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Subject: State Aid SA.64719 (2022/N) – Poland
Compensation for indirect ETS costs in Poland for 2021-2030

Excellency,

1. PROCEDURE

(1) Following pre-notification contacts, by electronic notification dated 8 February 2022, Poland notified to 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 letter of 8 April 2022 and by email of 2 June 2022. The Polish authorities replied on 27 April 2022, 17 May 2022, 27 May 2022, 7 July 2022, 29 July 2022 and 31 August 2022.

(3) By letter dated 27 April 2022, Poland exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958 and to have this Decision adopted and notified in English.

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2. Detailed 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 greenhouse gas emission allowance trading scheme post-2021[1] ("the ETS Guidelines post-2021").

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

(5) The legal basis for the measure is the Act of 19 July 2019 on the compensation scheme for energy-intensive sectors and subsectors[2] (the "Act"), as amended by the Act of 9 February 2022 amending the Act on the compensation scheme for energy-intensive sectors and subsectors[3] and the amendments to the Act on the compensation scheme for energy-intensive sectors and subsectors adopted by Parliament on 23 June 2022[4].

(6) Poland may adopt implementing regulations to lay down technical provisions regarding application process and conditionality verification procedures.

(7) According to Article 4 of the Act, no aid will be granted under the measure before the notification of the Commission's decision approving the measure.

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

(9) 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 first payments will be made in 2022 on the basis of the eligible costs for year 2021 and last payments in 2031 for costs incurred in 2030.

(10) The measure will be financed by the revenues from the auctioning of the EU ETS allowances. In accordance with the Act of 12 June 2015 on greenhouse gas emission allowances trading scheme[5], a share of 25 % of those revenues is transferred to a dedicated fund (the Fund for Indirect Emission Costs Compensation) managed by the Minister responsible for economy and earmarked to finance the measure. Where the resources of the fund in a given year exceed the actual aid provided to the beneficiaries, the surplus is used for the following years.

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1 Communication from the Commission – Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021 (OJC 317, 25.9.2020, p. 5), as supplemented by the Communication from the Commission supplementing the Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021 (OJC, C/528, 30.12.2021, p. 1).

2 Journal of Laws 2021, item 1896.

3 Journal of Laws 2022, item 469.

4 The consolidated version is available here: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001532

5 Consolidated text: Journal of Laws of 2021, item 332, as amended.

(11) The estimated total budget is PLN 45 435 million (approximately EUR 10 billion[6]) for 2021-2030. The estimated annual budget is distributed as follows:

Year	2022	2023	2024	2025	2026
Budget (PLN million)	1 767	4 190	3 745	3 824	5 014
Budget (EUR million)	390.3	925.5	827.2	844.6	1 107.5
Year	2027	2028	2029	2030	2031
Budget (PLN million)	5 135	5 276	5 688	5 604	5 192
Budget (EUR million)	1 134.2	1 165.3	1 256.4	1 237.8	1 146.8

(12) The President of the Energy Regulatory Office ("ERO")[7] will be the competent authority to grant the aid on the basis of an application from an eligible undertaking.

2.2. Beneficiaries

(13) Beneficiaries must be active in one or more sectors or sub-sectors listed in Annex I to the ETS Guidelines post-2021. Aid is granted based on same principles and conditions to all sectors listed in Annex I of the ETS Guidelines post-2021.

(14) No aid will be granted to:

- undertakings in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty[8];
- undertakings in arrears with the payment of taxes constituting income of the State budget or social insurance contributions; and
- undertakings subject to a pending recovery order following a previous decision of the European Commission declaring aid unlawful and incompatible with the common market.

(15) Pursuant to Article 12 of the Act, the measure includes an obligation to continue operation of the eligible installations for a period of two years following the calendar year in which the compensation was granted. If the beneficiary ceases the operations in the installation before such deadline, the President of the ERO issues a decision imposing a recovery obligation of the aid amount plus interests[9].

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6 Using the exchange rate on 8 February 2022 (4.5274 PLN/EUR).

7 The President of Energy Regulatory Office is a central body of State administration nominated on the basis of the Energy Law (The Energy Law Act of 10 April 1997; Journal of Law of 1997, No. 54 item 348, as amended), responsible for regulation in energy sector as well as promotion of competition.

8 Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1–28).

9 According to Article 14 of the Act, interests are calculated by applying the recovery rate determined in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1), as

Such recovery of aid is not required if the activity is transferred to an EEA Member State. The Polish authorities explained that according to the ETS Guidelines, the purpose of the measure is to prevent carbon leakage. Carbon leakage is observed when undertakings covered by the EU ETS relocate their production to third countries without comparable constraints and costs in a way that results in a global emissions increase. As the ETS Directive 2003/87/EC[10] has been extended to the EEA, the relocation to another EEA country does not constitute carbon leakage.

(16) Moreover, to be eligible under the measure, all beneficiaries, regardless of their size, must have implemented an environmental management system as defined in Article 2 (13) of the Regulation (EC) No 1221/2009; or an environmental management system certified with ISO 14001 by an authorized independent accreditation body; or an energy management system certified with ISO 50001 by an authorized independent accreditation body.

(17) The information provided in the application form must be confirmed by an independent verifier.

(18) In addition, to be eligible to aid, beneficiaries covered by the obligation to conduct an energy audit under Article 8(4) of Directive 2012/27/EU[11], have to either:

(a) complete all of the recommendations of the audit report, to the extent that the pay-back time for the relevant investments does not exceed 3 years, within 4 years of the date of the energy audit; or

(b) demonstrate that, in the calendar year for which the compensation was granted (year t), at least 30 % of the electricity for which the compensation was granted to the beneficiary, was produced from renewable sources, as proven by means of guarantees of origin, renewable power purchase agreements or renewable electricity self-generation facilities; or

(c) invest at least 50 % of the aid amount in projects aimed at reducing greenhouse gas emissions from an installation below the lowest between the applicable benchmark used for free allocation in the EU ETS and the average emissions of the 10 % best installations as listed in the Commission Implementing Regulation 2021/447[12] for the relevant product in the EU ETS[13].

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amended) converted into PLN at the average euro exchange rate published by the National Bank of Poland on the day preceding the day on which the decision was issued, starting from the date on which the compensation was transferred to the bank account of the entity receiving the compensation.

10 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

11 Directive 2012/27/EU of the European Parliament and of the Council of October 2012 on energy efficiency, amending Directives 2009/125/EC and 210/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

12 Commission Implementing Regulation (EU) 2021/447 of 12 March 2021 determining revised benchmark values for free allocation of emission allowances for the period from 2021 to 2025

(19) The Polish authorities will verify that the beneficiaries comply with the obligations described in recital (18) on an annual basis after the granting of the aid (beneficiaries must report on their obligations annually by 31 December in the year the compensation was granted). Compliance with the obligation described in recital (18)(a) above will be assessed over the period between two consecutive energy audits (4 years).

(20) If, after verification, it appears that the beneficiary has not complied with the obligations described in recitals (16) and (18), that beneficiary will be required to reimburse the aid already received plus interests[14].

(21) The expected number of beneficiaries is between 101 and 500.

2.3. Aid amount calculation

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

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

(24) The measure adopts the definitions of point 15 of the ETS Guidelines post-2021 for all the elements of the formulae. Annex II to the ETS Guidelines post-2021 establishing electricity consumption efficiency benchmarks and annual reduction rates and Annex III establishing the regional CO2 emission factors apply.

(25) 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.

(26) 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.

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pursuant to Article 10a(2) of Directive 2003/87/EC of the European Parliament and of the Council (OJ L 87, 15.3.2021, p. 29). The Polish authorities confirmed that in case of any update at EU level, Poland will use the updated values.

[13] The Polish authorities explained that those two requirements taken together ensure that the project leads to substantial reductions of the installation's greenhouse gas emissions and well below the applicable benchmark. This approach is similar to the approach followed in the context of the Just Transition Fund (see: https://ec.europa.eu/regional_policy/sources/thefunds/jtf/swd_territ_just_trans_plan_en.pdf, page 14).

[14] For the calculation of the interests, see footnote 9.

(27) The maximum aid intensity will be 75 %. The aid intensity will be the same for all eligible beneficiaries. In case of insufficient budget, the aid intensity may be reduced proportionately to the available budget for all beneficiaries by an equal percentage.

(28) The measure also provides for an additional compensation ("top-up") 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[15], in accordance with point 31 of the ETS Guidelines[16]. This top-up will apply without restriction to all undertakings in all eligible sectors. The top-up applies only if there is sufficient budget to achieve first an aid intensity of 75 % for all beneficiaries. Moreover, the top-up cannot exceed one third of the compensation calculated for the beneficiary concerned based on the regular 75 % aid intensity.

2.4. Cumulation

(29) When applying to the President of ERO, undertakings have to declare that they have not received any other State aid, *de minimis* aid or other forms of financing from the Union for the same eligible costs.

(30) That aid under the measure may be cumulated with other State aid in relation to the different identifiable eligible costs.

(31) 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.

2.5. Transparency, reporting and monitoring

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

(33) The information listed in point 56 of the ETS Guidelines post-2021 will be published on the ERO website https://www.ure.gov.pl/pl/energia-

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[15] The GVA is calculated in accordance with point 31 of the ETS Guidelines post-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.

[16] The top-up is calculated based on the GVA at the level of the entire undertaking and the indirect costs calculated in a line with point 28 of the ETS Guidelines (Indirect costs = Ct × Pt-1 × E × AOt or Indirect costs = Ct × Pt-1 × EF × AECt).

elektryczna/rekompensaty-sektorowe/wysokosc-przyznanych-re and on https://sudop.uokik.gov.pl/results/aidSource.

2.6. Evaluation

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

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

(36) The evaluation will provide general information, in particular, on whether the measure achieves its objectives as well as on the number of beneficiaries and their electricity consumption.

(37) For the purpose of evaluation of the measure, the Polish authorities will use several result indicators.

(38) The direct effects of the measure will be assessed on the basis of the greenhouse gas emissions of the installations, the energy efficiency of the production at plant level, the investments in energy efficiency or decarbonisation at plant level, the electrification of the production processes (electricity consumption compared to fossil fuel consumption at plant level), the share of electricity consumption from carbon-free sources at plant level, the productivity and assets per employee at plant level as well as the number of jobs, turnover and assets value at plant level.

(39) The indirect effects of the measure will be assessed on the basis of the quantity produced in Poland, imports and exports, and their share in the local demand, the productivity and assets per employee at country level, as well as the number of jobs, turnover and assets value at country level. The indirect effects of the measure will also be assessed on the basis of the CO2 emissions potentially avoided by keeping production in the EU (estimated emissions from equivalent production in the main exporting countries to Poland taking into account their national emission factor).

(40) The wider economic effects of the measure and in particular possible distortions of competition will be assessed on the basis of market shares, markup, prices and market concentration.

(41) The appropriateness and proportionality of the aid will be assessed on the basis of the aid intensity, the amount of compensation and top-up granted (see recital (28)), the administrative costs (e.g. costs borne by President of ERO on handling and processing applications, the Ministry's expenses, including salaries, for setting up and managing measure, etc.), the correlation between electricity prices and EUA prices, a comparison of electricity prices in different regions, a correlation between indirect compensation and electricity prices at country and international level, as well as the profitability profiles at plant level.

(42) The evaluation will be conducted by analysing specific indicators and their changes over time. Poland will analyse annual data collected from publicly available data sources and surveys.

(43) The evaluation plan highlights that reaching unequivocal results of the evaluation of the measure may be challenging, because many economic and institutional factors are at play. The main difficulties derive from both the absence of a direct control group and of a pre-treatment period.

(44) The evaluation plan presents the counterfactual method that will be used to assess the impact of aid. The evaluation will use a control group consisting of two types of companies. The first group will consist of companies from sectors that were eligible for CO2 compensation in years 2019-2020, but were excluded from indirect ETS costs compensation under the ETS Guidelines post-2021. This group in Poland consists of 19 companies.

(45) The second group will consist of the companies that are eligible for relief for energy-intensive users from the financing of the renewable energy sources support scheme (case SA.43697[17]) and for reduction of burdens arising from the renewables certificate obligation for energy intensive users (case SA.37345[18]) ("RES relief"), but are excluded from the measure. This group, based on 2021 data consists of 390 companies (out of 450 in total eligible for RES relief). Poland has decided to use those groups for two reasons. First, they cover companies from sectors that typically exhibit a high ratio between electricity cost and value added. Those companies are naturally most vulnerable to the carbon leakage problem. Second, Poland explained that, at least in theory, one can use the companies that lost the right for CO2 compensation as a natural experiment to verify the proportionality and appropriateness of the aid.

(46) The evaluation will be based on data collected from application forms by the President of ERO, ex-post monitoring of additional conditionality criteria by the President of ERO, Poland's statistics and Eurostat data on macroeconomic factors at NACE level, the energy markets and EUA prices, energy audits from beneficiaries (surveys), surveys and interviews from industry collected in public consultation process as well as information at EU and national level from public sources.

(47) The Polish authorities have committed to submit a revised version of the evaluation plan, taking into account the methodological comments provided by the Directorate-General for Competition of the Commission and the early evidences concerning the implementation of the measure, as part of a first interim report within 18 months after the adoption of the Commission's decision approving the measure. The first interim report will include descriptive statistics of the compensations paid in 2022 and during the previous years under the previous scheme SA.53850 (including the available information on the suggested indicators), 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, Poland commits to submit a second interim report in 2027 in order to assess the first five years of operation of the measure and the final evaluation report to the Commission in 2030 at least 9 months before the end of the measure.

[17] C(2017)8334 final.

[18] C(2016) 4944 final.

(48) The evaluation will be conducted by an independent entity to be selected by Poland through an open tender procedure in 2023. That entity will need to be both structurally and functionally independent from the Ministry of Development and Technology or its successor. The selection criteria will be experience in carrying out evaluative research concerning schemes and instruments designed for the improvement of competitiveness and innovativeness of economy; experience in evaluation conducted within the framework of the Cohesion Policy or in evaluation required under State aid rules (e.g. Guidelines on State aid for climate, environmental protection and energy 2022[19], Guidelines on State aid for environmental protection and energy 2014-2020[20] or Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty[21]); experience in conducting evaluation in the energy sector or in respect of industrial undertakings; qualifications and experience of members of the evaluation team in conducting evaluative research in the above mentioned areas, using the methods which will be used for the evaluation of the measure.

(49) The interim reports and the final evaluation report will be published on the website of the Ministry of Development and Technology[22]. All data collected for the purpose of the evaluation, excluding sensitive data (such as raw data from detailed research) will be available based on access to public information.

3. ASSESSMENT OF THE MEASURE

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

(50) In order for a measure to constitute State aid within the meaning of Article 107(1) TFEU it has to fulfil four conditions. Firstly, the aid must be granted by a Member State or through State resources. Secondly, the measure must confer a selective advantage to certain undertakings or the production of certain goods. Thirdly, the measure must be liable to affect trade between Member States. Fourthly, the measure must distort or threaten to distort competition in the internal market.

(51) The compensation is granted by the President of the ERO, a central body of State administration (see recital (12)), based on the law (see recital (5)). The compensation is funded through the revenues from the auctioning of the EU ETS allowances that are transferred to a dedicated fund managed by the Minister responsible for economy (see recital (10)). These revenues are to be treated similarly to any other State revenue. Hence, the measure is granted by the State and financed through State resources. It confers an advantage to the beneficiaries

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19 Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 (OJ C 80, 18.2.2022, p. 1).

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

21 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

22 https://www.gov.pl/web/rozwoj-technologia

by compensating for costs they would have incurred under normal market conditions. The aid is selective since it is granted only to the undertakings active in certain sectors (see recital (13)). These 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.

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

3.2. Lawfulness of the aid

(53) The Act provides that no aid will be granted under the measure before the approval of the measure by the Commission (see recital (7)).

(54) By notifying the measure before its implementation, the Polish authorities have fulfilled their obligations according to Article 108(3) TFEU.

3.3. Compatibility

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

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

(56) Aid to undertakings to compensate for EU ETS allowance costs passed on in electricity prices 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 on aid for indirect emission costs, that set out the conditions under which 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

(57) 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.

(58) The measure supports companies active in one of the sectors or sub-sectors listed in Annex I to the Guidelines post-2021 (see recital (13)), which correspond to sectors and sub-sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.

(59) 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

(60) 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[23].

(61) 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.

(62) 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 (9)). This is in line with point 25 of the ETS Guidelines post-2021.

(63) 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

(64) State aid that contravenes relevant provisions or general principles of EU law cannot be declared compatible[24].

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

(66) 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

(67) The measure will contribute to the development of sectors exposed to a genuine risk of carbon leakage due to indirect emission costs (see recital (59)).

(68) 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 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

(69) 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.

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

(70) 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.

(71) 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, all sectors listed in Annex I will be eligible (see recital (13)). 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

(72) 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.

(73) Under the measure, the support will take the form of a direct grant (see recital (9)). 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

(74) 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.

(75) 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.

(76) 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. The aid intensity may be lower depending on the available budget (see recital (27)).

(77) Moreover, if there is sufficient budget to achieve first an aid intensity of 75 % for all other beneficiaries, a top-up 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 (28)), in line with point 31 of the ETS Guidelines post-2021. The Commission notes that the top-up cannot exceed one third of the compensation calculated for the beneficiary concerned based on the regular 75 % aid intensity. This rule will apply without distinction to all eligible undertakings in all eligible sectors. The measure therefore complies with point 32 of ETS Guidelines post-2021.

(78) 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 (22)).

(79) 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 (24)).

(80) 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. The obligation to continue operation of the eligible installations for a period of two years following the granting of the aid (see recital (15)) will apply to all beneficiaries and can be justified in light of the objective of the scheme (i.e. avoiding the risk of carbon leakage). Therefore, this obligation complies with point 23 of the ETS Guidelines post-2021.

(81) 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 (26)).

(82) The duration of the measure does not exceed the duration of the ETS Guidelines post-2021 (see recital (8)). Therefore, the measure complies with point 36 of the ETS Guidelines post-2021.

3.3.3.5. Cumulation

(83) The measure's provisions on cumulation are in line with the requirements set out in points 33 to 35 of the ETS Guidelines post-2021 (see recitals (29) and (30)).

3.3.3.6. Energy audits and management systems

(84) Poland will verify that all beneficiaries, regardless of their size, implement a certified environmental management system or energy management system (see recital (16)). The measure therefore complies with point 54 of the ETS Guidelines post-2021.

(85) Moreover, beneficiaries covered by the obligation to conduct an energy audit under Article 8(4) of Directive 2012/27/EU must either (i) complete all recommendations of the audit report, to the extent that the pay-back time for the relevant investments does not exceed 3 years within 4 years of the date of the energy audit, (ii) cover at least 30 % of their electricity consumption in year t from renewable sources, as proven by means of guarantees of origin, renewable power purchase agreements or renewable electricity self-generation facilities, or (iii) invest at least 50 % of the aid amount in projects aimed at reducing greenhouse gas emissions from an installation below the lowest between the applicable benchmark used for free allocation in the EU ETS and the average emissions of the 10 % best installations as listed in the Commission Implementing Regulation 2021/447 for the relevant product in the EU ETS (see recital (18)).

(86) The Commission agrees that, as argued by Poland, the combination of the requirements described in recital (18)(c), namely emissions reductions below the lowest between the applicable benchmark for free allocation and the average emissions of the 10 % best installations as listed in the Commission Implementing Regulation 2021/447 for the relevant product in the EU ETS, ensures that the beneficiaries of the measure will reduce their emissions well below the applicable benchmark in line with point 55(c) of the ETS Guidelines post-2021. In particular, this approach takes into account the actual efficiency gains for the production of a given product and is consistent with the approach followed in the context of other EU instruments, namely the Just Transition Fund (see footnote 13).

(87) The Polish authorities will verify that beneficiaries comply with the obligations described in recitals (18) and (85) on an annual basis (see recital (19)). 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.

(88) In the present case, concerning the implementation of the measures identified in the energy audit, beneficiaries must complete the relevant investments within 4 years of the date of the energy audit. 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.

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

3.3.3.7. Transparency, reporting and monitoring

(90) The Polish 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 measure (see recital (32)).

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

(91) 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[25]. 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.

(92) 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 (14)).

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

3.3.3.9. Evaluation

(94) 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 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.

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

(96) The Commission notes the commitment made by the Polish authorities to submit a first interim report within 18 months after the adoption of the Commission's decision approving the measure, a second interim report in 2027 and at least 9

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[25] 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).

months before the end of the measure (see recital (47)). The Commission notes that the evaluation method might be further fine-tuned in common accord between the Polish authorities and the Commission, and it will be described in the first interim report.

(97) Moreover, the Commission acknowledges the commitments made by the Polish authorities, pursuant to the Commission requirements, that the evaluation will be conducted according to the notified evaluation plan by an independent evaluation body (see recital (47)). The procedures envisaged for selecting such evaluation body and described in recital (47) are appropriate in terms of ensuring the independence and skills of that body. Moreover, the proposed modalities for the publication of the evaluation results (see recital (48)) are adequate to ensure transparency.

(98) The Commission considers the that the notified evaluation plan, taking into account Poland'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 (34) to (49)).

(99) The Commission reminds that the measure has to be suspended if the final evaluation report is not submitted in good time and sufficient quality (see recital (47)).

3.3.3.10. Remaining distortions of trading conditions

(100) 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[26].

(101) 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).

(102) 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 measure, 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 (27) and (28)).

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26 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).

3.3.3.11. Conclusion on distortion of competition and balancing test

(103) As explained above, the measure 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 (59) and (68)).

(104) 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