EUROPEAN COMMISSION

Legal Service

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Administrative Division
of the Senate of the
Supreme Court of Latvia
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Latvia

REPLY FROM THE COMMISSION TO THE REQUEST FOR OPINION FROM THE ADMINISTRATIVE DIVISION OF THE SENATE OF THE SUPREME COURT OF LATVIA IN CASE DZIRNAVA

(NO SKA-81/2021)

1. INTRODUCTION

1. On 15 March 2021, the Commission received a request for an opinion from the Administrative Division of the Senate of the Supreme Court of Latvia on the basis of Article 29(1) of Regulation 2015/1589 (the "Procedural Regulation").[1]

2. It should be recalled that opinions of the Commission – in line with Article 29(1) of the Procedural Regulation and the Enforcement Notice[2] – are not binding upon the national court. Only the Union Courts can give a binding interpretation of EU State aid rules. Therefore, the Commission's opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union ("TFEU").[3]

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1 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, Official Journal of the European Union ("OJ") L 248, 24.9.2015, p. 9.

2 See points 89 to 96 of the Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1 (the "Enforcement Notice"). Currently, under revision.

3 See Enforcement Notice, point 81.

3. In accordance with the Enforcement Notice, when giving its opinion the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court.[4]

2. RELEVANT FACTS AND PROCEDURE

4. The applicant in the national court case is a small hydroelectric power plant called Dzirnava. The power plant received support under the Latvian renewables scheme approved by the Commission in 2017 ("the 2017 decision")[5].

5. Dzirnava started to receive support in 2007 for an installed capacity of 0.06 MW. In 2010, Dzirnava received funding under the Climate Change Financial Instrument support programme 'Technology transfer from fossil to renewable energy sources'. As a result of the the investment support, the hydroelectric power plant was modernised and its installed capacity increased to 0.118 MW. Dzirnava did not receive operating support for the increased generation capacity under the Latvian renewables scheme. It only received operating support for the initial 0.06 MW.

6. In order to mitigate the risk of overcompensation, Latvia introduced an internal rate of return (IRR) ceiling for installations receiving operating support under the renewables scheme at 9%. Latvia determined the IRR ceiling for Dzirnava taking into account the investment support, which was destined to modernise and enlarge the installed capacity of the plant. Latvia is of the view that the 2017 decision requires that the total amount of support and revenues of a renewables plant be taken into account to set the ceiling.

7. Dzirnava does not agree with this interpretation of the 2017 decision. In Dzirnava's view, investment support granted to create generation capacity that is sold at market prices, and for which Dzirnava does not receive any operating support, should not be taken into account in the IRR calculation.

8. Dzirnava contested the approach taken by Latvia in front of the national courts. Both the Latvian District Administrative Court and the Regional Administrative Court dismissed Dzirnava's arguments. The Regional Administrative Court emphasised that Dzirnava failed to identify the part of the investment support granted to expand the generation capacity for which it does not receive operating support as opposed to the part of the investment support destined at the modernisation of the part of the facility, for which it gets operating support.

9. Dzirnava subsequently challenged the Regional Administrative Court's findings in front of the Administrative Division of the Senate of the Supreme Court. Dzirnava argued that it was possible to distinguish between the part of investment support granted for the generation capacity for which it received operating support and the part of the investment support granted for the generation capacity sold at market prices. It also argued that the 2017 decision did not provide that support received by an installation for electricity generated outside the operating aid scheme had to be taken into account when setting the IRR ceiling. Finally, Dzirnava argued that taking

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4 See Enforcement Notice, point 93.

5 SA.43140 (2015/NN) – Latvia. Support to renewable energy and CHP. OJ C 176 of 2 June 2017, p. 1.

into account investment support for electricity generation not falling under the operating aid scheme is an unjustified restriction of its property rights.

