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A State Aid Framework for a Green Recovery

Mainstreaming climate protection in EU
State aid law

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legal analysis conducted with

REDEKER | SELLNER | DAHS

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Top Lines

- The EU Treaties provide the EU Commission with a powerful role in overseeing that State aid granted by national governments does not undermine the functioning of the EU's Single Market.
- Legal analysis conducted with lawyers from Redeker Sellner Dahs demonstrates that the Commission is *authorised* and *required* under the Treaties to apply environmental considerations even in its assessment of non-environmental aid. However, to date the EU Commission has been very reluctant to exercise its wide discretion in State aid matters to push for an alignment of national aid measures with European climate and energy objectives.
- The massive impact of current recovery programmes on future fiscal space and on the quality of Europe's economic trajectory into the future demands that EU State aid disciplines play a more active role in pushing for consistency of national economic stimulus programmes with EU climate protection and energy transition objectives.
- On 22 September 2020, the European Commission's Executive Vice-President and Commissioner for Competition Margrethe Vestager announced her intention to provide for "firm rules, requiring that [State] aid mustn't undermine the Green Deal." This report is a response to this call.
- Indeed, the report makes concrete recommendations as to how State aid rules and decision-making procedures should be reformed to ensure their consistency with Europe's commitment to become the first climate-neutral continent by latest 2050.
- **Specifically, we propose adding a new compatibility assessment criterion to the Commission's State aid decision-making practice that addresses the consistency of aid measures with EU climate protection and energy transition objectives.**

Executive Summary

There is widespread acknowledgement that Europe's economic recovery from the COVID-19 pandemic must be green. What is intended – and what this report calls “Green Recovery” – is a design of European and national recovery programmes that not only “do no harm” to the climate and the environment but also positively targets investments in and support to those industries and technologies that contribute to meeting Europe's pledged decarbonisation objectives.

National economic recovery measures that inject money into the economy may offer selective advantages to companies or (sub)sectors and thus qualify as State aid under the EU Treaties.

The EU Treaties provide the EU Commission with a powerful role in overseeing that State aid granted by national governments does not undermine the functioning of the EU's Single Market.

To date, the EU Commission has mostly focused its State aid oversight on limiting market distortions rather than ensuring that aid measures (at large) contribute to, or at least do not harm, climate and energy policies and regulations. In contrast, the EU Commission has been very reluctant to exercise its wide discretion in State aid matters to more generally push for an alignment of national aid measures with European climate and energy objectives when aid measures aim at other purposes than climate or energy.

The legal analysis conducted with lawyers from Redeker Sellner Dahs demonstrates that the Commission is *authorised* under the EU Treaties to consider environmental objectives in State aid decisions on non-environmental aid. The legal analysis furthermore argues that the Commission is *required* under the Treaties to apply environmental considerations in State aid decisions on non-environmental aid.

Indeed, this further evolution in EU State aid law is required due to the combined effect of the overwhelming scientific evidence of a looming climate crisis and increasingly stringent international and European commitments to rapidly reduce the EU's greenhouse gas emissions by 2030 and achieve climate neutrality in Europe by latest 2050.

Against this background, the report makes **concrete recommendations** for further developing the EU Commission's State aid rules and decision-making practice, in order to ensure that the EU's internal market becomes a powerful lever to advance EU climate and energy transition objectives.

1 Introduction

EU State aid law has traditionally been used as an instrument focusing primarily on the functioning of the EU's internal market. Climate and environmental protection considerations have only been considered in context of State aid measures directly aimed at climate or environmental protection objectives. The European Green Deal of December 2019 acknowledged that State aid rules shall be made fit for supporting Europe's decarbonisation since they are one of the instruments to channel finance to Europe's green transition.

In December 2019, EU heads of state and government agreed to make the EU climate-neutral by 2050 and instructed the Commission to revise the EU's 2030 climate targets.¹ Some weeks into the COVID-19 pandemic, they called for an economic recovery programme in keeping with the European Green Deal and the EU climate objectives.² The special European Council meeting in July 2020 confirmed the ambition to streamline climate change into national recovery and resilience plans and to earmark 30% of the new European budget to finance climate action and sustainable development.

It makes good economic sense to align Europe's economic recovery programmes with EU climate objectives. First, economists project that recovery programmes complying with the European Green Deal will perform better economically than programmes focusing only on short-term economic stimulus.³ Second, the budget and time for tackling the climate crisis are limited. Third, the effects of economic stimulus programmes unfold over years, sometimes even decades, which is why they must be consistent with the European Green Deal if Europe hopes to achieve climate neutrality by 2050.

In the meantime, there is, however, evidence of significant economic stimulus that stands at odds with Europe's climate objectives. Most notably, Member States have provided the airline industry with more than EUR 33 billion in bailout funds with little to no climate conditions. Only the French and Austrian governments tied their aid to Air France and Austrian Airlines respectively to the condition that the airlines reduce emissions from domestic flights and commit to using at least 2% alternative fuels. Similarly, support for energy intensive industries have often not been linked to conditions to adapt their business models and reduce their future emission levels. This raises the question of what EU State aid levers exist for pushing national governments to effectively develop economic stimulus programmes that are consistent with decarbonisation objectives.

National stimulus measures will often qualify as "State aid" under EU law, notably when they will support investment into, or operation of, particular industries or technologies. Under the EU Treaties, national aid measures need prior assessment and authorisation by the Commission to be legal. The main rationale for the strong EU competence on State aid is to preserve the integrity and the functioning of the EU's internal market; indeed State aid measures, by granting a selective advantage to certain companies or sub-sectors, can distort a level playing field. But as public financial support, as an **instrument of economic policy**, can also help certain companies or sectors to develop while pursuing **positive economic, social or environmental objectives**, they can be justified in certain circumstances.

¹ See the [EUCO conclusions](#) from 12 December 2020, para 1 and 9.

² See the "[Joint Statement of the Members of the European Council](#)" from 26 March 2020.

³ See Hepburn et al, "[Will COVID-19 fiscal recovery packages accelerate or retard progress on climate change?](#)", Joint paper of 4 May 2020.

The massive impact of economic stimulus programmes on future fiscal space and on the quality of Europe's economic trajectory into the future now raises the urgent question of whether EU State aid disciplines can and should also play a role in pushing for consistency of national economic stimulus programmes with EU climate and energy transition objectives. This is the main focus of this report.

Section 2 introduces the concept of State aid and explains the respective roles of national governments and of the EU Commission in ensuring that concrete State aid measures are consistent with the EU's internal market.

Section 3 explains the role of State aid in national and European climate and energy transition policies so far and how aligning the dual objectives of economic recovery and long-term climate-neutrality pose new challenges to the Commission's assessment practice.

Section 4 summarises the main findings of the detailed legal analysis accompanying this report, done with lawyers from Redeker Sellner Dahs, on "The Commission's powers and duties to take environmental protection into account in the definition and implementation of State aid policies".

Section 5 sets out concrete recommendations on how the EU Commission should systematically integrate climate and energy transition considerations into its State aid rules and decision-making practice.

2 The concept of State aid and the respective roles of national governments and the EU Commission

2.1 What is State aid (and what is not)?

State aid is defined in Article 107 of the Treaty on the Functioning of the European Union (TFEU) as an advantage in any form whatsoever conferred on a selective basis to undertakings (enterprises) by public authorities that has the potential to affect trade or distort competition within the Union internal market. The criteria are cumulative.⁴

Public authorities can be national, regional or local authorities, or public or private entities under the control of the State. Common forms of advantages are direct grants, price premiums, loans or guarantees at preferential conditions or certain tax exemptions.

⁴ This report provides only a general background of State aid law to enable readers to understand the issues discussed in this report. Any particular aid measure or scheme should be subject to a specific legal assessment. You might need to seek legal advice as appropriate.

For more details on these criteria, see e.g. the FAQs section of our previous project website: <https://www.clientearth.org/state-aid-decarbonised-europe>

Measures in the fields of climate and energy that often qualify as State aid:

- aid for energy efficiency measures
- operating aid to energy from renewable sources, such as feed-in tariffs or premiums that guarantee renewable energy producers a minimum price
- exemptions for energy intensive users from certain environmental taxes or from funding support for renewable energy sources
- financing of, or free allocation of emissions trading allowances
- funding under InvestEU depending on the design of the measure

Measures that generally do not qualify as State aid:

- aid lower than €200,000 over 3 years
- renovation subsidies to households
- general measures applying to all business across a country
- loans or guarantees granted under market terms, or a State taking equity at shares' market value
- financing of projects via centrally managed EU Funds such as Horizon 2020 or from the European Investment Bank or the European Investment Fund.

2.2 What control does the Commission exercise?

Contrary to what can seem since the outbreak of COVID-19, State aid is generally prohibited and can only be paid after the Commission authorises it pursuant to a **compatibility assessment**.

Member States can pay an aid measure directly when (i) it does not qualify as State aid under legal criteria (see above); (ii) it is exempted under the General Block Exemption Regulation⁵ or (iii) the Member State merely implements a general scheme that had already been authorised as such.

In all other cases, Member States need to **notify their planned aid measures to the Commission** for prior authorisation. Member States' freedom in designing aid measures is primarily limited by the compatibility of national aid measures with the smooth functioning of the EU internal market; which the **Commission has exclusive competence to control**. The Commission regularly issues interpretative guidance in the form of frameworks, guidelines or communications laying out how it intends to exercise its wide discretion in assessing whether planned aid measures are compatible with the Treaties.

The traditional general compatibility assessment criteria of aid measures are:

- The need for State intervention
- The appropriateness of the measure
- The incentive effect of the measure
- The proportionality of the aid i.e. whether it is limited to the minimum necessary to achieve the objective
- The absence of undue distortion of competition

⁵ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 26.6.2014, p. 1

The Commission can issue:

- **decisions not to raise objections or positive decisions** confirming that aid is compatible with the internal market and can be paid;
- **decisions to open formal investigations** when it doubts that a measure is compatible with State aid rules.⁶ These decisions open a public consultation but are not frequent;
- **conditional decisions** requiring the Member State to amend its aid measure or disburse it under certain conditions. To avoid lengthy formal proceedings, Member States can commit themselves to make certain amendments to their schemes;
- **negative decisions** with or without a recovery order when the aid was already paid (recovery is the principle), when the aid is incompatible with the internal market. Negative decisions are statistically rare in the energy sector.

The General Block Exemption Regulation frames the types of aid measures that are deemed not to unduly distort the market. It sets out conditions on the design of those aid measures – so they can be paid directly by Member States without requiring a notification to, and authorisation from, the Commission.

For the types of measures with significant case-load (e.g. renewable energy support schemes), the Commission regularly sets out in **guidelines** (or notices) design principles for aid to be consistent with the internal market. Such guidelines are of eminent practical relevance. Indeed, the Commission will assume that an aid measure that complies with the relevant guidelines is prima facie compatible with the internal market and can be granted by the Member State; more detailed assessments are conducted when an aid measure departs from the guidelines.

The Council and the European Parliament also have a role to play in State aid. First, the Council may specify, upon proposal of the Commission, which categories of aid are to be considered compatible with the internal market (article 107(3)(e) TFEU).⁷ The Parliament has a more political role to play by adopting resolutions or raising questions to the Commission on State aid subject matters. Furthermore, when co-developing European laws, the Council and the Parliament can also identify sectors or sub-sectors that can be promoted in the common European interest.

The Commission's State aid decisions are subject to judicial review by the Court of Justice of the European Union. However, access to justice for third parties (competitors, civil society groups or citizens) remain difficult due to the high admissibility threshold⁸ and civil society groups have so far never been recognised as admissible in State aid matters. As a result, the environmental impact of a project that receives State aid is often ignored by the Court since market participants challenging a State aid measure generally rely exclusively on economic arguments to make their case.

⁶ See e.g. decisions to open formal investigations on resource adequacy measures for the UK (ordered by the General Court, 2019), France (2016 and 2017), Germany (2018) and Lithuania (2019); in the nuclear sector for aid to Hinckley Point C nuclear station (2013); on exemptions for energy intensive users in Poland (2019); on gas storage in France (2020).

⁷ See e.g. Council decision of 2010 on aid for the closure of uncompetitive coal mines, OJ L 336, 21.12.2010, p. 24-29.

⁸ Pursuant to the *Plaumann* ruling (ECJ, 1963), only claimants that demonstrate to be directly and individually affected by the grant of aid can be found admissible to challenge a Commission's decision. In State aid law, this demonstration requires, as per case law, that the claimant's competitive position on the market be affected by the grant of aid; barring the possibility for non-market operators such as civil society groups or citizens to act. Moreover, the EU "Aarhus Regulation" 1367/2006 on the application of the *Aarhus Convention* (1998) explicitly excludes State aid and competition matters from its scope, thus preventing environmental NGOs from challenging State aid decisions that relate to the environment. A communication on the lack of compliance of the EU with the Convention is pending before the Aarhus Convention Compliance Committee (communication ACCC/EU/2015/128).

3 The interface of State aid with EU and national climate and energy policy

3.1 How has State aid been developing in support of the climate and energy transition?

As environmental protection concerns grew in importance in international and EU policies and legislation, the Commission adopted guidelines for environmental protection in 2001 with the aim of supporting Member States' actions and spending towards better environmental protection. These guidelines were revised in 2008 and in 2014 (the Guidelines on State aid for environmental protection and energy⁹, "EEAG") to progressively integrate energy matters.

By explicitly allowing Member States to grant aid to those sectors under conditions laid down in guidelines, the Commission is providing legal certainty to Member States and market operators and thus is facilitating those investments. In some areas (e.g. renewable energy investments, greening industrial production and energy infrastructure), State aid guidelines and decisions are as critical as formal EU legislation on climate and energy; and in a way, complement them. For example, in the 2014 EEAG, the European Commission established competitive tenders as the default approach to allocating renewable energy support payments, significantly impacting the market environment for renewable energy deployment across Europe and signalling that support should eventually be phased-out as the cost of RES becomes cheaper.¹⁰

However, the 2014 EEAG have been much criticised by Member States, enterprises and analysts for not being aligned with fast-pace technical and market developments of the green transition. On specific issues such as energy efficiency, lack of legal clarity has also given Member States cover to reduce the scope of fiscal measures to support the transition. The Commission plans on revising the EEAG and the General Block Exemption Regulation in the course of 2021.

