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Subject: State Aid SA.100559 (2022/N) – Germany
Compensation for indirect ETS costs in Germany for 2021-2030

Excellency,

1. PROCEDURE

(1) By electronic notification dated 8 June 2022, Germany notified to the European Commission (the "Commission"), in accordance with Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU"), a scheme to compensate undertakings for a share of their indirect emission costs, that is to say the costs resulting from the EU Emission Trading System ("ETS") passed on in electricity prices ("the measure").

(2) The Commission services requested additional information by emails of 23 June 2022, 30 June 2022 and 28 July 2022. The German authorities replied to those requests by emails of 4 July 2022 and 5 August 2022.

(3) By letter dated 28 June 2022, Germany exceptionally agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958[1] and to have the present decision adopted and notified in English.

[1] Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

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2. DESCRIPTION OF THE MEASURE

(4) The measure compensates certain undertakings for increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to the EU ETS, so called indirect emission costs, as defined in the Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021[2] (the "ETS Guidelines post-2021").

2.1. Legal basis, duration, budget, financing and granting authority

(5) The legal basis for the measure is the draft Act for aid to undertakings in sectors or subsectors where it is assumed that there is a significant risk of carbon leakage in view of the costs associated with EU ETS allowances, which are passed on in the electricity price[3].

(6) The draft Act provides that the payment of the aid is subject to the approval of the scheme by the Commission under State aid rules. The German authorities confirmed that no aid will be granted under the measure before the notification of the Commission's decision approving the measure.

(7) The measure covers indirect emission costs incurred in years 2021 to 2030.

(8) The aid, in the form of a direct grant, will be paid to the beneficiary, upon request, in year t + 1 for costs incurred in year t (the "accounting year"). The first payments will be made in 2022 on the basis of the eligible costs for year 2021 and the last payments in 2031 for costs incurred in 2030.

(9) The measure will be financed by the Energy & Climate fund[4] of the federal budget. The main sources of income for the fund are the EU ETS allowances auctions revenues and a grant from the general federal budget.

(10) The estimated total budget is EUR 27 493 million for 2021-2030 and the estimated annual budget is distributed as follows:

Year (payment in year t+1)	**2022**	**2023**	**2024**	**2025**	**2026**
Estimated budget (EUR million)	944	2 993	2 563	3 499	3 499
Year (payment in year t+1)	**2027**	**2028**	**2029**	**2030**	**2031**
Estimated budget (EUR million)	2 799	2 799	2 799	2 799	2 799

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2 Communication from the Commission — Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021, OJ C 317, 25.9.2020, p. 5.

3 Entwurf Richtlinie für Beihilfen für Unternehmen in Sektoren bzw. Teilsektoren, bei denen angenommen wird, dass angesichts der mit den EU-ETS-Zertifikaten verbundenen Kosten, die auf den Strompreis abgewälzt werden, ein erhebliches Risiko der Verlagerung von CO2-Emissionen besteht (Beihilfen für indirekte CO2-Kosten).

4 Gesetz zur Errichtung eines Sondervermögens „Energie- und Klimafonds" of 8 December 2010 (BGBl. I S. 1807), as amended by Article 4 of the Act of 14 July 2020 (BGBl. I S. 1683).

(11) The granting authority will be the German Emissions Trading Authority (DEHSt) at the Federal Environment Agency. The DEHSt carries out tasks under the measure under the joint technical supervision of the Federal Ministry of Economic Affairs and Energy and the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety.

2.2. Beneficiaries

(12) The beneficiaries are companies active in Germany in one or more of the sectors or sub-sectors listed in Annex I to the ETS Guidelines post-2021. All sectors listed in this annex will be eligible under the measure.

(13) No aid will be granted under the measure to:

- undertakings in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty[5];
- undertakings subject to a pending recovery order following a previous decision of the European Commission declaring aid unlawful and incompatible with the common market.

(14) The measure does not compensate for consumption of self-generated electricity from installations put into operation before 1 January 2021 and for which the beneficiary has a right to remuneration under the Renewable Energy Act[6]. The German authorities explained that this exclusion for existing installations is important because companies had decided to build the installations based on the economic incentives that existed pre-2021, which includes financial incentives available at that time, especially feed-in tariffs for electricity from renewable energies and the advantages of the consumption of self-generated electricity that was guaranteed for 20 years of operation, but not indirect cost compensation under the previous scheme (SA.36103[7]).

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5 Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

6 EEG 2017: *Erneuerbare-Energien-Gesetz* of 21 July 2014 (BGBl. I S. 1066), as amended by Article 2 of the Act of 22 December 2016 (BGBl. I S. 3106), for which the related aid scheme has been approved by the Commission's decision of 20 December 2016 in case SA.4561; EEG 2014: *Erneuerbare-Energien-Gesetz* of 21 July 2014 (BGBl. I S. 1066), as amended by Article 4 of the Act of 22 July 2014 (BGBl. I S. 1218), for which the related aid scheme has been approved by the Commission's decision of 23 July 2014 in case SA.38632; EEG 2012: *Erneuerbare-Energien-Gesetz* of 25 October 2008 (BGBl. I S. 2074), as amended by Article 1 of the Act of 17 August 2012 (BGBl. I S. 1754), see judgement of 28 March 2019 in case C-405/16 P, EU:C:2019:268.

