http://www.odbiorcyenergii.pl/ forum@iep.org.pl

Ul. Żurawia 24/6, 00-515 Warszawa

tel.: +48 22 875 90 96

FOEEIG/4/12/2021 Warsaw, 8.12.2021

Forum of Electricity and Gas Consumers ('**FOEEiG**') welcomes the opportunity given by the European Commission to submit observations in response to the '*Targeted review of the General Block Exemption Regulation (State aid): revised rules for State aid promoting the green and digital transition*'.

FOEEiG is an association of 8 organizations (Chamber of Industrial Energy Producers and Energy Consumers, Economic Chamber of Non-Ferrous Metals and Recycling, Polish Chamber of Chemical Industry, Association of Polish Papermakers, Polish Glass Manufacturers Federation, Polish Cement Association, Polish Lime Association, Polish Foundation for Technical Gases) bringing together a wide group of undertakings conducting their main activities in energy-intensive sectors.

Overall, we consider that the published draft Commission Regulation (EU) amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ('**the Draft**') will contribute to delivering the objectives of the European Green Deal and the European Digital Strategy. On the other hand, in respect of specific types of State aid measures we still see room for improvement of the compatibility conditions.

Our proposals for amendments of the Draft focus on rules concerning climate, environmental and energy aid.

1. Considering material experience gained by the Commission in the application of Section 3.7.2 ('*Aid in the form of reductions in the funding of support for energy from renewable sources*') of the Guidelines on State aid for environmental protection and energy 2014-2020 ('**EEAG**'), supported by significant number of State aid decisions in this area, FOEEiG encourages the Commission to exempt such reductions from the obligation to notify.

   At the same time, since the draft Climate, Energy and Environmental Aid Guidelines ('**CEEAG**') proposes that the reductions should be applied to broader scope of levies on electricity consumption, i.e. those which in general finance an energy policy objective (in particular, levies financing support to combined heat and power), this approach could be replicated in the prospective provision of the Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (`**the GBER**`).

   It seems that rules governing compatibility of the reductions at hand with the internal market are essentially of technical character and their application does not require complex economic assessment or weighing of positive effects against potential distortions of competition. Thus, they are suitable to be included in the GBER.

   Based on the above, we propose that the Draft introduces another Article (for instance, Article 44b) which will define conditions under which '*Aid in the form of reductions from electricity levies for energy-intensive users*' will be compatible with the internal market within the meaning of Article 107(3) of the Treaty and exempted from the notification requirement of

Article 108(3) of the Treaty. FOEEiG proposes that this provision relies on conditions set out in the EEAG as to the eligible sectors and aid intensity.

2. The definition added in point 47a, Article 2, reads: *'completion of the investment' means the moment when the investment is considered by the national authorities as completed or three years after the start of works, whichever is earlier.* This definition seems to limit investment completion to 3 years. Considering the diversity of investments, especially in terms of complexity and time-consumption, this definition may constitute a difficulty in the procedure of applying for support from public funds. Three years after the start of works is a very short time for the implementation of a number of complex, large-scale investments. We believe that the limitation of the completion of the investment to 3 years from start of works should be either deleted or increased appropriately (at least to 5 years).

   If specific period of time (for example 5 years) to complete the investment remains, additional questions arise - may the investment co-financed under the regional investment aid last more than three years from the start of works? If so, does this mean that if the 3-year deadline for a given investment is not met, the investor loses public aid either in the form of tax exemptions or returns the subsidy / advance payment with interest if it was paid in tranches for the investment not completed within 3 years, or maybe the investor loses public aid even for all investments carried out with state aid?

