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Green Deal and State aid

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1. Green Deal and Decarbonisation

The Green Deal makes Decarbonisation the top priority:

“It is a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use” (COM(2019)640 final, p.2).

This priority has been enshrined in EU Law: Article 2(1) and Article 4 of the European Climate Law

“In order to reach the climate-neutrality objective set out in Article 2(1), the binding Union 2030 climate target shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55% compared to 1990 levels by 2030” (article 4).

The objective of decarbonisation is not new (decarbonisation is one of the pillar of the Energy Union, ETS Scheme, EEAG...), but its importance has raised because of **the need to fight climate change**.



Consequences: would the reasoning of the Commission in HPC (SA.34947) be different today?

8.1.1.1. Decarbonisation

- (239) The UK argues that decarbonisation is a common objective based on the Environmental Aid Guidelines, Art 191 TFEU and Directive 2003/87.⁵⁵
- (240) The Commission notes that while Art 191 TFEU establishes that the preservation, improvement and protection of the environment must be regarded as objectives of EU policy, it is unclear whether such objective can be immediately applicable to low-carbon generation as defined by the UK. In particular, while certain generation technologies emit less carbon emissions, their impact on the environment might nonetheless be considered substantial. This seems to be particularly true of nuclear generation, due to the need to manage and store radioactive waste for very long periods of time, and the potential for accidents.
- (241) In this case, it is difficult to assess the trade-off between two potential common EU objectives, namely preserving the environment through the pursuit of low-carbon electricity generation while potentially increasing risks to the environment through the use of nuclear technology.

2. The role of State aid in delevering the Green Deal

State aid will be part of the solution:

“Competition policy, and State aid rules in particular, has an important role to play in enabling and supporting the Union in fulfilling its Green Deal policy objectives” (CEEAG, p.6).

Two important elements to bear in mind:

1. Compatibility assessment: *“the Court has already held that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (see, to that effect, judgment of 15 April 2008, Nuova Agricast, C-390/06, EU:C:2008:224, paragraphs 50 and 51)” (C-594/18P, HPC, Grand Chamber).*
2. Procedural aspects: Procedural framework of State aid control may be used as an efficient tool to control the respect of EU Law by Member States → Efficient tool to guarantee the implementation of EU secondary legislation.

Illustration: Security of supply and the requirements regarding CO₂ emissions

§320 of CEEAG: *“Security of supply measures must meet any relevant design conditions in Article 22 of Regulation 2019/943”*

Article 22(4) Regulation 2019/943 :

4. Capacity mechanisms shall incorporate the following requirements regarding CO₂ emission limits:

- (a) from 4 July 2019 at the latest, generation capacity that started commercial production on or after that date and that emits more than 550 g of CO₂ of fossil fuel origin per kWh of electricity shall not be committed or to receive payments or commitments for future payments under a capacity mechanism;
- (b) from 1 July 2025 at the latest, generation capacity that started commercial production before 4 July 2019 and that emits more than 550 g of CO₂ of fossil fuel origin per kWh of electricity and more than 350 kg CO₂ of fossil fuel origin on average per year per installed kWe shall not be committed or receive payments or commitments for future payments under a capacity mechanism.

The emission limit of 550 g CO₂ of fossil fuel origin per kWh of electricity and the limit of 350 kg CO₂ of fossil fuel origin on average per year per installed kWe referred to in points (a) and (b) of the first subparagraph shall be calculated on the basis of the design efficiency of the generation unit meaning the net efficiency at nominal capacity under the relevant standards provided for by the International Organization for Standardization.

→ Does it mean that any violation of any EU Law provision or principle should lead to a decision of incompatibility?

3. The scope of the CEEAG: What about nuclear?

The Commission has launched a consultation on the future State aid Guidelines for Energy, Environment and Climate.

A few remarks:

- The EEAG become CEEAG (« C » for Climate)
- These guidelines must be read in the light of the *Hinkley Point C* Judgement (C-594/18P) in order to understand the reshape of the compatibility assessment.

The scope of the Guidelines:

The scope of the Guidelines has been enlarged to add more areas and technologies. The CEEAG are supposed to include “all technologies that could deliver the Green Deal”.

However, “These guidelines do not apply to state aid for nuclear energy” (CEEAG, §12).

- Does it mean that nuclear should not be considered as a « technology that could deliver the green deal »?
- The rationale for this exclusion can be questioned as for some Member States, Green Deal objectives can not be met without nuclear (e.g. France).

From a legal point of view, the exclusion of nuclear raises an interesting legal issue: could the legality of the Guidelines be challenged before the Court of justice?

→ The French Council of State (Conseil d’Etat) has developed its case law to accommodate actions for annulment against acts of soft law. The same reasoning could be followed by the Court of Justice (judges dialogue)

4. Main trends of the CEEAG

The Commission uses a colourful classification to present the main trends of CEEAG:

- Green: aid in favour of the development of low carbon technologies
- Brown: aid helping to phase-out fossil fuels technologies (e.g. closure of plants that burn coal).
- Grey: aid must prevent lock-in effect (the measure must be « compatible with the 2050 climate target »)

Remarks/questions:

1. The carbon footprint of the measure becomes a decisive element.
2. Could State aid be granted to phase out low carbon technologies? Even if the decision ends up with a less favorable result for the climate (i.e. more CO2 emissions)? → Can a Member State decide to phase out nuclear if this decision ends up with more CO2 emissions?
3. The case of France, we will probably have:
 - State aid for new nuclear
 - State aid for existing nuclear
 - State aid for early closure of nuclear plants

5. Challenges ahead

Interactions between national energy policies will become more sensitive in the coming month/years (e.g. OPAL case, German loop flows, Dunkirk offshore wind farm, nuclear fleet...)

→ Negative externalities

→ Positive externalities

Legal answers:

- Solidarity principle (article 194 TFEU) – check the OPAL judgement (expected on 15 July 2021)
- CBCA decisions (Cross border cost allocation) – TEN-E Regulation
- Need for more coordination at a regional or EU level? – Could State aid control play a role?

Thank you for your attention