3. QUESTIONS RAISED BY THE ADMINISTRATIVE DIVISION OF THE SENATE OF THE SUPREME COURT

10. The Administrative Division of the Senate of the Supreme Court notes that neither the 2017 decision nor the Latvian law explicitly regulate a situation in which an undertaking both produces electricity for which it receives operating support and electricity which it sells on the market. In view of the above, the Administrative Division of the Senate of the Supreme Court asks the following questions on the way in which the IRR ceiling should be established:

    1) In the light of the Guidelines on State aid for environmental protection (2008/C 82/01) and the 2017 decision, must the IRR of a power plant used to calculate State aid for renewable energy compatible with the internal market be taken into account as a whole (and consequently all revenues) and all other aid received in respect of the power plant if only part of the electricity produced by the power plant is sold in the context of mandatory public procurement at the price provided for by the State aid scheme?

    2) Would it be contrary to the Commission's Guidelines and the Commission Decision to take into account in the calculation of the IRR only the capacity of the power plant and the corresponding revenues, and only the part of the other aid which can be attributed to the electricity sold in the context of the mandatory public procurement?

4. THE 2017 DECISION

11. The 2017 decision explains the following with regard to the Internal Rate of Return (IRR):

    « (32) In order to reduce any residual risk of overcompensation, the Latvian authorities decided to cap within 1 month of this decision the Internal Rate of Return (IRR) for beneficiaries of the scheme at 9 %. As of the first month following the adoption of this decision, for each beneficiary, the price paid for the subsidised electricity will therefore be reduced to the amount necessary to reach a 9 % overall IRR (see the formulas in recitals (16) and (17) above). Any additional investment aid received (e.g. from European structural funds) will be taken into account when calculating the plant's IRR. This measure will enter into force on the first day of the month following the adoption of this decision and will be applied until support ends ».

12. The formulas contained in the decision read as follows:

    « (16) The remuneration for biogas installations with installed capacity below 2 MW, wind power and small hydropower generators was calculated according to the following formula:

$$CE = FiT \times c \times d \times s$$

    where:

CE [EUR/MWh] is the energy component paid for the electric power sold under the Mandatory Procurement mechanism;

FiT [EUR/MWh] is the Feed in tariff for the specific technology;

c is a coefficient dependent on the power generation capacity of the plant;

d is a coefficient applied to account for decreased support after 10 years of operation;

s is a coefficient applied to prevent overcompensation and will enter into force on the first day of the month following the adoption of this decision (see also recital (32) below).

(17) The remuneration for biogas installations with installed capacity from 2 MW and for biomass generators was calculated according to the following formula:

$$CE = Tg / 9.3 \times D \times c \times s$$

where:

CE [EUR/MWh] is the energy component paid for the electric power sold under the Mandatory Procurement mechanism;

Tg [EUR/MWh] is the final tariff for the trade of natural gas approved by the Regulator (without value added tax);

D is a technology-specific coefficient (a non-dimensional number);

c is a coefficient dependent on the power generation capacity of the plant;

s is a coefficient applied to prevent overcompensation and will enter into force on the first day of the month following the adoption of this decision (see also recital (32) below). »

13. As a preliminary remark, the Commission clarifies that, in the notification leading to the 2017 decision, Latvia limited the scope of the notified measure to the period from 1 July 2007 to 31 December 2012. Latvia choose that period because, in its view, 1 July 2007 was the date of liberalisation of the Latvian electricity market and after 31 December 2012 no beneficiary was accepted in the aid scheme.[6] The Commission accepted that period as a working hypothesis in the 2017 decision, given that the Commission's authorisation of a notified measure cannot be wider than the scope of the measure as notified by the Member State. However, that working hypothesis does not reflect any confirmation by the Commission of the factual accuracy of the reasons invoked by Latvia for limiting the notification to that period. Therefore, in the 2017 decision the Commission has not confirmed that the Latvian electricity market was indeed liberalised only on 1 July 2007 or that no beneficiary was accepted in the aid scheme after 31 December 2012. As a matter of fact, those assumptions might not be accurate and some of their aspects are under assessment in Joined Cases C-17/21 and C-702/20, *GM and DOBELES HES*, currently pending in a reference for preliminary ruling before the Court of Justice.

