

Briefing:

The new State aid guidelines for climate, environmental protection and energy 2022

- The new State aid Guidelines for climate, environmental protection and energy 2022 (the “CEEAG”) were released on 21 December 2021.¹ They will **apply as from January 2022** and as long as the EU Commission finds them adequate. They may be re-evaluated as from 2028.
- The CEEAG aim at supporting the **Green Deal objectives**. They do so to a large extent by streamlining the rules for public financial support to renewables, energy communities, clean vehicles, decarbonisation technologies, nature protection and restoration and coal phase out.
- However, **not everything is green**. The long-standing pledge to phase out fossil fuel subsidies, reiterated recently in the political agreement on the 8th Environmental Action Programme, is still not fully implemented. Notably, the CEEAG leave room to finance fossil gas² projects, either directly for the construction of gas infrastructure or capacity contracts aiming at increasing gas back-up capacity, or indirectly through the production of low-carbon hydrogen or investments in CCUS equipment on gas plants. Energy intensive users can also keep benefiting from enlarged exemptions to pay renewables and social policies levies. One can therefore validly question whether the CEEAG are really supporting a just transition.
- More than the text, its **application by the Member States and the Commission will be key**. The interpretation of some conditions, in particular whether gas projects will contribute to the 2030 and 2050 climate targets or “avoid lock in”, should become clearer as cases develop.

Background

The Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 (the ‘CEEAG’) will replace the Guidelines on State Aid for the Environmental Protection and Energy 2014-2021 (the ‘EEAG’) as from January 2022.³

¹ https://ec.europa.eu/competition-policy/system/files/2021-12/CEEAG_Guidelines_with_annexes_I_and_II.pdf

² The CEEAG use the term “natural gas”.

³ The exact date of entry into force of the CEEAG is unknown and will depend on the Commission’s formal adoption. 1 January 2022 is most likely though since the EEAG expire on 31 December 2021. To date, the text available is unofficial but is the text endorsed by the College of Commissioners, so that it can be considered to be the final text (subject to possible minor language adjustments).

In principle, State aid must be notified by Member States to the Commission. The guidelines set out the criteria used by the Commission to assess whether State aid measures pursuing environment, climate and energy objectives granted by Member States to enterprises, can be found compatible with the internal market.⁴

The CEEAG are a communication from the Commission and thus were not adopted pursuant to the ordinary or special legislative procedure. The Commission endorsed the CEEAG on 21 December 2021, after a long period of revision that started in 2019 and was re-launched in 2020-2021 after the adoption of the European Green Deal. The Commission received more than 700 replies to the last public consultation that closed in August 2021.⁵

Are the CEEAG much different from the EEAG?

The CEEAG are not dramatically different from the EEAG and heavily borrow from the case practice developed under the EEAG between 2014 and 2021.

We find the **same categories of aid as in the EEAG**, including the most important ones:

- Renewables
- Energy efficiency
- District heating and cooling
- Security of supply
- Energy infrastructure
- Tax reductions
- Exemptions from levies for energy intensive users

But there are some **changes in the structure and new aid categories**:

- The title of the guidelines now includes “climate”, whilst recognising that environmental protection encompasses climate protection.
- Section 4.1 is a general section on “**decarbonisation measures**” including renewables and energy efficiency: this is quite novel and based on the principle that all technologies that can contribute to reducing greenhouse gas emissions should be equally supported and compete against each other in competitive tenders (renewables, energy efficiency, carbon capture and storage or usage, low-carbon and renewable hydrogen, etc.). The objective is clearly to decarbonise in the most cost-effective manner and such multi-technology competitive tenders schemes already exist.⁶ However, as mentioned below, it is still possible to organise technology-specific tenders, for renewables notably, under certain conditions (see more on this below).

⁴ In principle, State aid is prohibited by Articles 107 and 108 TFEU due to its distortive effect on the internal market, unless there are grounds to declare State aid compatible with the internal market. Indeed, in some circumstances, government intervention is necessary to address market failures (for instance, for R&D or the development of infrastructure, etc.).

⁵ See the Commission’s press release [here](#) and VP Vestager’s remarks [here](#).

⁶ For instance, the Netherlands has the large “SDE++” decarbonisation scheme in place where renewables compete amongst others with waste heat solutions, CCS, electric boilers and the production of hydrogen in competitive tenders.

- **Renewable energy communities** (“RECs”) are recognised as contributing to the transition. They can be exempted from participating in tenders for renewables projects up to 6MW, and up to 18MW for wind. The Commission will also assess positively other advantages Member States design for RECs(see more on this below).
- The CEEAG recognise that compliance with the **“Energy Efficiency First” principle** (“EE1st”) can be a more appropriate solution than granting State aid to reach certain objectives (see below).
- The CEEAG clearly distinguish between aid to **“the most polluting fossil fuels”** (coal, oil, diesel, peat) that are “extremely unlikely” (understand, will not) to be approved, and aid to **fossil gas**, that can be approved under certain conditions (see below). Fossil gas is undoubtedly presented as an unavoidable transitory solution away from the other fossil fuels for several Member States.
- **Renewable and low-carbon hydrogen production and infrastructure, including for refuelling clean vehicles**, are largely supported in the CEEAG (see below).
- Aid to carbon capture and storage (CCS) now includes **carbon capture and use (CCU)**.
- Building on cases in Germany and the Netherlands from 2020-2021, the CEEAG inserted a new aid category for the **closure of coal (hard coal and lignite), oil shale and peat plants and mines** (see below).
- A new category to grant aid for **clean mobility**, covering refuelling and recharging infrastructure as well as the acquisition or leasing of clean vehicles (used for road, rail, air, inland waterway and maritime transport) and retrofitting of vehicles, has been included (see below).
- A new category of aid to **protect or restore biodiversity, rehabilitate natural habitats and ecosystems and implement nature-based solutions for climate change** aims at supporting the EU Biodiversity Strategy for 2030 and the EU strategy for adaption to climate change.

There are also two new very interesting provisions for NGOs:

- **Aid measures and their beneficiaries must comply with Union environmental law, and other relevant Union law** (e.g. energy law).⁷ This is a direct result of the *Hinkley Point C* judgement of the CJEU according to which an aid measure cannot be found compatible with the internal market if it, or its beneficiary, breaches Union (environmental) law and principles.⁸ Member States must thus ensure compliance, under the Commission’s control. One would need to see in practice how much information is required from the Member States in the aid notification forms (that will be published later on).⁹
- **NGOs and citizens alleging that an aid measure or its beneficiary breaches Union environmental law should be admissible to file an action before Member States’ national courts.**¹⁰ The Commission cannot oblige national courts to grant standing to NGOs, due to the principle of procedural autonomy of Member States. Nevertheless, this is a nice and useful

⁷ CEEAG, points 11 and 33.

⁸ Judgement of the Grand Chamber of the CJEU, 22 September 2020, C*594/18P, *Austria v. Commission*, para. 44-45 and 100.

⁹ For ClientEarth’s practical recommendations on how this environmental law compliance must be checked in State aid, [see our note to the Commission](#) (May 2021).

¹⁰ CEEAG, point 11.

reminder of recently revised procedural rules¹¹, that compliance with Union law must be under scrutiny and that NGOs have a role to play in this respect .

- The Commission could also have mentioned its own obligation to check compliance of aid with environmental law and to eventually open access to internal review procedures of State aid decisions under the Aarhus Regulation.¹² Despite the absence of language in the CEEAG, those obligations exist and must be enforced.

Finally, some rules have changed (see for details below) and aid intensities have generally increased: whereas under the EEAG the amount of aid was capped to a percentage of eligible costs (e.g. the investment costs of a project), now the aid can often cover 100% of the funding gap of the measure, which can be advantageous; aid intensity for energy efficiency measures remain very low however.

Focus on some particularities and aid categories

Decarbonisation measures

This broad category encompasses **all technologies that can lead to a reduction and removal of greenhouse gas emissions**. It targets support to two main sets of technologies:

- (i) Renewable energy, biofuels, bioliquids, biogas and biomass fuels if compliant with sustainability criteria (to be defined in RED II delegated acts), waste and renewable hydrogen;
- (ii) Technologies that contribute to the reduction of emissions such as low-carbon hydrogen, synthetic fuels using low-carbon energy, energy efficiency, high-efficient cogeneration, CCS, CCU, demand response, energy storage.

However, these two groups are subject to the same regime (type of aid, aid intensity, etc.). This means that in principle all technologies are equally supported and should compete against each other in competitive **multi-technology tenders** in order to decarbonise in the most cost-effective way.

As an exception to the multi-technology tenders, it is possible to organise **technology-specific tenders** to meet EU targets for renewables, energy efficiency and renewable hydrogen if a target is set in legislation. For instance, a Member State can continue to organise renewable-only tenders, or even solar-only or offshore-wind only tenders, upon justification. It is also possible to limit tenders to certain regions to address network stability issues.

In order to increase transparency, as from 1 July 2023¹³ and for aid measures exceeding EUR 150 million per year, the Commission has introduced the obligation for Member States to **consult the public** for at least 6 weeks on the competition impacts and proportionality of the aid measures. A more limited public

¹¹ Commission Notice on the enforcement of State aid rules by national courts, point 27

¹² The EU is in breach of the Aarhus Convention on this point, as found by the Aarhus Convention Compliance Committee on 17 March 2021. The Commission committed to draw a report analysing the issue by the end of 2022 and address the issue, "if appropriate", by the end of 2023. ClientEarth is closely monitoring this and will participate in the process around the action plan of the Commission.

¹³ The obligation to consult does not apply in respect of amendments to already approved measures that do not alter their scope or eligibility. It means that schemes approved between January 2022 and July 2023 without a public consultation may not necessarily be re-opened for public consultation after July 2023.

consultation must be organized for aid below 150 million euro only if the aid is not granted following a competitive tender or the aid supports investments in fossil gas.

Small-scale projects and renewable energy communities

On the one hand, SMEs¹⁴ and RECs can be **exempted from participating in tenders** for renewable energy projects up to **6MW**. Small and microenterprises (not medium ones) and RECs can also be exempted from tenders for wind projects up to **18MW**.¹⁵ When a tender is organised, SMEs and RECs can benefit from flexible pre-qualification requirements or other favourable conditions to facilitate their participation.

On the other hand, other small-scale projects that are not owned by SMEs or RECs (for instance by large energy groups) can also be exempted from participating in tenders for project in electricity generation, storage projects, electricity consumption, heat generation and gas production (such as hydrogen) up to **1MW**.¹⁶

Feed-in premiums remain the rule. However, any power-generating small scale project (whatever the size or status of the undertaking or organisation) below 400kW, may benefit from feed-in tariffs.¹⁷ The threshold will be decreased to 200kW as from 1 January 2026.

All these exemptions are only **optional for the Member States**: they can include all market operators of all sizes in the same tenders.¹⁸ Market participants who would feel that an aid scheme should be designed differently (for example by exempting RECs from tendering) could remind Member States of these possibilities, notably during national public consultations.

There is no exception for small-scale hydropower despite its disproportionate negative impacts on the environment compared to its relatively small energy contribution.

Energy Efficiency First

As defined in the CEEAG and the Governance Regulation¹⁹, the EE1st principle requires Member States to *“take utmost account in energy planning, and in policy and investment decisions, of alternative cost-efficient energy efficiency measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy, whilst still achieving the objectives of those decisions.”*

¹⁴ The notion of SME includes fairly large undertakings, see Commission Recommendation of 6 May 2003 on the definition of SME.

