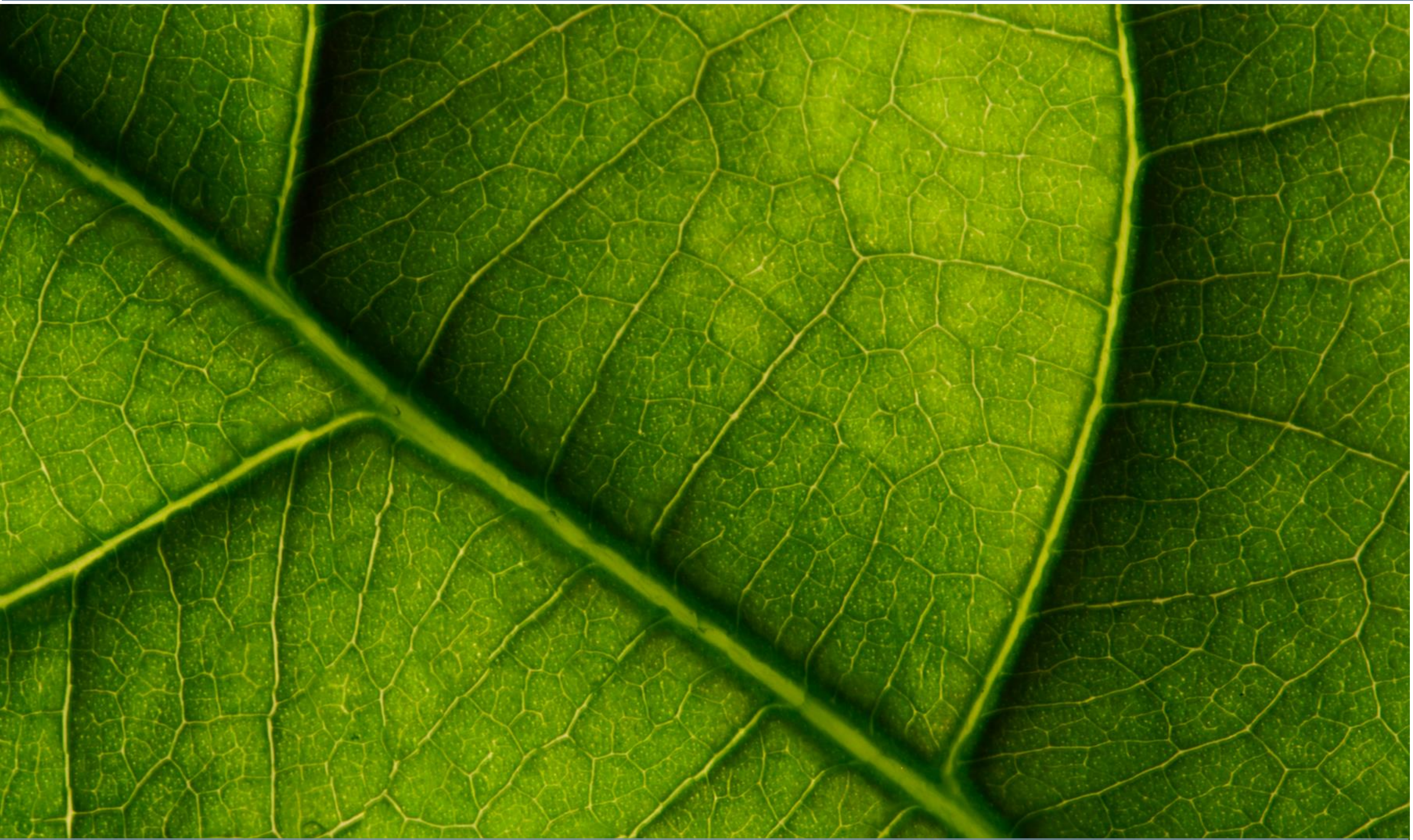
LATHAM & WATKINS



ANTITRUST CLIENT BRIEFING

State Aid and Environmental Protection and Energy

European Commission launches consultation on revising the 2014 State aid Guidelines on Environmental Protection and Energy

20 November 2020

The Development

- On 12 November 2020, the European Commission (EC) launched consultations on its initial plans to revise its 2014 Guidelines on State aid for environmental protection and energy (EEAG) and the corresponding provisions of the General Block Exemption Regulation (GBER). The EC has published:
  - An Inception Impact Assessment outlining the EC's initial ideas for revision
  - An online questionnaire on various topics to be addressed by the revision

Opportunity for Business

- Under the Green Deal, the EU has set the ambitious target of becoming carbon neutral by 2050, with a 50%-55% cut in emissions by 2030. The Green Deal will directly affect costs for many businesses, which will need to invest in carbon-free production processes and prepare for more expensive sources of energy (e.g., renewables).
- The EC's consultations are an important opportunity for businesses to provide their input on the necessary public support that will be required in their sectors to deal with the higher costs involved in the green transformation.
- The revised guidelines, which will enter into force on 1 January 2022, are likely to be the central State aid framework for environmental protection and energy projects for many years.

The EEAG and the GBER

- The EEAG set out the framework under which the EC assesses the compatibility of State aid granted to support projects to enhance environmental protection and energy generation adequacy, subject to certain conditions to ensure that the measures are cost-effective and non-distortive of competition.
- The GBER allows Member States to grant aid for smaller and simpler projects without the need to notify the measure to the EC in advance, provided the aid meets a number of pre-determined criteria.
- The EEAG and the GBER have been important tools for dealing with the sharp increase in spending by EU governments for environmental protection since 2014. In particular:
  - In 2018, 55% of all State aid spending (excluding aid to agriculture, fisheries, and railways), equal to €66.5 billion, was allocated to environmental protection and energy savings.
  - From 2014 to 2018, an increasing volume of compatible aid was granted in the environmental and energy field through more than 180 decisions under the EEAG, and more than 1,000 schemes or amendments under the GBER.
- On 30 October 2020, the EC published the results of its fitness check evaluation of certain State aid rules, including the EEAG. The evaluation found that the Green Deal necessitates a wide and deep review of several State aid rules, including the EEAG, to ensure that public support is geared towards providing the right incentives.

Inception Impact Assessment

The EC suggests two main building blocks as follows:

1. A review of the compatibility criteria for environmental protection

- The scope of the EEAG should be widened by organising the rules around broader policy objectives, such as environmental protection (including climate neutrality and other Green Deal objectives), security of supply, and the prevention of relocation risk due to energy-related charges, making scope for further technological and market innovations.
- A certain number of safeguards need to be established to ensure that the aid is effectively directed where it is needed (i.e., no crowding out of private investment, no greenwashing) and that the aid is limited to what is needed to achieve the environmental goals. This would involve consideration of the following:
  - If and to what extent a distinction between operating and investment aid is still justified, and to what extent rules should be aligned
  - To what extent Member States should be required to identify their contribution to environmental protection (e.g., based on the EU Taxonomy) and make transparent the environmental protection cost in their aid schemes in a harmonised manner
  - To what extent the competitive bidding requirement should be extended beyond renewables production and capacity mechanisms
  - Whether and to what extent schemes should be broadened to direct competitors, related industrial sectors, and other areas of the economy
  - Whether to require opening of support measures across Member States' borders

2. An assessment of State aid to energy-intensive users (EIUs)

- The options will span a range, including:
  - An update of the list of eligible sectors based on the most recent data and case practice
  - Greater consistency with the new State aid rules for indirect costs compensation for the fourth trading period of the EU Emissions Trading System (involving greater alignment, including some form of environmental conditionality), while taking into account possible negative EU geographic distribution effects.