In addition, the Commission is not assessing State aid measures that are not directly related to environmental protection against environmental or climate considerations. Notably, **the Commission does not require Member States to propose alternative measures that would equally meet their original objective (e.g. providing employment in a region) but with a less environmentally harmful effect.**¹¹ We explain why we believe this is inconsistent with the Treaties and recent climate law developments in [Section 4](#) of this report; our recommendations for correcting this failure are in [Section 5](#).

⁹ EEAG, OJ C 200, 28.6.2014, p. 1

¹⁰ For a further analysis of the tendering of feed-in premiums, see Agora Energiewende's and ClientEarth's presentation of 22 October 2019 at: <https://www.documents.clientearth.org/library/download-info/workshop-presentation-is-the-existing-state-aid-framework-in-support-of-a-decarbonised-europe-22-october-2019/>

¹¹ The [draft revised guidelines on regional State aid](#) (released in August 2021) recognise that "regional aid may also contribute to the achievement of the objectives of the European Green Deal by providing support for sustainable investment and activities in those regions. (...) As such, and in order to contribute to lasting and sustainable regional development, regional aid shall not support activities that are environmentally harmful (...)". It also proposes that for notifiable individual investment aid (apparently not for general schemes), "The project's contribution to the greening of the regional economy should be considered. Investments which contribute substantially to the digital transition or transition towards low carbon, climate neutral or climate-resilient activities without bringing any significant harm to the environment and which comply with minimum safeguards will be considered as a factor that contributes to regional development".

3.2 How can and should the State aid framework influence a Green Recovery – and vice versa?

Economic recovery in the context of the COVID-19 crisis can be conceptually divided into three phases: **relief** (measures to provide emergency liquidity aid), **recovery** (measures to stimulate the economy) and **reform** (measures to enact far-reaching structural changes to society). There is no obvious beginning nor end date to these phases but we can broadly state that we still find ourselves in the relief phase of the COVID-induced economic crisis and are gradually transitioning to the recovery and reform phases.

The Temporary State Aid Framework released to help the Member States support *relief* measures during the pandemic¹² has left it to Member States alone to determine whether to attach green strings to their aid measures.¹³

For the *recovery* and *reform* phases, it is critical that State aid given to exit the economic crisis is also consistent with another major ongoing crisis, the climate crisis, and helps to transform the European economy towards climate-neutrality. There is a real danger that State aid aiming only at short and midterm economic objectives will result in an irreversible setback with regard to the EU's environmental objectives and a factual cancellation of the European Green Deal and its roadmap.

In July 2020, EU heads of state and government agreed on the outlines of a new multi-annual European budget that will apply from 2021-2027 and an additional short-term budget, Next Generation EU, that will apply from 2021-2023. At the time of writing this report, Member States are developing spending priorities in dialogue with the EU Commission. While there is a general commitment that this European budget will support the twin objectives of economic recovery and of accelerated climate action, one must acknowledge its relatively small size compared to national budgets. One of the key challenges in Europe's green recovery thus is the complementary and consistency of European and national spending priorities. National budgets and the European budget must be aligned on the twin objectives of an economic recovery and of rapidly accelerated climate action in the next decade.

It is particularly in this regard that an update of the EU's State aid framework in light of the EU Green Deal is needed. Or put differently, the COVID-19 crisis demands a significant acceleration and recalibration in the update of EU State aid rules:

- **Acceleration:** it is critical to immediately prepare an extended (temporary) state aid framework for recovery efforts that guides governments as they are developing post COVID-19 stimulus packages in the autumn.
- **Recalibration:** it is important to recalibrate the update of EU State aid rules, as effective economic recovery will need to be an overarching objective next to consistency with the European Green Deal. To the maximum extent possible, any temporary State aid framework provisions introduced should be consistent with the longer-term revision foreseen.

¹² The Commission issued on 18 March 2020 a Temporary Framework of State aid rules that relaxes rules on direct grants, loans and guarantees, as well as capital injection and equity measures that the Member States can take by 31 December 2020. The Temporary Framework was already amended and complemented three times, on 3 April, 8 May and 29 June 2020 ([see here](#)).

¹³ Whereas equity measures are tied with explicit restrictions on the payment of dividends and executive bonus, there are no particular sustainability conditions besides the obligation on large enterprises to report on the use of aid in alignment with the Union's climate-neutrality objective.

The following box highlights some positive examples of recovery and reform measures designed to also advance climate protection and environmental objectives.

Examples of adopted green recovery measures

Transport: Germany

Germany agreed to a recovery package that includes several measures in the transport sector to boost the economy while incentivising electric vehicles sales, developing charging infrastructure and supporting public transportation. The EUR 130 billion plan includes EUR 40 billion set aside for climate-centred policies: EUR 2.5 billion for public transportation funding, EUR 2.5 billion on battery cell production and electric vehicle charging infrastructure with the goal of installing 1 million public charging stations by 2030. The plan also doubles the electric and hybrid vehicle purchase subsidy from EUR 3,000 to EUR 6,000 until the end of 2021 for cars costing up to EUR 40,000. The motor vehicle tax will double for new high-emission cars bought in 2021. Electric vehicles are exempt from all motor vehicles taxes until the end of 2030.

Transport: France and Austria

Some countries have provided State aid to their airline industry with green conditions. France is distributing EUR 7 billion in loans to Air France under the condition that the airline reduces emissions from domestic flights by 50%, a commitment to use at least 2% alternative fuels by 2025 and reduce the number of short flights. Austria gave EUR 600 million in State aid to Austrian Airlines with the requirement that the airline reduce its carbon emissions by 50% by 2030 compared to 2018, increase fuel efficiency by 1.5% per year and slash the number of short-haul flights.

Buildings: Italy

As a part of its economic stimulus package, Italy is expanding a tax rebate to 110% (up from 65% prior to the crisis) to boost renovation projects focused on energy efficiency. In addition, all solar PV installations and storage systems related to the renovations will receive a 110% tax rebate (up from 50% prior to the crisis). The tax break applies to certain types of renovation projects: building insulation, replacement of cooling and heating systems in multi-unit apartment buildings and in single-family homes. The programme will last from July 1, 2020 to December 31, 2021.

Industry: Denmark

Denmark proposed various funding measures aimed at helping industries decarbonise. The policies include funding for biogas and other green gases for industries that are difficult to decarbonise and grants to industry to fund electrification and energy efficiency from 2020 to 2024. In addition, the Danish Executive Board for Business Development and Growth will provide funding to assist companies in remaining committed to the green transition and circular economy.

Power: Poland

Poland is planning to propose an economic stimulus plan with EUR 2.2 billion in funding aimed at reducing emissions and strengthening green investments in renewables and offshore wind projects in the Baltic Sea.

4 Legally speaking, what could the Commission do if it wanted and why?

Whereas State aid policies have evolved over the years towards primacy of economic and competition-related considerations, the overarching principle of integrating environmental protection requirements into Union policies found in Article 11 TFEU has long been omitted.

This principle provides that “*Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.*”

The analysis conducted with lawyers from Redeker Sellner Dahs, that is included at the end of this report, makes a comprehensive, detailed and compelling legal argument for including EU State aid law in the scope of the Union’s environmental integration clause.

Indeed, the combination of overwhelming scientific evidence of the looming climate crisis with increasingly stringent international and Union law obligations to tackle this crisis demands a **fresh interpretation** of overarching, core ‘constitutional’ principles of the EU Treaties, including the ones relating to internal market and competition (see box below).

Relevant provisions in the EU Treaties

Article 3(3) TEU: The Union shall establish an internal market. It shall work for the sustainable development of Europe that includes a high level of protection and improvement of the quality of the environment

Article 3 TFEU: The Union has exclusive competence for establishing of the competition rules necessary for the functioning of the internal market

Article 4(3) TFEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties

Article 7 TFEU: the Union shall ensure consistency between its policies and activities, taking all of its objectives into account

Article 11 TFEU: environmental protection requirements must be integrated into the definition and implementation of Union’s policies and activities

Consequently, we argue that, as opposed to the narrow approach of the Commission to date focusing merely on distortion of competition, environmental and climate objectives must systematically be streamlined into State aid rules and decisions. Whether planned State aid measures would (also) affect the achievement of EU and national climate objectives must systematically become part of the conversation between the Commission and national governments.

Streamlining environmental protection and climate objectives in **national recovery aid measures** put in place to combat the economic consequences of the COVID-19 crisis is the only way to ensure that they are **legally consistent** with the EU Treaties, the Paris Agreement, the Clean Energy for all Europeans package, the European Green Deal, the 2030 EU climate and energy targets, the EU’s objective of climate-neutrality by 2050 and the (future) EU Climate Law.

This reasoning is valid under both Article 107(3)(b) TFEU (aid for remedying serious disturbances in the economy of a Member State), which has been triggered extensively by Member States during the COVID-19 crisis and on which the Temporary Framework is based; and under the general provisions of Article 107(3)(c) TFEU (aid to facilitate the development of economic activities). In respect of the latter, while other objectives could be pursued by an aid measure (e.g. regional development, research, security of supply), compatibility with the internal market should be assessed in due light of an internal market that is directed towards a sustainable economic growth that is fully consistent with European climate and environment objectives.

5 A new compatibility assessment criterion: Recommendations for integrating climate protection and energy transition objectives into State aid practice

To navigate Europe's recovery from the dual economic and climate crisis, and in light of fundamental Treaty principles on policy integration and consistency (see above), we propose that the Commission adds a **new assessment criterion** in its regular assessment of the compatibility of State aid measures with the internal market. This assessment criterion would be **the impact of the aid measure** (*in other words, of the project or activity supported by the aid*) **towards the achievement of the Green Deal objectives.**

This new compatibility assessment criterion would be **additional to, but neither supersede nor cancel the existing ones.** When an aid measure seems to be beneficial towards achieving climate-neutrality (e.g. an investment aid towards abatement measures or innovative technologies, or operating aid for renewable energy sources), Member States would still need to demonstrate that their support is needed in light of market failures; is adequate to remedy the issues; incentivises the beneficiary to develop its activity and is proportionate to the minimum needed to achieve those objectives while not unduly distorting competition.

Specifically, the additional compatibility assessment criterion should include the following aspects:

5.1 Rule 1: Compliance with EU environmental laws

*Verification by the Member States, controlled by the Commission, whether a supported project or activity **complies with the beneficiary's EU environmental law obligations** (and national law which implements EU environmental law)*

The current EEAG and regional aid guidelines already provide that "To avoid that State aid measures lead to environmental harm, in particular Member States must also ensure compliance with Union environmental legislation and carry out an environmental impact assessment when it is required by Union law and ensure all relevant permits."

This rule reminds Member States and undertakings of their legal obligations. Nevertheless, this obligation is currently not fully integrated in State aid practice and should be horizontally applied

as a minimum legal requirement across all State aid guidelines, as well as the Commission's decision-making practice under the general rules of Article 107(3) TFEU. This is also clearly confirmed in the recent CJEU ruling on the aid measures to Hinkley Point C nuclear power plant, in which the Grand Chamber held that "44. *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) [...] 100. (...) If [the Commission] finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.*¹⁴

To give full effect to this clause, the authorisation to grant aid shall be subject to satisfactory evidence of compliance – with Member States and aid beneficiaries being required to provide relevant documentation to the Commission and the Member State respectively. In case of non-compliance with environmental obligations, recovery of the aid from the recipient should be triggered.

5.2 Rule 2: Climate and environment compatibility assessment

The Commission must conduct a "climate and environment compatibility" assessment of the aid measure (in practice, of the project or activity supported by it) with the objectives of the European Green Deal and EU climate & environmental policies.

According to this test:

- The more an aid measure increases – or does not mitigate – negative environmental or climate effects (e.g. in terms of biodiversity or greenhouse gas emissions¹⁵),
- the more long-term the negative environmental or climate effects of an aid measure (e.g. because of the life-time or persisting pollution of the supported investment or activity),
- the more alternative measures exist that would be less harmful to the environment or avoid negative environmental effects altogether, and
- the less 'safeguards' for mitigating negative environmental effects are proposed by the beneficiary of the aid, then
- **the less an aid measure can be considered to be in line with sustainable development in the internal market and the more restrictive the compatibility conditions should be.**

As a *minimum* benchmark, an aid measure that is not consistent with national climate protection and energy transition objectives set out in Member States' national energy and climate plans (NECPs) would not meet the test.

¹⁴ Judgment of 22 September 2020, *Austria v. Commission*, C-594/18P, EU:C:2020:742, para. 44 and para. 100

¹⁵ Cf: <https://www.eib.org/en/about/priorities/climate-and-environment/climate-action/index.htm>.

In practice, the application of this rule means that in order to grant aid to projects/activities involving substantial greenhouse gas emissions (as scientifically evidenced), Member States will need to demonstrate and the Commission will need to check that:

- a) **The measure is nevertheless a step in the right direction to achieve the EU's climate and energy targets.** To this end, Member States should require the aid beneficiary to produce a "climate and environmental impact report" demonstrating how the aid will be used for the beneficiary to align its activities with climate protection and energy transition objectives. It is essential that such reports are published alongside the State aid measure or decision thereon, duly monitored and effectively enforced by the Member States and the Commission and that the practice always evolves towards more stringent pathways and commitments;
- b) **No less environmentally harmful alternatives to supporting the said project or activity exist.** If so, a duly motivated demonstration of why these are not used should be provided;
- c) When aid is granted to an installation or infrastructure with a long life-time (beyond 2030 or 2050), the Commission shall require a plan of appropriate "**safeguard measures**" such as:
 - A review of the climate and environment compatibility assessment of the aid every five years and in any case when the relevant climate, energy, biodiversity targets are revised upwards;
 - Member States' responsibility to demonstrate to the Commission that the beneficiaries of the aid continue to meet all the criteria every five years (as part of the Member States' obligations to report regularly on the implementation of the aid to the Commission).
- d) **Projects or activities relating to fossil fuels are not subsidised anymore.** In view of the imminent exhaustion of the global carbon budget, the phasing out of fossil fuels subsidies must now be immediate and definite. Such phasing out objective has been present in State aid rules for a decade without any concrete implementation.¹⁶ It is repeated in the Green Deal¹⁷ and recently in the EU Strategy for Energy System Integration. If directly replacing a highly greenhouse gas emitting activity with zero-emission technologies is technically not (yet) possible, any public support to a lower emitting technology must be limited in time and linked to a clear commitment to move to a zero-emission technology as soon as possible.¹⁸

¹⁶ Council decision on aid for the closure of uncompetitive coal mines, rec. 2; IPCEI Communication, rec.19 , referring to the "Resource Efficiency Roadmap" and to fact that "the European Council Conclusions of 23 May 2013 confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure"; EEAG, rec. 6; exclusion of (hard) coal from the scope of the rescue and restructuring aid guidelines, rec. 16 and 18.

¹⁷ This has not stopped the Commission from authorising rescue aid to coal plants after the European Green Deal was published. See [Commission's decision on SA.56250](#) on Rescue aid in favour of Complexul Energetic Oltenia SA of 24 February 2020.

¹⁸ A specific example would be to replace blast furnace in steel production with direct reduced iron (DRI) technology that initially uses fossil gas and is as soon as possible replaced by clean hydrogen.

5.3 How and when to adopt those criteria?

In order to truly streamline this assessment, the Commission should issue a horizontal notice or communication specifying the modalities and requirements that this assessment involves and ensuring that the revision of all State aid guidelines are consistent with them.

Given the immediacy of the crisis and upcoming preparation of national recovery plans, this communication should be issued as soon as possible and in no event later than the assessment of the first post-crisis recovery measures.

6 Conclusion

Transforming our economies towards climate-neutrality will require a mainstreaming of the EU's climate and energy objectives across all relevant policy domains and thus a fundamental shift in the way the EU's horizontal policies are applied. The EU's State aid practice is no exception. While long viewed as exclusively relevant in the context of a fair competition between enterprises in the internal market, this narrow interpretation can no longer be accepted since it is not in line with the Commission's obligation to integrate Union environmental protection requirements into all policies and activities, ensure their consistency and establish an internal market that contributes to, and fully integrates sustainable development.

An update of the EU's State aid framework is urgently required to articulate how Member States should address the dual challenge of an economic crisis and the climate crisis at the same time when designing national recovery programmes.

The Commission must now demonstrate that it is willing to rise to the challenge and act more boldly and decisively than in the past to ensure the success of the European Green Deal.

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Legal analysis: The Commission's powers and duties to streamline environmental and climate protection requirements in State aid law and practice

legal analysis conducted with Dr. Simone Lünenbürger and Dr. Clemens Holtmann

Executive Summary

This analysis demonstrates that **environmental protection requirements must be integrated into the definition and implementation of the Union's State aid policy**, in particular with a view to promoting sustainable development. This should be **systematical** and not only when an aid measure directly pursues environmental protection.

An assessment of the **environmental and climate impacts of the project or activity** supported by an aid measure shall be an integral part of the State aid compatibility assessment with the internal market.

This proposal finds a legal basis in the **overarching principle of Article 11 TFEU** in combination with Article 3 TFEU that gives exclusive competence to the EU to define competition and internal market policies, supported by Article 7 TFEU ('coherence principle') and Article 4(3) subparagraph 3 TFEU ('duty of cooperation').

Against the background of the climate crisis it is time to look at this situation in general, but in particular at the unprecedented amounts of economic aid being made available by the Member States to deal with the COVID-19 crisis. There is a real danger that part of this aid aims only at short and midterm economic objectives and results in an irreversible setback with regard to the EU's environmental objectives and a factual [de facto?] cancellation of the European Green Deal and its roadmap.

Streamlining environmental protection and climate objectives in **national recovery aid measures** put in place to combat the economic consequences of the COVID-19 crisis is the only way to ensure that they are **legally and politically consistent** with the EU Treaties (of which the Commission is 'guardian'), the Paris Agreement, the European Green Deal, the 2030 EU climate and energy targets, the EU and national objectives of climate-neutrality by 2050 and the (future) EU Climate Law.

Whereas State aid policies have evolved over the years towards primacy of economic considerations, the principle of integrating environmental protection requirements into Union policies in the Treaty has remained steady. It just needs to revive.

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1 Framework for recovery aid decisions of the Commission

1. Member States are in principle free to link public funding of any kind to environmental (or other) conditions that go beyond the requirements of European law. This also applies to recovery aid to mitigate the economic impact of the COVID-19 crisis right now. At national level, there is no legal argument against making such aid dependent on environmental or climate protection-related conditions. In contrast, this report examines how the European legal framework enables and indeed requires the Commission to take into account environmental protection requirements in State aid guidance and in State aid decisions.

1.1 Development of the environmental objective as a cross-sectional task in the Treaties, in EU secondary law (including the European Green Deal roadmap) and in State aid law

1.1.1 The treaties

2. The development of the Treaties shows that the economic and social components of the original European Economic Community are complemented by an ecological component since the Single European Act of 1986.

3. Only 'Economic Policy' and 'Social Policy' were included as 'Policy of the Community' in the EEC Treaty in 1957. 'Environment' was added to the list in 1986 with the Single European Act with the objective to integrate environment protection requirements into other policy areas (emphases added):

'1. Action by the Community relating to the environment shall have the following objectives:

- *to preserve, protect and improve the quality of the environment,*
- to contribute towards protecting human health,
- to ensure a prudent and rational utilisation of natural resources.

2. Action by the Community relating to the environment shall be based on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. *Environmental protection requirements shall be a component of the Community's other policies.[...]*

4. Against the political backdrop of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (that embraced the paradigm of 'sustainable development' and saw the adoption of global treaties on climate, biodiversity protection and desertification), the 1992 Maastricht Treaty strengthened the Community's commitment to environmental protection. It includes, as one of its basic tasks, the promotion of 'sustainable and non-inflationary growth respecting the environment' (Article 2).¹⁹

5. With the 1997 Treaty of Amsterdam, environmental policy was elevated from a sectoral policy area to a general 'Principle' in Article 6 of the EC Treaty as an obligatory and 'cross-cutting environment integration clause', and was reoriented with regard to sustainable development:

'Environmental protection requirements *must* be integrated into the definition and implementation of Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

6. With the 2007 Lisbon Treaty, the cross-cutting environment integration clause in Article 6 EC Treaty was moved to Article 11 TFEU, replacing the term 'Community' with 'Union' and the waiver of the words 'referred to in Article 3'.²⁰ Article 11 TFEU is classified in Title II of the TFEU as "provision having general application".

7. It must be noted that the objective obligation in Article 11 TFEU applies to the definition (i.e. the development) of Union policies as well as to their 'implementation' by EU institutions. In consequence, Article 11 TFEU also obliges the Member States when they are implementing EU law.²¹

8. The 2007 Lisbon Treaty made the EU Charter of Fundamental Rights (CFR) legally binding. Article 37 CFR emphasises the importance of environmental protection²²:

'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

Whereas Article 37 CFR directly obliges the EU institutions but read in conjunction with Article 51 (1) CFR, the provision is legally binding also for the Member States when implementing European law.

9. Lastly, one shall recall Article 7 TFEU. It overarches the Union's action: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.' Article 3(3) TUE makes "a high level of protection and improvement of the quality of the environment" fully part of the development of the Union's internal market.

¹⁹ In line with Principle 4 of the Rio Declaration on Environment and Development of 1992: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.', cf General Assembly of the UN, Report of the UN Conference in Environment and Development.

²⁰ Former Art. 3 TEC listed the competences falling under the scope of Union law. Nowadays, Art. 4 TFEU divides those competences between the Union's exclusive competence and the competences shares between the Union and the Member States.

²¹ Nettesheim, 'Grabitz/Hilf/Nettesheim' Commentary on the TFEU, Art. 11 recital 17 (German language); 'Single market and environment', COM (1999), 263, paragraph 2, cf: <http://aei.pitt.edu/5965/>.

²² Cf with respect to Art. 37 CFR also Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht', ZUR 2011, 563 (German language).

1.1.2 EU secondary law and the European Green Deal

10. At their meeting in June 1998 in Cardiff, EU heads of state and government instructed all relevant Council formations to integrate environmental considerations into their respective activities. The so called ‘Cardiff process’ marks the political beginning of efforts to put (then) Article 6 EC Treaty into practice.²³
11. The ‘Climate and Energy Package 2020’²⁴ and the ‘Framework for Climate and Energy Policy 2030’²⁵ combine multi-sector climate laws (such as the EU Emissions Trading System or the EU Effort Sharing Regulation) with sectoral legislation on renewable energy, on buildings, on vehicles, or on specific products, to name a few.
12. Environment integration was taken to the next level by the European Green Deal²⁶: in the face of a rapidly deteriorating natural environment and with potentially catastrophic consequences of a rapidly warming climate, the Commission is now placing the rapid reduction of greenhouse gas emissions and resource use at the centre of Europe’s strategy for growth, modernisation and innovation.²⁷
13. On 12 December 2019, the European Council unanimously endorsed ‘the objective of achieving a climate-neutral EU by 2050, in line with the objectives of the Paris Agreement’.²⁸ Based on Article 15(1) TFEU, it thereby established a general political direction and priority for future Union action.
14. On 4 March 2020, the European Commission followed up on this priority-setting by the European Council when proposing a European Regulation to enshrine the 2050 climate-neutrality target into law (the Climate Law).²⁹ The Climate Law is a prime example for an integrative approach to environmental protection since the effective reduction of greenhouse gas emissions requires measures in all sectors of the economy. It would establish a binding obligation on the relevant Union institutions and the Member States to take the necessary measures at Union and at national level to collectively achieve the climate neutrality objective.³⁰

²³ Commission Working Document, ‘Integrating environmental considerations into other policy areas - a stocktaking of the Cardiff process’, COM (2004) 394 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1591470880067&uri=CELEX:52004DC0394>.

²⁴ A set of binding legislation to ensure the EU meets its climate and energy targets for the year 2020, cf: https://ec.europa.eu/clima/policies/strategies/2020_en.

²⁵ ‘A Framework for Climate and Energy Policy 2020-2030’, COM (2014) 15 final cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN>.

²⁶ ‘The European Green Deal’, COM (2019) 640 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN>.

²⁷ Cf https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

²⁸ Cf General Secretariat of the Council, ‘European Council meeting (12 December 2019) – Conclusions’, EUCO 29/19 of 12 December 2019, paragraph 1: The decision makes explicit that one Member State (i.e. Poland) is not yet committed to implementing this objective. This does not call into question the unanimous endorsement of the objective as such. It makes the (political) point that EU-level implementing measures (including specific financial support) have yet to be devised. Or in the words of Michał Kurtyka, the Polish minister for climate and energy: ‘Poland subscribed to the objective of 2050 EU climate neutrality ... but we are not sure whether we’re able to reach [the goal] at the same time’ (quote from Politico of 9 June 2020 ‘Poland launches green investment plan’).

²⁹ Cf: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12108-Climate-Law> and https://ec.europa.eu/clima/policies/strategies/2050_en with the link to the proposal.

³⁰ Cf Article 2.2.

15. At its meeting of 5 March 2020, the Council of the EU adopted by consensus the EU's long-term low greenhouse gas emission development strategy. This strategy constitutes an update of the EU's and the Member States' determined contributions according to Article 4(2) of the Paris Agreement. The strategy recalls the full commitment of the EU and its Member States to the Paris Agreement and its long-term goals. It refers to the endorsement by the European Council, as reflected in the conclusions of its meeting of 12 December 2019, of the 2050 climate-neutrality target. By agreeing and delivering on ambitious social and economic transformation, the EU and its Member States aim to inspire global climate action and demonstrate that moving towards climate neutrality is not only imperative but also feasible and desirable.³¹
16. Pursuant to its special meeting on 17-21 July 2020, the European Council recognised that "the exceptional nature of the economic and social situation due to the COVID-19 crisis requires exceptional measures to support the recovery and resilience of the economies of the Member States. The plan for European recovery will need massive public and private investment at European level to set the Union firmly on the path to a sustainable and resilient recovery, creating jobs and repairing the immediate damage caused by the COVID-19 pandemic whilst supporting the Union's green and digital priorities." It also took the commitment that "Climate action will be mainstreamed in policies and programmes financed under the MFF [Multiannual Financial Framework] and NGEU [Next Generation EU]. An overall climate target of 30% will apply to the total amount of expenditure from the MFF and NGEU and be reflected in appropriate targets in sectoral legislation. They shall comply with the objective of EU climate neutrality by 2050 and contribute to achieving the Union's new 2030 climate targets, which will be updated by the end of the year. As a general principle, all EU expenditure should be consistent with Paris Agreement objectives."³² The conclusions do not refer to State aid, however.

1.1.3 State aid law

17. The first EU rules on State aid were motivated purely by industrial policy aims. A strong focus was on the coal and steel sectors. As early as 1965, the Commission adopted the first decision for the coal industry.³³ The aim was to provide state support for the restructuring of the European coal sector in response to growing pressure from cheap coal imports. The last purely industrial policy- oriented aid framework for the coal sector expired at the end of 2010.³⁴ The last specific legal basis for granting aid to strengthen the steel sector expired in 2002.
18. Subsequently, there were only provisions laying down the criteria for the compatibility of closure aid for the steel sector³⁵ and for uncompetitive coal mines.³⁶

³¹ Cf. <https://data.consilium.europa.eu/doc/document/ST-6612-2020-INIT/en/pdf>

³² <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>

³³ Commission decision No. 3/65/ECSC regarding the Community system of measures taken by the Member States to assist the coal-mining industry, OJ 31, 25.2.1965, p. 480.

³⁴ Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry, OJ L 205, 2.8.2002, p. 1.

³⁵ 'Rescue and restructuring aid and closure aid for the steel sector' C (2002) 315, OJ C 70, 19.3.2002, p. 21.

³⁶ Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines, OJ L 336, 21.12.2010, p. 24.

19. The green component in the State aid rules has significantly gained in importance in recent years. The Environmental Protection Aid Guidelines, which were first adopted in 1994³⁷, are regularly being updated by the Commission along with general block exemption rules, and the current rules shall be revised by the end of 2021.³⁸
20. Although State aid law has developed dynamically in line with evolving EU policy priorities, the Commission's decision-making practice only partially reflects its obligation under Article 11 TFEU to integrate environmental protection requirements into its State aid control. Indeed, environmental concerns are largely excluded from the assessment of aid other than environmental aid, despite the Commission's explicit commitment to this in its 2001 Environmental Protection Aid Guidelines:³⁹

'Under Article 6 of the EC Treaty, environmental policy objectives must be integrated into the Commission's policy on aid controls in the environmental sector, in particular with a view to promoting sustainable development. Accordingly, competition policy and environmental policy are not mutually antagonistic, but the requirements of environmental protection need to be integrated into the definition and implementation of competition policy, in particular so as to promote sustainable development.'⁴⁰

Under the headline 'Integration of environmental policy into other State aid guidelines' the Commission continued:

'When the Commission adopts or revises *other* Community guidelines or frameworks on State aid, it will consider how those requirements can best be taken into account. *It will also examine whether it would not be expedient to ask the Member States to provide an environmental impact study whenever they notify it of an important aid project, irrespective of the sector involved.*'⁴¹

21. However, the Commission did not follow-up on this commitment. Up to date, there is no specific regulation or guideline that would articulate how Member States should approach the integration of environmental protection objectives in aid measures that primarily aim at non-environmental objectives, such as at social and regional welfare. As will be explained below, the climate crisis and the European

³⁷ Community guidelines on State aid for environmental protection', 1994, OJ C 72, 10.3.1994, p. 3; Information from the Commission, 'Community guidelines on State aid for environmental protection', 2001, OJ C 37, 3.2.2001, p. 3; Community guidelines on State aid for environmental protection, 2008, OJ C 82, 1.4.2008, p. 1; Guidelines on State aid for environmental protection and energy 2014 – 2020', 2014, OJ C 200, 28.6.2014, p. 1.

³⁸ Commission, press release of 2 July 2020 available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1247. See also Retrospective evaluation support study on State aid rules for environmental protection and energy, published on 2 June 2020, cf: https://ec.europa.eu/competition/state_aid/modernisation/fitness_check_en.html; and ClientEarth's response to the fitness check consultation of 18 July 2019, cf: <https://www.documents.clientearth.org/library/download-info/clientearths-response-to-the-targeted-consultation-for-the-evaluation-of-the-guidelines-on-state-aid-for-environmental-protection-and-energy-2014-2020/>

³⁹ In force until 2008.

⁴⁰ Community guidelines on State aid for environmental protection, 2001, OJ C 37, 3.2.2001, p. 3, recital 3; in a footnote the Commission states, that it also set out its commitment to integrating environmental policy into other policy areas in its working paper of 26 May 1999 entitled Integrating environmental aspects into all relevant policy areas and in its report to the Helsinki European Council on integrating environmental concerns and sustainable development into Community policies SEC (1999) 1941 final.

⁴¹ Community guidelines on State aid for environmental protection', 2001, OJ C 37, 3.2.2001, p. 3, recital 83.

Green Deal orientation now require the Commission to systematically take account of environmental protection objectives also for non-environmental aid measures.

1.2 The link to relief and recovery aid in the context of the COVID-19 crisis

22. The COVID-19 pandemic makes the integration of environmental and climate considerations into State aid law more urgent than ever. Especially in times of crisis there is a risk that environmental efforts made so far are jeopardised and that short-term economic relief is given priority over long-term sustainable growth by the Member States. The Commission already stressed this in its 2009 financial framework:

'[...]There could indeed possibly be dramatic consequences if, as a result of the current [financial] crisis, the significant progress that has been achieved in the environmental field were to be halted or even reversed. For this reason, it is necessary to provide temporary support [...], thereby combining urgent and necessary financial support with long-term benefits for Europe.'⁴²

23. The Commission states now:

'Healthy and resilient societies depend on giving nature the space it needs. The recent COVID-19 pandemic makes the need to protect and restore nature all the more urgent. The pandemic is raising awareness of the links between our own health and the health of ecosystems. It is demonstrating the need for sustainable supply chains and consumption patterns that do not exceed planetary boundaries. [...] Investing in nature protection and restoration will also be critical for Europe's economic recovery from the COVID-19 crisis. When restarting the economy, it is crucial to avoid falling back and locking ourselves into damaging old habits. The European Green Deal – the EU's growth strategy – will be the compass for our recovery, ensuring that the economy serves people and society and gives back to nature more than it takes away.'⁴³

24. If Member States now fail to integrate climate and environmental protection considerations into their recovery packages, it almost certainly means that the massive public investments needed for implementing the European Green Deal and for transitioning to a climate-neutral European continent by 2050 will no longer be available.

25. The Commission has committed to amend several State aid rules in light of the Green Deal. However, this revision will only take place in 2021 – with the guidelines applying only as from 2022.⁴⁴ This comes definitely too late for recovery aid designed to mitigate the immediate economic impact of the COVID-19 crisis. Hence, the current COVID-19 crisis makes it more urgent than ever to ensure that State aid

⁴² Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 16, 22.1.2009, p. 1, point 1.1, cf: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv:OJ.C_.2009.016.01.0001.01.DEU&toc=OJ:C:2009:016:FULL.

⁴³ 'EU Biodiversity Strategy for 2030', COM(2020)380 final, p.1, cf: https://ec.europa.eu/info/sites/info/files/communication-annex-eu-biodiversity-strategy-2030_en.pdf.

⁴⁴ Commission's press release of 2 July 2020, at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1247

does not support a ‘fall back’ to industrial policies of the last century. The two most pressing crises – the climate crisis and the economic consequences of the pandemic – need to be faced at the same time. With the resolution of 15 May 2020 on the new multiannual financial framework, own resources and the recovery plan (2020/2631(RSP)) the European Parliament (emphases added)

‘20. Calls for this massive recovery package to transform our economies and strengthen their resilience through the pooling of strategic investments to support SMEs, [...] calls therefore for investments to be prioritised into the Green Deal, the digital agenda and achieving European sovereignty in strategic sectors, [...]

22. Stresses that these funds will be directed to projects and beneficiaries that comply with our Treaty-based fundamental values, the Paris Agreement, the EU’s climate neutrality and biodiversity objectives, and the fight against tax evasion, tax avoidance and money laundering; urges the Commission to ensure that State aid guidelines are compatible with such conditions;⁴⁵

26. The present report focuses on how the Commission can ensure that the requirements of the Treaty, the call of the Parliament and the European Council’s commitment to mainstream climate action into recovery plans are met.

⁴⁵ Cf: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0124_EN.html.

2 Incompatibility of measures contrary to the specific provisions of the Treaty – the importance of Article 11 TFEU

Anthropogenic climate change that, 40 years ago, seemed a distant possibility, has become an immediate and urgent problem. Only drastic and sustained measures to rapidly reduce greenhouse gas emissions by around 7% per year over the next 20-30 years can still avoid a potentially catastrophic planetary heating that would render large parts of the earth surface uninhabitable for humans.¹ This urgency must have a bearing on the relevance of Article 11 TFEU for the Commission and to related obligations for Member States not to endanger the Union's environmental objectives. The following recent examples (among others) show that it is now well recognised by the EU and other institutions that the climate is at risk:

- IPCC Special Report on 1.5 Degrees published in October 2019, prior to the Katowice global climate conference.
- Leading climate scientists warn against the irreversible passing of 'tipping points' in the Earth's climate system if warming is not kept at 1.5 degrees Celsius.¹
- Since April 2019, 1,496 jurisdictions and local governments covering 820 million citizens declared a climate emergency.¹
- In November 2019, the newly elected European Parliament adopted a resolution declaring a state of climate emergency,¹
- In its 15th Global Risks Report published in January 2020, the World Economic Forum (WEF) found that, for the first time in its reporting history, all of the 'top long-term risks by likelihood' are environmental, and climate change is rated the most important global threat¹

The climate emergency leads to the realisation that economic growth (also) in the internal market is threatened by climate change like never before. In 1999, environmental protection measures might have been perceived as the most adequate support for sustainable development and growth. Nowadays, medium- and long-term economic growth is no longer possible without taking environmental protection requirements into account. The only option for pursuing economic development is to stay within planetary boundaries.

The link between the economic conditions for competition and the functioning of the internal market (Article 3 (1) (b) TFEU) on the one hand and sustainable development through integrating environmental protection requirements (Article 11 TFEU) on the other hand was never as close as today. In this situation of climate emergency, the Union must respond by taking into account Article 11 TFEU and its self-commitment created by signing the Paris Agreement and by its own environmental policies and (proposed) legislation in its discretionary (also non-environmental) State aid decisions.

27. Article 107 (1) TFEU prohibits State aid in principle. The Commission has exclusive competence to decide on their compatibility with the internal market. Member States are only entitled to a positive decision without the Commission disposing of a discretion in the cases regulated in Article 107 (2) TFEU (including aid to make good the damage caused by exceptional occurrences such as the COVID-19 pandemic). For all cases falling under Article 107 (3) TFEU (including aid to facilitate the development of economic activities), however, the Commission enjoys wide discretion, the exercise of which involves 'complex economic and social assessments' which must be made in an Union context. This discretion is subject only to limited judicial control. Member States and third parties affected by a decision can therefore challenge it successfully only if the Commission exceeds the limits of its discretionary powers.⁴⁶

28. But there is a general legal standard which applies to every State aid decision. The State aid procedure

'must never produce a result which is contrary to the specific provisions of the Treaty. State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market.'⁴⁷

Article 11 TFEU being a specific part of EU primary law, it appears that the above case law applies to this provision.⁴⁸

2.1 Obligation to weigh environmental protection requirements in State aid decisions under Article 107(3) TFEU

29. Article 11 TFEU can be considered as an obligation of the Commission to take due account of environmental concerns in policy areas other than environmental protection policy (Article 191 TFEU) as this objective is a horizontal one and of fundamental importance.

2.1.1 Fundamental nature of Article 11 TFEU for the weighing within all State aid decisions

30. After Article 6 EC Treaty entered into force, the Commission assumed in working papers and communications:

'Article 6 of the EC Treaty now lays down the obligation to integrate the environment into the Community policies.'⁴⁹

⁴⁶ Judgment of the Court of Justice of 11 September 2008, *Kronofrance v Germany and Others*, Joined cases C-75/05 P and C-80/05 P, ECLI:EU:C:2005:614, paragraph 59, subsequently conformed in Judgment of the Court of Justice of 2 December 2010, *Holland Malt v Commission*, C-464/09 P, ECLI:EU:C:2010:733, paragraph 46; Judgment of the General Court of 16 July 2014, *Greece v Commission*, T-52/12, ECLI:EU:T:2014:677, paragraph 161; Judgment of the Court of Justice of 8 March 2016, *Greece v Commission*, C-431/14 P, ECLI:EU:C:2016:145, paragraph 68.

⁴⁷ Judgement of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 78 (references omitted); cf also Commission Decision (EU) (2015) 1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (notified under document C (2014) 8786), paragraph 217 et seq.

⁴⁸ Cf for a similar approach to the relevance of climate protection for (COVID-19) State aid control based on the EU fundamental rights, in particular on the protection of human dignity (Art. 1 ECFR) Frenz, 'Beihilfenverbot und Grundrechte: Klimaschutz und Corona', EWS 2020, 129 (German language): "human beings must continue to have a humane future").

⁴⁹ Commission working paper 'The Cologne Report of Environmental Integration - Mainstreaming of environmental policy', SEC (1999) 777 final, p. 3, cf: <http://aei.pitt.edu/3531/>.

and (emphasis added):

'The Amsterdam treaty has reinforced the principle of the integration of environmental requirements *into other policies recognising that it is key to promoting sustainable development* (Article 6 EC Treaty).'⁵⁰

31. The ECJ also expressly recognised the fundamental meaning and the cross-sectional character of Article 6 EC Treaty (emphasis added):

'Furthermore, in the words of Article 6 EC '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities', a provision which emphasises the *fundamental nature of that objective and its extension across the range of those policies and activities*.'⁵¹

32. Advocate General Jacobs made the following statement on the importance and extent of the obligation under Article 6 EC Treaty when it comes to exclusive EU competencies according to Article 3 EC Treaty (now Article 3 TFEU) (emphasis added):

'Of particular importance is Article 6, which now provides that: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies referred to in Article 3 including therefore the internal market, and which adds: 'in particular with a view to promoting sustainable development. As its wording shows, *Article 6 is not merely programmatic; it imposes legal obligations*.'⁵²

33. This statement reflects the fact that with Article 6 EC Treaty, environmental protection finally has been recognised as the third pillar (beside the economic and social ones) of sustainable development.⁵³ According to Advocate General Geelhoed the Commission complies with its obligation under Article 6 EC Treaty in particular with a view to promoting sustainable development if the relevant ecological concerns are duly recognised in the decision-making process (emphasis added):

'Article 6 EC requires environmental protection requirements to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 EC, which includes the common transport policy, in particular with a view to promoting sustainable development.

The Court has described the function of this provision by indicating that it emphasises the fundamental nature of the objective of

⁵⁰ 'Single market and environment', COM (1999), 263, recital 2, cf.: <http://aei.pitt.edu/5965/>.

⁵¹ Judgement of the Court of Justice of 13 September 2005, *Commission v Council of the European Union*, C-176/03, ECLI:EU:C:2005:542, paragraph 42; Judgement of the Court of Justice of 15 November 2005, *Commission v Republic of Austria*, C-320/03, ECLI:EU:C:2005:684, paragraph 73, cf as well Judgement of the Court of Justice of 17 September 2002, *Concordia Bus Finland Oy Ab*, C-513/99, ECLI:EU:C:2002:495, paragraph 57 and Judgement of the Court of Justice of 22 June 2017, *E.ON Biofor Sverige AB*, C-549/15, ECLI:EU:C:2017:490, paragraph 48.

⁵² Opinion of Advocate General Francis G. Jacobs of 26. October 2000, *PreussenElektra AG v Schlesweg AG*, C-379/98, ECLI:EU:C:2000:585, paragraph 23.

⁵³ 'Next steps for a sustainable European future - European action for sustainability', COM (2016) 0739 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0739&from=EN>, cf: https://ec.europa.eu/environment/sustainable-development/SDGs/implementation/index_en.htm with the link to the United Nations Sustainable Development Goals (UN SDGs) to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner, cf UN, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, p. 3, cf: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

environmental protection and its extension across the range of those policies and activities.

Although this provision is drafted in imperative terms, contrary to what the Republic of Austria asserts, it cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest. Such an interpretation would unacceptably restrict the discretionary powers of the Community institutions and the Community legislature. *At most it is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection stricto sensu. It is only where ecological interests manifestly have not been taken into account or where they have been completely disregarded that Article 6 EC may serve as the standard for reviewing the validity of Community legislation.*⁵⁴

34. The following decision of the CJEU in 2018 concerning the Common Fisheries Policy can be seen as confirmation of this insight with regard to Article 11 TFEU:

*[...] under Article 11 TFEU, environmental protection requirements must be integrated into the definition and implementation of the European Union's policies and activities, including the CFP. Whilst the European Union must comply with that provision when it exercises one of its competences, the fact remains that environmental policy is expressly referred to in the Treaties as constituting an autonomous area of competence and that, consequently, when the main purpose and component of a measure relate to that area of competence, the measure must also be regarded as falling within that area of competence.*⁵⁵

35. These are clear statements that environmental protection requirements must be taken into account in all Union policies, that Article 11 TFEU lays down an obligation of environmental integration and of mainstreaming environmental policies – particularly when the Union exercises exclusive competence such as for *'competition rules necessary for the functioning of the internal market'*.
36. Due to its fundamental importance, Article 11 TFEU moreover claims entitlement in the 'implementation of Community policies and activities' as a whole. This obligation of integration is, again, a "provision of general application" under Title II TFEU and shall be read in conjunction with the principle of coherence in Article 7 TFEU according to which 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.' Hence Article 11 TFEU obliges authorities to take environmental requirements into account not only for environmental State aid but also – and above all – for all types of aid.

⁵⁴ Opinion of Advocate General Geelhoed of 26 January 2006, *Austria v Parliament and Council*, C-161/04, ECLI:EU:C:2006:66, paragraph 57 et seq.

⁵⁵ Judgement of the Court of Justice of 20 November 2018, *Commission v Council*, Joined Cases C-626/15 and 659/16, ECLI:EU:C:2018:925, paragraph 101. It is worth noting that Regulation (EU) No 1303/2013 make express references to Art. 11 and Art. 191 TFEU, e.g. in Art. 8 ("The objectives of the ESI Funds shall be pursued in line with the principle of sustainable development and with the Union's promotion of the aim of preserving, protecting and improving the quality of the environment, as set out in Article 11 and Article 191(1) TFEU, taking into account the polluter pays principle.")

37. Environmental aid by its very nature pursues (already) the objective of environmental protection. But the meaning and purpose of the environment integration principle of Article 11 TFEU reflects the fundamental recognition that environmental policy alone cannot achieve the environmental improvements needed for a sustainable development.⁵⁶ Hence, the ‘integration’ of environmental requirements in the sense of Article 11 TFEU can only mean that the protection of the environment, as set out in Article 37 CFR, Article 3 (3) TEU and 191 TFEU, must be weighed and reconciled with other objectives pursued by other policies.⁵⁷ Hence, with its discretionary power of assessing the compatibility of aid measures with the internal market and its role as ‘guardian of the Treaties’, the Commission has with Article 11 TFEU an instrument at its disposal to pursue and integrate environmental protection requirements through implementation of State aid law at large. In this respect, Paragraph (3) of the 2001 Environmental Protection Aid Guidelines, quoted above (cf recital 20), was a first statement of intent – it now needs to become operational.
38. CJEU’s case law attributes a very broad discretion to the Commission under Article 107(3) TFEU – so long as decisions are duly motivated⁵⁸ and not manifestly erroneous in fact or law – because a compatibility assessment ‘involves complex economic and social assessments’.⁵⁹ The seemingly limited scope of this CJEU formulation – excluding a reference to the environment – reflects that this longstanding formulation dates back to case law from 1980 when only economic and social policies were named ‘Policy of the Community’ in the EEC treaty (see above). The Court has used this formulation also in recent judgments, although the Treaties and Union policies have evolved and recognise the environmental dimension of sustainable development.⁶⁰ Hence, given the increasing importance of environmental protection as a cross-cutting objective in the Treaties, the CJEU’s phrasing could and we argue, *must* be understood as ‘in accordance with complex economic, social and environmental assessments’.
39. Moreover, the absence of occasions for the Court to control whether the Commission should have assessed an aid measure against Article 11 TFEU can be explained by the fact that the provision creates only an objective obligation for the EU institutions (and the Member States when applying or implementing EU law). Article 11 TFEU does not provide for a subjective right for the competitors of an aid beneficiary that they could successfully invoke before the Court.⁶¹ Moreover, environmental

⁵⁶ Commission Working Document, ‘Integrating environmental considerations into other policy areas- a stocktaking of the Cardiff process, COM (2004) 394 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1591470880067&uri=CELEX:52004DC0394>.

⁵⁷ Regarding to dismissal decisions of the commission taking into account Art. 11 TFEU, cf also Judgement of the General Court of 26 September 2014, *Arctic Paper Mochenwangen GmbH v Commission*, T-634/13, ECLI:EU:T:2014:828, paragraph 72.

⁵⁸ The statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, judgement of th Court of Justice of 8 September 2011, *Commission v Netherlands* Case, Case C-279/08 P, ECLI:EU:C:2011:551; paragraph 125.

⁵⁹ Judgment of the Court of Justice of 2 December 2010, *Holland Malt v Commission*, C 464/09 P, ECLI:EU:C:2010:733, para-graph 46 et seq.

⁶⁰ ‘Next steps for a sustainable European future - European action for sustainability’, COM (2016) 739 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0739&from=EN>; cf: https://ec.europa.eu/environment/sustainable-development/SDGs/implementation/index_en.htm with the link to the United Nations Sustainable Development Goals (UN SDGs) to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner, cf UN, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, p. 3, cf: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

⁶¹ Cf Judgement of the General Court of 28. Mai 2019, Case T-330/18, *Armando Carvalho v European Parliament and Council of the European Union*, ECLI:EU:T:2019:324, paragraph 45 et seq.; cf also Kahl in ‘Streinz/Kahl’, Commentary EU law, 3rd edition

NGOs – which would have an interest in raising pleas based on environmental protection have so far not been found admissible to challenge a State aid decision before the CJEU⁶², despite the Aarhus Convention prescribing that they should have access to justice in matters relating to the environment.⁶³ In practice, market participants and their professional associations, they, primarily focus on economic arguments relating to undue distortion of competition, whereas environmental protection requirements are ignored in the judiciary debates.

2.1.2 Article 11 TFEU in the light of international law

40. The "environmental protection requirements" which the Commission is required to integrate into the Union's policies and activities – including State aid control – pursuant to Article 11 TFEU also include the commitments entered into by the European Union when ratifying the "Paris Agreement".⁶⁴ The essential obligations of the Parties to the Agreement are set out in Articles 2(1) and 4(2), which read as follows (emphasis added):

2(1) This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) *Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;*

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

(c) *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*

4(2) Each Party shall prepare, communicate and maintain successive nationally *determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.*

2018, TFEU Art. 11 paragraph 9 (in German language). This also follows from the interpretation of Art. 37 CFR. This provision, which does not have any regulatory content of its own beyond Article 11 TFEU, does not create any subjective rights either, cf. Jarass, 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht', ZUR 2011, 563 (German language); Epiney/Vedder/Heintschel von Heinegg, Commentary on EU law, 2nd edition 2018, TFEU Art. 11, point 4 (in German language).

⁶² Judgment of the Court of Justice of 15 July 1963, *Plaumann v Commission of the EEC*, 25/62, ECLI:EU:C:1963:17; Judgment of the Court of Justice of 13 January 2015, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C-401/12 P and C-403/12 P, ECLI:EU:C:2015:4.

⁶³ The Art. 2(2)(a) EU Regulation (EC) N° 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13), so called 'Aarhus Regulation' expressly excludes State aid law and decisions from the scope of the acts that environmental NGOs are entitled to challenge at EU level on the basis of the Aarhus Convention, even in cases of aid for environmental protection.

⁶⁴ Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ L 282, 19.10.2016, p. 1.

41. According to the case law of the European Court of Justice, international treaties ratified by the European Union are an integral part of Union law.⁶⁵ In addition, the Parties to the Paris Agreement are obliged to contribute to keeping a global temperature rise this century well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C. In application of Article 4(2) of the Paris Agreement the European Union has decided to contribute to these targets in reducing its greenhouse gas emissions by 40% by 2030 compared to 1999 and reaching climate-neutrality by 2050.⁶⁶ Consequently, the Commission must, in accordance with Article 11 TFEU, take into account the commitments entered into by the European Union when defining and implementing Union policies including in State aid law.

2.1.3 Self-commitment of the Commission through environmental legislation and policies

42. Since 1999, the Union has established a growing body of environmental legislation especially on combating climate change (notably the ‘Climate and Energy Package 2020’⁶⁷ and the ‘Framework for Climate and Energy Policy 2030’⁶⁸). The next steps will be the implementation of the “Clean Energy for all Europeans” package and of the roadmap of the Green Deal including proposals for revising the 2030 climate and energy targets and for a European Climate Law enshrining the 2050 climate-neutrality objective into binding EU rules.

43. Environmental legislation, environmental policies including the Green Deal and policies or legislation derived thereof can be deemed to be fully part of the ‘environmental protection requirements’ falling under Article 11 TFEU. The Union, including the Commission, is under a legal duty to avoid inconsistencies between those environmental protection requirements, on the one hand and competition policy, on the other hand. In other words, the achievements of environmental protection requirements should not be undermined by the implementation of competition policy.

44. The proposed obligation under Article 2 and Article 5(4) of the Climate Law shows, that the Commission recognises and is able and willing to implement the climate-neutrality objective in its internal work in all policy areas. The Climate Law would establish an obligation on the Commission to conduct climate-neutrality assessment for all Union measures and laws prior to their adoption:

‘The Commission shall assess any draft measure or legislative proposal in light of the climate-neutrality objective set out in Article 2(1) as expressed by the trajectory referred to in Article 3(1) before adoption, and include this analysis in any impact assessment accompanying these measures or proposals, and make the result of that assessment public at the time of adoption.’⁶⁹

⁶⁵ Judgment of the Court of Justice of 30 April 1974, *Haegemann v Belgian State*, C-181/73, ECLI:EU:C:1974:41, paragraph 2 et seq.

⁶⁶ Submission by Latvia and the European Commission on behalf of the European Union and its member states, of 6 March 2015, Riga, ‘Intended Nationally Determined Contribution of the EU and its Member States’, cf: <https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf>.

⁶⁷ A set of binding legislation to ensure the EU meets its climate and energy targets for the year 2020, cf: https://ec.europa.eu/clima/policies/strategies/2020_en.

⁶⁸ ‘A Framework for Climate and Energy Policy 2020-2030’, COM (2014) 15 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN>.

⁶⁹ Text as proposed by the Commission on 4 March 2020. The Climate Law is planned for discussion in trilogues for the autumn 2020.

45. The proposal for the Climate Law underscores two important legal points. Firstly, the Commission considers that it has competence to conduct such internal assessments. We concur with this assessment, but want to point out that – given the Commission’s right of initiative under the Treaties – there is nothing stopping the Commission from undertaking such assessments as of now – even without being obliged to this by the future Climate Law. Secondly, we argue that the proposed breadth of the formulation ‘*any draft measure or legislative proposal*’ should be deemed to encompass measures under all areas of Union competence, including competition law and policies. In particular, proposals for State aid guidelines (or rules in the GBER) should arguably be covered under the notion of ‘measures’ in this provision – even more so as they emanate from the Commission itself. With this reading, Article 5(4) of the proposed European Climate Law can thus be seen as a clear step towards reuniting the general consistency obligation set out in Article 7 TFEU and the environmental integration obligation set out in Article 11 TFEU (as discussed above).

2.1.4 Avoiding contradictions for relief and recovery aid

46. With regard to the Commission’s own plans for post-COVID-19 crisis recovery, Frans Timmermans, Executive Vice-President of the European Commission, and Commissioner Thierry Breton (Internal Market) made the following statement (emphasis added):

‘The EU’s temporary State aid framework has loosened the normal competition rules and facilitated a massive fiscal response to the spread of novel coronavirus. [...] *When it comes to the conditionality of the recovery plan and the support, we want to be able to accelerate the EU policies and the Green Deal. That really is key for us. We need to be able to make the most of this particularly important moment for the EU and for the world.*⁷⁰

‘We need to make sure that we don’t come out of the lockdown and sleepwalk into a *harmful ‘lock-in’ of the obsolete, polluting technologies and outdated business models of the past century.* If we are going to unleash trillions of euros for the recovery, let’s spend it right and invest in a *clean, competitive, resilient and inclusive economy for the 21st century.*⁷¹

47. If the Commission wants to stay credible and avoid contradictions, that must be seen as a plea for a strict assessment standard – which should be applied not only to the EU’s own recovery package but also to relief or recovery State aid. As was demonstrated above, the Treaties do not prevent the Commission from doing so. **On the contrary, the Commission would in fact infringe Article 11 TFEU, if it did not consider the impact of an aid measure on the climate or environment.**

⁷⁰ Breton, Mlex market insight, 18 May 20, EU’s internal market at risk from rich-poor divide over Covid-19 response, Breton warns.

⁷¹ Timmermans, cf: <https://www.euractiv.com/section/energy-environment/opinion/our-historic-duty-a-more-resilient-inclusive-and-green-recovery/>.

2.2 Impact on the duties of the Member States

48. The Member States are not directly bound by Article 11 TFEU when granting State aid. A direct obligation of the Member States to comply with Article 11 TFEU exists only when applying and implementing Union law. When granting aid, Member States do not apply or implement Union law. Rather, the granting of State aid is a national measure at the discretion of the respective Member State, in the implementation of which it 'only' has to observe the EU State aid rules.

49. However, an indirect obligation of the Member States to comply with Article 11 TFEU and, thus, to take into account the EU environmental objectives when granting State aid stems from Article 4(3) subparagraph 3 of the EU Treaty ('duty of cooperation'), which reads as follows:

'The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

50. Consequently, Member States may not grant aid which jeopardises the attainment of the Union's environmental objectives. This applies all the more as the Member States are also individually bound by environmental targets. They have signed and ratified the Paris Agreement and are bound to meet their individual 2020 climate and energy targets. The EU's 2030 climate and energy targets were supported by all EU Member States' leaders, and the European Council of 12 December 2019 endorsed the 2050 climate-neutrality target.⁷² Likewise, Member States committed to pursue the trajectories defined in their National Energy and Climate Plans and adopt measures to meet the milestones defined therein.

51. It follows from all this that Member States must respect and consider the Union's environmental objectives and the secondary legislation adopted to achieve them when designing their aid measures. Member States cannot argue that this unduly limits their own room for manoeuvre. The EU has been given all the powers at its disposal, including in the field of environmental legislation, by the Member States. All the powers and actions exercised by the Union institutions under the EU Treaties are powers delegated by the Member States. Accordingly, it would be contradictory and contrary to the obligation to cooperate if the Member States denied to take due account of objectives and environmental rules laid down by the EU under the powers conferred on it by the Member States.

52. **A breach of the Member States' 'duty of cooperation' for failure to comply with EU environmental objectives (Article 4(3) subparagraph 3 of the EU Treaty in conjunction with Article 11 TFEU) would also occur if a Member State granted aid for a project or activity which would cause the aid recipient to breach or endanger its environmental obligations under EU secondary legislation.** It is true that the addressee of the corresponding obligations under environmental law is first and foremost the aid recipient and not the Member State. However, EU secondary environmental legislation concretises the Union's overriding environmental objectives. **A Member State which grants aid for a project with which the recipient would violate or endanger EU environmental requirements would therefore jeopardise the achievement of the EU environmental objectives and thus violate its own duty for cooperation under Article 4(3) subparagraph 3 of the EU**

⁷² Conclusions of the Brussels European Council (8/9 March 2007), cf: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/93135.pdf; Conclusions of the Brussels European Council (13/14 March 2008), cf: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/99410.pdf; Conclusions of the Brussels European Council (23 and 24 October 2014), cf: <http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>; Conclusions of the Brussels European Council (12 December 2019), cf: <https://www.consilium.europa.eu/media/41768/12-euco-final-conclusions-en.pdf>.

Treaty. This is highlighted in recital (7) EEAG with regard to environmental aid, but also in recital (39) of the regional aid guidelines⁷³ as follows (emphasis added):

'To avoid that State aid measures lead to environmental harm, in particular Member States must also ensure compliance with Union environmental legislation and carry out an environmental impact assessment when it is required by Union law and ensure all relevant permits.'

53. As explained above, there is no reason to limit this obligation of Member States to environmental aid. This aspect, which the Commission may remind the Member States of in the context of State aid notification procedures, should be taken into account by the Commission in its consideration of Article 11 TFEU.

2.3 Conclusion

54. The Treaties, EU secondary law and the Commission's action are changing dynamically and are increasingly incorporating environmental objectives as per the deployment of overarching environmental principles and policies. This development shows that a purely industrial and – in a traditional sense – growth-motivated legislation and State aid policy are a discontinued model. The principle of environmental integration, laid down in Article 11 TFEU, recognises rather that environmental policy alone cannot achieve the environmental improvements needed as part of sustainable development.⁷⁴

55. Especially the Green Deal and its roadmap including a proposal for an European Climate Law show that the Commission now discourages more and more the silo-mentality of the past. This logic shall apply within the EU institutions themselves. This implies that policy and decision makers at EU level may not only look at individual (economic or industrial) policies while neglecting their effects on other, namely environmental, objectives. This is important in order to enhance the EU's policy coherence. The demonstrated development of the Commission's policy finally acknowledges the need to mainstream environmental protection as a cross-cutting policy objective – as laid down in Article 11 TFEU.

56. As was demonstrated above, the ratification of the Paris Agreement, the EU's determined contributions according to Article 4(2) of the Paris Agreement, the EU's environmental legislation (notably the 'Climate and Energy Package 2020'⁷⁵ and the 'Framework for Climate and Energy Policy 2030'⁷⁶) and the roadmap of the Green Deal create self-commitments for the Union. They form part of the 'environmental protection requirements' under Article 11 TFEU which the Commission must take into account from now on in all decisions concerning the functioning of the internal market.

⁷³ These guidelines are being revised and the draft published by the Commission reiterates this principle in draft recitals (54) and (59). Cf https://ec.europa.eu/competition/consultations/2020_rag/rag_en.pdf

⁷⁴ Commission Working Document, 'Integrating environmental considerations into other policy areas- a stocktaking of the Cardiff process', COM (2004) 394 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1591470880067&uri=CELEX:52004DC0394>.

⁷⁵ A set of binding legislation to ensure the EU meets its climate and energy targets for the year 2020, cf: https://ec.europa.eu/clima/policies/strategies/2020_en.

⁷⁶ 'A Framework for Climate and Energy Policy 2020-2030', COM (2014) 15 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN>.

57. It can be concluded from this that the environmental impact of an aid measure has to be considered not only for environmental aid but for all kinds of State aid, across all sectors. Article 11 TFEU must be seen as a procedural obligation that requires at least a consideration of possible negative or positive environmental consequences of any notified aid measure. Consequently, there could be an infringement of Article 11 TFEU, if the Commission did not consider possible effects of an aid measure on the climate or environment in a visible manner in its decision.
58. When designing their aid measures, Member States must respect and consider the Union's environmental objectives, to which they are committed, and the secondary legislation adopted to achieve them. The Commission must take the Member States' commitments and obligations into account in its compatibility assessments of aid measures.

2.4 Suggestions for the decision-making practice on relief and recovery aid

59. This approach must apply for every State aid, also to relief and recovery aid to combat the COVID-19 crisis as well as a post-pandemic recession. Even if granted under Article 107 (3)(b) TFEU or the Temporary Framework such aid will – at least to a significant extent – continue to have effects well beyond the current COVID-19 crisis. This is particularly the case of some types of mid-term measures e.g. guarantees, loans, and recapitalisation/equity injection.⁷⁷
60. The integration of environmental protection requirements into State aid rules, policies and decisions is even more pressing for long-term and large-scale recovery measures, such as investment, recapitalisation, research, development and innovation or operating aid to infrastructure or industrial projects, either existing or new ones. Given the lifespan of those installations and projects (which would either be facilitated or increased by the grant of recovery aid), the Commission has to assess if relief or recovery aid would risk harming the achievements of the 'Climate and Energy Package 2020',⁷⁸ the 'Framework for Climate and Energy Policy 2030'⁷⁹ and the Green Deal⁸⁰ including the Draft of the European Climate Law.⁸¹
61. Moreover, a design and control of relief and recovery aid measures without taking into account their harmful environmental effects would impose **additional costs and possibly double funding on the Member States. Financing environmentally harmful measures today will trigger additional costs in the future** – either in terms of financing new measures necessary to eliminate or mitigate the negative external effects of the original ones (e.g. remediation of polluted sites when they do not fall under the operator's liabilities), in terms of financing measures to counterbalance the harmful effects of the original aid (e.g. measures for climate change adaptation) or even by financing measures the Commission has to approve (without any discretion) on the basis of Article 107(2)(b) TFEU ('aid to

⁷⁷ Temporary framework, paragraph 25 f), 27 c), 61 b) and 85 of the consolidated version, cf: https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf.

⁷⁸ A set of binding legislation to ensure the EU meets its climate and energy targets for the year 2020, cf: https://ec.europa.eu/clima/policies/strategies/2020_en.

⁷⁹ 'A Framework for Climate and Energy Policy 2020-2030', COM (2014) 15 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0015&from=EN>.

⁸⁰ 'The European Green Deal', COM (2019) 640 final, cf: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN>.

⁸¹ Cf: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12108-Climate-Law>.

make good the damage caused by natural disasters or exceptional occurrences’). The Commission cannot ignore these probable consequences of badly-designed aid measures.

2.4.1 Propositions of general assessment criteria

62. The Commission can comply with its obligation under Article 11 TFEU to integrate the EU environmental objectives in different ways. This may result in a refusal, or in an approval – potentially with the provision of environmental safeguards – of the aid measure under assessment. In any case, the outcome needs to be objectively justified. The following criteria could be implemented by the Commission in a systematic manner:

63. The Commission should assess the effect that an aid measure would have on the environmental impact of a project or activity: reducing it (e.g. mitigation measures, abatement equipment); neutral; enhancing it (e.g. rescue or restructuring of polluting and emissive activities, development of infrastructure). As a result of that test:

- the more an aid measure increases – or does not mitigate – negative environmental or climate effects (e.g. in terms of greenhouse gas emissions⁸²);
- the more long-term the negative environmental or climate effects of an aid measure (e.g. because of the lifetime or persisting pollution of the supported investment or activity);
- the more alternative measures exist that would be less harmful to the environment or avoid negative environmental effects altogether; and
- the less ‘safeguards’ for mitigating negative environmental effects are proposed by the Member State,

the less an aid measure can be considered to be in line with sustainable development in the internal market and the more restrictive the compatibility conditions should be.

64. Beside, the Commission must assess, as a baseline, the compliance of projects or activities supported by Member States with environmental EU law. At the same time the Commission may follow the precautionary principle as general principle of EU law, stemming from Articles 11, 168(1), 169(1) and (2) and 191(1)(2) TFEU. Accordingly, the Commission may take measures to protect the environment or climate without having to wait until the existence and severity of risks of aid measures have been fully demonstrated in detail by scientific evidence or until adverse effects have occurred.⁸³

2.4.2 Implementing the proposed criteria in practice

65. Using these standards, the Commission could take the following measures (especially when it comes to aid to large undertakings):

- As a minimum requirement, the Commission shall verify whether the funded project/activity complies with the beneficiary’s EU environmental legal obligations and respectively national law which implements EU environmental law. This is also clearly confirmed in the recent CJEU ruling on the aid measures to Hinkley Point C nuclear power plant, in which the Grand Chamber held that “*State aid which contravenes provisions or general principles of EU law cannot be declared*

⁸² Cf: <https://www.eib.org/en/about/priorities/climate-and-environment/climate-action/index.htm>.

⁸³ On the precautionary principle stemming from the Art. 11, 168 (1), 169 (1) and (2) and 191 (1), (2) TFEU cf Judgement of the General Court of 17 March 2016, *Zoofachhandel Züpke GmbH et al v Commission*, ECLI:EU:T:2016:157, paragraph 51.

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). It follows that (...) State aid for an economic activity (...) that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market (...). If [the Commission] finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.⁸⁴

- In this respect, recital (7) EEAG and recital (39) of the regional aid guidelines providing that '[t]o avoid that State aid measures lead to environmental harm, in particular Member States must also ensure compliance with Union environmental legislation and carry out an environmental impact assessment when it is required by Union law and ensure all relevant permits' could be replicated in State aid law at large.⁸⁵ To this end the Commission shall require evidence and a commitment from the Member State (which could itself require evidence⁸⁶ from the beneficiary). In addition, the Commission decision shall indicate that the aid will be recovered if any breach occurs within ten years after the final payment. The Commission should encourage the Member State to make the granting of the aid also conditional on the compliance with any national environmental legislation, independently of whether or not it is based on European law.
- With regard to projects/activities which do not infringe the beneficiary's (EU) environmental law obligations directly, but which involve by nature substantial GHG emissions (e.g. fossil fuel activities, aviation, vehicles with combustion engines⁸⁷), the Commission shall request the Member State to demonstrate that the measure is nevertheless a step in the right direction to achieve the EU's climate and energy targets, in the medium term in the sense of GHG reduction (2030 targets) and in the long term in the sense of climate neutrality (2050 target). The Member State's documentation shall include a report from the beneficiary on how the aid will support its activities in line with EU objectives and national obligations linked to the green transformation, including the EU objective of climate neutrality by 2050 (environmental impact report)⁸⁸; Such report shall include clear measures for transparency and accountability and progress on the implementation of the plan shall be reported throughout the duration of the aid.

⁸⁴ Judgment of the Court of Justice of 22 September 2020, *Austria v. Commission*, C-594/18P, ECLI:EU:C:2020:742, paragraphs 44-45 and 100.

⁸⁵ Another example of the principle that Member States may not grant aid for activities or investments that contravene European environmental law is the Commission's 2009 Communication 'Responding to the crisis in the European automotive industry', COM (2009) 104 final, Annex 3 'Guidance on scrapping schemes for vehicles', section 2. There, the Commission stressed that '[t]he schemes must be compatible with the relevant Community legislation, in particular concerning the type-approval of vehicles which requires at present Euro 4/Euro IV emission limit values.'

⁸⁶ Member States could opt for a system of self-declaration from the beneficiaries, provided that controls can be conducted.

⁸⁷ Cf for example 'Responding to the crisis in the European automotive industry', COM (2009) 104 final, Annex 3 'Guidance on scrapping schemes for vehicles', section 2. According to Annex 3, section 3 b) scrapping schemes may involve State aid at the level of the producers if they 'discriminate with regard to the origin of the product' and/or at the level of the purchasers if the scheme is open only to certain undertakings in the Member State granting the premium.

⁸⁸ Cf the similar requirement introduced by the second amendment to the Temporary Framework of 8 May 2020, paragraph 44 and 45 of the consolidated version, cf: https://ec.europa.u/competition/state_aid/what_is_new/covid_19.html.

- Moreover, the Member State must demonstrate the absence of less environmentally damaging alternatives or why those are not used despite the ‘environmental objective of phasing out environmentally ... harmful subsidies, including for fossil fuels’.⁸⁹ On the ground of the precautionary principle, the Commission may give priority to climate protection even where the potential climate impact of aid measures cannot be demonstrated in detail by scientific evidence.⁹⁰ This could result in the incompatibility of aid to fossil fuel-based projects, especially for coal-fired installations.⁹¹
- The Commission could also decide to reject State aid to fossil fuels because of the environmental objective of ‘phasing out’ environmentally harmful subsidies - mentioned already ten years ago by the European Council⁹² - and even more clearly, to “phase out fossil fuels”⁹³ respectively “direct fossil fuel subsidies”.⁹⁴ Correlatively, new fossil fuel subsidies should not be approved.⁹⁵ The emission performance standard applying to capacity agreements (Article 22(4) Electricity Market Regulation)⁹⁶ is one example of limitation and progressive phase-out of subsidies to coal⁹⁷ and an approach based on a (stricter) emission performance standard could be adopted in State aid rules.

⁸⁹ Guidelines on State aid for environmental protection and energy 2014 – 2020, 2014, OJ C 200, 28.6.2014, p. 1, paragraph 43.

⁹⁰ On the precautionary principle cf Judgement of the General Court of 17 March 2016, *Zoofachhandel Züpke GmbH et al/Commission*, T-817/14, ECLI:EU:T:2016:157, paragraph 51.

⁹¹ In line with the Commission’s objective of ‘phasing out environmentally ... harmful subsidies, including for fossil fuels’ the EIB has decided to stop any financing for fossil fuel energy projects at the end of 2021. With the aim to phase out power and heat generation from fossil fuel sources, the EIB will apply a new emission standard. Based on recent projects appraised by the bank, its emission standard is set at 250 gCO₂/kWh. The EIB justifies this safeguard with the focus on projects needed over the long term by encouraging innovation, the development of new sources of flexibility and accelerating the development of low-carbon gases, see EIB Energy Lending Policy, recital 26 et seq., cf: <https://www.eib.org/en/publications/eib-energy-lending-policy.htm>.

⁹² Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines, OJ L 336, 21.12.2010, p. 24, recital 2.

⁹³ Sustainable Europe Investment Plan, p. 12.

⁹⁴ An EU Strategy for Energy System Integration, p. 16.

⁹⁵ The EIB made that decision as well and will end financing for fossil fuel energy projects from the end of 2021, cf: <https://www.eib.org/en/press/all/2019-313-eu-bank-launches-ambitious-new-climate-strategy-and-energy-lending-policy.htm>.

⁹⁶ Regulation (EU) 2019/943 (OJ L 158, 14.06.2019, p. 54).

⁹⁷ Because in practice only coal will exceed the 550g CO₂-threshold laid down in this provision.

A conflict with the second subparagraph of Article 194 (2) TFEU (Member States' right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply) can be denied with the following arguments:

It is true that the assessment of the conformity of each act of the Union is having regard to all the provisions of the Treaty, also Article 194 (2) TFEU. However, there is no reason to suppose that the second subparagraph of Article 194(2) TFEU establishes a general prohibition of measures preventing state aid to fossil fuels in Member States (or that this article includes an absolute right for Member States to grant state aid to fossil fuels):

1. Article 194(1) TFEU provides that the Union's policy on energy shall have 'regard to the need to *preserve and improve* the environment'; it is undisputed that 'environment' includes climate. As energy policy is a shared competence (Article 4(2)(i) TFEU), Member States committed to this direction of travel in the TFEU. It is also established that an energy system relying on fossil fuels goes against the preservation of the environment and degrades it.

2. Article 194(2) TFEU does not derogate to the objectives of Article 194(1) TFEU. Rather, paragraph (2) implements the objectives of paragraph (1) by merely recalling that Member States can elect their energy resources – but in respect of Union's policy of energy set in paragraph (1).)The fact that fossil fuels are excluded from the scope of the EEAG is a traduction of that. As it happens, the Union's energy policy developed for the last decade tends towards environmental protection and the objective to phase out fossil fuel subsidies.

3. Member States would argue that rejecting State aid to fossil fuels would *de facto* interfere in their right to elect their energy resources. But State aid control only has the consequence of authorising or refusing an aid measure; it never goes as far as prohibiting an energy resource if it is developed without State aid. Hence, nothing clearly prevents the Union, in exercising its exclusive competence to preserve competition on the internal market, to have regard to both Article 11 TFEU and Article 194(1) TFEU when the Commission adopts State aid rules or takes State aid decisions in the energy sector. In this respect, Member States dispose of a panel of options to support energy resources without State aid in the sense of Article 107(1) TFEU.

- The Commission shall take into account if a Member State is not 'on track' to contribute to the Union meeting its 2030 climate targets by GHG (or group of gases) and by sector (e.g. determination based on the EEA GHG projection report).⁹⁸ In such a case, it is justified for the Commission to adopt a particularly restrictive approach in the exercise of its discretion, especially when it comes to State aid in sectors that are not 'on track'.⁹⁹

⁹⁸ Cf: <https://www.eea.europa.eu/data-and-maps/data/greenhouse-gas-emission-projections-for-6>.

⁹⁹ This corresponds in the broadest sense to the principles and processes applied by the Commission to ensure full compliance with the Stability and Growth Pact (SGP) also in the medium-term: If a Member State breaches the SGP's outlined maximum limit for government deficit and debt, the surveillance and request for corrective action will intensify through the declaration of an Excessive Deficit Procedure (EDP), cf: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact_en.

3 Interpretation of existing principles for State aid decisions according to Article 107 (3) TFEU in conformity with Article 11 TFEU

Relief or recovery aid to combat the COVID-19 crisis may be granted under Article 107 (3)(b), but also under Article 107 (3)(c) TFEU and existing Commission State aid guidelines. The further analysis explains for each legal basis in which concrete ways the established State aid decision making practices can incorporate obligations according to Article 11 TFEU.

1. **Article 107 (3)(b) TFEU, State Aid for remedying serious disturbances in a Member State's economy:** Article 107 (3)(b) TFEU leaves room to consider environmental requirements according to Article 11 TFEU in compatibility assessment, but in times of crisis there is an (even greater) need to do so. This is in line with the Temporary Framework to support the economy in the current COVID-19 outbreak, which states that a proportionate State aid control has to keep in mind the importance of meeting the green and digital twin transitions in accordance with EU objectives.
2. **Art. 107(3)(c) TFEU, State aid for facilitating the development of economic activities:** Even when assessing the compatibility of aid other than environmental or energy efficiency aid under Article 107(3)(c) TFEU, we argue that the Commission must take Article 11 TFEU into account. This applies irrespective of whether the Commission examines such aid directly under Article 107(3)(c) or under guidelines adopted by the Commission on the basis of Article 107(3)(c) TFEU. Under Article 107(3)(c) TFEU the cross-cutting nature of the environmental protection objective is particularly relevant in practice for aid which, while promoting another recognised common interest (e.g. employment, regional cohesion, security of energy supply), relates to activities which involve by nature the emission of greenhouse gases. Very harmful effects of an aid measure on the environment can entirely neutralise its positive contribution to another well-defined common interest. A possible harmful impact of the measure on the environment can be absorbed or mitigated by environmental safeguards proposed by the Member State or demanded by the Commission.

66. Recent COVID-19 relief aids are based either on Article 107(2) TFEU, to a small extent, or more often on Article 107 (3) b) TFEU – this is the legal basis on which the Temporary Framework was adopted on 4 March 2020, as well as the Framework for the financial crisis in 2008. Nevertheless, the Commission also encourages Member States to use the existing possibilities to provide support under Article 107 (3)(c) TFEU.¹⁰⁰ But the wording and criteria under which aid measures can be approved by the Commission differ between paragraphs (b) and (c) of Article 107(3) TFEU since the measures do not target the same objectives. Therefore, the analysis in which way Article 11 TFEU has to be integrated into the assessment is outlined separately for each of these legal bases.¹⁰¹

¹⁰⁰ Decisions adopted under Article 107(2) TFEU directly relate to relief from a clearly identified and quantified damage. Whereas this legal basis is important, even if little used, for the relief measures, this report focuses on the longer term recovery measures that are susceptible of being authorised under either Article 107(3)(b) or (c).

¹⁰¹ We recall that the Commission does not have discretion in the assessment of aid measures falling under Art. 107-2) TFEU if the relevant exceptional circumstances or occurrences are established and the damage suffered by the aid beneficiary duly quantified.

3.1 Article 107 (3)(b) TFEU

67. Article 107 (3)(b) TFEU reads as follows (emphasis added):

‘The following *may be considered* to be compatible with the internal market: [...]’

b) [...] or to *remedy a serious disturbance in the economy of a Member State.*’

68. For aid granted under Article 107(3)(b) TFEU, the Member State must demonstrate that the State aid measures notified to the Commission have an incentive effect to the recipients and are appropriate, necessary and proportionate to remedy a serious disturbance in the economy of the Member State concerned. The Commission has set out compatibility conditions for certain types of State aid to support the economy in the context of the coronavirus outbreak in a new Temporary Framework.¹⁰² However, for measures not covered by the Framework, for example because they exceed the thresholds (e.g. a limit of €800,000 for direct grants per undertaking), the Commission can base its decision directly on Article 107 (3)(b) TFEU.

69. Recovery aid measures in the sense of Article 107(3)(b) TFEU should restore economic life and, thus, ensure growth in the affected Member State. At the same time the Union courts emphasise the need for a strict interpretation of any exceptional provision such as Article 107(3)(b) TFEU.¹⁰³ That seems to apply even more in a pan-European crisis requiring a coordinated EU response¹⁰⁴ and a close European coordination of national aid measures.¹⁰⁵ The need of coordination arises from the necessity to ensure sustainable development in the internal market as a whole, without being jeopardised by single Member States and their unilateral relief and recovery aid measures. While this should already be a constant preoccupation, it is particularly urging in the current context. Already in the Temporary Financial Framework of 2009 the Commission acknowledged that additional objectives in the interest of all Member States and the whole internal market are to be taken into account in order to combat a pan-European crisis:

‘The temporary additional measures provided for in this Communication pursue two objectives: first, in the light of the exceptional and transitory financing problems linked to the banking crisis, to unblock bank lending to companies and thereby guarantee continuity in their access to finance. [...] SMEs are particularly important for the whole economy in Europe and improving their financial situation will also have positive effects for large companies, thereby supporting overall economic growth and modernisation in the longer term.

The second objective is to *encourage companies to continue investing in the future, in particular in a sustainable growth economy.* There could indeed possibly be *dramatic consequences if, as a result of the*

¹⁰²Temporary Framework, cf:

https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf.

¹⁰³ Judgement of the General Court of 15 December 1999, *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission*, Joined Cases T-132/96 and T-143/96, ECLI:EU:T:1999:326, paragraph 167.

¹⁰⁴ Cf: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_458.

¹⁰⁵ Temporary framework, Headline 1.2 of the consolidated version, cf: https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf.

current crisis, the significant progress that has been achieved in the environmental field were to be halted or even reversed. For this reason, it is necessary to provide temporary support to companies for investing in environmental projects (which could, inter alia, give a technological edge to Community industry), thereby combining urgent and necessary financial support with long-term benefits for Europe. [...]

*The Commission considers that the proposed aid instruments are the most appropriate ones to achieve those objectives.*¹⁰⁶

70. Thus, to combat the pan-European financial crisis of 2009 the Commission has called for the objective to continue investing in the future, in particular in a sustainable growth economy and to avoid that ‘the significant progress that has been achieved in the environmental field’ was ‘halted or even reversed’.¹⁰⁷ It follows from that, that in a pan-European crisis like the current one, there is not only room, but there is an (even greater) need and obligation to consider environmental requirements according to Article 11 TFEU. As pointed out by the Commission in its Temporary Financial Framework of 2009 the pursuit of environmental objectives must be a key objective of State aid policy, especially in times of crisis. Not implementing these principles during the current pan-European COVID crisis could result in recovery aid harming the achievement of the various policies and binding obligations on the EU and Member States mentioned above.

71. This is also in line within the Temporary Framework that states (emphasis added):

‘A targeted and proportionate aid control serves to make sure, that national support measures are effective in helping the affected undertakings during the COVID-19 outbreak [...] keeping in mind the importance of meeting the green and digital twin transitions in accordance with EU objectives, [...]

*Large undertakings must report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050. [...] Against this background, the Commission notes that designing national support measures in a way that meets the EU’s policy objectives related to green and digital transformation of their economies will allow for a more sustainable long-term growth, and promote the transformation to the agreed EU objective of climate neutrality by 2050.*¹⁰⁸

These statements show that the Commission is not prevented from taking account of environmental objectives within the scope of application of Article 107(3)(b) TFEU, but rather that these can be part of the monitoring of the use of aid towards sustainable economic development.

¹⁰⁶ Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 16, 22.1.2009, p. 1, point 1.1, cf: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv:OJ.C_.2009.016.01.0001.01.DEU&toc=OJ:C:2009:016:FULL.

¹⁰⁷ Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’, OJ C 16, 22.1.2009, p. 1, point 1.1, cf: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv:OJ.C_.2009.016.01.0001.01.DEU&toc=OJ:C:2009:016:FULL.

¹⁰⁸ Temporary framework, cf recital 10 and 44 of the consolidated version, cf: https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf.

3.2 Article 107 (3)(c) TFEU

72. Article 107 (3)(c) TFEU reads as follows (emphasis added):

‘The following *may be considered* to be compatible with the internal market: [...]’

c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;’

73. The guiding principle for the compatibility assessment of an aid measure under Article 107 (3)(c) TFEU is the balancing of its positive effects to the achievement of well-defined objectives of common interest (‘positive side of the balance’) against its adverse effects on competition in the internal market (‘negative side of the balance’).¹⁰⁹ On the ‘positive side of the balance’ the Member State has to prove that the aid measure is an appropriate, necessary and proportionate means to contribute to the achievement of a common interest. On the ‘negative side’, the Member State has to demonstrate that the positive effects of the aid, namely the elimination of a market failure with regard to an objective of common interest, outweigh its negative effects, i.e. the distortion of competition. The Commission has laid down the criteria it applies when executing its discretion under Article 107 (3) (c) TFEU in a number of horizontal (e.g. EEAG) and sectoral State aid guidelines. As was mentioned above (see recital 20) the Commission itself has already stated in its 2001 Environmental Aid Guidelines that environmental protection requirements are not only relevant when it comes to the assessment of environmental aid but also of other kind of State aid:

‘Article 6 of the Treaty states that:

Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

When the Commission adopts or revises other Community guidelines or frameworks on State aid, it will consider how those requirements can best be taken into account. It will also examine whether it would not be expedient to ask the Member States to provide an environmental impact study whenever they notify it of an important aid project, irrespective of the sector involved.’¹¹⁰

In the following it is explained how this can be done within a discretionary weighing decision according to Article 107 (3)(c) TFEU.

3.2.1 On the ‘positive side’, the pursuit of an objective of common interest

74. The pursuit of an objective of common interest by the Member State is required by settled case-law. The Member State must demonstrate that the proposed aid measure is necessary, appropriate and proportionate to meet that objective (given that the objective could at times be achieved by non-aid measures such as regulatory interventions). The measure must also have an incentive effect for the

¹⁰⁹ Cf the description in the Draft ‘Common principles for an economic assessment of the compatibility of State aid under 87.3’, 2009, recital 9.

¹¹⁰ Community guidelines on State aid for environmental protection, 2001, OJ C 37, 3.2.2001, p. 3, paragraph 83.

beneficiary. The more the aid contributes to one or more common objectives, the more likely it is that its positive effects will outweigh its negative effects on competition.

75. **Environmental protection is such an objective of common interest.** As recalled in the Temporary Framework¹¹¹, Member States are free to impose green conditions on the granting of any kind of State aid. **The greater the contribution of a measure to environmental protection, alone or in combination with other common objectives, the more likely it is to be compatible with the internal market.** This has recently been expressly confirmed by Commission's Vice-President Vestager during an exchange of views with the European Parliament's Committee on the Internal Market and Consumer Protection on 4 May 2020, the day when the Commission approved a French loan guarantee to Air France that is subject to certain conditions about the airline reducing its greenhouse gas emissions.¹¹² **Hence, State aid law can – and should – be used as an incentive instrument for the greening of the European economy.**

76. Such use of State aid is, of course, possible by granting environmental aid to support undertakings to go beyond their environmental legal obligations under EU law.¹¹³ But also when it comes to aid measures which pursue other common objectives, the integration of environmental protection can be a prerequisite for the compatibility with the internal market under Article 107(3)(c) TFEU. This is because the compatibility assessment on the 'positive side of the balance' is not necessarily limited to the appropriateness of the aid to the common interest primarily pursued by the Member State. Indeed, an aid measure may be appropriate to contribute to the objective pursued by the Member State. However, the measure as a whole would be disproportionate if the objective pursued by the Member State were neutralised by the harmful effects on the environment. Therefore, the Commission has to bear in mind that the impetus of an aid measure for one common interest can be neutralised by its harmful impact on another one. This is for example expressly stipulated in para. 43 and 220 EEAG in relation with resource adequacy:

'(43) Different measures to remedy different market failures may also counteract each other. A measure addressing a generation adequacy problem needs to be balanced with the environmental objective of phasing out environmentally or economically harmful subsidies, including for fossil fuels.'

'(220) Aid for generation adequacy may contradict the objective of phasing out environmentally harmful subsidies including for fossil fuels. Member States should therefore primarily consider alternative ways of achieving generation adequacy which do not have a negative impact

¹¹¹ Temporary Framework, second amendment of 8 May 2020, recital 15: 'Member States can decide to grant State aid to support green and digital innovation and investment, and increase the level of environmental protection in line with existing State aid rules [...]', cf: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.164.01.0003.01.ENG&toc=OJ:C:2020:164:TOC. Although the Temporary Framework was adopted under Article 107(3)(b), this general statement is valid also under Article 107(3)(c) TFEU.

¹¹² Commission decision of 4 May 2020, State aid SA.57082 COVID-19 – France: Air France, cf the press release https://ec.europa.eu/commission/presscorner/detail/en/IP_20_796; the aid measure includes commitments made by Air France to carbon dioxide reductions and a shift toward more-sustainable fuel sources. According to MLex Editorial of 4 May 2020, Commissioner Vestager stated during her exchange of views with the Committee on the Internal Market and Consumer Protection EP's IMCO Committee: 'I very much appreciate and applaud what France has been doing, and it's highly likely that we can be more direct in saying that it is a good thing if member states [impose] green conditions when they [grant] State aid.' The public version of the Air France decision is not yet available.

¹¹³ State aid which merely supports an undertaking to comply with its legal obligations under EU law is lacking an incentive effect, the latter being an essential compatibility requirement. National rules going beyond the EU level of protection do not prevent the assumption of an incentive effect, cf. recital 55, sentence 4 EEAG..

on the objective of phasing out environmentally or economically harmful subsidies, such as facilitating demand side management and increasing interconnection capacity.’

77. Under Article 107(3)(c) TFEU the cross-cutting nature of the environmental protection objective is particularly relevant in practice for aid which, while promoting another recognised common interest (e.g. employment, regional cohesion, security of energy supply), relates to activities which involve by nature the emission of GHGs. In these cases, in order to attribute the aid measure the highest possible weight on the positive side of the balance against its adverse impact on competition, the Commission may suggest to the Member State that environmental protection safeguards should be integrated into the measure respectively make the approval of the aid conditional on such integration. In practice the Commission follows this approach not only in individual cases but also in State aid legislation. This is illustrated by the following quotations:

Recital 139 EEAG:

‘In order to ensure that aid contributes to a higher level of environmental protection, aid for district heating and district cooling and cogeneration of heat and electricity (‘CHP’) will only be considered compatible with the internal market if granted for investment, including upgrades, to high-efficient CHP and energy-efficient district heating and district cooling.’

78. Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines, recital 8:

‘In order to mitigate the environmental impact of the production of coal by coal production units to which closure aid is granted, the Member States should establish a plan of appropriate measures, for example in the field of energy efficiency, renewable energy or carbon capture and storage.’

79. The above provisions do not alter the fact that not only aid which (also) pursues environmental protection objectives is eligible for approval under Article 107(3)(c) TFEU. However, they clearly show that the Commission may conclude that aid does – as a result – not contribute to a common objective if the positive effects of the aid on other objectives are neutralised by its harmful impact on the environment. In such cases the adverse impact of aid on competition (‘negative side of the balance’) possibly cannot be outweighed by any contribution to well-defined common objectives (‘positive side of the balance’) with regard to other objectives (e.g. employment, regional cohesion, adequate energy supply). In this case, lacking a perceivable contribution of the aid to the achievement of common interests (‘positive side of the balance’), the balancing test cannot be passed. This goes without saying when it comes to the funding of a project/activity which contravenes the beneficiary’s EU environmental legal obligations stemming from national law which implements EU environmental law. In its recent ruling on the aid measures to Hinkley Point C nuclear power plant the CJEU 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). It follows that, since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision (...). If [the Commission] finds*

*an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.*¹¹⁴

80. But also for projects/activities which are not in breach of EU environmental law but which involve by nature the emission of GHG (e.g. fossil fuel activities, aviation, vehicles with combustion engines), the positive effects of the aid on other objectives are neutralised by its harmful impact on the environment. However **a possible harmful impact of the aid measure on the environment could be mitigated by environmental safeguards proposed by the Member State or demanded by the Commission.** Without taking into account and weighing up the effects on the environment and possible alternatives or safeguard measures, the Commission would be in breach of its obligation under Article 11 TFEU (see above in section 2.4).

3.2.2 On the ‘negative side’, the distortion of competition

81. According to Article 107(3)(c) TFEU, the Commission must also verify that the impact of the aid on competition is kept to the minimum necessary to achieve the pursued objective of common interest. In the following it will be demonstrated how environmental protection concerns must be taken into account – according to Article 11 TFEU – at this level of the balancing test.

82. As regards adverse effects of the aid on competition between the beneficiary and its competitors it can be argued that the aid must not aggravate competitive advantages unduly acquired by the beneficiary. In general, **non-compliance with environmental law obligations give the undertakings concerned a cost advantage compared with undertakings complying with legal requirements.** This is because compliance with environmental law obligations regularly leads to additional costs for companies. Granting State aid to an undertaking non-compliant in terms of environmental law would thus further increase the competitive advantage which it has unlawfully obtained over other market players and distort the level playing field in the internal market. As the consideration of existing competitive advantages constitutes an integral part of the compatibility assessment of State aid, it is only consequent to take into account also such advantages deriving from the non-compliance with (at times costly) legal obligations.

83. In the case of a violation of EU environmental law obligations the Commission, in its capacity as guardian of the level playing field in the internal market, is thus entitled to take account of unlawfully obtained cost advantages when assessing the aid. When it comes to national law the Commission should encourage the Member States to make the granting of the aid conditional on the observation and monitoring of national environmental law obligations, the violation of which would lead to competitive cost advantages.

¹¹⁴ Judgment of the Court of Justice of 22 September 2020, *Austria v. Commission*, C-594/18P, ECLI:EU:C:2020:742, paragraphs 44-45 and 100.

84. However, the assessment of the impact of aid on the market is not limited to the effects of the aid on the competitive relationship between the beneficiary and its competitors. Rather, the Commission has to consider the impact of the aid **on economic growth in general**. The Commission has already stressed this in its 2001 Environmental Aid Guidelines (recital 5):

'The Commission's approach in these guidelines therefore consists in determining whether, and under what conditions, State aid may be regarded as necessary to ensure environmental protection and sustainable development without having disproportionate effects on competition *and economic growth*.¹¹⁵

85. Accordingly, the Commission must take into account whether the measure supported by the aid can have a negative impact on economic growth. It is now recognised that climate change has a significant negative impact on the economy.¹¹⁶

86. Hence, environmental concerns can be taken into account as an inherent criterion for the assessment whether an aid measure has disproportionate negative effects on economic growth or not (when evaluating the economic advantages or disadvantages of a measure).¹¹⁷ It is for the Commission to evaluate if a measure has a disproportionate effect on economic growth within the internal market because of possible environmental effects and whether or in which extent the measures contribute to sustainable development within the market. This analysis is also supported by the integration of sustainable development and environmental protection into the development of the internal market called for by Article 3(3) TEU (see above section 2.4).

3.2.3 Compatibility with existing State aid guidelines based on Article 107 (3) (c) TFEU

87. In accordance with established case law of the CJEU, the Commission may derogate from existing guidelines if this is justified by objective reasons such as exceptional circumstances different from those envisaged in those guidelines.¹¹⁸ Unlike previous crises, the climate emergency and the COVID-19 crisis present exceptional circumstances and challenges to all Member States and sectors of the economy, which were not foreseen (to this extent) when the guidelines were adopted. Moreover, the Commission is only bound by its guidelines as far as they do not depart from the rules of the Treaty.¹¹⁹ Hence, given the climate emergency and the concrete danger in the current COVID-19 crisis of neglecting long-term environmental objectives and jeopardising the achievements already made do not only justify an integration of Article 11 TFEU in the Commission's discretion even when assessing cases which normally fall – or until the outbreak of the COVID-19 crisis fell – within the scope of guidelines adopted under Article 107 (3) (c) TFEU. Rather, by not taking Article 11 TFEU into account

¹¹⁵ Community guidelines on State aid for environmental protection, 2001, OJ C 37, 3.2.2001, p. 3, paragraph 5.

¹¹⁶ See e.g. statements in 'EU Biodiversity Strategy for 2030', COM(2020)380 final, p.1, cf: https://ec.europa.eu/info/sites/info/files/communication-annex-eu-biodiversity-strategy-2030_en.pdf.

¹¹⁷ Cf also Judgement of the Court of Justice of 17 September 2002, *Concordia Bus Finland Oy Ab*, C-513/99, ECLI:EU:C:2002:495, paragraph 57.

¹¹⁸ Judgment of the Court of Justice of 8 March 2016, *Greece v Commission*, C-431/14 P, ECLI:EU:C:2016:145, paragraph 70 to 72, confirmed in Judgement of the Court of Justice of 30 September 2016, *Kotnik and Others*, C 526/14, ECLI:EU:C:2016:570, paragraph 40 et seq.

¹¹⁹ Judgment of the Court of Justice of 5 October 2000, *Germany v Commission*, C-288/96, ECLI:EU:C:2000:537, paragraph 62.

the Commission would be in breach of the rules of the Treaty. Hence, the wording of existing guidelines does not and cannot prevent the Commission from taking into account Article 11 TFEU. In this respect, the guidelines must be interpreted and applied in accordance with primary law. This is all the more true as the guidelines do not explicitly exclude the application of Article 11, but merely do not mention it.

88. As especially measures during and after the COVID-19 crisis carry the risk of 'backward-looking' crisis management, e.g. through environmentally harmful subsidies, only the consideration of environmental protection requirements can ensure that the path taken with the Green Deal and its roadmap is not thwarted in the interim period until the guidelines are revised in light of the Green Deal in the course of 2021.¹²⁰ One could even think about another amendment of the Temporary Framework in that respect – even if this does not appear to be necessary given the Commission's obligations deriving from the Treaty itself.
89. Moreover, there is in principle no legitimate expectation that the Commission's guidelines based on Article 107 (3)(c) TFEU will remain unchanged. The Commission has the right to amend its guidelines for future cases (emphasis added):

'The Court of First Instance was also correct, in reliance on the settled case-law of the Court of Justice [...], to hold, in paragraph 77 of the contested judgment, that '[t]he proper functioning of the common market in steel clearly involves the obvious need for *constant adjustments to fluctuations in the economic situation and economic operators cannot claim a vested right to the maintenance of the legal situation existing at a given time*'. British Steel could not legitimately expect that a given legal situation would remain unchanged even though the economic conditions in the steel market were subject to changes which, in some cases, called for specific measures of adjustment.'¹²¹

90. However, the Commission

'retains the power to repeal or amend any guidelines if the circumstances so require.'¹²²

91. This means that the existing State aid guidelines could be supplemented at any time by provisions that take account of Article 11 TFEU - even before the revision scheduled for 2021.

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¹²⁰ 'Timetable for State aid policy reviews 2019 – 2022', cf: https://ec.europa.eu/competition/state_aid/legislation/timeline_table_SA_final.pdf.

¹²¹ Judgement of the Court of Justice of 23 November 2000, *Corus UK v Commission*, C-1/98 P, ECLI:EU:C:2000:644, paragraph 52; just as well Judgement of the Court of Justice of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, ECLI:EU:C:2005:408, paragraph 169.

¹²² Judgement of the General Court of 30 April 1998, *Vlaamse Gewest v Commission*, T-214/95, ECLI:EU:T:1998:77, paragraph 89.

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