

# Roadmap on the revision of the Communication on Important Projects of Common European Interest

## Feedback from ClientEarth

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ClientEarth is a non-profit European environmental law organisation with offices in Brussels, London, Madrid, Berlin, Warsaw and Luxembourg (as well as Beijing and Los Angeles). In total, ClientEarth currently has over 200 staff working on projects in more than 50 countries. Using the power of the law, we develop legal strategies and tools to address major environmental issues, and we use the courts where necessary to enforce environmental law. The organisation is composed of programmes on Climate, Energy, Fossil Fuels Infrastructure, Trade, Oceans, Harmful chemicals, Plastics, Clean air, Wildlife, Forest, Agriculture and Environmental Democracy.

ClientEarth welcomes the initiative to revise the Communication on Important Projects of Common European Interest (“**IPCEI Communication**”) based on the results of the Fitness Check of the State aid rules, to support the Commission’s priorities such as the European Green Deal and the plan for the post-COVID-19 recovery of the European economy.

Even though innovation and technological development in the Union can happen and be supported by aid in multiple manners and at various scales, the IPCEI regime can help particularly innovative projects to develop, especially at early stages. The combination of support from several Member States in order to create wide spillover effects (that should, we recommend, include environmental benefits as informed by sound, up to date science) to the ultimate benefit of Union citizens, must be encouraged in principle.

The ambition to develop IPCEIs shall nevertheless not take precedence over compliance and consistence with relevant legislation and policies (e.g. environmental and energy laws, energy system integration objectives) and obtaining relevant permits as per the usual legal procedures. This is in order to both safeguard the legal order all projects must evolve in, and to ensure a level playing field for those projects and other non-IPCEI projects that also contribute to innovation and decarbonisation.<sup>1</sup>

The present contribution first addresses some general questions regarding the roadmap and then focusses on the eligibility and compatibility criteria, mainly for aid to energy infrastructure projects. Indeed, despite the fact that aid to energy infrastructure projects has thus far not been granted under the IPCEI Communication, it does fall within its scope of application. Such is especially the case for projects listed as Projects of Common Interest (“**PCIs**”) under the TEN-E Regulation<sup>2</sup> as well as potential hydrogen IPCEIs.<sup>3</sup> The possible unsustainability of certain of those projects calls for a better alignment of eligibility and compatibility assessment criteria with the European Green Deal.

## 1 Integrating the Green Deal objectives and environmental protection requirements into the IPCEI Communication

ClientEarth calls for a rethinking of State aid policy and rules on the basis of the principles and direction of travel of the European Green Deal.<sup>4</sup> There is a need for mainstreaming environmental and climate protection objectives, that 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 Article 37 EU Charter of Fundamental Rights and Article 11 TFEU (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). **Explicit references to these Treaty provisions in the preamble of the IPCEI Communication are recommended.**

The IPCEI Communication must be **in line with new laws and policies** that are now driving the Union’s action, that are notably the European Green Deal and its various implementing or derived policies<sup>6</sup>, as well as relevant legislation such as that stemming from the Clean Energy Package for energy-related projects.

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<sup>1</sup> The proposal of industrial stakeholders such as Siemens to “ring-fencing” or “sandboxing” IPCEIs from existing regulations, under the argument that it “*would allow projects (such as IPCEIs) to demonstrate technological feasibility, e.g. to achieve CO<sub>2</sub> reductions, to test new industrial applications with AI, etc., as well as to draw conclusions about the legislative changes needed to make them competitive*” is not an adequate approach (see Siemens’ response to the targeted consultation on the IPCEI Communication). First, the Commission certainly does not have the competence to exempt IPCEIs from complying with any regulation (outside legal exceptions), nor in general nor under the IPCEI Communication; neither the Member States have this competence. Secondly, besides the risks of an arbitrary unequal treatment or discrimination in the application of the law, which could legally not be justified by any level of innovation or creativity a project may bring, this would severely uneven the level playing field.

<sup>2</sup> Regulation 347/2013 on guidelines for trans-European energy infrastructure.

<sup>3</sup> Minutes - Strategic Forum for Important Projects of Common European Interest (IPCEI) – 6th Meeting of the members 18 February 2020, Brussels; Potential projects are on the website Hydrogen for Climate action.

<sup>4</sup> See developments in our contribution to the Commission’s call on how competition policy can support the Green Deal of 20 November 2020,

<sup>5</sup> See developments in our report “A State Aid framework for a Green Recovery: Mainstreaming climate protection in EU State aid law”.

<sup>6</sup> E.g. the EU Action plan on Zero Pollution, the Energy System Integration Strategy, the Hydrogen Strategy etc.

This implies that projects should only qualify as Important Projects *in the Common European Interest* and be eligible to aid under the IPCEI Communication if:

- the projects comply with their environmental law obligations<sup>7</sup> – and any other legal obligations they are subject to;
- the projects are sustainable<sup>8</sup>, “do no harm” to the environment, climate or human health, and go well beyond the Union Standards<sup>9</sup>;
- the Energy Efficiency First principle<sup>10</sup> has been duly implemented by the notifying Member States;
- wide and net environmental spillover effects and benefits for society that go beyond socio-economic considerations have been clearly identified;
- projects in the fossil fuel sector, that use fossil fuels or are otherwise polluting are excluded from the notion of IPCEIs.<sup>11</sup> As ClientEarth repeatedly advocates, an increased environmental protection and efforts to combat climate change, require support to those measures that have the potential to protect the environment as well as the end of support to polluting and harmful activities.

In light of the European Green Deal, a holistic approach to the notion of “common interest” should be taken into account whenever assessing aid, in particular concerning energy infrastructure and industrial facilities. IPCEI projects should recognise the urgency of the climate and environmental crisis we are living, truly serve the interests of EU citizens and not jeopardise European’s right to live in a healthy and safe environmental and on a climate-neutral continent.

ClientEarth understands that some Member States are launching **hydrogen projects that could qualify as IPCEIs**<sup>12</sup> and DG Competition provided practical guidance and feedback to the industry.<sup>13</sup> Although clean (renewable) as well as low-carbon hydrogen projects<sup>14</sup> are currently being considered as IPCEIs, the latter shall not benefit from a support framework as it is not consistent with objectives of the Green Deal, will only have a very limited length of use resulting in stranded assets<sup>15</sup> and carbon capture and storage (“CCS”) is simply woefully off track.<sup>16</sup> Also, it should be noted that the potential introduction of

<sup>7</sup> Judgement in C-594/18 P, *Austria v. Commission*, 22 September 2020, ECLI:EU:C:2020:742, para. 44-45 and 100.

<sup>8</sup> At this stage, ClientEarth remains very cautious as to using the Taxonomy Regulation as a benchmark to determine positive environmental benefits of State aid measures, as the Commission has not yet adopted its delegated acts. For ClientEarth’s position in this respect, we refer to our [contribution to the Commission’s call on how competition policy can support the Green Deal](#) of 20 November 2020, p. 30.

<sup>9</sup> For instance, by reference to the relevant [Best Available Techniques Reference documents \(BREF\)](#)

<sup>10</sup> Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, recital (64) and Art. 2(18)

<sup>11</sup> We refer to pages 20-26 of our [contribution to the Commission’s call on how competition policy can support the Green Deal](#) 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>12</sup> [The launch of the new Hydrogen IPCEI has been announced on 17 December 2020.](#)

<sup>13</sup> DG Comp presentation ["Potential IPCEI on Hydrogen: Food for thought"](#) at the 6th Meeting of the Strategic Forum for Important Projects of European Interest.

<sup>14</sup> The notions of “clean” and “low-carbon” hydrogen refer to the definitions in the [EU Hydrogen Strategy](#), p.4.

<sup>15</sup> Investment in low-carbon hydrogen projects could lead to fossil gas lock-in and stranded assets if supply of clean (renewable) hydrogen to replace it is not guaranteed in the short or medium term.

<sup>16</sup> CCS is a costly technology that is unlikely to scale up in time. In addition, it cannot capture all emissions produced and even if it would, greenhouse gas would still be emitted due to the production and transportation of fossil gas before conversion into hydrogen. Indeed, independent studies of the fossil gas sector show that large amounts of methane leaks are vented and flared throughout the gas lifecycle. While the EU has indicated an intention to improve methane regulation, there are currently no binding performance standards for this sector. For more on this: Global Witness, [Why “blue hydrogen” is fossil fuel industry greenwash and won’t fix the climate.](#)

certificates of guarantee of origin for hydrogen contains a serious risk of greenwashing<sup>17</sup> and its potential to attract significant investment in renewables has proven dubious. Therefore, we call on the Commission to **exclude any direct or indirect aid to hydrogen that is not produced at 100% from renewable energy sources**<sup>18</sup> and not to support projects where the same results could be reached through other less expensive and equally effective technologies.<sup>19</sup> **Only clean hydrogen can be a promising solution for hard to abate sectors** (such as steel and cement production), provided significant additional renewable energy production capacity is being created.<sup>20</sup> At the very least, if the Commission were to allow low-carbon hydrogen projects as IPCEIs, this shall be contingent on requirements for projects to:

- evidence that efficiency measures are prioritised, in compliance with the Energy Efficiency First Principle;
- use those CCS technologies that ensure overall carbon emissions are limited taking into account the EU and national greenhouse emission reduction objectives as well as the 2050 objective of climate neutrality<sup>21</sup>;
- where hydrogen is to be produced from fossil gas, ensure lifecycle methane emissions for gas do not exceed 3% of gas extracted at the wellhead, or, if the EU has introduced methane performance standards or import standards which are in line with the 2050 carbon neutrality objective, ensure the fossil gas complies with those standards;
- set a binding date for the project to fully transition to clean hydrogen.

## 2 Suggestions for amendments of the IPCEI Communication

In this section, ClientEarth suggests amendments by following the current structure of the IPCEI Communication and calls upon the Commission to adopt a new IPCEI Communication in line with these suggestions and guiding principles.

As a general remark, although certain stakeholders call for a relaxation of the current framework arguing that Europe needs to rapidly innovate, the Fitness Check does not evidence or conclude that the IPCEI Communication has been a barrier to aid for innovative and large projects. ClientEarth believes that there

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<sup>17</sup> Some Member States raised concerns of greenwashing in the event a hydrogen producer connects an electrolyser to the electricity grid while purchasing fossil-fuel based electricity from the local grid as well as buying renewable guarantees of origin to sell hydrogen on the market. See “Additionality in renewable hydrogen production”, Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published).

<sup>18</sup> Our call is shared a.o. by [Bankwatch](#), [Food & Water Action Europe](#) but also [Danish Energy](#) (a lobby organisation for Danish energy companies stating very clearly “Therefore, “transitional” technologies, such as “low-carbon” hydrogen, should not be regarded as IPCEIs, recognizing that renewables are most compatible with the Union’s long-term objectives”) in their respective responses to the roadmap.

<sup>19</sup> Under the terminology of the [Hydrogen Strategy](#), this would entail excluding any support to “electricity-based hydrogen”, “fossil-based hydrogen”, “fossil-based hydrogen with carbon capture”, “low carbon hydrogen” and “hydrogen-derived synthetic fuels”.

<sup>20</sup> This is why some Member States are calling for “additionality” in the clean hydrogen production and in particular ask that clean hydrogen is only produced “*when the average of renewable electricity on the national grid is above a baseline or when renewable electricity production exceeds demand*”, *cf.* Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published). See also [Declaration from AT, ES, LU, PT ... On the adoption of the ‘Manifesto for the development of a European “Hydrogen Technologies and Systems” value chain’](#).

<sup>21</sup> A way to implement this would be to ensure overall carbon dioxide emissions are capped.

is no room for cutting down the eligibility and compatibility criteria, precisely given the strategic importance of IPCEIs for the EU market, their scale, expected spillover effects and the amounts of aid at stake.

## 2.1 Introduction

First, for the sake of coherence with Article 3(3) TEU, Article 11 TFEU and the objectives of the European Green Deal, IPCEIs can only represent a very important contribution to economic growth and the Union economy (para. 2 IPCEI Communication), if such growth is **sustainable and does not harm other environmental, climate and social objectives**. The positive spillover effects of IPCEIs on the internal market and Union society shall encompass **climate and environmental benefits**.

Also, para. 3 IPCEI Communication reads: *“IPCEIs make it possible to bring together knowledge, expertise, financial resources and economic actors throughout the Union, so as to overcome important market or systemic failures and societal challenges which could not otherwise be addressed. They are designed to bring together public and private sectors to undertake large-scale projects that provide significant benefits to the Union and its citizens.”* This wording, that is not limited to economic or market considerations, should equally include “environmental and climate challenges” and the pursuit of a “sustainable development” or “sustainable growth”, and state that IPCEIs shall not harm the environment and human health.

The European Green Deal, the Europe 2030 objectives and the climate-neutrality objective in the (future) European Climate Law should be included in the flagship policies of relevance for IPCEIs (para. 4 IPCEI Communication).

## 2.2 Scope of application

ClientEarth calls upon the Commission to declare aid to all fossil fuels or projects using fossil fuels ineligible to aid under the IPCEI Communication for not being in the common European interest. Indeed, support to fossil fuel projects has a high lock-in risk and is not compatible with the European Green Deal nor with the target to reduce greenhouse gas emissions by at least 55% by 2030. Para. 9 IPCEI Communication should thus explicitly **exclude any fossil fuels** at large (i.e. including investment related to, or relying on, the exploration, production, processing, transport, distribution, storage, combustion or use of fossil fuels) from the scope of application.<sup>22</sup>

More specifically, such ineligibility shall also apply for fossil fuel infrastructure projects listed as **Projects of Common Interest under the TEN-E Regulation**<sup>23</sup>, which could currently benefit from State aid under the IPCEI Communication as these projects are particularly well positioned to comply with the eligibility and compatibility criteria. The EU Ombudsman very recently found that the current (4<sup>th</sup>) PCI list elaboration did not properly assess sustainability of projects and the European Commission itself admitted that the sustainability assessment did not form a basis for awarding gas projects PCI status.<sup>24</sup> Subsequently, the

<sup>22</sup> [Bankwatch](#) shares this call in its response to the roadmap.

<sup>23</sup> Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure. Projects of Common Interest are eligible to EU funding, fast-tracked environmental impact assessment and to a presumption that they meet an objective of common interest in State aid assessments.

<sup>24</sup> Case 1991/2019/KR of the European Ombudsman on the European Commission’s action concerning sustainability assessment for gas projects on the current List of Projects of Common Interest. The Ombudsman called for future project assessments to take into account CO<sub>2</sub> and methane emissions, efficiency impacts, “as well as the impact on the overall greenhouse gas intensity of energy production in EU Member States and the emissions related to the

recent Commission proposal for the revised TEN-E Regulation states that “*natural gas infrastructure no longer needs support through the TEN-E policy*”<sup>25</sup>, a statement that should inspire an even more ambitious stance excluding any support to projects using non-renewable gas in the IPCEI Communication. The IPCEI Communication shall also replicate the reinforcement of the sustainability criterion suggested in the proposal for the revised TEN-E Regulation (further detailed below). In any case, the overoptimistic speculation about the potential use of fossil fuel infrastructure for so-called “green gases”<sup>26</sup> in the future, as contained in proposal for the revised TEN-E Regulation<sup>27</sup>, cannot be an excuse to justify aid and continue the lock-in into gas infrastructure, as there are serious doubts that so much green gas will be needed, available and/or economically viable.

In addition, since an aid measure for an activity that violates EU environmental law cannot be found compatible with the internal market<sup>28</sup>, para. 10 IPCEI Communication shall include a new libel (d) according to which “*This Communication shall not apply to ... (d): projects that infringe rules of EU law on the environment.*” It would be for the Commission to operate this control in depth, based on Member States and undertaking’s evidence and its own investigation where necessary.<sup>29</sup>

## 2.3 Eligibility criteria

### 2.3.1 Common European interest

- **General cumulative criteria**

When assessing the concrete, clear and identifiable **contribution of a project to one or more of the Union objectives** (para. 14 IPCEI Communication), the Commission must take into account the project’s **impact on the environment, public health and its capability to addressing climate change (with a priority for climate mitigation), as well as preventing and reducing pollution**. In case of a negative impact on the environment and/or climate change, the project shall under no circumstance be considered as contributing to one or more of the Union objectives, for being diametrically opposed to the green oath and the “do not harm” principle enshrined in the Green Deal.

Similarly, para. 15 IPCEI Communication should state: “*the project must represent an important contribution to the European Green Deal objectives, as well as to other Union’s objectives, including the Europe 2030 objectives, the climate-neutrality objective in the (future) European Climate Law, the Energy Efficiency First principle, the Zero Pollution ambition (...)*” (our additions underlined). ClientEarth shares

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*functioning of the infrastructure itself.” See also ClientEarth’ legal analysis, Non-compliance of the 4th PCI List with EU law and the Paris Agreement, 29 January 2020.*

<sup>25</sup> Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, recital 11.

<sup>26</sup> A.o. biogas, biomethane and low-carbon hydrogen.

<sup>27</sup> Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, recital 11.

<sup>28</sup> Judgment in C-594/18P, *Austria v. Commission*, para. 44-45 and 100.

<sup>29</sup> For instance, regarding the IPCEI on the construction of the Fehmarnbelt link, NABU - Naturschutzbund Deutschland e.V. evidenced that the project has an impact on habitat conservation, the protection of special species and nature conservation, and thus appears to breach the Birds and Habitats Directives as well as the Marine Strategy Framework Directive. In addition, NABU alleged, in the course of the notification procedure, that serious mistakes have been made in the environmental impact assessment of the project. The aid was authorised by the Commission nonetheless.

Denmark's suggestion to give higher weight and precedence to environmental and climate objectives over other EU objectives.<sup>30</sup>

With regard to the **minimum number of participating Member States** (para. 16 IPCEI Communication), ClientEarth believes the Commission is best placed to decide if it is necessary to increase the minimum number so as to allow for more geographically balanced participation of Member States. However, since the IPCEI Communication applies in a variety of economic sectors, it may not be possible to adopt a one-size-fits-all approach. Attaining a certain minimum number of participating Member States may be easier for an R&D&I project than for an energy infrastructure project, which is naturally bound to a certain geographic area. Therefore, a too high threshold on the minimum number of participating Member States may be an unnecessary burden for certain projects, especially since it is expected that the project has wide positive spillover effects anyway.

The demonstration of **wide spillover effects** in the Union should certainly remain a necessary feature of IPCEIs (para. 16 IPCEI Communication). For increased clarity, ClientEarth suggests to indicate the cumulative three-dimensional nature of positive spillover effects, i.e. that they should go beyond (i) the financing Member States, (ii) the beneficiaries of the aid and (iii) the sectors in which the beneficiaries are active. In addition, on the type of positive spillover effects, ClientEarth urges the Commission to not only look at the positive socio-economic effects of a project, but equally at its positive environmental effects<sup>31</sup>, in line with the European Green Deal, the Europe 2030 objectives and the climate-neutrality objective. A project without concretely identified **net significant socio-economic and environmental benefits** shall under no circumstances qualify as being of common European interest. Member States could provide administrative or technical support to SMEs that participate to an IPCEI for the demonstration of those spillover effects.

The requirement that the project must involve **co-financing by the beneficiary** should be more precise to indicate the degree of involvement, for instance by adding a threshold (para. 18 IPCEI Communication). This threshold could be lower for "green bonus" projects, if such notion is to be retained.<sup>32</sup>

Finally, regarding the last but not least general criterion, the obligation to respect the **principle of the phasing out of environmental harmful subsidies** (para. 19 IPCEI Communication) shall be strengthened to clearly state that any aid to any fossil fuels contradicts this principle in its very nature.<sup>33</sup> Similarly, the Commission should also put into place safeguards against "greenwashing" projects, an increasing practice undermining competition in the internal market. As indicated in the introduction, the push for so-called low-carbon hydrogen is a striking greenwashing effort undertaken by the industry to promote hydrogen made from fossil fuels rather than from renewable electricity. Hence, once again, we

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<sup>30</sup> In its response to the targeted consultation on the evaluation of the IPCEI Communication, Denmark states "*The 2014 communication already states that projects must contribute in a concrete, clear and identifiable manner to one of more EU objectives, including but not limited to sustainable growth and the 2030 framework for climate and energy policies. We suggest putting higher weight on this criterion for projects to contribute to a climate neutral economy in the EU by 2050 at the latest in the Commissions' assessment of strategic value chain IPCEIs by giving it precedence over other EU objectives, i.e. exalting the criterion.*"

<sup>31</sup> For energy and transport infrastructure, such benefits could be improved air quality, tackling climate change through a reduction of greenhouse gas emissions, restoring habitats and biodiversity, improved water quality.

<sup>32</sup> See Commission's call for contributions on the alignment of competition law with the Green Deal launched 12 October 2020 and ClientEarth's reply of 20 November 2020, pp. 27-28.

<sup>33</sup> In any case as called for above, a fossil fuel project should not be deemed to be in the common European interest and thus should not even be eligible to aid under the IPCEI Communication.

urge the Commission to declare hydrogen that is not produced at 100% by renewable energy sources ineligible as an IPCEI.

- **General positive indicators**

ClientEarth has no specific comments regarding the positive indicators on the Commission's involvement in and the governance structure of an IPCEI project (para. 20, (b) to (d) IPCEI Communication). However, in case of a strengthened governance role for the Commission in the future, as seems to be a common demand from industry stakeholders, ClientEarth calls upon the Commission to **increase the overall transparency** on its activities towards the public.<sup>34</sup>

We also suggest to add cumulation rules<sup>35</sup> in the event a project is co-financed by a Union fund (para. 20 (e) IPCEI Communication) in order to avoid overcompensation.

### 2.3.2 Specific criteria for environmental, energy and transport projects

ClientEarth would welcome more guidance on what the notions of “*great importance*” for the environmental, energy or transport strategy, as well as “*contribute significantly to the internal market*”, actually entail (para. 23 IPCEI Communication). In assessing these factors, especially for energy and transport IPCEIs, the Commission should have as baselines (i) the inclusion of environmental benefits into the assessment of spillover effects (see our recommendation above), (ii) the objective to concretely phase out, or not authorise environmentally harmful subsidies and (iii) the projects shall be tested against “better than Union Standards”.

In addition, ClientEarth calls upon the Commission to add a new criterion according to which **the project shall contribute significantly to sustainability and the EU decarbonisation and depollution objectives**.<sup>36</sup> In order for this criterion to materialise effectively, the Commission should perform a thorough **sustainability check of the project**, based amongst others on detailed assessments made by (and required from) the notifying Member States, experience and analysis of previous comparable projects, scientific evidence and projections and analysis of contributions to public consultations about the IPCEI when open.

### 2.3.3 Importance of the project

The last eligibility criterion is too restrictive: currently, a project can only be considered important quantitatively or qualitatively based on its size, scope, level of technological or financial risks (para. 24 IPCEI Communication). Rather, a project shall also be considered important if it **significantly contributes to fighting climate change, preserving/restoring the status of the environment** and preventing pollution in line with the objectives of the European Green Deal.

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<sup>34</sup> Although the Strategic forum for Important Projects of Common European Interest published certain documents discussed during its meetings in the Register of Commission expert groups, the level of transparency was insufficient as a.o. civil society organisations could not apply for membership (*cf.* [Call for application dated 5 February 2018](#)) and the meetings were not open to the public.

<sup>35</sup> Even though these may also be foreseen in the relevant rules of the EU fund in question.

<sup>36</sup> A similar criterion has been introduced in the Commission proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation 347/2013, COM(2020) 824, articles 1, 4 §3, Annex IV and recital 16.



Conversely, a project that may harm climate and environmental protection would not be in line with the “green oath” and should not be eligible.

## 2.4 Compatibility criteria

### 2.4.1 Necessity and proportionality of the aid

The **list of eligible costs** is a welcome guidance when identifying **the funding gap** (para. 31 and Annex IPCEI Communication), especially given the fact that the aid intensity could reach up to 100% of the funding gap. However, the current inclusion of “*other costs if justified*” annihilates the purpose of the already large list, since it is unclear what this category encompasses. Hence, ClientEarth suggests making the list exhaustive by removing label (h) in the Annex.

With respect to the **incentive effect** of the aid, which may be derived from important benefits brought to society by a project that is insufficiently profitable for an undertaking in the absence of aid (para. 33 IPCEI Communication), ClientEarth stresses that “benefits for society” should be largely interpreted to include significant environmental and social benefits, including to tackle climate change.<sup>37</sup>

Although ClientEarth acknowledges the *raison d'être* of the **matching clause** (para. 34 IPCEI Communication), the selection of an IPCEI should be driven only by a genuine European interest – as defined against the European Green Deal and relevant policies listed under (updated) paras 4. and 15 – and not by a race to match certain highly subsidized activities in third countries. The matching clause can only be regarded as a signal of what happens outside the EU, but shall in no event play a role for assessing the proportionality and/or aid level of an IPCEI.<sup>38</sup>

Moreover, it is unclear what the Commission means with “*energy security and energy efficiency are to be taken into account when relevant*” and how this should be applied (para. 37 IPCEI Communication). **Energy efficiency** must always be deemed “relevant”<sup>39</sup>, based on the energy efficiency first principle<sup>40</sup> - that should also be expressly included amongst the Union’s objectives (para. 15 IPCEI Communication). For the sake of completeness, ClientEarth underlines that new fossil gas infrastructure projects are by no means required for security of supply.<sup>41</sup> The Commission recognizes this in its proposed revision of the TEN-E Regulation: “*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*

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<sup>37</sup> Such benefits could be for instance, a significant reduction of greenhouse gas emissions or air, water or soil pollution, significant remedies to losses of biodiversity.

<sup>38</sup> Some distortive effects of foreign subsidies may eventually be addressed by the rules on Foreign Direct Investment and the Commission’s White Paper on Foreign Subsidies. To a certain extent and without prejudice, ClientEarth shares the view expressed by Denmark and the Netherlands in their response to the targeted consultation on the evaluation of the IPCEI Communication.

<sup>39</sup> In its response to the roadmap, Orsted also urges the Commission to ensure that the IPCEI Communication aligns with the principles of energy efficiency and renewable energy-first.

<sup>40</sup> Regulation 2018/1999 on the Governance of the Energy Union and Climate Action, recital (64) and Art. 2(18)

<sup>41</sup> Just for quoting one relevant source, a 2020 report by consultants Artelys, “An updated analysis on gas supply security in the EU energy transition”, 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 cases*” (p.3). Also, for instance, although the EU has a huge overcapacity for LNG terminals (as indicated by the Commission itself in its decision SA 51983 regarding the terminal in Krk (Croatia), the capacity utilisation is in the order of 25% to 30% on average in the EU), aid is provided and authorised for the construction of new LNG terminals.

*consumption of natural gas to be reduced significantly because its non-abated use is not compatible with carbon-neutrality*".<sup>42</sup>

Regarding the positive indicators for the proportionality of the aid, clearer guidance, for instance in the form of a threshold, would be welcome to determine the **significant own contribution by beneficiaries or private investors** (para. 38 IPCEI Communication)(also indicated above *cf.* the eligibility criteria).

Finally, although some stakeholders argue that the selection of beneficiaries of aid through a **competitive, transparent and non-discriminatory tender** may be too burdensome in certain Member States, such selection through a tender shall not only be a positive indicator of the proportionality of the aid. Instead, it shall be the general principle, as it is the case for other State aid regimes. Firstly, IPCEIs are largely anticipated so that organising a competitive tender is certainly compatible with the timeline of the project. Secondly, the Commission usually holds competitive tenders as the best way to select the most competitive projects and limit the amount of aid; we see no reason to depart from this analysis for projects of the size and importance of IPCEIs. It would also enable to select, through appropriate "green criteria" in the tender, projects that have the **highest degree of sustainability**. Thirdly, undertakings that have the ambition to participate in an IPCEI (again, given their size, importance and expected spillover effects) are generally used to tender procedures. In respect of enabling more SMEs to participate in IPCEIs, derogations to the tendering procedures are possible to enable their effective participation – there are examples of derogations in the EEAG (para. 125 and 127) that could serve as references.<sup>43</sup>

## 2.4.2 Transparency requirements

ClientEarth welcomes and supports, as a principle, recent Commission proposals to make aid measures more transparent<sup>44</sup>, and a similar effort needs to be replicated under the IPCEI Communication. Indeed, transparency regarding aid for IPCEIs is all the more important as these projects are, by definition, important projects, in a common European interest and are supposed to have positive spillover effects in a wide part of the Union. Enabling the public to know when and how State aid measures are planned by Member States and assessed by the Commission, would allow a better control of the use of public funds. At present, information is only provided when the Commission adopts a decision. In order to adopt **higher transparency standards**, we call upon the Commission to<sup>45</sup>:

- enter the dates of the procedural steps (including (pre-)notification of aid) in the State aid register;
- publish the (pre-)notification files so as to inform the public about the type, amount and objective of aid, the beneficiaries and relevant features (aid measures are generally decided in transparent manner at national level and do not justify secrecy at EU level);
- publish non-confidential versions of Commission's letters to Member States finding that Articles 107 and 108 TFEU are inapplicable to a measure that would not qualify as State aid;

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<sup>42</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>43</sup> This is without prejudice of ClientEarth's analysis and recommendations relating to these derogations in the EEAG. We refer to our reply to the revision of the EEAG, to be published by 7 January 2021.

<sup>44</sup> See draft regional aid guidelines, para. 144-147; ETS State aid guidelines for the period post-2021, section 6.

<sup>45</sup> For a more details on these recommendations, see also ClientEarth' analysis, Competition policy supporting the Green Deal. Our call for a sustainable competition policy, pp. 12-14.

- publish non-confidential versions of State aid decisions in a timely manner.<sup>46</sup>

Beyond the pure assessment of the aid measure by the Commission, ClientEarth believes that **increased transparency is needed at all stages of IPCEIs**, i.e. as from the moment a strategic value chain is selected and could potentially qualify as a future IPCEI, throughout the selection of the projects and participating companies (through a call for application and a tender), the (pre)-notification and assessment of aid under the IPCEI Communication, as well as in how the projects are being evaluated.<sup>47</sup> In other words, **it should be made possible for the public to follow the creation and evolution of an IPCEI**.

Moreover, ClientEarth welcomes the proposal made by the Commission in its revision of the EEAG to include a **public consultation** and we suggest to add a similar mechanism in the IPCEI Communication, especially considering the importance of an IPCEI project and the aid amounts at stake. Consultations could in particular focus on the sustainability of projects and their expected spillover effects, as well as their benefits to society.

Finally, there is no valid reason to waive the information obligation for individual aid awards below EUR 500.000 (para. 46 IPCEI Communication). Removal of this waiver is even more logical as many measures would be individual aid awards (as opposed to schemes) – as in the Microelectronics IPCEI – and the Commission wishes to encourage more undertakings, specifically SMEs, to participate to IPCEI projects, which may result in the latter getting individually lower levels of aid.

Beijing Berlin Brussels London Los Angeles Luxembourg Madrid Warsaw

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<sup>46</sup> For instance, to this date, **none of the public versions of the decisions** adopted on 9 December 2019 in respect of the Summer IPCEI Batteries notified by France (SA.54794), Sweden (SA.54796), Germany (SA.54801), Italy (SA.54806), Poland (SA.54808), Finland (SA. 54809) have been published in the State aid register.

<sup>47</sup> The transparency regarding the Strategic forum for Important Projects of Common European Interest was largely insufficient as civil society could not apply for membership and the meetings were not public. The power given to the industry to decide on the strategic value chains and IPCEIs also raises serious conflict of interest issues. The idea put forward by [Danish Chamber of Commerce](#) in its response to the roadmap to create a platform with an overview and details about the ongoing IPCEIs could be a start. ClientEarth also shares the viewpoint of the [Confederation of Swedish Enterprise](#) in its response to the roadmap.