6 See recital (6) of the 2017 decision.

14. Nevertheless, for the interpretation of the 2017 decision it must be born in mind that the temporal scope of that approval is limited to State aid granted in the period from 1 July 2007 to 31 December 2012. In view of that temporal scope, the compatibility assessment of the measure was conducted under the 2001 Community Guidelines on State aid for environmental protection (the "2001 EAG")[7] and the 2008 Community Guidelines on State aid for environmental protection (the "2008 EAG")[8].

15. The compatibility assessment under the 2001 EAG states:

> *« (75) However, Latvia identified instances of possible overcompensation for some categories of beneficiaries. Latvia already introduced two transitory measures to remedy the problem. Plants receiving the aid will be subject to the SET until 2017 (see recitals (30) to (33) above). After 2017, in case the SET was not sufficient to eliminate the risk of overcompensation, the price paid for electricity will be reduced in order to cap the IRR at 9 % (see recital (32) above).*
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> *(76) The calculations provided thus demonstrate that, as per point 56 of the 2001 EAG, aid is limited to compensate the difference between the cost of producing electricity from renewable energy and cogeneration and the applicable market price of electricity (as explained in recital (6) above, the electricity market was liberalised in 2007 with the formation of a market price). Furthermore, the abovementioned expected rate of return is reasonable and in line with the rate of return expected for projects in this sector.*[9][footnote 11 in the 2017 decision] *Therefore, the Commission considers that the aid is proportionate and the scheme complies with the conditions of the 2001 EAG.*
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> *(77) Latvia has also confirmed that any cumulation with any other form of support is taken into account when calculating the plants' IRRs (see recital (32) above). The Commission thus considers that the rules on potential cumulation of investment and operating aid as set by the second paragraph of point 59 of the 2001 EAG are complied with. »*

16. The compatibility assessment under the 2008 EAG states:

> *« (83) Based on the detailed cost calculations submitted by Latvia to determine the extra production costs for different types of renewable energy and cogeneration technologies, the Commission considers that the scheme complied with points 109 a) and b) of the 2008 EAG. In compliance with point 109 b), Latvia confirmed that any investment aid granted is taken into account when determining the production costs of electricity. »*

5. THE COMMISSION'S OPINION

17. As explained in paragraphs 13 and 14 above, the temporal scope of the Commission's authorisation in the 2017 decision is limited to State aid granted in the period from 1 July 2007 to 31 December 2012.

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7 OJ C 37 of 3.2.2001, p.3.

8 OJ C82 of 01.04.2008, p. 1.

9 See, for example, decision on Case SA.36023 (2014/NN) Estonia – Support scheme for electricity produced from renewable sources and efficient co-generation (OJ C44, 6.2.2015, p. 1).

18. According to the case-law, an aid is granted *"at the time that the right to receive it is conferred on the beneficiary under the applicable national rules"*.[10] In the present case, the national court's request for opinion does not specify whether the aid to Dzirnava was granted before or after 1 July 2007.

19. If the support to Dzirnava was granted before 1 July 2007, it would not be covered by the temporal scope of the Commission's authorisation in the 2017 decision. In such a case, the interpretation of the 2017 decision would not be relevant for the case before the national court. Instead, the national court would need to verify whether the support to Dzirnava qualifies as State aid within the meaning of Article 107(1) TFEU and, in the affirmative, whether such aid was granted in breach of the requirement of prior notification of Article 108(3) TFEU.[11] If the answer to both of those questions is to the affirmative, then the national court must take all appropriate action, in accordance with its national law, to address the consequences of the infringement of Article 108(3) TFEU, in particular as regards the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision, so that the aid does not remain freely available to the beneficiary until such time as the Commission decides on the compatibility of such aid with the internal market.[12]

20. If, however, the support to Dzirnava was granted on or after 1 July 2007, it would be covered by the temporal scope of the Commission's authorisation in the 2017 decision.[13] In that case, the Commission would propose the following interpretation of the 2017 decision to the national court.