¹⁵ CEEAG, para 107, (b), (iv) and (v).

¹⁶ The draft submitted to public consultation planned a threshold of 400kW.

¹⁷ CEEAG, footnote 70.

¹⁸ Competitive bidding processes can include selection criteria *“that are not directly or indirectly related to the main objectives of the measure. In such cases, these other criteria must account for not more than 30% of the weighting of all the selection criteria.”* This may enable to design selection criteria favouring specific market operators such as RECs or innovative technologies for example.

¹⁹ 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.

The CEEAG recognise compliance with the EE1st principle as an objective to be pursued and as a legal instrument that can help ensure an efficient internal energy market that **can sometimes be more appropriate than State aid**. It means that Member States should demonstrate, when planning an aid measure in a relevant area, that (i) they considered if compliance with the EE1st principle would achieve their objectives and (ii) as the case may be, why that was not adequate or sufficient to remedy the market failure, and hence a State aid would be appropriate.

The CEEAG do not indicate how a Member State can practically submit such assessment to the Commission, what studies it should provide. This could be indicated in the future notification forms. But since Member States must already justify why an aid measure is an appropriate instrument to remedy a market failure in light of other policy instruments, this should not be a real burden.

The CEEAG do not indicate either for which aid categories this assessment would be relevant. In ClientEarth's assessment, the EE1st principle is particularly relevant to assess whether aid for (i) energy generation²⁰, (ii) security of supply and (iii) energy infrastructure is appropriate.

Energy efficiency measures

The CEEAG recognise that fulfilling the **energy efficiency targets** will require significant investments and support. The new section on decarbonisation measures also integrates energy efficiency measures and objectives more explicitly than in the draft submitted to public consultation.

Energy efficiency measures supported under the section on decarbonisation measures may be exempted from competitive bidding processes where beneficiaries receive less than EUR 300 000 per project, for energy efficiency measures not involving energy generation benefitting SMEs.

Energy efficiency schemes can also take the form of reductions in taxes or parafiscal levies, such as levies financing environmental policy objectives.

Energy performance contracting may be supported under conditions:

- the service is performed by SMEs and small mid-caps,
- when that aid facilitates investments to improve the energy performance of industrial activities the service can only take one of the following forms:
 - a loan²¹ or guarantee²² to the provider of the energy performance improvement measures under an energy performance contract;
 - a financial product aimed to refinance the respective provider (for example, factoring or forfaiting).

Aid for energy efficiency measures in buildings specifically can be combined with aid for other equipment such as on-site generation of electricity from renewables, storage or clean vehicles charging stations. Importantly, aid can be granted to renovate buildings up to Union mandatory standards until they come

²⁰ This is without prejudice to the need to increase electricity generation from renewables in order to meet the Union's targets.

²¹ Coupled with a substantial co-investment rate by commercial providers of debt funding.

²² The public guarantee must not exceed 80 % of the underlying loan's principal.

into force, which should facilitate renovations; with a reduced aid intensity though if the aid is granted less than 18 months before the standard applies.²³

Gas boilers can still be supported, with a flexible assessment of they replace coal- or oil-based appliances.

Clean mobility

This category covers road²⁴, rail, air, inland waterway and maritime transport. Member States can support (i) the **acquisition or leasing of clean vehicles and retrofitting of vehicles** as well as (ii) the **refuelling and recharging infrastructure**. Competitive bidding processes are the norm to allocate aid, subject to exceptions.

Light-duty and heavy-duty vehicles using fossil gas and fossil gas refuelling infrastructure for light duty vehicle (only) are excluded from the scope of the guidelines.²⁵ For waterborne transport however, aid for LNG or CNG vehicles is not seen as having long-term lock-in effects as cleaner alternatives are not readily available. For air transport, the Commission follows a similar reasoning and thus allows aid when it contributes to a market uptake of efficient and “substantially more environmentally-friendly” aircraft.

Although the Commission recognises that unabated fossil hydrogen is undesired in the long run, it allows aid to be granted for hydrogen refuelling infrastructure that does not only supply renewable or low-carbon hydrogen until 2035. It thereby creates a loophole for unabated fossil hydrogen to receive support.

Member States will be able to demonstrate the necessity to deploy the infrastructure through an open publication consultation or an independent market study.

Fossil gas

Although support to the “most polluting fossil fuels” is mostly excluded, Member States can keep supporting fossil gas, **directly and indirectly**, notably through aid for:

- High-efficient cogeneration
- Investments in CCS and CCU (without any standards)
- The production of low-carbon hydrogen
- Gas infrastructure
- Capacity contracts aiming at increasing gas back-up capacity
- Gas-fired district heating / cooling networks
- Clean mobility (especially waterborne transport)

²³ The aid intensity must not exceed 30 % of the eligible costs for renovations of several elements of an existing building, or for new buildings. For renovation of only one element of an existing building, the aid intensity must not exceed 25 %. Where aid for investments enabling undertakings to comply with minimum energy performance standards qualifying as Union standards is granted less than 18 months before the Union standards enter into force, the aid intensities must not exceed 20 % of the eligible costs, or 15 % of the eligible costs, respectively. When a funding gap analysis is used, the aid intensity is 100% of the funding gap but capped at 70% if that is for complying with a Union standard less than 18 months before it applies.

²⁴ This includes electric vehicles but also hybrid vehicles.

²⁵ Aid to road vehicles using gas (notably LNG, CNG and biogas) was initially included in the draft CEEAG.

For most direct investments into fossil gas, with certain nuances depending on the aid category, the Member State will have to **demonstrate that the aid contributes to achieving the 2030 and 2050 climate targets**, in particular how **lock-in** of fossil gas will be avoided and how the fossil gas investment does not displace investments into cleaner alternatives (if available on the market). The Commission refers to binding commitments by the undertaking to implement decarbonisation technologies (CCS/CCU), the replacement of fossil gas with renewable or low-carbon gas or plant closure on a timeline consistent with the climate targets, as possible ways to demonstrate this.

It remains to be seen how the Commission will apply this general safeguard in practice in order to not undermine the climate targets and avoid stranded assets.

Moreover, many activities, which rely on fossil gas (but not only), are presumed to contribute to the 2030 and 2050 climate targets, such as it is the case for CCS and CCU or the production of low-carbon hydrogen. The lack of any conditions, standards (on capture of CO₂, methane leakage, etc.) or any limitation as to their use, may prove problematic to achieve the 2030 and 2050 climate targets.

Hydrogen

Renewable and low-carbon hydrogen are largely, and equally, supported in the CEEAG. Member States can grant aid for:

- the production of renewable and low-carbon hydrogen;
- the development of dedicated²⁶ hydrogen infrastructure projects (for instance in industrial clusters);
- investment in hydrogen infrastructure subject to third party access, which includes (i) transmission and distribution pipelines, (ii) storage facilities, (iii) facilities to dispatch, receipt, re-gas or decompress, (iv) terminals, (v) interconnectors and (vi) any equipment essential for the hydrogen system;
- Hydrogen recharging infrastructure for clean mobility.

Whereas renewable hydrogen is defined by reference to the methodologies for renewable liquid and gaseous transport fuels of non-biological origin (RFNBO) in REDII, low-carbon hydrogen is not defined in the CEEAG, not even by reference to other legislation. This creates legal uncertainties and will potentially lead to diverging interpretations. The Commission however confirmed that low-carbon hydrogen includes hydrogen made from nuclear energy.

The CEEAG do not set any conditions for hydrogen, regarding for instance its limited use to hard-to-abate sectors, standards for CCUS technologies or lifecycle methane leakage.

²⁶ Infrastructure is “dedicated” when it is built for one or a small group of pre-identified users.

Security of supply

The regime of aid for security of supply now incorporates the Clean Energy Package, in particular chapter IV of the Electricity Market Regulation. In particular, Member States must (or may depending on cases) rely on the European resource adequacy assessment or national resource adequacy assessments to determine whether there is a security of supply issue that cannot be remedied by market reforms only and require a scheme.

Apart from excluding coal-based generation from capacity mechanisms (that is already excluded under the Electricity Market Regulation), the CEEAG do not require to exclude other fossil fuels such as fossil gas. The CEEAG only give that option to Member States and no longer specify that at equivalent technical parameters, low-carbon resources should be favoured, as in the EEAG. The CEEAG simply provide that “such measures may also be designed to support environmental protection objectives, for example through the exclusion of more polluting capacity or measures to give more environmentally beneficial capacity an advantage in the selection process” – but they do encourage Member States to set up criteria to this end.

The principle is clearly the one of technology-neutrality – and for that reason Member States must justify having considered the eligibility of renewables, demand-side management and storage, notably.

Like for decarbonisation measures, public consultations on new schemes should be organised as from July 2023.

Energy infrastructure

Member States can keep supporting infrastructure for **electricity, gas²⁷, hydrogen, CO₂, thermal energy and project of common/mutual interest (PCI/PMI)**. Infrastructure projects subject to internal market legislation are presumed not to have undue distortive effects. Moreover, the Commission presumes that aid is necessary for PCI projects fully subject to internal market legislation, making the approval of aid fairly easier.

Gas infrastructure can still be supported with aid if the Member State can demonstrate that²⁸:

- (i) the infrastructure is “*ready for the use of hydrogen*” and leads to an increase of the use of renewable gases or, if this is not the case, the reason why it is not the case and how the project does not lead to a lock-in of fossil gas, and
- (ii) the investment contributes to achieving the EU’s 2030 and 2050 climate targets.

It remains unclear how all these conditions will be interpreted and whether these will function as an actual safeguard. In particular, these conditions do not seem to formally exclude the possibility for Member States to first grant aid for gas infrastructure that is not ready for the use of hydrogen, to later on grant new aid to repurpose that same gas infrastructure into hydrogen infrastructure.

²⁷ This includes fossil gas, biogas (including biomethane), renewable gas of non-biological origin.

²⁸ CEEAG, para. 382, (d).

Reductions from electricity and social levies for energy intensive users

Energy intensive users (EIUs) can still benefit from important reductions from paying full electricity levies, that allegedly contribute to increasing their energy costs and may lead them to relocate outside the EU (carbon leakage). The CEEAG do not explain how the risk of carbon leakage has been assessed²⁹, although is fundamental to justify the very existence of this aid category and is challenged by several stakeholders.

The aid regime for EIUs is wider in the final CEEAG than in the draft submitted to public consultation:

- **117 industry sectors are eligible** to reductions from energy and social policies levies, against 51 in the draft submitted to public consultation and 14 sectors eligible to compensation for indirect emissions costs in the ETS State Aid Guidelines. Sectors not listed in the annex could also be eligible to reductions upon justification. EIUs that are merely “at risk” of carbon leakage, and not at “significant risk” as in the past, are now eligible.
- EIUs can be **exempted from paying the full costs of levies financing energy and social policies**. This looks broader than the regime under the EEAG exempting EIUs from levies financing renewables, only. However, reductions from network costs or from capacity mechanism surcharges are excluded by the CEEAG.

An important novel criterion, that did not exist in the EEAG but has already been introduced in the ETS State Aid Guidelines post-2021, is that the EIUs commit to improve their energy efficiency or decarbonise their electricity supply to some extent. The ambition remains rather low though (eg. having a 30% electricity supply from carbon-free sources) and the implementation might depend on the ambition set in the commitments and monitoring by the Member States.

Aid for closing coal activities

The CEEAG include a new and important chapter on aid for the *closure* of coal, oil shale and peat activities (plants and mines). This regime heavily borrows from the case practice to date with aid for the closure of coal plants in the Netherlands and Germany.

The CEEAG recognise that phasing out of coal is one of the most important drivers for decarbonisation and that a just transition must be ensured. Nevertheless, the CEEAG refrain from setting a limit date by which coal must be phased out in Member States. The Commission will rely on the phase out dates set by the Member States in laws or policies, to assess whether a coal plant or mine is scheduled to close earlier with aid than it would have under normal market conditions (taking into account the evolution of carbon prices and climate policies). The final version of the CEEAG reinforces the language on the Commission’s assessment of the market conditions, profitability prospects of the activities and whether aid for closure would truly reinforce their legal certainty. The strength of these criteria will ultimately depend on their application.

For assessing which costs can be eligible to closure aid, the CEEAG distinguish between profitable and uncompetitive activities:

²⁹ This should appear in the impact assessment that is still not available to date.

- **Uncompetitive activities** can receive aid for covering a limited list of costs, detailed in Annex 2. They include costs related to the decontamination of sites (subject to compliance with the polluter pays principle), indemnification and retraining of workers, or the cancelling of ongoing contracts.
- **Profitable activities** can also be compensated for closure, based on justified foregone profits and costs, as well as “additional costs” related to the closure. Those “additional costs” are not specified though, despite insistence by NGOs during the revision process.

Although this was not in the draft submitted to public consultation, the CEEAG aim at facilitating the replacement of coal by gas capacity in Member States with low GDP (Bulgaria and Romania) if (i) coal capacity closes before 2026, (ii) that the Member State does not have security of supply measures in place and (iii) the replacement is part of a credible and ambitious decarbonisation strategy, including the prevention of stranded assets in view of the 2030 and 2050 targets. This favourable regime will be available until 31 December 2023.

Is there a link with the Taxonomy Regulation and the Do No Significant Harm principle?

The link between State aid or EU funds and the Sustainable Finance Taxonomy Regulation³⁰ and its delegated acts, is still not entirely clear. Legally speaking, the Taxonomy Regulation and its delegated acts should set out criteria for certain investments to qualify as “sustainable”, with the aim to “label” them for private finance. The Taxonomy Regulation and the delegated acts do not formally apply to public finance spending, such as State aid.

However, the Taxonomy has gained in importance politically and has almost become *the* framework one needs to use to determine what is or is not sustainable. Thus, it can be expected that the Taxonomy will be used in the future outside of its original scope and purpose. The Commission confirmed on several occasions that the ‘Do no significant harm’ (“DNSH”) principle could serve as an indicator in State aid practice as well.

The CEEAG make small references to the Taxonomy Regulation and the DNSH principle³¹, whereby the Commission will:

- balance the negative impacts of an aid on competition with its positive impacts (including contributing to climate and environmental protection and energy market objectives) taking into account the DNSH principle. *“For measures which are identical to measures within Recovery and Resilience Plans as approved by the Council, their compliance with the ‘Do no significant harm’ principle is considered fulfilled as this has already been verified”;*
- for the purpose of the point above, the Commission will assume that decarbonisation measures contribute to climate mitigation as defined in the Taxonomy delegated act *“as long as there are no obvious indications of non-compliance with the ‘do no significant harm’ principle”*. For district heating and cooling measures the Commission will make an actual assessment.

Despite having asked for clarification in the public consultation, it is still neither clear what an “obvious” non-compliance with the DNSH principle is, nor what the Commission will do if a non-compliance is not

³⁰ Regulation (EU) 2020/852 (Taxonomy) on the establishment of a framework to facilitate sustainable investment.

³¹ In points 134 and 398 of the CEEAG.

obvious. In any case, the Commission left itself the option to approve a State aid to a project that may violate the DNSH principle if the overall balance of its effect on the internal market is positive. The environmental impacts of aid measures thus remain secondary to their impact on the market.³²

Is nuclear power excluded from the CEEAG?

