EUROPEAN COMMISSION

Brussels, 26.8.2016
C(2016) 5433 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: **State Aid SA. 43128 (2015/N) – Luxembourg**
Modification du soutien aux SER au Luxembourg

Sir,

1. PROCEDURE

(1) The Luxembourg authorities notified the measure to the Commission on 21 September 2015 pursuant to Article 108(3) of the Treaty on the Functioning of the European Union ('TFEU'). The Luxembourg authorities provided additional information requested by the Commission on 18 December 2015, 10 May 2016 and 8 July 2016.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Background and objectives of the notified scheme

(2) Luxembourg has had a system of feed-in tariffs for renewable energy production in place since 2014 which was approved in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg*.[1]

(3) In that decision Luxembourg provided a commitment that the approved feed-in tariff regime would be phased out by 31 December 2015 to be replaced with a market premium system for installations over 500kW (3MW or 3 generation units for wind).[2] This was done because certain provisions of the *Guidelines on State*

[1] OJ C 44 2015.

[2] Recitals 17, 53 and 57.

His Excellency Mr Jean ASSELBORN
Minister of Foreign Affairs
Rue Notre-Dame 5
L - 2911 Luxembourg

aid for environmental protection and energy 2014-2020[3] ('EEAG') were due to come into force on 1 January 2016.

(4) The notified measure constitutes an amendment to that approved scheme which will extend the scope and the duration of the previous scheme to 2020 and modify it with a view to achieving compliance with the provisions of the EEAG which came into force on 1 January 2016.

(5) The notified measure is also designed to extend eligibility for support under the new scheme to cooperatives of individuals operating solar energy installations installed on impervious surfaces.

(6) The objective pursued by the scheme is to incentivise investment in the generation of electricity from renewable energy sources, thus contributing to both a cleaner energy mix and to the achievement of Luxembourg's 2020 renewable energy target, as set in accordance with Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion and use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC ('the Renewable Energy Directive').[4]

(7) Luxembourg's renewable energy target for 2020 is 11% renewable share of gross final energy consumption.

2.2. National legal basis

(8) The national legal basis of the measure is the modified *Grand Ducal Regulation of 31 March 2010 on the compensation mechanism relating to the organisation of the electricity market*, as amended by the *Grand-Ducal Regulation of 1st August 2014 on the production of electricity using renewable energy sources*.

2.3. Beneficiaries

(9) Operators of the following technology installations are eligible to receive aid under the scheme: onshore wind, solar, biogas, hydropower, biomass and wood waste, and sewage gas. The range of eligible technologies has not changed as compared with that approved in Commission decision SA.37232 *Feed-in tariffs for RES production in Luxembourg.*[5]

---

[3] Communication from the Commission – OJ C 200, 28.6.2014.

[4] OJ L 140, 5.6.2009.

[5] Recital 10.

(10) Only installations on which work has not already begun will be eligible for support.

(11) Luxembourg will verify by means of their application form that firms in difficulty, as defined by the *Guidelines on State aid for rescuing and restructuring firms in difficulty*[6], and companies which are subject to an outstanding recovery order following a previous Commission Decision declaring an aid measure illegal and incompatible with the internal market, do not receive support under the notified measure.

(12) Luxembourg has committed to ensuring that the application form will include an applicant's name, size of undertaking, a description of the project, the amount of aid needed to realise it, the eligible costs, and the counterfactual scenario. The granting authority will assess the credibility of counterfactual scenarios at this stage.

(13) The notified measure also extends eligibility to cooperatives of at least 7 individuals operating solar installations in two support categories for new installations of 30-100kW and 100-200kW of installed capacity installed on impervious surfaces. This is a new programme designed to mobilise citizens at local and regional level to engage with the production of electricity from renewable energy sources and so contribute to the attainment of Luxembourg's renewable energy target.

