



EUROPEAN COMMISSION

Brussels, 6.12.2017
C(2017) 8456 final

PUBLIC VERSION

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**Subject: State Aid SA.47354 (2017/NN) – Estonia
Amendments to Estonian RES and CHP support scheme**

Sir,

1. PROCEDURE

- (1) On 19 January 2017, Estonia pre-notified amendments to their support schemes for renewable energy sources (RES) and highly efficient combined heat and power (CHP) plants. Those support schemes were approved by the Commission on 28 October 2014 by Commission decision SA.36023¹ (hereinafter the “2014 Decision”).
- (2) Following pre-notification contacts, Estonia formally notified the amended schemes to the Commission on 10 November 2017.
- (3) On the same day, 10 November 2017, the Estonian authorities also provided a language waiver and agreed that the decision will be adopted and notified in English as authentic language.

¹ JOCE C/44/2015, SA.36023 – Estonia - Support scheme for electricity produced from renewable sources and efficient co-generation, available here:
http://ec.europa.eu/competition/state_aid/cases/254765/254765_1614362_64_2.pdf

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2. DETAILED DESCRIPTION OF THE MEASURE/AID:

2.1. Description of the proposed amendments

- (4) On 28 October 2014, the Commission adopted the 2014 Decision raising no objections to the Estonian schemes supporting the production of electricity from RES and highly efficient CHP.
- (5) In particular, the 2014 Decision concerned amendments to an existing scheme in Estonia, described at section 2.3 of the 2014 Decision (“existing scheme”). Those amendments concerned on the one hand changes to the existing aid scheme for existing RES and CHP producers (amendments described in sections 2.4.1 and 2.4.2 of the 2014 Decision), and on the other hand the introduction of a new support regime (“new scheme”) for new RES and CHP producers (amendments described in section 2.4.3 of the 2014 Decision).
- (6) After the adoption of the 2014 Decision, the notified changes to the existing support scheme described in sections 2.4.1 and 2.4.2 of the 2014 Decision did not enter into force. Instead, the Estonian authorities continued to apply the existing scheme as described in section 2.3 of the 2014 Decision. They however envisage to make some changes to the existing scheme, as described in section 2.1.1 of this decision below (the existing scheme together with these amendments is referred to as the “prolonged and amended existing scheme”).
- (7) The Estonian authorities moreover envisage to make certain amendments to the new scheme, described in section 2.1.2 of this decision below.
- (8) They notified the combination of these amendments to the existing scheme and to the new scheme for approval to the Commission.

2.1.1. Amendments to the existing scheme

- (9) Estonia firstly seeks to include in the existing scheme a definition of “existing producers”, to identify projects which could still apply for aid without being subject to a bidding process. The current proposal is different from the initial amendment proposed in recital (17) of the 2014 Decision.
- (10) At the time of the adoption of the 2014 Decision, Estonia had in place a scheme that supported RES and highly efficient CHP production via fixed feed-in premiums calculated and granted administratively. Although paragraph (126) of the Environmental and Energy Aid Guidelines (EEAG)² requires competitive bidding processes for granting aid only as of 1 January 2017, Estonia envisaged to introduce competitive bidding processes for new projects already as of 1 January 2015 (see recital (27) in conjunction with recital (28) of the 2014 Decision), together with the switch from fixed to floating feed-in premiums (see recital (31) of the 2014 Decision).
- (11) To identify projects which could still apply for aid without being subject to a bidding process, Estonia distinguished between “existing” and “new” producers. The latter would have to apply for aid following a competitive bidding procedure.

² Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1).

It defined “existing producers” (see recital (17) of the 2014 Decision) as “installations which by 1 March 2013 were (1) already producing electricity or (2) had a building permit or (3) were in contractual relations providing district heating or (4) had received financial investment support”.

- (12) Estonia seeks to change this definition and envisages to consider the following to constitute “existing producers”:
 - (a) A producer with an electrical capacity equal to or above 1 MW who at the latest on 31 December 2016 started the construction works on the investment, or sealed a firm commitment to order equipment, or has taken any other commitment that makes the investment irreversible. The commitment that makes the investment irreversible does not include the purchase of land or the obtaining of permits or preparatory works. For take-overs, the moment of commitment that makes the investment irreversible means the moment of acquiring the assets directly linked to the acquired establishment.
 - (b) A producer with an electrical capacity of less than 1 MW whose production unit produces electricity on 31 December 2018 at the latest.
- (13) Secondly, Estonia seeks to postpone the end date of the existing scheme from 31 December 2014 to 31 December 2016.
- (14) In view of the above, and in order to demonstrate compliance of the prolonged and amended existing scheme with the applicable State aid rules during the period 2015-2016, Estonia:
 - (a) provided updated levelised cost (LCOE) calculations, using the same parameters as explained at recital (25) of the 2014 Decision, to demonstrate that the RES/highly efficient CHP projects covered by the scheme in the period since 1 January 2015 obtained an IRR of 7.1% at most;
 - (b) explained that all RES producers in Estonia are selling their electricity onto the market;
 - (c) explained that all RES producers in Estonia are subject to balancing responsibilities; and
 - (d) explained that, despite the absence of a specific rule preventing support during hours of negative prices, no support has been paid in such hours since there have been no negative prices in the Estonian market. Moreover, in line with recital (34) of the 2014 Decision, Estonia re-confirmed that the TSO will deduct the amount of negative price hours from the monthly production amount. According to Estonia, this means that the envisaged scheme does not provide incentives for generators to produce when prices are negative.
- (15) All other provisions of the existing scheme remain unaltered.

2.1.2. Amendments to the new scheme

- (16) Estonia seeks to postpone the date for granting aid to “new producers” via a competitive bidding procedure from 1 January 2015 (Section 2.4.3 of the 2014 Decision) to 1 January 2017.
- (17) Estonia also seeks to organise competitive bidding procedures for RES production for the purposes of “statistical transfers”. According to this proposal, the Minister of Economic Affairs and Infrastructure may organise a competitive bidding process, as described in recitals (28) to (32) of the 2014 Decision in case another Member State wishes to enter into a statistical transfer agreement with Estonia to buy electricity from RES to meet its 2020 targets and Estonia needs to procure additional capacity to satisfy this demand. If another Member State for example wishes to buy 2 TWh per year of RES electricity and Estonia has a surplus of only 1.5 TWh per year, Estonia may organise a competitive bidding process to find the cheapest producer for an additional 0.5 TWh.
- (18) All other provisions of the new scheme remain unaltered.

2.2. Formal complaint of a biomass producer

- (19) On 9 June 2017 the Commission received a formal complaint from a biomass producer concerning the amended scheme, registered under case number SA.48491. Pursuant to this complaint, the statistical transfer auctions described in recital (17) would be tailored to support Eesti Energia’s power plants currently fuelled by oil shale.³ These plants have already been converted to allow co-firing of biomass and, thanks to auctions, could use more (subsidised) biomass for the generation of electricity instead of oil shale. In particular, the biomass producer alleges that:
 - (a) Only larger installations using biomass as RES-fuel can *de facto* compete in the statistical transfer auctions as the electricity will have to be delivered at short notice and in predictable quantities.
 - (b) Only Eesti Energia has the expected co-firing installations to deliver the electricity at short notice and in the probably required quantities.
- (20) The complainant also argues that, assuming the aid granted through the statistical transfer auctions indeed benefits Eesti Energia’s main biomass co-firing units (the Auvere power plant and CHP block of Baltic power plant), the sheer size of the additional biomass feedstock (fuelwood) would risk distorting the upstream market for higher quality biomass (industrial grade low quality wood/fuelwood⁴). In particular, the complainant argues that:
 - (a) Eesti Energia intends to burn up to 3.1 million cubic meters of biomass per year in its co-firing plants (a comparison is made to the consumption by the Drax power plant, subject to State aid case SA.38760⁵);

³ Eesti Energia is the incumbent electricity production company in Estonia.

⁴ Industrial grade low quality wood or fuelwood is one of many biomass sources.

⁵ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38760

- (b) the impact on Estonian forests would be considerable, since this quantity represents about 31 % of Estonia's maximum annual prescribed deforestation quota of 10 million cubic meters per year; and
- (c) the impact on fuelwood prices is expected to be substantial (a comparison is made with a 30 % surge in prices following Eesti Energia's decision to use larger quantities of fuelwood – though only one twelfth of the capacity it now intends to use – for one of its oil shale plants in the past).

2.3. Critical observations filed by interested parties

- (21) On 14 February 2017, the Commission received critical observations from Nelja Energia, a wind producer located in Estonia, arguing that Eesti Energia should not be considered an “existing producer” within the meaning of the amended scheme in relation to the Tootsi wind farm under development in *Metsaküla, Vändra* parish, *Pärnu* county, Estonia (the “Tootsi project”). According to Nelja Energia the Tootsi project should therefore have been awarded aid through a competitive bidding process in line with footnote 66 EEAG as the Tootsi project does not meet the requirements of the definition of “start of works” described in paragraph 19 (44) EEAG. They argue that (i) the land rights for the Tootsi project were not legally obtained by Eesti Energia, and (ii) Eesti Energia has not made substantial financial investments in the Tootsi project before 1 January 2017. Moreover, they argue that Eesti Energia did not conclude contracts in relation to the Tootsi project which established commitments which would make the project irreversible.
- (22) The Commission received further similar critical observations on the amended definition of “existing producers” and its application to the Tootsi project from Adepto OÜ, an investment company active in Estonia (on 17 May 2017), from the Estonian Wind Technology Union, representing wind technology innovators and wind farm developers in Estonia (on 13 July 2017) and from FootonVolt, a solar power producer located in Estonia (on 17 July 2017).
- (23) The Commission forwarded all formal complaints and written critical observations to the Estonian authorities. Their reply is summarised in the following recitals.

2.4. Observations by Estonia on the statistical transfer auctions and the potential impact on the biomass market

- (24) In reply to the complaint from the biomass producer, and in particular his allegations that the statistical transfers would favour Eesti Energia, Estonia explained that:
 - (a) If the statistical transfer auctions are in fact organised, which is dependent on the interest of other Member States and therefore highly uncertain, they will be open to all new RES (i.e. projects which do not already contribute to the RES production in Estonia) or to all projects that do not yet receive aid under the RES scheme. There are therefore no guaranteed revenues for Eesti Energia or any other Estonian producer from the statistical transfer auctions.

(b) As to the eligibility conditions, only two conditions are currently being discussed. Firstly, Estonia will apply a minimum bid requirement of 20 GWh, in order to minimize the administrative burden. This amount is lower than the two TWh mentioned by the complainant. Moreover, this figure is being discussed with market participants and would be considered generally acceptable. Secondly, Estonia requires a guaranteed production date, before 31 December 2020, in view of the 2020 target deadline.

(25) In reply to the complainants allegations that the statistical transfer aid risks distorting the upstream market for higher quality biomass (industrial grade low

quality wood), the Estonian authorities have argued that:

(a) it is firstly highly uncertain that statistical transfer auctions will be organised at all, since this is dependent on the interest of other Member States;

(b) even if there is such interest, these statistical transfer auctions are likely to be very competitive since several Member States already attained a surplus RES production to date;

(c) the draft act amending the Electricity Market Act sets an annual ceiling of 500,000 m³ for producing RES electricity using locally procured biomass. This ceiling can only be exceeded if the Government of Estonia – on the basis of a market analysis – decides that the additional quantities of biomass (exceeding 500,000 m³) would not harm the local biomass market;

(d) the biomass consumption of Eesti Energia's main biomass co-firing installations (the Auvere power plant and CHP block of Baltic power plant) is estimated at 4,000 GWh of primary energy, far below Drax's wooden pellet consumption of ca. 30,000 GWh of primary energy;

(e) the felling rate of about 10 million m³ referred to by the complainant is an average felling rate of Estonian forests over the last years, but the National Forest Strategy has determined that the optimal felling rate would be between 12-15 million m³;

(f) Estonia's pellet exports, a business engaged into by the complainant, exceed by one third the potential annual biomass consumption of Eesti Energia's main generation assets which could be used for the purpose of statistical transfers. This puts the volume of the possible statistical transfer auctions into perspective. Moreover, the impact on domestic fuelwood prices may be mitigated by a decrease in exports.

2.5. Observations by Estonia on the qualification of Eesti Energia as an “existing producer” regarding the Tootsi wind farm

(26) Estonia provided documents with the objective to show that:

- (a) prior to 1 January 2017, Eesti Energia started construction works on the Tootsi project;
- (b) prior to 1 January 2017, Eesti Energia signed a final and binding grid connection agreement with the transmission system operator, Elering AS (the “TSO”), regarding the development of the grid connection for the Tootsi project;
- (c) prior to 1 January 2017, Eesti Energia made substantial financial commitments in relation to the Tootsi project;
- (d) prior to 1 January 2017 and under the existing scheme, the Estonian authorities had no discretion in deciding whether to grant aid when installations would meet the legal requirements. Eesti Energia could therefore legitimately expect to receive aid; and
- (e) for the above reasons, Eesti Energia should be considered an “existing producer” in relation to the Tootsi project, as it fulfils the conditions of footnote 66 EEAG.

2.6. Observations by Eesti Energia on the qualification of Eesti Energia as an “existing producer” regarding the Tootsi wind farm

- (27) Eesti Energia provided a legal analysis of the Tootsi project’s development status prior to 1 January 2017. In particular, Eesti Energia argued that:
- (a) “start of works” as defined in paragraph (19) (44) EEAG contains a list of non-cumulative conditions to determine whether work on a project has started;
 - (b) it would be established case law of the European Court of Justice⁶ that there are no materiality thresholds for “start of works”. Even carrying out a small percentage of the total investment could therefore constitute start of works. Eesti Energia therefore considered this condition to be fulfilled in the case at hand since Eesti Energia completed the excavation works for two wind turbine foundation plots before 1 January 2017 (The works were halted mid-December 2016 by court order in view of a legal challenge regarding the title to the land);
 - (c) Eesti Energia performed extensive studies with regard to the Tootsi project prior to 1 January 2017 which went beyond preliminary feasibility studies to determine the cost of the project or studies required to obtain a building permit or meet other statutory obligations. In particular, Eesti Energia performed extensive bird and bats studies as well as extensive geotechnical studies in relation to the Tootsi project;

⁶ Reference is made to the judgment of the General Court T-551/10 of 13 September 2013, *Fri-El Acerra Srl/Commission*, paragraph 67 (decision available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d58bd5ce48a9eb4fdb575a06c7819a19b.e34KaxiLc3eQc40LaxqMbN4PaxuMe0?text=&docid=141086&pageIndex=0&d oclang=FR&mode=lst&dir=&occ=first&part=1&cid=584724>).

- (d) by signing the grid connection agreement with the TSO, Eesti Energia had taken full financial obligations as regards the subject matter of the contract, which should therefore be considered a firm (i.e. contractual) commitment to order equipment or, in any event, a commitment that makes the investment irreversible;
- (e) for all of the above reasons, Eesti Energia asks the Commission to explicitly confirm that the Tootsi project fulfils the conditions of footnote 66 EEAG.

3. ASSESSMENT OF THE MEASURE

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

- (28) The notified changes to the existing and new schemes do not alter the Commission's conclusion in section 3.1 of the 2014 Decision that those measures constitute State aid within the meaning of Article 107(1) TFEU. This view is moreover accepted by Estonia in its notification.

3.2. Lawfulness of the aid

- (29) By continuing the existing scheme described in section 2.3 of the 2014 Decision after 1 January 2015 and thereby allowing new producers to join the scheme, the Estonian authorities have put the aid measure into effect before a final Commission decision.
- (30) Moreover, by postponing the entry into force of the new scheme to 1 January 2017, the Estonian authorities have modified the aid measure without prior Commission approval.
- (31) Estonia has therefore breached the stand-still obligation set out in Article 108(3) TFEU.

3.3. Assessment of the amendments to the existing scheme and assessment of the prolonged and amended aid scheme

- (32) Estonia firstly seeks to amend the definition of "existing producers", as described at recital (12) above.
- (33) The definition consists of two elements, which will be assessed separately in sections 3.3.1 and 3.3.2.

3.3.1. Amendment of the definition of "existing producers" with an installed capacity equal to or above 1 MW

- (34) It follows from paragraph (126) EEAG that, as a rule, as from 1 January 2017 operating aid for electricity from renewable energy sources must be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria.
- (35) Footnote 66 EEAG however provides an exception to this rule. In particular, pursuant to footnote 66 EEAG, the requirement to grant aid in a competitive bidding process does not apply to "installations that started works before 1

January 2017 and had received a confirmation of the aid by the Member State before such date”. These two conditions are cumulative.

- (36) With respect to the first condition, “start of works” is defined in paragraph 19 (44) EEAG as meaning “either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works”. It follows from this definition that the conditions of “start of works” are not cumulative, but that works can be considered to have started if one of the three conditions is fulfilled.
- (37) The Commission notes that the definition of "existing producer" proposed by Estonia, cited at recital (12)(a) above, is aligned with the wording of the EEAG regarding the "start of works" requirement.
- (38) With respect to the second condition, the Estonian authorities explained that any aid applicant who meets the requirements set in the law would receive a subsidy under the amended existing aid scheme. In other words, the Member State authorities have no discretion regarding the granting or not of aid to a specific aid applicant that meets the legal and technical requirements. The Commission notes that in such a case the confirmation of the aid by the Member State is automatic, and can therefore be assumed as soon as a project meets the conditions for aid set in the law. In this particular case, whether or not a particular project can still receive aid under the amended existing scheme will therefore depend entirely on whether that project meets the conditions for being an “existing producer”.
- (39) In view of the above, the Commission concludes that the definition of "existing producer" cited at recital (12)(a) above is in conformity with the requirements in the EEAG.
- (40) As explained at recital (35) above, footnote 66 EEAG constitutes an exemption to the general rule that from 1 January 2017 onwards, new RES or highly efficient CHP projects can only receive aid via a competitive bidding procedure. The exemption allows Member States to smoothen the transition to the new provisions requiring a competitive bidding process.
- (41) With respect to the application of the amended definition of "existing producer" to specific projects, such as the Tootsi project, the Commission considers that the verification of whether the legal conditions are met in practice, is in essence a task for the Member State’s granting authorities, *in casu* the TSO.
- (42) Footnote 66 EEAG might be read as a transposition of the legal principle of “legitimate expectations” and is closely linked to the State aid requirement of “incentive effect”. In practice, this means that the granting authorities should consider as “existing producer” those producers whose project on 1 January 2017 was in such state of development that it would very likely be completed so that they should receive support under the existing support scheme (legitimate expectations). This requires as a minimum that the project developers had obtained the necessary state authorisation for constructing the project, and that they had the legal title to the land on which the project would be developed.

- (43) The “start of works” definition in paragraph (19) (44) EEAG provides more details in this respect. Footnote (66) EEAG should thus be read and interpreted by the granting authorities against this background. The Commission notes in this respect that the responsibility for the correct implementation of aid measures remains with the Member States via its relevant authorities.
- (44) In the event that the granting authority would consider that works on a certain project have been started, within the meaning of paragraph (19) (44) EEAG, prior to 1 January 2017, the Commission is of the opinion that such consideration relates to the project as such.

3.3.2. Amendment of the definition of “existing producers” with an installed capacity below 1 MW

- (45) Paragraph (127) EEAG provides that “[a]id may be granted without a competitive bidding process as described in paragraph (126) to installations with an installed electricity capacity of less than 1 MW[...]" even after 1 January 2017.
- (46) It follows that the prolongation of the existing scheme beyond 1 January 2017 for small installations, which implies that these installations are exempted from the competitive bidding requirement in paragraph (126) EEAG even beyond that date, is in line with paragraph (127) EEAG.
- (47) The Commission therefore concludes that the definition of "existing producer" cited at recital (12)(b) above is in conformity with the requirements in the EEAG.

3.3.3. Amendment of the end date of the existing scheme

- (48) Estonia also seeks to postpone the end date of the existing scheme from 31 December 2014 to 31 December 2016.
- (49) This prolongation implies a change in the applicable assessment framework since the 2014 Decision assessed the existing scheme only under the previous Community Guidelines on State aid for environmental protection from 2008⁷.

3.3.4. Assessment of the prolonged and amended existing scheme

3.3.4.1. Common objective

- (50) As explained at recital (93) of the 2014 Decision, the aim of the prolonged and amended existing scheme regarding RES is to help Estonia achieve the renewable energy targets set by the EU as part of its 2020 strategy, in particular to meet its national target of a 25 % share of energy from RES in the national gross final consumption by 2020 and to ensure its contribution towards the EU RES target by 2030.
- (51) As moreover explained at recital (95) of the 2014 Decision, the aim of the prolonged and amended existing scheme in relation to highly efficient CHP is to incentivise the use of highly efficient cogeneration of energy which can include waste fuel, while still respecting the waste hierarchy principle enshrined in paragraph (118) EEAG. In this way, Estonia seeks to contribute to meeting the

⁷ Guidelines on State aid for environmental protection, OJ C 82/1, 01.04.2008

Union objective of saving 20% of the Union's primary energy consumption by 2020.

- (52) In view of the above, the Commission considers that the prolonged and amended existing scheme is clearly aimed at an objective of common interest in accordance with Article 107(3) of the Treaty, both as regards the support to RES and highly efficient CHP.

3.3.4.2. Need for State aid

- (53) According to subsection 3.2.2 EEAG, Estonia has to demonstrate that there is a need for State intervention and in particular that the aid is necessary to remedy a market failure that otherwise would remain unaddressed. In the case of RES electricity production, the Commission presumes that a residual market failure remains, which can be addressed through aid for renewable energy, for the reasons set out in paragraph (115) EEAG.
- (54) Aid for cogeneration addresses a market failure linked to negative externalities by creating individual incentives to meet environmental targets in the field of energy efficiency and resource-efficient energy generation. Estonia provided information to substantiate that there are still insufficient incentives to invest in energy efficient generation as the costs of pollution are not fully internalised. Therefore, a market failure continues to exist in line with paragraph (35)(a) EEAG.

3.3.4.3. Appropriateness of the aid

- (55) In paragraph (107) 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*".
- (56) For the prolonged and amended existing scheme, Estonia has demonstrated that without the aid there would be no further investment in RES electricity generation since the costs are above the electricity market price. The operating aid is also needed to ensure the fulfilment of the RES target by 2020 and ensure RES contributions by 2030. Estonia has provided calculations, referred to at recital (14)(a) above, demonstrating that support for electricity production from RES is still needed.
- (57) On the basis of these estimates, the Commission concludes that, due to persistent negative externalities, the deployment of RES installations would not be financially viable without State aid.
- (58) Paragraph (27)(c) EEAG stipulates that in order to be deemed compatible State aid measures must be an appropriate policy instrument to address the objective of common interest.
- (59) According to paragraph (116) EEAG, in order to allow Member States to achieve their national energy and climate change targets, the Commission presumes aid to energy from RES to be appropriate and have limited distortive effects provided all other compatibility conditions are met.
- (60) Compliance with all other compatibility conditions is assessed in Sections 3.3.4.4 to 3.3.4.6 below. Consequently, the Commission considers that for the prolonged

and amended existing scheme in relation to RES electricity production, the aid is an appropriate instrument to address the objective of common interest.

- (61) The Commission moreover reiterates its finding at recital (100) of the 2014 Decision, that there are no indications that the current economic and legal context in Estonia provides for a less distortive instrument to incentivise high efficient cogeneration, in particular as the requirements of the Energy Efficiency Directive are already taken into account. It can thus be concluded that the existing scheme is also an appropriate instrument in relation to highly efficient CHP production.

3.3.4.4. Incentive effect

- (62) In line with paragraph 49 EEAG, the incentive effect occurs if the aid induces the beneficiaries to change their behaviour towards reaching the objective of common interest which they would not do without the aid.
- (63) The Commission notes, on the basis of the calculations submitted by the Estonian authorities (see recital (14)(a)), that in the absence of aid RES installations would not be deployed at the required scale and pace, as without the aid such projects would not be financially viable. The aid has therefore an incentive effect, since it determines the beneficiaries to change their behaviour and invest in RES projects.
- (64) The same reasoning applies *mutatis mutandis* to highly efficient CHP installations.

3.3.4.5. Proportionality

- (65) It follows from the postponement of the new scheme (see recital (16) above) that Estonia continued granting fixed feed-in premiums, beyond 1 January 2015, to all “existing producers”, irrespective of their size, as described in recital (12) of the 2014 Decision.
- (66) In particular, this means that the following fixed premiums will be paid out on top of the market price during 12 years following the start of production of the respective installations:
- (a) for electricity produced from RES, including CHP using RES: EUR 53.7/MWh; and
 - (b) for electricity produced in highly efficient CHP using natural gas, retort gas, peat and municipal waste: EUR 32/MWh
- (67) Consequently, the floating premiums described in recitals (19) to (24) of the 2014 Decision have not been applied by Estonia as part of the prolonged and amended existing scheme.
- (68) As explained at recital (83) above, paragraph (126) EEAG requires competitive bidding processes for RES as of 1 January 2017. For the years 2015 and 2016, paragraph (126) EEAG requires that aid for at least 5 % of the planned new electricity capacity from RES is granted in a competitive bidding process (“pilot

tenders"). Paragraph (126), third subparagraph EEAG however lists three possible exemptions from the obligation of competitive bidding processes.⁸

- (69) Estonia explained that there was no limit to the overall amount of aid and the overall number of applications that could be made under the prolonged and amended existing scheme in the years 2015 and 2016. If, under these conditions, Estonia had organised pilot tenders for 5 % of the RES capacity, these tenders would not have been effective. The reason is that the RES producers would always have had the option to apply for aid directly under the general and open-ended FiP scheme in place. In other words, the RES producers would only have had an incentive to participate in the pilot tenders if they could have obtained more aid than they would in any case have received under FiP scheme. For this reason, and based on the exemption provided in paragraph (126), third subparagraph, (b) EEAG, the Commission considers that a competitive bidding process for 5 % of the RES capacity in the period 2015-2016 would, if anything, have led to higher support levels.
- (70) In the absence of a competitive bidding process, the EEAG however require, in order to ensure the proportionality of the aid, that the conditions of paragraph (128) EEAG (including its cross-references to paragraphs (131), (124) and (125) EEAG) are complied with. To that effect, as explained at recital (14), Estonia:
- (a) provided updated LCOE calculations, using the same parameters as explained at recital (25) of the 2014 Decision, which show that the RES/highly efficient CHP projects covered by the scheme in the period since 1 January 2015 obtained an IRR of 7.1 % at most, so that the measure complies with paragraph (131) EEAG;
 - (b) explained that all producers are selling their electricity onto the market so that the measure complies with paragraph (124)(a) EEAG;
 - (c) explained that all producers in Estonia are subject to balancing responsibilities so that the measure complies with paragraph (124)(b) EEAG; and
 - (d) explained that, despite the absence of a specific rule preventing support during hours of negative prices, no support has been paid in such hours because Estonia confirmed that there have been no negative prices in the Estonian market. Moreover, in line with recital (34) of the 2014 Decision, Estonia re-confirmed that the TSO will deduct the amount of negative price hours from the monthly production amount. This means that the envisaged scheme does not provide incentives for generators to produce when prices are negative. The measure therefore complies with paragraph (124)(c) EEAG.
- (71) With respect to the floating aid premiums, the Commission took the view in the 2014 Decision, that the maximum aid levels set by the floating premiums “[do]

⁸ The Commission has already applied the competitive bidding exemptions in paragraph (126), third subparagraph, (a)-(c) EEAG to the pilot tenders; see e.g. JOCE C/369/2016, SA.43128 (2015/N) – Luxembourg – Modification du soutien aux SER au Luxembourg, at recital (88) *et seq.* and JOCE C/284/2016, SA.42218 (2015/N) – Finland – Operating aid for forest chips fired power plants, at recital 50 *et seq.*

not alter the aid level to an extent that is more advantageous for the existing CHP and RES producers, but rather [aim] to avoid future overcompensation in the foreseeable event of increasing electricity prices". In other words, although these caps did not appear necessary to curb overcompensation at the time of the 2014 Decision, the 2014 Decision accepted that the caps might become necessary in the case of increasing electricity prices.

- (72) The Estonian authorities now assume an annual average increase of 1 % in electricity prices for the coming years and, in view of this, do not see a risk of overcompensation to "existing producers" even in the absence of the maximum aid levels set by the floating premiums, since these levels are not likely to ever be reached.
- (73) As explained at recital (70)(a) above, the Estonian authorities have provided updated LCOE calculations, using the same parameters as explained at recital (25) of the 2014 Decision, for all existing RES/highly efficient CHP projects covered by the scheme in the period since 1 January 2015. The Commission has assessed these calculations together with the calculations it had already received in 2014 regarding all other "existing producers", and found no risk of overcompensation.
- (74) The Commission also notes in this respect that the aid will be paid out during a 12-year period only and that the overall annual cap of 600 GWh on subsidies to "existing producers" using wind power, described in recital (14) of the 2014 Decision, will remain in place. The Commission considers that this overall annual cap on support under the scheme also contributes to minimize the risk of potential overcompensation of "existing producers".
- (75) In view of the above, the Commission concludes that the prolonged and amended existing scheme is proportionate to reach the common objectives, both of RES electricity production and of highly efficient CHP production.

3.3.4.6. Distortions of competition and trade

- (76) According to paragraph (90) 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. Moreover, 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.
- (77) According to paragraph (116) EEAG, the Commission presumes aid to electricity from RES to have limited distortive effects provided all other compatibility conditions are met. In the present case, the applicable conditions laid out in section 3.3.2.1 EEAG are fulfilled, for which reason the Commission considers that the aid to RES-e installations under the prolonged and amended existing scheme, including the changes approved in section 3.3 above, does not have undue distortive effects on competition and trade.
- (78) As the prolonged and amended existing scheme, including the changes approved in section 3.3 above, also meets the applicable conditions for aid to highly efficient cogeneration, the Commission concludes that the aid to cogeneration does not have any undue distortive effects on competition and trade.

- (79) Consequently, the Commission concludes that the distortion of competition caused by the prolonged and amended existing scheme is balanced by the positive contribution towards the common policy objectives it serves.

3.3.4.7. Conclusion

- (80) The Commission concludes that the prolonged and amended existing scheme complies with Article 107(3) TFEU.

3.4. Assessment of the amendments to the new scheme

- (81) The new scheme was considered State aid (see recital (54) of the 2014 Decision), assessed against (see section 3.3.5 of the 2014 Decision), and found compatible with the EEAG (see section 4 of the 2014 Decision) in the 2014 Decision. The Commission notes that the amendments proposed to the new scheme are not of such a nature to alter the Commission's assessment of the new scheme under the EEAG. In the following section, the Commission therefore limits its assessment to the amendments to the new scheme, and the formal complaint received in that respect (described at section 2.2 above).

3.4.1. Amendment of the starting date for competitive bidding procedures

- (82) As a first amendment to the new scheme, Estonia seeks to postpone the date for granting aid to “new producers” via a competitive bidding procedure from 1 January 2015 (section 2.4.3 of the 2014 Decision) to 1 January 2017.
- (83) Paragraph (126) EEAG requires competitive bidding as from 1 January 2017. The proposed amendment is therefore in line with this requirement in paragraph (126) EEAG.
- (84) Paragraph (126) EEAG also requires that for the years 2015 and 2016 aid for at least 5 % of the planned new electricity capacity from RES is granted in a competitive bidding process (“pilot tenders”). The Commission concluded at recitals (68) and (69) above that Estonia was exempted from the obligation to organise pilot tenders by application of paragraph (126), third subparagraph, (b) EEAG. Moreover, Estonia substantiated proportionality of the aid in that period in compliance with paragraph (128) EEAG (including its cross-references to paragraphs (131), (124) and (125) EEAG), as set out at recital (70) above.
- (85) In view of the prolongation of the existing RES/highly efficient CHP scheme for another two years, Estonia has agreed to implement a remedy for the potential violation of Article 30/110 TFEU in relation to imported green electricity that is similar to the remedy contained in recital (127) of the 2014 Decision, i.e. an investment to increase Estonia's interconnection with neighbouring EU Member States. The compensatory amount reserved for investments in such interconnection projects is thus increased accordingly. Estonia estimates that the possible imported and consumed quantity of electricity during 2015-2016 was 734 GWh, of which around 256 GWh was from RES. This represents a possible discrimination of around EUR 2.5 million. Estonia has committed to invest this amount in a project to synchronise the Estonian electricity grid with the NordPool market area, a project with a cost of EUR 0.8–1 billion which would enable further power flows from other Member States to Estonia. This project will

therefore benefit foreign producers and compensate them for the potential past discrimination.

- (86) Moreover, Estonia re-confirms its commitment in recital (125) of the 2014 Decision to open up the future competitive bidding processes for RES/highly efficient CHP support to foreign producers without restrictions.

3.4.2. Introduction of possibility of statistical transfers

- (87) With its second amendment of the new scheme, Estonia seeks to organise competitive bidding procedures for RES and highly efficient CHP production for the purpose of “statistical transfers”, as described at recital (16) above.

- (88) The Commission also received a complaint from a biomass producer, referred to at recitals (19) and (20) above, that consists of two claims:

- (a) the future statistical transfer auctions would be tailored to Eesti Energia’s oil shale plants, so that those can use more (subsidised) biomass for the generation of electricity instead of oil shale; and
- (b) the size and capacity of those plants to burn biomass would be such as to create distortions to the upstream market for higher quality biomass (industrial grade low quality wood/fuelwood).

- (89) With respect to the first claim, the Commission considers that it is irrelevant from a State aid perspective whether Estonia organises competitive bidding procedures to achieve its own 2020 RES targets or to statistically transfer the RES generation beyond its target to other Member States as long as support complies with the EEAG.

- (90) Moreover, the Commission notes that the EEAG explicitly provide for the possibility to grant support to existing fossil-fuel power plants which have the option of co-firing biomass, in order to promote the use of biomass rather than fossil fuels (see paragraph (132) *seq.* EEAG).

- (91) With respect to the allegations made by the complainant and summarised in recital (19) above, i.e. that the conditions of the competitive bidding process would favour Eesti Energia, the Commission notes that, as such bidding processes have not yet been materialised, details as regards their terms and conditions are not yet decided; therefore, these allegations are mere assumptions which find no basis in the law nor in its implementation. Therefore the Commission takes the view that the complainant’s allegations to this extent are unsubstantiated.

- (92) Estonia has, in contrast, explained that, if the statistical transfer auctions were to take place, they will be subject to the same conditions as other RES auctions. In particular, Estonia explained that the auctions will be open to all types of RES generation and they will be based on clear, transparent and non-discriminatory criteria. As regards a claim that the auctions are tailored to Eesti Energia's needs, the Commission notes that the currently discussed minimum size threshold of twenty GWh is much lower than the two TWh mentioned by the complainant, whereas the contested production deadline (production before 31 December 2020) necessarily results from the objective of the auctions (help to reach 2020 targets).

The Commission therefore currently has no reasons to consider that the statistical transfer auctions will be discriminatory.

- (93) Moreover, in response to the second part of the complaint, Estonia has explained that even if the statistical transfer auctions were won by Eesti Energia's main

biomass co-firing installations, the impact on the local biomass fuelwood market would be limited due to:

- (a) an annual ceiling of 500,000 m³ for producing renewable electricity using locally produced biomass;
 - (b) a lower fuelwood consumption of these co-firing power plants than assumed by the complainant (7.5 times lower than Drax's consumption referred to by the complainant);
 - (c) current forest felling of about 10 million m³ being below the National Forest Strategy target of between 12-15 million m³.
- (94) Moreover, Estonia explained that pellet exports would account for a bigger impact on fuelwood prices than the possible fuelwood consumption by Eesti Energia's co-firing installations.
- (95) On this basis, the Commission concludes that there are no reasons to doubt that the statistical transfer auctions will comply with the EEAG and that sufficient safeguards are in place to avoid undue distortions to the Estonian fuelwood upstream market even if the statistical transfer auctions were won by Eesti Energia for co-firing fuelwood in its main biomass co-firing installations (the Auvere power plant and CHP block of Baltic power plant).

4. CONCLUSION

- (96) The Commission regrets that Estonia put the aid in question into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (97) However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3) TFEU.
- (98) 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>.

(99) 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