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## STATE AID

### THE GREEN DEAL AND EU STATE AID LEGISLATION: NEW COMMISSION GUIDELINES ON STATE AID FOR CLIMATE, ENVIRONMENTAL PROTECTION AND ENERGY

Shortly before Christmas, on 21 December 2021, the European Commission published its new Guidelines on State aid for climate, environmental protection and energy 2022 ('CEEAG'). The College of Commissioners has approved the new guidelines and they are expected to be formally adopted before the end of January. The long-awaited CEEAG and their annexes are initially only available in English.

Though official adoption of the document is therefore still pending, Member States and potential aid recipients would be well advised to take a closer look at the main new elements and possible effects on the way State aid is granted in future.

#### CEEAG vs. EEAG: structural changes

As already discussed in our [earlier article](#), the CEEAG bring with them many changes as compared to the previous Guidelines on State aid for environmental protection and energy 2014-2020 ('EEAG'). The main body of the CEEAG is now 111 pages long, making it far longer than its predecessor. The Commission has also introduced several new categories of aid into the CEEAG, including aid for the reduction and removal of greenhouse gas emissions (4.1), aid for clean mobility (4.3), and aid for resource efficiency and for supporting the transition towards a circular economy (4.4). In addition, there are special provisions for energy-intensive users (4.11) and a new category of aid has been created for the closure of power plants (that burn coal, peat or oil shale) and also of mining operations (for coal, peat or oil shale) (4.12). The CEEAG specifically do not apply to State aid for nuclear energy (point 13 (d)).

Structure-wise, the CEEAG are at least similar to the EEAG in that they still have a general section preceding the sections dealing with the individual aid categories. This general section applies to all categories of aid unless the general criteria are narrowed down, amended or declared inapplicable in the more specific sections. The CEEAG no longer contain any aid categories that are to be assessed solely on the basis of the general criteria, however.

#### The general criteria

There are already signs in the general section of an increasing trend towards the grant of aid on the basis of competitive bidding processes (point 49). While the Commission states that, as a general principle, the criterion will be the net extra cost (funding gap) necessary to meet the objective of the aid measure, which is to be determined by means of counterfactual analysis (point 48), this will not be required if aid is granted on the basis of a competitive bidding process that meets the requirements set out in point 49.

In certain cases, where a competitive bidding process is not used and future developments in costs and revenues are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the Commission now also explicitly points to the possibility of compensation models. These models can consist of a mix of *ex ante* and *ex post* criteria, a claw-back mechanism or a cost monitoring mechanism (point 55).

It is also interesting to note that the strict thresholds for individual notifications to the Commission – as they were still referred to in Recital 20 EEAG and which, in the absence of a competitive bidding process, could lead to an individual notification being mandatory despite an aid scheme having been approved – are no longer to be found in

the CEEAG. However, the CEEAG contain a general provision allowing the Commission to take into account “further factors” to determine the overall balance of certain categories of aid schemes in certain cases (point 76). Here the Commission explicitly mentions the possibility of *ex post* evaluation or, in the absence of a competitive bidding process, of individually notifying support projects of a certain size or presenting certain characteristics, and a requirement that aid measures be subject to a time limitation.

This means that aid schemes may be subject to an *ex post* evaluation even if they have already been approved by the Commission (see also point 455 et seq. in section 5). The Commission refers in particular to schemes with large aid budgets (more than EUR 150 million in a year or EUR 750 million over the total duration of the scheme). However, an *ex post* evaluation is also conceivable in other cases (e.g. aid schemes with new features). Member States must also submit an evaluation plan to the Commission.

The Commission can approve aid schemes on the basis of the CEEAG for a maximum period of 10 years (point 70). The new CEEAG requirements are to apply to aid schemes and individual aid (whether they are based on an aid scheme or granted ad hoc) (point 18). New is also the explicit mention that measures may not entail a violation of relevant Union law (point 33). This comes as a consequence of recent case law.

### **The aid categories of the CEEAG – in particular aid for the reduction and removal of greenhouse gas emissions**

Section 4.1 (Aid for the reduction and removal of greenhouse gas emissions including through support for renewable energy) represents a significant new element. This section covers aid measures for promoting energy from renewable sources (including aid for the production of renewable energy or synthetic fuels produced using renewable energy) and aid measures involving a wide range of other technologies primarily aimed at reducing greenhouse gas emissions (point 78). Alongside already familiar technologies such as *carbon capture and storage*, for example, section 4.1 now also includes *carbon capture and use* (point 83) as well as aid to support electrification using renewable electricity and/or low-carbon electricity and hence, explicitly, also support for industrial processes (point 88).

The Commission is making it clear that a range of different instruments can be used. In addition to the possibility of grants, it explicitly refers to so-called contracts for difference, which can also take the form of what are known as carbon contracts for difference. Operating aid is now explicitly mentioned as well (point 121).

One main change, which was already included in the draft version, is the new requirement for Member States to carry out a public consultation prior to notification (point 98 et seq.). Depending on the amount of annual aid, this may take a minimum of four weeks or a minimum of six weeks. The results of such a consultation process must also be published. Exceptions to the mandatory public consultation process appear to be possible, however, under certain (stringent) conditions (see in particular point 100). The Commission has now also clarified in the CEEAG that this section will only apply from 1 July 2023 (point 98).

The Commission also seems to assume that aid on the basis of section 4.1 should generally be granted through a competitive bidding process (point 103). The bidding processes should, in principle, be open to all eligible beneficiaries (point 104). Exceptions to the generally open nature of the bidding processes as well as to the requirement of a competitive bidding process per se are possible. The exceptions to the latter requirement – of a competitive bidding process – concern specific smaller projects or cases where there is insufficient supply to ensure competition (point 107). For potential aid recipients, this means that in future they must apply for aid in an open, transparent, non-discriminatory and ‘clear’ process in competition with other undertakings.

As already explained above, the CEEAG appear to no longer provide for an individual notification obligation for aid in excess of a particular amount despite an approved underlying aid scheme. For section 4.1, this is clarified insofar as an individual notification obligation (or some other measure mentioned in point 76) is only to be ordered in cases where measures are particularly novel or complex or the Commission identifies risks of additional competition distortions (point 131).

### **Other CEEAG aid categories – a brief description**

Section 4 of the CEEAG sets out many more categories of aid:

- ’ Aid for the improvement of the energy and environmental performance of buildings (4.2): This primarily concerns aid to improve energy efficiency,
- ’ Aid for clean mobility: Aid for the acquisition and leasing of clean vehicles and clean mobile service equipment and for the retrofitting of vehicles and mobile service equipment and aid for the deployment of recharging or refuelling infrastructure (4.3): This covers aid for the acquisition and leasing of clean transport

- › vehicles and aid for the deployment of recharging or refuelling infrastructure,
- › Aid for resource efficiency and for supporting the transition towards a circular economy (4.4): This includes, among other things, aid for investments aimed at improving resource efficiency through a reduction in the resources consumed in the production of the same quantity of output or through the replacement of primary raw materials with re-used or recycled materials,
- › Aid for the prevention or the reduction of pollution other than from greenhouse gases (4.5): This section covers aid for undertakings which go beyond Union standards or comply with Union standards that are not yet in force or which increase the level of environmental protection in the absence of such standards,
- › Aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation (4.6), Aid in the form of reductions in taxes or parafiscal levies (4.7),
- › Aid for the security of electricity supply (4.8): This includes capacity mechanisms, for example; here too, the guidelines provide for a public consultation as of 1 July 2023,
- › Aid for energy infrastructure (4.9),
- › Aid for district heating or cooling (4.10): This category relates to support for the construction or upgrade of energy efficient district heating and cooling systems,
- › Aid in the form of reductions from electricity levies for energy-intensive users (4.11): This section now makes explicit reference to energy-intensive users and deals with aid in the form of reductions from electricity levies. The current EEAG already provide for a similar category of aid in section 3.7 (aid in the form of reductions in or exemptions from environmental taxes and in the form of reductions in funding support for electricity from renewable sources), but some of the details have changed:
  - › Section 4.11 includes levies financing support to renewable sources or to combined heat and power and levies financing social tariffs or energy prices in isolated regions (point 403).
  - › Levies which reflect part of the cost of providing electricity (such as exemptions from network charges or financing of capacity mechanisms) are not covered, however. Levies on the consumption of other forms of energy, in particular natural gas, are also not covered by this section (point 403).
  - › The stipulation made in the draft that reductions from levies may only be granted where the overall cumulative level of these levies (before any reductions) exceeds a certain amount (point 356 of the then draft) was dropped. There is therefore no such additional upper limit in the CEEAG.
  - › Aid based on section 4.11 is to be limited to sectors that are particularly exposed. These are characterised by two factors, their trade intensity at Union level and their electro-intensity. The Commission has listed these sectors in Annex I CEEAG, where they are divided into sectors at significant risk and sectors at risk. This distinction is also new compared to the previous Annex 3 to the EEAG.
  - › The Commission generally considers the aid to be proportionate if the beneficiary pays at least 15% or 25%, as the case may be, of the levies covered by the aid scheme (see point 408 et seq. for the details). This strikes a balance between the former EEAG, which considered 15% to be sufficient in the context of aid in the form of reductions in the funding of support for energy from renewable sources (point 188 EEAG) and the draft of the CEEAG, which originally provided for a figure of 25% (see point 359 of the draft CEEAG).
  - › Section 4.11 also provides that Member States must commit to verifying that the beneficiary complies with its obligation to conduct an energy audit. Member States must also monitor whether these beneficiaries meet one or more of the additional requirements in point 415 (e.g. to reduce their carbon footprint so as to cover 30% of their electricity consumption from carbon-free sources, or to invest a significant share of at least 50% of the aid amount in projects that lead to substantial reductions of their installation's greenhouse gas emissions).
- › Aid for the closure of power plants using coal, peat or oil shale and of mining operations relating to coal, peat or oil shale extraction (4.12): This section includes two different measures - first, aid for early closure and, second, aid for exceptional costs resulting from a closure.

## **Outlook**

The CEEAG feature numerous new elements as compared to their predecessor, the EEAG, as well as changes from the draft published in advance for consultation. Section 4.1 would seem to be the most striking change, and at the same time it shows where the Commission's focus lies, namely on the decarbonisation of industrial production processes.

The Commission has also retained what are arguably the most significant new procedural steps, namely the focus on competitive bidding processes, and public consultation. Putting these additional administrative hurdles in place could pose a challenge for some Member States, in particular, and jeopardise the swift implementation of potential aid measures. The years to come will show whether at the end of the day these new procedural steps will simply prove to be a theoretical problem that the Commission will solve by exercising flexibility and pragmatism in interpreting the exceptions.

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