3. The fact that the definitions of the terms used in the regulation have been supplemented and made more specific is received positively as it helps to better understand the provisions of the regulation and helps to avoid ambiguities. In our opinion, for an even better contribution to environmental protection, some of the definitions to be inserted in Article 2 of the GBER should be amended or completed:

   a. (102c) It should be emphasized that renewable hydrogen includes also hydrogen produced from biogas, biomethane and waste;

   b. (102e) The definition of low-carbon hydrogen – we propose that the definition takes the following wording:

      '*Low-carbon hydrogen means hydrogen produced with use of different technologies using mixtures of energy from renewable and non-renewable sources or non-renewable sources with a lower carbon footprint compared to conventional methods. The carbon footprint of low-carbon hydrogen shall only include greenhouse gas emissions from processes whose sole purpose is to produce hydrogen or the energy to produce hydrogen. Emissions occurring as an unavoidable and unintended consequence of other processes and wholly accounted for under the EU ETS shall not be included in the carbon footprint of low-carbon hydrogen. Under these circumstances, the carbon footprint of low-carbon hydrogen should not exceed the carbon footprint level of [value tbd] . Low-carbon hydrogen may be produced with use of different technologies, such as, but not limited to:*

i. *electrolysis using nuclear energy or mixture of electricity from renewable energy sources and grid;*

ii. *electrolysis using electricity from conventional sources with CO2 capture and storage (CCS) or CO2 capture and use (CCU);*

iii. *gasification, fermentation or pyrolysis of biomass;*

iv. *steam reforming of hydrocarbons with CCS or CCU;*

v. *coal gasification with CCS or CCU, IGCC and IFGC;*

vi. *processes based on liquid or gaseous fuels which are produced from non-renewable liquid or from non-renewable process waste gas and combustion gas which occur as an unavoidable and unintended consequence of the production process within industrial installations;*

vii. *processes using waste energy generated as an unavoidable consequence of the production process within industrial installations*;

viii. *pyrolysis of methane using electricity from RES*'.

c. (130)(b)(i) We propose to include the infrastructure for the transport of biomethane in energy infrastructure concerning gas;

d. (130)(c)(iii) Equipment for the synthesis and re-synthesis of hydrogen to / from hydrogen-bearing substances such as ammonia, emethanol, synthetic fuels should be included.

4. Provisions of Section 7 of the GBER in their current wording include the possibility to apply the so-called '*regional bonuses*': '*The aid intensity may be increased by 15 percentage points for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty and by 5 percentage points for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty*'.

   The above arrangement is foreseen for numerous types of investment aid (please refer to Article 36(8), Article 37(5), Article 38(6), Article 40(6), Article 41(9), Article 46(4) and Article 47(9)). Based on that Member States are allowed to grant higher support for projects contributing to green transition in underdeveloped regions where more intensive public expenditure is required. Increasing the intensity of aid by 15 or 5 p.p. may be a significant factor in determining the realisation of investments.

   We strongly believe that '*regional bonuses*' constitute a very much needed facilitation for the attainment of Green Deal objectives in Poland and thus oppose its deletion from Section 7 of the GBER.

5. As regards proposed wording of Article 36 of the GBER ('*Investment aid for environmental protection, including climate protection*'):

a. we suggest deleting the first sentence in proposed Article 36(1a). It is our understanding that the Commission intends to draw a clear line between different aid measures, however in this particular case we believe that some flexibility will not entail any distortive effects;

b. in our opinion, introduction of the requirements for the origin of hydrogen, proposed in Article 36(1a) and 36a(2) should be postponed, at least until the cost of renewable and low-carbon hydrogen will be comparable to the cost of the so-called grey hydrogen. The technology for producing renewable and low-carbon hydrogen is currently highly expensive. During the transitional period, the predominant amount of used hydrogen will come from natural gas processing. In order to create a hydrogen market, preferential treatment of investments in hydrogen infrastructure is needed, with no restrictions as to the origin of hydrogen;

c. it is also worth considering adding to Article 36(1a) a premise indicating that investments in equipment, machinery and industrial production processes which use hydrogen and improve their energy efficiency are also eligible for aid for environmental protection. Thanks to this extension, the possibility of improving the energy efficiency of installations that do not use renewable or low-emission hydrogen would also be allowed, which would effectively contribute to achieving climate targets and reducing greenhouse gas emissions from industrial installations;

d. in line with proposed Article 36(3), '*Aid shall not be granted where investments are undertaken to ensure that undertakings merely comply with the Union standards in force. Aid encouraging undertakings to comply with new Union standards not yet in force, which increase the level of environmental protection, may be granted under this Article provided that the Union standard has been adopted and the investment for which the aid is granted is implemented and finalised at least 18 months before the date of entry into force of the standard concerned*'

   We suggest that aid should be considered admissible if the investment is carried out and completed at least 6 months before the EU standards come into force. Such arrangement would increase the possibility of rationalising the investment process. As the investment process for advanced installations, in particular energy-intensive ones, requires appropriate planning and modelling of its impact on the overall production chain, the time available for the implementation of such investment should be increased, thereby reducing the risk that the award of funds depends on the *vacatio legis* between the adoption of the act establishing new Union standards and its entry into force[1];

e. it is recommended to consider increasing the aid intensity for CCUS-related investments by far more than 20%. The aid intensity for CCUS-related investments

[1] The proposed Article 38(2a) should be amended accordingly.

appears to be too low. CCSU technology is still in the initial stage of development, and the existing carbon dioxide capture, storage and utilization installations are test and demonstration installations. Despite its early stage of development, CCUS technology is an indispensable tool to meet the EU's climate goals, especially in high-carbon energy countries. CCUS technology will also be indispensable in the decarbonisation of sectors where it is impossible to resign from fossil fuels use. Therefore, the CCUS technology should be given preferential treatment, and the maximum aid intensity of 20% for CCUS-related investments, mentioned in the document, should be significantly increased. Currently, the level of social acceptance of the CCUS technology is not high, and one of the tools that could change this is the co-financing of these investments.

6. Article 36a(3) (*Investment aid for recharging or refuelling infrastructure*), states that eligible costs may cover investments in renewable sources of electricity and storage of electricity or hydrogen. We suggest to extend the scope of investments which support the operation of the refuelling infrastructure that can be covered as eligible costs, to:

    a. infrastructure for the production of renewable and low-carbon hydrogen, the efficiency of which is at the level of the demand for hydrogen by hydrogen refuelling stations that will be supplied with hydrogen from a given source;

    b. hydrogen distribution devices (trailer, pipelines, cylinders, tankers).

7. In Article 36(6b), Article 36a(4), Article 36b(4) and Article 41(10) the Draft introduces provisions governing aid awards on the basis of a competitive bidding process. At the same time, the Draft sets out certain features of such awarding procedures, in particular requiring that the submitted bid or the clearing price shall not account for less than 75 % of the weighting of the selection criteria (this refers to aid governed by Articles 36-36b).

    Based on our experience, in certain instances this requirement may be overly strict and should be relaxed. Investment aid granted in Poland is often financed from external sources (not from the national sources), such as the Just Transition Fund, the European Investment and Structural Funds, the Modernisation Fund set up based on the Directive 2003/87/EU or the Recovery and Resilience Facility.

    Due to designed arrangements regarding the management of the above funds, in principle they are treated as state resources within the meaning of Article 107(1) of the TFEU and consequently subject of State aid control (also based on the GBER). At the same time, disbursement of those funds may be subject of other rules adopted at the EU level governing *inter alia* specific awarding procedures (such procedures are foreseen for the Modernisation

Fund[2] or for the ESIF[3]). Therefore, the design of the selection criteria may depart from those proposed in the Draft.

In order to exclude doubts or inconsistencies between regimes which govern granting of aid from the above mentioned funds and the GBER, the Draft should include an explicit indication that if aid is awarded in line with procedures defined at the EU level, such procedures are deemed to be in line with the requirements of the GBER, irrespective of whether the non-price selection criteria account for more than 25% of the weighting of all the selection criteria.

Thus, we propose to add additional sentence in respective provisions of the Draft (i.e. proposed Article 36(6b)(c), Article 36a(4))(c), Article 36b(4))(c) and Article 41(10): '*The aid award procedure is deemed to be competitive if it complies with respective Union rules governing the distribution of specific funds, e.g. the Modernisation Fund and the European Structural and Investment Funds*'.

Moreover, irrespective of above, we propose to introduce more flexibility as regards application of non-price criteria and increase admissible weighting of such criteria.

Finally, we note that the requirements for the competitive bidding process set out in Articles 36-36b differ from the requirements defined for the same process in Article 41(10). We think it would be useful if those requirements were defined consistently across the entire GBER.

8. We note that the Commission proposed to increase a number of notification thresholds, which we consider a positive development. However, to further cut red tape, we believe that in some cases the changes could be even more far-reaching:

    a. in respect of investment aid for environmental protection, the notification threshold could be set at EUR 50 million per undertaking per investment project;

    b. in respect of operating aid for the promotion of electricity from renewable sources, as referred to in Article 42, and operating aid for the promotion of energy from renewable sources and renewable hydrogen in small scale installations and for the promotion of renewable energy communities, as referred to in Article 43, the notification threshold could be set at EUR 50 million per undertaking per project;

[2] See: Commission Implementing Regulation (EU) 2020/1001 of 9 July 2020 laying down detailed rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards the operation of the Modernisation Fund supporting investments to modernise the energy systems and to improve energy efficiency of certain Member States.

[3] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

c. due to limited distortive potential, we believe that notification thresholds should be removed in respect of those aid schemes where support is allocated exclusively on a competitive bidding process basis;

d. finally, in those cases where individual aid is allocated in a procedure satisfying the definition of a '*competitive bidding process*', individual notification threshold should not apply.

9. In proposed Article 8(2) of the Draft the Commission recognises that in certain cases (i.e. in respect of the projects supported by the European Defence Fund) the total public funding (from the EU and national sources) may reach up to the total eligible costs of the project.

   In fact, rules governing also other centrally managed programmes often define only maximum funding rate from the EU (centrally managed) sources and remain silent on the admissible total public funding rate. At the same time, in some cases securing corresponding support from national sources is mandatory. Consequently, if the programme's rules define only funding rate for EU sources, additional support of national origin may not be entirely in line with the GBER. Thus, we think that the proposed rule referring to the European Defence Fund should be extended to all centrally managed programmes.

10. In a number of proposed provisions (please refer to Article 41(4a), Article 46(1b) and (1c)(c)) the Commission allows for supporting investments relying on natural gas on condition that compliance with the 2030 and 2050 climate targets is ensured. We believe that such requirement in the GBER may raise unnecessary uncertainties, in particular for aid beneficiaries, and should be deleted. Since Member States undertook to pursue certain climate targets, it should be assumed that aid measures implemented by them will not compromise those obligations.

11. On top of the above presented comments in reference to the proposed Article 41, FOEEiG would like to submit additional observations on this provision:

    a. in respect of the proposed scope defined in Article 41(1), we suggest that installations for the production of low-emission hydrogen should also be eligible for investment aid in accordance with the rules laid down in this Article (in such case also the title of the Article should be adjusted). A positive effect of the introduced change will be an increase in the supply of low-emission hydrogen, which may encourage potential investors to carry out research into the use of low-emission technologies using hydrogen, for example in the transport sector;

    b. we would like to draw the Commission's attention to the fact that the Polish translation of the title of Article 41 refers solely to '*Investment aid for the promotion of electricity from renewable sources*', whereas the English text makes it clear that this provision covers different forms of energy.

       In consequence, it is our understanding that investment aid may be granted for projects consisting in construction or upgrade of installations producing different

types of Renewable Fuels of Non-Biological Origin, not only hydrogen. Otherwise, Article 41 would contravene the principle of technological neutrality and the objectives of '*Fit for 55*' package;

c. final sentence of Article 41(1a) reads as follows: '*Aid to storage connected to an existing renewable installation (behind-the-meter) may also be covered by the same scheme, where the storage investment fulfils the same conditions and all investment projects (renewables and storage) are considered an integrated project for verification of compliance with the thresholds set out in Article 4* (emphasis added)'.

