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## Energy Community Forum: Competition law in the energy sector

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# #3 Energy and Environmental State Aid Guidelines under review

Webinar - 29 January 2021\*

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**A step-change in the role of State aid to support industrial policy is possible if strategic autonomy becomes a priority for the European Union.”**

James Webber



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### James Webber

James Webber introduced the panel members and the current importance of the topic, noting the large number of public consultations in the field over the past six months and other calls for changes, such as the Covid-19 pandemic and the recent CJEU case-law.

A step-change in the role of State aid to support industrial policy is possible if strategic autonomy becomes a priority for the European Union. If we support building assets in the EU through subsidies, as well as sustainability, this will become much more controversial considering the different external trade agreements the European Union has concluded or is about to.

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**The Guidelines should particularly be turned into a decarbonisation tool, supporting the EU to reach its objective.”**

Nicola Pesaresi



## Nicola Pesaresi

Nicola Pesaresi presented the forthcoming revision of the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (EEAG), expected by end 2021, after a one-year extension to make room for reflection on how to ensure that the Guidelines support the European Green Deal. The Covid-19 pandemic has also called for a rapid and substantial revision of the Guidelines, as the Recovery and Resilience Plans dedicate half of the flagships to energy and environmental protection. Concomitantly, a call for contribution was launched on how competition policy could support the Green Deal. The result of such a process will be an important input to the revision process of the Guidelines.

According to the 2020 fitness check of the State aid framework, the current Guidelines have facilitated a more effective and less distortive implementation of State support for environmental protection and energy. However, several provisions need to be clarified and some issues require an adjusted response, such as the need to adapt to new technological developments, new types

of supports and recent environmental and energy legislation. This retrospective exercise has not been dedicated to the level of ambition subsequently raised by the Green Deal and the Recovery Plan. A wider consultation on the revision of the Guidelines has been launched in the second semester of 2020.

The scope of the Guidelines should be broadened with rules designed around broader policy objectives (environmental protection, security of supply). In a long-term perspective, as shown by the recent consultation, the Guidelines should particularly be turned into a decarbonisation tool, supporting the EU to reach its objective. Moreover, it should be ensured that aid is directed where it is necessary, in a proportionate manner, with limited distortion of competition and in order to achieve the policy objective through cost-effectiveness. We need to find a balance between the capacity of national funds and the need to ensure competition and preserve market efficiency.

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**A violation of EU environmental rules would exclude compatibility of the measure with the internal market.”**

Leigh Hancher



## Leigh Hancher

Leigh Hancher highlighted some of the issues discussed in the *Hinkley Point* ruling (Case C-594/18 P) and the lessons that can be drawn for the revision of the Guidelines in light of the Green Deal. Austria objected the appraisal of the Commission concerning an important project to replace Britain's ageing nuclear power plants. The Court could not avoid ruling on the merits of such a political case because the burden to establish a right of standing is alleviated for privileged applicants such as a Member State. The Advocate General Hogan stated in his Opinion that the Court was not the right forum to settle such a political controversy between Member States which are in favor of nuclear power and those which are not.

The Court firstly examined the compatibility of the large and complex aid granted to Hinkley. The objective of common interest put forward by the Commission would be to allow nuclear investments to faster forward.

The market would not provide the funding on time, which would result in a certain capacity shortfall in the UK. The State aid would therefore ensure security of supply in the UK. The reasoning was similar with regard to the existence of a market failure, linked to the need to provide timely funding for a project of this scale.

Advocate General Hogan stressed that the principle of environmental protection in Article 11 TFEU does not apply to nuclear. According to this controversial position, Austria could not argue that nuclear was per se contrary to those principles. The Court ruled that State aid regulation could apply to the nuclear sector and that all the principles set out in Article 11 TFEU and Article 37 of the Charter apply to the nuclear sector. Hence, a violation of EU environmental rules would exclude compatibility of the measure with the internal market. Those principles have to be taken into account in the strict proportionality test of Article 107(3)

c) and its two conditions: that aid would pursue economic development objectives and would not have an adverse effect on trade. But environmental objectives do not figure in this second test and the conditions elaborated in the Guidelines are put aside.

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## Juliette Delarue

Juliette Delarue presented that there are two ways to see State aid rules, either only as a means to preserve competition in the internal market or as a policy instrument to control the support that Member State gives to certain economic activities in order to achieve certain goals. An appropriate regulatory and competition framework with an environmental playing field are needed to channel State aids to achieve the Green Deal objectives. Environmental protection and subsequent targets (decarbonisation, health, biodiversity) must irrigate State aid practice and the Guidelines are the starting point.