Online Questionnaire

First half of questionnaire

The EC seeks views on various energy and environmental issues, including:

- The impact of the COVID-19 pandemic on Member States' direction of resources to support environmental protection, including decarbonisation
- Whether, in light of technological progress and market evolutions (e.g., a significant decrease in equipment costs), the State aid possibilities for environmental protection purposes should be more restricted or subject to stricter conditions — or instead widened
- The areas in which State aid should be allowed (e.g., renewable electricity, demand response, energy storage, etc.)
- The areas in which aid covering operating costs (in particular, energy costs and raw material costs) on top of investment costs should generally be allowed, taking into account:
  - The areas in which aid paid out as a premium covering the difference between the production costs for one unit and the revenues is more suited than aid paid ex ante as a share of the investment costs
  - Whether operating aid impacts a beneficiary's behaviour differently than investment aid
  - The usefulness of different instruments to incentivise investments in renewable energy
- The impact and effect on incentives of the use of carbon contracts (for difference)
- Whether aid intensities combined with the use of a counterfactual should be maintained as a way to measure the proportionality of the aid, and the specific types of investments where applying aid intensities would be particularly useful
- The effectiveness of the "funding gap" approach to calculating the amount of aid that can be received
- Any projects that were not implemented due to the current approach in the EEAG
- Whether a clawback mechanism should be introduced to avoid excessive funding
- The potential competition distortions that may result from the continued and increasing use of State aid for environmental protection (over-compensation, crowding-out of private investment, greenwashing, lack of cost effectiveness, and "deep-pocket" distortions), as well as the pros and cons of various tools that could be used to reduce these distortions, including:

- Transparency requirements (including reporting the actual cost per unit of environmental benefit, such as emissions reduced)
- Broadening by increasing the eligibility for participating in an aid scheme from a specific beneficiary or group of beneficiaries (in terms of technology or sector) to other beneficiaries, direct and indirect competitors, sectors, or technologies that can contribute to the same objective
- Cross-border opening of aid schemes by requiring national support schemes to be open to projects in other Member States that can contribute to the achievement of the targeted objective
- Use of competitive bidding processes for more types of aid than at present
- Public consultation by Member States on a public platform, covering the main features of the support scheme as well as the proposed eligibility and the way projects would be selected for support

Second half of questionnaire

The EC seeks views on aid in the form of reduced energy charges for EIUs, including the following:

- How, in the context of the Green Deal and the planned decarbonisation, the various components of the electricity bill are expected to change in light of the EU's increased climate ambitions
- Based on the expected levels of charges and levies to finance renewables and other decarbonisation objectives (decarbonisation levies) or energy taxes, the risk that EIUs would relocate (carbon leakage), on the basis that either the existing exemptions for EIUs will continue to apply or are removed
- The risk that the expected levels of taxes and levies on electricity will significantly impair incentives for EIUs to electrify their production processes
- Ratings of the use of various sources of financing for support to decarbonisation schemes
- Whether the need for reductions for EIUs could be reduced or eliminated if decarbonisation measures were financed through means other than surcharges on electricity
- The relevant factors for identifying the sectors that will be at risk of relocation due to taxes and levies with a decarbonisation objective
- Whether (in order to minimise the risk of relocation while ensuring a level playing field) the possibility of granting reductions to EIUs be limited to only those Member States that have reached a certain EU-wide minimum level (in absolute amount) of decarbonisation levies
- Whether the granting of reductions to EIUs should be made conditional upon requirements to invest part of the support in energy efficiency and/or the decarbonisation of production processes

Next Steps: Timeline

10 December 2020: Deadlines for comments on the Inception Impact Assessment

7 January 2020: Deadline for responses to the EC's questionnaire

2021: Further public consultation (of eight weeks) on a draft text of the proposed revised EEAG

Spring 2021: EC summary report of the public consultation

Summer 2021: Final EC report of the public consultation

Autumn 2021: Adoption of new EEAG

1 January 2022: Entry into force of new EEAG

Sources

Please see here the Inception Impact Assessment.

Please see here the online questionnaire.