



EUROPEAN COMMISSION

Legal Service

Brussels, 22 March 2023
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Hof van beroep Brussel
Sectie Marktenhof
19^{de} kamer A
Kamer voor marktzaken
Poelaertplein 1, 1000 Brussel
Belgium

Object: Opinion of the European Commission in Case No 2022/AR/561 pending before the Brussels Court of Appeal

Dear Sir/Madam,

The European Commission (the ‘Commission’) has the honour to submit an opinion in response to the request submitted on 10 August 2022 by the Brussels Court of Appeal and supplemented on 7 September 2022, on the basis of Article 29(1) of Regulation 2015/1589 (the ‘Procedural Regulation’)¹.

The Commission recalls that, in accordance with Article 29(1) of the Procedural Regulation and point 117 of the Commission’s notice on the enforcement of State aid rules by national courts², opinions of the Commission are not binding on the national court. Only the Union Courts can give a binding interpretation of the Union’s 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’).

1. RELEVANT FACTS AND PROCEDURE

- (1) This opinion is based on the factual findings made by the Brussels Court of Appeal in its request, which the Commission assumes to be accurate.

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 (OJ L 248, 24.9.2015, p. 9).

² Commission notice on the enforcement of State aid rules by national courts (OJ C 305, 30.7.2021, p. 1) (the ‘Enforcement Notice’).

- (2) The case pending before the Brussels Court of Appeal concerns an appeal, by Electrabel N.V., against Decision (B)2356 adopted by the Commission for the government of the electricity and the gas ('CREG') on 31 March 2022 on the formal requirements for a request for a derogation from the intermediate price cap ('IPC') (the 'contested decision').³ The contested decision lays down the formal requirements that a request for derogation from the IPC must meet in the context of the Belgian capacity remuneration mechanism ('CRM').
- (3) In the CRM, a distinction is made between capacities requiring little or no investment (which receive one-year contracts) and those requiring significant investments (with the possibility of contracts lasting more than one year). The IPC applies to one-year contracts and it aims to avoid that capacities that do not require significant investments could receive disproportionately high infra-marginal revenues in the CRM auctions.
- (4) The contested decision was adopted pursuant to Article 22(2), second paragraph of the Royal Decree of 28 April 2021 laying down the parameters determining the volume of capacity to be purchased, including their calculation method, and the other parameters necessary for the organisation of the auctions, as well as the method and conditions for obtaining individual derogation from the IPC under the CRM (the 'Royal Decree').⁴
- (5) Article 22(2), second paragraph of the Royal Decree sets out a list of elements that a request for a derogation from the IPC should contain. These elements are also listed in the application form for a derogation (Annex 1 to the contested decision).
- (6) According to the methodology described in the Royal Decree, the IPC should be calibrated to the expected 'missing money' level of the worst performing technology currently in the market, i.e. the difference between the costs and revenues generated by such technology. Under Article 16 of the Royal Decree, the 'missing money' is calculated for each technology included in the reduced list of existing technologies referred to in Article 18(1), according to the formula referred to in Article 20, taking into account the cost estimate referred to in Article 18 and the revenue estimate referred to in Article 19.
- (7) The CREG submits that the formal requirements set out in Annex 1 to the contested decision are intended to ensure consistency between the assessment of the IPC and the assessment of the merits of the requests for derogation from the IPC.
- (8) Electrabel N.V. disagrees with that approach and has therefore brought an appeal against the contested decision. Electrabel N.V. claims that the contested decision failed to take certain costs, in particular, overheads, local taxes, rental costs, fixed costs for the purchase of electricity, specific personnel costs, portfolio management costs and asset costs, into account in the assessment of the individual derogation

³ Available at : <https://www.creg.be/sites/default/files/assets/Publications/Decisions/B2356NL.pdf>.

⁴ Available https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=21-04-30&numac=2021041351 at:

from the IPC, which prevents Electrabel N.V. from bidding its true costs in capacity auctions under the CRM.

- (9) Electrabel N.V. recalls that, in the Commission Decision of 21 September 2020 to initiate a formal investigation procedure laid down in Article 108(2) TFEU in respect of the CRM⁵ (the ‘opening decision’), the European Commission expressed doubts whether the introduction of an IPC for capacity in the one-year contract category, without the possibility of an individual derogation, could exclude certain capacity holders from the CRM. At recital 226 of the opening decision, the Commission observed that having a IPC as a permanent feature without any possible individual derogation could have the effect of preventing existing capacity from bidding their true costs, while not being able to apply for multi-year contracts.
- (10) At recital 227 of the opening decision, the Commission considered that, while the IPC could be useful to avoid windfall profits in line with point 230 of the Guidelines on State aid for environmental protection and energy 2014-2020⁶ (the ‘EEAG’), assessing its effect on the auctions and its compatibility with point 233(c) of the EEAG required further information.
- (11) During the formal investigation procedure, Belgium put in place a derogation mechanism from the IPC. The third subparagraph of Article 7j(2) of the Belgian Electricity Act (the ‘Electricity Act’) stated that ‘the King shall lay down by decree, adopted after consultation within the Council of Ministers, the method and conditions for obtaining individual exceptions to the application of the intermediate price limit(s), after consulting the economic operators.’
- (12) As stated at recitals 129 and 130 of the Commission’s final decision of 27 August 2021 approving the CRM⁷ (the ‘final decision’), the derogation mechanism was introduced in the Royal Decree to determine the methodology for the capacity calculation and auction parameters in the context of the CRM. As stated further, the derogation mechanism was subject to public consultation and would apply to both national and cross-border capacities.
- (13) According to Electrabel N.V., the contested decision infringes the Electricity Act and/or the Royal Decree, since the Electricity Act grants a delegation to the King which is limited and which does not permit the creation of a derogation mechanism from the IPC which does not take into account actual costs.

2. QUESTIONS FROM THE NATIONAL COURT

- (14) In the light of the above, the Brussels Court of Appeal asks the Commission for its interpretation and opinion on the following points:

⁵ Commission Decision C(2020) 6415 final of 21 September 2020 in case SA.54915 (2019/N) – Belgium – Capacity remuneration mechanism (OJ C 346, 16.10.2020, p. 27).

⁶ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1).

⁷ Commission Decision (EU) 2022/639 of 27 August 2021 on the aid scheme SA.54915 (2020/C) (ex 2019/N) – Belgium – Capacity remuneration mechanism (OJ L 117, 19.4.2022, p. 40).

1. On the compatibility of the failure to take into account actual and proven costs for the calculation of the ‘missing money’ in the context of the applications for derogation from the IPC with the opening decision and the final decision.
2. Is it the intention (implicit or explicit) of the Commission in the context of its abovementioned decisions that actual costs must always be taken into account when determining whether an exception from the IPC can be granted?
3. Is there a comparable situation in other Member States?
4. Whether CREG’s refusal to take into account certain costs constitutes an alteration to an existing aid scheme and qualifies, under the Procedural Regulation, as ‘new aid’, with the effect that the modification of eligible costs must be notified to the Commission pursuant to Article 108(3) TFEU.

3. THE COMMISSION’S OPINION

- (15) The third question is rather a request for information and will be dealt with in a separate section.
- (16) As regards questions 1, 2 and 4, which will be dealt with together, it is settled case-law that in order to interpret Commission decisions, it is appropriate not only to examine their actual text, but also to refer to the notification made by the Member State concerned.⁸
- (17) In the present case, both the methodology for determining the IPC and the methodology for obtaining an individual derogation from the IPC were communicated to the Commission (as part of the notification or during the formal investigation procedure) prior to the adoption of the final decision.
- (18) None of the costs that, according to Electrabel N.V., should be taken into account for the purpose of determining the IPC or assessing an application for derogation, appeared among the costs mentioned by those methodologies.
- (19) The description and assessment of those methodologies in the final decision was made in light, in particular, of the characteristics now disputed by Electrabel N.V. before the national court in the case at hand.
- (20) Indeed, those methodologies were an element on which the Commission based its assessment of the CRM. More specifically, the final decision described how the IPC is determined, including the costs to be taken into account (see section 1.5.4.2. of the final decision). Recital 130 of that decision stated that the derogation mechanism from the IPC had been introduced in the Royal Decree to determine the methodology for the capacity calculation and auction parameters in the context of the CRM. While the final decision did not detail the conditions for obtaining an individual derogation from the IPC as specified by the Royal Decree, the

⁸ See judgment of the Court of Justice of the European Union of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 38 and case-law cited therein.

assessment of this feature of the CRM in recitals 515 to 517 of the final decision was based on the information indicated by Belgium in its notification form.

- (21) In the light of the foregoing, the Commission's opinion with regard to questions 1, 2 and 4 is that the methodology for determining the IPC as well as the methodology for obtaining an individual derogation from the IPC were covered by the final decision. Therefore, those methodologies do not involve an alteration to existing aid within the meaning of Article 1(c) of the Procedural Regulation.

4. THE INFORMATION REQUESTED

- (22) As regards question 3, the Commission approved market-wide capacity mechanisms in Italy, Ireland, France and Poland. In general, the capacity payment in those mechanisms corresponds to the clearing price (i.e. pay-as-cleared), subject to the maximum auction price cap.
- (23) In addition, the Polish and Irish capacity mechanisms apply a separate price cap for existing capacity. In the Irish capacity mechanism, the existing capacity price cap is related to the net cost of new entry ('net CONE') and set at $0.5 * \text{net CONE}$. However, for capacities that have higher net going forward costs, an application can be submitted to obtain a higher unit-specific price cap at a level equivalent to those costs. Demand-side response operators and new capacity are not subject to that cap and can bid up to the maximum auction price cap ($1.5 * \text{net CONE}$).⁹
- (24) In the Polish capacity mechanism, the price cap for existing capacity is determined on the basis of fixed capital and operating costs.¹⁰ No individual derogation from the price cap for existing capacity is foreseen.

Finally, pursuant to point 129 of the Enforcement Notice, the Commission may also make its opinions publically available on its website.

For this reason, the Brussels Court of Appeal is requested to give its consent to the publication of the opinion at hand. Should the opinion contain information which is considered confidential including professional secrecy and data protected by the General Data Protection Regulation¹¹ ('confidential information'), the Brussels Court of Appeal is asked to provide the Commission services with a non-confidential version thereof or indicate which parts of the opinion would contain confidential information. The Commission would be grateful if the Brussels Court of Appeal could reply at its earliest convenience at the following mail address: [COMP-AMICUS-STATE-](mailto:COMP-AMICUS-STATE-@ec.europa.eu)

⁹ Commission Decision of 24 November 2017 in case SA.44464 (2017/N) – Ireland – Irish Capacity Mechanism (OJ C 121, 6.4.2018, p. 1), see recital 50.

¹⁰ Commission Decision of 7 February 2018 in case SA.46100 (2017/N) – Poland – Planned Polish capacity mechanism (OJ C 462, 21.12.2018, p. 1), see recitals 46 to 48.

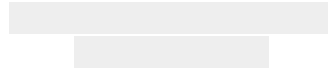
¹¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

AID@ec.europa.eu, preferably within 2 months after the date of this opinion. In case of objections, the Court is kindly asked to give the reasons for its refusal.

To complement the envisaged publication of the opinion, the Commission also intends to publish the full judgment of the Brussels Court of Appeal when it is given, cleared from confidential information, on the Commission's website, or to provide a link to the national website where that judgment is published, in order to give broader knowledge to the public and to share good practices with other jurisdictions. To this end, the Commission asks the Brussels Court of Appeal to provide it with the judgement or with the link to the judgment if it has been published on a national website, at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu. If national law does not foresee such publication, however, the Brussels Court of Appeal is kindly requested to inform the Commission services thereof, in which case Commission will only publish the opinion at hand.

I trust that the clarifications provided above will be helpful in the resolution of the case at hand.

With kind regards,

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