EUROPEAN COMMISSION

Brussels, 04.05.2016
C(2016)2874 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: **State Aid SA.41694 (2015/N) – Portugal**
Support to renewable electricity in Portugal.

Sir,

1. PROCEDURE

(1) Pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU), Portugal notified the scheme for financing renewable energy technologies. The application was submitted electronically on 27 April 2015. The Commission requested additional information on 8 August 2015, 5 November 2015 and 27 January 2016 to which Portugal replied on 8 September 2015, 19 November 2015 and 24 February 2016 respectively.

2. DESCRIPTION OF THE MEASURE

2.1. Background and objectives of the scheme

(2) In line with the long term European energy policy and innovation strategy, Portugal notified a scheme aimed at supporting deployment of new installations generating electricity from renewable sources.

(3) In order to reach its European targets of 31% renewable energy by 2020, Portugal intends to deploy approximately 300 MW of renewable energy generation per year. To this aim, Portugal notified a transitory scheme covering 2015 and 2016.

S. Ex.ª o Ministro dos Negócios Estrangeiros Augusto SANTOS SILVA
Largo do Rilvas
P – 1399-030 - Lisboa

(4) The scheme will support new installations and all renewable energy technologies for electricity generation. Additional goals of the scheme are to ensure stability of the National Electric System while increasing costs effectiveness of the support scheme through the use of competitive procedures for mature technologies.

2.2. The scheme

(5) Under the proposed scheme, larger generators will be selected with tender procedures while smaller generators will be eligible to apply for one of two alternative remuneration mechanisms: receiving a subsidy equivalent to the average market price or receiving a subsidy equivalent to the long term market price.

(6) The tender procedure will consist of individual tenders for less established technologies and mature technologies according to the needs of the systems (e.g., to guarantee security of supply, to reach the National Renewable Energy Action Plans' (NREAP) envisaged targets or to diversify energy sources). The remuneration received by generators is a combination of two different components: (i) the market price of electricity and (ii) a variable market premium based on the difference between the tender strike price and the reference electricity market price (that difference can be either negative or positive).

(7) Allocation rounds are structured according to the following principles:

(a) Individual auctions will be undertaken for each technology. Participants are invited to bid for the lowest 'tender price' (i.e. at discounts to the "Indicative Auction Price").

(b) The "Indicative Auction Price" will be set in line with the relevant technology's average Levelised Cost of Electricity (LCOE) and international benchmarks.

(c) Producers are invited to sell the energy in the power market (e.g. on the Mercado Ibérico de Electricidade (MIBEL) or through bilateral agreements) and will receive the variable market premium from the responsible body.

(d) Producers will be subject to standard balancing responsibilities and trading costs. Alternatively, producers may sell their power to an entity under the control of the State that will act as an off-taker of last resort handling also balancing services, transaction costs, etc., with a penalty or discount compared to the market price of electricity.

(e) The remuneration obtained under the tender procedure will be available for a 15 year period, after which generators may sell electricity at market price.

(8) If prices on the forward MIBEL are at zero for 6 consecutive hours or more, the premium will be set at zero for the whole period.

(9) Independently of the technology used, renewable energy generators with installed electrical capacity below 500 kW or below 3 MW or 3 generation units in case of wind energy can opt to receive an average market price. In that case, they will receive a floating price based on the average pool price of electricity in the

previous 12 months. The remuneration will be set on a monthly basis over a 15 year period, after which generators may sell electricity at market price.

(10) The scheme provides that the remuneration can never be higher or lower than two reference values (called respectively Floor and Cap). For 2016, the Floor and Cap are set at 45 EUR/MWh and 85 EUR/MWh respectively.

(11) Finally, renewable energy generators with installed capacity below 500 kW or below 3 MW or 3 generation units in case of wind energy can choose to apply for a fixed remuneration to be set according to a long term market price benchmark. The benchmark will be set based on market prices of forward/future wholesale electricity contracts traded at MIBEL, deducted from the balancing and other management services costs. In case there is not enough liquidity in the market, the long term market price benchmark may be indexed to the long run marginal production costs (RMSA) figures for Portugal, which reflect the expected market price in the long run. Remuneration under the long term market price mechanism is expected to be set at approximately 65 EUR/MWh for 2016.

2.3. Beneficiaries

(12) Portugal estimates that new generation capacity under the tender procedures, together with the remuneration mechanism based on the average and long term market prices, will not exceed 300 MW/year.

(13) Expected beneficiaries include all new renewable generation capacity, excluding (i) large hydro plants (with installed capacity larger than 10MW), (ii) cogeneration and (iii) self-consumption and small production units (larger than 250kW), which are not eligible to apply for this remuneration scheme.

(14) Only projects that have not started works prior to the application for the aid are eligible under the scheme. Examples of the most common renewable technologies which are eligible to apply for support under this scheme include:

- Biogas Anaerobic digestion;
- Biomass;
- Energy from waste;
- Geothermal;
- Small Hydro (<10MW);
- Landfill or sewage gas;
- Onshore wind;
- Solar photovoltaic.

(15) New hydro-morphological modifications, such as new hydropower plants, funded under the scheme should comply with the requirements for exemptions of Article 4(7) of Directive 2000/60/EC and should be adequately justified, in particular as regards the assessment of alternative options, and should include all necessary mitigation measures.

(16) Only biodegradable, non-recyclable waste can be used as input fuel in plants benefitting from the scheme.

2.4. Financing and duration

(17) The scheme was notified until 31 December 2016.

(18) Support will be granted to individual projects for a period of 15 years. This period is considered to be in line with other remuneration regimes already existing in Portugal and adequate to mitigate part of the cash flow volatility of renewable energy projects. Moreover, this period does not exceed the projects' depreciation period which typically ranges between 20 to 25 years depending on the technology and is never less than 15 years.

(19) Remuneration under the long term market price and the average market price mechanisms is indexed to market prices; therefore, Portugal foresees no additional cost to the National Electric System.

(20) The tender scheme will be financed by the tariff for the Global Use of System (UGS), levied on energy consumers proportionally to their energy use. The UGS tariff finances the Global System Management activity which includes:

(i) Costs for the operation of the system.

(ii) Costs arising from energy or environmental policy measures, or measures with a general economic interest.

(iii) Costs for the maintenance of the contractual balance.

(21) The UGS tariff is determined according to the regulation set by the Energy Services Regulatory Authority, ERSE. ERSE is the independent regulatory entity responsible for regulation of the gas and electricity sectors. ERSE is independent in the performance of its duties, without prejudice to the guiding principles of the energy policy established by the Government. ERSE operations are subject to ministerial approval, and its board of directors is appointed by the Council of Ministries.

2.5. Reporting, Transparency and Cumulation

(22) Portugal will ensure that detailed records regarding all measures involving the granting of aid are maintained. These records will be kept for the duration of the scheme plus an additional period of ten years, including all information relevant to demonstrating that the terms of the proposed scheme have been complied with.

(23) Detailed information about the projects funded will be published on a comprehensive website in order to comply with the provisions of section 3.2.7 of the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)[1].

(24) Projects supported under the scheme are not eligible for any other type of investment or operating aid.

[1] OJ C 200 of 28.06.2014.

2.6. National regulatory framework

(25) The measure will be enacted by the Portuguese authorities through a new Decree-Law. Legal basis for that decree are the Decree-Law no. 172/2006, of 23 August 2006, as amended by Decree-Law no. 215-B/2012, of 8 October 2012.

3. ASSESSMENT OF THE MEASURE:

3.1. Existence of aid

(26) A measure constitutes State aid in the meaning of Article 107 (1) TFEU if it is "*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 […] in so far as it affects trade between Member States*."

(27) The projects selected through a tender procedure will be financed through a levy on electricity consumption as described in recital (20) above. Portugal acknowledges that the measure is imputable to the Portuguese State. The Commission notes that both the regulatory authority setting the tariff (ERSE) and supplier of last resort (EDP Serviço Universal S.A.) are public entities, with an independent status from the government.

(28) As the Commission noted in the Decision in case SA.39347,[2] the fact that a measure is not financed directly by the State but by a public or private body established or appointed by the State to administer the aid does not exclude that that measure is financed through State resources.[3] In the present case, in particular, the State created and imposed the UGS tariff. The State has also defined the purpose and destination of the tariff which serves inter alia to finance the renewable feed-in premium of this scheme. The Commission therefore concludes that the funds involved in the scheme are under control of the State and constitute State resources and that the measure is imputable to the State.

(29) Furthermore, the notified measure will provide a selective advantage to the beneficiaries selected by the tenders. The notified measure will allow beneficiaries to receive an additional compensation beyond that which they would obtain on the Portuguese electricity market. The notified measure will therefore confer an economic advantage to certain undertakings.

(30) The projects remunerated with the average market price will receive a fixed tariff and will not be exposed to the volatility of wholesale electricity prices. Moreover,

---

[2] Decision not yet published.

[3] See also Judgment of 27 September 2012, *France v Commission*, T-139/09, EU:T:2012:496, paragraphs 61 to 65, Judgment in *Vent De Colère and Others*, C-262/12, EU:C:2013:851, paragraph 25. Under the above mentioned jurisprudence, subsidies financed through para-fiscal charges or contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation imply a transfer of State resources, when administered by entities designated by the State. "*The Court has held that funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities (see, to that effect, Case 173/73 Italy v Commission [1974] ECR 709, paragraph 35).*"

due to the combined effect of the Floor and prices Cap (described in recital (10) above) generators are likely to receive a higher average price for the electricity produced compared to the market price. For example, according to simulations carried out by Portugal using MIBEL spot prices data from 2007 to 2014, it appears that, applying the Floor and Cap, the average electricity price would be 3.2 EUR/MWh higher than market price. This amount will provide an additional compensation to selected undertakings. Moreover, generators benefitting of the measure will not be exposed in full to the volatility of market prices, which constitutes for them an economic advantage. Therefore, the Commission concludes that the mechanism described in recitals (9) and (10) above entails selective advantage.

(31) Similarly, projects remunerated with the long term market price are liable to receive remuneration higher than other participants in the market. For example, the long term market price for Portugal described in recital (11) above (i.e. 65 EUR/MWh) is higher than the average spot market price in Portugal from 2007 to 2014 (i.e. 47 EUR/MWh). Moreover, generators receiving a fixed price will not be exposed to market risks. Therefore, the Commission concludes that also the mechanism described in recital (11) above provides a selective advantage to its beneficiaries.

(32) Electricity is widely traded between Member States and therefore the notified measure is likely to distort the competition on the electricity market and affect trade between the Member States. In this particular case, Portugal is interconnected with Spain and participates in the MIBEL. The measure is therefore liable to affect electricity trade between Portugal and Spain.

(33) In conclusion, the notified measure (in all its three variants) constitutes State aid in the meaning of Article 107(1) TFEU.

3.2. Legality

(34) No aid will be granted before a positive Commission decision. The Portuguese authorities did not put the aid measure into effect before a final Commission decision. Thus, Portugal has complied with the stand-still obligation set out in Article 108(3) TFEU.

3.3. Compatibility under the Guidelines on State aid for environmental protection and energy 2014-2020

(35) The Commission notes that the notified measure aims at providing operating aid to the generation of electricity from renewable sources. As it regards support for electricity from renewable sources, the notified measure falls within the scope of the EEAG.

(36) The Commission has therefore assessed the notified measure based on the general compatibility provisions of the EEAG (set out in its section 3.2.) and based on the specific compatibility criteria for operating aid granted for electricity from renewable energy sources (sections 3.3.1 and 3.3.2. of the EEAG).

(37) The Commission notes that the measure complies with the transparency provisions in section 3.2.7 EEAG.

3.3.1. Objective of common interest

(38) The aim of the notified aid measure is to help Portugal to achieve the long term climate change and energy sustainability targets set by the EU as part of its EU 2020 strategy. The scheme will help Portugal to reach the objectives set out in the NREAP. In line with paragraphs 30 and 31 of the EEAG, Portugal defined the objective of the measure and explained the expected contributions toward ensuring a competitive, sustainable and secure energy system.

(39) The Commission considers that the notified aid measure is aimed at an objective of common interest in accordance with Article 107(3)(c) of the Treaty.

3.3.2. Need for state aid, appropriate instrument and incentive effect

(40) In paragraph 107 of the EEAG the Commission acknowledges that *"under certain conditions State aid can be an appropriate instrument to contribute to the achievement of the EU objectives and related national targets"*.

(41) Pursuant to paragraph 116 of the EEAG, in order to allow Member States to achieve their targets in line with the EU 2020 and 2030 objectives, the Commission presumes the granting of State aid is an appropriate instrument to promote energy from renewable sources, provided that all other conditions set therein are met.

(42) In line with paragraph 49 of the EEAG, the incentive effect occurs if the aid induces the beneficiary to change its behaviour towards reaching the objective of common interest which it would not do without the aid.

(43) The Portuguese authorities demonstrated that for the technologies eligible under the tender scheme the LCOE would be higher than the expected market price. The average levelised cost for renewable energy technologies in Portugal will be used to determine the Indicative Auction Price for the auctions. The tender scheme will allow project developers to bid at a price higher than the market price in order to cover their total costs. Without the aid and under normal market conditions, the rate of return for these projects would be below what beneficiaries normally require to develop that kind of projects. The Commission concludes that without the aid the projects benefitting from the scheme would not be financially viable. The aid therefore allows the beneficiaries to change their behaviour and invest in the renewable projects.

(44) According to Portugal, only a limited number of projects will be economically viable under the average market price and long term market price remuneration. Even for those projects, remuneration higher than the average market price and guaranteed for 15 years is considered needed to reduce the risk for investors. The Commission notes that there is no indication that a meaningful number of renewable energy projects will be developed purely on market terms. The guaranteed price is therefore liable to allow the beneficiaries to change their behaviour and invest in renewable energy projects.

(45) The Portuguese authorities confirmed that the applicants are required to submit an application form before being selected for funding under the scheme in a transparent selection process. Furthermore, aid will only be granted to projects that started work after the application for aid.

(46) Consequently, the Commission considers that the aid for the notified projects is necessary, granted by means of an appropriate instrument and provides the necessary incentive effect to address the objective of common interest.

3.3.3. Proportionality

(47) According to paragraph 69 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.

(48) The Commission assessed proportionality of the aid under the provisions of Section 3.3.2 EEAG on operating aid to energy from renewable sources.

(49) The Commission notes that the scheme is notified until December 31st 2016. Aid will be allocated with tenders except for small installations (that will receive a feed-in tariff, see recitals (9) to (11) above). Aid allocated with tenders will be granted as a premium on top of electricity market price, beneficiaries will be subject to standard balancing responsibilities and will have no incentive to sell electricity in case of zero energy prices. The Commission concludes that the scheme complies with the provisions of paragraph 124 EEAG, (taking into account the provisions for small installation described in paragraph 125)

(50) As stated in paragraph 126 EEAG, for the aid awarded on the base of bidding processes in 2015 and 2016, the Commission will presume that the aid is proportionate. The Commission therefore concludes that the aid granted by means of tenders is proportionate.

(51) Portugal estimates that the aid allocated with tenders will exceed the aid for small installation receiving a feed-in tariff. The Commission therefore concludes that the scheme complies with the provisions of paragraph 126 EEAG until January 1st 2017 (i.e., that in a transitional period covering the years 2015 and 2016, aid for at least 5% of the new capacity from renewable sources is granted with competitive bidding processes).

(52) Aid will be granted only to new installations and the duration of the aid will not exceed the normal depreciation period of the plant.

(53) As specified in paragraph 128 of the EEAG, in the absence of competitive bidding, the Commission assesses proportionality of the aid under the provisions of paragraph 131 of the EEAG.

(54) Portugal demonstrated that the average market price (see recital (9) above) or the long term market price (see recital (11) above) are below the Indicative Auction Prices set on the basis of the reference LCOE prices for the relevant renewable energy technologies in Portugal. Therefore, Portugal does not foresee any situation where the tariff exceeds the LCOE (which is not directly taken into consideration in setting the remuneration under those two remuneration mechanisms). Moreover, projects eligible under the scheme will not be eligible for other type of aid and remuneration will not exceed the normal depreciation period of the plant.

(55) In light of the above, the Commission concludes that remuneration granted to small scale installations satisfies the conditions of paragraph 131 EEAG (a), (b)

and (d) (while the provision of 131 (c) does not apply) and is, therefore, proportionate.

3.3.4. Distortion of competition and balancing test

(56) According to paragraph 90 of the EEAG, the Commission considers that aid for environmental purposes will by its very nature tend to favour environmentally friendly products and technologies at the expense of other, more polluting ones. Furthermore, the effect of the aid will in principle not be viewed as an undue distortion of competition since it is inherently linked to its very objective.

(57) According to paragraph 116 of the EEAG, in order to allow Member States to achieve their targets in line with the EU 2020 objectives, the Commission presumes the distortive effects of the aid are limited, provided that all other conditions set therein are met.

(58) In particular, the Commission notes that the measure explicitly requires that beneficiary of the aid to respect the Union legislation on waste hierarchy and Directive 2000/60/EC regarding modification of bodies of water.

(59) In light of what is set forth above in Sections 3.3.1, 3.3.2 and 3.3.3, the Commission considers that all relevant conditions are met, the overall balance of the proposed scheme is positive and the measure does not have undue distortive effects on competition and trade.

3.3.5. Other aspects – Compliance with Articles 30 and 110 TFEU

(60) In accordance with paragraph 29 of the EEAG, as the levy has the aim of financing the support for green electricity, the Commission has examined its compliance with Articles 30 and 110 TFEU.

(61) 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 Treaty if the revenue from such a charge is intended to support activities which specifically benefit the taxed domestic products. If the advantages which those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect 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 to this provision as regards the proportion used to offset the burden borne by the domestic products[4].

(62) If domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including consumption of imported electricity), then the method of financing, which imposes a burden on imported electricity not benefitting from this financing, risks having a discriminatory effect

[4] Joined Cases C-128/03 and C-129/03 AEM, EU:C:2005:224, paragraphs 44 to 47; Case C-206/06 Essent, EU:C:2008:413, paragraph 42.

on imported electricity from renewable energy sources and thereby violating Article 30 or 110 TFEU[5].

(63) The Portuguese authorities explained that the scheme will be financed by the tariff for the Global Use of System (*tarifa de Uso Global do Sistema* – UGS), levied on energy consumption. In this respect, Portugal notes that the UGS tariff covers the costs of a wide range of activities, including costs for maintenance and the operation of the system. Hence, the revenues from the UGS tariff are not necessarily allocated for the financing of the aid schemes for renewable energy. The Commission notes, however:

- that the notified aid scheme is financed through a charge imposed on electricity consumed in Portugal, domestic and imported production alike;
- that the charge is calculated on the amount of electricity consumed (and thereby imposed on the product itself).

(64) Where a Member State finances aid for domestic producers through a charge that is levied on imported and domestic products alike, the charge may have the effect of further exacerbating the distortion on the product market caused by the aid as such. For that matter, it is not necessary that the charge exclusively finances the aid, since the additional distortive effect can already be present if a sizable share of the revenues from the charge is used to finance the aid.

(65) In order to alleviate any concern regarding compliance with Articles 30 and 110 TFEU, Portugal ensured that producers located in other European Member States will be allowed to apply for a capacity of 12,4 MW, representing 6,2% of the notified scheme. The percentage figure has been established as a function of Portugal's total imports of green electricity from the neighbouring countries divided by the total electricity consumption in Portugal.

(66) The participation of RES-E producers from other Member States in the support scheme can be available upon the signing of a cooperation agreement between Portugal and the relevant Member State describing, among others, the rules to prove physical delivery of electricity. The Commission considers that this is in line with paragraph 122 of the EEAG which provides that Member States can set up cooperation mechanisms.

(67) The Commission considers that the opening of the scheme in this manner reduces the risk of possible discrimination against producers of green electricity in other Member States.

(68) In light of the above, the Commission considers that the financing mechanism of the notified aid measure does not infringe Article 30 or Article 110 TFEU.

3.3.6. Conclusion with regard to the compatibility of the measure

(69) In light of the above, the Commission considers that the notified scheme pursues an objective of common interest in a necessary and proportionate way without

[5] Case 47/69 France v Commission, EU:C:1970:60, paragraph 20. See also Case SA.38632 (2014/N) Germany – EEG 2014 – Reform of the Renewable Energy Law (not yet published in the OJ).

unduly affecting competition and trade, 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) of the Treaty on the Functioning of the European Union.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy and should not be published, please inform the Commission within fifteen working days of notification of this letter. If the Commission does not receive a reasoned request by that deadline, Portugal will be deemed to agree to the publication of the full text of this letter. If Portugal wishes certain information to be covered by the obligation of professional secrecy, please indicate the parts and provide a justification in respect of each part for which non-disclosure is requested.

Your request should be sent electronically in accordance with Article 3(4) of Commission Regulation (EC) No 794/2004,

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission