



EUROPEAN COMMISSION

Brussels 19.12.2022
C(2022) 9678 final**SENSITIVE***: *COMP Operations***Subject: State Aid SA.103704 (2022/N) – Belgium
Compensation for indirect ETS costs in Flanders for 2021-2030**

Excellency,

1. PROCEDURE

- (1) By electronic notification dated 12 July 2022, the Belgian authorities 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 email dated 15 September 2022, 9 November 2022 and 11 November 2022. The Belgian authorities replied to those requests by emails of 8 November 2022, 18 November 2022 and 25 November 2022.
- (3) By letter dated 22 November 2022, the Belgian authorities exceptionally agreed to waive their rights deriving from Article 342 TFEU, in conjunction with Article

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Hare Excellentie mevrouw Hadja Lahbib
Minister van Buitenlandse Zaken, Europese Zaken en Buitenlandse Handel, en van de
Federale Culturele Instellingen
Karmelietenstraat 15
1000 Brussel
BELGIË

3 of Regulation 1/1958¹ and to have this Decision adopted and notified in English.

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-2021² (“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 decision of the Flemish Government granting aid to undertakings for the compensation of indirect emission costs³ (the “draft decision”). The text will be formally adopted after the notification of the Commission’s decision approving the measure.
- (6) The Belgian authorities also submitted an accompanying explanatory note⁴, which formally does not constitute part of the legal basis.
- (7) The Belgian authorities have confirmed that no aid will be granted under the measure before the notification of the Commission’s decision approving the measure.
- (8) The Flanders Innovation & Entrepreneurship Agency⁵ (VLAIO) will be the competent authority to grant the aid on the basis of an application from an eligible undertaking. The Verification Office⁶ (VBBV) will be responsible for verifying the data submitted.
- (9) The measure covers indirect emission costs incurred in years 2021 to 2030.

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

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 (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).

³ *Besluit van de Vlaamse Regering tot toekenning van steun aan ondernemingen voor de compensatie van indirecte emissiekosten.*

⁴ *Bisnota aan de vlaamse regering.*

⁵ The Agency was established by the Flemish Government Decree of 7 October 2005. It has the status of “internal agency without legal personality” that falls under the control of the Flemish government.

⁶ The Verification Office is an independent verification body established by Article 1.1.1 (2) (103) (1) of the Energy Decree of 19 November 2010. It is mandated by the Flemish Government to ensure the correct implementation of the Energy Policy Agreements and to verify the data provided in the applications under the measure. In addition, it also assesses the monitoring plans and monitoring methodology plans under the EU ETS in Flanders. See <https://ebo-vlaanderen.be/nl/verificatiebureau>.

- (10) 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 the last payments in 2031 for costs incurred in 2030.
- (11) By way of derogation, aid for costs incurred in 2021 will be paid until 31 May 2023. The Belgian authorities explained that this additional period compared to that provided for in point 25 of the Guidelines is necessary in view of the time needed to prepare the measure (in particular the new rules on energy audits in accordance with points 54 and 55 of the Guidelines and the possibility to notify a market-based CO₂ emission factor under point 11 (15) of the ETS Guidelines post-2021) and implement it following the adoption of the present decision⁷ as well as in view of the exceptional circumstances linked to the energy crisis and Russia's aggression against Ukraine. According to Belgium, the services of the Flemish authorities responsible for the preparation of the measure had to cope with an exceptionally high and sudden workload linked to the setting up of urgent legislative and administrative measures to support the sectors affected by the energy crisis since mid-2021 and the current crisis linked to Russia's aggression against Ukraine on 24 February 2022⁸. The Belgium authorities explained that this exceptional workload persists at the present time, as the energy crisis requires constant support from those authorities. The Belgian authorities therefore continue to be strongly involved in the preparation of several types of urgent measures which might prove necessary in an extremely uncertain economic context due to the current crisis.
- (12) The Belgian authorities also stressed that the energy crisis and Russia's aggression against Ukraine occurred just after the COVID-19 pandemic crisis in 2020 and 2021, which had already mobilised a particularly large part of the services responsible for the preparation of the measure⁹. The Belgian authorities explained that these successive crises significantly delayed the preparation of the measure and that an additional period until 31 May 2023 is necessary in view of the different procedural steps for the implementation of the measure (see footnote 3).

⁷ As an indicative timeline, the Belgian authorities explained that, after the adoption of the present decision, the draft decision will be confirmed by the Flemish government and sent to the "Raad van State/Conseil d'état" for legal advice, which is to be given within a period of one month. Subsequently, the final decision will be approved by the Flemish Government and has to be published in the "Belgisch Staatsblad/Moniteur Belge" after which it comes into force. This procedure could be finalized within three months after the present decision (i.e. by the end of March 2023). After the final adoption of the decision, applicants will be given approximately one month to apply (ultimately until the end of April 2023, but sooner if the procedural steps can be taken earlier). The processing of the applications will then take around one month until the disbursement of the aid by the end of May 2023.

⁸ In particular, Flanders has introduced schemes for aid in the form of limited amounts of aid and liquidity support in the form of subsidised loans (see decision SA.103314 (2022/N) of 12 July 2022, *TCF: bridge loans in the Flemish Region*) and aid in the form of limited amounts of aid (see decision SA.103790 (2022/N) of 1 August 2022, *TCF: Scheme to compensate for additional costs in the fisheries sector caused by the Russian aggression against Ukraine*).

⁹ The granting authority under the measure (VLAIO – see recital (8)) was in charge of the development and implementation (i.e. case handling and follow up of all applications) of 24 support measures to mitigate the impact of the COVID-19 pandemic crisis. The Belgian authorities explained that those measures represented more than 640 000 applications. Within VLAIO, 20 full-time equivalent have been mobilised during the last two years, which represents 1/4 of the State aid teams.

- (13) The measure will be financed by the revenues from the auctioning of the EU ETS allowances (“EUA”) that flow to Flanders. Those revenues are transferred to a dedicated fund, the Flemish Climate Fund (VKF)¹⁰ established by the Flemish Government. Those revenues can be considered as part of the Flemish regional budget.
- (14) The estimated total budget is EUR 2 109.9 million for 2021-2030. The estimated annual budget is distributed as follows:

Year	2022	2023	2024	2025	2026
Estimated budget (EUR million)	70	149.2	245.5	242.8	240.2
Year	2027	2028	2029	2030	2031
Estimated budget (EUR million)	237.5	235	232.4	229.9	227.4

2.2. Beneficiaries

- (15) Beneficiaries are installations in the Flemish region 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.
- (16) In addition, according to Article 8(3) of the draft decision, to be eligible to support under the measure, beneficiaries must have an electricity consumption of at least one GWh in year t for their eligible activities. According to the Belgian authorities, this minimum limit is introduced in order to avoid small amounts of aid and to ensure that the amount of aid is proportionate to the administrative costs¹¹.
- (17) Undertakings shall comply with the environmental and energy regulations applicable in the Flemish Region within a period of five years prior to the decision to grant the aid.
- (18) No aid will be granted to:

¹⁰ On 27 April 2012, the Flemish Government decided to set up the Flemish Climate Fund in the form of an organic budget fund (Article 14 of the Decree of 13 July 2012 laying down provisions accompanying the second adjustment of the 2012 budget). Those funds can be used to implement the Flemish climate policy.

¹¹ The Belgian authorities estimate that the administrative costs per application amount to around EUR 5 000 for the granting authority (VLAIO) and EUR 1 250 for the independent body verifying the electricity consumption (VBBV). The Belgian authorities explained that, in addition to that, the applicant also has administrative costs, which is difficult to estimate and probably highly dependent on the company and in particular its size. The estimated aid amount for 1 GWh of electricity consumption is EUR 7 678 for 2021 based on the fall-back efficiency benchmark.

- undertakings in difficulty within the meaning of Article 2 (18) of the General Block Exemption Regulation¹²; and
 - undertakings subject to a procedure based on European, national or regional law for the recovery of aid granted, in particular those subject to an outstanding recovery order following a previous decision of the European Commission declaring aid unlawful and incompatible with the common market.
- (19) Pursuant to Article 24 of the draft decision, beneficiaries must continue to operate the eligible installations for a period of five years following the granting of the aid. If the beneficiary ceases its operations in the eligible installation before such deadline, the aid for the activity that has been discontinued must be recovered¹³ within 10 years after the granting of the aid, unless the cessation occurs due to the fact that an activity is no longer authorised by the State.
- (20) In addition, according to Article 8(2) of the draft decision, for installations which are not operated by a small or medium-sized enterprise (“SME”), on the date of submission of the application for aid, the beneficiary must have a certified energy plan¹⁴ or carry out an energy audit¹⁵, in line with the requirements of Article 8 Directive 2012/27/EU¹⁶.
- (21) According to Article 11 of the draft decision, beneficiaries covered by the obligation described in recital (20) must carry out the investments referred to in that energy plan or energy audit for the eligible installations within four years after the granting of the aid if the payback period of those investments does not exceed three years¹⁷. The Belgian authorities will verify that the beneficiaries comply with that obligation on an annual basis after the granting of the aid (beneficiaries must report on their obligations annually). If, after verification, it

¹² 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), as amended.

¹³ The European reference rate for the recovery of unlawful State aid applies.

¹⁴ See Article 6.5.1 to 6.5.8 of the Energy Decree of 19 November 2010.

