PKEE
Polski Komitet Energii Elektrycznej
Polish Electricity Association

Brussels, December 8, 2021

The Polish Electricity Association position on the targeted review of the General Block Exemption Regulation (State aid): revised rules for State aid promoting the green and digital transition

The Polish Electricity Association (PKEE) welcomes the opportunity given by the European Commission to submit its 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*'.

Below please find our proposals for amendments of the 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**') which we believe can further improve the Draft and contribute to the attainment of the EU climate and digital objectives. Due to sectoral focus of the PKEE, our submission concerns rules on climate, environmental and energy aid.

1. Provisions of Section 7 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**`) in their current wording provide for the possibility to apply the so-called '*regional bonuses*'[1] for 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. We believe the '*regional bonus*' serves its purpose and should not be removed from the above provisions of the GBER, as proposed in the Draft.

   It should also be noted that '*regional bonus´* was retained in the GBER provisions governing other categories of aid, for instance '*aid for access to finance for SMEs*' (Section 3 of Chapter III of the GBER) or '*Aid for research and development and innovation*' (Section 4 of Chapter III of the GBER). Moreover, '*regional bonus*' has been retained even in some of the provisions of Section 7 the GBER, e.g. in Article 47(9).

   Based on the above, we do not see any concrete justification for a more stringent approach in the amended Articles and we strongly encourage the Commission to maintain the so-called '*regional bonuses*'.

2. We welcome proposed increases of a number of notification thresholds in Article 4 of the GBER. However, we believe that in some cases the changes could go even further:

   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;

[1] '*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*'.

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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.

3. In contrast to the draft Climate, Energy and Environmental Aid Guidelines ('**CEEAG**') the Draft does not include arrangements allowing relaxation of the purely formalistic assessment of the incentive effect. We encourage the Commission to extend Article 6 of the GBER, so that it includes similar solutions to those proposed in point 30 of the CEEAG[2]. We believe such step will be in line with one of the purposes of the current revision, defined in the Explanatory Note, namely that '*the purpose of the amendments subject to this public consultation is to modify the GBER in a targeted way that ensures that it complements well the relevant State aid Guidelines being revised in parallel*'.

   As regards the proposed wording of Article 36(3), we suggest that aid should be considered to have an incentive effect if the investment is carried out and completed at least 12 months before the EU standards come into force, not 18 months as currently envisaged in the Draft. Our experience shows that early adaptation to the standards is associated with a significant increase in operating costs, which may discourage the use of this type of support.

4. 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.

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[2] Point 30 of the CEEAG reads as follows*:*

'30. In certain exceptional cases aid can have an incentive effect even for projects which started before the aid application. In particular, aid is considered to have an incentive effect in the following situations:

(a) the aid is granted automatically in accordance with objective and non-discriminatory criteria and without further exercise of discretion by the Member State and the measure has been adopted and is in force before work on the aided project or activity has started, except in the case of fiscal successor schemes, where the activity was already covered by the previous schemes in the form of tax advantages;

(b) the national authorities have published, before the start of works, a notice of their intention to establish the proposed aid measure, conditional upon the Commission's approval of the measure as required by Article 108(3) of the Treaty. That notice must be made available on a public website or other publicly accessible media with comparably broad and easy access and clearly state the type of projects that the Member State proposes to be eligible and the point in time from which the Member State intends to consider such projects eligible. The proposed eligibility must not be unduly limited. The beneficiary must have informed the granting authority prior to the start of works that the proposed aid measure was considered as a condition for the investment decisions taken. Where it relies upon such a notice to demonstrate an incentive effect, the Member State must provide, as part of its State aid notification, a copy of the notice and a link to the website on which it was published or respective proof of its availability to the public;

(c) operating aid granted to existing installations for environmentally friendly production where there is no 'start of works' because there is no significant new investment. In these cases, the incentive effect can be demonstrated by a change to operate the installation in an environmentally friendly way rather than an alternative cheaper mode of operation that is less environmentally friendly'.

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.

5. 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 defines certain features of such awarding procedures, in particular it requires that the submitted bid or the clearing price shall not account for less than 75 % of the weighting of the selection criteria. We believe that in certain instances this requirement may be overly strict and should be relaxed in particular in respect of aid funded within the framework of the Cohesion Policy (e.g. from the European Regional Development Fund, from the Cohesion Fund or from the Just Transition Fund).

   The procedures for the distribution of the European Structural and Investment Funds (ESIF) generally assume a bidding procedure; however, this procedure will not necessarily in each and every case meet the conditions of a competitive bidding process. Particularly, in the case of the operational programmes implemented within the framework of the Cohesion Policy, the selection criteria are not focused primarily on the price aspect but rely on other selection criteria.

   In order to exclude doubts or inconsistencies between regimes which govern granting of aid from different funds (e.g. the ESIF, the Modernisation Fund set up based on the ETS Directive and the Recovery and Resilience Facility) and the GBER, it would be desirable if the GBER included provision stating that if aid is awarded in line with competitive procedures for which the requirements are set at the EU level (e.g. Article 73 of the Regulation (EU) 2021/1060 of The European Parliament And Of The Council or Articles 6 and 7 of Commission Implementing Regulation (EU) 2020/1001), 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.

   Moreover, irrespective of above, we propose to introduce more flexibility as regards application of non-price criteria and increase admissible weighting of such criteria from 25% to 35%.

   Finally, we note that the requirements for the competitive bidding process set out in Articles 36, 36a and 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 on the basis of modified (as proposed above) provisions of Articles 36, 36a and 36b.

6. We suggest deleting the first sentence in the 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.

7. We note that Article 40 of the GBER establishing compatibility conditions for Investment aid for high-efficiency cogeneration is to be deleted. However, in our opinion, there is no sufficient justification for such deletion. Therefore, we would like to suggest that "separate" article related to investment aid for the high-efficiency cogeneration should be preserved.

8. 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.

   However, if the Commission eventually decides to insert the above condition to the GBER, the Member States should be given clear guidance on how compliance with the 2030 and 2050 climate targets should be demonstrated. In this respect, it should suffice for the scheme to be in line with the respective National Energy and Climate Plan adopted in accordance with the Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action. Most importantly, no additional evidence should be required form the prospective beneficiaries.

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

   a. 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 above provision seems to imply that for the needs of the notification threshold, in the case of investments consisting in the construction of storage connected to a previously built RES installation, consideration should be given not only to the amount of State aid granted for the storage component, but also to the costs of investment in the generating unit even if the generating unit was not supported with aid. Such an arrangement does not appear to be justified, and we suggest deleting the part '*for verification of compliance with the thresholds set out in Article 4*'.

      In addition, we believe that the requirement that storage investment shall have as a maximum the same capacity as the connected renewable investment should be waived in respect of heat storage. Otherwise, the parameters and characteristics of heat storage facilities, including large-scale and seasonal heat storage, may lead to the exclusion of this group of projects from the possibility of receiving aid under Article 41;

   b. 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%;

   c. 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 the so-called '*regional bonuses*' (please refer to point 1 above);

d. referring to the proposed definition of 'green cogeneration' (cf. point 108b added in Article 2), considering other definitions such as renewable electricity, renewable hydrogen, etc., we have doubts whether use of the term 'green' instead of 'renewable' is appropriate. We believe that the European Commission should seek full consistency in the terminology. In addition, in order to clarify this definition, a following sentence about biomass could be inserted – '*Cogeneration based on biomass should be considered as 'renewable [green] cogeneration*'.

10. Based on previous Commission decision-making practice[3], it appears that sufficient experience has been gathered on the assessment of cases involving support to cover additional operating costs of existing plants after their depreciation. Consequently, we propose that this type of support becomes block-exempted on the basis of Articles 42 and 43 of the GBER (the first sentence in Article 42(11) and the first sentence in Article 43(7) should be deleted).

11. In line with proposed Article 45(2b), '*Aid for rehabilitation following the closure of power plants and mining operations shall not be exempted under this Article from the notification requirement of Article 108(3) of the Treaty*'. In Poland, the majority of rehabilitation projects are planned in areas included in the Territorial Just Transition Plans (TJTP). Considering that the funds from the Just Transition Mechanism should be disbursed within certain timeframe, in our opinion, the above arrangement (i.e. notification requirement) will significantly impede the execution of rehabilitation projects. We thus propose to add additional sentence in Article 45(2b) stating that notification obligation does not apply to projects carried out in areas included in the TJTP or to delete Article 45(2b) in its entirety.

    According to proposed Article 45(3) '*where the entity liable under the applicable law cannot be identified or made to bear the costs, in particular because the liable undertaking has ceased to legally exist and no other undertaking can be regarded as its legal successor, or <u>where there is insufficient financial security to meet the costs of remediation</u>, aid may be granted to support the entire project*'. It is not clear what does it mean that '*there is insufficient financial security to meet the costs of remediation*'. In our opinion some further explanations should be made, for example in preamble. Alternatively, definition of '*insufficient financial security*' should be included in Article 2. This issue is relevant as it determines the admissibility of granting of aid in the context of the '*polluter-pays*' principle.

12. As regards the proposed wording of Article 46, we would like to submit the following comments:

    a. referring to Article 46 (1a), we would like to point out that definition of an '*energy efficient heating & cooling system*' will be – according to proposal presented by the European Commission

[3] Cf. case SA.36659 2013/N – Denmark – Aid for all forms of biogas use – B; case SA.42393 (2016/C) (ex 2015/N) –Reform of support for cogeneration in Germany; cases SA.51192 – Poland – CHP support and SA.52530 – Poland – Reductions from CHP charges for Energy Intensive Users.

in July 2021 – the subject of significant modification in framework of the revision of the EED, therefore Member States should be allowed to grant State aid to district heating networks, which are not part of energy efficient district heating systems if investments required to reach the standard of energy efficiency commence within five years from the start of the aided project. The current proposal concerning three years period is insufficient, if definition of energy efficient system is about to change.

