To: Executive Vice-President Margrethe Vestager
Executive Vice-President Frans Timmermans
Commissioner Kadri Simson

Brussels, 16 December 2021

Dear Executive Vice-Presidents, dear Commissioner,

State aid Guidelines on climate, environmental protection and energy 2022

ClientEarth and the European Environmental Bureau (EEB) are writing with regards to the ongoing revision of the guidelines on State Aid for climate, environmental protection and energy (the CEEAG).

We strongly believe that State aid policy must integrate environmental protection on the basis of Article 11 TFEU and thus be aligned with the climate and environmental protection objectives of the European Green Deal, the Zero Pollution objective and the Polluter Pays Principle. The Union agreed to transition to a sustainable Europe that achieves climate neutrality by 2050 and put citizens at its core, however this transition will not happen with undue State aid to selected undertakings that go counter those objectives.

With this letter, we would like to alert you on a specific point in the Regulatory Scrutiny Board's Opinion (in annex) related to the impact assessment on the revision of the CEEAG that raises **serious concerns in relation to the regime of aid for energy intensive users (EIUs)** and more generally, on the policy-making process within the Commission.

Indeed, the RSB's Opinion finds that the impact assessment (IA) of the CEEAG "*does not clearly explain the preferred policy option for reductions in levies funding support for electricity from renewable energy sources for EIUs*" and "*does not assess and specify the final parameters of the preferred option*". This finding is based on a draft IA of the CEEAG that, we assume, reflected the draft CEEAG submitted to public consultation in June 2021.

On governance, we are concerned that the Commission did not submit an adequate explanation nor its preferred policy choice to the RSB. Actually, the RSB had made the same remark on the impact assessment for the ETS State Aid Guidelines post-2021[1]. Moreover, a market operator filed an action for annulment of Annex I of the ETS State aid guidelines (containing the list of eligible EIUs) on the grounds, amongst others, that the methodology for setting the list was not justified by the Commission.[2] Based on these precedents and the RSB Opinion, we hope the final IA will be duly substantiated.

[1] Regulatory Scrutiny Board Opinion on the Commission's impact assessment of the ETS State Aid Guidelines, 26 June 2020, SEC(2020) 320 final.
[2] Action brought on 15 December 2020 – *Grupa Azoty and Others v Commission*, Case T-726/20.

We also draw your attention to the fact that the Commission is systematically breaching the jurisprudence of the Court of Justice of the EU, requiring impact assessments to be made publicly accessible in accordance with Article 12 of Regulation 1049/2001, before the corresponding proposal is adopted to allow members of the public to participate in the Commission's decision-making process (case C-57/16).

On the policy choice**, the recent leaked draft of the CEEAG[3] significantly waters-down the aid regime for EIUs** proposed in the official draft released last June. Although it did not include a (new) annex with eligible sectors, the enlargement of the categories of aid beneficiaries from those at *significant* risk of carbon leakage to those only *at risk* implies that the Commission has contemplated **that more EIUs should become eligible to the aid regime**. Such policy choice would be different from the one in the EEAG 2014-2020, thus different from option E0 "BAU" in the table attached to the RSB Opinion. It does not appear from the RSB Opinion that such (new) fourth option was ever presented to the RSB.

On substance, the risk of carbon leakage, which is the very reason for granting reductions from electricity levies to EIU, remains unproven.[4] The regime of reductions is also not adequate in light of the evolution of climate policies and the plans to introduce a carbon border adjustment mechanism.[5]

Even supposing that the risk would be duly substantiated in the IA, neither **policy option E0 "BAU", nor a more permissive option such as the one in the recent leaked draft CEEAG, can objectively be deemed the best policy option.**

On the one hand, the quantification table annexed to the RSB Opinion shows that **the benefits** for society/ the economy, the environment, the public administration and the companies**, are greater if the list of eligible EIUs is reduced (option E1 "Single list") and the greatest if that list is reduced even further to 14 eligible sectors only (option E2 "ETS list**"). These options would notably lead to:

- (much) lower competition distortions (which is the main objective of State aid policy),
- important annual budget reductions, and
- increased EU policy coherence (that is required by Article 7 TFEU).