¹⁵ See Article 6.5.9 to 6.5.15 of the Energy Decree of 19 November 2010. For the emission years 2021 and 2022, the condition relating to the energy audit must be complied with within the period specified in Article 6.5.10 of the Energy Decree of 19 November 2010.

¹⁶ Directive 2012/27/EU of the European Parliament and of the Council of 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).

¹⁷ This does not apply to investments for which an exemption has been granted, upon request from the operator, by the Flemish Energy and Climate Agency (VEKA) as referred to in Article 6.5.5 (2) and Article 6.5.13 (4), second subparagraph, of the Energy Decision of 19 November 2010. In its request, the operator must give sound economic or financial reasons that the abovementioned term cannot be met, or that the internal interest rate has become lower than the internal interest rate calculated in the audit, thus no longer meeting the profitability threshold under the Flemish legislation on energy policy agreements (see recital (23)). Such an exemption is granted only in exceptional circumstances, for instance in case of sudden dramatic rise of energy costs.

appears that the beneficiary has not complied with that obligation, that beneficiary will be required to reimburse the aid already received¹⁸.

- (22) In addition, the measure provides for the following additional national requirements.
- (23) First, according to Article 8(1) of the draft decision, for eligible installations, the beneficiary must have joined the energy policy agreement applicable to the installation¹⁹ for year t and comply with that agreement. Under the Flemish energy planning regulation²⁰, energy-intensive establishments (i.e. establishments with an energy usage above 0.1 PJ) must perform an energy audit and draw up an energy plan every four years. They must implement the measures in that energy plan with an internal rate of return (“IRR”) of at least 13 %. Those establishments can join voluntary “energy policy agreements” with the Flemish government (*Energiebeleidsovereenkomsten* or “EBO”). The Belgian authorities explained that the next round of EBO’s (period 2023-2026) will pursue a higher level of ambition. Participating enterprises will have to perform an energy audit resulting in an energy plan every four years and implement all measures as of 10.5 % IRR (for non-ETS installations) and 12 % IRR (for ETS installations), whereas the previous thresholds were 12.5 % and 14 % respectively. Moreover, from 1 January 2023, all establishments with an energy usage between 0.05 PJ and 0.1 PJ, and all establishments classified as a large undertaking (regardless of their energy consumption) will have to perform an energy audit and implement all measures resulting from this audit with an IRR greater than 13 % within a period of three years after the energy audit.
- (24) Second, according to Article 9 of the draft decision, all beneficiaries, regardless of their size, must submit a climate plan that draws the possible scenarios for the company to become carbon neutral by 2050²¹.
- (25) Third, according to Article 10 of the draft decision, for a sub-installation producing products covered by a product-specific electricity consumption efficiency benchmark as established by Annex II of the ETS Guidelines post-2021, if the target value of this benchmark is not met, the beneficiary has to invest a significant share of at least 50 % of the aid amount in projects for the reduction of the energy consumption of the processes in one or more operating sites of the company in the Flemish Region or the production of renewable energy or flexible electricity consumption in the Flemish Region within five years from the granting of the aid.
- (26) The expected number of beneficiaries is between 65 and 80 annually.

¹⁸ The European reference rate for the recovery of unlawful State aid applies.

¹⁹ The energy policy agreement of 4 April 2014 for the anchoring and continued energy efficiency in the Flemish energy-intensive industry (EU ETS installations) or the energy policy agreement of 4 April 2014 for the anchoring and continued energy efficiency in the Flemish energy-intensive industry (non-ETS installations), or its successors.

²⁰ *Energiebeleidsovereenkomsten 2023-2026 voor Vlaamse energie-intensieve ondernemingen*, approved by the Flemish Government on 10 November 2022.

²¹ This condition is met for companies that have drawn up a climate roadmap in accordance with the energy policy agreement (ETS installations).

2.3. Aid amount calculation

- (27) 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.
- (28) 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.
- (29) 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 applies.
- (30) 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.
- (31) 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.
- (32) The aid is calculated on the basis of the market-based CO₂ emission factor notified by Belgium (0.51 tCO₂/MWh) in accordance with point 15(11) of the ETS Guidelines post-2021. This was established on the basis of a study of the CO₂ content of marginal technology determining the actual price on the electricity market prepared by Compass Lexecon. The study was submitted for approval to the national regulatory authority, the Commission for Electricity and Gas Regulation (CREG). If the study is not approved by CREG, the authorities will apply the CO₂ emission factor for Belgium (0.36 tCO₂/MWh) as established by Annex III to the ETS Guidelines post-2021. In such a case, Belgium may notify an amendment to the measure on the basis of a new study approved by CREG.
- (33) The study uses the European power market dispatch model developed by Compass Lexecon (the “model”). The model uses the commercial modelling platform Plexos²². According to the study, Plexos is used worldwide by utilities, regulators, TSOs and consulting firms. The input data of the model are mainly publicly available data (electricity demand, installed capacity, availability, generation figures, hydropower reserves, transmission capacities) from the ENTSO-E Transparency Platform²³, as well as Compass Lexecon’s proprietary databases (technical and economic characteristics of production units) or other

²² <https://www.energyexemplar.com/plexos>

²³ <https://transparency.entsoe.eu/>

databases (fuel prices). The accuracy of the model to effectively and correctly simulate the functioning of the electricity market was demonstrated by a backtesting exercise, which shows that the simulated results are very close to the actual day-ahead market results for the year 2019.

- (34) According to that study, the market-based CO₂ emission factor is equal to the weighted average of the CO₂ content of the technologies identified as determining the electricity price for each hour in Belgium over the reference year (2019).
- (35) The study used the model referred to in recital (33) to identify the marginal unit of production for each hour in 2019. The identification of the marginal technology is a direct output of the model and is even computed at a unit-based level, including where the marginal production unit is located in a neighbouring country.
- (36) Thus, according to the study, CCGT²⁴ gas plants set prices for 12 % of the time in 2019, while the share of hydro power plants (pumped hydro) was 5 %, the share of steam gas plants was 2 %, the share of gas turbine plants was 1 %, and the share of “several technologies”²⁵ was less than 1 %. Power plants located outside Belgium²⁶ set prices for 80 % of the time in 2019. The Belgian authorities explained that this high rate of marginality of imports is mainly related to the relatively small size of the Belgian market, the strong interconnections with the neighbouring countries and the large share in the national production mix of technologies with low production costs that are rarely marginal²⁷.
- (37) The average CO₂ content attributed by the study to each technology is 0.87 tCO₂/MWh for coal, 1.08 tCO₂/MWh for lignite, 0.38 tCO₂/MWh for CCGT and 0.52 tCO₂/MWh for gas turbine, 0.45 tCO₂/MWh for steam gas, based on data concerning the efficiency of the plants²⁸ and the CO₂ content of fuels²⁹.
- (38) According to the study, a CO₂ content is also attributed to hours when hydro sources with storage (pumped and large dams) are marginal. Pumped hydro and large dams are technologies with storage constraints (so called “storage-limited” technologies). They have a limited quantity of water that they dispatch within the day and the year based on their opportunity costs. Due to their limited stock, the operator must carefully manage the amount of water available in order to optimise its revenues. For instance, it may decide to reduce the generation during hours with low prices, even if prices are higher than the variable costs, in order to save fuel and to use it during hours with higher prices instead. Those means of production participate in the *day-ahead* auction on the basis not of their variable production cost, but of their opportunity cost, which reflects the profit they forego

²⁴ Combined cycle gas turbine.

²⁵ This category corresponds to (i) hours when at least two different thermal technologies are identified to be marginal (e.g. one CCGT and a coal-fired plant) and (ii) hours when a hydro unit and a thermal unit are identified as marginal.

²⁶ These are CCGT, coal-fired, lignite-fired, nuclear and hydro power plants (pumped-hydro and dams).

²⁷ Nuclear and renewables represent respectively 52 % and 18 % of the national production mix.

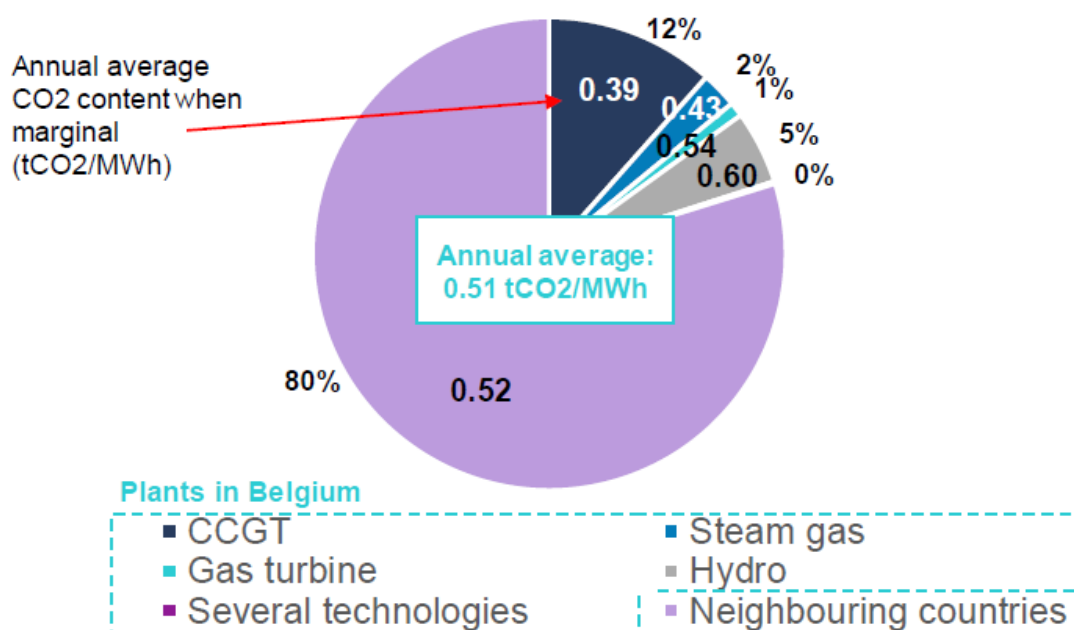
²⁸ Compass Lexecon database, built from information from builders, operators and network operators.

²⁹ Standard values, available for instance in the ENTSO-E database.

by not being able to produce in another hour due to limited stock of water. According to the study, these opportunity costs are often correlated with the marginal cost (short-run marginal costs – SRMC) of thermal units. Thus, the prices offered by the operators of hydro power plants with stock can in practice be very close to the expected marginal costs of fossil fuel plants (gas, coal, fuel oil) for which hydropower plants are substituted. Therefore, for hours when hydropower sources are marginal, the study allocates a CO₂ content equal to the CO₂ content of the fossil technology that the marginal hydro power plant is estimated to replace according to the model. This value amounts to 0.61 tCO₂/MWh.

- (39) For hours where at least two different thermal units are identified as marginal, the study attributes the average CO₂ content of those technologies. For hours when a hydro power plant and a thermal unit are identified as marginal, the study attributes the CO₂ content of the thermal unit.
- (40) For hours when the electricity price is set by a power plant located outside Belgium, the study uses the model to identify the marginal unit of production. Thus, the CO₂ content attributed to the hours when imports (i.e. means of production outside Belgium) set the electricity price in Belgium is equal to the average CO₂ content of these different means of production according to the principles described in recitals (37) to (39), i.e. 0.52 tCO₂/MWh.
- (41) The market-based CO₂ emission factor calculated according to the methodology notified by Belgium is equal to 0.51 tCO₂/MWh and will be applicable for the calculation of aid granted for the period 2021-2025, subject to recital (32), in line with the timetable for the partial revision of the ETS Guidelines post-2021 foreseen in 2025 in accordance with point 67 of the ETS Guidelines post-2021. Belgium commits to notify the Commission for approval of the value applicable for the period 2026-2030 on the basis of the revised Guidelines. As part of this notification, Belgium commits to provide an evaluation of the implementation of the market-based CO₂ emission factor in order to compare the notified value for the period 2021-2025 with the market developments.

Graph 1: Calculation of the market-based CO₂ emission factor



Source: Compass Lexecon Study

- (42) Subject to recital (43), the maximum aid intensity will be 75 %. The aid intensity will be the same for all eligible beneficiaries.
- (43) The measure also provides that, subject to the approval of the Flemish government, an additional compensation may be granted under the measure 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 costs³⁰, in accordance with point 31 of the ETS Guidelines. The overall aid intensity taking into account that additional compensation, if activated, cannot exceed 90 %. If activated, this additional compensation will apply without restriction to all eligible sectors and to all eligible undertakings in the relevant sectors.
- (44) In case of insufficient budget, the aid intensity may be reduced proportionately to the available budget for all beneficiaries by an equal percentage.

2.4. Cumulation

- (45) In accordance with points 33 to 35 of the ETS Guidelines post-2021, aid under the measure may be cumulated with:

³⁰ 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.

- (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 with 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.
- (46) In addition, aid under the measure will not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in exceeding the maximum aid intensity applicable under the measure.
- (47) 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

- (48) The Belgian 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.
- (49) The information listed in point 56 of the ETS Guidelines post-2021 will be published on <https://webgate.ec.europa.eu/competition/transparency/>

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. First, the aid must be imputable to the State and involve State resources. Second, the measure must confer a selective advantage 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.
- (51) The compensation will be granted by the Flanders Innovation & Entrepreneurship Agency (VLAIO), which is under the control of the Flemish government (see recital (8)), based on a decision of the Flemish Government (see recital (5)). The measure is funded through Flanders' EUA auctioning revenues that considered as part of the Flemish regional budget (see recital (13)). 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 (15)). Those sectors are all exposed to international competition as noted in point 20 of the ETS Guidelines post-2021, making it liable to 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 legal basis of the measure is still a draft and will be formally adopted after the notification of the Commission's decision approving the measure (see recital (5)).
- (54) By notifying the measure before its implementation, the Belgian 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

- (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 aimed at compensating for 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

- (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 (15)), which correspond to sectors and sub-sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.
- (59) Therefore, the Commission considers that the notified aid 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 (or of an economic area). 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 aid³¹.

- (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 (10)).
- (63) For the first year, the measure provides for a derogation, according to which aid for costs incurred in 2021 will be paid until 31 May 2023 (year t + 2). This extension of the period of the payment of aid for the first year of the measure constitutes a deviation from point 25 of the ETS Guidelines post-2021. The Commission therefore assessed whether the circumstances invoked by Belgium constitute exceptional circumstances capable of justifying such a deviation, and assessed the applicable national rules in the light of the objective of point 25 of the ETS Guidelines post-2021 and in the light of the objective of the measure in accordance with point 20 of the ETS Guidelines post-2021.
- (64) The Commission notes that the Belgian authorities have argued that this additional time is necessary for the preparation and implementation of the measure and in view of exceptional circumstances linked to the energy crisis and Russia's aggression against Ukraine (see recital (11)). The services of the Belgian authorities responsible for the preparation of the measure had to cope with an exceptionally high and sudden workload linked to the introduction of urgent legislative and administrative measures to support the sectors affected by the energy crisis since mid-2021 and the current crisis linked to Russia's aggression against Ukraine on 24 February 2022 (see recital (11)).
- (65) The Commission also notes that the Belgian authorities also stressed that the energy crisis and Russia's aggression against Ukraine occurred just after the COVID-19 pandemic crisis in 2020 and 2021, which had already mobilised a particularly large part of the services responsible for the preparation of the measure (see recital (12)). The Belgian authorities explained that these successive crises significantly delayed the preparation of the measure and that an additional period until 31 May 2023 is necessary in view of the different procedural steps for the implementation of the measure.
- (66) The Commission acknowledges that those exceptional and unexpected circumstances linked to Russia's aggression against Ukraine may have led to administrative delays and occurred in a context of successive crises that have particularly affected the services responsible for the preparation of the measure. The Commission considers that the additional workload faced by the Belgian authorities as a result of those events still persists at the present time (see recital (11)).
- (67) In view of those exceptional circumstances, and since this grace period is of a reasonable duration in light of the timetable for setting up the measure (see recital

³¹ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742.

(11)) and only covers the first year of the measure, the Commission considers that the measure is in line with the objective of point 25 of the ETS Guidelines post-2021, namely that the aid has an incentive effect, and more broadly that the grace period is in line with the objective of the measure to prevent the risk of carbon leakage in accordance with point 20 of the ETS Guidelines post-2021. The Commission will apply the same approach to any similar case in the future³².

- (68) In addition, the Commission considers that, in view of the current economic situation characterised by a sharp increase in electricity prices, to refuse a reasonable grace period for the aid paid for costs incurred in 2021 could lead to irreversible relocation of production outside the Union despite the aid available in subsequent years.
- (69) The measure therefore complies with points 25 and 26 of the ETS Guidelines post-2021.
- (70) The Commission therefore concludes that the aid has an incentive effect and facilitates the development of certain economic activities. The Commission considers that the deviation from the ETS Guidelines post-2021 referred to in recitals (63) to (68) above does not call this conclusion into question.

3.3.2.3. Compliance with other relevant provisions of EU law

- (71) State aid that contravenes provisions or general principles of EU law cannot be declared compatible³³.
- (72) Beneficiaries must comply with their obligations under Article 8 of Directive 2012/27/EU on energy efficiency (see recital (20)).
- (73) Therefore, 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

- (74) 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)).
- (75) Addressing the risk of carbon leakage serves an environmental objective since the aid aims to avoid 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.

³² See, for instance, decision of 1 December 2022 in case SA.63404 (2022/N) – France, *Compensation des coûts des émissions indirectes en France pour la période 2021-2030*; and decision of 12 December 2022 in case SA.102712 (2022/N) – Slovakia, *Compensation for indirect ETS costs in Slovakia for 2021-2030*.

³³ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

3.3.3.2. Need for State intervention

- (76) 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 CO₂ costs in their electricity prices and the beneficiary is unable to pass on those costs to product prices without losing significant market share.
- (77) According to point 21 of the ETS Guidelines post-2021, for the purposes of those guidelines, 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.
- (78) The beneficiaries of the notified measure are undertakings active in one of the sectors or sub-sectors listed in Annex I to the ETS Guidelines post-2021. All sectors listed in that annex will be eligible for aid under the notified measure (see recital (15)). Hence, the Commission concludes that the aid is necessary to realise the measure's objective of developing sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs and, moreover, avoiding an increase in global greenhouse gas emissions.

3.3.3.3. Appropriateness of the aid

- (79) 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.
- (80) In the present measure, the support will take the form of a direct grant (see recital (10)). 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

- (81) 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.
- (82) 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.

- (83) The measure does not provide for full compensation, as this could remove the incentive for beneficiaries to further reduce electricity consumption. Subject to recital (43), the maximum aid intensity will be 75 % (see recital (42)), in compliance with point 27 of the ETS Guidelines post-2021.
- (84) The measure also provides that, subject to the approval of the Flemish government, an additional compensation may be granted under the measure up to limiting the remaining indirect costs (after regular compensation at 75 % intensity) to 1.5 % of the undertaking's GVA in year t, calculated at factor costs³⁴. The Commission notes that the overall aid intensity taking into account that additional compensation, if activated, cannot exceed 90 %. If activated, this additional compensation will apply without restriction to all eligible sectors and to all eligible undertakings in the relevant sectors (see recital (43)). The measure therefore complies with points 31 and 32 of the ETS Guidelines post-2021.
- (85) The formulas for the calculation of maximum aid payable under the notified aid are in line with point 28 of the ETS Guidelines post-2021 (see recital (27)).
- (86) The measure also complies with points 29 and 30 of the ETS Guidelines post-2021 for the following reasons. 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 must be 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 shall be calculated only for the products that are eligible for aid (see recital (31)).
- (87) The measure adopts the definitions of point 15 of the ETS Guidelines post-2021, for all the elements of the formulas (see recital (29)). The measure also applies the electricity consumption efficiency benchmarks defined in Annex II of the ETS Guidelines post-2021 (see recital (29)).

³⁴ 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.

- (88) According to point 15(11) of the ETS Guidelines post-2021, Member States intending to grant indirect cost compensation may, as part of the notification of the relevant scheme, request that the applicable CO₂ emission factor be established based on a study of the CO₂ content of the actual margin setting technology in the electricity market. Such a notification of a market-based CO₂ emission factor must demonstrate the appropriateness of the retained market-based CO₂ emission factor based on a model of the electrical system simulating price formation and observed data on the margin setting technology over the entire year t-1 (including the hours when imports were margin setting). This report must be submitted to the national regulatory authority for approval and transmitted to the Commission when the State aid measure is notified to the Commission pursuant to Article 108(3) of the Treaty. The Commission assesses the appropriateness of the study and the resulting market-based CO₂ emission factor as parts of its compatibility analysis under Article 107(3)(c) of the Treaty and the ETS Guidelines post-2021.
- (89) Under the measure, the aid is calculated on the basis of the market-based CO₂ emission factor notified by Belgium (0.51 tCO₂/MWh). This factor was established based on a study of the CO₂ content of the actual margin setting technology in the electricity market prepared by Compass Lexecon. The study was submitted for approval to the national regulatory authority, CREG (see recital (32)). The Commission notes that if the study is not approved by CREG, the authorities will apply the CO₂ emission factor for Belgium (0.36 tCO₂/MWh) as established by Annex III to the ETS Guidelines post-2021. In such a case, Belgium may notify an amendment to the measure on the basis of a new study approved by CREG.
- (90) The Commission notes that the identification the marginal technology is a direct output of the model. The model is based on the commercial modelling platform Plexos (which is widely used across the industry). It uses historical market data to simulate electricity price formation (see recital (33)). The average CO₂ content attributed to each technology is based on data concerning the efficiency of the plants and the CO₂ content of fuels (see recital (37)).
- (91) As regards the CO₂ content attributed to hours when hydro sources with storage are marginal, the study takes into account the particular management of those technologies with storage constraints (see recital (38)). The Commission notes that this management is based on the opportunity costs associated with the decision of hydro plants with storage to produce at a given moment. As hydro power plants have close to zero (or limited in the case of pumped storage) operating costs, the decision whether to produce electricity now or later is mainly based on opportunity cost considerations. Those means of production participate in the day-ahead auction on the basis not of their variable production cost, but of their opportunity cost, which reflects the profit they forego by not being able to produce in another hour due to limited stock of water. Those opportunity costs are mainly determined by the possibility to save (or pump) the water and use it in the hours with the highest electricity prices. Prices, in turn, are influenced by fossil fuel technologies with high operating costs, because hydro generators act flexibly and, in a calculated way, bid at prices close to the prices of fossil fuel power

plants in order to replace them in *merit order*³⁵. Thus, the market behaviour of operators of hydro power plants is influenced by CO₂ prices, which the study submitted by the Belgian authorities correctly reflects through robust and documented methodologies. The CO₂ content assigned to hours when hydro sources are marginal is equal to the CO₂ content of the fossil technology that the marginal hydro power plant is estimated to replace according to the model. The Commission considers that the proposed method for approximating the CO₂ content assigned to hours when hydro sources are marginal is acceptable.

- (92) As regards the CO₂ content attributed to hours when the electricity price is set by a power plant located outside Belgium, the study uses the model to identify the marginal unit of production (see recital (40)(40)). The attributed CO₂ content is then the average CO₂ content of those different means of production according to the principles described in recitals (37) to (39).
- (93) The proposed methodology for the calculation of the market-based CO₂ emission factor is therefore in line with paragraph 15(11) of the Guidelines. The Commission also notes that the calculated factor will be applicable for the period 2021-2025 and that Belgium has committed to notify, for approval, to the Commission, the applicable value for the period 2026-2030 on the basis of the revised Guidelines (see recital (41)). The Commission also notes Belgium's commitment to provide, as part of this notification, an evaluation of the implementation of the market-based CO₂ emission factor in order to compare the notified value for the period 2021-2025 with the market developments.
- (94) 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 eligibility conditions and the procedure laid down in the measure referred to in recitals (16) to (19) comply with those requirements.
- (95) In particular, concerning the requirement for beneficiaries to have an electricity consumption of at least one GWh in year t for their eligible activities (see recital (16)), the Commission considers that this requirement can be justified in light of the aim pursued (reduction of administrative costs) based on the justification provided by the Belgian authorities and that this requirement is based on objective, non-discriminatory and transparent criteria and applies in the same way for all competitors in the same sector, in line with point 23 of the ETS Guidelines post-2021.
- (96) Moreover, the obligation for beneficiaries to continue to operate the eligible installations for a period of five years following the granting of the aid (see recital (19)) 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.

³⁵ Decisions SA.102454 (2022/N) – Spain and SA.102569 (2022/N) – Portugal – Production cost adjustment mechanism for the reduction of the electricity wholesale price in the Iberian market, recital (22).

- (97) The duration of the measure does not exceed the duration of the ETS Guidelines post-2021 (see recital (9)). Therefore, the measure complies with point 36 of the ETS Guidelines post-2021.

3.3.3.5. Cumulation

- (98) 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 (45) to (47)).

3.3.3.6. Energy audits and management systems

- (99) The measure foresees that, for installations which are not operated by a SME, on the date of submission of the application for aid, the beneficiary must have a certified energy plan or carry out an energy audit, in line with requirements of Article 8 Directive 2012/27/EU (see recital (20)). The compliance with this obligation is checked before the granting of the aid. The measure therefore complies with point 54 of the ETS Guidelines post-2021.
- (100) Moreover, beneficiaries covered by the obligation described in recitals (20) and (99) must carry out the investments referred to in that energy plan or energy audit undertaking for the eligible installations within four years after the granting of the aid if the payback period of those investments does not exceed three years (see recital (21)). The Belgian authorities will verify that the beneficiaries comply with that obligation on an annual basis after the granting of the aid (beneficiaries must report on their obligations annually). If, after verification, it appears that the beneficiary has not complied with that obligation, that beneficiary will be required to reimburse the aid already received.
- (101) The Commission considers that a reasonable period of time for implementing the obligation under point 55(a) of the ETS Guidelines post-2021 is in line with point 55 of the ETS Guidelines post-2021. The Commission considers that the four-year deadline provided for under the measure for implementing the obligation described in recitals (21) and (100) is reasonable.
- (102) Therefore, the measure complies with point 55 of the ETS Guidelines post-2021.
- (103) Moreover, the Commission notes that the measure provides for additional national requirements, namely (i) for eligible installations, the beneficiary must have joined the energy policy agreement applicable to the installation for year t and comply with that agreement, (ii) all beneficiaries must submit a climate plan and (iii) for products covered by a electricity consumption efficiency benchmark as established by Annex II of the ETS Guidelines post-2021, if the target value of this benchmark is not met, the beneficiary has to invest a significant share of at least 50 % of the aid amount in certain projects to reduce their carbon footprint within five years from the granting of the aid (see recitals (22) to (25)). The Commission considers that those additional national obligations are 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

- (104) The Belgian 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 (48)).

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

- (105) No aid will be granted to (i) undertakings in difficulty within the meaning of Article 2 (18) of the General Block Exemption Regulation 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 (18)).
- (106) Therefore, the measure complies with points 10 and 11 of the ETS Guidelines post-2021.

3.3.3.9. Remaining distortions of trading conditions

- (107) Compensation for indirect ETS costs risks distorting competition between companies 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 2030³⁶.
- (108) 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).
- (109) Those risks are however mitigated by the fact that the notified measure complies with all the conditions laid down in both 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 measure, the same aid intensity will be applied to all beneficiaries depending on the available budget (see recitals (42) to (44)).

3.3.3.10. Conclusion on distortion of competition and balancing test

- (110) 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 (62) and (75)).
- (111) Moreover, the necessity, appropriateness and proportionality of the aid limit its impact on competition and trade. The Commission concludes that even if an impact on intra-sector and inter-sector competition cannot be excluded, it appears

³⁶ 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).

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.

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

Your request should be sent electronically to the following address:

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

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

