

Consultation on the draft Communication on State aid for important projects of common European interest

Feedback from ClientEarth

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Executive Summary

ClientEarth¹ welcomes the consultation on the draft Communication on State aid for Important Projects of Common European Interest (“Draft IPCEI Communication”) to address punctual adjustments of the existing communication and align it with the twin-transition to a green and digital economy.

The new obligation for projects to comply with the “do no significant harm” principle as one of the eligibility criteria for aid to an IPCEI (para. 15 and 21 Draft IPCEI Communication) is certainly a step in the right direction. Its interpretation and implementation in practice is key to prevent public financial support to polluting and unsustainable activities.

An additional prerequisite to ensure that aid measures do not adversely harm environmental protection, is to verify if the aided economic activities comply with all relevant EU environmental law obligations, which will include the climate targets for 2030 and 2050 once the European Climate Law is adopted.

Compliance with these two paramount principles implies that **aid to projects of the hydrogen IPCEI can only be granted for renewable hydrogen**. If the Commission would regrettably allow aid to low-carbon hydrogen, such can only be granted subject to strict cumulative requirements, such as those suggested by ClientEarth, to limit the climate and economic risks of a gas lock-in as much as possible.

The fact that the Commission does not endorse certain stakeholders’ call for a relaxation of the current framework but provides adjustments and clarifications to give stakeholders comfort and guidance to rapidly innovate, is another positive element of the Draft IPCEI Communication. ClientEarth believes there is indeed no room for cutting down the eligibility and compatibility criteria, given the strategic importance of IPCEIs for the EU market, their scale, expected spillover effects as well as the amounts and intensities of the aid at stake.

Regarding the eligibility criteria, **a project’s impact on the environment and its capability of addressing climate change** should be taken into account when assessing the project’s contribution to EU objectives. Positive environmental benefits should also qualify, alone or with other socio-economic benefits, as spillover effects that aid beneficiaries must achieve.

On the compatibility criteria, the selection of beneficiaries through competitive and transparent procedures should be the general principle. Also, the fact that the incentive effect of the aid may be derived from important benefits brought to society, should be interpreted to include environmental benefits.

Finally, the Commission should increase transparency of its State aid decisional practice by publishing in particular the notification form, the dates of the procedural steps as well as the non-confidential versions of State aid decisions in a timely manner.

Similar to our feedback on the roadmap², our response to this consultation consists of two parts. First, we set out general recommendations to implement the Green Deal when assessing aid under the IPCEI Communication. We also set out a Green Deal consistent approach regarding the hydrogen IPCEI, currently in the works. Second, we suggest several amendments to the Draft IPCEI Communication in order to clarify certain eligibility and compatibility conditions and align it further with the Green Deal.

¹ 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.

² ClientEarth’s [feedback to the roadmap on IPCEI](#). Due to a technical IT failure during the upload of our response on the “have your say” portal, we sent our response to the State Aid Greffe on 20 December 2020 (registration: 2020/158613).

1. General recommendations to implement the Green Deal

1.1 Compliance with environmental law and the “do no harm” principle

As indicated in our response to the roadmap, there is an urgent need to mainstream environmental and climate protection laws and objectives in Member States’ decisions to grant aid, and in the Commission’s control thereof.³ Indeed, State aid policy should be entirely consistent with, and actively support Articles 11 TFEU and 37 EU Charter of Fundamental Rights (integration of environmental protection principles into Union’s policies), Article 3(3) TEU (act towards sustainable development) and Article 9 TFEU (high level of protection of human health). Pursuant to Article 4(3) TEU the Member States have the obligation to cooperate sincerely in achieving such consistency (see also Article 13 TFEU), including in their State aid policy.⁴

As the Commission is well aware, economic activities benefitting from **aid shall comply with all relevant EU environmental law obligations**.⁵ This is a first prerequisite for ensuring that aid measures contribute to, or at least do not adversely harm, environmental protection. Although this applies to any compatibility assessment under Article 107(3) TFEU, including under point (b), the IPCEI Communication should explicitly state as a general rule that, as ruled by the Court, aid that violates EU environmental law⁶ is necessarily incompatible with the internal market (see below). Such general rule would also eliminate the risk of insufficient assessments associated with partial references to specific environmental legislation.