On the other hand, the table makes clear that option E0 "BAU" would burden annual budgets even more.

Options E1 and E2 would allegedly have the disadvantage of reducing "*incentives for electrification and protection against carbon leakage*". In our understanding, this would simply be because the list of eligible EIUs would be shorter, so fewer undertakings would have to comply with the new conditions attached to the aid regime – it is not because the design of the regime would substantially differ. Let us recall that currently in a business as usual scenario, there is no incentive for electrification or reducing energy consumption since *(i)* there is no such condition in the EEAG 2014-2020 and *(ii)* the existence of the regime of reductions as such dis-incentivises EIUs from reducing their energy consumption in the EU. **Policy**

[3] As published by Euractiv on December 1st, 2021.

[4] The Commission's 2020 impact assessment of the ETS State Aid Guidelines indicates that there is no demonstrated risk of carbon leakage and that "political considerations seem to remain the main driver for Member States" to grant aid for ETS allowances (see pp. 23-24 and 31).

[5] Reconsideration of the compensations for indirect emissions costs is foreseen in the ETS State Aid Guidelines post-2021 (point 7) so the same principle should apply in the CEEAG: " *Following the review and possible revision of all climate-related policy instruments (notably of the Directive 2003/87/EC) to deliver additional greenhouse gas emissions reductions for 2030, reflecting the Climate Target Plan, and the initiative for the creation of a Carbon Border Adjustment Mechanism, the Commission will check whether any revision or adaptation of these Guidelines is necessary to ensure consistency with, and contribute to, the fulfilment of the climate neutrality objective while respecting a level playing field.*"

options E1 and E2 can only improve that situation. We also stress that EIUs can benefit from direct State aid to increase their electrification under other sections of the CEEAG.

Another disadvantage identified in the opinion in options E1 and E2 according to which *"costs for companies that are not benefitting any longer from EIU reductions*" would increase, does not stand either and is a circular reasoning. The Commission's assumption here is, based on an E0 "BAU" scenario, that companies should keep benefitting from reductions no matter what (whereas the regime was never solidly justified in the first place).

We reiterate that maintaining a regime of reductions for EIUs in the CEEAG is not justified and goes counter the very objectives of the CEEAG and of the Green Deal.

If this regime were to be maintained it would need to be substantially justified and improved. From the three options presented by the Commission to the RSB, based on its Opinion, **option E2 "ETS list" appears to be the most appropriate to ensure that State aid to EIUs in the form of reductions from electricity levies would target only those EIUs that are at *significant* risk of carbon leakage (if any), in a cost-effective manner and with the least distortive effect on competition, in line with the general objectives of State aid policy.**

Finally, the CEEAG should specify that the efficiency and decarbonisation conditions the EIUs need to implement **cannot be financed through additional State aid**.

We thank you for taking these points into consideration in view of the final adoption of the State aid guidelines.

Yours sincerely,

For ClientEarth

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For the EEB

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Annex: Regulatory Scrutiny Board Opinion on the impact assessment of the CEEAG, 18 October 2021

EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Revision of the Guidelines on State Aid for environmental protection and energy

Overall opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

The objective of the Commission's State aid control is to ensure that government interventions do not unduly distort competition and trade inside the EU. State aid control is the exclusive competence of the Commission. As a result, the Commission defines the conditions under which State aid is considered to be compatible with the internal market. In this respect, the Commission adopts horizontal and sectoral guidelines, which set out the approach that it will take when assessing the compatibility of State aid measures. In the field of environmental protection and energy, the relevant guidelines are the Guidelines on State aid for environmental protection and energy (EEAG).

Member States can also grant environmental and energy aid under the General Block Exemption Regulation (GBER). This Regulation allows Member States to grant aid up to a certain amount without the need to notify the measure in advance.

The current EEAG will expire at the end of 2021. The impact assessment follows an evaluation of the EEAG and GBER in the context of the 2020 State aid Fitness Check. This has shown that the EEAG are not fully adapted to new technologies and novel support types. They are also not entirely coherent with more recent environmental, climate and energy legislation, in particular the Green Deal and the related ‘Fit for 55’ legislative package.

(B) Summary of findings

The Board notes the useful additional information provided in advance of the meeting and commitments to make changes to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

(1) The report does not clearly justify the scope of the impact assessment and its limitation to the analysis of aid for decarbonisation, fossil fuels and energy intensive undertakings (EIUs). The relevance of the objectives and the scope of

This opinion concerns a draft impact assessment which may differ from the final version.

application and impact of the measures remains unclear.**

(2) The report does not clearly explain the preferred policy option for reductions in levies funding support for electricity from renewable energy sources for EIUs. The report does not assess and specify the final parameters of the preferred option.

(C) What to improve

(1) The report should clarify and justify the scope of its analysis. It should demonstrate that further considered changes to the EEAG that are not presented in the report are less contentious or involve no real policy choices. These should nevertheless be mentioned in the report and explained in an annex. The report should explain how cross-cutting issues that are now analysed with regard to decarbonisation and fossil fuels would apply to other categories of aid covered by the Guidelines (e.g. competitive tendering, public consultations, and thresholds). Where the application of such horizontal measures is likely to lead to meaningful impacts (e.g. administrative and compliance costs) these should be assessed. The report should also clarify the link between the evaluation (in the context of the State aid fitness check) and the problem analysis.

(2) Regarding reductions in levies for EIUs, the report should present the recalibrated preferred policy option and assess it in the analysis of impacts. It should also describe how the revised policy option takes into account stakeholders' concerns (reflecting the most recent stakeholder input).

(3) The report should present the impact of the policy options on small and medium-sized enterprises (SMEs) in a more comprehensive way. It should show how some measures, such as competitive tendering, could increase their administrative burden, while other measures, such as those for energy efficiency, will mainly benefit SMEs. The report should highlight the measures taken to mitigate the impact on SMEs, including the modification to the thresholds of the General Block Exemption Regulation.

(4) The report should use the 'business as usual' options as the baseline. They should be the reference point for the impact analysis and comparison of options.

(5) The report should explain how it incorporates the Fit-for-55 proposals. This includes both how the increased climate ambitions are reflected in the general approach to fossil fuels and promoting green aid, and individual measures taken to enable the Guidelines to support the new policies of the Fit-for-55 package.

(6) The report should explain how support measures included in approved Recovery and Resilience Plans would be compatible with the requirements under the preferred policy options.

(7) Among the policy options for the approach to fossil fuels, the report should better justify why the alignment with the taxonomy is not retained. It should explain how the taxonomy is designed for a different purpose than pursued by the Guidelines.

The Board notes the estimated costs and benefits of the preferred options in this initiative, as summarised in the attached quantification tables.

Some more technical comments have been sent directly to the author DG.

<u>(D) Conclusion</u>

The DG must take these recommendations into account before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.

Full title	Revision of the Guidelines on State aid for environmental protection and energy
Reference number	PLAN/2020/8023
Submitted to RSB on	15 September 2021
Date of RSB meeting	13 October 2021

<u>ANNEX – Quantification tables extracted from the draft impact assessment report</u>