For electricity from renewable energy sources ("RES") installations fed into the grid, the beneficiary receives a market premium or feed-in tariff (varying for different renewable energies). For their own consumption of self-generated electricity from RES installations, the beneficiary was completely or partially exempted from the obligation to pay the nationwide, Renewable Energies Act levy (EEG-Umlage).

7 Commission decision C(2013) 4422 final in case SA.36103 (2013/N) – Germany – State aid for indirect CO2 costs (ETS).

(15) Germany commits to verifying that beneficiaries comply with their obligation to conduct an energy audit under Article 8 of Directive 2012/27/EU[8] ("EED"), either as an independent energy audit or within the framework of an Energy Management System or Environmental Management System, for example the EU eco-management and audit scheme (EMAS).

(16) In addition, all beneficiaries must install and operate, no later than 1 January 2023, a certified energy management system or certified environmental management system, such as the EMAS[9].

(17) Moreover, for the accounting years 2021 to 2024, beneficiaries must implement the measures identified in the energy management system, by 31 December 2024, when the payback period does not exceed three years and the investment costs do not exceed the sum of the aid amounts granted for 2021 to 2024, and provide a commitment in their application in this regard.

(18) As of the accounting year 2025, a company will receive the aid if it has carried out the measures identified in the energy management system to improve energy efficiency with a payback period not exceeding three years and investment costs at least equal to the sum of the aid amount granted to the undertaking for the year preceding the accounting year (i.e. year t-1)[10], in advance of applying for the aid.

(19) In addition to the obligation described in recitals (17) and (18), as of the accounting year 2023, according to Article 4.2.1c of the draft Act, which refers to Article 11(3), third sentence of the BECV[11], if the measures identified with a payback period not exceeding three years amount to less than 50 % of the previous accounting year's aid, beneficiaries must make additional investments so that, in total, they invest at least 50 % of the previous accounting year's aid (i) to implement the economically feasible measures identified in the energy management system[12], (ii) to reduce their electricity consumption below the applicable electricity consumption efficiency benchmark established in Annex II of the ETS Guidelines post-2021 or (iii) to decarbonise their production process to the extent that such measures reduce the

8 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

9 Undertakings that had an average total electricity consumption of less than 10 GWh in the three calendar years preceding year t, may, at the latest from 1 January 2023 operate an uncertified energy management system based on DIN EN ISO 50005: 2021 at least in accordance with implementation stage 3, or be a member of an energy efficiency and climate network registered with the Energy Efficiency and Climate Change Networks Initiative.

10 The German authorities explained that a requirement to invest at least the amount received over 3-4 years from 2025 onwards would result in significant and disproportionate risks and disadvantages for beneficiaries in light of the ex-ante approach (beneficiaries are required to invest at least the full yearly aid amount in advance, before applying for the aid).

11 Ordinance on measures to prevent carbon leakage through national fuel emission trading ("*Verordnung über Maßnahmen zur Vermeidung von Carbon Leakage durch den nationalen Brennstoffemissionshandel (BEHGCarbon-Leakage-Verordnung – BECV)*") of 21st of July 2021 (BGBl. I p. 3129).

12 Measures are considered to be economically feasible, if they have a positive net present value when accounting for 60 % (for accounting years 2023 to 2025) or 90 % (from accounting year 2026) of the expected useful life (maximum of nine years from accounting years 2023 to 2025).

greenhouse gas emissions to a level below the applicable product benchmark for free allocation under the EU ETS.

(20) Alternatively to carrying out the measures identified in the energy management system mentioned in recitals (17) to (19), as of the accounting year 2023, beneficiaries can cover at least 30 % of their electricity consumption from renewable energy sources, justified by means of own renewable installations, renewable power purchase agreements or guarantees of origin, provided that:

- the electricity is sourced from installations producing electricity from renewable energy sources within the meaning of Section 3(21) of the Renewable Energy Act;

- at least 80 % of electricity comes from plants located within the geographical area of "Central Western Europe" as defined in Annex III to the ETS Guidelines post-2021 and to a maximum of 20 % from plants located in another geographical area referred to in Annex III to the ETS Guidelines post-2021, which is electrically connected to the geographical area of "Central Western Europe"; and

- for which neither a payment under the Renewable Energy Act, the Renewable Energy Regulation[13] or the Combined Heat and Power Act[14] in the version applicable to the installation, nor any other support within the meaning of § 9(1)(6)(b) of the Renewable Energy Regulation is claimed.

(21) The German authorities will verify that beneficiaries comply with the obligations described in recitals (16) to (20). Beneficiaries must report the implementation of the measures to the competent authority on an annual basis.

(22) If, after verification, it appears that the beneficiary has not complied with its obligations, the aid received has to be reimbursed. As regards the additional obligation under Article 4.2.1c of the draft Act (see recital (19)), if proof of the fulfilment of this provision is not provided or is not provided to the required extent, the aid must be reimbursed pro rata as a percentage of the non-fulfilment based on the amount spent under Article 4.2.1c of the draft Act compared to the 50 % threshold.

(23) The expected number of beneficiaries is around 322, based on the number of beneficiaries for aid granted for 2020 under the previous compensation scheme for

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13 *Erneuerbare-Energien-Verordnung* of 17 February 2015 (BGBl. I S. 146), as amended by Article 87 of the Act of 10 August 2021 (BGBl. I S. 3436)

14 KWKG 2000: *Kraft-Wärme-Kopplungsgesetz* of 12 May 2000 (BGBl. I S. 703); KWKG 2002: *Kraft-Wärme-Kopplungsgesetz* of 19 March 2002 (BGBl. I S. 1092), as amended by Article 170 of the Act of 31 October 2006 (BGBl. I S. 2407); KWKG 2009: *Kraft-Wärme-Kopplungsgesetz* of 19 March 2002 (BGBl. I S. 1092), as amended by Article 11 of the Act of 28 July 2011 (BGBl. I S. 1634); KWKG 2012: *Kraft-Wärme-Kopplungsgesetz* of 19 March 2002 (BGBl. I S. 1092), as amended by Article 331 of the Act of 31 August 2015 (BGBl. I S. 1474); KWKG 2016: *Kraft-Wärme-Kopplungsgesetz* of 21 December 2015 (BGBl. I S. 2498), as amended by Article 7 of the Act of 8 August 2020 (BGBl. I S. 1818); KWKG 2020: *Kraft-Wärme-Kopplungsgesetz* of 21 December 2015 (BGBl. I S. 2498), as amended by Article 88 of the Act of 10 August 2021 (BGBl. I S. 3436).

indirect ETS costs (SA.36103[15]), with a total of 716 companies identified in the eligible sectors.

2.3. Aid amount calculation

(24) The maximum aid amount payable per installation will be calculated on the basis of the two formulas outlined in point 28 of the ETS Guidelines post-2021.

(25) Where electricity consumption efficiency benchmarks have been published, the formula of point 28(a) of the ETS Guidelines post-2021 applies. Where no product-related electricity consumption efficiency benchmarks have been published, the formula of point 28(b) of the ETS Guidelines post-2021 applies.

(26) The measure adopts the definitions of the ETS Guidelines post-2021 for all the elements of the formulas. Annex II to the ETS Guidelines post-2021 establishing the product-specific electricity consumption efficiency benchmarks and annual reduction rates and Annex III establishing the regional CO_2 emission factors apply.

(27) For the purpose of calculating the aid under the formula set out in point 28(b) of the ETS Guidelines post-2021, a fall-back electricity consumption efficiency benchmark of the baseline electricity consumption will be used, as envisaged by Annex II to the ETS Guidelines post-2021.

(28) If an installation manufactures both products for which the electricity consumption efficiency benchmark is listed in Annex II to the ETS Guidelines post-2021 and products for which the fall-back electricity consumption efficiency benchmark is applicable, the electricity consumption for each product is apportioned according to the respective tonnage of production of each product. If an installation manufactures products that are eligible for aid and products that are not eligible for aid, the maximum aid payable is calculated only for the products that are eligible for aid.

(29) The maximum aid intensity will be 75 % of the indirect emission costs incurred. The aid intensity will be the same for all eligible beneficiaries.

(30) The measure also provides for an additional compensation up to limiting the remaining indirect costs (after regular compensation at 75% intensity) to 1.5% of the undertaking's gross value added ("GVA") in year t, calculated at factor costs[16], in accordance with point 31 of the ETS Guidelines post-2021 (so called "super cap"). The super cap and the base amount, see recital (32)(b), will apply without restriction to all undertakings in all eligible sectors.

(31) The aid is subject to budget availability. Additional compensation based on the super cap will be granted only if there is sufficient budget to achieve first an aid

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[15] Commission decision C(2013) 4422 final on case SA.36103 (2013/N) – Germany – State aid for indirect CO2 costs (ETS), OJ C 353, 3.12.2013, p. 1.

[16] The GVA is calculated in accordance with § 64 paragraph 6 no. 2 EEG 2021, i.e. as turnover, plus capitalised production, plus other operating income, plus or minus changes in stocks, minus purchases of goods and services (which shall not include personnel costs), minus other taxes on products that are linked to turnover but not deductible, minus duties and taxes linked to production. Alternatively, it can be calculated from gross operating surplus by adding personnel costs. Income and expenditure classified as financial or extraordinary in company accounts is excluded from value added. Value added at factor costs is calculated at gross level, as value adjustments (such as depreciation) are not subtracted.

intensity of 75 % for all beneficiaries. In case of insufficient budget, the additional compensation based on the super cap will be proportionally reduced for all beneficiaries of the super cap.

(32) Germany further limits the maximum aid amount in two ways.

(a) First, eligible beneficiaries will have to bear a certain share of their indirect emission costs for which no aid will be paid out ("retention" or "*Selbstbehalt"*). This retention will be operated by deducting, from the total amount of aid a beneficiary can claim, an amount of aid corresponding to the CO_2 costs of 1 GWh of electricity consumption per year and per installation. Such retention applies to all installations. This can mean in practice that beneficiaries with small installations of less than 1 GWh of consumption per year will not receive any aid. The German authorities explained that in cases of low electricity use (below 1 GWh per installation), the effort involved in filing an aid application exceeds the aid amount[17]. Considering those associated administrative costs for the applying company, such an application would not be worthwhile for the company and would produce unnecessary costs for the administrative body.

(b) Second, a "base amount" ("*Sockelbetrag*") of the relevant indirect emission costs calculated on the basis of 5 % of the relevant EUA[18] forward price, but at least EUR 5 per tonne of CO_2, is excluded from the super cap.

2.4. Cumulation

(33) The German authorities confirmed that the measure will comply with points 33 to 35 of the ETS Guidelines post-2021, so that the aid may be cumulated with:

(a) any other State aid in relation to different identifiable eligible costs;

(b) any other State aid, in relation to the same eligible costs, partly or fully overlapping, and any other State aid without identifiable eligible costs, only if such cumulation does not result in exceeding the maximum aid intensity or aid amount applicable under the measure.

(34) Union funding centrally managed by the Commission that is not directly or indirectly under the control of the Member State, does not constitute State aid. Where such Union funding is combined with State aid, only the latter is considered for determining whether notification thresholds and maximum aid intensities are respected, provided that the total amount of public funding granted in relation to the same eligible costs does not exceed the maximum funding rate(s) laid down in the applicable rules of Union law.

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[17] The German authorities estimated that with the fall-back electricity consumption efficiency benchmark and European Union Allowance price of EUR 25.09 or EUR 75, excluding additional compensation, the aid amount for an electricity consumption of 1 GW would amount to EUR 10 800 or EUR 32 400, respectively. The German authorities explained that, in the past years, estimated internal administrative costs and auditing costs combined amounted to approximately EUR 15 000 (excluding costs for external consulting) on average. Considering the increased requirements for beneficiaries related to energy management systems and decarbonisation measures, the German authorities expect those costs to rise.

[18] European Union Allowance ("EUA").

(35) Aid must not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in exceeding the applicable maximum aid intensity under the measure.

2.5. Transparency, reporting and monitoring

(36) The German authorities undertake to comply with and apply the reporting, transparency and monitoring requirements set out in points 56 to 62 of the ETS Guidelines post-2021.

2.6. Evaluation

(33) The German authorities have submitted an evaluation plan for the measure. The main elements of the evaluation plan are described below.

(34) The evaluation plan notified by the German authorities describes the objectives of the scheme subject to evaluation and includes evaluation questions in order to assess the scheme's direct and indirect effects, as well as the proportionality of the aid and the appropriateness of the chosen aid instrument.

(35) The evaluation plan contains guiding evaluation questions regarding target achievement, impact monitoring, efficiency and future relevance of the scheme. Therefore, the evaluation will provide general information, in particular, on whether the scheme achieves its objectives and how the climatic and economic impact and the economic efficiency of the measure are to be assessed.

(36) For the purpose of evaluation of the scheme, the German authorities will use several result indicators. Due to complex economic interrelationships, the evaluation plan highlights that carbon leakage as well as environmental effects can hardly be quantified. The same applies to a quantified indication of the greenhouse gas savings achieved. The evaluation plan uses the indirect emission intensity (taking into account the non-compensated electricity volumes) as an indicator in order to estimate the carbon leakage risk caused by indirect CO_2 costs.

(37) The evaluation plan underlines that due to very complex economic interrelationships carbon leakage as well as environmental effects cannot be quantitively determined by the econometric methods usually used for assessing the causal impact of State aid programmes. Therefore, the complex correlation between electricity price compensation, indirect CO_2 costs and potential carbon leakage will be fully assessed by taking into account all parameters that can lead to investment leakage, production leakage or relocation, e. g. the current economic situation, the international competitive pressure, the market demand or labour costs.

(38) In the course of the evaluation process, the extent to which analytical methods can be deployed will be examined. The evaluation plan presents different counterfactual methods[19] and, for each, discusses in details the feasibility in the current context. The main difficulties derive from both the absence of a control group and of a pre-treatment period. Germany expects further ideas for evaluation to derive from the chance of bidders to propose evaluation methods.

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[19] All major methods discussed in the European Commission Staff Working Document Common methodology for State aid evaluation, SWD(2014) 179 final, 28 May 2014.

(39) The evaluation will be based on a wide range of data at EU and national level from public sources, including Eurostat, Destatis and EU Transaction Log (EUTL), as well as non-public data on the different aid beneficiaries collected during the application process from the DEHSt. The evaluation plan will also assess to what degree micro data can be used for potential microeconometric evaluation methods. Additionally, the Federal Ministry for Economic Affairs and Climate Action intends to conduct comprehensive company surveys by means of online questionnaires and interviews in 2025 and towards the end of the funding period in 2030.

(40) The German authorities have committed to submit a revised version of the evaluation plan, taking into account the methodological comments provided by DG COMP and the early evidences concerning the implementation of the scheme, as part of a first interim report within 12 months after the adoption of the Commission's decision approving the scheme. The first interim report will include descriptive statistics of the compensations paid in 2022 and during the previous years under the previous scheme SA.36103 (including the available information on the indicators suggested), an analysis of the methodology that could be used for the evaluation and an annex with the revised version of the evaluation plan. In addition, Germany commits to submit a second interim report in 2025 and the final evaluation report to the Commission by the end of the scheme in 2030.

(41) In 2022, towards the end of the first application process, this process will be evaluated and the super cap will be reviewed by the DEHSt. During the first half of the year 2023, there will be a decision on the continuation and further development of the super cap. Besides that, the DEHSt will undertake a yearly analyses of all result indicators that can be quantified.

(42) For the purpose of ensuring the quality and reliability of the evaluation, the evaluation will be conducted by an external independent evaluator to be selected by Germany through an open tender procedure in 2024. The selection criteria will be the independence, experience and economic and methodological knowledge necessary to conduct a comprehensive and reliable evaluation.

(43) The interim reports and the final evaluation report will be published on the website of the Federal Ministry for Economic Affairs and Climate Action ("BMWK")[20]. Personal and/or confidential data will be used in accordance with the relevant regulations. The published results of the evaluation will comply with provisions of the German statistical law and statistical secrecy. Access to third-party data will be subject to the rules imposed by these third-party bodies. Data collected during the evaluation process will be made accessible for the purpose of replicating results or for further studies.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid within the meaning of Article 107(1) TFEU

(44) In order for a measure to constitute State aid within the meaning of Article 107(1) TFEU it has to fulfil four conditions. First, the aid must be imputable to the State and involve State resources. Second, the measure must confer a selective advantage

[20] https://www.bmwk.de/.

to certain undertakings or the production of certain goods. Third, the measure must be liable to affect trade between Member States. Fourth, the measure must distort or threaten to distort competition in the internal market.

(45) The compensation is granted by the DEHSt (see recital (11)) based on the draft Act (see recital (5)), and funded by the Energy & Climate fund[21] of the federal budget (see recital (9)). Hence, the measure is imputable to the State and financed through State resources. It confers an advantage to the beneficiaries by compensating for costs they would have borne under normal market conditions. The aid is selective since it is granted only to the undertakings active in certain sectors (see recital (12)). Those sectors are all exposed to international competition as noted in point 20 of the ETS Guidelines post-2021, making it likely the aid can affect trade between Member States and distort competition.

(46) Based on the above, the Commission considers that the scheme constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Lawfulness of the aid

(47) The draft Act has not entered into force yet and provides that no aid will be granted before the notification of the Commission's decision approving the measure (see recital (6)).

(48) By notifying the scheme before its implementation, the German authorities have fulfilled their obligations under Article 108(3) TFEU.

3.3. Compatibility

3.3.1. Legal basis for the assessment of the compatibility of the aid

(49) The Commission has assessed if the measure can be considered compatible with the internal market pursuant to Article 107(3)(c) TFEU.

(50) Aid aimed at compensating for EU ETS allowance costs passed on in electricity prices incurred by undertakings from sectors or subsectors deemed to be exposed to a significant risk of carbon leakage falls within the scope of the ETS Guidelines post-2021. The Commission assessed the measure's compatibility on the basis of section 3.1 of the ETS Guidelines post-2021, which sets out the conditions under which such aid may be deemed compatible.

3.3.2. The aid facilitates the development of an economic activity

3.3.2.1. Contribution to the development of an economic activity

(51) According to Article 107(3)(c) TFEU, the Commission may consider to be compatible with the internal market aid to facilitate the development of an economic activity, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

[21] Gesetz zur Errichtung eines Sondervermögens „Energie- und Klimafonds“ vom 8. Dezember 2010 (BGBl. I S. 1807), das zuletzt durch Artikel 4 des Gesetzes vom 14. Juli 2020 (BGBl. I S. 1683) geändert worden ist.

(52) The scheme supports companies active in one of the sectors or sub-sectors listed in Annex I to the Guidelines post-2021 (see recital (12)), which correspond to sectors and sub-sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.

(53) In view of the above, the Commission considers that the measure contributes to the development of certain economic activities, namely sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.

3.3.2.2. Facilitation of an economic activity and incentive effect

(54) To be declared compatible with the internal market under Article 107(3)(c) TFEU, the aid must effectively facilitate the development of an economic activity. State aid has an incentive effect if it incentivises the beneficiary to change its behaviour towards the development of a certain economic activity pursued by the aid and if the change in behaviour would not occur without the aid[22].

(55) According to point 25 of the ETS Guidelines post-2021, for the aid to have an incentive effect and actually prevent carbon leakage, it must be applied for and paid to the beneficiary in the year in which the costs are incurred or in the following year.

(56) The measure foresees that the aid will be paid to the beneficiary in the year following the one in which the costs were incurred (year t + 1) (see recital (8)). This is in line with point 25 of the ETS Guidelines post-2021.

(57) The Commission therefore concludes that the aid has an incentive effect and facilitates the development of certain economic activities.

3.3.2.3. Compliance with other relevant provisions of EU law

(58) State aid that contravenes provisions or general principles of EU law cannot be declared compatible[23].

(59) Beneficiaries must comply with their obligations under Article 8 of Directive 2012/27/EU on energy efficiency.

(60) In light of the above, the Commission considers that the notified aid measure does not infringe other relevant provisions of EU law.

3.3.3. The aid does not unduly affect trading conditions to an extent contrary to the common interest

3.3.3.1. Positive effects of the aid

(61) The measure will contribute to the development of sectors exposed to a genuine risk of carbon leakage due to indirect emission costs (see recital (53)).

(62) Addressing the risk of carbon leakage serves an environmental objective since the aid aims at avoiding an increase in global greenhouse gas emissions due to shifts of production outside the Union, in the absence of a binding international

[22] Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742.
[23] Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

agreement on reduction of greenhouse gas emissions, as explained in point 20 of the ETS Guidelines post-2021.

3.3.3.2. Need for State intervention

(63) Point 20 of the ETS Guidelines post-2021 requires that the objective of the aid is to prevent a significant risk of carbon leakage due to EU ETS allowance costs passed on in electricity prices and incurred by the beneficiary, if its competitors from third countries do not face similar CO_2 costs in their electricity prices and the beneficiary is unable to pass on those costs to product prices without losing significant market share.

(64) According to point 21 of the ETS Guidelines post-2021, a significant risk of carbon leakage is considered to exist only if the beneficiary is active in a sector or subsector listed in Annex I. Moreover, according to point 22 of the ETS Guidelines post-2021, if Member States decide to grant the aid only to some of the sectors listed in Annex I, the choice of sectors must be made on the basis of objective, non-discriminatory and transparent criteria.

(65) The beneficiaries of the measure are undertakings active in one of the sectors or sub-sectors listed in Annex I to the ETS Guidelines post-2021. In addition, the German authorities confirmed that all sectors listed in Annex I will be eligible for the whole duration of the measure (see recital (12)). Hence, the Commission concludes that the aid is necessary to realise the measure's well-defined objective, namely contributing to the development of sectors exposed to a genuine risk of carbon leakage due to indirect emission costs and, moreover, avoiding an increase in global greenhouse gas emissions due to shifts of production outside the Union.

3.3.3.3. Appropriateness of the aid

(66) According to point 24 of the ETS Guidelines post-2021, for the purpose of compensating indirect ETS costs, State aid is considered an appropriate instrument independently of the form in which it is granted. In this context, compensation taking the form of a direct grant is considered an appropriate instrument.

(67) In the present scheme, the support will take the form of a direct grant (see recital (8)). Therefore, the Commission considers the type of aid chosen is appropriate to address the risk of carbon leakage.

3.3.3.4. Proportionality of the aid

(68) According to point 27 of the ETS Guidelines post-2021, the aid is proportionate and has a sufficiently limited negative effect on competition and trade if it does not exceed 75 % of the indirect emission costs incurred. The electricity consumption efficiency benchmark ensures that support to inefficient production processes remains limited and maintains the incentive for dissemination of the most energy-efficient technologies.

(69) Moreover, according to point 31 of the ETS Guidelines post-2021, given that for some sectors the aid intensity of 75 % might not be sufficient to ensure that there is adequate protection against the risk of carbon leakage, when needed, Member States may limit the amount of the indirect costs to be paid at undertaking level to 1.5 % of the gross value added of the undertaking concerned in year t. The gross

value added of the undertaking must be calculated as turnover, plus capitalised production, plus other operating income, plus or minus changes in stocks, minus purchases of goods and services (which shall not include personnel costs), minus other taxes on products that are linked to turnover but not deductible, minus duties and taxes linked to production. According to point 32 of the ETS Guidelines post-2021, when Member States decide to limit the amount of the indirect costs to be paid at undertaking level to 1.5 % of gross value added, that limitation must apply to all eligible undertakings in the relevant sector. If Member States decide to apply the limitation of 1.5 % of gross value added only to some of the sectors listed in Annex I, the choice of sectors must be made on the basis of objective, non-discriminatory and transparent criteria.

(70) The measure does not provide for full compensation, as this could remove the incentive for beneficiaries to further reduce electricity consumption. The maximum aid intensity will be 75 %, in compliance with point 27 of the ETS Guidelines post-2021. As noted above, the aid intensity may be lower depending on the available budget (see recital (31)).

(71) Moreover, if there is sufficient budget to achieve first an aid intensity of 75 % for all other beneficiaries, a higher aid intensity would apply up to limiting the amount of the remaining indirect costs to be paid at undertaking level to 1.5 % of the gross value added of the undertaking concerned in year t (see recital (30)), in line with point 31 of the ETS Guidelines post-2021. This rule will apply without distinction to all eligible undertakings in all eligible sectors. The scheme therefore complies with point 32 of ETS Guidelines post-2021.

(72) The maximum aid amount payable per installation will be calculated on the basis of the two formulas outlined in point 28 of the ETS Guidelines post-2021 (see recital (24)).

(73) The measure adopts the definitions of point 15 of the ETS Guidelines post-2021, for all the elements of the formulas. The measure also applies the electricity consumption efficiency benchmarks defined in Annex II of the ETS Guidelines post-2021, as well as the maximum regional emission factor of Annex III of the ETS Guidelines post-2021 (see recital (26)).

(74) Germany further limits the maximum aid amount in two ways (see recital (32)).

(75) Moreover, the measure does not compensate for consumption of self-generated electricity under certain circumstances (see recital (14)).

(76) According to point 23 of the ETS Guidelines post-2021, within the eligible sector, Member States need to ensure that the choice of beneficiaries is made on the basis of objective, non-discriminatory and transparent criteria and that the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation.

(77) Moreover, according to point 28 of the ETS Guidelines post-2021, the amounts calculated on the basis of the formulae mentioned are maximum aid amounts. A Member State is not obliged to grant the full aid amount authorised under the ETS Guidelines post-2021.

(78) As long as restrictions on the eligibility and limitations of the aid amounts do not contradict the ETS Guidelines, nor result in the breaching of any provision of Union law, the Member State may opt for such further limitations of aid amounts.

(79) Concerning the exclusion for self-generated electricity from installations put into operation before 1 January 2021 and for which the beneficiary has a right to remuneration under the Renewable Energy Act (see recital (14)), the Commission notes that self-generation was not eligible under the previous German scheme for indirect cost compensation, that those installations were set up without the incentive of benefiting from indirect cost compensation but based on other economic incentives available at that time.

(80) Therefore, the Commission agrees that users of self-generated electricity from installations put into operation before 1 January 2021 and for which the beneficiary has a right to remuneration under the Renewable Energy Act can be considered to be in a different factual situation compared to other users of self-generated electricity (those consuming electricity from installations put into operation as of 1 January 2021) and users consuming electricity from the grid or based on power purchase agreements.

(81) Therefore, the Commission considers that this exclusion is based on objective, transparent and non-discriminatory criteria in line with point 23 of the ETS Guidelines post-2021.

(82) Concerning the retention, the German authorities explained that in cases of low electricity use, the costs involved in filing an aid application exceeds the aid amount and would produce unnecessary costs for the administrative body (see recital (32)(a)). Therefore, the Commission considers that this limitation is based on objective, transparent and non-discriminatory criteria in line with point 23 of the ETS Guidelines post-2021.

(83) Concerning the "base amount" referred to in recital (32)(b), the Commission notes that base amount reduces the additional aid that Member States may grant under point 31 of the ETS Guidelines post-2021, which is a maximum. Therefore, the Commission considers that this limitation is in line with point 31 of the ETS Guidelines post-2021 and it is based on objective, transparent and non-discriminatory criteria in line with point 23 of the ETS Guidelines post-2021.

(84) The measure also complies with points 29 and 30 of the ETS Guidelines post-2021. In particular, if an installation manufactures products for which a product-specific electricity consumption efficiency benchmark is applicable and products for which the fall-back electricity consumption efficiency benchmark is applicable, the electricity consumption for each product is apportioned according to the respective tonnage of production of each product. If an installation manufactures products that are eligible for aid and products that are not eligible for aid, the maximum aid payable will be calculated only for the products that are eligible for aid (see recital (28)).

(85) The duration of the scheme does not exceed the duration of the ETS Guidelines post-2021 (see recital (7)). Therefore, the scheme complies with point 36 of the ETS Guidelines post-2021.

3.3.3.5. Cumulation

(86) The scheme's provisions on cumulation are in line with the requirements set out in points 33 to 35 of the ETS Guidelines post-2021 (see recital (33) to (35)).

3.3.3.6. Energy audits and management systems

(87) Germany committed to verifying that beneficiaries comply with their obligation to carry out an energy audit under Article 8 of Directive 2012/27/EU, either as an independent energy audit or within the framework of an Energy Management System or Environmental Management System, for example the EU eco-management and audit scheme (EMAS) (see recital (15)). The scheme therefore complies with point 54 of the ETS Guidelines post-2021.

(88) The additional requirement to install and operate, no later than 1 January 2023, a certified energy management system or certified environmental management system, such as the EMAS (see recital (16)) is an objective, non-discriminatory and transparent criterion in line with point 23 of the ETS Guidelines post-2021.

(89) Moreover, for the accounting years 2021 to 2024, beneficiaries must implement the measures identified in the energy management system with a payback period not exceeding three years and investment costs at least equal to the sum of the aid amounts granted for 2021 to 2024, by 31 December 2024 (see recital (17)).

(90) From the accounting year 2025, a company will receive the aid if it has carried out the measures identified in the energy management system to improve energy efficiency with a payback period not exceeding than three years and investment costs at least equal to the sum of the aid amount granted to the undertaking for the year preceding the accounting year (i.e. year t-1), in advance of applying for the aid (see recital (18)).

(91) Alternatively, from the accounting year 2023 onwards, beneficiaries can cover at least 30 % of their electricity consumption with electricity generated by own renewable installations, renewable power purchase agreements or guarantees of origin provided that certain conditions are met (see recital (20)). Those conditions are based on objective, transparent and non-discriminatory criteria, in line with point 23 of the ETS Guidelines post-2021.

(92) The German authorities will verify that beneficiaries comply with those obligations (see recital (21)). The Commission considers that a reasonable period of time for implementing one of those obligations is in line with point 55 of the ETS Guidelines post-2021.

(93) In the present case, concerning the implementation of the measures identified in the energy management system, for the accounting years from 2021 to 2024, beneficiaries must complete the relevant investments by 31 December 2024. The Commission considers that this deadline is reasonable to give sufficient time for beneficiaries to adapt in line with point 55(a) of the ETS Guidelines post-2021.

(94) From 2025, beneficiaries must provide evidence of completion of the relevant investments already in their application (i.e. prior to the granting of aid). Taking that into account, the Commission considers that the requirement to invest at least

the yearly aid amount in advance is justified and in line with point 55(a) of the ETS Guidelines post-2021.

(95) Concerning the alternative obligation from the accounting year 2023 to cover at least 30 % of their electricity consumption with renewable electricity (see recital (20)), beneficiaries will need to provide evidence of compliance in their application, in line with point 55(b) of the ETS Guidelines.

(96) Therefore, the scheme complies with point 55 of the ETS Guidelines post-2021.

(97) Moreover, from the accounting year 2023, according to Article 4.2.1c of the draft Act, beneficiaries must additionally implement economically feasible measures identified in the energy management system, if the measures identified with a payback period not exceeding three years amount to less than 50 % of the previous accounting year's aid (see recital (19)). Alternatively, beneficiaries can implement measures to decarbonise their production process. The Commission considers that this additional obligation is based on objective, non-discriminatory and transparent criteria and therefore complies with point 23 of the ETS Guidelines post-2021.

3.3.3.7. Transparency, reporting and monitoring

(98) The German authorities committed to comply with the requirements set out in points 56 to 62 of the ETS Guidelines post-2021 on transparency, reporting and monitoring of the scheme (see recital (36)).

3.3.3.8. Firms in difficulty or subject to an outstanding recovery order

(37) According to point 10 of the ETS Guidelines post-2021, aid may not be awarded to firms in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty. Moreover, according to point 11 of the ETS Guidelines post-2021, when assessing aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring aid to be illegal and incompatible with the internal market, the Commission will take account of the amount of aid still to be recovered[24]. In practice, it will assess the cumulative effect of both aid measures and may suspend the payment of the new aid until the outstanding recovery order is implemented.

(38) Under the measure, no aid will be granted to (i) undertakings in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty and (ii) undertakings subject to an outstanding recovery order following a previous Commission decision declaring aid to be illegal and incompatible with the internal market (see recital (13)).

(99) Therefore, the measure complies with points 10 and 11 of the ETS Guidelines post-2021.

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[24] See in this respect the joint Cases T-244/93 and T-486/93, *TWD Textilwerke Deggendorf GmbH* v Commission EU:T:1995:160, and the Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

3.3.3.9. Evaluation

(100) Point 52 of the ETS Guidelines post-2021 states that the Commission may require that certain aid schemes be subject to an evaluation, where the potential distortion of competition is particularly high, that is to say when the measure may risk significantly restricting or distorting competition if their implementation is not reviewed in due time. Given its objectives, evaluation only applies for aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation scheme, must be carried out by an independent expert on the basis of a common methodology provided by the Commission. This plan has to be made public.

(101) The measure fulfils the criteria of being a scheme with a large aid budget. Therefore it will be subject to an evaluation.

(102) The Commission notes the commitment made by the German authorities to submit a first interim report within 12 months after the adoption of the Commission's decision approving the scheme, a second interim report in 2025 and a final report by the end of the scheme (2030) (see recital (40)). The Commission notes that the evaluation method might be further fine-tuned in common accord between the German authorities and the Commission, and it will be described in the first interim report.

(103) Moreover, the Commission acknowledges the commitments made by the German authorities, pursuant to the Commission requirements, that the evaluation will be conducted according to the notified evaluation plan by an independent evaluation body. The procedures envisaged for selecting such evaluation body are appropriate in terms of independence and skills. Moreover, the proposed modalities for the publication of the evaluation results are adequate to ensure transparency.

(104) The Commission considers the that the notified evaluation plan, taking into account Germany's commitment, will contain all the necessary elements: the objectives of the aid scheme to be evaluated, the evaluation questions, the result indicators, the envisaged methodology to conduct the evaluation, the data collection requirements, the proposed timing of the evaluation including the date of submission of the final evaluation report, the description of the independent body conducting the evaluation and the criteria that will be used for its selection and the modalities for ensuring the publicity of the evaluation (see recitals (33) to (43)).

(105) The Commission reminds that the notified scheme has to be suspended if the final evaluation report is not submitted in good time and sufficient quality.

3.3.3.10. Remaining distortions of trading conditions

(106) Compensation for indirect ETS costs risks distorting competition between undertakings within the same sector active in different EU Member States (intra-sector competition). This is because only some countries may put a compensation scheme in place for the fourth EU ETS trading period from 2021 to 2030[25].

[25] See the impact assessment report for the ETS Guidelines post-2021, p. 13 (available at: https://ec.europa.eu/competition/state_aid/what_is_new/2020_ets_revision/impact_assessment_report_ets_2021_en.pdf).

(107) Additionally, the measure may create a limited risk of competition distortions to the extent that products of certain eligible sectors may compete with products manufactured in sectors that are not eligible for indirect cost compensation (inter-sector competition).

(108) Those risks are however mitigated by the fact that the measure complies with all the conditions laid down in the ETS Guidelines post-2021, which set a list of eligible sectors, a maximum aid intensity, aid calculation formulas and electricity consumption efficiency benchmarks at Union-level. Moreover, under the notified scheme, the same aid intensity will be applied to all beneficiaries in a given year depending on the available budget, subject to the application of a higher aid intensity based on the undertaking's GVA (see recitals (30) and (31)).

3.3.3.11. Conclusion on distortion of competition and balancing test

(109) As explained above, the scheme will facilitate the development of sectors exposed to a significant risk of carbon leakage due to indirect emission costs and will contribute to avoiding an increase in global greenhouse gas emissions (see recitals (52) and (62)).

(110) Moreover, the necessity, appropriateness and proportionality of the aid limit its impact on competition and trade in the internal market. The Commission concludes that even if an impact on intra-sector and inter-sector competition cannot be excluded, it appears that the negative effects of the aid are sufficiently limited for the overall balance of the measure to be positive.

4. CONCLUSION

The Commission has accordingly decided 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.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President