

## Call for Contribution from the European Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of Important Projects of Common European Interest (IPCEI) AFEP Contribution

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As part of this consultation, the European Commission intends to update its 2014 communication, which will expire at the end of 2021, on the criteria relating to the analysis of State aid intended to support IPCEIs.

Before commenting further on the project, the companies wish to reiterate the importance of IPCEIs in many ways:

- They are major tools for supporting new innovative projects (batteries, microelectronics, hydrogen, etc.) necessary for the European economy, for the renewed industrial strategy and for European objectives of climate and digital transition. While regretting that the service sector is still largely absent from this tool while these companies are also engaged in innovation, companies welcome in this sense the addition of projects in the fields of health and digital in the scope of the new communication (§ 26);
- Its modernisation is an opportunity to bring European state aid policy up to standard in a world that has changed dramatically over the past 7 years (general digitalisation of the economy, globalised competition, the economic power of third countries, etc.).

The IPCEIs are an essential element to encourage companies to innovate and to project themselves into the future economy, in the service of the internal market. However, it is important to note that the IPCEIs, by their construction, remain recent and complex tools. As such, the update of the 2014 communication should focus on clarifying the existing framework, to provide a stable and predictable tool for European industrial players and service providers.

The companies consider that the communication on the IPCEI must aim to promote cooperation between the Member States and European industrialists. The joint construction or production of shared technological solutions between companies sometimes requires very significant investments, particularly in environmental or digital research, development, and innovation ("RDI"). Such projects can also strengthen the leadership of the European Union in the fight against climate change, in particular in certain key technological sectors (aerospace and defence, energy, microelectronics, automotive, etc.), and promote European strategic autonomy given competition from third countries that are implementing massive support for their businesses.

After the health and economic crisis suffered by the European economy, it is important to offer all its players support tools that can be implemented within a clear and efficient legal framework.

For the sake of readability, the comments below follow the order of the paragraphs of the draft Communication. Faced with the red tape created with this update of the 2014 Communication, they intend to promote a pragmatic, flexible and structured text in the service of projects of common interest for Europe.

## I. COMMENTS ON THE GENERAL CUMULATIVE CRITERIA

Various general cumulative criteria are listed (point 3.2.1.), most of which include elements that have existed since 2014. The modifications made to some of them (§ 15, 17, 18, 19, 20) raise practical difficulties for economic players. Likewise, the lack of updating sometimes proves to be a source of potential harm (§ 19).

The companies, therefore, wish to make the following comments to the paragraphs:

- **15:** the Covid crisis has confirmed the need to implement tools to secure our raw material supplies and the need to reinforce our sovereignty issues. As such, companies believe that participation in securing supplies to Europe should be retained among the various eligibility criteria for an IPCEI.

Consequently, § 15 should be completed as follows:

- “The project must represent an important contribution to the EU’s objectives, for example by being of major importance for the European Green Deal, the Digital Strategy and European Strategy for Data, the New Industrial Strategy for Europe, ***securing the supply of raw materials for European industry***, Next Generation EU, the new European Research Area for research and innovation, the new Circular Economy Action Plan or the EU’s objective to become climate neutral by 2050, among others.”

- **17:** henceforth, “unless a smaller number is justified by the nature of the project, the project must involve at least four Member States”. In 2014, it was mentioned (§ 16) that the project should “normally involve more than one Member State”.

Without calling into question the objectives set by the Commission, companies deplore this tightening of eligibility which would discourage many projects. They do not deny the partnership power required to initiate and support strong and structuring projects for the economy of tomorrow (e.g.: hydrogen). Smaller-scale projects can, however, prove to be just as supportive of collective interest and contribution to European policies. This was notably the case in 2014 for one of the first IPCEI, carried by two Scandinavian countries (SA. 39078). As such, they should not be prevented by an excessively strict principle which would lead to long and time-consuming instruction times depending on the understanding of the subject by each Member State concerned by the project.

The statement "unless a smaller number is justified by the nature of the project" is not sufficient to balance the tightening of this eligibility criterion. This justification will most often be impossible to provide. This condition will increase the administrative burdens of companies and States, which will have to spend time demonstrating the relevance of their project. They would also generate legal uncertainty hampering the development of these transnational projects. This addition of administrative burdens is all the more paradoxical as SMEs are also encouraged to join IPCEIs.

Moreover, Europe has a vital need to quickly project itself into promising strategies for the future.