It should be also borne in mind that the definition of an energy-efficient district heating system is directly related to the source (generation facilities) supplying district heating networks, whereas the identity of the grid owners and the generation source is not always the same. In this context it should be stressed that distribution network owner often does not have the possibility to commit to start the works on generation facilities;

b. as regards the provision of Article 46(1c), it will constitute a major obstacle to the expansion and upgrade of heating systems in countries such as Poland.

First, the proposed provision does not allow to support the expansion of heating networks if they are supplied by sources based on fossil fuels, since it refers solely to upgrades of existing networks. This condition will have negative environmental effects. The development of district heating networks (even those based on fossil fuels) contributes to the elimination of coal-fired boilers in buildings and thus reduces the total amount of greenhouse gases emitted to the atmosphere as well as PM2,5, PM10 and benzo[a]pyrene (this issue is particularly important in case of Poland because of considerable issues with air quality). We therefore believe that the construction of a distribution network should be allowed where the measure aims to address air quality.

Second, even in the case of upgrades, an upgrade may not result in an increased generation of energy from fossil fuels except for natural gas. It seems that in the Member States such as Poland, where the majority of sources in the heating systems are so far based on solid fossil fuels (primarily coal), the proposed solutions will significantly impede the upgrade of the heating sector.

Thus, it would serve to the benefit of emission reduction if the Commission confirmed that expansion or upgrade of networks may still be supported in those cases where individual heating sources based on solid fossil fuels will be substituted by system heating, even if based on solid fossil fuels. Heat generation in professional heating systems is more efficient than traditional coal-fired boilers used by individual customers. Even by connecting customers using solid fossil fuels for heat production to district heating systems using solid fossil fuels, emissions can be significantly reduced.

Consequently, we encourage the Commission to supplement Article 46(1c)(b) with additional explanation that in the above case, condition stipulated in this provision is satisfied.

Third, in respect of the condition set out in Article 46(1c)(b), if the connection of new customers increases the source's emissions, it also reduces the total emissions as individual generation sources based on coal emit much more GHG and pollutants than generating units supplying

heating networks. Moreover, connecting additional customers does not in itself amount to an increase in generation as it entails reduced emissions from individual heat sources.

In view of the above, we propose that aid for the construction or upgrades of storage and distribution networks that transmit heating and cooling generated based on fossil fuels should be allowed on condition that within five years from the commence of the aided project an investment aiming at replacing heat source(s) based on solid fossil fuels with RES or high-efficiency cogeneration units or source(s) based on waste heat is started;

c. standard aid intensity proposed in Article 46(3) is materially lower than admissible under the current rules. We suggest that this intensity is kept at the level of 45%. On top of that, we encourage the Commission to reinstate the so-called '*regional bonuses*' (please refer to point 1 above);

d. as regards the provision of Article 46(4), we would like to propose following wording: '*The aid intensity may be increased by 15 percentage points for investments using only renewable energy sources (including renewable cogeneration)* ***or waste heat*****.**

In our opinion use of waste heat should be strongly promoted in the district heating sector. Such approach seems to be fully coherent with the EU Strategy for Energy System Integration.

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. That's why we believe that in assisted areas the investment aid for resource efficiency and for supporting the transition towards a circular economy should not require to go beyond economically profitable or established commercial practices.

14. Article 48 of the GBER sets out conditions for compatibility and exemption form the notification obligation of State aid for energy infrastructure. We would like to submit our observations in connection with this category of aid:

a. recital 49 of the preamble to the GBER explains *inter alia* that if a 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 economic use remains purely ancillary (i.e. up to 20% of the infrastructure's annual capacity). Also, recital 72 of the preamble to the GBER reads that '*in the culture and heritage conservation sector, a number of measures taken by Member States may not constitute aid because they do not fulfil all the criteria of Article 107(1) of the Treaty, for example because the activity is not economic or because trade between Member States is not affected*'.

Considering the Commission's guidance provided in points 187-189 of the Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union and additional explanation presented in points 331-334 of the CEEAG which refers specifically to State financing of the energy infrastructure, in the same vein, we encourage the Commission to complement the preamble to the GBER (by adjusting the Draft) with additional recital explaining conditions under which presence of State aid may be ruled out with respect to certain types of energy infrastructure, i.e. in the case of legal monopoly or natural monopoly. We believe this would contribute to increased legal certainty in this area;

b. furthermore, we note that in line with the proposed Article 2 (130)(a)(v) only those off-shore electricity grids are considered to fall within the scope of the definition of '*energy infrastructure*' which have dual functionality: interconnection and transmission or distribution of offshore renewable electricity from the offshore generation sites to two or more countries.

   We believe that with respect of off-shore electricity grids the requirement regarding interconnection of at least two countries constitutes an unnecessary restriction. Off-shore electricity grids are indispensable for the development of capital intensive off-shore installations. Considering ambitions to materially increase off-shore capacity in the EU set put in '*An EU Strategy to harness the potential of offshore renewable energy for a climate neutral future*' (COM(2020) 741 final), such restrictions should be removed.

15. 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.

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