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

I. Overview of Benefits/Advantages				
	Benefits for society/economy	**Benefits for environment**	**Benefits for public administration**	**Benefits for companies**
Problem area I: GHG emissions and fossil fuels – Preferred option				
Option A1 Partial harmonization according to sectoral characteristics	Highest cost-effectiveness: Encouragement of pro-competitive schemes and more competition between technologies within a single scheme (non-quantifiable)	NA	- No duplication of rules and shorter State aid guidelines - Future-proof: accommodating to financial and technology innovation (both non-quantifiable)	Harmonized approach beneficial for companies, in particular for SMEs and demand-side market participants, as well as market participants and equipment suppliers who have an interest in innovative technologies. (non-quantifiable)
Option B2 Facilitation with safeguards	~€32 billion of aid (2022-2030) benefits from more flexible and cost-effective compatibility conditions, enabling more eligible costs to be covered through both investment and operating aid.	~41 million tonnes of CO_2 avoided	Administrative simplification: - 20-50 notifications less up to 2030 thanks to block exemptions; - ~43 notified measures less thanks to fewer individual notifications Better State aid decisions thanks to public consultation and lower risk for appeal	Administrative simplification: - 20-50 notifications less up to 2030 thanks to block exemptions; - ~43 notified measures less thanks to fewer individual notifications Public consultation: - more legal certainty thanks to better decisions - competitors'

				input taken on board
Option C3 Multi-technology competitive bidding unless justified	1% cost-effectiveness gain possible	~37.5 million tonnes of CO_2 avoided	Neutral impact on administrative burden authorities	NA
Option D1 Fuel type	Supporting phase out of most polluting fossil fuels (oil, coal, lignite)	Positive environmental impact: most polluting fossil fuels result in about twice the GHG emissions from natural gas	Administrative simplicity: easy to understand rule	Administrative simplicity: easy to understand rule, in particular reducing complexity for SMEs
Problem area II: EIUs – All options (no preferred option)				
Option E0 BAU	Comparable protection against relocation (high coverage sectors and companies)	Comparable support to electrification of EIUs and protection against carbon leakage	NA	Comparable protection against relocation and support to electrification
Option E1 Single list	Annual budget reduction of 65% (stricter eligibility, lower aid intensity and a minimum level of levy to grant reductions) Lower competition distortions	Environmental conditionality Better preserves incentives to electro-efficiency	Increased policy coherence	Lower competition distortions Neutral impact on SMEs
Option E2 ETS list	Annual budget reduction of 89% (much stricter eligibility and lower aid intensity) Much lower competition distortions	Environmental conditionality Better preserves incentives to electro-efficiency	Full alignment with ETS	Much lower competition distortions Neutral impact on SMEs

II. Overview of Costs/Disadvantages				
	Costs for society/economy	**Costs for environment**	**Costs for public administration**	**Costs for companies**
Problem area I: GHG emissions and fossil fuels – Preferred option				
Option A1 Partial harmonization according to sectoral characteristics	NA	NA	NA	Stakeholder concerns that combined measures for RES and other GHG reduction measures might result in lower incentives to invest in RES (non-quantifiable)
Option B2 Facilitation with safeguards	NA	NA	Quantification of environmental protection cost: - increases the administrative burden - conservative cost estimate of €100 000 per scheme with over €150 million of aid annually Public consultation: - increases the administrative burden (non-quantifiable, although not estimated to be significant)	NA
Option C3 Multi-technology competitive bidding unless justified	NA	NA	Neutral impact on administrative burden public authorities	Higher administrative burden on companies; in case of SMEs counterbalanced by more frequent exemptions from

				notification
Option D1 Fuel type	No phase out of all fossil fuels (natural gas) in near future	State aid still allowed for some fossil fuel assets for a limited period	NA	NA
Problem area II: EIUs – All options (no preferred option)				
Option E0 BAU	Comparably low efficiency in protection against relocation risk Leads to annual budget increase by 9%	Comparably low incentives in electro-efficiency Comparably low efficiency in protection against carbon leakage	NA	Comparably high competition distortions
Option E1 Single list	Lower protection against relocation	Reduces incentives for electrification and protection against carbon leakage	NA	Increased costs for companies that are not benefitting any longer from EIU reductions
Option E2 ETS list	Much lower protection against relocation	Significantly reduces incentives for electrification and protection against carbon leakage	NA	Increased costs for companies that are not benefitting any longer from EIU reductions

Electronically signed on 18/10/2021 11:24 (UTC+02) in accordance with article 11 of Commission Decision C(2020) 4482