

Consultation response:

Prolongation of the State aid Regulations and Guidelines reformed under the State aid modernisation (SAM) package and expiring by the end of 2020

16 May 2019

BACKGROUND

1. ClientEarth is an innovative public interest environmental law organisation that operates in Europe and beyond, bringing together law, science and policy to create practical solutions to key environmental and energy challenges.
2. Our dedicated Energy team pursues Europe's clean energy transition and a fully functioning internal energy market by supporting the development and implementation of EU energy and environmental legislation. Our team has expertise amongst other in State aid law, having notably participated in the public consultation on the adoption of the EEAG in 2014¹ and more recently analysed and/or filed observations to the Commission, in respect of capacity mechanisms, in the UK², Poland³ and Greece⁴. We have also contributed to the adoption of the Clean Energy Package through various analysis pieces.⁵
3. We are hereby submitting our comments in respect of the public consultation (ref. HT.5594) on the prolongation of the State aid Regulations and Guidelines expiring by the end of 2020 (the "**Rules**"), in particular the Guidelines on State aid for environmental protection and energy ("**EEAG**") and the General Block Exemption Regulation ("**GBER**") in so far as it relates to State aid for environmental protection (GBER, Section 7). We welcome the opening of a public consultation on this prolongation of the Rules, especially in light of the impact the prolongation will have on the market and legal consequences relating to the assessment of State aid measures in light of secondary EU legislation that will enter into force in the meantime.

¹ ClientEarth consultation response to the Paper of the Services of DG Competition containing draft Guidelines on environmental and energy aid for 2014-2020 of 13 February 2014, available at: <https://www.documents.clientearth.org/wp-content/uploads/library/2014-02-13-clientearth-consultation-response-to-paper-of-the-services-of-dg-competition-containing-draft-guidelines-on-environmental-and-energy-aid-for-2014-2020-ce-en.pdf>

² ClientEarth's observations to the Commission on the compatibility of GB capacity mechanism, dated 23 April 2019, available at: <https://www.documents.clientearth.org/library/download-info/clientearths-observations-to-the-commission-on-the-compatibility-of-great-britains-capacity-mechanism-with-state-aid-rules-23-april-2019/>; For previous observations to the Commission, see ClientEarth and RAP's joint observations in 2014 (<https://www.documents.clientearth.org/library/download-info/the-regulatory-assistance-projects-rap-and-clientearths-concerns-with-uk-capacity-mechanisms-state-aid-conformity/>) and follow-up observations (<https://www.documents.clientearth.org/library/download-info/the-regulatory-assistance-projects-rap-and-clientearths-concerns-with-uk-capacity-mechanisms-state-aid-conformity-follow-up/>)

³ ClientEarth' Assessment of the Polish Act on the Capacity Market, available at: <https://www.documents.clientearth.org/library/download-info/assessment-of-the-polish-act-on-the-capacity-market/>; The Polish Draft Act on the Capacity Market in light of EU law, available at: <https://www.documents.clientearth.org/library/download-info/the-polish-draft-act-on-the-capacity-market-in-light-of-eu-law/>; The Polish capacity market under EU State aid law - ClientEarth Winter Package presentation, available at: <https://www.documents.clientearth.org/wp-content/uploads/library/2017-03-01-case-study-the-polish-capacity-market-under-eu-state-aid-law-ce-en.pdf>

⁴ See also our response to the national public consultation open in Greece, dated 10 May 2019: <https://www.documents.clientearth.org/library/download-info/clientearths-response-to-the-consultation-of-the-long-term-capacity-remuneration-mechanism-in-the-greek-electricity-market/>

⁵ For an example, see: <https://www.documents.clientearth.org/library/download-info/the-market-design-initiative-towards-better-governance-of-eu-energy-markets-2/>; ClientEarth's response to the Commission's public consultation on a New Market Design available at: <https://www.documents.clientearth.org/library/download-info/clientearths-response-to-the-commissions-public-consultation-on-a-new-market-design/>

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1 Comments on the two year duration of the prolongation

4. According to the draft regulation and draft communication supporting the public consultation, the Commission intends to prolong the Rules by two years, until 31 December 2022.
5. As a matter of legal certainty, we appreciate that the current Rules must be prolonged until they are revised pursuant to the ongoing fitness checks. We therefore welcome the principle of a prolongation, insofar as the Commission's schedule would not allow it to revise the Rules before their original expiry date⁶ - schedule on which we, as external stakeholders, have no view on. For the same reason of being external stakeholders, we cannot comment on why fitness checks were not anticipated earlier than early 2019 in view of the time necessary for conducting them.
6. Nevertheless, a prolongation by two years may not be deemed "short"⁷, in light of (i) the original duration of the Rules (6.5 years for the EEAG and GBER) and (ii) the evolution of the market and of secondary EU legislation, in particular in the energy sector. As detailed hereafter, both these evolutions call for a revision of the EEAG by 2020 already.
7. It is therefore necessary that the Commission conducts the fitness checks and revision processes of the Rules in the timeliest manner, given that some of these Rules, notably the EEAG, are already no longer fit for purpose.