Improving consistency between State aid rules and EU law should be an objective of the revision, with a certain number of changes in the reasoning as in the wording of the Guidelines. Clear wording and effective verification by the Commission that activities comply with environmental law are crucial. As regards the structure of the Guidelines, separating environment and energy maintains a problematic reasoning of separating the need to ensure security of supply on one side and the need to do it in a clean manner by decarbonising our energy systems on the other side.

How to channel aid to projects which are actually beneficial for the environment in the long-term was anticipated in the Green

This imposed return to the Treaty by the Court raises many questions on the future practice of the Commission, particularly on the balancing test between the positive and negative effects of the measures.

Deal. State aid rules must both support activities pursuing the Green Deal and prevent support to those harming its achievement. Juliette Delarue calls for the phasing out of subsidies to incumbents and those that harm the objectives we want to pursue. The review would be the occasion for the Commission to really stand by the « phase harmful subsidies » principle, with concrete applications.

The implementation of the Energy Efficiency First principle is necessary to influence the assessment of the necessity for aid for energy infrastructures but also for resource adequacy measures. In the current Guidelines, there is a need to consider the negative impacts of subsidies while taking into account the need to assess trade-offs between different areas and policies. In the field of energy, other objectives have so far mostly prevailed in the trade-off, while a fair combination of these objectives is desirable.

The new Guidelines will have to be consistent with the different principles of the Treaty but also with Commission's current policies. For instance, there should be a strong presumption that support for gas infrastructures is no longer necessary as EU funding is no longer justified to support this industry. The level of control that applies to EU funding should also be carried out in State aid control.

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## Marc Isabelle

Marc Isabelle explained the competition between aid granted under the EEAG or the Important Project of Common European Interest (IPCEI), two potentially substitutable sets of regulations to support investments in the energy transition. In the coming years, companies will certainly balance the two options.

The Guidelines have succeeded in shaping the energy and environment landscape in which every European citizen is navigating through their daily life. According to a recent report of the European Environmental Agency, European energy supply is still largely dominated by imported fossil fuels but the share of renewable energy sources in primary



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Marc Isabelle



energy supply has more than tripled and will continue to increase rapidly. In terms of cost, environmental aids remain the main policy focus of Member States. In 2018, 55% of the 120 billions of euros of State aid was allocated to environmental protection and energy savings. But there is a key policy question regarding the non-European projects supported. For example, most European solar panels are produced in China, due to export subsidies. In 2018, the European Commission abandoned the custom duties imposed on imports of Chinese photovoltaic panels.

Explicitly mentioned in article 107 (3) b), TFEU, IPCEI stands as a State aid legal basis to promote the realisation of important projects of common European interest, compatible with the internal market. This tool has not been used in a long time but the Covid-19 outbreak changed the situation. It would henceforth matter for strategic independence, security of supply and economic resilience. IPCEI addresses both the challenges of climate change and European strategic independence, with a

focus on environmental protection and innovation. It brings together public and private actors to undertake projects that will bring significant benefits to the EU and its citizens, and is particularly suitable in the energy and transport sectors. This framework is also currently being modernised, with the aim to offer Member States and companies the support they need to address market failures and cohesion concerns in different areas.

In the hydrogen market, green hydrogen could be very powerful to decarbonise many heavy industries but has high costs, without the possibility of fair competition with cheaper fossil-based products. A strong public support would therefore be provided with the forthcoming IPCEI hydrogen technological system. Fifteen Member-States are supporting dozens of participants along the value chain, from renewable electricity generation to various uses of hydrogen in the mobility and industrial sectors. IPCEI will be able to leverage both environmental protection and innovation, with a consequent reduction in the cost of green hydrogen.

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## Questions and answers

In response to a question on the meaning of EU common interest in the light of *Hinkley Point*, Leigh Hancher recalled that the Court ruling that Guidelines could be contrary to article 107 (3) c) TFEU is a step backwards from the guidance offered by the Guidelines on different objectives of common interest in various areas. Nicola Pesaresi detailed the necessary adjustment of the balancing test to reflect the ruling by which the Court shows the division of roles between legislation (internal market, climate change) and State aid enforcement.

A participant asked whether a combination of energy measures, such as the use of nuclear for hydrogen, was possible. Nicola Pesaresi recalled that the freedom of Member States to choose their energy mix is recognised by the Treaty. The Euratom treaty makes it possible to support investments in nuclear. However, the recent European Hydrogen Strategy refers to low-carbon energy sources to support the development of hydrogen. ■