LIETUVOS RESPUBLIKOS ENERGETIKOS MINISTERIJA

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Lietuvos Respublikos Seimo posėdžių sekretoriatui	2023-08- Į 2023-08-07	Nr. Nr. Nr. S-2023-3564 (KL-33)

Kopija:
Seimo narei Laimai Nagienei

DĖL INFORMACIJOS PATEIKIMO

Lietuvos Respublikos energetikos ministerija gavo Lietuvos Respublikos Seimo posėdžių sekretoriato raštą, kuriuo persiunčiamas Seimo narės Laimos Nagienės 2023 m. rugpjūčio 7 d. rašytinis paklausimas Nr. 410-KL-33, kuriame keliami papildomi klausimai dėl Atsinaujinančių išteklių energetikos įstatymo (toliau – AIEĮ) nuostatų, susijusių su elektros energijos gamybos iš atsinaujinančių energijos išteklių įmokos (toliau – gamybos įmoka) mokėjimu, notifikavimu Europos Komisijai ir įsigaliojimu. Energetikos ministerija, susipažinusi su rašte išdėstytais klausimais, pagal kompetenciją teikia prašomą informaciją.

Energetikos ministerija, atsakydama į pirmąjį klausimą, kuriuo siekiama išsiaiškinti kokie probleminiai klausimai neleidžia užbaigti neformalaus potencialios valstybės pagalbos schemos pristatymo ir kaip neformalus derinimo procesas yra suderinamas su ES Tarybos reglamentu (ES) 2015/1589, informuoja, kad Energetikos ministerija vykdė komunikaciją su Europos Komisija siekdama įsitikinti, kad gamybos įmokos modelis turi būti notifikuotinas Europos Komisijai ir pagal kokias taisykles tai turėtų būti padaryta. Šiuo metu, klausimai prieš teikiant pre-notifikaciją yra išnagrinėti.

Pateikiama proceso eiga ir pridedami žemiau nurodyti priedai:

1. Energetikos ministerija 2022 m. balandžio 7 d. kreipėsi į Europos Komisiją prašydama pateikti nuomonę ar pristatyta priemonė gali būti laikoma valstybės pagalba ir ar ją reikėtų notifikuoti. Žr. Priedas Nr. 1. „Inquery to the EC on charges on the production of electricity“;
2. Klausimams dėl valstybės pagalbos išgryninti, su Europos Komisijos ir Energetikos ministerijos specialistais 2023 m. balandžio 11 d. buvo suorganizuotas susitikimas, kurio metu Energetikos ministerija pristatė gamybos įmokos modelį. Žr. Priedas Nr. 2. „Electricity production from renewable energy sources fee“;
3. Europos Komisija, siekdama visapusiškai įvertinti gamybos įmokos modelį, 2023 m. balandžio 11 d. pateikė papildomus klausimus, į kuriuos Energetikos ministerija atsakė 2023 m. balandžio 24 d. Žr. Priedas Nr. 3. „LT response to questions submitted by EC on 11th April 2023“.
4. Europos Komisija 2023 m. birželio 6 d. pateikė preliminarų vertinimą dėl gamybos įmokos modelio atitikties valstybės pagalbai. Žr. Priedas Nr. 4. „DG Competition“ atsakymas.

Atsižvelgdama į Europos Komisijos nuomonę, šiuo metu Energetikos ministerija baigia pildyti pre-notifikacijos formą, kuri iki šių metų rugsėjo mėnesio bus išsiųsta Lietuvos Respublikos Konkurencijos tarybai, kuri pateiks šią formą Europos Komisijai.

Europos Komisijos „Valstybės pagalbos kontrolės procedūrų vykdymo gerosios praktikos kodekse“ (žr. Priedas Nr. 5. „Code of Best Practices for the conduct of State aid control procedures“) Europos Komisijos tarnybos ragina valstybes nares susisiekti su jomis prieš oficialiai pranešant Europos Komisijai apie galimas valstybės pagalbos priemones (kontaktai iki pranešimo). Šio kontaktavimo metu Komisijos tarnybos ir Valstybė narė gali aptarti teisinius ir ekonominius

siūlomos priemonės aspektus neoficialiai ir konfidencialiai bei išsiaiškinti kokia informacija yra reikalinga notifikavimo procesui tam, kad jis būtų sėkmingai užbaigtas. Iki šiol vykęs Energetikos ministerijos kontaktavimas su Europos Komisija buvo reikalingas dėl notifikuojamos priemonės kompleksiškumo, siekiant kuo korektiškiau užpildyti pre-notifikacijos formą.

Atsakant į antrąjį klausimą, kuriuo siekiama išsiaiškinti kada yra planuojama rengti oficialų pranešimą ir teikti valstybės pagalbos schemą Europos Komisijos notifikavimui, informuojame, kad pre-notifikacijos forma Europos Komisijai bus pateikta iki šių metų rugsėjo mėnesio.

Atsakant į trečiąjį klausimą, kuriuo teiraujamasi ar atsižvelgiant į tai, kad formali notifikacijos procedūra nėra pradėta, o teisinis reguliavimas dėl gamybos įmokos mokėjimo gali įsigalioti tik po Europos Komisijos pritarimo, reiškia, kad gamintojai, gavę leidimus gaminti elektros energiją laikotarpiu nuo 2023 m. liepos 1 d. iki Įstatymo 7 straipsnio įsigaliojimo dienos, neturės mokėti gamybos įmokos, Energetikos ministerija informuoja, jog AIEĮ pakeitimo įstatymo Nr. XIV-1169 18 straipsnio 5 dalyje nurodoma, kad gamybos įmokos mokėjimas taikomas gamintojams, leidimą gaminti elektros energiją gausiantiems po 2023 m. liepos 1 d. Tai reiškia, kad visi gamintojai, kurie gaus gamybos leidimą po 2023 liepos 1 d. turės mokėti gamybos įmoką.

Atsakant į ketvirtąjį klausimą, kokie būtų tolimesni Energetikos ministerijos veiksmai dėl gamybos įmokos taikymo teisinio reguliavimo, Europos Komisijai nepritarus siūlomam teisiniam reguliavimui bei ar yra svarstomi alternatyvūs gamybos įmokos taikymo teisinio reguliavimo variantai, informuojame, kad šiuo metu nėra realaus pagrindo manyti, kad Europos Komisija nepritars priemonei, todėl alternatyvūs gamybos įmokos taikymo teisinio reguliavimo variantai nėra svarstomi.

Penktuoju klausimu teiraujamasi kokiam skaičiui vėjo jėgainių buvo išduoti leidimai plėtoti elektros energijos gamybą ir leidimai gaminti elektros energiją nuo 2022 m. liepos 8 d. iki 2023 m. birželio 30 d. ir nuo 2023 m. liepos 1 d. iki rugpjūčio 7 d. ir kokia yra suminė šių vėjo jėgainių galia (MW). Energetikos ministerija informuoja, jog:

1. Laikotarpiu nuo 2022 m. liepos 8 d. iki 2023 m. birželio 30 d. (remiantis Valstybinės energetikos reguliavimo tarybos viešai paskelbtais 2023 m. rugpjūčio 3 d. duomenimis) išduoti 13 leidimų gaminti elektros energiją vėjo elektrinėse. Bendra suminė įrengtoji galia – 99,29 MW;
2. Laikotarpiu nuo 2023 m. liepos 1 d. iki rugpjūčio 3 d. (remiantis Valstybinės energetikos reguliavimo tarybos viešai paskelbtais 2023 m. rugpjūčio 3 d. duomenimis) leidimai gaminti elektros energiją vėjo elektrinėse nebuvo išduoti;
3. Laikotarpiu nuo 2022 m. liepos 8 d. iki 2023 m. birželio 30 d. išduoti 54 leidimai plėtoti elektros energijos gamybos pajėgumus vėjo jėgainėse. Bendra suminė įrengtoji galia – 1396,943 MW;
4. Laikotarpiu nuo 2023 m. liepos 1 d. iki rugpjūčio 3 d. (remiantis Valstybinės energetikos reguliavimo tarybos viešai paskelbtais 2023 m. rugpjūčio 3 d. duomenimis) išduoti 5 leidimai plėtoti elektros energijos gamybos pajėgumus vėjo jėgainėse. Bendra suminė įrengtoji galia – 14,9 MW.