2.4. Form of aid and level of support

(14) Installations with a rated electrical output of up to 500kW (or up to 3MW or 3 generation units for wind) will continue to receive a feed-in tariff. The feed-in tariffs will be the same as those approved in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg.*[7]

(15) The notified measure also provides cooperatives of 7 people or more with the opportunity to benefit under the scheme for the first time. There are two categories of eligible installation: solar installations of 30-100 kW of installed capacity and solar installations of 100-200kW of installed capacity. These installations fall below the 500kW threshold for market premia and so will be remunerated through a feed-in tariff.

(16) In calculating the feed-in tariff for installations in these two categories the Luxembourg authorities considered a typical 200kW asset. The underlying capital

6 Communication from the Commission – OJ C 249, 31.7.2014.

7 Recitals 15-16.

costs are based on an assumption of €1.56/kW of installed capacity. This is in addition to operating costs of €26.52/kW of utilised capacity.

(17) Utilised capacity is assumed to be 900h per year based on historical figures in Luxembourg showing an average load factor for this type of installation of 806h per year; this has been increased to 900h per year to account for improvements in technology since 2013 which is the year the load factor information was gathered.

(18) Both the methodology and the assumed rate of return used for the calculation of the tariffs for these installations are the same as those used to calculate the approved feed-in tariffs in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg.*[8]

(19) From their assumptions this leads to total costs of €250.89/MWh as compared to an assumed market price of €45/MWh for these installations.

(20) For installations above 500 kW (3 MW or 3 generation units for wind) support will take the form of a market premium to be paid to eligible beneficiaries for each unit of green electricity transferred to the grid.

(21) Luxembourg has committed to ensuring that this premium will not be paid where prices are negative for more than 6 consecutive hours on the EPEX day-ahead market for Germany/Austria for installations over the thresholds in Point 125 of the EEAG.

(22) The following formula shows how the market premium is calculated:

Market Premium = RE – PMM + DSP

Where:

RE = Reference earnings

PMM = Monthly market price

DSP = Direct Selling Premium

(23) The reference earnings used to calculate the premium are the same as the feed-in tariff under the approved scheme in SA.37232 *Feed-in tariffs for RES production in Luxembourg*.[9] The methodology remains unchanged.

[8] Recital 60.

[9] Recitals 12 -16.

(24) There are three different monthly market prices relevant to the calculation of support, depending on the technology of the installation in question:

(a) For hydropower, sewage gas, biogas, solid biomass and wood waste installations the average will be taken of the value 'MW EPEX'. This corresponds to the average hourly price for all day-ahead contracts concluded on the EPEX Power Exchange.

(b) For wind installations the value 'MW wind year land' will be used. This as an isolated average price for electricity from onshore wind installations only.

(c) For solar installations the value 'MW solar' will be used. This is an isolated average price for electricity from solar installations only.

(25) All three values are derived from day-ahead prices on the EPEX Power Exchange in Paris for the price area of Austria/Germany.

(26) The direct selling premium for wind and solar energy is €4/MWh. For all other technologies it is €2/MWh. This premium is designed to represent the actual costs of direct selling and balancing responsibilities which the notified measure introduces for installations over 500kW for the first time. The original reference earnings were calculated on the basis of a scheme which did not impose direct selling requirements or balancing responsibilities on generators, therefore the costs associated with these measures were not factored into the calculation of the tariff previously. Under the notified scheme, however, Luxembourg has now committed to ensuring that all installations over 500kW (3MW or 3 generations units for wind) will be subject to standard balancing responsibilities.

(27) Luxembourg has thus sought to capture two categories of cost components in the direct selling premium:

(a) The costs of profile/service compensation for forecasting errors, which will incur imbalance payments; and

(b) Trade participation costs i.e. those costs connected with the entry into market transactions. These include market access costs, transaction costs, staff and office and other costs connected to the direct selling requirement.

(28) In articulating the costs in the first category Luxembourg has drawn a distinction between intermittent and non-intermittent technologies. The former face a higher risk of forecasting errors and thus higher imbalance costs. Luxembourg estimates the overall costs for wind and solar power in Luxembourg at €3.50/MWh. For all other technologies this cost is estimated at €1.50.

