



The Role of State Aid for a Green Recovery

Webinar of 30 June 2020

Matthias Buck, Juliette Delarue, Clemens Holtmann
BERLIN AND BRUSSELS



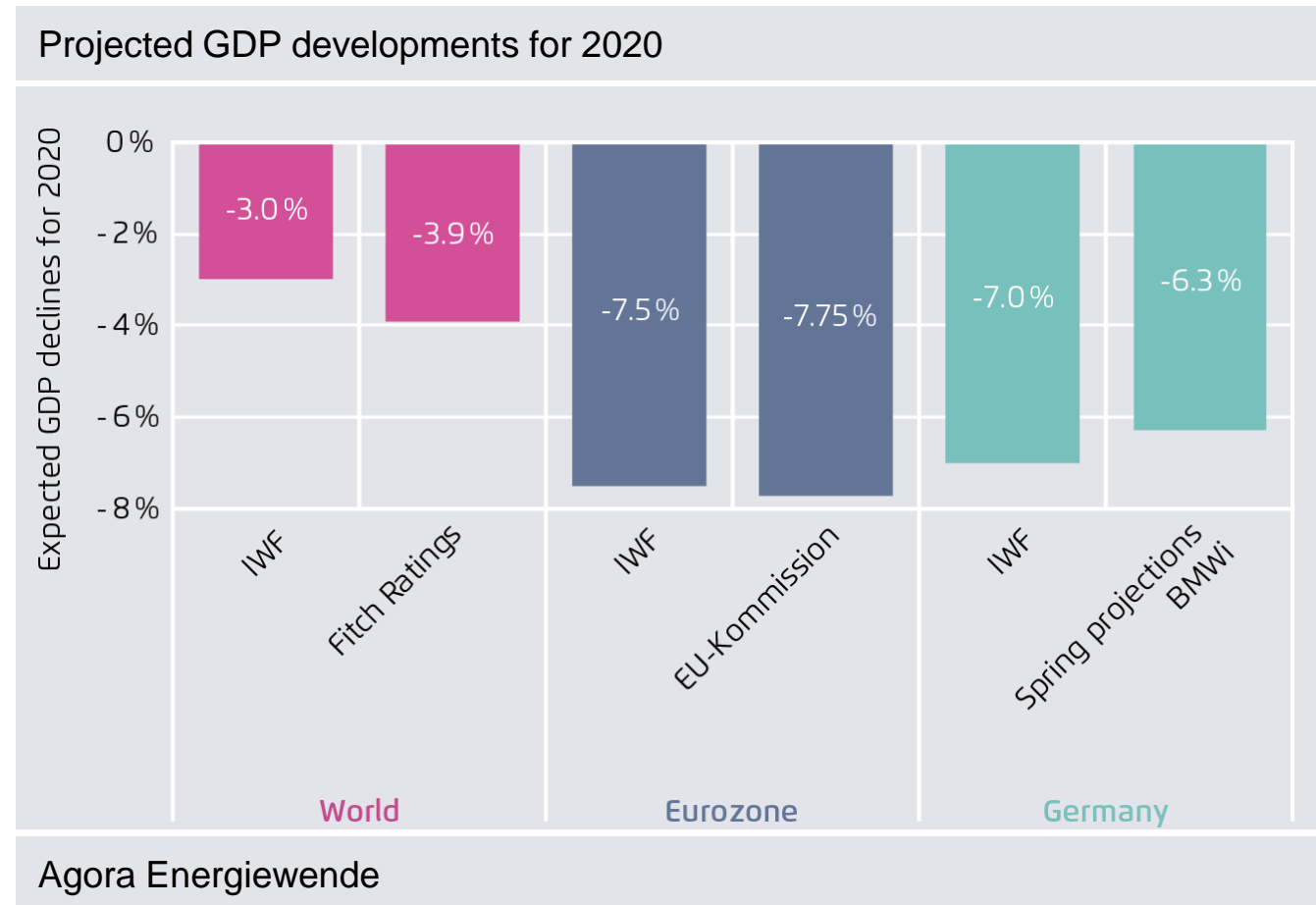
On the Panel

1. Matthias Buck, Agora Energiewende

2. Juliette Delarue, ClientEarth

3. Dr. Clemens Holtmann, Redeker Sellner Dahs

Measures to fight COVID-19 pandemic cause worst recession since the Great Depression



The International Monetary Fund expects worst recession since the Great Depression in the 1930s

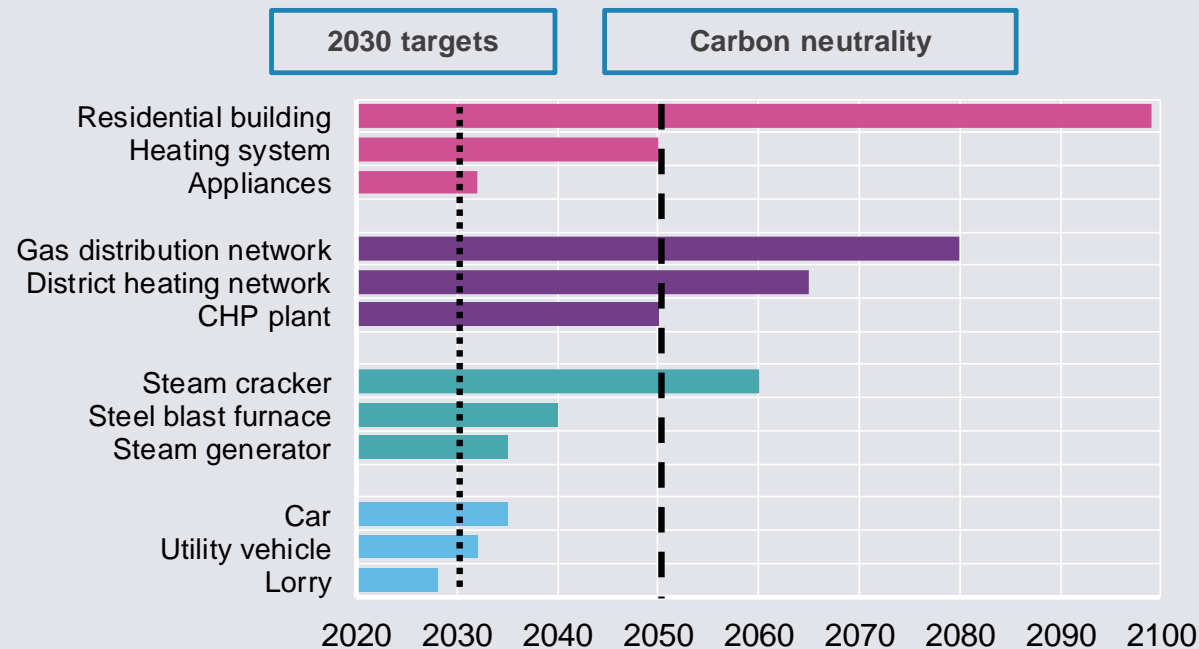
GDP in Europe is forecast to drop by around 7.5% in 2020; possibly more if Member States fail to swiftly adopt the future EU budget

Simultaneous supply and demand shock as consumers (can) consume less due to lockdown and companies (have to) reduce production

Biggest difference to the financial crisis of 2008/2009 is that today no growth impulse from Asia will strengthen economies in the OECD

The economic recovery must be green. Climate-neutrality by 2050 must guide economic stimulus programmes

Lifetime of specific technologies if reinvestment takes place in 2020



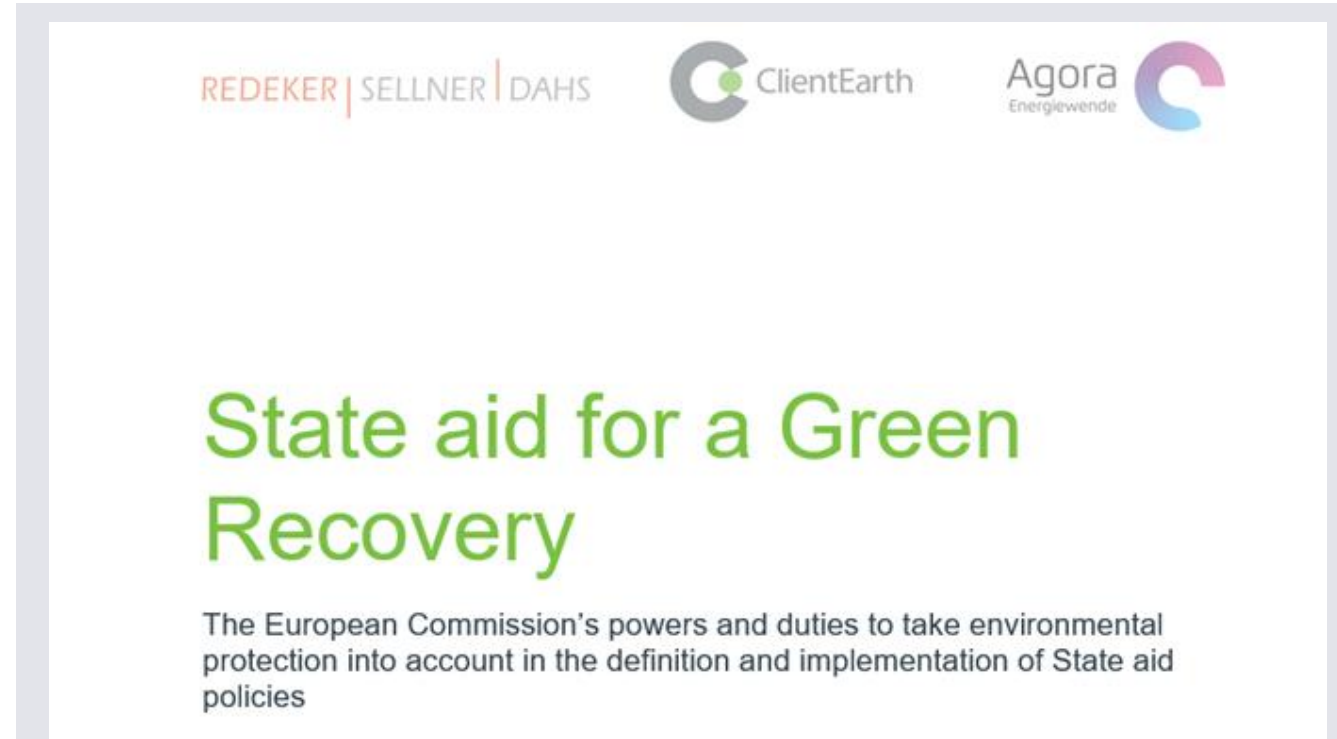
It is not possible to get the economy back on its feet today and care about the climate crisis later:

- Investments initiated now have a climate impact until 2030, 2040, 2050, ...
- Limited fiscal space, time constraints and economic efficiency demand tackling the coronavirus crisis and the climate crisis at the same time.
- Every economic recovery programme needs to give a dual stimulus: combining a swift economic recovery with accelerated transition to climate-neutrality

Will Europe Recover Better? What role for EU State aid control in pushing for a green recovery?



Forthcoming Report by ClientEarth and Agora Energiewende in cooperation with law firm Redeker Sellner Dahs



Own picture

EU leaders stress that stimulus measures must support the Green Deal and EU climate targets.

But views differ on the role of State aid in pushing for Green Deal-consistent stimulus programmes.

Main messages from the forthcoming report:

- The EU Treaties empower and oblige the Commission to address environmental effects of non-environmental State aid measures.
- The Commission violates its duties under the Treaties when approving State aid measures without due consideration to their consistency with EU climate laws and objectives.
- The Commission should inform Member States how it plans to assess the Green Deal-consistency of national stimulus programmes.

What is State aid?

Why is it relevant for recovery programmes?

- State aid is an **advantage** in any form whatsoever conferred on a **selective basis to undertakings** by national public authorities.
- Aid measures must be authorised by the Commission (unless exempted from notification) before being granted. Aid that is incompatible with the internal market must not be paid or be reimbursed.
- **Rules on State aid can block or enable investments** and thus shape how markets will evolve.
- Most national recovery programmes will be considered as State aid. Some examples:
 - Airline bailouts
 - Government-backed guarantees for industry investments into modernising production sites
 - Investment support for the build-up of electrolyser-capacity to scale the production of green hydrogen
 - Public support programmes to incentivise energy efficiency investments in buildings

Role of State aid in recovering better

- *Short-term economic relief:* Temporary State Aid Framework enabling Member States to inject liquidity into their economies (adopted 19 March, revised 3 April, 8 May, 29 June). Ends in Dec 2020.
- *Medium- to long-term economic recovery and reform:* The EU will soon adopt a recovery budget for 2021-2024. Many governments now prepare economic stimulus programmes. There is a vital public interest in the consistency of economic stimulus programmes with climate and energy targets.

The Commission must update its State Aid framework to:

- **Empower public investments into the European Green Deal** by streamlining relevant decisions (e.g. upcoming revisions of the Environmental protection and Energy Aid Guidelines, the General Block Exemption Regulation, the Important Projects of Common European Interest communication).
- Provide governments with a clear indication how it will assess **environmental and climate impacts of non-environmental aid** and measures governments could take to align non-environmental aid with EU climate and energy targets (*focus of the forthcoming report*).

Recommendations on State Aid for a Green Recovery

The Commission should ***clarify as soon as possible*** how it will in the future exercise its power and duties under the Treaties to systematically assess and mitigate climate and environmental impacts of non-environmental aid.

The Commission should:

- Seek evidence of the environmental law **compliance** of the project/ activity benefitting from the aid;
- Always conduct a *prima facie* analysis of whether an aid measure is directly or indirectly increasing greenhouse gas emissions;
- For aid measures that would (directly or indirectly) yield a substantive increase in greenhouse gas emissions, the Commission should:
 - systematically assess **consistency** of State aid measures with the net-zero pathway;
 - seek evidence that relevant **environmental impacts** have been assessed, and their conclusions;
 - condition granting of aid to a **credible business plan** to align the beneficiary's activities with climate targets;
 - ensure **transparency**, publication, monitoring and enforcement of the business plan.

Dr Clemens Holtmann, 30 June 2020



The role of State aid in the EU's green recovery – main legal arguments

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I. Environmental protection as a cross-sectional task in EU law

EU Treaties:

- initially (Treaty of Rome) only Economic Policy and Social Policy as Community objectives
- since 1997 (Treaty of Amsterdam) cross-cutting environmental integration clause, now in **Art. 11** TFEU (ex Art. 6 EC):
- objective obligation of the EU institutions to integrate environmental protection requirements into the definition and implementation of EU policies and activities (i.a. competition law, Art. 3 TFEU)
- Art. 4(3) TEU ('duty of cooperation'): indirect obligation of the Member States not to grant State aid in conflict with EU environmental objectives

EU Secondary law:

- 'Climate and Energy Package 2020' / 'Framework for Climate and Energy Policy 2030' (combination of multi-sector climate laws with sectoral legislation)
- 'Green Deal' (December 2019) / proposal 'European Climate Law' (March 2020)

Political and Factual Context:

- EUCO endorsement of 2050 climate-neutrality objective (December 2019)
- Overwhelming scientific evidence that rapid ghg-emission reductions from today to 2050 are needed to avoid a climate crisis with potentially catastrophic consequences

I. Environmental protection as a cross-sectional task in EU law

State aid law:

- initially purely industry oriented (e.g. coal and steel sectors)
- since 1994 regularly updated Environmental Protection State Aid Guidelines. In 2001 announcement of „integration of environmental policy into other State aid guidelines“, however, only little concrete activities
- recognition of environmental protection as key objective of State aid policy especially in times of crisis (financial crisis 2009 and 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 will be ... the compass for our recovery.’ (EU Biodiversity Strategy for 2030)
 - ‘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.’ (2020 Temporary Framework for State aid in the context of the COVID-19 crisis)
 - COM committed to update the current environment and energy State aid rules in the light of the Green Deal (only) in 2021

II. Environmental mainstreaming into (recovery) aid control

General legal standard (CJEU):

‘State aid, certain conditions of which contravene other provisions of the Treaty, cannot ... be compatible with the common market.’

- Art. 11 TFEU is ‘[an]other provision of the Treaty’
- Art. 6 EC (now Art. 11 TFEU) ‘is to be regarded as an obligation on the part of the Community institutions to take account of ecological interests in policy areas outside that of environmental protection in strictu sensu.’ (Advocate General Geelhoed, Case C-161/04)
- this obligation also extends to the assessment of State aid measures other than environmental aid: Art. 3 TFEU (competence for EU competition law),
- COM must take into account its self-commitments (Paris Agreement, 2030 and 2050 targets, Green Deal/proposal for an European Climate Law), otherwise infringement of Art. 11 TFEU in conjunction with Art. 7 TFEU (‘consistency clause’)
- Member States obliged to comply with the EU environmental objectives when designing State aid measures (Art. 4(3) TEU, ‘duty of cooperation’)

II. Environmental mainstreaming into (recovery) aid control

Interpretation of existing assessment principles under Art. 107(3) TFEU:

Relief/recovery aid may be granted notably under Art. 107(3)(b) and (c) TFEU

Art. 107(3)(b) TFEU ('aid to remedy a serious disturbance in the economy of a Member State'):

- COM acknowledges 'serious disturbance in the economy' of all Member States after COVID-19 outbreak
- Temporary Framework (based on Art. 107(3)(b) TFEU) lays down compatibility criteria for certain aid measures; other measures may be based directly on Art. 107(3)(b) TFEU
- aim of Art. 107(3)(b) is support of economic growth in the sense of a sustainable long-term growth economy (cf Temporary State Aid Frameworks 2009 and 2020)
- nowadays, medium- and long-term economic growth is not any longer possible without environmental protection ('climate emergency')
- in times of crisis, there is a concrete danger that environmental achievements may be reversed and environmental objectives postponed. Close European coordination is needed.
→ environmental protection must be a key objective of State Aid control under the Temporary Framework / Art. 107(3)(b)

II. Environmental mainstreaming into (recovery) aid control

Art. 107(3)(c) TFEU ('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'):

- = balancing of positive effects of the aid on objectives of common interest ('positive side') against its adverse effects on competition and economic growth ('negative side')
- consideration of Art. 11 TFEU on the 'positive side':
 - positive impetus for the common interest pursued by the Member State (e.g. employment, regional cohesion, security of energy supply) can be neutralised by very harmful effects on the environment
 - particularly relevant for aid other than environmental aid to projects/activities which involve by nature GHG emissions (e.g. coal-fired power stations, aviation, vehicles with combustion engines)
- consideration of Art. 11 TFEU on the 'negative side':
 - climate change has a significant negative impact on the economy
 - Does this adverse effect on a sustainable economic development outweigh the positive impetus for the pursued common interest?

III. Environmental assessments and requirements on non-environmental aid within the scope of the Commission's State aid decision-making authority

The following (non-exhaustive) environmental assessments, considerations and requirements seem within the Commission's authority on State aid decision-making conferred to it under the Treaties:

- verification whether a funded project/activity complies with the beneficiary's EU environmental legal obligations (and national law which implements EU environmental law)
- with regard to projects/activities which involve by nature substantial GHG emissions: verification that the measure is nevertheless a step in the right direction to achieve the EU's climate and energy targets ('environmental impact report')
- requiring a Member State to demonstrate the absence of less environmentally harmful alternatives or why these are not used
- in principle rejection of fossil-fueled projects/activities: in view of the imminent exhaustion of the global carbon budget, the phasing out must now be definite
- especially where aid is granted to an installation/infrastructure with a long life-time (beyond 2030 or 2050), COM shall require a plan of appropriate 'safeguard measures' (e.g. investment (on site or not) in energy efficiency measures)
- consideration when the Member State concerned is not 'on track' to meet its 2030 targets

Thank you very much for your attention!

Dr Clemens Holtmann, Lawyer
Av. de Cortenberg 172, B-1000 Brussels
Tel +32 2 74 00 3 23
holtmann@redeker.de



Rechtsanwälte, Partnerschaftsgesellschaft mbB, Sitz Bonn, Essen PR 1947



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Conclusions

- State aid will play an important role in the EU's successful economic recovery and reform
- The Commission is **empowered and obliged** under the Treaties to systematically assess and address environmental effects of non-environmental State aid measures planned by national governments. This goes in particular for planned State aid measures that would (directly or indirectly) result in a substantial increase of greenhouse gas emissions and thus risk running against the EU's shared objective of climate-neutrality by 2050 and achievement of the 2030 climate targets.
- The Commission would violate its duties under the Treaties when approving State aid measures without giving due consideration to their **consistency with EU climate laws and objectives**.
- The Commission should soon inform Member States **how** it will assess the climate-policy-consistency of national stimulus programmes.

Agora Energiewende
Anna-Louisa-Karsch-Str.2
10178 Berlin

T +49 (0)30 700 1435 - 000
F +49 (0)30 700 1435 - 129

www.agora-energiewende.de

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www.agora-energiewende.de
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Thank you for your attention!

Questions or Comments? Feel free to contact me:

Matthias.Buck@agora-energiewende.de
jdelarue@clintearth.org

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