2 Assessment of State aid measures during the prolongation period

8. The prolongation of the Rules, in particular the Commission's guidelines, must not be a manner for the Commission to assess State aid measures that will be notified or investigated during that two-year period with the same eye as measures that were assessed to date.
9. Member States are undoubtedly required to design State aid schemes in a manner that reflects both the evolution of the market and is compliant with relevant secondary EU legislation, specifically in respect of the assessment criteria of the pursuit of an objective of common interest, necessity, appropriateness and proportionality of aid. These criteria must be assessed dynamically by both the Member States and the Commission, as they are intrinsically linked with the underlying market. This statement applies particularly in the energy sector.
10. The **energy market** has clearly evolved since the EEAG and GBER were adopted or revised in 2014, sometimes even as a result of the State aid measures that the Member States have implemented under these Rules. To some extent, this is notably true in respect of development of renewable energy through feed-in tariffs or premium or energy efficiency measures. The need for resource adequacy measures has severely diminished correlatively

⁶ The Commission anticipates that "the results of the evaluations will not be available before beginning 2020".

⁷ http://ec.europa.eu/competition/consultations/2019_gber_deminimis/index_en.html

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to the development of renewable energy generation and of flexibility (e.g. demand response management) and the reduction of demand. ClientEarth will comment further on these evolutions in its response to the public consultation on the revision of the EEAG and GBER.⁸

11. **EU secondary legislation** also sensibly evolved since 2014, in particular following the adoption of the so-called "Clean Energy for All Europeans" package. In this respect, the most notable provisions that will have a legal, direct influence on the necessity and design of State aid measures in the energy sector⁹ are:

(i) Articles 20-24 of the recast Regulation on the internal market for electricity relating to resource adequacy measures;

(ii) Article 9 of the recast Directive on Common rules for the internal market for electricity, on public service obligations relating to security, including the security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection;

(iii) Article 20(b)(3), Article 21(b)(7), Article 22 (g) and Article 23(1)(j) of the recast Regulation on the Governance of the Energy Union and Climate Action, requiring the Member States to include in their integrated national energy and climate progress reports the financing measures they have taken in relation to, respectively, renewable energy, energy efficiency, energy security and internal energy market;

(iv) Articles 4 to 6 and Articles 21(2)(d) and Article 22 of the recast Directive on Renewable Energy, relating to support schemes for energy from renewable sources.

Most of these new rules will enter into force in January 2020 i.e. during the prolongation period of the State aid Rules. They must fully be part of the State aid assessments where they apply and the Commission must absolutely not authorise or approve State aid measures that violate or have the potential to violate these new rules.¹⁰

3 Conclusions

12. We are supportive of a prolongation of the Rules insofar as the ongoing fitness checks and revision processes may not be completed by the original expiry dates of the Rules (i.e. 31 December 2020). However, a two-year duration shall not be set in stone and must be reduced if the revision processes of the Rules is completed earlier; this process must be completed in the timeliest manner and certainly long before 2022.

13. The Rules, in particular the EEAG and GBER must be interpreted in a manner that is consistent and compliant with the evolution of the market on the one hand, and of relevant

⁸ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6623981/public-consultation_en

⁹ This is not an exhaustive list. ClientEarth will respond more extensively to the public consultation on the revision of the EEAG and GBER.

¹⁰ Contrary to the Commission's statement of 10 May 2019 on the draft Regulation on the internal market for electricity ([Inter-institutional File: 2016/0379\(COD\), 8737/19 ADD 1](#)), the Commission may not disregard applicable EU secondary legislation that has got an impact on the adoption of State aid measures, notably on their necessity, on the mere ground that it is exclusively competent to assess the compatibility of State aid measures under Article 108 TFEU.

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EU secondary legislation, e.g. the Clean Energy for All Europeans package, on the other hand. It is indeed an obligation on the Member States to design measures that comply with relevant EU secondary legislation in all respects and it is the Commission's duty to exercise its control on such compliance, notably when there is such a tight link between these rules and State aid rules.

14. ClientEarth will respond to the public consultation on the revision of the EEAG and GBER and provide more substantiated comments on how these Rules shall be revised and in the meantime, interpreted, in light of the market and legislative frameworks evolutions.

15. We remain at your disposal for any further clarification.

Yours sincerely,

Maria Kleis

Head of Energy
+32 (0) 28 08 3470
mkleis@clientearth.org

Juliette Delarue

Juriste / Lawyer Energy
+32 (0) 28 08 34 65
jdelarue@clientearth.org