Energetikos ministras Dainius Kreivys

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Priedas Nr. 1

El. paštu 2022 m. balandžio 7 d. Europos Komisijai išsiųstas užklausimas

INQUERY TO THE EC ON CHARGES ON THE PRODUCTION OF ELECTRICITY

The Ministry of Energy is preparing amendments to the legislation, with the aim to increase the positive attitude of local communities and their organizations towards the development of renewable energy sources. In order to ensure that the proposed regulation does not infringe the provisions of the Treaty on the Functioning of the European Union, please provide an opinion, if a below described national regulation could be considered as a state aid and should be notified to the European Commission.

In the draft of the Law on Renewable Energy it is proposed to determine that the electricity producers who have started developing projects using solar, wind and biogas after the entry into force of this law, to the administrator appointed by the government will pay an electricity generation fee, which will be calculated based on the amount of the electricity supplied to the electricity networks in the previous calendar year and multiplied by 0.0003 Eur / kWh (preliminary size).

Entities that are proposed to be exempt from paying fee:

1) generating electricity for non - commercial purposes, e.g. prosumers, renewable energy communities, active consumers, citizen energy communities;
2) participated in the auctions and won.

The collected electricity generation fee will be allocated to the local governments, which will select the projects of the local communities or community organizations and in accordance with the procedure established by the Government will provide financing for the development of these projects, as well as to cover the reasonable costs of the administrator.

Electricity production from renewable energy sources fee

11th April, 2023

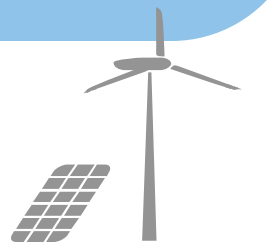
MINISTRY OF ENERGY
OF THE REPUBLIC OF LITHUANIA

Electricity production from renewable energy sources fee

Electricity production from renewable energy sources fee (**production fee**) should be paid by all producers of electricity who produce electricity in solar, wind and/or biogas power plants (except for specific exemptions established in the law).

The production fee paid for the previous calendar year is calculated by multiplying the amount of electricity produced and supplied to the electricity grid in the previous calendar year by 0.0013 euros per 1 kWh. (the need to pay a fee and its amount originate from the decisions of the State).

The ultimate goal of the fee – to support communities impacted by the development of RES installations.



MINISTRY OF ENERGY
OF THE REPUBLIC OF LITHUANIA

Production fee is not paid by:

#1 Producers whose primary production objective, – to satisfy their own demand for electricity:
1) prosumers;
2) persons who build, equip and operate prosumers‘ power plants and have a permit to produce electricity for the electricity, which belongs to the prosumers and is produced in that part of the power plant and supplied to the electricity network;
3) active consumers of electricity;
4) renewable energy communities;
5) citizens‘ energy communities;

#2 Producers who do not supply electricity to networks:
6) producers whose operating power plant‘s permissible generating power is equal to zero;

#3 Producers who produce electricity in on-shore or off-shore power plants and pay an alternative community fee to bordering communities:
7) producers who won the auction or the tender (tenders);

Electricity production from renewable energy sources fee

Electricity production from renewable energy sources fee (**production fee**) should be paid by all producers of electricity who produce electricity in solar, wind and/or biogas power plants (except for specific exemptions established in the law).

The production fee paid for the previous calendar year is calculated by multiplying the amount of electricity produced and supplied to the electricity grid in the previous calendar year by 0.0013 euros per 1 kWh. (the need to pay a fee and its amount originate from the decisions of the State).

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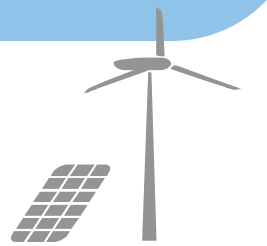


MINISTRY OF ENERGY
OF THE REPUBLIC OF LITHUANIA

Production fee is not paid by:

#4 Small-scale producers, who own small RES installations, which do not affect the interests of communities living around those installations (agreement of community is not required for such installations):
8) producers operating solar power plants connected to electricity distribution networks;
9) producers, when the installed power of their operated power plants does not exceed 30 kW.

Release of such entities from a fee does not trigger state aid since:

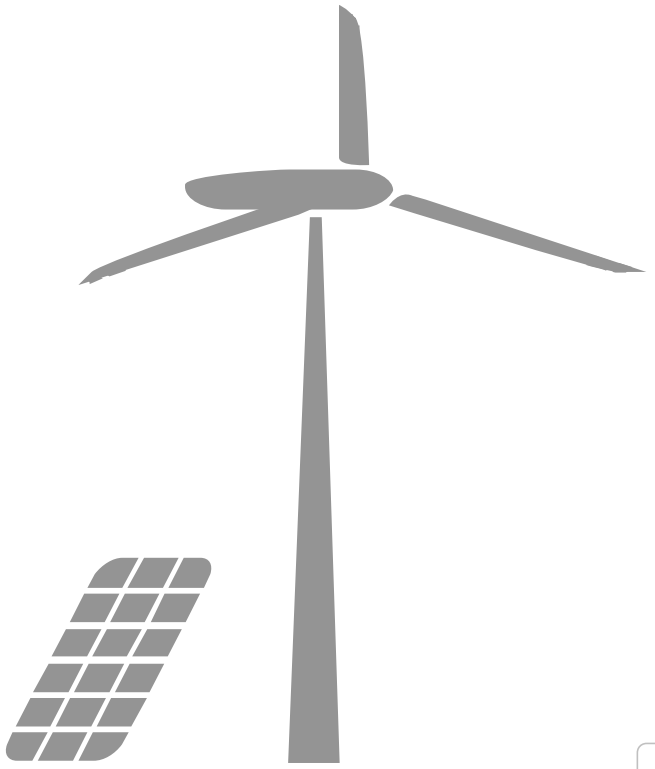
- The released entities do not amount to undertakings *in general* (#1)
- The released entities do not amount to undertakings *at some specific point in time*, since they did not start their economic activity (#2)
- The released entities appear in a different factual and/or legal position than entities subject to the production fee (there is no selectivity of the measure). The released entities do not own RES installations, which would affect the interests of communities. They are ***(i)*** located in sea, which do not have neighboring communities whose interests would be affected (although such installations are subject to payment of an alternative fee) (#3) or ***(ii)*** are small in size and their existence does not affect the interests of neighboring communities.

Administrator of funds

Upon the proposal of the Ministry of Energy, the Government appoints the administrator of the fee for electricity production from renewable energy sources (the fee administrator), who shall perform the functions of calculation, collection, administration and payment of the production fee.

The administrator shall be controlled by the State. The administrator shall be entitled only to the compensation of its costs for the performance of its function (no profit).

Cost compensation shall not trigger state aid since (i) the administration of funds does not amount to an economic activity (there is no market for the administration of funds); (ii) the compensation of costs (without profit) does not give economic advantage (does not improve financial standing of an entity appointed to administer funds); and (iii) there is no effect on competition and trade between the Member States since only entities controlled by the Lithuanian Government could provide such services.



MINISTRY OF ENERGY
OF THE REPUBLIC OF LITHUANIA

Production fee funds allocation

Funds shall be allocated to the projects implemented by *community organisations*

Community organisation – a special purpose association whose founders and members are residents (their representatives) of the community of a residential area (its part or several residential areas) and whose *purpose is to implement public interests related to living in the neighborhood through initiatives.*

An association is a *non-profit public legal entity* whose purpose is to coordinate the activities of the members of the association.

The main eligibility criteria established in the Law

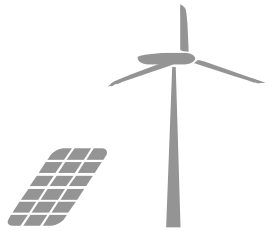
Funded projects must be implemented in the territories where RES installations are established.

1) Funded projects must give **environmental, economic or social benefits** to the community, community organization or their members.
2) The projects must be implemented following the rules established in the law and determined by the Government.

Absence of state aid

It is expected that community organizations shall not engage in *economic activity* in the course of implementation of funded projects, which rules-out the existence of state aid.

MINISTRY OF ENERGY
OF THE REPUBLIC OF LITHUANIA



Priedas Nr. 3

24-04-2023

POTENTIAL AID INVOLVED IN THE COLLECTION OF ELECTRICITY PRODUCTION FROM RENEWABLE ENERGY SOURCES FEE

1. DESCRIPTION OF DIFFERENT TYPES OF ELECTRICITY PRODUCERS THAT WILL BE EXEMPTED FROM THE PRODUCTION FEE:

During an online meeting, which took part on 11 April 2023, the Commission asked Lithuanian authorities to provide further explanations regarding separate categories of RES electricity producers that shall be released from the obligation to pay the Production fee. In particular, the Commission asked to describe the categories of "*active consumers of electricity*" and "*prosumers.*"

Before commenting on the types of subjects defined in the Lithuanian legislation exempted from the obligation to pay the Production fee, a few aspects of terminology should be highlighted.

In a general sense, "*prosumers"* are defined as individuals who are both able to "produce" as well as "consume" products or services.[1] Yet, in accordance with the European Union (**EU**) legislation, the Lithuanian legislator distinguishes between two types of such "prosumers":

1) "Active consumers of electricity"; and

2) "Renewables self-consumers" (which, in the context of the scheme in question, the Lithuanian authorities refer to as "prosumers").

See explanations on each category of prosumers below.

1.1. ACTIVE CONSUMERS OF ELECTRICITY

Active consumers of electricity (lith. "*aktyvieji elektros energijos vartotojai"*) are exempted from the obligation to pay the Production fee based on Art.13[1](2)(3) of the Law on Renewable Energy of the Republic of Lithuania (the **Law on RES**).

The definition of "*active consumers of electricity*" is provided in Art. 2(1) of the Law on Energy of the Republic of Lithuania (the **Law on Energy**):

> *"1)* ***Active consumer of electricity –*** *consumer of electricity or a group of such consumers acting together, who consume and/or store electricity produced in electrical installations owned by them, or sell the electricity produced by themselves, or participate in the provision of electricity system resilience services and/or the deployment of energy efficiency improvement measures, provided that such an economic activity does not form the core of their main activity."*[2]

This definition is transposed from Art. 2(8) of the Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU (**Electricity directive**). In this directive,

> *„(8) '**active customer**' means a final customer, or a group of jointly acting final customers, who consumes or stores electricity generated within its premises located within confined boundaries or, where permitted by a Member State, within other premises, or who sells self-generated electricity or participates in flexibility or energy efficiency schemes, provided that those activities do not constitute its primary commercial or professional activity. "*

To sum up, the notion of "active consumers of electricity" includes any final consumer of electricity who consumes electricity and sells self-consumer electricity in the market, provided such sales do not constitute

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[1] CSERES, K. J. (2018) "The Active Energy Consumer in EU Law," European Journal of Risk Regulation. Cambridge University Press, 9(2), p. 233.

[2] ***Aktyvusis elektros energijos vartotojas*** *(toliau –* ***aktyvusis vartotojas)*** *–* ***elektros energijos vartotojas arba grupė*** *kartu veikiančių tokių vartotojų, kurie vartoja ir (ar) kaupia elektros energiją, pagamintą jiems nuosavybės teise priklausančiuose elektros įrenginiuose, arba parduoda pačių pasigamintą elektros energiją, arba dalyvauja teikiant elektros energetikos sistemos lankstumo paslaugas ir (ar) diegiant energijos vartojimo efektyvumo didinimo priemones, jeigu tokia ūkinė veikla nėra jų pagrindinė veikla.*

its primary commercial or professional activity. The notion of "*active consumers of electricity*" is not limited to any technology consumers use to produce electricity.

1.2. PROSUMERS

Prosumers (lith. "*elektros energiją iš atsinaujinančių išteklių gaminantis vartotojas"*) are exempted from the obligation to pay the Production fee based on Art.13[1](2)(1) of the Law on RES.

The definition of "*prosumers*" is provided in Art. 2(30) of the Law on Energy:

> "*2) **Prosumer** – consumer of electricity who produces electricity from renewable resources in electricity production facilities, managed by ownership or other legal grounds, to meet his own needs and the needs of the business and having the right produced, but on his own needs not consumed electricity to supply to the electricity networks in accordance with the procedure established by the Law.*"[3]

This definition is transposed from Art. 2(14) of the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (**RED II**):

> *"(14) '**renewables self-consumer'** means a final customer operating within its premises located within confined boundaries or, where permitted by a Member State, within other premises, who generate renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a non-household renewables self-consumer, those activities do not constitute its primary commercial or professional activity."*

Prosumers can "store" the electricity they produced and did not consume for their own or household use in the electricity networks for two years, from April to March. The prosumer is charged the grid access fee for the amount of electricity "stored" and received back from the electricity networks. The amount of electricity supplied to the grid in excess of the electricity consumed by the prosumer during the storage period is not carried over to the following storage period, but independent suppliers pay agreed compensation for this excess.

Today consumers can become prosumers in three ways – having a power plant at the property where there is consumption, at a distant property and buying a part of a power plant in solar parks.

1.3. COMPARISON OF PROSUMERS AND ACTIVE CONSUMERS OF ELECTRICITY

As provided above, there are two types of prosumers in Lithuania:

1) Renewables self-consumers (prosumers); and
2) Active consumers.

Renewable self-consumers (prosumers), under the Law on RES, are only entitled to generate electricity for their self-consumption. If they have excess electricity, they can feed that excess into the grid and consume it later when they need to. This means they cannot sell their surplus electricity if they want to be recognised as renewable self-consumers (prosumers) and participate in net metering. The **active consumer**, whose status is established in the Law on Energy, has more rights and responsibilities, including the right to sell self-generated electricity to consumers.

1.4. ACTIVE CONSUMERS OF ELECTRICITY AND PROSUMERS ARE NOT CONSIDERED AS "UNDERTAKINGS" FOR THE PURPOSE OF APPLICATION OF STATE AID RULES

The Court of Justice of the European Union (**ECJ**) has consistently held that European Union (**EU**) competition law and, in particular, the prohibition laid down in Article 107(1) of the Treaty on the Functioning of the European Union (**TFEU**) concern the activities of undertakings.[4] In the sphere of EU competition law,

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[3] ***Elektros energiją iš atsinaujinančių išteklių gaminantis vartotojas*** *(toliau – gaminantis vartotojas) – elektros energijos vartotojas, gaminantis elektros energiją iš atsinaujinančių išteklių elektros energijos gamybos įrenginiuose, valdomuose nuosavybės teise ar kitais teisėtais pagrindais, savo reikmėms ir ūkio poreikiams tenkinti ir turintis teisę pagamintą, bet savo reikmėms ir ūkio poreikiams nesuvartotą elektros energiją patiekti į elektros tinklus Lietuvos Respublikos atsinaujinančių išteklių energetikos įstatymo nustatyta tvarka.*

[4] Judgments of 23 March 2006, *Enirisorse*, C-237/04, EU:C:2006:197, paras 27-28, and of 5 March 2015, *Commission and Others v Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, para 88.

the concept of 'undertaking' covers any entity engaged in economic activity, regardless of its legal status and how it is financed.[5]

Lithuanian authorities consider that neither prosumers nor active consumers are "undertakings" in the sense of EU competition law and in connection to Article 107(1) of the TFEU.

The definitions of prosumers and active consumers in the Electricity Directive and the RED II (Articles 2(8) and 2(14), respectively) define consumers who produce electricity primarily to meet their *own needs* and not to supply the electricity market. In other words, the main activity of these persons is not connected to engaging in economic activity but is intended to produce electricity for their use. Although prosumers receive compensation for the unused electricity at the end of the period and active consumers may sell surplus electricity on the electricity market, this cannot be their main commercial activity as defined by the Electricity directive and the REDII. With the amendments to the Law on RES, Lithuania intends to encourage these types of consumers to self-generate and consume electricity as a primarily non-economic activity (i.e., not for the purpose of active engagement in the electricity market).

Lithuanian authorities consider that active consumers of electricity sale of residual volumes of electricity on the market does not amount to economic activity and is sufficient to rule out the presence of state aid.

Nevertheless, in the case that such a minor sale of electricity on the market by the active consumers of electricity would be considered an economic activity, attention should be made to the position expressed by the Commission in its Framework for State aid for research and development and innovation (**R&D framework**)[6]. In such a framework, the Commission suggested that in the case of financing research and development organisations that engage both in economic and non-economic activities, where the research organisation or research infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economical use remains purely ancillary.[7]

For the purposes of the R&D framework, the Commission will consider this to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity.[8]

Even if there were grounds to consider that consumers are engaged in economic activities on the electricity market, the Lithuanian authorities, by analogy, take the view that, in this case, the activity of active consumers of electricity in selling unused surplus electricity that they produced on the market is an ancillary activity that is inseparable from the non-economic activity (as the consumers are primarily generating electricity for their own use) and that due to the marginal nature of such an activity, it should lead to the treatment of the consumers as undertakings.

1.5. RELEASE FROM PAYMENT OF PRODUCTION FEE IS NOT SELECTIVE

In case the Commission would consider that prosumers and active consumers should be perceived as "undertakings", the presence of state aid in releasing such persons from the Production fee should be ruled out by the absence of selectivity criterion.

There is no selectivity since prosumers and active consumers, in light of the objectives intrinsic to the system, are not in a comparable factual and legal situation with other market participants, which are bound to pay the Production fee.

As noted above, the Production fee is meant to compensate for the discomfort caused to local communities by the business. Even though prosumers and active consumers produce electricity and sometimes sell (in case of active consumers of electricity) it to the market, their primary aim is not engaging in business. Moreover, such persons are themselves part of the community, which should receive compensation from producers. These two factors distinguish them from other electricity producers, which are subject to the Production fee. Hence, different treatment of such categories of prosumers is not selective (its differentiation, rather than discrimination).

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5 Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, para 107.

6 Communication from the Commission — Framework for State aid for research and development and innovation, OJ C 198, 27.6.2014, p. 1–29.

7 Article 20 of the R&D framework.

8 *Idem.*

In this regard, it should be mentioned that the necessity to differentiate categories of producers is also established in the EU law. The EU encourages Member States to remove legal and commercial barriers preventing consumers from self-generating electricity and from consuming, storing or selling self-generated electricity to the market and ensure that such consumers contribute adequately to system costs. The EU legislators have provided that Member States should be able to have different provisions in their national law with respect to taxes and levies for individual and jointly-acting active customers, as well as for household and other final customers.[9]

2. EXPLANATION OF THE RATIONALE FOR THE DECISION TO APPLY PRODUCTION FEE ONLY TO PRODUCERS TO WHOM ELECTRICITY PRODUCTION PERMITS WILL BE ISSUED AFTER 1ST OF JULY 2023.

The Commission also inquired why the Production fee should be paid only by producers to whom electricity production permits will be issued after 1st of July 2023.

Lithuania intended to introduce a Production fee to compensate communities in a *unified* and *organised* manner for the discomfort caused by the neighbourhood of electricity production facilities (e. g. construction and operation of wind-power turbines cause pollution of noise and view).

Before the introduction of amendments to the Law on RES, developers of power plants usually engaged in individual discussions with the communities aiming to compensate for their discomfort and assumed individually negotiated financial obligations against such communities. This could be illustrated by the Lithuanian Wind Power Association data, which claimed during the parliamentary debate that more than 60 % of already operating producers producing electricity in wind power plants had entered contracts with communities and are already supporting them. Developers were willing to enter such agreements to avoid administrative restrictions in developing power plants (i.e., community opposition).

In this regard, Lithuania assumed that developers who received their production permits before 1st of July 2023 in one way or another resolved their relations with the communities – they either persuaded the community of the absence of discomfort or no community was affected in their individual project, either they entered into legally binding contracts, which obliged to compensate distress of communities.

To resolve the concerns of communities in a regulated manner, Lithuania notified developers of power plants *well in advance* that Lithuania intends to regulate negotiations with communities by law, i.e., to introduce a Production fee, which shall be used to support neighbouring communities. Amendments to the Law on RES, which introduce the Production fee, were established in the Law on RES on 08-07-2022 and contained transitional provisions suggesting that the Production fee shall come into force *within a year* and all producers, who shall receive production permits after 01-07-2023, shall be subject to the payment of such Production fee. With such information in mind, developers could decide whether to promise additional support to communities, make such support conditional to receiving statutory compensations, etc. Moreover, possession of such information in advance also enabled the management of legitimate expectations of developers in investing in *new* power plants.

Considering such differences in the position of electricity producers, Lithuania decided to differentiate electricity producers appearing in different legal and factual situations. Lithuania considered that (i) power plants which received production permits before the legislative amendments had already resolved their issues with communities in a mutually acceptable way; and (i) power plants which shall receive production permits after the legislative amendments should resolve their issues with communities in a manner regulated by the law.

Only such regulation makes sense and avoids discrimination. Imposing a Production fee on all electricity producers would discriminate against producers who have already completed the development of their power plants. A significant part of such producers already remunerated communities and/or assumed legally binding obligations to provide such remuneration in the future with no ability to terminate such contracts. As a result, imposition of Production fee on such producers would charge them twice – they should remunerate communities according to the agreement and according to the statutory provisions of law. Hence, such differentiation is objectively necessary.

3. THE POTENTIAL BUDGET FOR PRODUCTION FEE

During the meeting on 11th April, the Commission also inquired what the budget of a State measure could be.

[9] Paragraph 42 of the preamble to the Electricity directive.

Lithuania's electricity grid operators evaluated the bandwidths granted to electricity production facilities and the existing free bandwidths of electricity networks, considering the actually used bandwidths of electricity networks. The technical possibilities of the electricity energy system allow for connecting 4.4 GW permitted generation capacity of solar power plants and 5 GW permitted generation capacity of wind power plants to the electricity grid until 2030.

Until 30 January 2023, free bandwidths of the electricity system are allocated for the priorities specified in Article 31(21) and Article 39(2) of the Law on Energy (for non-commercial producers) and amounts to 1.6 GW of permitted generation power for solar power plants and 0.57 GW of permitted generation power for wind power plants.

Considering the issued permits to develop electricity production capacities for commercial producers, it reaches 866 000 kW of installed power in solar power plants and 2569 000 kW of installed power in wind power plants. Counting the potential amount of the production fee budget**, we assume that a 1 kW solar power plant generates 1050 kWh of electricity per year and a 1 kW wind power plant generates 2500 kWh** yearly. Having in mind that the production fee tariff is 0,0013 EUR/kWh, the possible overall budget would be **9 531 340 EUR** yearly (please keep in mind that this number is indicative).

Priedas Nr. 4

El. laiškas gautas iš Europos Komisijos 2023 m. birželio 6 d.

Dear Gabija,

I am writing to let you know that we discussed the proposed tax on electricity production from renewable sources with our colleagues who are experts on selective tax cases (in copy). They confirmed our preliminary assessment that the measure, as currently designed, likely constitutes a selective tax measure and therefore entails State aid. This is because many of the exemptions from the tax do not appear prima facie justifiable in light of the objective of the measure. We take note of the arguments provided vis-a-vis the active consumers of electricity, prosumers, and the already existing RES installations. With regards to the first 2 categories, we are aware of the ancillarity arguments used to exclude aid with regards to the use of R&D infrastructure. However, to our knowledge, this approach has not been applied in the energy sector. Furthermore, it is not clear how the Lithuanian authorities will ensure that the 20% threshold is not exceeded in practice. Existing case law confirms that if activities do not remain ancillary, also secondary economic activities can be subject to State aid rules.

Importantly, there are six other categories of producers exempted from the production fee as set out in art. 13 (2) of the law on renewable energy sources for which the justification of the exemption has not been provided. They are also not obvious to us, see for example exemption 8) which refers to '8) producers operating solar power plants connected to electricity distribution networks'. We also note that the list of exemptions in the law is longer than the list in the accompanying slides. For a proper State aid assessment, all exemptions must be assessed and justified in light of the objective of the measure.

Given that avoiding the State aid qualification appears difficult at this stage, and considering that the tax appears to be relatively small, we wanted to ask whether you have considered the possibility setting up a de minimis scheme as a legal basis for providing support to the exempted undertakings.

Please also note that up to now we have not registered our correspondence as a pre-notification. We would be grateful if you could let us know whether you would like to officially pre-notify the measure and continue the discussions on the measure in a more official format. At this stage however, it appears that a no aid decision is not at all straightforward and, if at all possible, will likely require significant changes to the measure and more time for the assessment.

Finally, I wanted to specify that given the lack of details, no State aid assessment can be made at this stage as regards the use of the production fee funds. Any projects financed with the respective proceeds should be subject to a complete State aid assessment, and when applicable notified to the Commission, before the aid is granted.

We remain at your disposal in case of questions.

EUROPEAN
COMMISSION

Brussels, 16.7.2018
C(2018) 4412 final

COMMUNICATION FROM THE COMMISSION

Code of Best Practices for the conduct of State aid control procedures

COMMUNICATION FROM THE COMMISSION

Code of Best Practices for the conduct of State aid control procedures

Table of Contents

1. SCOPE AND PURPOSE OF THE CODE

1. Over recent years, the Commission has implemented a State Aid Modernisation agenda ('SAM') to focus its State aid control on measures which genuinely affect competition in the Internal Market, while at the same time simplifying and streamlining rules and procedures. This has facilitated public investments, by empowering Member States to grant public support without prior scrutiny by the Commission and by speeding up decision-making in State aid procedures.

1. The Commission has, in particular, adopted:

   - A Notice on the Notion of State Aid ('NoA')[1] clarifying the types of public support that do not involve State aid. This is the case, for example, for funding of economic activities on market terms, investments in infrastructure such as railways, motorways, inland waterways and water distribution systems which do not compete with similar infrastructures, investments in small-scale infrastructures and funding of essentially local services.
   - A General Block Exemption Regulation ('GBER')[2] allowing Member States to implement a wide range of State aid measures without prior Commission approval which are unlikely to distort competition. More than 97% of newly implemented State aid measures fall under the GBER and, therefore, are implemented without prior Commission approval[3].
   - A revised Procedural State Aid Regulation, including rules on complaint-handling and on market information tools to target State aid control on cases which are most liable to distort competition in the Internal Market[4].
   - A series of decisions in specific cases confirming that Member States can support many small-scale projects without State aid control, due to their local nature and very limited impact on the Internal Market[5].

2. The effort to focus and streamline EU State aid rules is continuing. In the context of the Multiannual Financial Framework 2021-2027, the Commission has proposed a revision of the EU State aid Enabling Regulation to make it easier (i) to combine EU Funding which is paid in the form of financial instruments with Member States

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1 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50.

2 Commission Regulation (EU) No. 651/2014 of 17 June 2014, OJ L 187, 26.06.2014, p. 1-78, as further amended by Commission Regulation (EU) 2017/1084 of 14 June 2017, OJ L 156, 20.6.2017, p. 1-18.

3 Commission State Aid Scoreboard 2017, Results, trends and observations regarding EU28 State Aid expenditure reports for 2016, 29.11.17, p. 14.

4 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union , OJ L 248, 24.9.2015, p. 9-29.

5 See Commission Press Release, State aid: Commission gives guidance on local public support measures that do not constitute State aid, IP/16/3141, 21 September 2016; Commission Press Release, State Aid: Commission gives guidance on local public support measures that can be granted without prior Commission approval, IP/15/4889, 29 April 2015.

funding and (ii) streamline the conditions for Member States to support certain projects under EU structural and investment funds[6].

4. To make the most of those modernised State aid rules, this Communication ('Best Practices Code') provides guidance to Member States, aid beneficiaries and other stakeholders, on how State aid procedures work in practice[7]. It aims to make State aid procedures as transparent, simple, clear, predictable and timely as possible. It replaces the Notice on a Code of Best Practices adopted in 2009[8] and integrates the Simplified Procedure Notice of 2009[9].

5. To achieve the goals pursued by this Communication and to ensure the correct and efficient application of the State aid rules, Member States and the Commission should closely cooperate as partners. In this context, the Commission services will continue to offer pre-notification contacts concerning potential State aid measures that the Member States are considering implementing. They will work with the Member States to define priorities with regard to the procedural handling of cases. Furthermore, they will have in place a network of country coordinators and offer support to Member States in the form of guidance and training on the application of the State aid rules. As part of stepping up its effort to strengthen its cooperation and partnership with Member States, the Commission services will encourage them to share experiences with it and each other on best practices and challenges encountered in applying the State aid rules.

6. This Best Practices Code also seeks to improve the procedure for dealing with State aid complaints. It clarifies the conditions under which the Commission services will consider a case to be a formal complaint and provides indicative deadlines for the handling of formal complaints.

7. The specific features of an individual case may however require an adaptation of, or deviation from this code. The specificities of the fishery and aquaculture sectors and of the activities in the primary production, marketing or processing of agricultural products may also justify a deviation from this code.

2. RELATIONSHIP TO EU LAW

8. This code describes and clarifies the procedures followed by the Commission services when assessing State aid cases. It does not provide an exhaustive overview of EU State aid rules, but should rather be read together with all other documents containing those rules. The code does not create any new rights in addition to those

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6 Commission Proposal for a Council Regulation amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, COM/2018/398 final - 2018/0222, 06/06/2018.

7 Since a significant part of the measures covered by Simplified Procedure Notice are now exempted from State aid notification and the use of that procedure is thus very limited, the Simplified Procedure Notice has been integrated into the present Best Practices Code.

8 Commission Notice on a Code of Best Practice for the conduct of State aid control procedures, OJ C 136, 16.6.2009, p. 13-20.

9 Commission Notice on a Simplified procedure for the treatment of certain types of State aid, OJ C 136, 16.6.2009, p. 3-12.

laid down in the Treaty on the Functioning of the European Union ('the Treaty'), the Procedural Regulation[10] and the Implementing Regulation[11] and their interpretation by the EU Courts. It also does not alter those rights in any way.

3. PRE-NOTIFICATION

3.1. Objectives

9. The Commission services invite the Member States to contact them before formally notifying potential State aid measures to the Commission ('pre-notification contacts'). These 'pre-notification contacts' have several objectives.

10. First, during these pre-notification contacts, the Commission services and the Member State can discuss what information is needed for the notification of the State aid measure in question to be considered as complete. Thus, pre-notification contacts generally lead to better and more complete notifications. This in turn speeds up the handling of such notifications, generally allowing the Commission to adopt decisions within 2 months of the date of notification[12].

11. Second, during the pre-notification contacts, the Commission services and the Member State can discuss the legal and economic aspects of a proposed measure in an informal and confidential[13] manner before it is formally notified. In particular, the pre-notification phase can provide an opportunity to address those aspects of a proposed measure that might not be fully in line with the State aid rules, including in cases where significant changes to the measure are necessary.

12. Third, during the pre-notification phase the Commission services will make a first assessment of whether or not a case qualifies for application of the streamlined procedure (see Section 6).

3.2. Scope

13. The Commission services will engage in pre-notification contacts whenever a Member State requests them. The Commission services strongly recommends that Member States engage in such contacts in cases which have novel aspects or features or complexity which justify prior informal discussions with the Commission services. Pre-notification contacts can also be useful for projects of common interest with high EU relevance, such as the Trans-European Network for Transport (TEN-T) core network projects, to the extent that their funding is likely to constitute State aid.

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10 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

11 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as last amended by Commission Regulation (EU) 2015/2282 of 27 November 2015, OJ L 325, 10.12.2015, p 1.

12 See Article 4(5) referring to decisions under Articles 4(2), 4(3) and 4(4) of the Procedural Regulation. That deadline cannot be respected where the Commission's services has to issue several requests for information due to incomplete notifications.

13 Based on Article 30 of the Procedural Regulation the Commission is bound by professional secrecy in all State aid proceedings. This is backed by the general obligation of professional secrecy laid down in Article 339 of the Treaty.

3.3. Timing

14. To ensure that the pre-notification contacts are efficient, Member States should provide the Commission services with all information necessary for assessing a proposed State aid measure, in the form of a draft notification. Informal pre-notification contacts will then take place typically by email, telephone or conference call to speed up the process. Where necessary, or at the request of the Member State, meetings between the Commission services and the Member State may also take place.

15. For particularly complex cases (such as those on restructuring aid, or large or complex individual aid measures), the Commission services recommend that Member States initiate pre-notification contacts as early as possible to allow for a fruitful discussion. Such contacts can also be useful in some seemingly less problematic cases, in order to validate Member States' own initial assessment and establish the information the Commission services would need to assess the case.

16. The timing and format of pre-notification contacts largely depend on the complexity of the case. Although such contacts may last several months, they should, as a general rule, not last more than 6 months.

17. After the conclusion of the pre-notification contacts, the Member State should be able to submit a complete notification. In cases where the Commission services consider that pre-notification contacts do not bring satisfactory results, they may close the pre-notification phase. This does not prevent the Member State from pre-notifying or notifying a similar measure again.

3.4. Content

18. Based on its experience, especially in cases with major technical, financial and project-related implications, the Commission recommends involving the beneficiaries of individual measures in pre-notification contacts. Nevertheless, the decision on whether or not to involve the beneficiary rests with the Member State.

19. For measures involving several Member States (for instance, important projects of common European interest), the participating Member States are generally encouraged to discuss between themselves before initiating pre-notification contacts, to ensure a consistent approach to the measure and to establish a realistic timeline.

20. The Commission services will try to provide the Member State with an informal preliminary assessment of the measure at the end of the pre-notification phase. That preliminary assessment comprises non-binding guidance from the Commission services on the completeness of the draft notification and an informal and non-binding assessment[14] of whether the measure constitutes State aid and whether or not it is compatible with the internal market.

21. In particularly novel or complex cases, the Commission services might not provide an informal preliminary assessment at the end of the pre-notification phase. In such cases, at the request of the Member State, they may indicate in writing what

[14] Thus, it does not constitute or prejudge an official position of the Commission.

information still needs to be provided to enable them to carry out an assessment of the measure.

22. Pre-notification contacts are voluntary and confidential. They do not affect the assessment of the case after its formal notification. In particular, the fact that pre-notification contacts have taken place does not mean that the Commission services cannot request the Member State to provide further information after the formal notification.

4. CASE PORTFOLIO APPROACH AND MUTUALLY AGREED PLANNING

4.1. Case portfolio approach

23. Member States may ask the Commission services to treat cases that they consider of priority with more predictable timelines. To that end, they can participate in the 'portfolio exercise' offered by the Commission services. Twice per year[15], the Commission services will ask the Member States to inform them which notified cases in their portfolio they consider to be of high or low priority. If they wish to participate in the exercise, Member States should reply to the request within the given timeline. Once it has received that information, and with due regard to available resources and other pending cases involving the Member State making the request, the Commission services may propose a Mutually Agreed Planning for those cases to ensure they are dealt with promptly and predictably.

4.2. Mutually Agreed Planning

4.2.1. Objective and content

24. Mutually Agreed Planning is a tool which can be used to increase the transparency and predictability of the likely duration of a State aid investigation. This tool allows the Commission services and the Member State to agree on the expected timeline of an investigation in a specific case, and in some cases also on the likely course of the investigation. This can be particularly useful in cases which have novel aspects, which are related to TEN-T core network projects or which are technically complex, urgent or sensitive.

25. In particular the Commission services and the Member State could agree on the following:

– Priority treatment of the case as part of the portfolio exercise. Where necessary for planning or resource purposes[16], priority treatment can be granted in return for the Member State's formal acceptance of the suspension or the extension of the time limit of the examination[17] of other cases from its portfolio.

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15 Currently at the end of January and the end of September of each year.

16 For instance, in cases where the financial institutions of the European Union act as holding fund.

17 See Article 4(5) of the Procedural Regulation.

– Which information[18] the Member State and/or the intended aid beneficiary should provide to the Commission services, and which type of unilateral information-gathering the Commission services intend to use in the case.

– The likely form and duration of the assessment of the case by the Commission services after its notification.

26. If the Member State promptly provides all information agreed upon, the Commission services will endeavour to comply with the mutually agreed time frame for their investigation of the case. Nevertheless, it may not be possible to work within that time frame in cases where the information provided by the Member State or third parties raises further issues.

4.2.2. Scope and timing

27. Mutually Agreed Planning will, in particular, be used in cases which involve very novel aspects, or are technically difficult or sensitive. In these cases, Mutually Agreed Planning will take place at the end of the pre-notification phase, and be followed by the formal notification.

28. Mutually Agreed Planning can also take place at the beginning of the formal investigation procedure. In such cases, the Member State should request Mutually Agreed Planning for further treatment of the case.

5. THE PRELIMINARY EXAMINATION OF NOTIFIED MEASURES

5.1. Requests for information

29. The Commission services start their preliminary examination of each notified measure when they receive its notification. If they need further information after an aid measure has been notified, they will send a request for information to the Member State. Because the Commission services try to group requests for information and because pre-notification contacts should ensure that Member States submit complete notifications[19], one comprehensive request for information will generally be enough. The request explains which information is needed and will normally be sent within 4 weeks following the formal notification.

30. After receiving the Member State's response, the Commission services may raise additional questions depending on the content of the answers and on the nature of the case. This does not necessarily mean that the Commission has serious difficulties in assessing the case.

31. If the Member State does not provide the requested information within the deadline, the Commission services will send a reminder. If, after one reminder, the Member State still does not send the information, the Commission services will inform the Member State that the notification is considered as withdrawn[20], unless there are exceptional circumstances. If a notification is considered to have been withdrawn,

[18] For example studies or external expertise.

[19] Unless otherwise agreed in Mutually Agreed Planning.

[20] On the basis of Article 5(3) of the Procedural Regulation.

the Member State may subsequently re-notify the measure with the missing information added.

32. When the conditions to open the formal investigation procedure are met, the Commission will generally open that procedure after, at the most, two rounds of questions. However, in some cases more requests for information may be issued before the formal investigation procedure is opened, depending on the nature of the case and the completeness and complexity of the information provided by the Member State.

5.2. Agreed suspension of the preliminary examination

33. The Commission services may suspend the preliminary examination, for example when a Member State requests a suspension in order to change the aid measure to bring it in line with State aid rules, or by common agreement.

34. The period of suspension will be agreed in advance. If the Member State has not submitted a complete notification which complies with the State aid rules at the end of this period, the Commission services will continue the procedure from the point at which it was suspended. The Commission services will usually then inform the Member State that the notification is considered to have been withdrawn, or immediately open the formal investigation procedure due to serious doubts as to whether the aid measure complies with the State aid rules and hence its compatibility with the internal market.

5.3. 'State of play' contacts and contacts with the aid beneficiary

35. Upon request, the Commission services will inform the Member State of the state of play of the preliminary examination of the notification.

36. The Member State may decide to involve the beneficiary of a potential (individual) State aid measure in the 'state of play' contacts with the Commission, especially in cases with major technical, financial and project-related implications. The Commission services recommend the beneficiary becomes involved in such contacts. Nevertheless, the decision on whether or not to involve the beneficiary rests with the Member State.

6. STREAMLINED PROCEDURE IN STRAIGHTFORWARD CASES

6.1. Cases that may be subject to the streamlined procedure

37. If a case is straightforward and certain conditions are fulfilled, the Commission may agree to handle it under a streamlined procedure. In such cases, the Commission will, within 25 days from the date of notification, endeavour to adopt a short-form decision finding that the notified measure does not constitute aid or a decision not to raise objections[21].

38. If a Member State asks for the streamlined procedure to be applied, the Commission services will decide whether the case is suitable for this procedural treatment. This may, in particular, be the case when a measure is sufficiently similar to other

[21] Pursuant to Article 4(2) or 4(3) of the Procedural Regulation.

measures which were approved in at least three Commission decisions adopted in the 10 years preceding the date of pre-notification ('precedent decisions'). To decide whether the measure is sufficiently similar to those assessed in the precedent decisions, the Commission services will look at all applicable substantive and procedural conditions, and in particular at the objectives and overall set-up of the measure, the types of beneficiaries, eligible costs, individual notification ceilings, aid intensities and applicable bonuses (if any), cumulation provisions, incentive effect and transparency requirements.

39. Generally, where at least three precedent decisions are available, it is clear that the measure does not constitute aid or that the aid measure is compatible with the internal market. Nevertheless, this may not be the case in certain circumstances, for example if the Commission is reassessing the precedent decisions in the light of recent case-law. As such cases need to be closely examined, the Commission services will usually refuse to apply the streamlined procedure.

40. The Commission services may also refuse to apply the streamlined procedure in cases where the aid measure could benefit a company which is under an obligation to repay State aid that the Commission held to be illegal and incompatible with the internal market[22].

6.2. Pre-notification contacts in determining the use of streamlined procedure

41. The Commission services will only agree to apply the streamlined procedure if pre-notification contacts have taken place on the aid measure in question. In this context, the Member State should submit a draft notification form containing all relevant information, including references to precedent decisions, and a draft summary of the notification[23], which is intended for publication on the website of DG Competition.

42. The Commission services will only apply the streamlined procedure if they consider the notification form to be, in principle, complete. This means that the Commission services in principle would have enough information to approve the measure, if the Member State bases its notification on the draft notification form including the results of the pre-notification contacts.

6.3. Notification and publication of the short summary

43. The time limit of 25 days for the adoption of a short-form decision (see Point 38) starts when the Member State submits the notification. The standard notification forms[24] are used in the streamlined procedure.

44. After having received the notification, the Commission services will publish a summary of the notification[25] on DG Competition's website and will state that the aid measure may qualify for the application of the streamlined procedure. Interested parties will then have 10 working days to comment, particularly on circumstances which might require more thorough examination. If an interested party raises

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22 On the basis of an outstanding recovery order of the Member States, see Judgment of the ECJ of 9 March 1994, Case C-188/92, TWD Textilwerke Deggendorf, ECLI:EU:C:1994:90.

23 Annex to this Best Practices Code.

24 Annex I of the Implementing Regulation.

25 This summary is based on the standard form provided in the Annex of this Best Practices Code.

concerns which are at first sight well founded, the Commission services will apply the normal procedure. They will inform the Member State and the interested parties thereof.

6.4. Short-form decision

45. In cases where the streamlined procedure is applied, the Commission will normally issue a short-form decision. The Commission will endeavour to adopt a decision finding that the notified measure does not constitute aid or a decision not to raise objections[26] within 25 working days from notification.

46. The short-form decision contains the summary published at the time of notification and a short assessment of the measure under Article 107(1) of the Treaty and, where applicable, mentions that it is in line with the Commission's previous decision-making practice. The public version of the decision will be published on DG Competition's website.

7. THE FORMAL INVESTIGATION PROCEDURE

47. The Commission aims to improve the transparency, predictability and efficiency of the treatment of the complex cases which are handled under the formal investigation procedure. To this end, it will efficiently use all procedural means it has on the basis of the Procedural Regulation.

7.1. Publication of the decisions and meaningful summaries

48. The Commission endeavours to publish its decision to open the formal investigation procedure ('opening decision'), together with a meaningful summary[27] within 2 months of its adoption in cases where the Member State does not ask for confidential information to be removed from the decision.

49. Where there is disagreement between the Commission services and the Member State about removal of confidential information from the opening decision, the Commission will apply the principles of the Communication on professional secrecy[28] and will publish the decision as soon as possible after its adoption[29]. The same practice applies to the publication of all final decisions[30].

7.2. Interested parties' comments

50. Interested parties, including the beneficiary of the aid, may comment on the opening decision within 1 month of its publication[31]. The Commission services will, in principle, not extend that deadline or accept submissions after it has passed[32]. The Commission services can grant an extension only in exceptional and duly justified

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26 Based on Article 4(2) or 4(3) of the Procedural Regulation.

27 The 'meaningful summary' is intended to be a short summary of the grounds on which the Commission has decided to open the procedure. The meaningful summary is translated into all official languages of the EU and published together with the full text of the opening decision in the Official Journal.

28 Commission communication on professional secrecy in State aid decisions (OJ C 297, 9.12.2003, p. 6).

29 In line with paragraph 33 of the Communication on professional secrecy.

30 In line with paragraph 34 of the Communication on professional secrecy.

31 Article 6 of the Procedural Regulation.

32 Without prejudice to Article 12(1) of the Procedural Regulation.

cases, for example if the interested party intends to submit particularly voluminous factual information or if there has been contact with the interested party before the deadline expires.

51. In very complex cases, the Commission services may send a copy of the opening decision to interested parties, including trade or business associations, and ask them to comment on specific aspects of the case[33]. Interested parties' cooperation is voluntary. In their letter, the Commission services will invite interested parties to reply within 1 month to ensure that the procedure is efficient. The Commission will send the same invitation to comment to the aid beneficiary.

52. In order to respect the rights of defence[34], the Commission services will forward a non-confidential version of any comments received from interested parties to the Member State concerned and invite the Member State to reply within 1 month. If there are no comments from interested parties, the Commission services will inform the Member State to that effect.

53. The Commission services invite the Member States to accept comments from interested parties in their original language, so that they can be forwarded as quickly as possible. Nevertheless, the Commission services will provide a translation if a Member State asks for it. This may result in the procedure taking longer.

7.3. Member States' comments

54. The Commission services strive to complete the formal investigation procedure as quickly as possible. Therefore, they strictly apply the deadlines laid down in the Procedural Regulation. If a Member State does not submit comments on the opening decision or on third-party comments within 1 month[35], the Commission services may extend the deadline by another month, if the request from the Member State is justified, stating that, except in exceptional circumstances, no further extension will be granted. If the Member State does not send a sufficient and meaningful reply, the Commission may take a decision on the basis of the information available to it[36].

55. If information which is essential for the Commission in order to come to a final decision is missing in the case of unlawful aid (that is to say if new aid put into effect is in breach of Article 108(3) of the Treaty), the Commission might issue an information injunction[37] requiring the Member State to provide the information. If the Member State does not respond to the injunction within the prescribed period, the Commission may take a decision based on the information available to it.

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33 According to settled case law, the Commission is entitled to send the decision to open the formal investigation to identified interested parties; see for example Case T-198/01, Technische Glaswerke Ilmenau v. Commission, ECLI:EU:T:2004:222, paragraph 195; Joined Cases C-74/00 P and C-75/00 P, Falck Spa and others v. Commission, ECLI:EU:C:2002:524, paragraph 83.

34 And in accordance with Article 6(2) of the Procedural Regulation.

35 Article 6(1) of the Procedural Regulation.

36 In line with Article 9(7) and 15(1) of the Procedural Regulation.

37 Article 12 of the Procedural Regulation.

7.4. Requests for additional information from the Member State concerned

56. In very complex cases, the Commission services may need to send a further request for information after the Member State's comments on the opening decision have been received. The deadline for the Member State to reply is normally 1 month.

57. If a Member State does not reply by the deadline, the Commission services will send a reminder, setting a final deadline, which is usually 20 working days. They will also inform the Member State that, in the absence of a suitable response by the deadline, the Commission has several options according to the characteristics of the case. It may observe that the notification is withdrawn[38]. It may send a request for information to other sources[39]. For cases of unlawful aid, the Commission may issue an information injunction. It may also take a decision based on the information available to it[40].

7.5. Requests for information made to other sources

58. After initiating the formal investigation procedure in cases where it has been formally concluded that the Member State has not provided sufficient information during the preliminary examination, the Commission may issue a request for information to sources other than the Member State[41].

59. If the Commission services want to request information from the aid beneficiary, they need to obtain the Member State's express consent. The Member State will typically have a short deadline to reply to such a request for consent.

60. The Commission services will respect the principle of proportionality[42] and only request information from other sources if that information is at the disposal of those parties. Interested parties will have a reasonable period, usually no more than 1 month, to provide the information.

61. Besides requests for information from other sources, the Commission also has the power to investigate and collect information based on the case-law of EU courts[43]. This power is not affected by the specific rules governing requests for information to other sources.

7.6. Justified suspension of a formal investigation

62. The Commission services will only suspend a formal investigation in exceptional circumstances and in agreement with the Member State. This could be the case if the Member State asks for a suspension to bring its project in line with the State aid

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38 Article 5(3) of the Procedural Regulation.

39 Article 7 of the Procedural Regulation.

40 Articles 9(7) and 15(1) of the Procedural Regulation.

41 Article 7 of the Procedural Regulation.

42 Article 7 of the Procedural Regulation.

43 For instance, in Case T-198/01 Technische Glaswerke Ilmenau v Commission, ECLI:EU:T:2004:222, the Court of First Instance recognised implicitly that the Commission was entitled to put questions to one of the firms that made comments following the decision to open the formal investigation procedure. Similarly, in Case T-296/97 Alitalia v Commission, ECLI:EU:T:2000:289, the Court of First Instance also implicitly accepted that the Commission could, via its appointed expert consultants, contact institutional investors in order to assess the conditions of investment of the Italian State in Alitalia.

rules, or where the judgment in a case pending before EU courts is likely to have an impact on the assessment of the case.

63. Formal suspension will normally only be granted once, and for a period agreed in advance between the Commission services and the Member State.

7.7. Adoption of the final decision and justified extension of the formal investigation

64. The Commission always endeavours to adopt a final decision expeditiously and, as far as possible, within 18 months from the opening of the procedure[44]. That time limit may be extended by agreement between the Commission services and the Member State. An extension may be appropriate if the case concerns a novel aid measure or raises novel legal issues.

65. To ensure that this 18-month deadline is complied with, the Commission will endeavour to adopt the final decision no later than 6 months after the Member State submits the last piece of information, or after the last deadline expires.

8. INVESTIGATIONS INTO SECTORS OF THE ECONOMY AND INTO AID INSTRUMENTS

66. The Commission has the power to conduct sector inquires, in which it will respect the principle of proportionality[45]. At the end of such an inquiry, the Commission will publish a report on the results of its investigation on DG Competition's website. The Commission will inform Member States and invite them and other concerned parties to comment on the report within a period of no more than 1 month.

67. The information obtained through the sector inquiry may be used in State aid procedures, and could lead to the Commission launching investigations into State aid measures on its own initiative.

9. FORMAL COMPLAINTS

68. The Commission services endeavours to handle complaints from interested parties as efficiently and transparently as possible, using the best practices described below.

9.1. The complaint form and obligation to show affected interest

69. Article 1(h) of the Procedural Regulation defines interested parties as any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations. Interested parties wanting to submit a formal complaint to the Commission should fill out the complaint form[46] and provide all the requested information, together with a non-confidential version of the complaint[47]. If the complaint form is complete and the submitting party shows that its interests might be affected by the granting of the aid pursuant to Article 1(h) of

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44 Article 9(6) of the Procedural Regulation. Pursuant to Article 15(2) of that Regulation, the Commission is not bound by the deadline in the case of unlawful aid.

45 Article 25 of the Procedural Regulation.

46 Annex IV to the Implementing Regulation.

47 See Article 24(2) of the Procedural Regulation.

the Procedural Regulation[48], the Commission services will register the case as a formal complaint.

70. If the submitting party does not provide all information required by the complaint form or does not show that it has an interest to act, the Commission services will treat the submission as market information[49]. The Commission services will inform the submitting party to that effect. Market information may lead to further investigation by the Commission.

9.2. Indicative time frame and outcome of the investigation of a formal complaint

71. The Commission services endeavour to investigate a formal complaint within a non-binding time limit of 12 months from when they are registered. The investigation could be longer based on the circumstances of the case, for example if the Commission services need to ask the complainant, Member State or third parties for further information.

3. If a complaint is unsubstantiated, the Commission services will try to inform the complainant within 2 months from its registration that there are insufficient grounds for taking a view on the case. They will invite the complainant to submit further substantive comments within 1 month. If the complainant does not provide further comments within the deadline, the complaint will be considered to have been withdrawn.

73. With regard to complaints on approved aid and/or aid measures which do not need to be notified, the Commission services will also try to reply to the complainant within 2 months from receipt of the complaint.

74. Depending on its workload and in applying its right to set the priorities for investigations[50], the Commission services will try to carry out one of the following within 12 months following the registration of the complaint:

- adopt a decision[51], and send a copy to the complainant;
- send a letter to the complainant setting out its preliminary views on the measure based on the available information ('preliminary assessment letter'); this letter is not an official position of the Commission.

75. If the preliminary assessment letter provisionally concludes that there is no incompatible aid, the complainant can comment on it within 1 month. If the

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48 'Interested party' means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

49 As explained in Recital 32 in the preamble to the Procedural Regulation, '[t]o ensure the quality of the complaints submitted to the Commission, and at the same time transparency and legal certainty, it is appropriate to lay down the conditions that a complaint should fulfil in order to put the Commission in possession of information regarding alleged unlawful aid and set in motion the preliminary examination. Submissions not meeting those conditions should be treated as general market information, and should not necessarily lead to ex officio investigations.

50 Case T-475/04, Bouygues SA v Commission, ECLI:EU:T:2007:196, paragraphs 158 and 159.

51 Article 4 of the Procedural Regulation.

complainant does not comment within the deadline, the complaint will be considered to have been withdrawn.

76. If a complaint concerns unlawful aid, the Commission services will remind the complainant that it is possible to start proceedings before national courts which can order that such aid be suspended or recovered[52]. The Commission services may treat formal complaints on aid measures which are being challenged before national courts as a low priority for the duration of those proceedings.

77. The Commission services will usually, but not necessarily, forward the non-confidential version of the substantiated complaints to the Member State for comments. The Commission services will invite the Member State concerned to meet the deadlines for commenting and providing information on complaints. Complaints will normally be sent to the Member State in their original language. Nevertheless, the Commission services will provide a translation if the Member State asks for it. This may result in the procedure taking longer.

78. The Commission services will systematically keep Member States and complainants informed of the processing or closure of complaints.

10. EVALUATION PLANS

79. The positive effects of State aid should outweigh its potential negative effects on competition and trade. To ensure that this is the case, the Commission encourages an effective *ex post* evaluation of aid schemes which could lead to substantial distortions of competition. This includes aid schemes with large budgets or novel characteristics, and schemes in markets where significant market, technology or regulatory changes are expected. The Commission services will decide during the pre-notification phase whether an evaluation is necessary. They will inform the Member State as soon as possible, so that it has enough time to prepare an evaluation plan.

80. For schemes that must be evaluated on the basis of the GBER[53], the Member State must notify its evaluation plan to the Commission within 20 working days from the scheme's entry into force. The Commission will assess the evaluation plan and, if it meets the conditions, approve it as soon as possible. It will also then extend the period for which the scheme can be implemented under the GBER.

81. For notified schemes that must be evaluated, the Member State must submit its evaluation plan to the Commission at the same time as the notification. The Commission will assess the evaluation plan alongside the scheme itself, and its decision will cover both the plan and the scheme. All procedural requirements from the Procedural Regulation apply in full.

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52 See Commission Notice on the Enforcement of State Aid Law by National Courts (OJ C 85, 9.4.2009, p. 1-22).

53 Article 1(2)(a) of the GBER excludes from the scope of the block-exemption aid schemes with annual budgets exceeding EUR 150 million, from 6 months of their entry into force, unless the Commission has prolonged that period following the approval of an evaluation plan.

11. MONITORING

82. The Commission keeps all systems of aid that exist in the Member States under constant review[54]. The review takes place in cooperation with the Member States, which must provide all the necessary information to the Commission[55].

83. Since SAM, Member States have had greater possibilities to grant aid without notifying it to the Commission, mainly because GBER now applies to more measures. To ensure that those measures comply with the rules in a consistent way throughout the EU, it is increasingly important for the Commission to monitor how Member States apply existing or exempted aid schemes. Therefore, the Commission services have set up an annual monitoring process during which they select a sample of State aid cases for further scrutiny.

84. The Commission services check both the compliance of the selected schemes with their legal basis and their implementation[56].

85. The Commission services obtain the necessary information for the monitoring process through requests for information to the Member States. Member States usually have 20 working days to reply to these requests. In justified cases, for example where an exceptionally large amount of information needs to be provided, that period may be longer.

86. If the information provided is not sufficient to conclude whether the measure is correctly designed and implemented, the Commission services will send further requests for information to the Member State.

87. The Commission services will try to complete the monitoring of a State aid measure within 12 months from the first request for information and inform the Member State concerned of the outcome.

12. BETTER COORDINATION AND PARTNERSHIP WITH MEMBER STATES

88. Since SAM, Member States have had greater responsibility in State aid control and more possibilities to grant aid without notifying it to the Commission. Therefore, cooperation between the Commission and the Member States on the application of the new State aid rules has become more important.

89. To foster closer working relationships with Member States, the Commission services have set up several working groups bringing together representatives from both the Member States and the Commission. These working groups meet on a regular basis and are meant to exchange information on practical aspects and lessons learned in the application of State aid rules. The Commission services provide the secretariat for the working groups.

90. In addition, the Commission services are also ready to support Member States, for example by providing informal guidance on the interpretation of the new rules. The

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54 On the basis of Article 108(1) of the Treaty.

55 In accordance with Article 21(1) of the Procedural Regulation.

56 If the scheme was actually implemented.

Commission services also try to provide training sessions for Member States on State aid topics when asked for by the Member States.

91. The Commission services have also set up a network of country coordinators to facilitate day-to-day contacts with the Member States. The country coordinator is a contact point for Member States that wish to reach out to the Commission services on the handling of cases and other aspects of the application of State aid rules. The country coordinators should be kept in copy of electronic communication on cross-cutting issues, especially on the case portfolio approach.

13. FUTURE REVIEW

92. The Commission will apply this Best Practices Code to notified measures and measures which were otherwise brought to its attention 30 days after it is published in the *Official Journal of the European Union.*

93. This Best Practices Code may be revised to reflect:

- changes to legislative, interpretative and administrative measures;
- the relevant case-law of the EU Courts; or
- experience gained in its application.

94. The Commission will engage, on a regular basis, in dialogue with the Member States and other stakeholders on the application of the Procedural Regulation in general, and this Best Practices Code in particular.

ANNEX

Summary of Notification: Invitation to third parties to submit comments
Notification of a State Aid measure

On … the Commission received a notification of an aid measure pursuant to Article 108 of the Treaty on the Functioning of the European Union. On preliminary examination, the Commission finds that the notified measure could fall within the scope of the Streamlined Procedure pursuant to Section 6 of Communication from the Commission on a Code of Best Practices for the conduct of State aid control procedures (OJ C … xx.xx.2018, p. …).

The Commission invites interested third parties to submit their possible observations on the proposed measure to the Commission.

The main features of the aid measure are the following:

Reference number of the aid: SA …

Member State:

Member State reference number:

Region:

Granting authority:

Title of the aid measure:

National legal basis:

Proposed Union basis for assessment: … guidelines or established Commission practice as highlighted in Commission Decision (1, 2 and 3).

Type of measure: Aid scheme/Ad hoc aid

Amendment of an existing aid measure:

Duration (scheme):

Date of granting:

Economic sector(s) concerned:

Type of beneficiary (SMEs/large enterprises):

Budget:

Aid instrument (grant, interest rate subsidy, …):

Observations raising competition issues relating to the notified measure must reach the Commission no later than 10 working days following the date of this publication and include a non-confidential version of these observations to be provided to the Member State concerned and/or other interested parties. Observations can be sent to the Commission by fax, by post or email under reference number SA … to the following address:

European Commission
Directorate-General for Competition
State Aid Registry
1049 Bruxelles/Brussels
BELGIQUE/BELGIË
Fax +32 22961242
Email: stateaidgreffe@ec.europa.eu