

Secretariat's Note, 28 September 2022

Assessment of national measures to tackle the impacts of the energy price surge

- preliminary findings and recommendations -

I. Background

The picking up of global energy demand due to increased economic activity necessary for the economic recovery from the COVID-19 pandemic, combined with the direct and indirect consequences of the military conflict between Russia and Ukraine, has resulted in a surge in energy commodity prices. Contracting Parties have taken measures to tackle the impact of the energy price surge.

At the meeting with Commissioner Simson on 12 April 2022 and on the meeting of PHLG on 20 April 2022, the Secretariat announced that it would review all national measures adopted to tackle the energy price surge and suggest the introduction of clear phase-out measures and timelines in case of interventions in the market framework.

On 21 July 2022, the Secretariat shared with the Contracting Parties a checklist it has developed for the assessment of whether a measure adopted by a Contracting Party to tackle the impact of the energy price surge is compliant with the Energy Community *acquis*, in particular the legal framework for public service obligations (PSO) and State aid. The checklist developed by the Secretariat can be used by the relevant national authorities of the Energy Community Contracting Parties to help them identify key questions and guide their assessment as well as by the Secretariat to assess compliance of measures with the *acquis*.

The compliance of the measures already taken by the Contracting Parties was assessed under the Electricity Directive 2009/72/EC. Even though the Electricity Directive (EU) 2019/944 has been incorporated in the Energy Community by the Ministerial Council in 2021, the deadline for transposition has not yet expired. With regard to the application of the State aid rules, the checklist was updated to take into account the State Aid Temporary Crisis Framework, as updated by the European Commission on 20 July 2021.

II. Preliminary findings

Hereby, the Secretariat shares the preliminary findings of its assessment of national measures adopted to address the price surge.

a) Notification

In accordance with Article 3(15) of the Directive 2009/72/EC, the Contracting Parties have the obligation to inform the Secretariat about measures taken to implement a public service obligation, including crisis measures in intervening in the energy market functioning or compensation for providing services of general economic interest that may or may not amount to State aid.

However, none of the measures designed and adopted as PSOs and financial support to energy undertakings were notified to the Secretariat before adoption. Therefore, the assessment was limited to publicly available information and some information provided by the Contracting Parties upon explicit request by the Secretariat.

b) Measures imposing public service obligations

Several Contracting Parties established emergency or crisis situation in the energy sectors and most of them adopted various PSOs in the first half of 2022.

The PSOs included measures such as:

- price caps for electricity for eligible customers;
- obligations to state-owned companies (generators or wholesale traders) to purchase electricity for the needs of the universal service providers, and in some cases also for the needs of the supplier of last resort and system operators (DSOs and TSOs) for losses;
- limitations for wholesale gas prices allowing the suppliers to offer the supply of natural gas at cheaper prices not reflecting the actual price;
- limiting the profit margin of traders, suppliers and generators in order to limit the price of electricity to the national industry.

Most of the PSO measures were adopted by acts of the Governments (with the exception of some amendments to primary laws). They were well designed, clear and transparent.

Few of them lacked clarity in relation to the scope, beneficiaries or undertaking entrusted with the obligation and raised issues of compliance related to the proportionality of the measures adopted. In this regard, some measures lacked assessment as to whether the means were the least onerous in pursuing the objectives and very few were not limited in duration. In particular, those related to purchasing electricity for covering the whole demand of the universal service suppliers and the suppliers of last resort as well as those measures imposing PSOs related to electricity necessary for covering the demand of the system operators for losses were disproportionate, and encroaching upon Articles 15(6) and 25(5) of the Directive 2009/72/EC, requiring the TSOs and the DSOs to procure the energy it uses to cover energy losses according to (i) transparent, (ii) non-discriminatory and (iii) market-based procedures.

Most of the PSOs were accompanied by acts governing the compensation for provision of such services (though not always explicitly linked with the PSO in question). And in one case, it appeared that the undertakings on which PSO was imposed were not fully compensated for the services provided.

c) Measures related to financial support

Most measures granting financial support in the context of the energy crisis constituted compensation for the provision of services of general economic interest, as defined by the case-law of the European Court of Justice (in particular *Altmark Trans*), thus did not confer an advantage on undertakings and therefore did not amount to State aid. In such cases, the financial support did not need to be notified to the relevant national state aid authority. However, due consideration has to be paid to the exact compensation mechanism, to ensure that the compensation is limited to what is necessary to discharge the service and no-overcompensation is granted.

In cases where the financial support amounted to State aid, it should have been notified to the competent national State aid authority. The latter should have informed the Energy Community Secretariat pursuant to Article 2 of the Dispute Settlement Rules. Only in case of approval of compatible State aid by the competent State aid authority, measures constituting State aid may be granted to beneficiaries without the risk of recovery of unlawful State aid.

III. Recommendations

Based on the preliminary findings resulting from the assessment of national measures addressing the energy crisis, the Secretariat recommends the following to the Contracting Parties:

- inform the Secretariat and notify measures related to addressing the energy crisis before adoption for compliance check and assistance in the design in line with Energy Community law to the extent necessary, as notification on all measures related to implementation of public service obligation is required by Article 3(15) of the Directive 2009/72/EC;
- follow the implementation of the adopted PSO measures by regular reviews and verify the need for extension in justified cases only, but also phase out or replace with other more suitable measures those ones that are not suitable for ensuring the provision of the service in question;
- define an end date to measures that are not limited in time;
- phase out PSO measures that relate to purchase of electricity for / on behalf of the system operators (DSOs and TSOs) for losses, in a non-market -based procedure as they are non-compliant with Articles 15(6) and 25(5) of the Directive 2009/72/EC; this is without prejudice to possibility to provide financial support for provision of services of general economic interest in accordance with the state aid rules;
- ensure that compensation granted to energy undertakings entrusted with provision of PSOs is sufficient and that the provision of such services does not amount to a financial burden on the undertakings in question, endangering their liquidity and economic viability;
- where energy is supplied below cost to final customers, ensure that the undertakings supplying such energy are compensated for the difference between regulated prices and actual costs of supply;
- review and set a timeline for price regulation for customers others than households and small and medium enterprises;
- contact the national State aid authorities for information on which measures would be considered compensation for provision of services of general economic interest, or would fall under other rules not requiring notification (de minimis, block exemption etc.);
- if financial support is granted which may constitute State aid, the exact amounts of financial support shall be verified in light of the current legal State aid framework and measures such as grants, guarantees, loans, tax rebates etc. shall be notified to the national state aid authorities for compliance check under the state aid rules before their adoption.