21. The principal question at stake is what should be taken into account when calculating the 9% IRR ceiling for the operating aid received by Dzirnava. It is correct, that the 2017 decision does not explicitly detail what approach should be followed in a case where a beneficiary receives operating support for part of its installed capacity and sells the remainder of the electricity on the market.

22. Nevertheless, when the Commission carries out a proportionality assessment to ensure that the aid is kept to the minimum required, it looks at the costs and revenues generated by the aided project. It does so in isolation from other economic activities an undertaking may carry out.

23. In recitals (32), (77) and (83) the 2017 decision the Commission notes that any other (investment) support granted, shall be taken into account when calculating the IRR ceiling of the beneficiary. However, in recitals (77) and (83) of the 2017 decision, the control of cumulation of aid is explicitly linked to the second paragraph of point 59 of the 2001 EAG and to point 109(b) of the 2008 EAG, respectively. The two latter provisions foresee that the determination of the amount of operating aid should take into account any investment aid granted to the beneficiary *"in respect of the new plant"*.

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[10] Judgment of the Court of Justice in Case C-129/12 *Magdeburger Mühlenwerke* ECLI:EU:C:2013:200, para. 40.

[11] For more guidance in that regard, see section 2.1 of the Enforcement Notice.

[12] Judgment of the Court of Justice in Case C-349/17 *Eesti Pagar* ECLI:EU:C:2019:172, para. 89.

[13] Of course, for the aid to fall within the temporal scope of the Commission's authorisation in the 2017 decision, it must also have been granted to Dzirnava no later than 31 December 2012, meaning that Dzirnava must have been conferred no later than 31 December 2012 the right to receive the support under the applicable national rules.

24. The reference to a "new plant" is explained by the usual scenario whereby the operating aid contributes to the construction of a new plant, which was not in place before the aid. That new plant has a certain generation capacity, which can contribute with a corresponding amount of renewable energy thanks to the operating aid that made possible its construction. Nevertheless, in order to avoid overcompensation, any investment aid for that same generation capacity should also be taken into account in the calculation of the operating aid that is finally needed for that generation capacity to come into fruition.

25. It follows that, although point 59 of the 2001 EAG and point 109(b) of the 2008 EAG refer to a "new plant", in essence they mean "new generation capacity" that is created thanks to the operating aid. The idea behind the anti-cumulation rule of points 59 and 109(b) is that, for a given amount of new generation capacity created thanks to operating aid approved by the 2017 decision, any investment aid granted to build that same generation capacity should also be taken into account, so that the amount of operating aid is reduced accordingly, in order to avoid overcompensation.

26. In the current case, it seems that the investment aid was granted on the one hand to modernise the initial 0.06 MW installed capacity for which operating support is granted and on the other hand to expand the generation capacity to 0.118 MW.

27. As regards the investment aid granted to modernise the generation capacity of 0.06 MW, such aid should be taken into account in the determination of the amount of operating aid that can be granted for that same generation capacity under the 2017 decision. Besides, the modernisation of that capacity could increase the profits expected from that generation capacity, which would reduce accordingly the need for operating aid for that same capacity. The proportionality of the operating aid received is determined on the basis of the costs and revenues related to the 0.06 MW installed capacity for which the beneficiary receives operating aid.

28. By contrast, any investment support received for additional capacity or revenues generated by such additional capacity are not relevant for the proportionality assessment of the operating aid approved by the 2017 decision[14]. The investment aid granted to expand the generation capacity from 0.06 MW to 0.118 MW does not seem capable of influencing the operating aid that was needed for the *separate* generation capacity of 0.06 MW to come into fruition. The Commission understands that any energy produced by the extended generation capacity (from 0.06 MW to 0.118 MW) does not benefit from operating aid, but is sold on the market without support. Therefore, the operating aid granted for the capacity up to 0.06 MW does not seem to have facilitated the extension of capacity from 0.06 MW to 0.118 MW and, vice versa, the investment aid for the extended capacity does not influence the operating aid needed for the construction of the separate capacity of 0.06 MW.

29. It therefore seems that in the current case the investment support granted to modernise the 0.06 MW installed capacity should be taken into account when setting the IRR ceiling, since it was granted for the same purpose as the operating support, i.e. the generation of 0.06 MW hydro power. However, the investment support granted to expand the generation capacity of the installation from 0.06 MW to 0.118 MW is not relevant, as it was granted for a different purpose and facilitated the

[14] The present opinion of the Commission does not express any view on the investment support as such.

creation of a *separate* generation capacity, which does not seem to influence the operating aid needed for the construction of the capacity of 0.06 MW.

30. In such a context, the Latvian authorities might have to distinguish between:

    - the proportion of investment aid that supported the modernisation of the already installed capacity of 0.06 MW, which is to be taken into account in the calculation of the operating aid that may be granted for that capacity under the 2017 decision; and
    - the proportion of investment aid that supported the extension of generation capacity from 0.06 MW to 0.118 MW, which the Latvian authorities do not have to take into account when calculating the operating aid permissible under the 2017 decision for the *separate* capacity up to 0.06 MW.

31. Nevertheless, the Commission needs to make an important clarification as regards the second abovementioned proportion of investment aid (for the extension of capacity). Although the Latvian authorities are allowed not to take into account that second proportion of investment aid when calculating the operating aid permissible under the 2017 decision for the capacity up to 0.06 MW, the Latvian authorities are not obliged to do so, insofar as EU State aid rules are concerned.

32. In the words of Advocate General Wahl, *"under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company"*.[15] According to the case-law, a Commission decision declaring a State aid compatible with the internal market has the effect of authorising the Member State concerned to grant the aid, but it does not compel that Member State to grant such aid.[16]

33. On that basis, the Court has accepted that Member States may impose additional requirements of national law for granting an aid scheme, such as a requirement that the beneficiary must not have any unpaid debts towards the State, even if such requirement was not foreseen in the Commission's decision authorising that aid scheme.[17] Therefore, Member States are allowed to impose further requirements of national law that restrict an aid scheme to a stricter scope than the scope approved in the Commission's decision authorising that aid scheme.

34. In the same vein, in the present case, it would be permissible for the Latvian authorities to impose an additional requirement whereby they would take into account any investment aid for the same power plant, even for generation capacity separate from that supported by the operating aid approved by the 2017 decision. Similarly, the 2017 decision would not be in conflict with an additional requirement of national law whereby Latvia would calculate the operating aid for a given capacity by taking into account also revenues generated by additional capacity of the beneficiary power plant.

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15 Opinion of Advocate General Wahl in Case C-526/14 *Kotnik* EU:C:2016:102, para. 79.

16 Judgment in Case C-18/08 *Foselev Sud-Ouest* EU:C:2008:647, para. 16. Judgment in Case C-138/09 *Todaro Nunziatina & C.* EU:C:2010:291, para. 52. See also the judgment in Case T-670/14 *Milchindustrie-Verband and Deutscher Raiffeisenverband v Commission* EU:T:2015:906, para. 29; and the order in Case T-186/18 *Abaco Energy v Commission* EU:T:2019:206, paras 58 and 82.

17 Order in Case C-481/17 *Yanchev* EU:C:2018:352, paras 22-24.

35. Consequently, the Commission's opinion on the two questions referred by the national court is that:

    a. The 2017 decision is to be interpreted in the sense that the IRR of a power plant does not have to be taken into account as a whole (and consequently all revenues) and all other aid received in respect of the power plant, if only part of the electricity produced by the power plant is sold in the context of mandatory public procurement at the price provided for by the State aid scheme approved by the 2017 decision.

    b. The 2017 decision does not oblige the Latvian authorities to take into account in the calculation of the IRR only the capacity of the power plant and the corresponding revenues, and only the part of the other aid which can be attributed to the electricity sold in the context of the mandatory public procurement. The Latvian authorities would be free to calculate the operating aid for a given capacity by taking into account also revenues generated by additional capacity of the beneficiary power plant.

With best regards,

Cc: