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**Subject: State Aid SA.45765 (2018/NN) – Lithuania  
Support to power plants producing electricity from renewable  
energy sources**

Sir,

The European Commission wishes to inform you that, having examined the information supplied by your authorities on the matter referred above, it has decided to raise no objections to the notified aid measure.

#### **1. PROCEDURE**

- (1) Following pre-notification contacts pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”), Lithuania notified a measure concerning support to power plants producing electricity from renewable energy sources to the Commission on 20 November 2018.
- (2) By letter dated 21 November 2018, the Commission informed Lithuania that it had decided to transfer the case to the register of unlawful aid (NN), as support to power plants producing electricity from renewable energy sources was already granted in the past.
- (3) On 2 March 2016, the Commission received a formal complaint from the Lithuanian Confederation of Industrialists (“LPK”), AB Achema, AB ORLEN Lietuva and AB Lifosa regarding, *inter alia*, support to power plants producing electricity from renewable energy sources. The complaint was forwarded to the Lithuanian authorities on 20 June 2016 who replied on 25 July 2016.

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- (4) On 27 June 2016, the Lithuanian authorities pre-notified the support to power plants producing electricity from renewable energy sources. On 21 November 2016, the Lithuanian authorities submitted additional information.
- (5) On 3 March 2017, the Commission received additional information from Achema, ORLEN Lietuva and Lifosa (the “complainants”). The additional information was forwarded to the Lithuanian authorities on 22 March 2017 who replied on 27 April 2017. On 15 January 2018, the complainants sent an additional letter and a meeting was organised with the Commission services on 21 February 2018.
- (6) On 15 March, 8 May, 10 July and 24 October 2018, the Commission sent requests for information to the Lithuanian authorities to which they replied subsequently on the 10 April, 31 May, 24 August and 12 November 2018.
- (7) As the measure concerned by the complaint corresponds to the aid measure notified by the Lithuanian authorities on 20 November 2018 under the present procedure, the Commission have examined the complainants’ arguments in the framework of the present case (SA.45765 (2018/NN)) and informed the complainants thereof by letter of 22 November 2018.
- (8) Furthermore, Lithuania waived its right under Article 342 TFEU in conjunction with Article 3 of the EC Regulation No 1/1958<sup>1</sup> to have the decision adopted and notified in Lithuanian and agreed that the decision be adopted and notified in English.

## **2. DETAILED DESCRIPTION OF THE MEASURE**

### **2.1. National legal basis, background and objective of the scheme**

- (9) According to the Lithuanian authorities, the liberalisation of the Lithuanian electricity market began in 2010 and provided for the possibility for consumers to progressively change their electricity provider. It entailed the formation of a market price<sup>2</sup>.
- (10) In 2011, the Law on Renewable Energy Sources No XI-1375 of 12 May 2011 (“the 2011 Law on RES”) was adopted. It restructured the conditions established for the support granted to installations producing electricity from renewable energy sources (“RES”). According to Article 67 of the 2011 Law on RES, the provisions related to the support granted to RES installations entered into force on 31 December 2011.
- (11) In line with the energy policy of the European Union, the scheme aimed at promoting deployment of renewable energy sources. In particular, the scheme aimed at increasing the share of renewable energy in the gross final consumption

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

<sup>2</sup> Government resolution No 740 of 8 July 2009.

of energy in Lithuania up to 23% by 2020, as laid down in the 2009/28/EC Directive<sup>3</sup>.

- (12) To achieve this objective, the 2011 Law on RES introduced new quotas for the installed capacity of different energy sources:
- (a) 500 MW for wind power plants;
  - (b) 10 MW for solar power plants;
  - (c) 141 MW for hydro power plants;
  - (d) 355 MW for biomass and biogas power plants (on 2 July 2013<sup>4</sup> this quota was reduced to 105 MW).
- (13) That scheme was to remain into force until the quotas were reached. The Lithuanian authorities have explained that the quotas were reached on 31 July 2015, when the last decision for the winner of the last auction was taken.

## **2.2. Beneficiaries**

- (14) Beneficiaries of the scheme are electricity producers using renewable energy sources. The aid measure targets wind, solar and hydro power plants as well as biomass and biogas installations.
- (15) As regard hydro power plants, Lithuania indicated that the installations benefitting from support under the notified scheme are subject to the compliance with environmental requirements, in line with Directive 2000/60/EC<sup>5</sup> (“Water Framework Directive”).

