

# Revision of the General Block Exemption Regulation

ClientEarth's feedback to the roadmap

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## Executive summary

ClientEarth<sup>1</sup> welcomes the revision of the GBER to align it with the European Green Deal and the Industrial Strategy. The ongoing revision of the different State aid instruments is the right time to align these rules with environmental and climate protection objectives. The GBER has proved to be a relevant instrument to facilitate the grant of aid by public authorities and help the Commission focus on novel, complex cases or those involving high amounts of aid.

To fully align with the Green Deal, **only those aid measures that are supporting activities complying with the Union's decarbonisation objectives should be exempted** from notification. Aid to high-efficient cogeneration, district heating or cooling and energy infrastructure (in assisted areas or not) shall fall within the scope of the GBER only when they fully rely on sustainable renewable energy sources. When that is not the case, notably when these activities rely on fossil fuels, the aid measures should be found incompatible with the internal market or at least, put to an *ex ante* scrutiny of the Commission in order to determine on a case-by-case basis whether the measures comply with EU environmental law, the decarbonisation and Green Deal objectives. The same goes for support to unsustainable activities such as forest-biomass and small hydropower.

Conversely, new categories of aid could be included in the GBER in order to support the green transition, especially aid for energy storage and sustainable batteries, aid for zero exhaust emissions vehicles and charging infrastructure, as well as dedicated support for energy communities.

The GBER needs to be future-proof and accurate in five or six years. This implies both immediately addressing any current flaws; and anticipating the development of upcoming innovative technologies and solutions, including their market potential and their impact on the Union's energy systems and environmental and climate protection objectives. It means giving legal certainty to operators and Member States, as well as all stakeholders, that the design of aid measures will support the green transition and be exempted from notification only when it is right.

Our response focusses on energy and environmental protection measures. We underline that providing concrete and detailed input on many of these measures is challenging in light of the concomitant revision of the State aid rules, the GBER and State aid guidelines for environmental protection and energy (EEAG) mainly, and of relevant energy legislation expected to set new sustainability standards or thresholds of greenhouse gas emissions, amongst other things.<sup>2</sup>

We first outline general recommendations to implement the Green Deal and climate objectives into the GBER. Second, we identify areas for reform and propose the changes needed regarding several aid measures for environmental protection and local infrastructure. Third, we propose the introduction of new aid categories in the GBER.

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<sup>1</sup> ClientEarth is an environmental law organisation, comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges.

<sup>2</sup> In particular, the Hydrogen and Gas markets Decarbonisation Package, the Trans-European Network Regulation (TEN-E), the Renewable Energy Directive (RED II) and its delegating and implementing regulation (a.o. on forest biomass and the minimum thresholds for the greenhouse gas emissions savings of recycled carbon fuels), the Energy Taxation Directive and new rules are upcoming such as to prevent methane leakage.

# 1. General recommendations to implement the Green Deal

The recommendations set out in the present section apply to all categories of aid in the GBER. These should therefore be taken up into the preamble and in Chapters I and II of the GBER.

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

The GBER, together with the other State aid instruments such as EEAG, have created a valuable **framework for public investments across the EU and an increasing volume of aid has been granted in the past years.**<sup>3</sup> Unfortunately, these instruments have also facilitated support to unsustainable activities and sectors such as fossil fuels, small hydropower, forest biomass and cogeneration of heat and power (CHP).

ClientEarth calls for a rethinking of State aid policy and rules in line with the Green Deal.<sup>4</sup> There is a need to mainstream environmental and climate protection objectives, which are part of EU’s constitutional principles, in member states’ decisions to grant aid, and in the Commission’s control thereof. As demonstrated extensively in a previous report<sup>5</sup>, 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. We recommend making explicit references to these Treaty provisions in the preamble and in Chapter I of the GBER.

As the Commission is well aware, activities (in all sectors) benefitting from (any type of) **aid shall comply with all their EU environmental law obligations.**<sup>6</sup> 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, the GBER should explicitly provide as a general rule, that aid that violates EU environmental law is necessarily incompatible with the internal market. Such general rule would also eliminate the risk of insufficient assessments associated with partial references to environmental legislation.

EU environmental law has a large scope. The principle of protection of the environment, the precautionary principle, the ‘polluter pays’ principle and the principle of sustainability are an integral part of EU environmental law acquis; besides specific EU secondary legislation such as the Water Framework Directive, the Waste Framework Directive, the Habitats Directive, or the Birds Directive. Upcoming legislation stemming from the Green Deal such as the European Climate law with its binding greenhouse gas emissions reduction targets, are also environmental law.

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<sup>3</sup> Fitness Check Report, Commission Staff Working Document of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, PART 3/4, page 83.

<sup>4</sup> See our contribution to the Commission’s call on [how competition policy can support the Green Deal](#) (November 2020).

<sup>5</sup> 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).

<sup>6</sup> Judgement in C-594/18 P, *Austria v. Commission*, 22 September 2020, ECLI:EU:C:2020:742, para. 44-45 and 100.