As a second prerequisite, in order to implement the “do no significant harm” principle of para. 21 Draft IPCEI Communication (which should be “do no harm” in accordance with the Green Deal – see below), **aid to harmful activities must be eliminated**.⁷ Increased environmental protection and efforts to combat climate change do not only entail support to measures that have the potential to protect the environment, but also ending **public support to polluting and harmful activities**. It is the only logical solution from an environmental and climate protection perspective, but it also the most rational and **cost-effective use of public funds**.

The principle of “phasing out of environmentally harmful subsidies” in State aid policy has clearly not been able to decrease, let alone stop, the support to unsustainable activities and sectors such as fossil fuels.⁸

³ See our contribution to the Commission’s call on how competition policy can support the Green Deal (November 2020).

⁴ See our analysis in our joint Report on A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law (with Agora Energiewende and Redeker lawyers)(September 2020)

⁵ Judgement in C-594/18 P, *Austria v. Commission*, 22 September 2020, ECLI:EU:C:2020:742, para. 44-45 and 100. Together with the present response, we are also providing you with our legal analysis of the Hinkley Point C ruling. It addresses why and how the Commission must implement the Green Deal in State aid rules.

⁶ EU environmental law has a large scope. It contains in particular the principles of protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability as well as specific EU secondary legislation such as the Industrial Emissions Directive, the Environmental Impact Assessment Directive, the Water Framework Directive, the Waste Framework Directive, the Habitats Directive, or the Birds Directive and any other specific/sectoral legislation. It will also include upcoming legislation such the European Climate law.

⁷ See our contribution to the call on how competition policy can support the Green Deal (November 2020), pp.20-26 for a developed reasoning, examples and recommendations in the field of energy (coal, gas, production and infrastructure), electro-intensive users, fisheries, petrochemicals and plastics.

⁸ Commission Report, 2020 report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action, Brussels, 14.10.2020, COM(2020) 950 final.

In light of the Green Deal and EU decarbonisation targets for 2030 and 2050, the time for “phasing out” is over and any **new environmentally harmful subsidies should be prohibited**.

In order to impose and implement these two prerequisite principles in practice, the Commission should systematically **check compliance of the supported activities with EU law on the environment and climate as well as the “do no harm” principle⁹** for every notified IPCEI project:

- a. Member States shall be primarily responsible for verifying compliance when granting aid under the IPCEI Communication, subject to the Commission’s and CJEU’s control. To this end, beneficiaries must demonstrate compliance of their activities in their aid application;
- b. When notifying an aid measure, Member States shall provide all relevant evidence of compliance of the aided activity with environmental law, at the time of the first grant and throughout the duration of the aid measure;
- c. If the Commission has doubts about the compliance of an activity with environmental law, it should open a formal investigation - as for any other type of doubts about the compatibility of an aid measure;
- d. Commission decisions reviewing exempted schemes must always state reasons for finding that the activity complies with environmental law (Article 296 TFEU).

To support the **Commission’s compliance check, the notification of an IPCEI project by Member States should contain¹⁰**:

- a. Information on the conformity with EU law on the environment and climate of each beneficiary of aid.¹¹
- b. A description of the positive and negative environmental (and climate) impacts of the supported activities. To this end, Member States could require aid beneficiaries to submit a “climate and environmental impact report”, similar to what is required in section 3 of the RRF Technical Guidance.

The IPCEI Communication and other State aid rules can only be **truly future-proof** if the Commission and the Member States adopt a strict stance towards compliance of supported activities with environmental law and truly implement the “do no harm principle”, without leaving loopholes for aid to harmful activities (such as for fossil fuels).

⁹ The fact that compliance with these two principles are separate obligations is also confirmed by the Commission in the Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, 2021/C 58/01, (RRF Technical Guidance), p.5.

¹⁰ For those IPCEI projects which do not have a direct impact on the environment and climate (e.g. microelectronics), the information to be provided can be short, although it is necessary.

¹¹ Similarly to what is sporadically the case for aid that has to be notified using specific supplementing notification forms by sectors, such as for regional aid, agriculture aid, fisheries, aid for environmental protection and energy, aid to airport and airlines.