   The emphasized sentence may suggest that an investment in energy storage, which is to be connected to a previously established RES installation, for the purpose of calculating the amount of State aid should also take into account the investment costs of the generation source, even if it is not covered by support. In the context of promoting energy storage, which increases network stability, such a limitation of the amount of support seems to be unjustified;

d. we emphasize the need to ensure consistency of State aid rules for the production of hydrogen (Article 41 paragraph 3 of the GBER) with the future criteria for the production of green hydrogen from electricity, to be published by means of a delegated act of the EC in connection with the proposed changes in the scope of Article 27(3) of the RED II Directive. Ensuring the possibility of receiving public support for RES sources generating electricity for the production of green hydrogen will be an important factor for the profitability of decarbonisation investments in the industry. This is especially true for projects assuming blending green hydrogen in technological processes in order to reduce direct emissions;

e. pursuant to proposed wording of Article 41(7)(a), the aid intensity shall not exceed 30 % of the eligible costs for the production of energy from renewable energy sources, renewable hydrogen and high-efficiency cogeneration. This intensity is materially lower than admissible under the current rules. We suggest that this intensity is kept at the level of 45%;

f. aid intensity is to be reduced to only 15% for projects involving electricity storage (cf. proposed wording of Article 41(7)(b)).

   The wording of the provision does not allow unambiguous determination if in the case of projects which combine generating unit with an electricity storage facility, the aid intensity shall be 15% for the entire project (i.e. the generating unit and the storage), or whether the aid intensity amounts to 15% only in respect of the costs of the energy storage facility (so that aid of intensity of 30% applies to the costs of the generating unit).

   In any case, in our opinion, the intensity of aid for storage shall be at least 30% (assuming that the standard aid intensity is kept at 45%, as proposed above). On top

of that, we encourage the Commission to reinstate '*regional bonuses*' (please refer to point 4 above);

g. also, the aid intensity for the installations producing hydrogen appears to be underestimated. Currently, the investment gap of hydrogen production projects is 60-70%. In our opinion the aid intensity for the production of hydrogen should exceed 50%.

12. For reasons set out in point 8(a) above, we encourage the Commission to extend the scope of Articles 42 and 43 of the GBER to the production of low-emission hydrogen.

13. In line with the proposed wording Article 47(6), investment aid for resource efficiency and for supporting the transition towards a circular economy may be granted only for those investments which '*go beyond economically profitable or established commercial practices that are generally applied throughout the Union and across technologies. From a technological perspective, the investment should lead to a higher degree of recyclability or to a higher quality of the recycled material as compared to normal practice*'.

    In our opinion, there should be no obstacle for granting aid as part of an economically profitable practice provided that such aid leads to positive environmental effects. Moreover, criteria to determine whether a practice is economically viable have not been defined and this area may pose interpretative doubts, e.g. in the area of determining the relevant market for profitability assessment.

14. Article 58(5) of the GBER reads as follows: '*If this Regulation is amended, any aid scheme exempted under this Regulation as applicable at the time of the entry into force of the scheme shall remain exempted during an adjustment period of six months*'. Considering that the CEEAG establish a two-year adjustment period, we consider it appropriate to replicate this arrangement also in respect of aid schemes covered by Section 7 of the GBER. Thus, we propose that following the entry into force of the amending rules to the GBER included in the Draft, State aid schemes under Section 7 of the GBER shall remain exempted until 31 December 2023.

Sincerely,

Olga Dzilińska-Pietrzak
Vice-chairman of the *Forum of Electric Energy and Gas Consumers*

Henryk Kaliś
Chairmen of the *Forum of Electric Energy and Gas Consumers*