As a second prerequisite, building on the first one and in line with the “do no harm” principle set out in the Green Deal, **aid to harmful activities must be eliminated**.<sup>7</sup> 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**. Not only is it the only logical solution from an environmental protection perspective and to achieve the Green Deal objectives and climate targets, it is the most rational and **cost-effective use of public funds**. The focus too often lies on enabling more aid for less polluting or environmentally harmful activities, instead of proposing the phase-out of public support for polluting activities.<sup>8</sup>

Based on the above, we highly recommend the Commission to:

1. Insert the following clear and stringent **general principles** into Chapter I of the GBER (Common Provisions), the more given the fact that the centre of gravity to control compliance lies with the Member States:
  - (a) As a general principle, *“Aid, granted individually or pursuant to a scheme, to an activity [or undertaking] that does not comply with all its **EU environmental law obligations** cannot be found compatible with the internal market. When 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.”*
  - (b) Similarly to what the Commission proposed in its draft revised IPCEI Communication<sup>9</sup>, an aid measure *“must respect the ‘**do no significant harm**’ principle and ensure the **phasing out of environmentally harmful subsidies**, as recalled by the European Green Deal”*. In order to implement these principles, the Commission could provide technical guidance on what activities can be sustainable and compliant with the “do no harm” principle. The technical guidance on the application of the “do not significant harm” principle under the RRF (the “RRF Technical Guidance”) could be used as a model<sup>10</sup>, except for the permission of *“measures related to power and/or heat generation using natural gas, as well as related transmission and distribution infrastructure”*.<sup>11</sup>

We also suggest adding that: *“**aid to fossil fuels, be it for electricity or heat generation or for any other purpose, cannot be considered compatible with the internal market**”* and to exclude from the scope of application of the GBER.

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<sup>7</sup> 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.

<sup>8</sup> For instance, maintaining free emission allowances and indirect cost compensation under the ETS Directive and the ETS State aid guidelines without effective conditionality disincentives the eligible industries - that generally have polluting production processes and are intensive energy consumers – to align their practices with energy and climate-neutrality targets.

<sup>9</sup> Commission Communication, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, Draft dated 23 February 2021, para 21.

<sup>10</sup> RRF Technical Guidance.

<sup>11</sup> See 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 climate targets in the EU Climate Law.

2. Impose and implement an obligation to systematically **check compliance of the supported activities with EU law on the environment and climate as well as the “do no harm” principle** for every aid measure or scheme.<sup>12</sup>
  - (a) Such obligation will be directed primarily at Member States under the GBER subject to the Commission’s and CJEU’s control. To this end, beneficiaries must include a justification of compliance of the activities in their State aid application;
  - (b) When responding to the Commission’s monitoring requests, 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) When the Commission would review compliance of a scheme with the GBER and would have doubts about the compliance of an activity with its environmental law obligations, it should open a formal investigation - as for any other type of doubts about the compatibility of an aid measure. This increases the possibility for the Commission to gather evidence, by consulting interested parties and requesting information directly from market participants including the beneficiaries of aid;
  - (d) Commission decisions reviewing exempted schemes must always state reasons for finding that the activity complies with environmental law (Article 296 TFEU).
3. Adapt the **information form** to be provided by Member State:
  - (a) The information form should contain a field (or multiple fields or boxes) on the conformity of the aid measure with EU law on the environment and climate.<sup>13</sup>
  - (b) Member States should also be required to describe 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.

It is only if the Commission and Member States adopt a strict stance towards compliance of activities with environmental law and truly implement the “do no harm principle”, without leaving loopholes for aid to harmful activities (such as coal and fossil gas combustion and infrastructure), that the GBER and other State aid rules can be **truly future-proof**. Environmental protection (including climate neutrality and Green Deal objectives) must not be a separate pillar but must overarch the GBER. Moreover, as technology, loss of biodiversity and climate change evolve fast, overarching and strong principles must be provided rather than only addressing each technology or form of aid in separate sections.

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<sup>12</sup> Member States should for instance make sure that all relevant permits have been granted, make an assessment of the potential impact on the supported activities on air, soil, water, biodiversity, etc.

<sup>13</sup> This is already 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 Increase transparency and reporting requirements

As para. 27 of the GBER states: “*transparency of State aid is, therefore, essential for the correct application of Treaty rules and leads to better compliance, greater accountability, peer review and ultimately more effective public spending.*” To increase transparency, it is important for the public to know when an aid measure is planned by a Member State and how it is designed, particularly when it is not notified to the Commission. It would also enable the public to better monitor, during the process and not only after, if planned aid measures are aligned with State aid law, the Green Deal objectives and environmental law. However, such transparency is missing today.

At present, the Commission’s State Aid Transparency Public Search is completed only *after* the Member States grant aid and report it. This is too late for the public to effectively be informed of the granting of State aid. Member States should also be transparent on State aid to which they have committed, before it is granted.

Moreover, Member States have an obligation to publish the information about the aid on a national/regional website within 6 months from the date the aid was granted, or within 1 year from the date the tax declaration is due for tax advantages (article 9, §4 GBER). However, they have to report similar information to the Commission within 20 working days following the entry into force of the aid measure (article 11 (a) GBER). There is no justification for having two different deadlines to publish similar information.

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

- (i) **require Member States 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) set a **20 working days deadline for Member States to publish the information on the national/regional website**.<sup>14</sup> This would not create an additional administrative burden on granting authorities as they provide the same information to the Commission within the same timeframe;
- (iii) **publish the State aid information reported by granting authorities within one month upon receipt thereof**;
- (iv) require publication of the full text every aid measure as well as the **implementing provisions or legal basis for individual aid**;
- (v) require a summary of the text of the aid measure to be published in English;
- (vi) require Member States to organise their State aid websites, on which the information laid down is to be published, in such a way as to allow easy access to the information. Information shall be published in a non-proprietary spreadsheet data format, which allows data to be effectively searched, extracted, downloaded and easily published on the internet, for instance in CSV and XML format. Access to the website shall be allowed to the general public without restrictions and no prior user registration shall be required to access the website;
- (vii) decrease the threshold for Member States to publish information referred to in Annex III GBER for each individual aid award to €100,000.

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<sup>14</sup> Many of the links provided by national authorities to the websites on which the summary of the aid measure and the text of the aid should be published does not work. This clearly affects transparency towards the public.

### 1.3 Hydrogen should not be included in the GBER

Hydrogen projects are innovative and barely at their inception. The Member States and the Commission have not yet developed enough experience with aid for hydrogen projects, whether so-called renewable or low-carbon, to include hydrogen in the GBER. As indicated in the GBER (para. 4), it is the Commission's experience which enables it "*to better define the conditions under which certain categories of aid can be considered compatible with the internal market and to extend the scope of block exemptions*". The few State aid decisions in relation to hydrogen projects nearly all concern R&D<sup>15</sup>, which means the Commission cannot yet set the right conditions for exempting aid to investment or operation of hydrogen projects.

Hydrogen projects are typically also large and/or financially important projects that require an *ex ante* scrutiny by the Commission given their potential impact on the internal market. Due to their innovative nature and the necessity to reserve hydrogen to those hard-to-abate sectors that cannot yet rely on direct electrification, it is paramount to steer potential hydrogen projects in Europe at the centralized EU level. This is all the more important to avoid the lock-in and overinvestment of new infrastructure.<sup>16</sup>

Hence, **aid to hydrogen shall not be included in the GBER**, except for aid to R&D on (renewable) hydrogen.

For the sake of clarity, the hydrogen exclusion shall entail any direct or indirect type of aid (investment and operating aid) for hydrogen projects. That includes infrastructure works on the supply side (retrofitting and repurposing of infrastructure; regasification, liquefaction and generation facilities), demand side support (contracts for difference to cover the cost differential of using renewable/low-carbon hydrogen), storage of hydrogen, construction/upgrade of CO<sub>2</sub> pipelines, installation of CCS/CCU capturing technology, etc.

### 1.4 The Energy Efficiency First principle must apply to aid for energy projects

The energy efficiency first (EE1st) principle is a key pillar of the Energy Union<sup>17</sup> 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.<sup>18</sup> It must be, as per the Governance of the Energy Union Regulation, driving the EU institutions' decisions and legislation as well as Member States' energy planning, policy and investment decisions (notably for energy security, energy infrastructure and market integration decisions).<sup>19</sup>

The GBER should first define the "EE1st principle" in Article 2, based on the definition thereof in Article 2 (18) Governance of the Energy Union Regulation. Second, the GBER, mainly through the aid categories

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<sup>15</sup> The State aid register only contains six Commission decisions in relation to Hydrogen.

<sup>16</sup> Agora Energiewende published a detailed report on the necessity of hydrogen in different sectors and the infrastructure that should be built to achieve this. It for instance concludes that an EU-wide hydrogen backbone is not necessary. For more, see "[No-regret Hydrogen](#)".

<sup>17</sup> See [Factsheet on energy efficiency](#).

<sup>18</sup> 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.

<sup>19</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1–77, recital (64) and Article 2(18);



“environmental protection” and “local infrastructure”<sup>20</sup>, should contribute to strengthen this principle and its full implementation by Member States. The latter must therefore consider, before granting State aid, 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. Hence, the **EE1st principle should be a priority baseline** for assessing whether an aid measure in energy projects is necessary.

## 2 Recommendations regarding the current aid measures for environmental protection and local infrastructure

ClientEarth has identified different areas for reform and calls for several changes to the categories “aid measures for environmental protection” (Section 7)<sup>21</sup>, aid for energy efficiency and aid for energy infrastructure (Section 13).

### 2.1 Investment aid for energy efficiency measures (Articles 38 and 39 GBER)

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

Overall, the energy efficiency-related provisions of the GBER seem too restrictive and complex to apply for Member States. The methodology to assess eligible costs under Article 38 GBER is not suitable for complex ownership and contracting models including professional landlords, commercial real estate owners and Energy Service Companies (ESCO). This is notably because only “additional costs” necessary to achieve the higher level of energy efficiency are eligible, while private homeowners get funding based on total costs of projects. We thus suggest to make **the entire investment costs necessary to achieve a higher level of energy efficiency eligible under Article 38 GBER**.

The Commission could also consider including **specific provisions for ESCO**, which have the ability to offer energy services ‘off balance’ as ‘asset-based solutions’. Indeed ESCO 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.

While Article 39 of the GBER specifically provides investment aid to energy efficiency in buildings through financial instruments, the Fitness Check Report concludes that it was little used by Member States because of its complexity.<sup>22</sup> We thus call on simplifying the numerous conditions set in Article 39 GBER.

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<sup>20</sup> Currently respectively Chapter III, Section 7 and Section 13 GBER.

<sup>21</sup> This section should more accurately be called “Aid to environmental protection and energy” in line with the EEAG.

<sup>22</sup> Fitness Check Report, PART 1/4, page 66.

It is also our understanding that the financial instruments listed in Article 39 para. 4 GBER do not represent the full scope of financial instruments suitable for all the different energy efficiency projects in buildings. **The list should therefore be broadened** so as to enhance the possibilities of developing energy efficiency schemes and not preclude opportunities of using innovative business models for building renovations, such as ESCO. We also recommend the Commission to **clarify Article 39 GBER itself and provide guidance** to Member States and sharing best practices on how to interpret and implement it in a very practical way.

## 2.2 Investment aid for high-efficient cogeneration (article 40 GBER)

High efficient cogeneration (CHP) is clearly encouraged by the State aid rules and the Energy Efficiency Directive (EED)<sup>23</sup>, regardless of the type of energy source. Energy production from cogeneration contributes to the EU and national energy efficiency targets.<sup>24</sup> To facilitate the achievement of those targets, “*measures supporting energy efficiency, high efficiency cogeneration as well as energy efficient district heating and cooling should be covered by the block exemption*” (recital 58 preamble GBER). It is also indirectly supported by Renewable Energy Directive (REDII)<sup>25</sup> since energy from biomass can be taken into account for achieving the EU and national renewable targets under certain conditions.<sup>26</sup>

This approach towards CHP is clearly outdated and not consistent with the new climate ambition of the EU. CHP is mainly a fossil fuel based technology, therefore support to it shall cease to achieve the Union’s pledge to phase out fossil fuel subsidies and more broadly, to eliminate environmentally harmful subsidies. CHP plants receive other benefits creating significant competitive advantage to CHP over renewable heat generation e.g. free allocation of emission allowances under the EU Emissions Trading Scheme.

Conversion from coal CHP plants to biomass is not a sustainable solution either; forest biomass – *a fortiori one that is sources in a sustainable manner* – is a scarce resource that is sorely needed for preserving habitats and capturing carbon emissions (see our section on biomass below).

Furthermore, although the State aid regime for CHP is based on the definition of high-efficient CHP set in the EED, some studies demonstrate that high efficient CHP **are not in practice as efficient as they should be**.<sup>27</sup> The calculation method of efficiency in the EED is also highly questionable. As per the EED, large CHP plants must save 10% of primary energy compared to the separate production of electricity and heat in order to be qualify as highly efficient.<sup>28</sup> However, the choice of comparative plants to assess this

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<sup>23</sup> Directive 2012/27/EU on energy efficiency (EED).

<sup>24</sup> In their annual monitoring report to assess their progress toward EE target, Member States shall analyse various indicators including electricity and heat generation from CHP. See Article 24 para. 1 EED.

<sup>25</sup> Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast)(RED II).

<sup>26</sup> Provided that it fulfils sustainability and GHG emission saving criteria. Other specific criteria apply on electricity from biomass fuels. See Article 29 RED II.

<sup>27</sup> For instance, CHP plants in Germany are only around 12% more efficient than plants with separate energy generation without even considering grid losses which amount to around 10%. See the reports from Prognos AG, Fraunhofer IFAM, Öko-Institut e.V., BHKW-Consult “”, 25 April 2019; DPG, “Energie Forschung und Perspektiven”, Prognos AG, Fraunhofer IFAM, Öko-Institut e.V., BHKW-Consult, 25 April 2019; DPG, “Energie Forschung und Perspektiven”, March 2016.

<sup>28</sup> See EED, Annex II.

energy saving is not adequate and technically obsolete.<sup>29</sup> No efficiency minimum requirement applies to small CHP<sup>30</sup>, which means that any “primary energy savings” qualify them as highly efficient; alternative energy production that emits less carbon is not considered either.

For these reasons, ClientEarth calls on the Commission to **remove aid to CHP from the GBER. Given the adverse impact on the climate targets and the Green Deal objectives, any aid to CHP 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.

## 2.3 Aid for the promotion of renewable energy sources (articles 41, 42, 43 GBER)

The comments and recommendations set out below apply for investment aid and operating aid for renewable energy sources (RES).

The EEAG and GBER have been effective in enabling the deployment of renewables at lower costs in Europe. Given the urgent need to reduce greenhouse gas (GHG) emission by at least 55% by 2030, there is and will be a significant need for renewable electricity production. Hence, support to RES is necessary in light of market failures, appropriate and creates only limited distortive effects on competition.

The prices per unit of RES vary significantly depending on the different types of technology.<sup>31</sup> Whilst solar and wind power developed particularly well under the GBER and EEAG (with some operators placing “zero bids”<sup>32</sup>), continuing to support RES technologies would allow for less-developed technologies (such as geothermal, thermal solar, or floating wind turbines) to reach market competitiveness faster. This would unlock the benefits of diversifying RES<sup>33</sup>, and mitigating the power variability of intermittent technologies.<sup>34</sup>

The principle of support by feed-in premiums (either fixed or floating, or contracts for difference) seems generally adequate and is supported by the REDII.<sup>35</sup>

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<sup>29</sup> E.g. as a comparison for separate electricity generation, a gas-fired power plant with an electrical efficiency of 53% is stipulated, although gas and steam power plant technology with electrical efficiencies of at least 60% has been state of the art for years. The heat pump, which has been well established for years, is not mentioned as a comparative system for separate heat generation (not even in the new edition for 2016 and subsequent years). See for further details: Gerhard Luther, *Wärmepumpe oder KWK – was passt zur Wärmewende?*, pp. 123 and seq.; See also Commission Delegated Regulation (EU) 2015/2402 of 12 October 2015 reviewing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2012/27/EU of the European Parliament and of the Council and repealing Commission Implementing Decision 2011/877/EU, Annex I.

<sup>30</sup> See EED, Annex II.

<sup>31</sup> Fitness Check Report, PART 3/4, page 84.

<sup>32</sup> Nevertheless, it does not imply that these RES operators are not otherwise supported. The Fitness Check Report (p. 85) notes that some benefit from subsidisation of their cost of connection to the grid.

<sup>33</sup> Such as reducing their overall environmental impacts if included in hybrid plants (i.e. by sharing sites, reducing land occupation, or by sharing grid connection, which would defer new grid development). These benefits have already been clearly identified for solar-wind hybrid plants: Wind Europe, *Renewable Hybrid Power Plant – Exploring the benefits and market opportunities*, July 2019.

<sup>34</sup> G. R.G. Hoste et al, *Matching Hourly and Peak Demand by Combining Different Renewable Energy Sources – A case study for California in 2020*, Stanford University.

<sup>35</sup> Article 4 §3 RED II.

This must however not be at the expense of the participation of smaller operators who have a tremendous role to play in the energy transition. Feed-in tariffs for small-scale operators should thus also be maintained. We highlight the increasing role of energy communities and active consumers, who should benefit from a favourable aid regime (see below).

Conversely, in line with the ‘do no harm’ principle of the Green Deal and to effectively ensure the phasing out of environmentally harmful subsidies, forest-biomass and small hydropower that qualify as RES under REDII, should no longer be supported under the GBER, for the following reasons.

### 2.3.1 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.<sup>36</sup> 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**.

This however **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.<sup>37</sup> 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.<sup>38</sup> Worse, there is evidence that carbon emissions per unit of electricity generated from forest biomass are higher than from coal.<sup>39</sup> Additionally, the increased 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. NOx, PM<sub>10</sub>, PM<sub>2.5</sub> 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.<sup>40</sup>

Whilst the revised REDII may contain sustainability criteria for bioenergy, we insist that the GBER should take a negative approach on support to biomass, in particular on forest biomass, by:

- (i) **excluding conversions from coal to biomass plants** and operation of biomass installations from the scope of the GBER;
- (ii) **finding aid to forest biomass incompatible** with the internal market as it is inconsistent with the Green Deal and climate targets of the Union and Member States are bound by;
- (iii) controlling external costs (i.e. greenhouse gas emissions) and potential distortive market effects of support to biomass in light of the 2050 climate neutrality objective;

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<sup>36</sup> Climate Home News, “[Not all biomass is carbon neutral, industry admits as EU reviews policy](#)”.

<sup>37</sup> For ClientEarth’s 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.

<sup>38</sup> Duncan Brack, Chatham House, *Woody Biomass for Power and Heat: Impacts on the Global Climate*, 2017.

<sup>39</sup> European Academies Science Advisory Council “[Commentary on Forest Bioenergy and Carbon Neutrality](#)”, 2018.

<sup>40</sup> Linde Zuidema, State Aid for solid biomass: the case for improved scrutiny, EUI working paper, Department of Law, LAW 2020/13.

- (iv) increasing monitoring of the various supports to biomass based on different instruments to avoid distortion on the renewable energy market.

The prohibition of investment and operating **aid to food-based biofuels** must be maintained for environmental and climate purposes, but also as a matter of compliance with the REDII. Regarding operating aid, the exclusion of food-based biofuels must not only apply for small-scale installations but for all installations, no matter the size.

### 2.3.2 Hydropower

Hydropower has many negative impacts on habitats and species associated with changes to habitat, hydrological and hydrogeological regimes, water chemistry, and interference with species migration pathways.<sup>41</sup> It also has negative impacts on population and health through human displacement, water quality, impairment of property rights, etc.

Small hydropower plants have additional negative impact as their small size allows them to be built in more remote areas.<sup>42</sup> The contribution of small hydropower plants of a capacity 10 MW or less to the European energy production and security of supply is limited, while the impact on the environment is disproportionately severe.

For these reasons and to stop the further fragmentation of rivers, the Technical Expert Group on Sustainable Finance recommends to prioritise refurbishment of existing hydropower plants and rehabilitation of existing barriers, as well as to avoid the construction of hydropower projects below 10MW.<sup>43</sup>

Nonetheless, the current support in the GBER (and EEAG) and the exemptions (article(s) 42 §8-9 (and 43) GBER), have contributed to the rapid development of small hydropower.

Moreover, although it is specified that hydropower projects shall be compliant with the Water Framework Directive to receive investment aid (article 41 GBER), there is no such condition for operating aid (articles 42 and 43 GBER). Also, whilst the Water Framework Directive is clearly relevant, compliance with Habitats Directive (especially article 6.4; for projects that have a proven impact on the water status and habitats and species), *inter alia*, is also directly relevant. Hence, the GBER should rather include a general provision according to which an activity that breaches any of its environmental law obligations is not eligible to aid.

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<sup>41</sup> The problems relate to changes in riverine habitats, water quality deterioration, disruption of sediment dynamics, biological diversity loss, changes in landscape, barriers to fish migration, dispersal of protected species, etc. Changes to flow regimes create less selective habitats and thus reduce genetic diversity of endemic fauna, as well as makes the new habitat more accessible for non-native generalist species. By changing the community structure and genetic diversity, the whole system becomes less able to adapt to a changing world; For more: [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.

<sup>42</sup> Small hydropower plants are usually derivation-type plants that can severely impact access to and quality of water for local people in remote areas, whilst deforestation for the construction of access roads and pipelines can lead to erosions and impact access to land and disrupt kilometres after kilometres of river banks. These are only examples of negative effects. See also for a detailed analysis, [Policy Guidelines by the Energy Community Secretariat on small hydropower projects in the Energy Community](#) PG 02/2020 / 17 September 2020.

<sup>43</sup> [Technical annex to the TEG final report on the EU taxonomy](#), p. 465. The EU biodiversity strategy also aims to restore at least 25 000 km of free-flowing rivers by 2030 by removing barriers and restoring floodplains and wetlands. See the Report of the European Environmental Agency, [Tracking barriers and their impacts on European river ecosystems](#), February 2021.

On this basis, we recommend the Commission to:

- (i) find **any aid to small hydropower plants incompatible** with the internal market;
- (ii) require the **mandatory compliance of hydropower plants** projects with all relevant environmental and technical standards, including **the Water Framework Directive and Habitats Directive for investment and operating aid**; and
- (iii) in case of a compliant hydropower plant, to only allow **investment aid for improving the level of environmental protection and/or technical efficiencies of existing hydropower plants**.

## 2.4 Investment aid for district heating and cooling (article 46 GBER)

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”.<sup>44</sup>

**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.

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.

Should the Commission decide to adopt more flexible rules to allow State aid to non-efficient district heating networks as suggested in the Sustainable Europe Investment Plan, this should:

- (i) not be allowed under the GBER and
- (ii) only be for an actual modernisation of networks (or the creation of a network when there is none); available only once for a relevant geographical area or network zone; and be accompanied by clear, binding and measurable commitments by Member States to undertake the appropriate modernisation to an efficient system at the earliest possible and with an adequate completion date.

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<sup>44</sup> 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.

## 2.5 Investment aid for energy infrastructure and local infrastructure (article 48 GBER) and for local infrastructure (article 56 GBER)

First, the definition of energy infrastructure in the GBER (and in the EEAG) needs to be updated to include the new categories of energy infrastructure listed in the Commission's proposal for the revised TEN-E Regulation.<sup>45</sup> This is a matter of consistency and would ensure that all State aid for energy infrastructure is assessed pursuant to the same compatibility criteria.<sup>46</sup>

Second, **aid to fossil fuel infrastructure should be found incompatible with the internal market** since these investments are not in line with the European Green Deal and decarbonisation targets. At least, the current exclusion for electricity and gas storage and oil infrastructure should be enlarged to fossil gas infrastructure. This would be in line with the Commission's own statements: "*for gas, the infrastructure is now well connected and supply resilience has improved substantially since 2013. (...) Moreover, the Commission's climate target impact assessment expects the consumption of natural gas to be reduced significantly because its non-abated use is not compatible with carbon-neutrality*".<sup>47</sup> A recent report from NGO Global Witness found that in less than a decade, the EU has wasted nearly 440 million euro of taxpayers' money on gas projects that have either failed or are likely to fail.<sup>48</sup> There is thus no reason to assume that gas infrastructure needs further support through State aid, especially not under the GBER.<sup>49</sup> In the very limited exceptions where aid for fossil fuel infrastructure may be necessary, for instance due to particularly significant challenges in the transition away from coal, aid must be assessed on a case-by-case basis, thus after a notification. Such *ex ante* scrutiny should be done by the Commission in light of compliance with the "do no harm" principle of the Green Deal and the EU decarbonisation objectives.<sup>50</sup>

Third, aid for energy infrastructure should no longer be restricted to assisted areas as the underlying facts have shifted since the adoption of the GBER in 2014. The energy infrastructure in assisted areas developed at a fast pace in the last years. However, given the climate emergency and the energy transition, all Member States need to make energy infrastructure investments, such as strengthening the grid for deploying RES.

Regarding the condition that the supported energy infrastructure "*shall be subject to full tariff and access regulation according to internal energy market legislation*" (§3), we suggest to clarify that energy infrastructure which is lawfully exempted from these rules<sup>51</sup> cannot benefit from aid under the GBER.

Moreover, as stressed above, Member States should duly apply the **Energy Efficiency First principle** and consider non-infrastructure investments (such as demand response) before resorting to aid to energy

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<sup>45</sup> Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, article 1 and Annex 2; See also our contribution to the [Targeted consultation on the revision of Regulation 347/2013 on guidelines for trans-European energy infrastructure](#).

<sup>46</sup> Correlatively, this entails that the definition of energy infrastructure should keep encompassing gas and oil infrastructure in order to make clear that these infrastructures should not be exempted under the GBER.

<sup>47</sup> Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, recitals 5 and 11.

<sup>48</sup> Global Witness, '[EU companies burn fossil gas and taxpayer cash](#)' (22 February 2021).

<sup>49</sup> A recent report by Artelys found that "*the existing EU gas infrastructure is sufficiently capable of meeting a variety of future gas demand scenarios in the EU28, even in the event of extreme supply disruption*", for more: Artelys, [An updated analysis on gas supply security in the EU energy transition](#); Similarly, Global Energy Monitor published a report "[Gas at a Crossroads – Why the EU should not continue to expand its gas infrastructure](#)".

<sup>50</sup> RRF Technical Guidance, p.6.

<sup>51</sup> Such as an exemption from the gas internal market rules in accordance with article 36 of Directive 2009/73 concerning common rules for the internal market in natural gas.

infrastructure. No aid should be deemed necessary if this principle has not been fully and duly implemented. In practice, Member States shall demonstrate how the EE1st principle was taken into account in their information forms.

Finally, as mentioned above Member States should not be able to fund hydrogen, directly or indirectly (for instance through aid to CO<sub>2</sub> transport), through this aid category. Any such loopholes are damaging to reaching climate neutrality and must be avoided.

Provided that aid for local infrastructure can also fund energy projects if these do not fall within the scope of “aid to energy infrastructure”, the principles and recommendations set out in this section shall similarly apply to any energy project which would currently be funded under Article 56 GBER.

## 3 New categories in the GBER to support the Green Deal

### 3.1 Aid for energy communities

The Green Deal puts **citizens at the heart of the energy transition**<sup>52</sup> and the Clean Energy Package (CEP) explicitly recognizes the specific characteristics of renewable energy communities (RECs)<sup>53</sup> as well as their environmental, economic and social benefits.<sup>54</sup> As for citizen energy communities (CECs), which may also engage in renewable energy production, the Electricity Market Directive<sup>55</sup> also considers they “constitute a new type of entity due to their membership structure, governance requirements and purpose”.<sup>56</sup> Both the REDII and the EMD require Member States to provide an enabling framework to promote and facilitate the development of RECs and CECs respectively.<sup>57</sup>

However, the **current State aid framework does not allow their full development on the market**. The Commission affirms that the EEAG need to be adjusted, fine-tuned or potentially aligned with new CEP rules, including treatment of self-consumption and energy communities in RES schemes.<sup>58</sup> The shift from feed-in tariffs to feed-in premium with market-based auctions has made it much more difficult for RECs to finance their projects and the GBER thresholds for small projects (articles 42 §8-9 and 43 GBER) are not high enough for these projects.