To avoid these biases, companies offer to:

- consider this point as one of the additional general positive indicators in § 22 and not as a strict characterisation;
- leave the possibility for a few Member States (less than 4) to work on projects of common interest to promote all the opportunities that meet the desired objectives of general European interest;
- Draft § 17 accordingly as follows: ~~"Unless a lower number is justified by the nature of the project, the latter~~ The project must involve at least ~~four~~ **two** Member States...".

- **18**: the substance of this paragraph, which should allow all interested Member States to participate in an emerging project, has been moved from general positive indicators (§ 20-a in 2014) to general cumulative criteria.

The result is a strengthening of these criteria. Companies once again consider that this additional burden is not justified for the IPCEI, an incentive instrument allowing Member States to jointly invest in support of European political objectives. There is no need to go so far as to impose as an eligibility criterion that the 27 member states have a "genuine" possibility (unclear concept) of participating in an emerging project.

Consequently, companies propose to word this § 18 as follows: ***"When the project justifies it, all the Member States..."***.

- **19**: the companies note that the wording of this § relating to the repercussions of the profits generated by the project concerned is identical to that of 2014.

The requirements relating to the search for a leverage effect ("spillover") related to IPCEIs omit to explicitly mention that the intellectual property developed by companies that have invested in an IPCEI must also be protected, and should be rebalanced in this sense. Firms must have an economic interest to participate in an IPCEI- extensive obligations to share their intellectual property will rather discourage them from doing so; it cannot be a precondition for obtaining the Commission's agreement on an IPCEI. This obligation is, moreover, quite difficult to understand given the objective of the IPCEIs to contribute to European industrial competitiveness. This can further discourage companies from participating in joint research and technology (R&T) and R&D activities, which will

nevertheless be the cornerstone of the competitiveness of European companies in the face of future challenges.

This legitimate interest in the protection of intellectual property must therefore also be taken into account in the context of the elements characterising the project in question, alongside the effects of “spillover”.

- **20:** the co-financing of the project by the beneficiary must now be “significant”, a qualification that does not exist in the 2014 version (§ 18).

The "significant" characterisation brings a subjective notion that is not very reassuring for the project initiators, who will moreover have to face a complicated way out of the crisis in the coming months, the outcome of which lies in part in the implementation of costly projects for which European aid is essential. (e.g. hydrogen, digital, alternative energy sources). The primary objective of the IPCEIs is to support projects that the market cannot finance alone, on value chains that are strategic for Europe. Their analysis is based on the concepts of objective and quantifiable state aid ("funding gap") based on investment budgets and documented business plans.

Objective criteria relating to co-financing by the beneficiary, therefore, seem more appropriate. It is therefore proposed to drop this "significant" addition and to refer to the existing methodology, based on the notion of "funding gap" as part of an analysis carried out on a case-by-case basis to ensure adequate proportionality of the funding.

## II. [COMMENTS ON THE GENERAL POSITIVE INDICATORS](#)

The main comments from companies relate to paragraphs 22, 24, 32, 33, 37, 39 and 50:

- **22-f):** point f) specifies that “the project takes into account the Taxonomy Regulation”

Regulation 2020/852 proposes a European classification to support sustainable investments. It offers a useful frame of reference for determining the sustainability of an economic activity, but it still needs to be complemented by delegated acts

Whilst the use of taxonomy appears *a priori* interesting to identify “already green” activities from the angle of the first two objectives already examined (climate change mitigation and adaptation), the work on this theme is nevertheless currently insufficient to assess the contribution of all the projects to the ecological transition:

- the taxonomy applies to activities and only indirectly to projects: it is indeed based on an analysis of activities by NACE code, which does not allow to grasp the complexity of certain industrial projects;
- the notions of transitional and enabling activities, introduced only for the climate criteria and not for the other four environmental objectives, could exclude many activities which are nevertheless in this situation. This classification should not entail a risk of excluding transitional projects;

- while the technical screening criteria for the climate objectives of the taxonomy have been recently adopted, many activities have not been covered by the proposed delegated act and the environmental criteria for the remaining four objectives have not yet been defined. They could nevertheless potentially contribute to the ecological transition and the objectives of the Green Deal and will be at the core of the climate change transition.