(29) Added to this is the second category of cost component, i.e. the costs of selling directly to the electricity market. For all installations Luxembourg estimates these 'trade participation costs' at €0.50/MWh. Together this results in a €4/MWh premium for solar and wind installations, and a €2/MWh premium for all other installations.

(30) Luxembourg has committed to monitor the evolution of these costs for both categories of technology and ensure that the direct selling premium is adjusted in order to reflect any evolution in these costs over the lifetime of the scheme.

(31) This is achieved by application of a correction factor to each of the cost components in determining their quantum in any given year. This correction factor will be determined by the Minister for Economic Affairs and will take into account the evolution of electricity markets and the commercialisation of renewable energy in the electricity markets in order to ensure that the cost components continue to represent the real costs incurred by generators as closely as possible.

(32) Support to small installations under the market premium threshold of 500kW (3MW or 3 generation units for wind) will be paid by means of a repurchase agreement between the network operator and the beneficiary. For larger installations, i.e. those above the thresholds in Point 125 of the EEAG, the support will be paid through a contract for the market premium, concluded between the network operator and the beneficiary, otherwise installations will sell their electricity directly on the market.

(33) Luxembourg has committed to ensuring the publication of all of the information specified in Point 104 of the EEAG.

2.5. Duration of Support

(34) Eligible installations will receive support for a period of 15 years. This is the average useful lifespan of renewable installations covered by this decision.

2.6. Source of financing

(35) The scheme is financed in accordance with the compensation mechanism detailed in decision SA.37232 *Feed-in tariffs for RES production in Luxembourg.*[10] The notified scheme does not propose any changes to this system.

[10] Recitals 20 – 26.

2.7. Budget

(36) The expected overall budget of the scheme is an estimated €150 million over its lifetime.

3. ASSESSMENT OF THE MEASURE

3.1. Presence of aid

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

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

(38) The first aspect of the Article 107(1) TFEU definition requires that State aid is granted by a Member State or through State resources. The notified measure is financed via a compensation mechanism which imposes an obligation on network operators that is passed on to consumers.

(39) This mechanism was found to constitute aid granted through State resources in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg.*[11] This mechanism has not changed and so the Commission determines that the notified measure is granted through State resources.

3.1.2. Favouring certain undertakings or the production of certain goods, distortion of competition and effect on trade between Member States

(40) The notified measure provides operating aid to eligible generators of electricity from renewable energy sources. These generators will therefore be remunerated at a rate exceeding that which they would ordinarily have received on the market in the absence of support. This support is only available to renewable energy installations in Luxembourg and not to any other category of producer. The aid thus constitutes a selective economic advantage awarded to eligible generators of electricity from renewable energy sources.

(41) Beneficiaries under the notified measure operate on a liberalised electricity market with cross-border trade. The advantageous treatment which they may receive in the form of support under the notified measure thus threatens to distort competition and is likely to affect trade between Member States.

[11] Recitals 30 – 41.

3.1.3. Conclusion with regard to the presence of State aid

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

3.2. Legality

(43) The Luxembourg authorities intend to implement the measure in 2016, once a decision of the Commission has been adopted. The Luxembourg authorities have not therefore put the scheme into effect before a final Commission decision on the compatibility of the scheme has been taken and have so complied with the stand-still obligation set out in Article 108(3) TFEU.

3.3. Compatibility

(44) The Commission has assessed the compatibility of the notified aid scheme on the basis of Article 107(3)(c) TFEU. The measure pursues an environmental and energy objective namely the achievement of Luxembourg's 2020 renewable energy target, therefore the EEAG apply, as per Point 13 thereof.

(45) Point 27 of the EEAG provides that the Commission will consider a State aid measure compatible with the internal market where it satisfies a set of common assessment principles detailed in Point 27(a)-(e) of the EEAG. The compatibility of the notified measure with each of these is considered below.

3.3.1. Objective of common interest

(46) Point 27(a) of the EEAG establishes that aid measures must contribute to a well-defined objective of common interest in accordance with Section 3.2.1 of the EEAG.