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<sup>52</sup> Commission Communication, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

<sup>53</sup> Para 71 REDII: “the specific characteristics of local renewable energy communities in terms of size, ownership structure and the number of projects can hamper their competition on an equal footing with large-scale players, namely competitors with larger projects or portfolios”.

<sup>54</sup> See the REDII, §70 which acknowledges that renewable energy communities bring particular added-value on the energy market in terms of local acceptance of renewable energy project and access to additional private capital which results in local investment that traditional market players cannot provide. As the REDII stresses: “Such local involvement is all the more crucial in a context of increasing renewable energy capacity”

<sup>55</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity.

<sup>56</sup> Para.46 EMD.

<sup>57</sup> See Article 22(4) REDII and Article 16 of the EMD.

<sup>58</sup> Fitness Check Report, Annex 8, p.104:



Moreover, bidding procedures increase the administrative burden and costs for smaller participants. This is particularly true for RECs, due to their size and ownership structure.<sup>59</sup> On top of the usual costs, RECs face additional costs related to the time and budget dedicated to local mobilisation and dialogue specific to democratic decision-making structures. RECs do also not have the same means to reduce risks for investors, limiting their access to financing compared to profit-oriented market players. Bidding procedures also mainly focus on economic criteria without taking sufficient account of social or environmental aspects of projects (that are difficult to monetise), which characterise RECs. This issue would be exacerbated should the GBER introduce a requirement for broadening schemes and to select the most cost-effective projects. Such would have the effect of restricting access to State aid almost exclusively to traditional economic market players. The lack of certainty about winning bidding procedures is also an obstacle to access finance for feasibility studies, permits and other administrative procedures. Hence, **RECs cannot compete with conventional producers<sup>60</sup> without more flexibility in the GBER.**

In accordance with Article 22(7) REDII, the GBER should recognise the existence and specific benefits and obstacles of energy communities, and enable Member States to design adapted support to RECs. The Commission should therefore consider the following options:

- (i) increasing the level of **thresholds** for exempting RECs and CECs developing RES projects from bidding procedures<sup>61</sup>, or
- (ii) dedicating a **special aid regime** for energy communities in the GBER.

This would be justified by the significant environmental and grid benefits they provide<sup>62</sup> as well as their positive impact on regional and local development opportunities, on social cohesion and social acceptance of the transition.<sup>63</sup>

Concretely, the GBER could explicitly set **specific auctions** (i.e. reserving a certain quantity of capacity to be procured only from energy communities' projects, as it is done in Ireland<sup>64</sup>), **relax the rules** for participating in calls for tenders e.g. in terms of the financial guarantees required or totally exempt them from bidding procedures. An **increase of aid intensity** could also apply to RECs and CECs.

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<sup>59</sup> See Article 2 (16) (b) REDII: The shareholders or members of renewable energy communities shall be natural persons, SMEs or local authorities, including municipalities.

<sup>60</sup> RED II, recital 71.

<sup>61</sup> EEAG, para. 127.

<sup>62</sup> Energy communities can contribute to the operability and affordability of electricity systems offering services and benefits such as flexibility, balancing, ancillary services such as frequency regulation, energy efficiency, or grid development deferral. See B. Claeys, [Energy communities with grid benefits: A quest for a blueprint](#), RAP, pp. 7-8.

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

<sup>64</sup> Commission decision of 20 July 2020 on SA.54683 (2020/N) – Ireland Renewable Electricity Support Scheme.

## 3.2 Aid to zero exhaust-emission vehicles and charging infrastructure

The GBER allows investment aid for the acquisition of new transport vehicles that go beyond Union standards, subject to certain conditions (article 36 GBER).<sup>65</sup> The investment for electric car charging stations could also fall into aid to local infrastructure (article 56 GBER). However, as indicated in the Fitness Check, the GBER (and EEAG) needs to better cater for zero-exhaust- and low-emission vehicles and the charging infrastructure.<sup>66</sup> The Green Deal sets an objective of reaching about 1 million public recharging and refuelling stations for the 13 million zero-exhaust- and low-emission vehicles expected on European roads by 2025. The deployment of zero and low-emissions vehicles and charging stations are also a priority under the Recovery and Resilience Facility (RRF) and ClientEarth welcomes the guiding templates in this respect.<sup>67</sup>

When State aid rules apply<sup>68</sup>, the baseline for compatibility of aid for the purchase of zero- or low-emissions vehicles shall remain that the supported purchases of vehicles must increase the level of environmental protection in comparison with the Union standards.<sup>69</sup> However, given the fact that the technology to electrify road transport is ready, that battery performances are rapidly increasing and that the scarce renewable hydrogen should be reserved for hard-to-abate sectors, ClientEarth holds the view that a **new aid category in the GBER should focus on zero-exhaust-emissions vehicles (ZEEV)**. For cars, vans, urban buses and trucks under 16t, battery electric vehicles (BEV) are clearly the most energy-efficient choice and have the lowest total Cost of Ownership.<sup>70</sup> The same is true for trucks over 16t although the current shorter refuelling time and the greater autonomy of fuel cell trucks present certain advantages.<sup>71</sup>

We also support the inclusion of **aid for publicly accessible infrastructure** for ZEEV in the GBER, since these are most in need of deployment with State support. Given our view that road transport should be electrified (to the most possible extent), aid should focus on electric charging infrastructure and not on hydrogen fuelling infrastructure.

In addition, ClientEarth advocates for the following, to be put in priority in the GBER and, beyond high thresholds if any, in the EEAG<sup>72</sup>:

- (i) **Investment aid to electric bicycles and cargo bicycles as well as the renewal of public transport fleets to ZEEV should be explicitly enabled, and prioritised.** These contribute to the triple objective of decarbonising transportation, increasing people's well-being<sup>73</sup> and making the transition socially acceptable for Union citizens.

<sup>65</sup> Commission, GBER Frequently Asked Questions, question 152.

<sup>66</sup> Fitness Check, PART 3/4, p.99.

<sup>67</sup> Commission's Recovery and Resilience Facility, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles, para. 48(v); ClientEarth also welcomes the Commission's suggestion that aid intensities can be increased by an "eco-bonus" in relation to aid granted under the RRF, but the type and level of such "eco-bonus" would need to be clarified, if different from the existing "eco-innovation bonus".

<sup>68</sup> They have a marginal role to play in this field, as indicated by the Commission's Recovery and Resilience Facility Guiding template: District heating/cooling generation and distribution infrastructure, paras. 11-28 and Guiding template: Electric recharging stations and hydrogen stations for road vehicles, paras. 8-40.

<sup>69</sup> Commission's Recovery and Resilience Facility, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles, para. 48.

<sup>70</sup> That is the purchase price plus the operation costs of a product, including charging energy costs.

<sup>71</sup> For a detailed comparison: Transport & Environment, Comparison of hydrogen and battery electric trucks.

<sup>72</sup> To the extent these measures constitute State aid.

<sup>73</sup> This includes health benefits such as noise reduction and physical exercise, in addition to reduction of air pollution; and increased road safety due to reduction of traffic.

- (ii) **Investment aid to support SMEs** (in particular small and micro businesses) **that are developing innovative technologies for a zero emission transport system.**
- (iii) With regard to **investment aid to charging infrastructure:**
  - a. **more explicit rules**, and particularly **sufficient aid intensity** to help **financing the installation of charging points in residential** condominiums and workplaces.
  - b. an ubiquitous, interoperable and convenient coverage of public charging infrastructure along highways and suburban/urban roads, with a focus on areas not served by the market i.e. with lower utilization rates. **Incentivising gas stations operators** along motorways to install charging points could also be necessary, albeit playing on the concessions tenders scoring and concession contracts requirements should be prioritised for new concessions, prior to considering that aid is necessary.
- (iv) **Only scrappage schemes for the purchase of ZEEV** are consistent with the net-zero objective, environmental protection in EU policies and people's right to breathe clean air (as recognized by the Commission<sup>74</sup>). Eligibility of the vehicles shall be **based on the best and cleanest technology available on the market** and shall be defined dynamically as technology and emissions standards evolve.
- (v) A more enabling regime for **aid to BEV acquisition and retrofitting by increasing aid intensities.**<sup>75</sup>

### 3.3 Aid for energy storage / batteries

ClientEarth calls to exclude energy storage technologies that rely directly or indirectly on fossil fuels (such as LNG or CNG storage) and/or have significant negative impact on the environment from aid. Such would obviously be contrary to the Green Deal objectives and the “do no harm” principle.

However, battery storage systems will be increasingly needed to face intermittency from the growing deployment of RES and will contribute to grid stability and security of supply. Batteries are also key for zero-exhaust emissions transport. As the battery industry is emerging and needs to develop rapidly, delays caused by project financing hurdles may affect its deployment. However, batteries raise environmental and safety questions arising from their reliance on raw materials and leakage issues.

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<sup>74</sup> In its examples on non-compliance of the “do not significant harm” principle under the RRF to car scrappage schemes, the Commission has recognized that “*electric cars represent a better available alternative with a higher environmental performance in the sector in terms of climate mitigation*”. It therefore concludes that a scrappage scheme where a combustion car is replaced by another combustion car with low CO<sub>2</sub> emissions would lead to a significant harm to climate mitigation, See Commission Notice, Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, C(2021) 1054 final, p.26.

<sup>75</sup> At national level, governments could require a programme of mandatory vehicle recall, retrofit, upgrade. This programme would work best if targeted at those on low incomes and small to medium enterprises (SMEs), and would ensure that older, more polluting vehicles are cleaned up by the manufacturers. It could also target specialised Heavy Duty Vehicles, where retrofit could be more cost-effective than buying a replacement, e.g. refuse vehicles. This would support the creation of new technologies and an upskilling programme.

To support energy storage in the GBER (and EEAG), in line with new Battery Regulation which aims at modernising EU legislation on batteries and addressing the social, economic and environmental issues related to all types of batteries<sup>76</sup>, we call for the following:

- (i) **Aid under the GBER should be limited to batteries which fulfil all, including the sustainability, safety, labelling and transparency requirements** of the future Battery Regulation;
- (ii) **No support for non-rechargeable, or otherwise not sustainable batteries**, with a view to phase them out as announced by the Commission in the new Circular Economy Action Plan<sup>77</sup> and the future Battery Regulation. Support shall be targeted and limited to batteries that can be re-used, re-purposed or recycled (following the waste hierarchy principles).

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ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.

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<sup>76</sup> Proposal for a Regulation concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM(2020) 798/3, 2020/353 (COD).

<sup>77</sup> Commission's Circular Economy Action Plan.