Given the many texts that should still help stabilise the implementation of this regulation and given that the adoption of the new IPCEI communication is announced for the second half of 2021, the companies are proposing the following addition, to take into account as much as possible the initial feedback on the regulation and the availability of data:

f) "The project takes into account the Taxonomy Regulation *as soon as the legal framework relating to its implementation is stabilized.*"

- **24:** this new paragraph targets projects comprising of first industrial deployment must allow for the development of a new product or service with high research and innovation content.

While it must remain a preponderant element in the analysis of the projects and in particular of their future competitiveness, companies consider that the innovative criterion cannot be the only one. The public support offered by the IPCEIs can indeed be justified to develop or consolidate a European industrial offer that would replace imports to strengthen the strategic autonomy and the resilience of value chains.

For this purpose, the following modifications are proposed in § 24:

Projects comprising of first industrial deployment must allow for the development of a new product or service **resulting from** ~~with high~~ research and innovation content and/or the deployment of a ~~fundamentally~~ innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products **might** ~~do not~~ qualify as first industrial deployment.

- **32 and 33:** by amending the 2014 Communication, these two paragraphs aim to ensure that the Member State provides the Commission with "a comprehensive description of the counterfactual scenario ...".

Very widespread in competition law, the counterfactual is an exercise that remains complex to perform and a source of numerous and lengthy debates between the stakeholders. In addition, it conditions the amount of aid granted.

The main feature of the IPCEI is to encourage Member States to support transnational projects clearly contributing to the achievement of the strategic objectives of the EU (infrastructure, microelectronics, battery value chain and hydrogen). All of these areas of the future are in essence strategic for the Europe of tomorrow.

It is urgent to launch them; making a counterfactual does not make much sense and wastes precious time in the face of agile and rapid global competition, in prospective areas that did

not exist until then and are precisely intended to propel Europe into a new economy (e.g., hydrogen) thanks to this public support.

It is therefore proposed that those paragraphs devoted to realizing unrealistic counterfactual scenarios be deleted.

- **37:** this new paragraph tends to limit the profitability of projects subject to State aid by considering a possible recovery mechanism from the notifying Member State.

While this mechanism is undoubtedly legitimate in principle, companies do not support its application targeting IPCEIs. Indeed, since the amount of the aid and its form are previously to be analysed as proportionate and limited to what is strictly necessary by services of the States involved and of DG Competition, it seems excessive to add such device. This logic indeed balances the positive effects of an IPCEI on the objectives of European industrial policy and the dynamism of its internal market.

Considering ex-post repayment mechanisms amounts to limiting the scope of this incentive mechanism, inherent in this type of aid, by condemning in advance too favourable results economically. Europe needs strong support such as the policy led by the Commission during the health crisis of 2020, which was welcomed by economic players as a whole, because of its repercussions which will deeply reach the entire internal market for many years to come.

For these various reasons, clarifications are necessary to better define the scope of this reimbursement mechanism within the framework of the IPCEI. In any case, a reimbursement mechanism can only be considered if it has been agreed on ex-ante contractually.

- **39:** this paragraph, already existing in the 2014 Communication, rightly aims to take into account the subsidies paid in third countries during the three previous years to compensate for distortions in international trade. The proposed addition allowing the Commission to take "appropriate action to address competition distortions arising from subsidies received outside the EU " is welcome.

However, companies wish to draw the Commission's attention to the major economic developments confirmed since 2014.

The European approach to competition policy must indeed continue to adapt to support companies operating in a complex and rapidly changing globalised world. In this context, a more dynamic approach must take into account the potential competition in a time frame more in line with the reality of the economy, the lifespan of a product as well as the ability of competitors to enter the market in the medium-term.

In this context, it is proposed to draft the following sentences of § 39 as follows: "the Commission may take account of the fact that, directly or indirectly, competitors located outside the EU have received (in the last three **to five** years) or are going to receive, aid of an equivalent intensity for similar projects. ***In its analysis, the Commission can also consider the supports that are or could be provided taking into account the life cycle of the product***

**concerned.** However, where distortions of international trade are likely to occur after more than **five** years”

- **50:** this paragraph, which deals with the transparency to be provided in the context of this aid, requires the following comments:

- To ensure better consistency in the requirement to provide the full text of the decision granting individual aid (a), it is proposed to go back to the following part of c) at the end of a): “except business secrets and other confidential information in duly justified cases and subject to the Commission’s agreement in accordance with the Commission communication on professional secrecy in State aid decisions”;
- A clarification of the wording of new point d) is requested.

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