EUROPEAN COMMISSION

Brussels, 28.11.2016
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In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of 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, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

Subject: **State Aid SA.40171 (2015/NN) – Czech Republic**
Promotion of electricity production from renewable energy sources

Sir,

1. PROCEDURE

(1) By electronic notification of 11 December 2014, the Czech Republic notified, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), the support scheme for electricity production from renewable energy sources by installations commissioned between 1 January 2006 and 31 December 2012. The notified measure has been implemented prior to a formal Commission approval and was therefore registered as a non-notified measure. The support scheme for electricity produced from renewable energy sources by installations commissioned as of 1 January 2013 was authorised as compatible State aid in Commission decision SA.35177 (2014/NN) of 11 June 2014.

(2) The Commission requested additional information on 19 February 2015 to which the Czech authorities replied on 20 and 23 March 2015. Further contacts and exchanges of correspondence took place between the Commission services and

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the Czech authorities in the period September 2015 – July 2016; the latest submission of information by the latter dates 25 October 2016.[1]

(3) On 3 August 2016, the Czech authorities provided a language waiver and agreed that the decision would be adopted and notified in English as the authentic language. On 23 November 2016, the Czech Republic amended the notification, by adding the commitment described below in recitals (56) to (59).

2. SUBMISSIONS FROM THIRD PARTIES

(4) On 16 December 2003, the Commission received a letter alleging unlawful State aid (as well as infringements of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001,[2] and 2003/54/EC) from the Czech Society for Wind Energy and Eurosolar. The submission concerned a draft law, which was later adopted as Act No. 180/2005 Coll. of 31 March 2005. On 27 July 2004, the Commission services informed the correspondent that on the basis of the information available to the Commission services (i.e. the draft law in its version of December 2003), the draft law did not seem to involve the use of State resources. It invited the correspondent to inform the Commission services of any new particulars that might demonstrate the existence of State aid as soon as possible. The correspondent did not follow up on this letter.[3]

(5) On 9 August 2016, the Commission also received a complaint from six owners of photovoltaic plants commissioned in January and February 2011. They argue that the aid measures for plants put into operation between 1 January 2011 and 28 February 2011 violate the general Union law principles of legitimate expectation and equal treatment.

(6) In addition, the Commission has received submissions from the Czech Photovoltaic Association CZEPHO (on 20 February 2015) and a joined submission from eight associations of producers of renewable electricity (on 18 March 2016). They argue that for the period from 1 January 2006 until 31 December 2010, the measure under examination does not constitute State aid.

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1 The Commission sent questions to the Czech authorities on 30 September 2015 and 22 October 2015 to which the Czech authorities replied on 30 October 2015 and on 13 November 2015 respectively. Further questions were sent to the Czech Republic on 14 December 2015, to which replies were received on 13 January 2016. Further communications and information were exchanged between the Commission and the Czech authorities on 12 February 2016 and 2 March 2016, 4 March 2016, 8 March 2016 and 17 March 2016. The Czech authorities submitted further information on 18 March 2016. The Commission requested additional information on 18 April 2016, which the Czech authorities provided on 22 April 2016 and 13 May 2016. The Commission sent a new set of questions on 23 May 2016 to which the replies were received on 6 June 2016. Exchanges of information between the Commission and the Czech Republic continued on 21 June 2016, 27 June 2016, 29 June 2016, 18 July 2016, 20 July 2016, 3 August 2016, 16 September 2016, 23 September 2016, 26 September 2016, 14 October 2016, 18 October 2016, 20 October 2016 and 25 October 2016.

2 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ L 283, 27.10.2001 p. 33).

3 A number of letters concerning Act No. 180/2005 Coll. of 31 March 2005 were exchanged between the Commission and the Czech authorities in the period 27 January 2004 – 26 April 2004. That law was also discussed, in an incidental manner, in correspondence between the Czech Republic and the Commission concerning case NN70/2008 – Ecological Tax Advantages.

Furthermore, they consider that the changes to the measure that took effect after that date violate the general Union law principle of legitimate expectation.

(7) Ten investors from other EU Member States, which have initiated investor-State arbitration against the Czech Republic on the basis of the Energy Charter Treaty and the bilateral investment treaty between Germany and the Czech Republic ("German-Czech BIT") because of the changes to the measure that took place on 1 January 2011, have made numerous submissions to the Commission between 26 February 2015 and 11 September 2015. The ten investors argue in particular that the Commission services letter of 27 July 2004 constitutes a decision not to raise objections against Act No. 180/2005 Coll. of 31 March 2005, so that the measure under examination would be existing aid; that the measure under examination does not constitute State aid until 1 January 2011, and, in any event, that Act No 180/2005 Coll. of 31 March 2005 is compatible without any amendment, with the internal market; that the changes that took effect on 1 January 2011 violate the general Union law principle of legitimate expectation; and that the Commission is barred from assessing the measures under examination because it has created legitimate expectations by virtue of the Commission services letter of 27 July 2004.

3. DETAILED DESCRIPTION OF THE MEASURE

3.1. Objectives and scope

(8) The primary objective of the notified measure is environmental protection through promotion of electricity production from renewable energy sources (RES). The notified measure covers operating aid in the form of feed-in tariffs (the so called "mandatory purchase prices") and feed-in premiums (the so called "green bonuses").

(9) According to the Czech authorities, the State support to RES contributes to the environmentally friendly utilisation of natural resources and to the permanent sustainable development of society. Furthermore, it creates the conditions for the fulfilment of the goals for the share of energy from renewable sources in gross final energy consumption in the Czech Republic set by the Directive 2001/77/EC as amended and subsequently repealed by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009.[4]

3.2. Legal basis

(10) The legal basis of the notified measure is Act No. 180/2005 Coll. of 31 March 2005 on support of the production of electricity from renewable energy sources as amended[5] and complemented by a number of implementing provisions,[6] and the

[4] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16.

[5] Acts amending Act No. 180/2005 Coll. of 31 March 2005 are: Act No. 137/2010 Coll. of 21 April 2010, Act No. 330/2010 Coll. of 30 November 2010, and Act No. 402/2010 Coll. of 14 December 2010.

[6] Decree No. 343/2008 Coll. on the specimen application for the issue of a guarantee for the origin of electricity from renewable sources and specimen warranty on the origin of electricity from renewable sources; Decree No. 482/2005 Coll. on setting the kinds, uses, and parameters of biomass in the support of electricity generation from biomass, as amended; Decree No. 502/2005

annual price decisions, issued by the Czech Energy Regulatory Office (ERO), on the basis of all the aforementioned acts and implementing measures.[7]

3.3. Duration

(11) The notified measure covers installations commissioned between 1 January 2006 and 31 December 2012. The duration of payments after commissioning[8] the installation is set out below in recitals (28) and (29), and varies between 15 and 30 years.

3.4. Granting authority

(12) The granting authority is the Czech Ministry of Industry and Trade.

(13) In the period 1 January 2006 – 31 December 2012, the payments of the individual aid were carried out by the Czech Transmission System Operator (TSO) - ČEPS, a.s. and the regional electricity distribution companies (DSOs) - E.ON Distribuce, a.s., ČEZ Distribuce, a.s. and PRE Distribuce, a.s.

(14) Since 1 January 2013 the payments of the individual aid under the scheme are administered by the Czech Electricity and Gas Market Operator – OTE, a.s. (OTE) as set out in Act No. 165/2012 Coll.

(15) The level of the support for each individual category of aid is set annually by the ERO by means of the so-called price decisions.

3.5. Beneficiaries

(16) Beneficiaries of the notified measure are operators of installations producing renewable electricity and commissioned in the period 1 January 2006 – 31 December 2012. These include:

- Small hydropower plants with up to 10 MW of installed capacity;
- Photovoltaic power plants;
- Wind power plants;
- Biomass power plants;
- Biogas power plants; and

Coll. on the method of reporting electricity quantity for the co-firing of biomass and a non-renewable fuel, as amended; Decree No. 475/2005 Coll. which implements certain provisions of the Act on the promotion of electricity production from renewable energy sources; Decree No. 140/2009 Coll. on manner of price regulation in the energy sector, and price control procedures, as amended; Decree No. 150/2007 Coll. on the method of price regulation in energy industries and procedures for price regulation; Decree No. 438/2001 Coll. setting the contents of economic data and procedures for price regulation in energy industries, as amended; Government Regulation No. 418/2010 Coll. stipulating a limit on State budget funds for providing subsidies for payment of additional costs related to the promotion of electricity from renewable sources [for 2011] and Government Regulation No. 316/2011 Coll. stipulating a limit on State budget funds for providing subsidies for payment of additional costs related to the promotion of electricity from renewable sources for 2012.

[7] ERO price decisions can be found on the ERO's webpage at: https://www.eru.cz/en/search/-/my-search/?_search_WAR_erusearch_keywords=price+decisions&p_p_id=search_WAR_erusearch&_search_WAR_erusearch_action=search

[8] The date of commissioning is determined in accordance with Czech national law. Under Czech law, the moment of commissioning of installations coincides with the putting into operation of those installations.

- Geothermal power plants.

(17) Only beneficiaries located in the territory of the Czech Republic are eligible under the notified scheme.

(18) The Czech authorities have also confirmed that no aid was granted to undertakings in difficulty or to undertakings subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market.

3.6. Source of financing

(19) In the period 1 January 2006 – 31 December 2012, the TSO and the regional DSOs were obliged by law, without any contract or specific granting act, to purchase all renewable electricity produced by beneficiaries connected to their respective networks. The applicable purchase prices and green bonuses were those set by the ERO in the annual price decisions. The obligation to purchase renewable electricity involved extra costs to both TSO and DSOs. Those costs were passed on to the final consumers, as described below in Sections 3.6.1 and 3.6.2.

(20) Since 1 January 2013, under the provisions of Act No.165/2012 Coll. the TSO and DSOs are no longer under the obligation to purchase renewable electricity. Renewable electricity sold at feed-in tariffs (purchase prices) is bought by the so-called mandatory purchasers,[9] while electricity sold under the feed-in premium (green bonuses) regime is placed on the market with the premiums being paid out by OTE.

3.6.1. Financing in the period 2006 -2010

(21) In the period 2006 – 2010, the measure was financed solely through a surcharge (special levy) imposed on the electricity transmission and distribution tariffs. The levy was charged per MWh of electricity transported through the transmission and regional distribution networks and was paid by end electricity consumers to the obligated TSO and DSO. The levy was imposed by implementing provisions[10] and price decisions issued by ERO.[11]

(22) The legal framework in place in the period 2006 – 2010 provided for the TSO and the regional DSOs to pass the total extra costs stemming from the purchase of renewable electricity onto end consumers in the form of transmission and

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9 Mandatory purchasers are electricity trading companies who pay the established feed-in tariffs (purchase prices) for the electricity delivered and are compensated for the difference between these and the market price by OTE, as set out in recital (31) below.

10 Decree No. 438/2001 Coll., as amended; Decree No. 150/2007 Coll.; and Decree No. 140/2009 Coll., as amended.

11 Implementing provisions and price decisions issued by ERO also provided for balancing the costs of RES support among the TSO and regional DSOs and ensured that any deficit or surplus was reflected in the future amounts of the levy. The TSO and regional DSOs had to report to ERO the amounts of support paid to beneficiaries and the amounts received from electricity consumers for support of renewable electricity.

distribution surcharges. In that context, end consumers bore the full burden of financing the notified renewables support scheme.[12]

3.6.2. Financing in the period 2011 - 2015

(23) Between 1 January 2011 and 31 December 2015, the notified scheme was financed through the proceeds collected from the transmission and distribution surcharges and resources from the State budget.

(24) Act No. 402/2010 Coll. of 14 December 2010 amending Act No. 180/2005 Coll. of 31 March 2005,[13] certain implementing provisions and ERO´s price decisions provided for the TSO and DSOs to pass part of the extra costs stemming from the support to RES onto end consumers in the form of transmission and distribution surcharges, while the other part of the renewables support costs were reimbursed to the TSO and DSOs from the State budget through a grant by the Ministry of Trade and Industry.

3.6.3. Financing as of 1 January 2016

(25) As of 1 January 2016,[14] the payments of individual aid under the support scheme are financed through a combination of:

- a connection fee, in the form of a single payment in CZK/MW of connected output for extra high voltage and high voltage levels and a payment in CZK/Ampere for customers on the low voltage level; this connection fee is subject to a cap of CZK 495 per MWh of electricity consumed;[15] and
- resources from the State budget.

3.7. Budget

(26) The total estimated budget of the scheme is CZK 836.5 billion (some EUR 30.95 billion) to be paid from 2006 until 2042 (the date for the last payments to hydro installations commissioned in 2012).

3.8. Form of aid

(27) Support under the notified measure is granted in the form of:

- feed-in tariffs; or
- feed-in premiums.

(28) Support is granted for the lifetime (service life) of installations, which never exceeds their corresponding depreciation period as set out in Act No. 586/1992 Coll. on Income Tax.

(29) The table below summarises the service life of the different types of renewable technologies.

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12 The monetary flows between individual market players are presented in the figures in Annex I.

13 Act No. 165/2012 Coll. since 1 January 2013.

14 Since 1 January 2016 the extra costs stemming from the support to RES is borne by OTE, which is reimbursed for the costs incurred in relation to the renewables support scheme by the Czech State.

15 Any potential State aid that might result from the application of the cap of CZK 495 per MWh on the connection fee used to finance the notified support scheme is not subject to the present decision and falls outside its scope. The Commission reserves the right to examine it at a later point in time.

Table 1: Service life of renewable installations

Technology Type	Service life in years
Hydro	30
Photovoltaic	20[1]
Wind	20
Biogas	20[1]
Biomass	20
Geothermal	20

[1]15 years for installations commissioned by 31.12.2007

Source: Czech Authorities

(30) Producers can make their choice as to the form of support for a duration of one year (*i.e.* between feed-in tariffs in the form of purchase prices and feed-in premiums in the form of green bonuses) and thereafter can switch to a different form of support every subsequent year if they so choose.

(31) Electricity subject to the feed-in tariff regime was sold by RES producers to the TSO or to the DSOs who paid the established purchase price, *i.e.* the feed-in tariff, for the electricity delivered. Since 1 January 2013, electricity subject to the feed-in tariff regime is bought by mandatory purchasers (see above recital (20)).

(32) Electricity subject to the feed-in premium regime is sold by RES producers to electricity traders on the free electricity market. In exchange, RES producers receive the prevailing market price from electricity traders and support in the form of green bonuses from the TSO or DSOs. Since 1 January 2013 green bonuses are paid out by OTE.

3.8.1. Feed-in tariffs – purchase prices

3.8.1.1. Methodology for setting the feed-in tariffs – purchase prices

(33) Act No. 180/2005 Coll. of 31 March 2005 stipulates that the feed-in tariffs are set to provide for a 15-year simple (i.e. not discounted) payback period of the investment. That is to say that the feed-in tariffs result in a stream of revenues which allows beneficiaries to recover their initial investment in the renewable installation within the first 15 years from commissioning. The revenues beneficiaries will receive from the feed-in tariffs beyond the first 15 year from commissioning until the end of the service life (see above recitals (28) and (29)) will constitute the profits they derive from the project. Those profits can be expressed as the IRR of the project.

(34) Feed-in tariffs are calculated for the economic lifetime of the relevant types of installations (see Table **1** above after recital (29)) on the basis of estimated free discounted cash flows. Once set, feed-in tariffs for all renewable installations, with the exception of biogas and biomass installations, are only subject to yearly indexation throughout the entire support period. Feed-in tariffs for biogas and biomass installations are also subject to yearly adjustments to reflect variations in the cost of fuel.

(35) The level of feed-in tariffs differs depending on the technology type (i.e. wind, photovoltaic, etc.), the size of installation (small vs large installations), and the year of commissioning. The difference results from the different technical and economic parameters specific to each technology type and size of installation at the time when the feed-in tariff is set.

(36) The main technical and economic parameters, used for the calculation of the free discounted cash flows are typical investment costs per kW of installed capacity of the technology in question, operating costs, typical annual utilisation rates of the relevant types of installations and, in the case of biomass and biogas installations, fuel acquisition costs. All these parameters are based on assumptions and statistical data available at the time the tariff is set.

(37) The levels of investment costs, utilisation rates and fuel acquisition costs are established for each type of installation (photovoltaic, wind etc.) on the basis of market studies commissioned by the ERO from the Czech Technical University. The Czech Republic has submitted those studies to the Commission, and the Commission has verified their reasonableness.

(38) The level of operating costs per type of installation is set as a percentage of investment costs and is subject to a yearly revision before fixing the level of the new feed-in tariffs for installations to be commissioned in the upcoming year. Operating costs, expressed as a percentage of investment costs, are listed in Table 2 below

Table 2: Operating costs as a percentage of investment costs

Year	Technology	Operating costs as a % of investment costs
2006 - 2012	Hydro	[…]
	Photovoltaic	[…]
	Wind	[…]
	Biogas	[…]
	Biomass	[…]
	Geothermal	[…]

(39) In order to calculate the Net Present Value (NPV) of the projects in a discounted cash flow model, the Czech authorities adopted the indexation assumptions outlined in recitals (42) and (43) below. They also assumed a Weighted Average Cost of Capital (WACC) of 7 % for the period 2006 - 2010, and of 6.3 % for 2011-2012, as set out in recitals (40) and (41) below.

(40) For the period 2006 – 2010, the WACC was set at 7 % on the basis of a representative business entity with a capital structure of 60 % debt and 40 % equity, whose profits were taxed at the applicable yearly tax rate. When calculating the WACC, the ERO took account of factors such as the market risk in the Czech Republic and the business specific risks associated with the production of renewable electricity.

(41) For the period 2011 – 2012, the WACC was set at 6.3 %.[16] The slight decrease reflects a change in the capital structure of the model business entity, which in the period 2011 – 2012 was financed by 40 % debt and 60 % equity, as well as a slight decrease in the costs of debt and equity, associated with reduced risk levels.

(42) The original established operating costs were indexed by 2.5 % on a yearly basis.

(43) The above indexation of the operating costs and a 2 %[17] indexation of feed-in tariffs are taken into account in the calculation of the annual net cashflows and are thus reflected in the calculations based on the 15-year simple payback period and in the resulting rates of return (see Table 3 below). The Czech authorities have confirmed that in the future the feed-in tariffs will not be indexed by more than 2 % in any given year.

(44) The potential year-on-year decrease of the level of purchase prices is subject to a cap (degression limit) of 5 %.[18] Consequently the purchase price established for a given renewable technology commissioned in any given year cannot be lower than 95 % of the level of the purchase price for that technology commissioned in the preceding year.

(45) The calculations submitted by the Czech authorities show that without the support in the form of purchase prices the net present value of the cashflows for the relevant renewable installations would be negative.

3.8.1.2. Calculation of the implied rates of return

(46) In carrying out the NPV calculation exercise using the above assumptions the NPV in general was equal to zero, i.e. the Internal Rate of Return (IRR) was equal to the assumed WACC. However, there were some installations for which this was not the case, but in these cases the resulting IRR was higher. However according to the Czech authorities the variance in IRR remains within the realm of returns which are considered reasonable for these installations. The resulting IRR levels are summarised in Table 3 below by technology group:

Table 3: Tariff ranges and resulting rates of return per technology type

Year	Technology	Tariffs CZK/MWh range[2]	IRR range in %
2006 - 2012	Hydro	2 130 - 3 190	6.3% - 7.0%
	Photovoltaic	5 500 - 13 200	6.3% - 8.4[1]%
	Wind	2 230 - 2 460	6.3% - 7.0%
	Biogas	2 980 - 4 120	7.0% - 10.6%
	Biomass	1 460 - 4 210	7.0% - 9.5%
	Geothermal	4 500	7.00%

[1]The rates of return take into account the levy imposed on photovoltaic installations (see section 3.9).

[2]The range includes the minimum and maximum calculated tariffs approved in the period 2006 - 2012.

Source: Czech Authorities

16 With the exception of the WACC for geothermal power plants, which remained 7% for the entire period 2006 -2012

17 The value is linked to the Czech National Bank´s inflation target.

18 The cap of 5 % was abolished for certain installations commissioned after 1 January 2011.

3.8.2. Feed-in premiums – green bonuses

(47) The Green bonus represents a supplement to the market price. It is determined as a value fixed annually and corresponding to the difference between the feed-in tariff and a proxy for the market price of electricity for the given renewable technology. The proxy for the market price is an administratively set technology-specific price, determined on an annual basis through a consultation process with electricity traders and electricity buyers, taking into account the evolution of electricity market prices. The administratively set market prices tend to be higher than the actual market prices, which further minimises the level of the green bonuses.

(48) Green bonuses are established by the ERO for a duration of one year and are subject to a yearly revision. The rates of return resulting from green bonuses are comparable to those for the purchase prices (see Table 3 above).

(49) The calculations submitted by the Czech authorities show that without the green bonuses the net cashflows for the relevant renewable installations would be negative.

3.8.3. Tax exemptions

(50) A number of tax exemptions[19] were applicable to renewable installations benefitting from aid under the notified scheme. The calculations provided by the Czech authorities show that all those exemptions have been taken into account when setting the levels of purchase prices and green bonuses and that they are thus reflected in the resulting levels of return set out in Table 3 above.

3.9. Levies

(51) Due mainly to the combined effect of the 5 % cap for the setting of the purchase prices for new installations commissioned in the subsequent year (see recital (44) above) and the decline in costs for photovoltaic installations, which has been higher than 5 % in certain years, in 2011 the Czech authorities introduced levies on the purchase prices and green bonuses granted to photovoltaic installations commissioned between 1 January 2009 and 31 December 2010, with the exception of certain small-scale installations with installed capacity of less than 30 kW. The purpose was to ensure that over the service life, there would be no overcompensation.[20]

(52) In the period 1 January 2011 – 31 December 2013 the level of the levies was set at 26 % and 28 % for purchase prices and green bonuses respectively.

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19 An exemption from income tax originally designed to be applicable for six years (which was abolished on 31 December 2010 with immediate effect), an exemption from electricity tax (applicable only to renewable installations with capacity up to 30 kW since 1 January 2016 on the basis of Directive 2003/96/EC), and an exemption from property tax (amounting to CZK 5 per m² (EUR 0.2 per m²) and applicable to some 9 % of the installations). Any potential State aid stemming from those tax exemptions is not subject to the present decision and falls outside its scope. The Commission reserves the right to examine this in a separate decision.

20 See in that regard and in detail also judgment of the Czech Constitutional Court 2012/05/15 - Pl. ÚS 17/11: Photovoltaic Power Plants, in particular paragraphs 65 to 77, and the documents referred to therein, as well as the explanation of the Czech Government in paragraph 17 of that judgment.

(53) Since 1 January 2014, the levies imposed on photovoltaic installations benefiting from purchase prices and green bonuses are set at 10 % and 11 % respectively. These levies are applicable for the entire period during which beneficiaries are entitled to receive aid.

3.10. Cumulation

(54) Aid under the notified measure can be cumulated with investment aid and other forms of operating aid.

(55) The Czech authorities have acknowledged that the notified scheme does not incorporate any provision allowing for the adjustment of support levels in case of cumulation of aid.

(56) In light of the lack of provisions ensuring adjustment of support levels in case of aid cumulation, the Czech authorities have committed to introducing a review mechanism. The purpose of the review mechanism is to eliminate any risk of overcompensation that may result from cumulation of aid or overestimation of any of the cost elements, factored in in the support level calculations. The review of support will be carried out 10 years after the commissioning of installations benefitting from support under the scheme.[21]

(57) The Czech authorities will monitor the overall level of support which installations receive under the notified scheme. In any case where, by virtue of either decreased production costs and/or a combination of investment and other operating aid with the aid granted under the notified scheme, a beneficiary is in receipt of overall revenues which would result in a return above the acceptable range of returns[22] deemed reasonable by the Czech authorities and the Commission (see Table 3 above), the Czech authorities will adopt the below measures, to ensure any overcompensation is avoided and, where necessary, recouped.

(58) In any case of overcompensation, the Czech authorities will alternatively reduce the level of future support, limit the period during which support is paid out or, where necessary, recover the amounts of aid that have led to overcompensation.

(59) Undertakings having benefitted, over a three-year period, from aid under the notified scheme and from other *de minimis* aid, cumulatively not exceeding the

[21] In order to allow for the time needed to enact the necessary legislation and implementing provisions, the review mechanism for installations commissioned in the period 2006-2008 will be carried out by the end of February 2019.

[22] When carrying out the review of support, the Czech authorities will publish and apply the same methodology used to establish the actual rates of return for the different categories of beneficiaries, i.e. reflecting the costs of each different category of beneficiaries, as the one used for the setting of the original support levels. The review of support will be carried out at the level of individual installations only in the cases where aid under the notified scheme has been cumulated with investment aid or other types of operating aid. In all other cases, the review will be carried out on the basis of a representative sample of the different categories of installations that ensures beneficiaries' costs are properly reflected.

threshold set out by Commission Regulation No 1407/2013[23] will not be subject to the review mechanism.

3.11. Individual notification threshold

(60) The Czech authorities have confirmed that no operating aid has been granted for the production of renewable electricity or combined production of renewable heat to installations in sites where the resulting renewable electricity generation capacity exceeded 125 MW.

3.12. Proposed remedy to the possible infringement of Articles 30 or 110 of the TFEU

(61) To remedy any possible infringement of Articles 30 and 110 of the TFEU in the period 2006 to 2015, i.e. prior to the replacement of the levy with the connection fee, the Czech authorities have committed to setting aside a compensational amount that will be invested in interconnection capacity.

(62) The compensational amount is calculated on the basis of an estimate of the total quantity of green electricity imported from neighbouring Member States in the period 2006 – 2015 and the quantum of the corresponding levies applicable since the introduction of the support scheme.

(63) The compensational amount equals CZK 560 278 403[24] (EUR 20 730 917).

(64) The Czech authorities have drawn up a list of interconnection projects, in which the compensational amount will be invested.

(65) These are projects which are either on the list[25] of Projects of Common European Interest (PCI) or form part of the Czech TSO´s development plan. They are to be realised in the period 2016 – 2026. Although some of these projects will benefit from partial EU funding, for the majority of them the financing is not yet fully guaranteed as it will be subject to the availability of the TSO´s own resources.

(66) The tables below present the list of interconnection projects in which the compensational amount is to be invested.

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23 Commission Regulation No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

24 As explained in recital (62) above the compensational amount is derived from the estimated imports of green electricity for the period 2006 -2015 and the quantum of the applicable levies. Thus the annual compensation is a product of the estimated annual green electricity imported into the Czech Republic from other EU Member States and the levy in the relevant year. For the period 2006 – 2013 the share of total electricity imported which is represented by green electricity is estimated on the basis of the percentage of renewable generation of each neighbouring Member State, using Eurostat data. To estimate the green imports for the period 2014 – 2015, recorded actual transactions backed by guarantees of origin are used. For the period 2006 – 2013 the compensational amount was estimated to amount to CZK 22 030 035, while for the period 2014 – 2015 the figure is CZK 538 248 368.

25 Second list issued on 18 November 2015 under European Parliament and Council Regulation No 347/2013 of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Commission? Decision No 1364/2006/EC and amending European Parliament and Council? Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 Text with EEA relevance (OJ L 115, 25.4.2013, p. 39–75).

Table 4: Czech PCI projects

[…]

Source: Czech Authorities

Table 5: Projects part of the Czech TSO development plan

[…]

Source: Czech Authorities

3.13. Water Framework Directive

(67) The Czech authorities have committed to ensure full compliance with the requirements of European Parliament and Council Directive 2000/60/EC[26] (Water Framework Directive) and in particular with Article 4(7) thereof.

4. ASSESSMENT OF THE MEASURE

4.1. Presence of State aid

(68) Article 107(1) TFEU provides that "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market"*.

4.2. Aid granted by a Member State or through State resources

(69) The notified aid takes the form of (i) a guaranteed purchase price for electricity from RES, or (ii) a green bonus paid on top of the electricity market price to producers of energy from RES.

(70) The financing mechanism for feed-in tariffs and green bonuses has evolved over time.

(71) Initially, DSOs and the TSO were financing the increased purchase prices and passed on that burden to the final electricity consumers. The regulated electricity price, approved by ERO, had a component called the "renewable energy charge", as recognised also in the submissions of the associations mentioned in recital (7).[27] The ten investors, mentioned in recital (7), on the contrary, contest the existence of such a charge, but provide no substantiated arguments. Even they concede, however, that the DSOs and TSO were free to pass on the additional costs.

(72) In conclusion, under Act 180/2005, the State had introduced a charge, set by an independent public authority and collected by the DSOs and TSO, which were designated to use the proceeds of that charge to administer an aid scheme. The

[26] Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

[27] Legal basis for this charge is Article 4 of Act 180/2005, Article 2 of Decree 150/2007 and the pricing decisions of ERO taken on that basis.

legal situation is hence identical to the situation in *Essent*,[28] *Vent de Colère*[29] and *Austria* v *Commission*.[30]

(73) The associations and the ten investors rely for the opposite view in particular on the judgment in *PreussenElektra*,[31] as well as on Commission decision NN 27/2000 of 22 May 2002, German Renewable Energy Act of 2000, and the fact that the DSOs and TSO do not have separate accounts through which to collect the charge.

(74) Those arguments are not convincing. First, the Commission observes that there are important differences as compared to *PreussenElektra*. In that case, the DSOs and TSOs were prohibited from passing on the additional costs to their final customers. Furthermore, there was no charge set by law, and the DSOs and TSOs were in private ownership (whereas in the Czech Republic, they are in majority publicly owned). Second, the decision NN 27/2000 does not, according to standing case-law, bind the Commission for future decisions, as State aid is an objective notion that has to be assessed only against Article 107 TFEU.[32] In addition, that decision concerns a law that did not include a charge to be collected from final consumers (but only the possibility of a pass-on). Third, whether or not the DSOs and TSOs are obliged to keep separate accounts is not decisive for the presence of State control, at least not in a situation where the charge is set by a public authority and its collection is done on the basis of the law, for a purpose clearly defined and circumscribed in the law, and subject to control by the regulator. Either of those elements suffice to establish control of the State over the charge.

(75) For those reasons, the Commission concludes that the support to the production of electricity from renewable sources under Act No. 180/2005 Coll. was financed from State resources.

(76) With regard to financing as of 1 January 2011, the Commission observes that both feed-in tariffs and green bonuses are funded through a combination of transfers from the State budget, and a levy which is imposed on the users of the transmission and distribution systems, which are used to compensate the entity that is obligated to purchase the renewable electricity or pay the green premium.

(77) Aid granted directly by transfers from the State budget is an advantage granted directly by the State.

(78) In its *Vent de Colère* judgment, the Court of Justice recalled that "*[t]he concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid*".[33]

(79) The ERO is appointed as regulator and price setter for the notified measure per Section 6 of Act No. 180/2005 Coll. on support for electricity production from

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28 Case C-206/06 *Essent Netwerk Noord and Others* EU:C:2008:413.
29 Case C-262/12 *Association Vent De Colère!* EU:C:2013:851.
30 Case T-251/11 *Austria* v *Commission* EU:T:2014:1060.
31 Case C-379/98 *PreussenElektra*EU:C:2001:160.
32 Case C-138/09 *Todaro* EU:C:2010:291, paragraph 20.
33 Case C-262/12 *Association Vent De Colère!* EU:C:2013:851, paragraph 20.

renewable energy sources. The entities obliged to pay the feed-in tariff and the green premium are appointed to pay out that support, as prescribed by the law and at the level defined by ERO, and to obtain compensation for their additional costs from the transfers from the State budget and the collection of the levy.

(80) Furthermore, the overall levy compensation mechanism in which the network operators and obliged entities participate is managed by the regulator.[34] For all those reasons, it involves State resources.

(81) The payments made to producers of electricity from RES, which are funded through contributions collected by the network operators from customers, are therefore also financed through State resources.

4.3. Selective advantage

(82) The notified measure provides for feed-in premiums and feed-in tariffs for producers of electricity from RES. Those producers will therefore be remunerated at a rate exceeding the remuneration which they would ordinarily have been in receipt of from the market, had the aid not been granted. This support is only available to this category of producer and not to any other. The aid thus constitutes a selective economic advantage awarded to producers of electricity from RES.

4.4. Distortion of competition and effect on trade between Member States

(83) The notified measure only favours the generation of electricity from benefitting plants, which compete with other electricity producers. The measure has therefore the potential to distort competition between electricity producers. The beneficiaries operate in a liberalised market for electricity with cross-border trade. Therefore the measure is also likely to affect trade between Member States.

4.5. Conclusion with regard to the presence of state aid

(84) The notified measure thus satisfies all relevant tenets of Article 107(1) TFEU and constitutes State aid.

4.6. Legality of the aid

(85) By implementing the measure on 1 January 2006, before a final Commission decision, the Czech Republic has breached the stand-still obligation set out in Article 108(3) TFEU.

4.7. Existing aid/new aid

(86) The ten investors claim that the Commission letter of 27 July 2004 constitutes a decision pursuant to Article 4(2) of the Procedural Regulation. As a consequence, they claim that the measure under examination constitutes existing aid.

(87) The Commission cannot share that view. It is, first, necessary to underline that that letter contains a preliminary assessment of a draft law, i.e. the version from

[34] See, for the importance of assessing the degree of intervention of the public authorities, Case T-139/09 *France* v *Commission* EU:T:2012:496, paragraphs 57 to 89.

December 2003, whereas the final law was adopted only in 2005 and was subsequently modified. In any event, the measure has been substantially altered as of 1 January 2011. The letter is solely based on the assessment of the previous draft law, and in particular it has not assessed the impact of regulated electricity prices and the renewable energy charge on the presence of State resources.

(88) Second, the Commission services were obviously and manifestly incompetent to adopt a decision pursuant to Article 4(2) of the Procedural Regulation. In fact, the Czech Republic had not notified the measure and the measure had not yet been put into effect, so that it was also not possible to adopt a decision on unlawful aid.

(89) Third, the letter does not contain a definitive view of the Commission services, let alone the Commission, and expressly invites the complainants to inform the Commission services as soon as possible about all relevant further details.

(90) Therefore, the Commission concludes that the measure is new aid.

4.8. Compatibility of the aid

(91) The ten investors have asked the Commission to assess first whether the Act No. 180/2005 Coll. and its implementing measures could be declared compatible as such, without the subsequent amendments, with the internal market.

(92) The Commission considers, first, that it is the sovereign decision of the Member State whether or not to grant State aid. The assessment of the Commission is therefore limited to assessing the aid, as notified by the Member State. The Commission cannot oblige a Member State to grant more aid than it has notified, as there is "no right to State aid". Therefore, that argument is moot.

(93) Considering the clear environmental objective of the scheme - promoting the generation of electricity from renewable sources - the Commission has assessed the compatibility of the measure at hand according to Article 107(3)(c) TFEU and in the light of the applicable environmental (and energy) aid guidelines. In line with point 248 of the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)[35], unlawful environmental aid or energy aid is to be assessed in accordance with the rules in force on the date on which the aid was granted.

(94) Therefore the Commission has assessed the measure at hand pursuant to:

- the 2001 Community Guidelines on State aid for environmental protection[36] ("2001 EAG") for aid granted in the period 1 January 2006 – 1 April 2008, and
- the 2008 Community Guidelines on State aid for environmental protection ("2008 EAG") for aid granted as from 2 April 2008.

[35] OJ C 200, 28.6.2014, p. 1–55

[36] Community Guidelines on State aid for environmental protection, OJ C 37 of 3.2.2001, p.3.

4.8.1. Compatibility of the aid under the 2001 EAG

(95) Act No.180/2005 Coll. allows operating aid to electricity generators using renewable sources (see recital (16) above) as defined in point 6 of the 2001 EAG. Section E.3.3 of those Guidelines concerns rules applicable to operating aid for the production of energy from renewable sources.

4.8.1.1. Proportionality

(96) According to point 59 of the 2001 EAG, operating aid for the production of renewable energy can be granted to cover the difference between the cost of producing energy from renewable sources and the market price of the form of energy concerned. The aid can only be granted until plant depreciation and can include a fair return on capital. Any investment aid should be taken into account.

(97) The Czech authorities provided sample calculations of the feed-in tariffs applicable in the period 2006 – 2008 for the different types of renewable technologies. As explained in recital (34) above the tariff calculations are based on assumptions made and data available at the time of approval of the tariffs.

(98) The Czech authorities demonstrated the viability of the data and the assumptions used for the purposes of the feed-in tariff calculations. As explained in recitals (36) to (41) above, data on investment costs, utilisation rates and fuel costs (for biomass and biogas installations) were based on results from market surveys, while the assumptions underlying the WACC take into account country specifics in terms of risk factors.

(99) The rates of return resulting from the cashflow calculations of the feed-in tariffs are in the range of 6.3% to 10.6% (see Table 3). These rates of return are comparable to the rates of returns, accepted by the Commission as reasonable under adopted decisions on other European renewable support schemes[37]. Therefore the Commission considers the rates of return observed under the notified scheme reasonable.

(100) The Czech authorities have explained that the indexation of feed-in tariffs and operating costs has been taken into account in the model calculations (see recital(43)). That is also demonstrated through the calculations submitted by the Czech authorities to the Commission. Moreover the Czech authorities have committed to limiting the future percentage of indexation to a maximum of 2% (see recital (43)).

(101) As described in recital (47) above, green bonuses are determined as the difference between feed-in tariffs and an administratively set technology-specific electricity price that serves as a proxy for the market price. They are meant to compensate beneficiaries for the extra costs resulting from the production of renewable energy. To ensure that the level of that compensation is limited to the minimum needed the Czech authorities tend to maximise the level of the administratively

[37] See, for example, Commission Decision C(2016) 5205 final of 04.08.2016, State Aid SA.44840 (2016/NN) – Bulgaria Support for renewable energy generation in Bulgaria.

set technology-specific electricity price used for the calculation of the green bonuses (see recital (47)).

(102) It should be noted that one beneficiary, whatever its production costs, can choose between receiving a green bonus or a feed-in tariff. In addition the level of the green bonus results from the levels of feed-in tariffs (see recital (47) above). Therefore as long as the feed-in tariffs provide for a normal rate of return, the resulting green bonus is deemed to satisfy the condition for the aid level set out in point 59 of the 2001 EAG. Furthermore as explained in recital (48), green bonuses provide for the same rates of return to beneficiaries as feed-in tariffs.

(103) The Czech authorities have confirmed that the income tax and the electricity tax exemptions, as well as the termination of the former, are taken into account when setting the levels of support to ensure rates of return remain unaffected. The property tax exemption in itself does not have a material effect on the rate of return levels. (see footnote (20))(44).

(104) The Czech authorities have acknowledged that the cumulation rules as set out in the 2001 EAG have not been fully complied with when support under the notified schemes has been cumulated with other forms of aid (see recital (55)). However taking into account the Czech authorities´ commitment to introduce an effective review mechanism, as described in recitals (56) -(59), which will cover the cumulation of operating aid with investment aid or other operating aid, the Commission concludes that the notified scheme is in line with the cumulation requirements as set out in the second paragraph of point 59 of the 2001 EAG

(105) The Czech authorities demonstrated, as explained in recital (28), that support under the notified scheme is not granted beyond the full depreciation of installations.

(106) In light of the facts outlined in recitals (95) to (105) above the Commission concludes that the aid in the period 1 January 2006 – 1 April 2008 is proportionate.

4.8.1.2. Incentive effect

(107) Incentive effect is present if the aid results in changing the behaviour of beneficiaries so that the level of environmental protection is increased.

(108) As explained in recitals (45) and (49) above, without the aid the renewable energy projects would not be economically feasible. Hence without the aid, there would have been an insufficient incentive to undertake the projects for electricity generation from RES as such activity would have resulted in a loss.

(109) The aid enables beneficiaries to undertake the renewable projects, which they would not have done without the aid. Thus a change in behaviour is observed, which demonstrates the existence of an incentive effect in the case of the notified measure.

4.8.1.3. Conclusion with regard to the compatibility under the 2001 Guidelines

(110) In light of what has been explained in this section 4.8.1, the Commission considers that the aid granted between 1 January 2006 and 1 April 2008 under the

notified scheme for support of renewable energy sources complies with the conditions of the 2001 EAG.

4.8.2. Compatibility of the aid under the 2008 EAG

(111) The Commission notes that the 2008 EAG apply to the aid granted since 2 April 2008. The provisions concerning support to renewable energy have not substantially changed.

(112) The information submitted by the Czech Republic (see recital (16) above) confirmed that aid has only been granted to energy from renewable sources as defined by point 70(5) of the 2008 EAG.

4.8.2.1. Proportionality

(113) In accordance with points 107 and 109(a) of the 2008 EAG, the aid can compensate the difference between the costs of producing energy from renewable sources and the market price of energy concerned. This is essentially the test which was also applicable under the 2001 EAG.

(114) The Czech authorities provided detailed calculations for the feed-in tariffs granted in the period 2 April 2008 – 31 December 2012. The submitted calculations are based on assumptions available at the moment aid was granted.

(115) The rates of return of all renewable installations in the period 2 April 2008 – 31 December 2012 (see Table 3) are comparable with the rates of return of such types of renewable installations with a similar level of business risk. Thus the feed-in tariffs applicable in the mentioned period result in normal rates of return.

(116) Some of the aid levels under the notified scheme have been affected by the introduction on 1 January 2011 of the levies on feed-in tariffs and green bonuses granted to photovoltaic installations commissioned in the period 2009 – 2010. Factoring in the levies leads to a reduced level of aid that does not exceed the level of production costs plus the resulting rate of return (see recital (51) above).

(117) The rates of return of photovoltaic installations subject to the levy do not exceed the level of 8.4% (see Table 3). Such levels of return are in line with levels of return of similar photovoltaic installations under similar conditions observed in other EU Member States.

(118) In light of what has been outlined in recitals (113) to (117), it can be concluded that the feed-in tariffs in the period 2 April 2008 – 31 December 2012 comply with the requirements of points 107 and 109(a) of the 2008 EAG.

(119) The calculation methodology of the green bonus described in recital (47) remained unchanged during the entire period 2006 – 2012. Green bonuses are derived from feed-in tariffs and result in the same rates of return (see recital (48)). Consequently, since the feed-in tariffs in the period 2 April 2008 – 31 December 2012 comply with the requirements of points 107 and 109(a) of the 2008 EAG, the same conclusion must be drawn for the green bonuses applicable in the same period.

(120) The Czech authorities have confirmed that tax exemptions and their termination, except for the exemption from the property tax, are taken into account when

setting the levels of support to ensure rates of return remain unaffected. The property tax exemption in itself does not have a material effect on the rate of return levels (see footnote 19).

(121) Any overcompensation that may have resulted from the cumulation of operating aid and investment aid is to be tackled by the review mechanism the Czech authorities have committed to introducing (see recitals (57) and (58) above).

(122) As provided for by point 109(a) of the 2008 EAG, aid is granted only until renewable installations are fully depreciated (see recital (28) above).

(123) Based on what is outlined in recitals (114) to (122) the Commission concludes that aid granted in the period 2 April 2008 – 31 December 2012 is proportionate.

4.8.2.2. Incentive effect

(124) The calculations submitted by the Czech Republic demonstrate that without the aid under the notified scheme the renewable projects commissioned in the period 2 April 2008 – 31 December 2012 would not have been economically viable (see recitals (45) and (49)) and consequently would not have been undertaken.

4.8.2.3. Individual thresholds

(125) As explained in recital (60), the Czech authorities have not granted any operating aid to renewable installations with an installed capacity above 125 MW. Accordingly, no individual notification of projects in receipt of operating aid after 2 April 2008 was required pursuant to point 160(b)(iii) of the 2008 EAG.

4.8.2.4. Conclusion with regard to the compatibility under the 2008 Guidelines

(126) In light of the explanations set out in this section 4.8.2, the Commission considers that the notified aid scheme for support of RES complies with the conditions of the 2008 EAG.

4.8.3. Articles 30 and 110 TFEU

(127) During the administrative procedure, the Commission services had expressed concerns that the financing mechanism of the notified support scheme in the period 2006 – 2015 by means of a levy based on electricity consumption, might infringe Article 30 TFEU which prohibits customs duties on imports and exports and charges having equivalent effect, or Article 110 TFEU which prohibits the imposition of taxes on imported products if this is in excess of the taxes borne by similar domestic products. If domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including consumption of imported electricity), then the method of financing, which imposes a burden on imported electricity not benefitting from this financing, may have a discriminatory effect on imported electricity from RES.

(128) However as set out in section 3.12 above, the Czech authorities have committed to remedying the potential discrimination of imported renewable electricity by investing a compensational amount in interconnection capacity with the aim of enabling an increase in cross-border flows in the European electricity market.

(129) As of 2016, there is a connection fee, which has been accepted in earlier Commission decisions to be in line with Articles 30 and 110 TFEU.[38]

5. ASSESSMENT OF SUBMISSIONS FROM THIRD PARTIES

(130) The submissions allege violations of various provisions of Union law as a consequence of the amendments to Act No. 180/2005 Coll. and the tax exemptions.

(131) Furthermore, they allege that the Commission created legitimate expectations by the letter of the Commission services of 27 July 2004.

(132) None of those claims are founded.

5.1. Alleged violation of the principle of legitimate expectations expectations because of the amendment of the support for photovoltaic installations*

(133) The submissions argue that the Czech Republic could not amend the support for those installations that had been connected to the grid prior to the amendments, and that there had to be a sufficient transition period for those installations that were already planned and under construction but not yet connected to the grid.

(134) The measures under examination constitute the implementation of obligations of the Czech Republic under Union law, namely Directives 2001/77/EC, 2009/28/EC. Therefore, the general principles of Union law apply to the measures under examination.[39]

(135) However, according to the case-law, traders are not protected against future changes to an on-going situation, and the immediate application of the new rule is the general rule for the application in time of new rules.[40] Therefore, the Commission takes the view – just like the Czech Constitutional Court[41] – that the modifications to the support scheme and the tax measures were not retroactive, and did not violate the principle of legitimate expectation. That is even more so because Act No. 180/2005 Coll. did not guarantee a certain purchase price or green premium,[42] but only a simple payback of the investment over a period of 15

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38 See, in addition to decision SA.35177, also the decision on Slovenia (Decision 2007/580/EC, paragraph 96) and Austria (N317/A/2006, paragraph 74).

39 Case C-195/12 *IBV* EU:C:2013:598, paragraph 49.

40 Case 245/81 *Edeka* v *Germany* EU:C:1982:277, paragraph 27.

41 Judgment of the Czech Constitutional Court 2012/05/15 - Pl. ÚS 17/11: Photovoltaic Power Plants, in particular paragraphs 46 to 64. Although the Czech Constitutional Court basis its assessment on the basis of the principles under Czech law, it has to be noted that the considerations can be transposed to the application of the principles under Union law. In that context, it is also of particular relevance that the Czech Constitutional Court bases its conclusion not only on case-law from the Czech Courts, but also on an interpretation based on comparing the case-law of the various supreme Courts in the Union and in third countries, which all tend to the same conclusion.

42 As Ernst and Young puts it in a study submitted by the associations: "Parameters used for setting the Feed-in tariff were only indicative, they were not binding."

* Should read: "Alleged violation of the principle of legitimate expectations because of the amendment of the support for photovoltaic installations"

years. The levy on photovoltaic producers has been calculated so as to ensure such simple payback, but no more.

(136) Finally, there cannot be any violation of the principle of legitimate expectation is even more evident since the measures constituted unlawful State aid. As to the question of whether unapproved State aid measures are liable to create legitimate expectations for potential or actual beneficiaries, the Commission points to the well settled jurisprudence of the Court of Justice stating that a recipient of State aid cannot, in principle, entertain a legitimate expectation as to the lawfulness of aid that has not been notified to the Commission.[43]

(137) In that regard also the Commission services letter of 27 July 2004 does not change the situation. For the reasons set out above in section 4.7, that letter contains a provisional assessment of a draft law, and could in no way create legitimate expectations with regard to the final, modified law. It invited the associations to come back with any further useful information, which they never did. It should also be stressed that it is not an act of the Commission, but a mere letter of the Commission services.

5.2. Alleged violation of the Union law general principles of legal certainty and legitimate expectation because of the absence of activity by the Commission over a long period

(138) It is alleged that the fact that the Commission did not adopt a decision earlier, despite its knowledge of the draft law, would constitute a violation of the the general principles of Union law of legal certainty and legitimate expectations.

(139) First, that claim is unfounded. Such absence of Commission action has not been considered relevant by the Court, except where the Commission manifestly failed to act and clearly breached its duty of diligence.[44] There is no indication for such a situation being present in the present case. In particular, it should be recalled that the associations were invited to come back with any further useful information, which they never did.

(140) Second and in any event, as the Commission approves the aid, and does not order recovery, there is no need to assess whether there is a possible violation of the general principles of Union law of legal certainty and legitimate expectations with regard to the absence of aid. Indeed, the only possible relevance of a breach of those principle would be that they could possibly exclude the order of recovery of State aid. However, the Commission in the present case approves the aid, and does not order any recovery of State aid.

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[43] See the judgment in case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* EU:C:1997:163, in which the Court of Justice has concluded that "*In view of the mandatory nature of the supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principles, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.*" (paragraphs 13 and 14); see also the judgment in case C-169/95 *Spain v Commission* EU:C:1997:10.

[44] Case C-408/04 P *Salzgitter* v *Commission* EU:C:2008:236 paragraph 106.

5.3. Alleged violation of the principle of equal treatment

(141) The producers connected to the grid between 1 January 2011 and 28 February 2011 complain that ERO decision Nr. 2/2010 of 8 November 2010, which sets the feed-in tariff for their installations 55% lower than compared to installations commission in 2010, violates the principle of equal treatment.

(142) The Commission observes that those investors are in a different position compared to investors of installations connected in 2010. They benefit from a "grace period" and transitional provisions; but they are not entitled to the same treatment as investors that invested one year earlier. It should also be recalled that there is no "right to State aid" – the Czech Republic could, from a State aid point of view, also have abolished the aid completely.

5.4. Alleged violation of the provisions of the Energy Charter Treaty and the German-Czech BIT on fair and equitable treatment

(143) As a preliminary point, the Commission observes that the ten investors that have raised this claim are based in other Member States of the Union. Pursuant to Article 3(2) TFEU, any provision in an international investment treaty, be it bilateral or multilateral, which might affect common rules of the EU law or alter their scope, is contrary to the Union law. As such, the Commission considers that any provision that provides for investor-State arbitration between two Member States is contrary to Union law In particular, it violates Article 19(1) TEU, Article 3(2) TFEU, the principles of the freedom of establishment, the freedom to provide services and the free movement of capital, as established by the Treaties (in particular Articles 49, 52, 56, and 63 TFEU), as well as Articles 64(2), 65(1), 66, 75, 107, 108, [45] 215, 267 and Article 344 TFEU, and the general principles of Union law of primacy, unity and effectiveness of Union law, of mutual trust[46] and of legal certainty.

(144) The violation concerns both substance and enforcement. On substance, Union law provides for a complete set of rules on investment protection (in particular in Articles 49, 52, 56, and 63 TFEU, as well as Articles 64(2), 65(1), 66, 75 and 215 TFEU). Member States are hence not competent to conclude bilateral or multilateral agreements in that field, because by doing so, they may affect common rules or alter their scope.[47] As the two sets of rules on investment protection are not identical in content and are applied by different adjucitators, there is also a risk of conflicts between the international investment treaty and Union law.[48]

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45 See on Articles 107 and 108 TFEU Decision (EU) 2015/1470 of the Commission of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — arbitral award of 11 December 2013 in *Micula v Romania* (OJ L 232 of 4.9.2015, p. 43).

46 Opinion 2/13, paragraphs 168, 191, 194 and 258 first indent; Case C-536/13 *Gazprom* EU:C:2015:316; Cases C-411/10 and C-493/10 *N.S. a.o.* EU:C:2011:865, paragraph 83; Case C-195/08 *PPU, Rinau* EU:C:2008:406, paragraph 50; Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA* v *West Tankers* EU:C:2009:69; Case C-159/02, *Turner* EU:C:2004:228, paragraph 24, and Cases C-187/01 and C-385/01, *Gözütok und Brügge* EU:C:2003:87, paragraph 33.

47 Case C-370/12, *Pringle* EU:C:2012:756, paragraphs 100 and 101.

48 See Cases C-249/06, *Commission* v *Sweden* EU:C:2009:119, paragraph 42; C-205/06, *Commission* v *Austria* EU:C:2009:118, paragraph 42; and Case C-118/07, *Commission* v *Finnland*

(145) On enforcement, an Arbitral Tribunal created on the basis of the Energy Charter Treaty or an intra-EU BIT has to apply Union law as applicable law (both as international law applicable between the parties and as domestic law of the host state). However, according to the case-law, it is not a court or tribunal of a Member State, and hence cannot make references to the ECJ, because in particular the requirements of permanence, of a State nature, and mandatory competence are not met.[49]

(146) The resulting treaty conflict is to be solved, in line with the case-law of the Court, on the basis of the principle of primacy in favour of Union law.

(147) In case of the Energy Charter Treaty, it is also clear from the wording, the objective and the context of the treaty that it does not apply in an intra-EU situation in any event. In general, when negotiating – as in the case of the Energy Charter Treaty – multilateral agreements as a "block", the Union and its Member States only intend to create international obligations vis-à-vis third countries, but not *inter se*. That has been particularly clear in case of the Energy Charter Treaty, which had been initiated by the Union in order to promote investment flows from the then European Communities to the East, and energy flows in the opposite direction, as part of the external action of the European Communities. It is also borne out by the wording of Articles 1(3) and 1(10) of the Energy Charter Treaty, which defines the area of a regional economic integration organisation as the area of that organisation. The lack of competence of Member States to conclude *inter se* investment agreements and the multiple violations of Union law set out above in recitals (143) to (145) also constitute relevant context for the interpretation of the Energy Charter Treaty in harmony with Union law, so as to avoid treaty conflict.

(148) For those reasons, the ten investors cannot rely on the Energy Charter Treaty or the German-Czech BIT.

(149) In any event, there is also on substance no violation of the fair and equitable treatment provisions. First, as explained above, the Czech Republic has not violated the principles of legitimate expectation and equal treatment, neither under its domestic law nor under Union law. As both under the Energy Charter Treaty and the German-Czech BIT Union law is part of the applicable law, the principle of legitimate expectation under the fair and equitable treatment provision has to be interpreted in line with the content of that principle under Union law. Second, in case of the Energy Charter Treaty, it has been expressly recognized by Arbitral Tribunals that the provisions of the Energy Charter Treaty have to be interpreted in line with Union law, and that in case of conflict, Union law prevails[50]. It is settled case-law that a measure that does not violate domestic

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EU:C:2009:715, paragraph 33. On the fact that the risk of conflict is sufficient to trigger incompatibility, see also Case C-471/98, *Commission* v *Belgien* („*Open Skies*") EU:C:2002:628, paragraphs 137 to 142; and Opinion 2/13, paragraphs 198, 199 and 208.

49 See, on the requirements in general, Case C-54/96 *Dorsch Consult* EU:C:1997:413, paragraphs 22 to 37, and Case C-377/13 *Ascendi Beiras Litoral e Alta* EU:C:2014:1754, paragraphs 23 to 34. For their application to commercial arbitration, see for example Case 102/81 *Nordsee* EU:C:1982:107, paragraphs 11 and 12.

50 *Electrabel* v *Hungary*.

provisions on legitimate expectation generally does not violate the fair and equitable treatment provision.

(150) Finally, the Commission recalls that any compensation which the Arbitral Tribunals were to grant would constitute in and of itself State aid. However, the Arbitral Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they were to award compensation, they would violate Article 108(3) TFEU, and any such award would not be enforceable, as that provision is part of the public order.

6. AUTHENTIC LANGUAGE

(151) As mentioned under section 1 of this decision, the Czech Republic has waived its right to have the decision adopted and notified in Czech. The authentic language of this decision will therefore be English.

7. CONCLUSION

The Commission regrets that the Czech Republic put the aid measure in question into effect in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:
http://ec.europa.eu/competition/elojade/isef/index.cfm.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

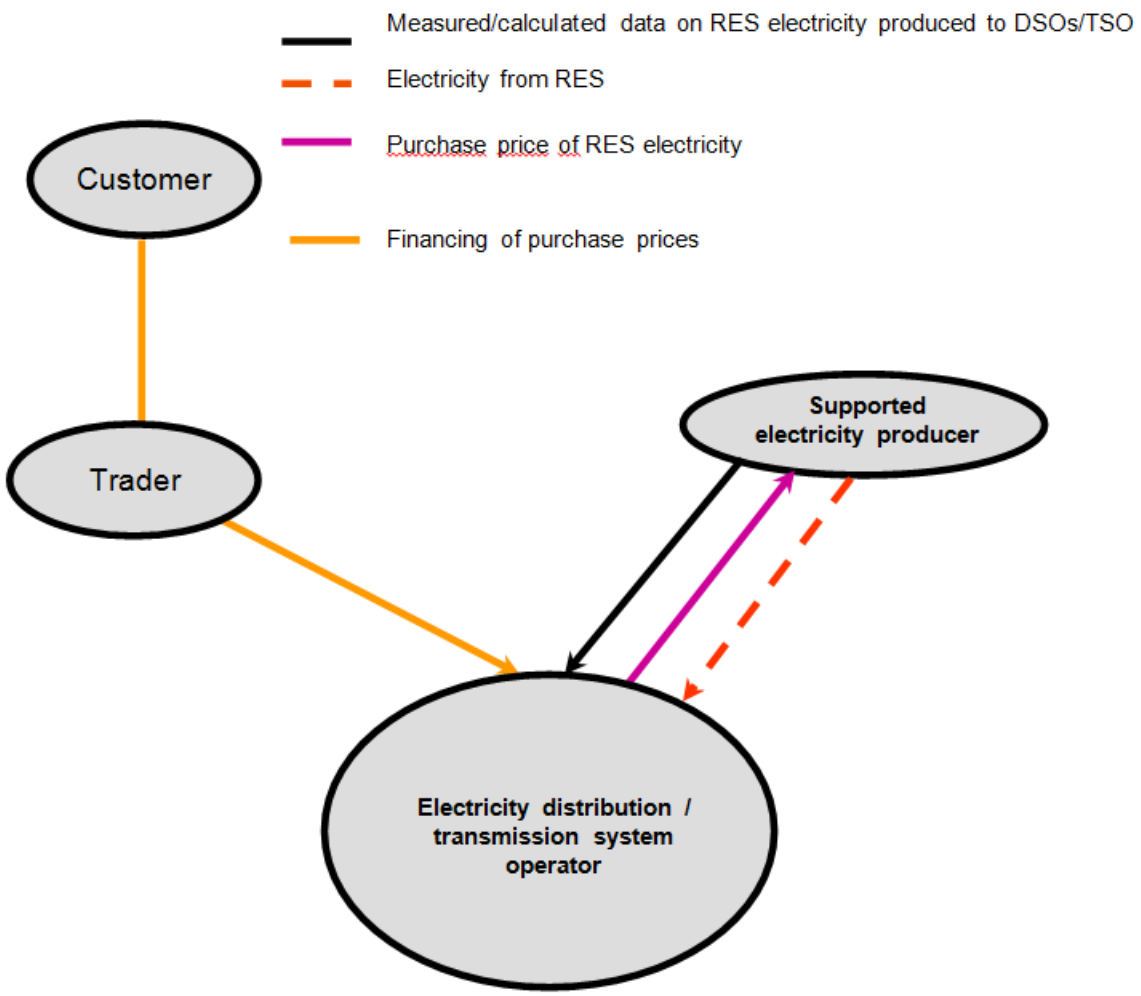
CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Annex I

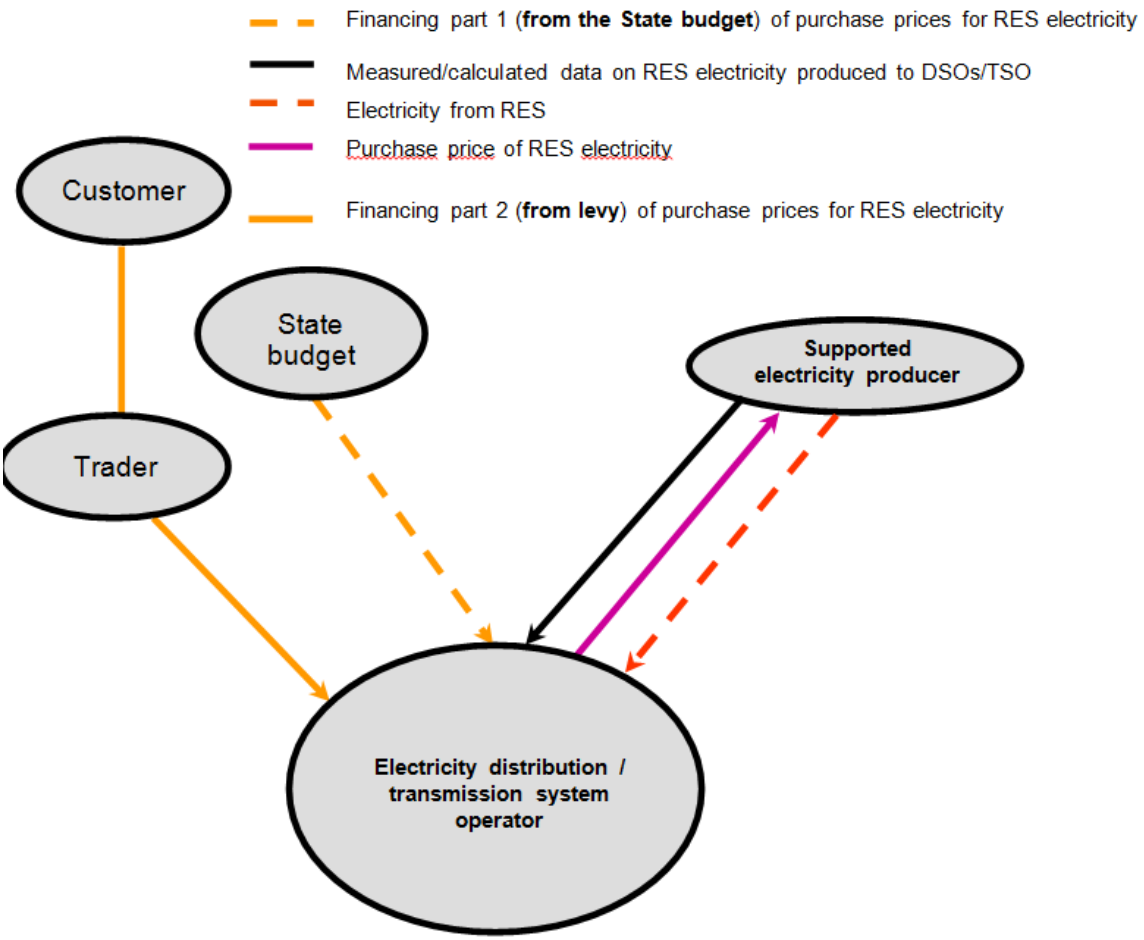
Purchase prices

Market Relations. Data and Financial Flows in the period 1 January 2006 – 31 December 2010



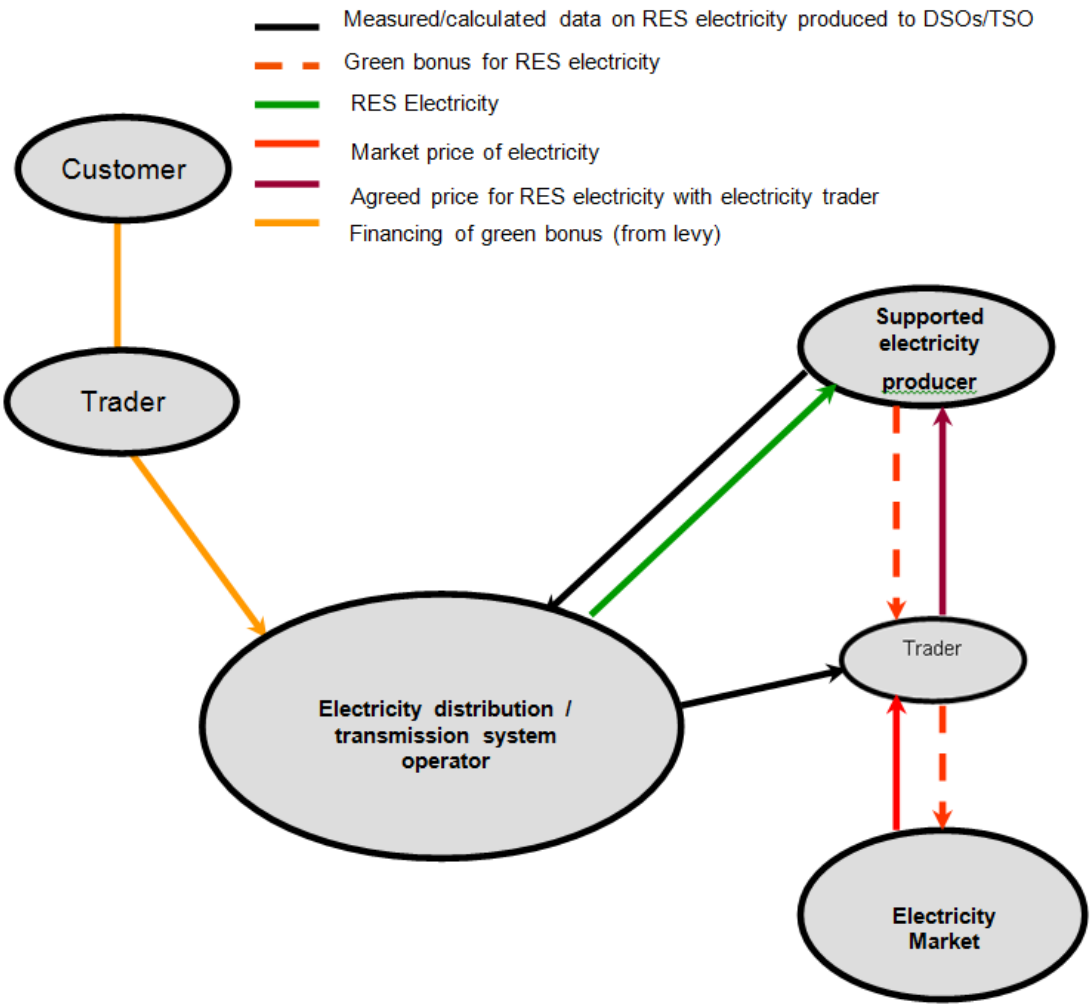
Purchase prices

Market Relations. Data and Financial Flows in the period 1 January 2011 – 31 December 2012



Green bonuses

Market Relations. Data and Financial Flows in the period 1 January 2006 – 31 December 2010



Green bonuses

Market Relations. Data and Financial Flows in the period 1 January 2011 – 31 December 2012