

Polish Electricity Association contribution to „Competition Policy supporting the Green Deal – Call for contributions”

1 About PKEE

1. In reply to the call for contributions on questions about how competition rules and sustainability policies work together (document ‘*Competition Policy supporting the Green Deal. Call for contributions*’) published by the DG Competition on 22 September 2020 the Polish Electricity Association (‘**PKEE**’) welcomes the opportunity to present its position.
2. PKEE is an association of the energy sector, whose activities focus on issues related to the functioning of the industry in a modern market economy. The Association engages in actions and projects thanks to which the Polish energy industry can better meet the challenges related to European integration, ensuring power supply safety, competitive market, environmental protection and development of state-of-the-art technologies.

The supporting members of the PKEE include the largest Polish power companies, as well as leading organisations operating in the industry. PKEE is a member of the Union of the Electricity Industry – EURELECTRIC, which is the biggest association of the electrical power industry in Europe.

2 Introductory remarks

3. To achieve the climate neutrality in the EU by 2050 and to repair the economic and social damage brought by the coronavirus pandemic, the Member States acting hand-in-hand with the European enterprises will **need to incur massive expenditure**. In shorter perspective, it is expected that the 2030 target for emissions reductions will be increased from 40% to at least 55%.
4. In order to achieve the above targets, the Commission committed to put new proposals on the table by mid-next year on key energy and climate

legislation, including to adapt the EU Emissions Trading System, and to set up new renewables and energy efficiency targets. All these legislative changes pose serious challenge for companies, as they will **need to align their businesses with considerable amount of regulation. The evolution of regulatory framework will be particularly challenging to companies operating in the energy sector** as investments they make require long payback period and their depreciation spreads over decades.

5. PKEE fully supports the Commission's stance expressed in the call for contributions that *'competition policy is not in the lead when it comes to fighting climate change and protecting the environment'*. In this vein, PKEE considers that competition rules, in particular State aid legislation, should not be at the forefront of the combat with climate change, but should be aligned with other pieces of legislation adopted by the Council and the Parliament, once they enter into force.
6. Based on established jurisprudence of the EU Courts, no State aid measure may be declared compatible with the internal market if that measure or the conditions attached to it, entail a non-severable violation of Union law. As an illustration, the EEAG explicitly makes aid to hydropower conditional upon full compliance of the investment with the Water Framework Directive. In the same vein, State aid for energy from renewable sources using waste as input fuel must not circumvent the waste hierarchy set out in the Waste Framework Directive. State aid rules should thus duly react to the developments of the EU law, but should never become a tool to enforce more stringent standards than those adopted in the already binding legislation. In particular, State aid measures that are not directly related to environmental protection should not be assessed against environmental or climate considerations.
7. In the Communication on the European Green Deal the Commission clearly recognized that the transition towards economic growth which is decoupled from resource use *'must be just and inclusive. It must put people first, and pay attention to the regions, industries and workers who will face the greatest challenges'*. PKEE considers that the amended State aid rules should appropriately take account of this need. To this end, PKEE calls the Commission to consider **different starting points of European countries**. In some regions affected by structural changes, Member States will need to put more effort to change their generation mix to achieve the EU

decarbonisation goals, which would require to allow the continuation of State aid dedicated to transitory fuels such as natural gas.

8. Finally, the amended State aid rules should allow for a green transformation of regions and coal-dependent sectors historically engaged in mining of solid fossil fuels and generation of electricity with use of hard coal and lignite. Restrictions stemming from State aid rules should not sweep coal-reliant companies out of the market, but should **facilitate their green shift**, in particular by helping them clear their balance sheets of assets which do not satisfy sustainability criteria. Thus, the modernised State aid rules should allow not only for those types of State support which have direct positive environmental impact, but also for those types of support which indirectly contribute to the green shift (e.g. closure aid for coal mines or generation adequacy measures).

3 Replies to the Commission's questions

1. What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

9. Prospective changes in State aid rules should focus on:
 - a. **aligning the present rules with already adopted EU legislation, in particular the Clean Energy Package.** Amendments to State aid legislation resulting in stricter conditions for granting State support should not outpace (and thus *de facto* prejudice) amendments made in respective regulations and directives. PKEE strongly believes that the European Commission's competence to shape rules of compatibility of aid should not substitute the general law-making process. Consequently, PKEE considers that while State aid rules should (and actually do) provide additional support to particularly environmentally friendly technologies, there is nothing in the rules currently in force that would run counter to environmental objectives;
 - b. **extending the scope of admissible types of support, in order to cover recent market developments.** It is therefore vital that State aid rules are fit for purpose in relation to market developments and technological changes in the energy sector (e.g. storage, hydrogen,

EV charging infrastructure and smart energy technologies). Such extension should be also reflected in the GBER provisions so as to enable swift implementation of support measures;

- c. extending the scope of admissible types of aid to help companies cope with an unprecedented pace of climate policy driven regulatory changes;
- d. allowing more flexible State support in regions particularly affected by implementation of the policy pursuing step cut of carbon footprint (transition regions). We propose to increase the basic aid intensity by another 5 p.p. for coal regions covered by territorial just transition plans. This should apply to any aid concerning energy or environment purposes.

10. More ambitious climate policy will inevitably lead to higher EUA prices which will push hard coal and lignite fired installations out of the market, thus reducing their financial viability. In parallel, financial institutions are no longer willing to insure fossil-fuel-related assets. Finally, companies who have hard coal and lignite assets in their portfolio face difficulties in acquiring debt financing on the market (often necessary to refinance existing obligations).

All these issues are particularly challenging for those companies who have been entrusted with securing supplies of electricity on a national level. Those companies should not be penalised for their past role and the Commission should allow for granting support to such companies to help them reduce their carbon footprint. In particular, they should be eligible for support enabling them to clear balance sheets of hard coal and lignite assets on condition that such support must not result in additional advantages.

11. Once coal and lignite assets are transferred from the companies concerned, it may turn out that those assets are still necessary for public objective reason, i.e. for reasons of security of supply. Member States should be allowed to temporarily maintain such assets for period limited to minimum necessary.
12. The Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines sets out strict time limits for granting both closure aid and aid to cover exceptional costs. PKEE considers that time constraints imposed by the Council Decision should be

relaxed and aligned with the trajectory of emissions reductions and security of supply in respective Member States.

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

13. PKEE considers that where necessary, State aid rules should be updated and aligned with binding EU law to avoid confusion and discrepancies. This is particularly the case where new provisions impact admissibility of granting support. For instance, emission performance standards set out in Article 22 of the Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity directly impact conditions under which State aid may be granted within the framework of the capacity mechanisms.

14. On the other hand, State aid rules should not become a tool to enforce more stringent standards than those adopted in the regulations and directives adopted by the Council or the European Parliament. Referring to examples provided by the Commission:

- a. if a broadband/railway investment could impact biodiversity, such project must be made subject to an environmental impact assessment. This procedure has been established in the EU directives and has been implemented to the national legislation.

Environmental assessment can be undertaken for individual projects, such as a dam, motorway, airport or factory, on the basis of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (known as 'Environmental Impact Assessment' – EIA Directive) or for public plans or programs on the basis of the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the

environment (known as 'Strategic Environmental Assessment' – SEA Directive). The common principle of both Directives is to ensure that plans, programs and projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorization. Consultation with the public is a key feature of environmental assessment procedures.

The Directives on Environmental Assessment aim to provide a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation of projects, plans and programs with a view to reduce their environmental impact. They ensure public participation in decision-making and thereby strengthen the quality of decisions. Thus, **there is no need to impose additional conditions in State aid rules;**

- b. as regards hydro power plants, they are subject to additional environmental procedure pursuant to provisions of the Water Framework Directive and in particular Article 4(7) thereof, which lays down criteria in relation to allowing new modifications of bodies of water. Paragraph 117 of the EEAG explicitly refer to these rules, making it clear that no aid to hydro power plants may be granted if the provisions of the WFD are not properly observed. Thus, **State aid legislation already addresses the twofold impact which hydro power plants may have on biodiversity.**

15. As mentioned in paragraph 6 above, no State aid measure may be declared compatible with the internal market if that measure or the conditions attached to it, entail a non-severable violation of Union law. Consequently, if support is granted to a project developed in contradiction either with the Directives on Environmental Assessment or with the Water Framework Directive, such aid is *ex lege* incompatible.

16. Thus, **there is no need of attaching new 'environmental' criteria to State aid rules as sufficient legal instruments are already in place.**

17. Finally, as regards State aid measures that are not directly related to environmental protection, the Commission should not assess them against environmental or climate considerations. For instance, the Commission should not require Member States to propose alternative measures that would equally meet their original objective (e.g. providing employment in a region) but with a less environmentally

harmful effect. Such arrangement would entail additional costs, administrative burden and the assessment would be subjective in nature.

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits (“green bonus”)? If so, how should this green bonus be defined?

b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

18. PKEE has identified a number of areas where State aid rules could be amended so as to better contribute to a green transition.

19. There are regional economies in the EU which still heavily rely on fossil fuels. In order to adapt to the Green Deal agenda, these regions will have to undergo significant transition which will require massive investment. To address this issue, PKEE proposes that Member States should be allowed to grant regional investment aid with additional intensity bonuses (e.g. 20 p.p.) for all types of initial investments regardless of the size of undertaking in those regions which cumulatively satisfy the following criteria:

- a. are eligible for regional investment aid, that is are ‘a’ or ‘c’ areas as defined in the prospective Regional Aid Guidelines; and
- b. are regions most affected by the transition given their dependence on fossil fuels (regions eligible for support from the Just Transition Fund).

Moreover, sectorial exclusion of the energy sector from regional investment aid in the above regions should be waived¹. To make sure that this arrangement does not compromise environmental objectives, relevant State aid rules (most likely, the upcoming Regional Aid Guidelines) should make it clear that aid cannot be granted for projects related to extraction of fossil fuels or generation of energy from solid fossil fuels.

¹ We are aware that this exclusion has been in place since 2013, but investment needs some regions face are unprecedented.

20. The current EEAG and relevant GBER provisions typically set the maximum aid amount based on the extra costs of the relevant investment compared to a theoretical alternative investment that is less environmentally friendly (so-called alternative scenario). Although this arrangement has been in place for years, these days less environmentally friendly investments are either inadmissible due to regulatory constraints or simply unprofitable. Thus, identification of an alternative scenario is difficult and often entails additional administrative burden.

Considering the above, PKEE is of the opinion that with regard to projects that are in line with the climate policy eligible costs for investment support should be determined by reference to the funding gap (such arrangement applies currently under section 3.8.5 of the EEAG as regards State funding of energy infrastructure).

Alternatively, we propose to increase the basic aid intensity by another 5 p.p. for coal regions covered by territorial just transition plans. This should apply to any investment aid concerning energy or environment purposes.

21. PKEE considers that the Commission's recent approach towards State support to district heating has been unnecessarily strict.

First of all, support, which is limited to district heating distribution networks, should be considered to fall outside of State aid control as an infrastructure measure which does not affect competition and trade. Such heat distribution networks should be run in the same way as other energy infrastructure through separation from the heating generation (at least in terms of separate accounting), third-party access and regulated tariffs.

Alternatively, it should be allowed to grant State aid to district heating networks, which are not part of energy efficient district heating systems if investments that make the heat generation energy efficient will start within three years upon the completion of the modernisation of the network.

Second, to unlock the potential of district heating to contribute to the transition to a climate-neutral economy and to reduce administrative burden, a funding gap approach should be allowed for the district heating generation as an alternative to the maximum aid intensities set in the EEAG or the GBER.

22. In view of the need to move to the circular economy, Member States should be given more scope to support measures needed for the shift from a linear economy to a circular economy: recycling of waste, re-use of CO₂, or the

separate collection of waste streams. State aid rules currently in force are unnecessarily strict in this respect. For instance, the requirement of Article 47 of the GBER ('Investment aid for waste recycling and re-utilisation') that the supported investment must go beyond the state of the art effectively renders this provision entirely unattractive.

23. The Commission should approve Member States' support of companies to decarbonise or electrify production processes, provided that economic incentives do not already warrant the investment concerned and the companies reduce their impact on the environment. When identifying economic incentives or defining possible benchmarks, the Commission should take due account of their impact on competitive position of the EU enterprises *vis-à-vis* their competitors from third countries (e.g. China, the US or Russia).
24. Re-use of brownfields can bring many co-benefits in terms of jobs creation, jobs allocation, social cohesion, environment, land use, waste reduction and circular economy. Projects that boost repurposing of postindustrial areas should be leveraged under the State aid rules. There should be envisaged a special aid rule concerning repurposing of postindustrial brownfield sites. Current rules (especially GBER art. 45) are insufficient, because they concentrate only on remediation of contamination. We believe that the scope of art 45 of GBER should be extended to all postindustrial sites, no matter if they are contaminated.
25. We propose to change the definition of a disadvantaged worker in GBER. We propose that as a disadvantaged worker should also be considered worker, who has worked in the coal industry and related sectors (e.g. solid fossil fuel energy sector) for the last 3 years. If the economy is to be transformed, then workers currently working in the coal and related industries will have to move to new sectors of the economy. This will mean increased costs for companies in recruiting and training such workers.

4. How should we define positive environmental benefits?

a. Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

26.

It should be taken into account that the final EU taxonomy framework is still to be adopted. This not only includes the relevant delegated acts setting out

the technical screening criteria for various economic activities under climate change mitigation and climate change adaptation, which should be prepared by the end of 2020 and will be applied from the 1st of January 2022, but also the establishment of technical screening criteria for the other environmental objectives listed in the EU taxonomy regulation. On this last issue the European Commission will be advised by the Platform on Sustainable Finance and will have time till the end of 2021 to prepare the relevant delegated acts. These in turn will be applied from the 1st of January 2023.

27. Only after the EU taxonomy framework has been fully defined, adopted and applied further reflections on its relevance for State aid regulatory framework should be made, taking into account the EU acquis on this domain. Therefore the EU taxonomy should currently not be used in the EU competition policy.
28. Finally, the objective of the EU taxonomy is to introduce the principles of sustainable financing to the private sector. The primary objective of State aid rules (which refer to public expenditure) in the context of the Green Deal should be to support energy transition. PKEE considers that reliance on the EU taxonomy is inconsistent with financing measures would radically limit the possibilities of financing objectives related to mitigating the effects of the transition. For instance, it could unnecessarily restrict investments in mining regions, investments in gas as a transitory fuel, recultivation and retraining of employees.