(47) The aim of the notified measure is to help Luxembourg to achieve the renewable energy targets set by the EU as part of its 2020 strategy, reaching 11% energy from renewable energy sources in gross final consumption by 2020.

(48) In line with Points 30 and 31 of the EEAG, Luxembourg has defined the objective of the measure and explained that the measure will contribute towards reaching the European energy policy goals.

(49) The Commission thus considers that the notified scheme is clearly aimed at an objective of common interest in accordance with Article 107(3) TFEU.

3.3.2. Need for State intervention

(50) Under Point 27(b) of the EEAG, State aid may only be deemed compatible with the internal market if the Member State has demonstrated a need for State

intervention, i.e. that the State aid measure is targeted towards a situation where aid can bring about a material improvement that the market cannot deliver, assessed in accordance with Section 3.2.2 of the EEAG.

(51) The Luxembourg authorities submitted evidence within the context of the Commission decision on *SA.37232 Feed-in tariffs for RES production in Luxembourg* demonstrating that in the absence of aid all eligible installations would face production costs which are higher than the price which they can expect to receive from the market.[12] Luxembourg has satisfied the Commission that these circumstances have not changed.

(52) The Luxembourg authorities also submitted calculations for solar installations up to 200kW, which will become eligible for receipt of aid where operated by cooperatives under the notified scheme. As detailed in Recitals 16 – 19 above, these demonstrated that the production costs faced by installations under this threshold are higher than the price which they can expect to receive from the market.

(53) Luxembourg has demonstrated that the aid does not exceed the difference between the production costs of these facilities and the market price. In the absence of support the market price alone would be insufficient to cover the production costs of beneficiaries.

(54) The Commission therefore accepts that without support the installations eligible for support under the notified measure would not be financially viable and would not go ahead.

(55) Without the deployment of installations producing electricity from renewable energy sources Luxembourg would not be in a position to meet its renewable energy targets for 2020. The Commission finds that without the intervention the market would not deliver the attainment of Luxembourg's renewable energy goals. Luxembourg has thus demonstrated a need for state intervention.

3.3.3. Appropriate instrument

(56) Point 27(c) of the EEAG stipulates that the proposed measure should be an appropriate policy instrument to address the objective of common interest in accordance with Section 3.2.3. of the EEAG. The Commission will also consider the notified measures compliance with Section 3.3 of the EEAG, some parts of which are relevant to this assessment.

(57) In order to allow Member States to achieve their renewable energy targets in line with EU 2020 objectives Point 116 of the EEAG provides that the Commission

[12] Recitals 60 – 68.

will presume the appropriateness and limited distortive effects of aid to support the generation of energy from renewable energy sources provided the aid complies with all other applicable conditions.

(58) Per Recital 118 below, the Commission is satisfied that this requirement is met in the present case and thus presumes that the measure is being realised via an appropriate instrument.

3.3.4. Incentive effect

(59) Point 27(d) of the EEAG provides that aid must have an incentive effect in accordance with Section 3.2.4 of the EEAG in order to be deemed compatible with the internal market.

(60) Point 49 of the EEAG provides that State aid has an incentive effect if it induces the beneficiary to change its behaviour towards reaching the objective of common interest.

(61) The Commission notes that in the absence of aid renewable energy technologies will not be deployed at the required scale and pace because in the absence of support such projects are not financially viable, see *SA. 37232 Feed-in tariffs for RES production in Luxembourg*[13] which details this for all installations other than cooperative solar projects (the detail for which is set out in Recitals 16-19 above). The aid therefore has an incentive effect since it causes the beneficiaries to change their behaviour and invest in renewable energy projects.

(62) Point 50 of the EEAG provides that aid will not have an incentive effect where the beneficiary commences work on the project prior to applying for support from the relevant aid scheme. The Commission notes per Recital 10 above that this is complied with.

(63) Luxembourg has committed to ensuring the requirements of Points 50 to 52 of the EEAG are respected for all installations receiving support under the notified measure as detailed in Recital 12, above.

(64) The Commission thus finds that the notified measure has an incentive effect.

3.3.5. Proportionality

(65) Point 27(e) of the EEAG establishes that the notified measure must be proportionate, in accordance with Section 3.2.5 of the EEAG. The Commission will also check compliance with part of Section 3.3 of the EEAG as some points of Section 3.3 are relevant here.

[13] Recitals 62-63.

(66) According to Point 68 of the EEAG, environmental aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection objective aimed for.

(67) There are three different forms of aid payable under the notified measure:

(a) Feed-in tariffs to installations under 500kW;

(b) Market premiums to installations over 500kW (3MW or 3 generation units for wind); and

(c) Feed-in tariffs to solar installations operated by collectives of at least 7 individuals.

(68) The aid for the first category, feed-in tariffs to installations under 500kW, remains the same as that approved in Commission decision *SA.37232 Feed in tariffs for RES production in Luxembourg*[14]. No changes have been proposed to this approach and the Commission finds, per that decision, that the aid in this category remains proportionate.

(69) For the second category of installations, i.e. those over 500kW (or 3MW/3 generation units) the aid also remains based on the calculations of feed-in tariffs approved in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg* except insofar as a premium has been added to cover the costs of balancing responsibilities and direct market selling (as detailed above in Recitals 26 to 31).

(70) Given that the imposition of a direct selling obligation and the imposition of balancing responsibilities for installations above 500kW is a requirement under Point 124 of the EEAG that applies from 1 January 2016 it is appropriate that this extra cost, now applicable to these generators where it was not before, be added to the total cost base when determining the market premium.

(71) The Commission is satisfied that Luxembourg has taken steps to ensure that the costs component of this direct selling premium have been properly articulated in such a manner that will ensure they reflect the real costs which generators incur on the market and so do not result in overcompensation (see Recitals 30 and 31 above).

(72) Therefore the Commission finds that the aid to installations over 500kW (3MW or 3 generation units for wind) has been limited to the minimum amount necessary to achieve Luxembourg's objective and is thus proportionate.

[14] Recitals 60-63.

(73) The third category of installations includes solar installations of between 30kW and 100kW, or between 100kW and 200kW, of installed capacity. These installations fall below the 500kW threshold in Point 125 of the EEAG and so may be remunerated via a feed-in tariff rather than a market premium.

(74) In considering a typical installation in the range of 1-200kW it is clear that the levelised costs of electricity far exceed the market price as per Recitals 16 to 19 above.

(75) The Commission is thus satisfied that without the notified measure the installations in question would not be financially viable and thus would not go ahead. The aid therefore is found to be proportionate to the objective pursued.

3.3.6. Avoidance of undue negative effects on competition and trade between Member States

(76) Point 27(f) of the EEAG provides that in order for a measure to be deemed compatible with the internal market the Commission will perform a balancing test to consider whether the negative effects of aid are sufficiently limited so that the overall balance of the measure is positive in accordance with Section 3.2.6. of the EEAG. The Commission will also consider compliance with the relevant parts of Section 3.3 of the EEAG.

(77) According to Point 90 of the EEAG, the Commission considers that aid for environmental purposes will by its nature tend to favour environmentally friendly technologies over other more polluting ones, the effect of the aid will in principle not be viewed as an undue distortion of competition since it is inherently linked to the objective which it pursues – environmental protection.

(78) The Commission must take into account the overall environmental effect of the measure as compared to its negative impact on the market.

(79) The Commission presumes per Point 116 of the EEAG that aid to renewable energy does not have undue distortive effects on competition and trade because all other applicable conditions of the EEAG are fulfilled (see Recital 118 below).

(80) The Commission therefore concludes that the distortion of competition caused by the notified scheme is balanced by the positive contribution towards common policy objectives.

3.3.7. Transparency

(81) Point 27(g) of the EEAG requires that the aid measure is transparent per Section 3.2.7 of the EEAG. As detailed in Recital 33, Luxembourg has committed to publishing all of the information required by Point 104 of the EEAG in line with

the requirements in Point 106 of the EEAG. The notified measure therefore complies with Section 3.2.7.

3.3.8. General Conditions for aid granted to energy from renewable sources

(82) The general conditions for aid granted to energy from renewable energy sources are set out in Section 3.3.2 of the EEAG.

(83) Point 124 of the EEAG sets out the cumulative conditions applicable from 1 January 2016 for ensuring that beneficiaries producing energy from renewable energy sources are required to sell their electricity directly in the market subject to normal market obligations. Point 125 of the EEAG limits the application of these conditions to installations of 500kW (3MW or 3 generation units for wind) or over.

(84) Point 124(a) of the EEAG requires that aid is granted as a market premium in addition to the market price whereby the generators sells its electricity directly on the market. The notified measure introduces a market premium for all generators above the thresholds in Point 125 of the EEAG whereby aid will be granted by means of a premium, calculated by deducting the monthly market price for electricity, categorised by technology, from the reference earnings and adding a direct selling premium. The notified measure therefore complies with Point 124(a).

(85) Point 124(b) requires that beneficiaries of the measure are subject to standard balancing requirements, except in cases where no liquid intra-day market for electricity exists. Luxembourg has confirmed that this requirement will be satisfied for all installations above the thresholds in Point 125 of the EEAG as per the commitment in Recital 26 above and so complies with this requirement.

(86) Point 124(c) of the EEAG requires that measures are put in place to ensure that beneficiaries have no incentive to generate under negative prices. As outlined in Recital 21 above, Luxembourg has committed to ensuring that no support will be payable under the notified measure where prices are negative for more than 6 consecutive hours on the EPEX day-ahead market for Germany/Austria for installations over the thresholds in Point 125 of the EEAG and so complies with this requirement.

(87) Luxembourg has proposed the day-ahead price as the most appropriate reference price on grounds that the bulk of renewable energy quantities in Luxembourg are sold on the day-ahead market. They also point out that day-ahead market prices are the essential reference for the European internal electricity market and thus enable the best estimate to be made of an economic welfare effect within the market as a whole. The Commission thus accepts that the chosen reference

market operates as a good working proxy for the actual prices received by renewable energy installation operators in Luxembourg for their electricity from the market and so finds that the notified measure is compliant with Point 124(c) of the EEAG.

(88) Point 126 of the EEAG requires that aid is granted via a competitive bidding process on the basis of clear non-discriminatory criteria. For the transitional phase of 2015-2016 aid allocated in this way should account for at least 5% of all new electricity capacity from renewable energy sources. For aid granted from 1 January 2017 all support should be allocated in this manner, unless one of the exceptions in limbs (a) – (c) of Point 126 applies.

(89) The first exception in Point 126(a) relates to the Member State's ability to demonstrate that in the case of a competitive tender only one or a very limited number of projects would come forward. The Commission is satisfied that in the case of Luxembourg sufficient evidence has been adduced to demonstrate that this outcome is likely.

(90) In support of this the Luxembourg Ministry of Economic Affairs provided a 2015 study by the Institute for Resource Efficiency and Energy Strategies GmbH and the Fraunhofer Institute for Systems and Innovation Research analysing the available potential for renewable energy in Luxembourg ('the LuxRES study'). This is an update of a 2007 study commissioned to consider the same subject matter.

(91) In respect of biogas Luxembourg has demonstrated that the vast majority of projects fall under the 1MW threshold. One undertaking is responsible for most all projects both small and large although in the past 5 years Luxembourg has explained that only one biogas project has come forward. Luxembourg has deduced no evidence that this trend is likely to change during the lifetime such that very few installations over 1MW are likely to come forward and, if they do, Luxembourg expects they would all be proposed by that one undertaking.

(92) Hydropower installations are also typically under 1MW and Luxembourg has again only identified one potential project which exceeds that threshold that is likely to come forward for support during the lifetime of the scheme. As such the number of projects and likely project developers appears so limited as to merit an exception to the tender requirement per Point 126(a) of the EEAG.

(93) Biomass projects are also normally small scale, typically at domestic level. Luxembourg explained that most all of the projects which were looked at as part of its feasibility study will be carried out by municipalities rather than private developers, or the same undertaking which is responsible for biogas projects in Luxembourg.

(94) Under the scheme approved in Commission decision *SA.37232 Feed-in tariffs for RES production in Luxembourg* only solar installations of up to 30kW were eligible for support. The notified measure extends this threshold to 200kW for installations operated by collectives of 7 people or more but it remains the case that no solar installation is eligible for support under this scheme which is above the 1MW threshold in Point 127 of the EEAG. These installations are thus exempt from the requirement in Point 126 of the EEAG.

(95) Luxembourg has indicated to the Commission, however, that it is considering extending the provision of support to large solar installations in the future. If such a measure is introduced Luxembourg has committed to organising the allocation of any such support through a competitive tender.

(96) For wind installations Luxembourg has demonstrated that only one project is currently in development stages in Luxembourg, and that one dominant actor is behind most all projects in the country.

(97) The Commission is therefore satisfied that due to this unusual market set-up the requirement of the exception in Point 126(a) of the EEAG 'Member States demonstrate that only one or a very limited number of projects or sites could be eligible' is satisfied.

(98) The Commission therefore finds the notified measure in compliance with the provisions of Point 126 of the EEAG and the exceptions from the tender requirement contained therein by virtue of the particulars of the energy market in Luxembourg.

(99) Point 129 of the EEAG requires that aid may only be granted to installations generating electricity from renewable energy sources until the plant in question has fully depreciated, in accordance with normal accounting principles. The compatibility of the scheme with this requirement was considered in *SA.37232 Feed-in tariffs for RES production in Luxembourg*[15] and the Commission is satisfied that no aspect of the scheme affecting this assessment has changed. The notified measure is therefore compliant with Point 129 of the EEAG.

3.3.9. Specific rules for hydropower and waste.

(100) According to Point 117 of the EEAG when granting State aid to hydropower installations, the Member State must respect the requirements of Directive

[15] Recitals 64 – 65.

2000/60/EC[16], in particular Article 4(7) thereof which lays down criteria in relation to allowing new modifications of water.

(101) Point 118 of the EEAG requires that State aid for energy from renewable sources using waste, including waste heat, as input fuel should comply with the waste hierarchy, as laid down in Directive 2008/98 EC.[17]

(102) Luxembourg has reiterated the commitment it made in *SA.37232 Feed-in tariffs for RES production in Luxembourg*[18] that the requirements of both Point 117 and 118 of the EEAG have been duly implemented in national legislation.

(103) The Commission therefore finds that the present scheme complies with Points 117 and 118 of the EEAG.

3.3.10. Other Treaty provisions

(104) Point 29 of the EEAG provides that that where an aid measure (including its financing method where such method is an integral part of the aid) entails a non-severable violation of Union law, the aid cannot be declared compatible with the internal market.

(105) Point 29 of the EEAG draws specific attention to Articles 30 and 110 TFEU, providing that any levy that has the aim of financing a State aid measure would need to be found to be in compliance with both.

(106) The notified measure is financed by means of a levy and accordingly the Commission has examined its compliance with Articles 30 and 110 TFEU.

(107) According to the case law, a charge which is imposed on domestic and imported products according to the same criteria may nevertheless be prohibited by the TFEU if the revenue from such a charge is intended to support activities which specifically benefit the taxed domestic (and not the imported) products. If the advantages which these products enjoy wholly offset the burden imposed on them, the effects of the charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effects to custom duties, contrary to Article 30 TFEU. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 TFEU and will be contrary

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

[17] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008.

[18] Recital 49.

to this provision as regards the proportion used to offset the burden borne by the domestic products.[19]

(108) If domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including the consumption of imported electricity), then the method of financing which imposes a burden on imported electricity to finance a measure from which it cannot benefit may have a discriminatory effect on importers of such electricity and thereby violate Articles 30 or 110 TFEU.[20]

(109) The notified measure is financed through a contribution imposed on electricity consumed in Luxembourg.[21] That charge is calculated on the basis of the amount of electricity consumed and is thus imposed on the product itself.[22] It constitutes a charge unilaterally imposed on network operators by virtue of the *Grand Ducal Regulation of 31 March 2010 on the compensation mechanism relating to the organisation of the electricity market* which does not correspond to the price paid for the product.

(110) Network operators charged with paying the contribution will naturally have an incentive to pass this cost onto their consumers. To the extent that they may do so the Commission concludes that the compensation mechanism could entail violation of Articles 30 and 110 TFEU.

(111) In line with the commitment made in the Commission decision SA.37232 *Feed-in tariffs for RES production in Luxembourg*,[23] Luxembourg has offered a commitment to open up its renewable support scheme to generators from other Member States. As such, Luxembourg is seeking to establish a tender mechanism with other Member States which will allow producers from other Member States the opportunity to tender for support up to a 13% of the renewable support available in Luxembourg.

---

[19] Joined Cases C-128/03 and C-20/03 *AEM* [2005] ECR I-2886, paras 44-77; Case C-206/06 *Essent* [2008] ECR I-0000, para 42.

[20] Case 47/69 *France v Commission*, EU:C1970:60, para 20. See also Case SA.38632 (2014/N) *Germany – EEG 2014* OJ C 325 2015.

[21] Electricity constitutes a product for the purposes of the provisions of the TFEU: See Cases C-393/92 *Almelo* EU:C:1994:71, para 28, Case C-158/94 *Commission v Italy* EU:C:500, para 17, and Case C 206/06 *Essent Network Noord*, EU:C:2008:413, para 46.

[22] Case C-206/06 *Essent Netwrok Noord*, EU:C:2008:143, para 44.

[23] Recital 79.

(112) The 13% figure has been established as a function of Luxembourg's peak use of interconnection capacity divided by the total electricity consumption in Luxembourg and multiplied by the annual new installed green electricity capacity (expressed in terms of production volume).

(113) The Commission considers that this commitment is in line with Articles 30 and 110 TFEU given that for a Member State where interconnection capacity is basically unlimited, the peak use of this capacity provides a realistic approximation of how much electricity is imported.

(114) The opening of renewable support to producers in other Member States is subject to the conclusion of reciprocal cooperation agreements with those Member States. The Commission accepts that this is necessary to ensure that non-domestic production that would qualify for support in this way can be counted towards Member States' national renewable energy targets, as imposed by the Renewable Energy Directive. This corresponds with Point 122 of the EEAG and Article 11 of the Renewable Energy Directive which both provide that Member States may set up joint support schemes containing allocation rules between parties relating to the amount of renewable energy produced. Joint support schemes imply the conclusion of reciprocal cooperation.

(115) The participation in tendered access to Luxembourg's renewable support scheme is further subject to physical import taking place. This condition is in line with Articles 30 and 110 TFEU as without physical import no potential infringement of Article 30 or 110 TFEU would arise in the first place. In addition, Luxembourg needs to ensure that any such electricity is indeed delivered to Luxembourg.

(116) The Commission notes that the same commitment was made by Luxembourg in the context of the Commission decision on case SA.37232 *Feed in tariffs for RES producers in Luxembourg.*[24] Luxembourg has adduced evidence of its progress in securing the conclusion of a cooperation mechanism during the lifetime of that decision and the Commission is satisfied with Luxembourg's commitment to secure the conclusion of this commitment during the lifetime of the notified measure.

(117) Given the opening of a tendered scheme for access to Luxembourg's renewable support scheme would remove the risk of discrimination against producers of green electricity on other Member States, such mechanism will be compliant with Articles 30 and 110 TFEU.

[24] Recitals 79 – 81.

3.3.11. Conclusion with regard to the compatibility of the measure with the internal market

(118) In light of the above assessment, the Commission considers that the notified aid scheme pursues an objective of common interest in a necessary and proportionate way and that therefore the aid is compatible with the internal market on the basis of the EEAG.

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) TFEU.

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

Your request should be sent electronically to the following address:

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

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission