectors for reductions under section 3.7.2. of the EEAG?

[I don't know]

29. In addition to comments above, the effectiveness of the reductions in funding support for RES is not proven and urgently needs to be assessed. For example in Germany, the Federal Government cannot say which companies in the energy-intensive industries have demonstrably migrated abroad due to high electricity prices since 2015, nor which companies in the energy-intensive industries have opened new plants abroad – in particular outside the EU.

30. It appears that the list in Annex 3 is not adequate and certainly too wide. We encourage the Commission to enquire precise data from all the Member States on the actual impact on these industries.

31. In contrast, the industry exemptions allowed under State aid rules particularly increase the bills of household consumers, and reduce their purchasing power, again reducing competitiveness of EU firms.

10 Have the minimum own contributions of the full electricity surcharges… been adequately set…?

[I don't know]

32. There is no evidence to date that support to RES did create or increase risks of carbon leakage and, conversely, that exempting EIUs from funding of this support has had the effect of maintaining their production in the relevant Member State and the EU generally. On the contrary, there is evidence from the EU Emissions Trading Scheme that this risk does not materialise.[13]

[13] http://www.caneurope.org/docman/emissions-trading-scheme/2333-eu-2030-briefing-on-lack-of-evidence-for-carbon-leakage-february-2014/file

11 Have the reductions in electricity surcharges given to energy-intensive users (EIUs) created market distortions?

[I don't know]

12 What impact have reductions granted to energy intensive users had on renewable energy charges and other relevant charges paid by non-energy intensive industrial consumers and households?

[Excessive]

33. Very clearly, and as assessed by the Commission in recent decisions on SA.52615 and SA.51502[14], exemptions from environmental taxes and reduction in funding support to RES result in reducing the financing-base of these mechanisms and, necessarily, in shifting the gap to other consumers (notably residential and smaller businesses). We refer to our observations under section 1.1 in this respect.

13 Has the higher aid intensity allowed under point 78 of the EEAG been adequate to address the double market failure linked to the higher risks of innovation and the environmental aspects of the project…?

[I don't know]

34. We generally support the methodology of increasing the level of aid intensity permitted for SMEs, investments located in assisted areas and eco-innovation set by para. (78) EEAG. Whereas we cannot confirm that the increase of the aid intensity by 10 percentage points for eco-innovation is an appropriate level to trigger those investments, we support the criteria that only projects that substantially improve the state of the art and are expected to bring significant environmental benefits are eligible to such increase of aid intensity. Such an increase of aid intensity should incentivise aid and, more widely, investment in those projects that clearly aim at driving the change towards a more sustainable future.

[14] See ClientEarth's observations: https://www.documents.clientearth.org/library/download-info/observations-on-reductions-from-a-capacity-mechanism-levy-for-energy-intensive-users-in-poland/

14 To what extent are the different compatibility conditions and methodologies included in the EEAG and the GBER related provisions sufficiently clear and easy to apply:

	Yes	No	I don't know
- in general terms?	◉	○	○
- as regards the methodology for calculating eligible costs for investment aid to go beyond standards, in the absence of standards and early adaptation to standards under Article 36 of the GBER and points 73 to 75 of the EEAG?	○	○	◉
- as regards the criteria for limiting bidding processes for renewables to specific technologies (see EEAG point 126 and GBER Article 42.3)?	◉	○	○
- as regards the methodology for calculating eligible costs for investment aid to renewables and co-generation (CHP) projects?	○	○	◉
- as regards the methodology to assess proportionality of aid based on levelised cost of energy (see point 131 of the EEAG and Article 43, paragraphs 5 and 6 of the GBER)?	○	○	◉
- as regards the methodology to assess eligible costs for energy-efficiency investment aid under Article 38 of the GBER?	○	○	◉

	Yes	No	I don't know
- as regards the compatibility conditions (in particular the full passing on, the leverage condition, the conditions imposed on the financial intermediaries) for energy efficiency projects in buildings (see paragraphs 4 to 10 in Article 39 of the GBER)?	○	○	◉
- as regards the compatibility conditions for aid for Resource Efficiency (section 3.5.1 of the EEAG read in combination with section 3.2 of the EEAG)?	○	○	◉
- as regards the compatibility conditions (in particular the "state of the art" requirement, the "polluter pays principle" and the "treatment of the waste of others") for waste management projects under 47 of the GBER and section 3.5.2 of the EEAG?	○	○	◉
- as regards the methodology for calculating eligible costs for waste management projects under Article 47 of the GBER and section 3.5.2. of the EEAG?	○	○	◉
- Other (please specify)	○	○	○

15 How do administrative costs incurred by the aid application under the EEAG and GBER related provisions compare with the actual amount of compensation received?

[I don't know]

35. The diversity of stakeholders, in terms of size and business model, makes it difficult to systematise the share of administrative costs for compensation received. Nevertheless, it is established that small-scale energy operators have been facing relatively high administrative costs for participating to tenders for renewable energy support schemes. Likewise, energy communities, due to their innovative business model that is still not mature in many Member States, have incurred obstacles for applying to some support schemes.

16 Have the EEAG and GBER adequately addressed recent market developments or technological changes such as:

	Yes	No	Partially	I don't know
Storage	○	○	◉	○
Zero subsidy bids	○	○	○	◉
Repowering	○	○	○	◉
Renewable energy power purchase agreements	○	○	○	◉
Renewable self consumption and/or active consumers	○	◉	○	○
Citizens energy communities and/or renewable energy communities	○	○	◉	○
Hydrogen, synthetic fuels and low carbon gas	○	○	○	◉
Alternative fuel infrastructure (publicly accessible or dedicated infrastructure)	○	○	○	◉
Low or zero emission vehicles	○	○	◉	○
Carbon Capture, Storage and/or Utilisation	○	○	○	◉
Nearly-zero-energy buildings	○	○	○	◉
Smart energy technologies (e.g. in buildings)	○	○	○	◉
Energy services (e.g. energy performance contracting)	○	○	○	◉
Advanced technology for water reuse (e.g. membranes and UV)	○	○	○	◉
Other (please specify)	○	○	○	○

36. On low or zero emission vehicles, we welcome the fact that the Commission authorised several aid schemes for the support to renewals of vehicles fleets towards low to zero emission vehicles, and the investment in correlated charging infrastructure (often directly

under Article 107(3) TFEU). In this respect, the rapid evolution of this market calls for a new dedicated section in the next EEAG and GBER that would provide a clear framework for enabling the development of new technologies (electrification in particular) that help achieve a low to zero emission vehicle fleet in the EU, including for public transport.

17 To what extent do recent economic developments impact the relevance of the rules which apply to reductions for energy-intensive users (EIUs)?

	To a large extent	To some extent	Not at all	I don't know
Falling costs of renewable energy producers	○	○	○	◉
Changes to the trade intensity of the sectors listed in Annex 3 and 5 of the EEAG	○	○	○	◉
Changes to the electro intensity of the sectors listed in Annex 3 of the EEAG	○	○	○	◉
Other (please specify)	○	○	○	◉

18 To what extent are the EEAG and the related GBER provisions coherent with relevant EU policies and legislation such as:

	Yes	No	Partially	I don't know
Renewable Energy Directive	○	○	◉	○
Electricity Directive [6]	○	○	◉	○
Electricity Market Regulation [7]	○	○	◉	○

	Yes	No	Partially	I don't know
Risk-preparedness Regulation [8]	○	○	○	◉
EU ETS Directive	○	○	○	◉
Industrial Emissions Directive	○	○	○	◉
Alternative Fuels Directive	○	○	○	◉
Energy Efficiency Directive	○	○	◉	○
Energy Performance of Buildings Directive	○	○	◉	○
EU Waste legislation	○	○	○	◉
Water Framework Directive	○	○	○	◉
Air Quality Directive	○	○	○	◉
Birds Directive	○	○	○	◉
Habitats Directive	○	○	○	◉
ERDF Regulation	○	○	○	◉
Other (please specify)	○	○	○	○

18.1 Clean Energy For All Europeans package

37. It is absolutely essential that the EEAG and GBER are interpreted in a manner that is consistent with the Clean Energy for All European package as soon as it applies. This implies on the one hand, that provisions of the EEAG or the GBER conflicting with secondary legislation should be set aside by the Commission when assessing the compatibility of State aid measures. On the other hand, compatibility assessments must be reinforced when secondary legislation is stricter on the requirements that the Member States are bound by to design State aid measures.

38. With respect to the recast Energy Market Regulation, the Commission should not allow itself to depart from Chapter 4 that provides a clear framework for designing **capacity mechanisms**. Those rules must be repeated in the next guidelines, which must also include an obligation on the Commission to verify that the scheme comply with those rules. We propose to insert a paragraph in the next guidelines reading as follows (based on the model of para. 117 and 118 EEAG): “when granting aid to resource adequacy, **Member States must respect the Regulation on the internal market for electricity**

(EU) 2019/943 and in particular Chapter 4 thereof, which lays down criteria in relation to the assessment for the need, appropriateness and proportionality of resource adequacy measures and conditions for their design". Moreover, the terminology "generation adequacy" should be replaced by "**resource adequacy**" throughout the guidelines.

39. In relation with support to electricity from **RES**, the principles laid down in recitals 16-19, 22-24 and 26 in particular of the revised Renewable Energy Directive (EU) 2018/2001 must be fully integrated in and rendered effective by the next guidelines and the Commission's decisional practice in the meantime.

40. With respect to the new framework for energy efficiency measures, we support the full implementation of the **"energy efficiency first" principle** and its embodiment as an objective of common interest and guiding principle in the next guidelines. As required by recital (64) of the Governance Regulation: "Member States should use the energy efficiency first principle, which means to consider, before taking energy planning, policy and investment decisions, whether cost-efficient, technically, economically and environmentally sound alternative energy efficiency measures could replace in whole or in part the envisaged planning, policy and investment measures, whilst still achieving the objectives of the respective decisions. This includes, in particular, the treatment of energy efficiency as a crucial element and a key consideration in future investment decisions on energy infrastructure in the Union. Such cost-efficient alternatives include measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy." This should find a direct, effective translation in several aspects of the next guidelines that are not directly related to creating new energy efficiency measures. In particular, energy efficiency measures and demand side response initiatives should be taken into account when assessing the need for, and size of, capacity mechanisms. To this end, **energy efficiency measures should be directly included next to other resources in relevant provisions on resource adequacy** such as in (current) para. 220, 224, 233(a) EEAG.

18.2 EU Waste Legislation

41. The waste-to-energy provisions in the EEAG also need to be complemented by the new provisions from the RED II and Waste Framework Directive amendments. In particular, the wording of Article 3 RED II is stronger than that in the EEAG and needs to be introduced also into the next guidelines. Since it enters force on 30 June 2021, all assessments made before this date also need to take this requirement into account.

42. Under Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste, Article 22 states: "1. Member States shall ensure that, by 31 December 2023 and subject to Article 10(2) and (3), bio-waste is either separated and recycled at source, or is collected separately and is not mixed with

other types of waste." This needs to be introduced also into the updated EEAG, but since this cannot be implemented overnight, all assessments made before this date also need to take this requirement into account.

43. The Commission's Communication on the role of waste-to-energy in the circular economy of 26.1.2017 has clearly recognised the threat of aid conflicting with the circular economy. This suggests that the EEAG has not been fully sufficient to prevent conflicts with circular economy goals, however we are unclear on whether/how incinerator aid has been awarded in practice since the EEAG entered force.

18.3 Environmental legislation

44. It is about time that Articles 7, 9 and 11 TFEU are duly and fully taken into account in State aid control, by a full reference to these rules in the next guidelines, in the Commission's decision, and an efficient inclusion and enforcement of these Treaty rules into State aid policy and decisions. These Articles provide, respectively:

- Article 7: "The Union shall ensure consistency between its policies and activities taking all of its objectives into account";
- Article 9: "In defining ad implementing its policies and activities, the Union shall take into account…the protection of human health";
- Article 11: "Environmental protection requirements must be integrated in the definition and implementation of Union policies and activities, in particular with a view to promote sustainable development."

So far, the Commission has not taken steps to ensure the full integration of these Treaty rules into State aid policy and decisions and is denying that they apply because State aid would be a competition matter only. This is incorrect and comes in contradiction with the EEAG themselves which clearly set the Union State aid policy for meeting the 2020/2030 environment and climate targets.

45. Also, the EEAG provides in para. 117 that the production of hydropower helps reducing GHG emissions but may have a negative impact on water systems and biodiversity and, therefore, aid measures shall comply with the Water Framework Directive. These provisions are welcome but it needs to be clearer how they are to be applied in practice to individual projects in cases where they do not comply, in particular in the course of a project for which financing through State aid has been authorised by the Commission. In particular, the next guidelines should provide stringent criteria and conditions as to what has to happen if a renewable energy plant is not built or operating in line with EU environmental directives. It should be made clear in the next guidelines that non-compliance with environmental legislation equals to non-compliance with the EEAG and the Commission's decision authorising the aid should be subject to compliance of the Member State and the beneficiaries complying with relevant Environmental legislation.

46. Also, it should be clearly stipulated that national authorities who establish that producers have not built or operated their plants in line with their permitting conditions shall have their aid suspended until the deficiencies are addressed. E.g. the Dabrova Dolina hydropower plant in the Mrežnica Natura 2000 site in Croatia was not built in line with the project specifications for which it was permitted and did not apply the mitigation measures stipulated in its environmental permit. In summer 2017 this contributed to the drying out of the Šušnjar tufa waterfall, yet the authorities dragged their feet in admitting the problem and only acted more than a year later after prompting from the European Commission. However, for the period of non-compliance the project was still receiving feed-in tariffs.[15]

Final comments and proposal for a framework for support to the closure of high carbon energy infrastructure

47. The next EEAG could include a framework for support to the closure of high carbon (or otherwise environmentally damaging) energy (or other) infrastructure. It could take a similar approach to Council Decision 2010/787/EU on State aid to facilitate the closure of uncompetitive coal mines. This Decision allowed Member States to grant aid to undertakings which committed to close hard coal mines by 31 December 2018, subject to strict conditions regarding the use of this aid and preventing cross-subsidisation.

48. To ensure compliance with the Paris Agreement, all OECD (including EU) countries must close their coal (including lignite) plants by 2030. Allowing Member States to support undertakings that seek to close their coal plants by 2030, subject to similar strict requirements as exist in Council Decision 2010/787/EU, would send a strong signal. In some Member States, such as Germany, such compensation is seen as vital if coal phase-outs are to be societally acceptable. Establishing such a framework would greatly reduce the risk of over-compensation or distortions of competition, or other effects which are detrimental to achieving energy system decarbonisation.

49. This also avoids any risk of conflict with the right of Member States to choose their energy mix (Art. 194(2) TFEU).

[15]https://bankwatch.org/project/dabrova-dolina-hydropower-plant-croatia;and https://files.hrote.hr/files/PDF/OIEIK/GI_2018_HROTE_OIEiK_verzija_za_WEB.pdf p.64

18 July 2019

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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