Direct State aid to a nuclear power plant does not fall under the scope of the CEEAG. State aid for investments in a nuclear power plant (investment aid or contracts for difference for instance) can nonetheless be authorised by the Commission directly under Article 107(3)(c) TFEU.

However, some support to nuclear power, mostly indirect, is possible under the CEEAG, via:

- Aid to low-carbon hydrogen production: “low-carbon hydrogen” is not defined in the CEEAG (nor in legislation to date) but the Commission confirmed that the CEEAG can support hydrogen produced from nuclear power;
- Aid to “infrastructure that enables physical or wireless connection of renewable or carbon-free energy between producers and users from multiple access and exit points and which are open to access by third parties not belonging to the infrastructure owner/manager undertakings”. Carbon-free includes nuclear power;
- To benefit from reductions from renewable or social policies levies, energy intensive users must make certain commitments, including (if they so choose) to ensure that their electricity supply comes for at least 30% (or 50%) from carbon-free sources – that may thus include nuclear power – including via power purchase agreements or near-site generation.
- Industries processing nuclear fuels³³ are deemed to be at risk of carbon leakage in the CEEAG and are thus eligible to aid for energy intensive users.³⁴
- Aid can be granted for the upgrade, construction or operation of district heating and cooling networks using “carbon neutral” sources, which are not defined but could include nuclear.

³² The Commission always took that stance, that they argue was confirmed by the *Hinkley Point C* case in which the CJEU stated that the environmental impact of measures or projects is not part of the criteria to assess whether a State aid is compatible with the internal market under Article 107(3)(c) TFEU, outside a violation of Union law on the environment.

³³ According to INSPIRE (economic activities EU database), NACE 2446 “includes:- production of uranium metal from pitchblende or other ores- smelting and refining of uranium”.

³⁴ They were already eligible to the same type of aid under the EEAG.

What is next?

The CEEAG will apply as **from January 2022**. In the meantime, the Commission will continue authorising aid measures under the EEAG.

Notification forms listing the amount of evidence Member States will need to provide to the Commission should be drafted at a later stage. The more precise they will be, the better for ensuring that Member States tick all boxes and seriously justify compliance with Union (environmental) law, with the climate targets and the binding commitments from aid beneficiaries, or that they undertook legal action to make polluters pay, in particular. Notification forms draft are not subject to public consultation.

The application of the CEEAG will be key: how will the Commission interpret certain criteria (such as “lock in”), how will it align new notions such as low-carbon hydrogen with future legislation and policies, how will Member States organise public consultations and report on the level of CO₂ emissions reduced by their decarbonisation measures (subsidy per tonne of CO₂), will the Commission strengthen its interpretation overtime as the climate targets become more stringent and CO₂ prices increase...? The answers to these questions will be crucial to ensure that State aid policy supports and does not undermine the Green Deal.

Member States will have to bring their **existing aid schemes in line with the CEEAG by 31 December 2023**. It means that some aid schemes may have to be amended. However, if a scheme consists in organising tenders for granting contracts to operators, such as capacity contracts or feed-in tariffs or premiums, the contracts concluded before January 2022 are secured; amendments will apply only to future contracts, as a matter of legal certainty. Hence, undertakings will not have to reimburse the aid received before January 2022 if the measure does not comply with the new rules in the CEEAG.

The Commission is also revising the **General Block Exemption Regulation** (“GBER”), to bring it in line with the Green Deal objectives. The GBER is another set of State aid rules under which Member States do not need to notify their measures to the Commission – over 95% of State aid are paid that way. It is thus another very important framework, that needs to be straightforward for the Member States and cover non-controversial types of aid, because there is no room for interpretation (for instance, the vague criteria on gas lock-in would be tricky in the GBER). The public consultation closed on 8 December 2021. The GBER is announced for publication in Q2 2022, after the second meeting of the Advisory Committee on State Aid (composed of the Commission and the Member States) scheduled in May 2022.

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