1.2 Hydrogen IPCEI: conditions to comply with the “do no harm” principle

With respect to the Hydrogen IPCEI, launched in December 2020 and scheduled to be notified to the Commission by the end of 2021¹², ClientEarth reiterates its call upon the Commission to **only allow State aid for renewable hydrogen**.¹³ Allowing State aid to fossil gas or gas-derived hydrogen including low-carbon hydrogen¹⁴, would be a mistake, economically and climatically.¹⁵ This is based on (i) the EU's proven pattern of overinvesting in fossil gas, (ii) the advantages of bypassing fossil gas-based hydrogen and moving straight to green hydrogen¹⁶ and (iii) the adverse consequences further gas lock-in would have on future budgets, energy prices and the climate.¹⁷ As the Commission is aware, this view is supported by Austria, Denmark, Luxemburg, Portugal and Spain as indicated in the context of the Hydrogen IPCEI.¹⁸

Although hydrogen presents notable inefficiencies¹⁹ and high costs compared to direct (renewables-based) electrification, renewable hydrogen can be a solution for hard-to-abate priority sectors for which full electrification and energy efficiency measures are not a viable alternative, i.e. maritime shipping, aviation and very high-temperature industrial applications (such as steel-making).

In pursuing renewable hydrogen, an emissions assessment of the electricity used for hydrogen electrolysis is necessary to ensure that the hydrogen is actually renewable.²⁰ Moreover, the availability of renewable hydrogen at scale can only be guaranteed by investing at least to an equal extent in renewable energy capacity. Some Member States are therefore rightfully calling for “additionality” in renewable hydrogen

¹² See [Manifesto for the development of a European “Hydrogen technologies and systems” value chain](#).

¹³ Using the terminology of the Hydrogen Strategy, this would exclude any support to “electricity-based hydrogen”, “fossil-based hydrogen”, “fossil-based hydrogen with carbon capture”, “low carbon hydrogen” and “hydrogen-derived synthetic fuels”.

¹⁴ Even with carbon capture and storage (CCS) requirements, independent studies of the fossil gas sector show that large amounts of methane leak and are vented and flared throughout the gas lifecycle. Also, commercially viable CCS for hydrogen is very unlikely to be available at scale until the 2030s; See Friends of the Earth's report “[The Role of hydrogen in our low-carbon transition](#)” and the Global Witness report “[Why blue hydrogen is fossil fuel industry greenwash and won't fix the climate](#)”.

¹⁵ We also refer to E3G [factsheets on hydrogen](#) (April 2021) outlining science-based approaches to the debates on this topic. These focus on hydrogen supply, blending of hydrogen into the gas grid, the role for heating and the infrastructure needs for hydrogen deployment.

¹⁶ 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.

¹⁷ Global Witness, ‘[EU companies burn fossil gas and taxpayer cash](#)’ (22 February 2021).

¹⁸ [Declaration from AT, DK, ES, LU, PT on the adoption of 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.*”; This firm position has been repeated by these Member States at the High Level Conference on Hydrogen “Hydrogen in Society - Bridging the Gaps” organised by the Portuguese Presidency on 7 April 2021.

¹⁹ For instance, regarding the role of hydrogen to provide long-term buffer storage i.e. converting electricity through electrolysis into hydrogen and then hydrogen back into electricity (so called round-trip), this would come with a loss of around 60% of the original electricity. See IEA, [The Future of Hydrogen](#), June 2019, p. 158

²⁰ The emissions intensity of hydrogen depends on the efficiency of the electrolyser and the emissions intensity of the electricity powering the electrolyser. Hence, the formula set forth by Bellona to calculate the carbon intensity of hydrogen (tCO₂/tH₂) = (carbon intensity of the electricity * efficiency of the electrolysers) / 30 ; See further, Bellona, [Electrolysis Hydrogen Production in Europe, 2021](#) pages 5-6 (to be published end of April).

production²¹ – and the Commission also requires this additionality in its guidance on the assessment of the “do no significant harm” principle in the national recovery plans²².

In light of the above, we urge the Commission to:

(i) **Exclude any direct or indirect support to hydrogen that is not renewable.**

This exclusion should not only apply to the production of fossil gas-derived hydrogen, including low-carbon hydrogen (whether investment or operating aid). It should also apply amongst others to works on the supply side (construction, retrofitting and repurposing of transport infrastructure as well as regasification, liquefaction and generation facilities for non-renewable hydrogen), demand side support, transport and storage of gas-derived hydrogen, construction/upgrade of CO₂ pipelines, and installation of CCS/CCU capturing technology.

(ii) **Allow aid to renewable hydrogen subject to the following cumulative requirements:**

- a. Only for use in hard-to-abate priority sectors (as defined above);
- b. An assessment of projected demand and supply shall be provided to avoid infrastructure lock-in;
- c. An emissions assessment shall be provided to ensure that the electrolysed hydrogen produced is renewable;
- d. Support to electrolysed hydrogen should be matched with support to renewable energy.

(iii) *Alternatively*, in the regrettable event that the Commission would allow direct or indirect support to non-renewable hydrogen, aid should only be granted **subject to the following cumulative requirements** to limit climate and economic risks as much as possible:

- a. Only for use in hard-to-abate priority sectors (as defined above);
- b. The use of the best available CCS technologies should be mandatory for all generation facilities associated with the project to ensure overall CO₂ emissions are limited in accordance with the EU’s and relevant national emissions reductions targets;²³
- c. An independently-assessed plan shall detail how captured CO₂ waste from the generation facility will be stored or utilised, and the estimated lifetime costs;
- d. Lifecycle methane leakage for any gas used to produce hydrogen associated with the relevant plant or infrastructure shall, by the start of 2025, be no higher than 0.2% for upstream emissions²⁴, 0.12% for distribution-level emission²⁵, and a commensurate level for midstream emissions, or if the EU has adopted a methane performance

²¹This means that renewable hydrogen is only produced using “renewable electricity from the grid that would, if the electrolyser did not exist, never have been generated, would have been wasted, curtailed or would constitute a seasonal or periodical surplus in the electricity system based on a high variable renewable share. Thus, additionality is a means to increment renewable energy production wherever renewable penetration is low”. See “Additionality in renewable hydrogen production”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020.

²² RRF Technical Guidance, p.6 and Annex III.

²³ A way to implement this would be to ensure overall carbon dioxide emissions are capped.

²⁴ As committed by the key global and national-level gas industry companies through the Oil and Gas Climate Initiative – see ‘Methodological note for OGCI methane intensity target and ambition’.

²⁵ GIE and Marcogaz, ‘Potential ways the gas industry can contribute to the reduction of methane emissions’ (5-6 June 2019).

- 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 standard ²⁶;
- e. For any fossil-based hydrogen, a binding date shall be set for the project to fully transition to renewable gas or hydrogen, based on the EU's and relevant country's emissions reductions targets;
 - f. An independent assessment of the viability of the project's conversion to renewable gas or hydrogen within the required timeframe shall be provided and conditions shall be set, including details of the renewable fuel source and its proven additionality to the energy system. Transition should in any case be done cost-effectively, to minimize transition costs.
 - g. 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 both during its operation and in the event the beneficiary would cease to exist.

These requirements shall constitute aid-granting conditions for eligible projects. Any non-compliance with these conditions shall result in an immediate suspension and/or recovery of granted aid.

In the latter hypothesis, we also strongly recommend to make the aid intensity for renewable hydrogen projects, and aid amounts in absolute terms, considerably higher than for low-carbon hydrogen projects. Only this approach would be aligned with the Commission's and Council's²⁷ commitment to prioritise the development of a European renewable hydrogen industry.

Finally, ClientEarth wishes to express its deep concern regarding the hydrogen industry's demand to use all flexibilities of the current IPCEI Communication, or even to use provisional measures with relaxed assessment rules. We are of the firm opinion that the Draft IPCEI Communication is sufficiently flexible and that the ambition to develop an IPCEI shall never take precedence over compliance with relevant legislation. This is paramount to safeguard the legal framework all projects must be developed within and to ensure a level playing field for similar competing non-IPCEI projects.

²⁶ 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).

²⁷ Council Conclusions "Towards a hydrogen market for Europe", 11 December 2020, para. 2.13.

2 Suggestions for amendments to the Draft IPCEI Communication

2.1 Introduction

In addition to stating that IPCEIs may represent a very important contribution to sustainable economic growth (para. 2 Draft IPCEI Communication), we suggest to add that such **growth should not harm other environmental, climate and social objectives**. This is in line with the proposed 8th Environmental Action Programme and the Council's opinion on it, making it a priority that "economic growth is decoupled from resource use and environmental degradation".²⁸

Regarding the positive spillover effects on "*society as a whole*", we understand this to include the environment at large and recommend to add such explicit reference for the avoidance of doubt. Such additions would be consistent with para. 15 and 21 Draft IPCEI Communication.

Similarly, "*societal challenges*" (para. 3 Draft IPCEI Communication) should be enlarged to "*societal, climate and environmental challenges*".

In addition, in line with our recommendations on **compliance with environmental law** as a prerequisite for granting aid²⁹ (see above), we suggest to add the following general principle in the introduction:

"Aid granted to an activity [or undertaking] that does not comply with all its EU environmental law obligations cannot be found compatible with the internal market. When granting aid, Member States must verify compliance of the potential beneficiaries and their activities with EU environmental law. Any breach of EU environmental law by the beneficiary after aid was granted will constitute a misuse of aid."

2.2 Scope of application

ClientEarth strongly recommends **excluding any fossil fuels projects at large** from the scope of application (i.e. including investment related to, or relying on, the exploration, production, processing, transport, distribution, storage, combustion or use of fossil fuels). Support to fossil fuel projects cannot in any way be compatible with the "do no (significant) harm" principle (para.21 Draft IPCEI Communication) nor with the EU's target to reduce greenhouse gas emissions by at least 55% by 2030. Ending public financing to fossil fuel projects is also a sound budgetary decision given the high stranded asset risk.³⁰

Such exclusion should also apply to fossil fuel infrastructure projects listed as Projects of Common Interest (PCI) under the TEN-E Regulation³¹. These are particularly well positioned to fulfil the eligibility and compatibility criteria of the IPCEI Communication. Although the draft TEN-E Regulation states that "*natural*

²⁸ Commission Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030 of 14 October 2020, COM(2020) 652 final ; Council opinion of 17 March 2021, 7121/21

²⁹ Judgement in C-594/18 P, *Austria v. Commission*, 22 September 2020, ECLI:EU:C:2020:742, para. 44-45 and 100.

³⁰ Global Energy Monitor, *Europe Gas Tracker Report 2021*, p.3: "*With EU members planning steep reductions in fossil fuel use as per the Paris Agreement, these expansion plans create an €87 billion stranded asset risk (...)*"

³¹ Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure (currently under revision).

gas infrastructure no longer needs support through the TEN-E policy”³², it does not entirely exclude support for fossil gas in practice.

Furthermore, aid should also not be granted to undertakings which have links to tax havens.³³ We therefore suggest adding the following exclusion (para. 10 Draft IPCEI Communication):

“This Communication does not apply to: Measures consisting of aid to undertakings which have links with jurisdictions which feature on the EU list of non-cooperative jurisdictions, in accordance with the Commission recommendation on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions”.

2.3 Eligibility criteria: on the notion of “common European interest”

In line with the comments made for the Introduction (see above), the Commission must take into account the project’s **impact on the environment, public health and its capability to addressing climate change and pollution** when assessing a project’s contribution to the EU objectives and strategies (para. 14 and 15 Draft IPCEI Communication). Hence, we recommend to add that in case of a negative impact on any of these items, the Commission can under no circumstance consider that the project contributes to one or more of the Union objectives or strategies.³⁴

The demonstration by aid beneficiaries of their active commitments to wide spillover effects for the EU economy and society is certainly a necessary feature of an IPCEI. Clearly defined and/or quantified net **positive environmental effects in line with the European Green Deal and the decarbonisation objectives should also qualify, alone or with other socio-economic benefits, as spillover effects** for the EU economy and society. To avoid confusion, we suggest to further clarify this important condition of an IPCEI, notably by indicating that the spillover effect should go beyond the beneficiary’s, sector’s and involved Member States’ benefit and requires a beneficiary’s active commitment.

Moreover, although it is good that a project must involve “significant” co-financing by the beneficiary (para. 20 Draft IPCEI Communication), we suggest to provide for a clearer threshold or guidance as to what is considered significant.

As indicated above, ClientEarth welcomes the inclusion of the “**do no significant harm**” principle (para 21 Draft IPCEI Communication). However, we suggest amending it in accordance with the European Green Deal (to which it refers) which contains the “**do no harm**” principle, without any threshold. In order to implement this important principle, the Commission should provide technical guidance on what activities can be compliant with the “do no harm” principle. The technical guidance on the application of the “do not significant harm” principle under the RRF could be used as a model³⁵, save for the case-by-case exceptions for “*measures related to power and/or heat generation using natural gas, as well as related*

³² Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, recital 11.

³³ See Commission recommendation of 14.7.2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions, C(2020) 4885 final

³⁴ ClientEarth shares Denmark’s suggestion to give higher weight and precedence to environmental and climate objectives over other objectives. See [Denmark’s response to the targeted consultation on the evaluation of the IPCEI Communication](#).

³⁵ RRF Technical Guidance and its four Annexes.

*transmission and distribution infrastructure*³⁶, which cannot be considered in the common European interest.

The reference to the phase out of environmentally harmful subsidies (para. 21 Draft IPCEI Communication) should be replaced by a clear stance that projects that are harmful for the environment cannot be deemed to be in the common European interest (see above). Furthermore, the fact that a project that “*takes into account the Taxonomy Regulation*” is considered as a positive indicator of a common European interest is an interesting new indicator, but is too vague (para. 22 (f) Draft IPCEI Communication). If the Taxonomy Regulation were chosen as a reference³⁷, **the positive indicator should stem from the qualification of the privately financed part of the project as sustainable pursuant to the Taxonomy Regulation.** We therefore suggest the following wording: “*The significant co-financed part by the beneficiary qualifies as sustainable pursuant to the Taxonomy Regulation*”.

Finally, with regard to the **specific criteria**, ClientEarth reiterates its request for more guidance on what constitutes “*great importance*” for the environmental, climate, energy or transport, health and digital strategy, as well as “*contribute significantly to the internal market*” (para. 26 Draft IPCEI Communication). Also, the project’s great importance to the listed sectors should not be optional with the project’s contribution to the internal market, it should be cumulative (so “*or*” should be replaced by “*and*”). Furthermore, especially for energy projects, depending on how the Commission will apply the “do no (significant) harm” principle (above), we maintain our suggestion to add that a **project shall actually contribute to sustainability and the EU decarbonisation and depollution objectives**.³⁸

2.4 Compatibility criteria

2.4.1 Necessity and proportionality of the aid

ClientEarth welcomes the insertion of a claw-back mechanism as an additional safeguard to ensure the **proportionality of the aid**, especially given the size and amounts at stake in IPCEI projects (para. 37 Draft IPCEI Communication). However, we still find unclear the open category of “*other costs if justified*” in the list of the eligible costs; we suggest removing it (or at least clarifying it with examples) (Annex Draft IPCEI Communication).

We are also concerned about the fact that the counterfactual scenario can be demonstrated by the beneficiary’s internal documents only, without the necessity to provide independent external studies and audits – why would a potential beneficiary of aid produce documents demonstrating the commercial possibility to conduct a project without aid? Hence, we recommend an amendment to this end (para. 32 and 35 Draft IPCEI Communication).

Furthermore, regarding the fact that the **incentive effect** may be derived from important benefits brought to society by a supported project that is insufficiently profitable in the absence of aid (para. 38 Draft IPCEI

³⁶ RRF Technical Guidance, p. 8. This permission “on a case-by-case basis” cannot be accepted in State aid at large in light of the precautionary, prevention and sustainability principles mentioned in the Hinkley Point C ruling, and in application of the binding 2030 and 2050 emission reduction targets in the EU Climate Law.

³⁷ This is without prejudice of ClientEarth’s opinion on whether the Taxonomy Regulation and its future delegated acts are only containing sustainable activities.

³⁸ Similar to the Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, articles 1, 4 §3, Annex IV and recital 16; Practically, the Commission should perform a sustainability check based amongst others on detailed assessments made by the notifying Member States (see above), its experience with previous comparable projects, and scientific evidence

Communication), ClientEarth insists that “*benefits for society*” should be interpreted to include environmental and social benefits, including to tackle climate change.

Finally, for the numerous reasons set out in our response to the roadmap³⁹, the selection of beneficiaries through a **competitive, transparent and non-discriminatory procedure should be the general principle** whenever feasible, and not only a positive indicator (para. 43 Draft IPCEI Communication).

2.4.2 Prevention of undue distortions of competition and balancing test.

With respect to projects involving the **construction of an infrastructure** that can lawfully be wholly or partly exempted from the internal market rules, such as the principles of open and non-discriminatory access to the infrastructure, it is important to perform a thorough analysis assessment of the potential distortions of competition taking into account the degree of third party access to the supported infrastructure, access to alternative infrastructure and the market share of the beneficiary (para. 47 Draft IPCEI Communication). It should not benefit from any presumption on the fulfilment of the compatibility criteria. We refer to section 3.8 (aid to energy infrastructure) of the Guidelines on State aid for environmental protection and energy for a similar assessment.

2.4.3 Transparency requirements

At present, the Commission’s State aid register is completed only *after* the Commission takes a decision on the notified aid. This is too late for the public to effectively be informed about the use of public funds by Member States. Increased transparency about Member States’ plans to grant aid and the Commission’s assessment is all the more important for IPCEI projects given the size and amounts at stake.

Moreover, Member States have an obligation to publish the information about the aid only within 6 months from the date the aid was granted. As the information to be provided is available as from the moment the Member State notifies the aid to the Commission, subject to modifications during the assessment process, Member States should be required to publish the information much sooner.

Hence, to increase transparency towards the public, we still **recommend the Commission to:**

- (i) **Publish the dates of the procedural steps**, including the (pre-)notification of aid, in the State aid register;
- (ii) **Publish the notification form** in the State aid register⁴⁰;
- (iii) **Publish non-confidential versions of State aid decisions in a timely manner**⁴¹. To this effect, Member States should be given a fixed short period (that could be two weeks) to redact any confidential information, beyond which the Commission decision would be presumed not to contain any confidential information and should be published in the State aid register;

³⁹ ClientEarth’s [feedback to the roadmap on IPCEI](#) (p.10).

⁴⁰ There is no reason for secrecy at EU-level since aid measures are generally decided in a transparent manner at national level.

⁴¹ For instance, to this date, **none of the public versions of the decisions adopted on 9 December 2019** in respect of the Summer IPCEI Batteries notified by France (SA.54794), Sweden (SA.54796), Germany (SA.54801), Italy (SA.54806), Poland (SA.54808), Finland (SA. 54809) **have been published in the State aid register**. The lack of publication of a decision after almost 1,5 years clearly harms transparency towards the public.

- (iv) Request Member States to publish the **information about the aid within one month from the date the aid was granted.**

However, the Commission reduced the transparency regarding individual aid awards below €500,000 as the possibility to waive publication has been modified into a publication exemption (para. 51 Draft IPCEI Communication). Although we can partially understand the potential administrative burden of publication for very small aid awards, the current threshold of €500,000 is too high. We therefore suggest lowering it to €100,000.

ClientEarth welcomes the fact that the Member States will also have to provide information on the “objective of the aid”. We suggest such information also to comprise the expected spillover effects and the project’s contribution to EU policies or strategies. However, the beneficiary’s identity should under no circumstance remain confidential.

Finally, although it does not relate to the compatibility assessment strictly speaking, ClientEarth calls on the Commission to also **increase the transparency during the preparation and the development of an IPCEI**, i.e. as from the moment a strategic value chain is determined and throughout the selection of the projects and participating companies. Such transparency should not only have the purpose to ascertain the openness of IPCEIs and allow all Member States to participate in time, but also to inform the public about the creation and evolution of an IPCEI. An open centralized platform with an overview of the ongoing IPCEI application procedures in all participating Member State would be a step in the right direction. It would go hand in hand with certain stakeholder’s demand for a strengthened governance role for the Commission.

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