## **2.3. Form of aid**

- (16) Under the 2011 Law on RES, the RES support scheme consists of three support measures (the “support for RES”):
- (a) A feed-in-premium (“FiP”): beneficiaries receive support on top of the electricity market price equal to the difference between the level of support established for each project (see Section 2.3.1 below) and the electricity market price. The market price is determined by the National Commission for Energy Control and Prices (“NCECP”). Small scale power plants receive a feed-in-tariff (“FiT”). Small scale power plants are plants with an installed capacity below 30 kW, and since 2013<sup>6</sup>, plants with an installed capacity below 10 kW;
  - (b) Partial compensation of power plant connection costs: compensation of 60% of the costs for power plants with a capacity above 350 kW and of 100% for power plants with a capacity below or equal to 30 kW. Since

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<sup>3</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 in the promotion of the use of energy from renewable sources (OJ L 140, 5.6.2009, p.16).

<sup>4</sup> Law No XII-494 of 2 July 2013 amending the 2011 Law on RES.

<sup>5</sup> 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, p. 1).

<sup>6</sup> Law No XII-169 of 17 January 2013 amending the 2011 Law on RES.

2013<sup>7</sup>, the compensation is of 60% for power plants with a capacity above 350 kW and of 80% of power plants with less capacity;

- (c) Release from the electricity balancing obligation which is taken over by the Transmission System Operator (“TSO”) or the Distribution System Operator (“DSO”) depending on the grid connection of the RES producer.
- (17) The level of support in the form of FiP is set by bidding procedures (see section 2.3.1 below), whereas the level of the FiT is calculated by the NCECP based on a standard scenario of development and operation of small-scale power plants. Small scale power plants can only receive support for the purchase of their residual electricity, i.e. the part of their production they do not consume themselves (up to 50% of their annual production).
- (18) Beneficiaries winning the bidding procedures and small-scale power plants will benefit from all three measures referred to in recital (16) above. The partial compensation of the connection costs and the release from the balancing obligation contained in the support for RES are deducted from the FiP/FiT to avoid any overcompensation.

#### 2.3.1. *Auction procedure and Feed-in-Tariff for small scale installations*

- (19) The 2011 Law on RES provides that the auction procedures are organised by the NCECP. Lithuania indicated that auctions are open, transparent and non-discriminatory aiming at selecting the operator which is able to develop a new power plant with the least FiP.
- (20) The 2011 Law on RES also provides that the NCECP establishes a cap, i.e. the maximum price of the FiP that could be requested by the bidders in the auction procedure. To do so, the NCECP relies on an approved methodology<sup>8</sup> that takes into consideration the level of investments, the capacity, the useful life of the each plant category, the variable costs, the capital costs, the discount rate, the amount of own/borrowed capital, the financing costs, the electricity balancing costs, *etc.* for a typical plant for each technology. The data used for application of the methodology stemmed from reports on these data in other EU Member States, provided by independent experts and were adjusted to the specificities of the Lithuanian market. These figures have also been publicly discussed with the market operators and amended as needed to reflect the actual needs of the Lithuanian market.

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<sup>7</sup> Law No XII-169 of 17 January 2013 amending the 2011 Law on RES.

<sup>8</sup> FiP calculation methodology has been approved by the NCECP Resolution No 03-233 which entered into force on 1 August 2011.

- (21) Separate auctions were organised for each RES technology and the auctions were opened to all interested parties. The winner of the auction was the operator presenting the offer with the lowest FiP. The table below presents the results of the competitive bidding processes organised so far in Lithuania:

Auction	Maximum possible FiP (EUR ct/kWh without VAT <sup>9</sup> )	Electricity market price (EUR ct/kWh without VAT)	Auction winners price (EUR ct/kWh without VAT)
Auction for wind-power plants IC <sup>10</sup> >350 kW The auction began on 10 December 2012 and ended on 22 February 2013	8.10	4.48	7.09
Auction for biogas power plants IC <1000 kW The auction began on 4 March 2013 and ended on 18 July 2013	16.79	4.48	13.61
Auction for wind-power plants 30 kW < IC ≤ 350 kW The auction began on 10 December 2012 and ended on 28 March 2013	10.42	4.48	10.42
Auction for wind-power plants IC >350 kW The auction began on 17 December 2012 and ended on 28 March 2013	8.10	4.48	7.24
Auction hydro-power plants 30 kW < IC ≤ 1000 kW The auction began on 2 April 2013 and ended on 30 May 2013	7.81	4.38	7.81
Auction biomass plants 30 kW < IC ≤ 5000 kW The auction began on 4 January 2013 and ended on 20 June 2013	13.03	4.38	9.70
Auction for wind-power plants IC > 350 kW The auction began on 4 March 2013 and ended on 18 July 2013	7.53	4.65	6.95
Auction hydro-power plants 10 kW < IC ≤ 1000 kW The auction began on 18 June 2013 and ended on 7 November 2013	6.95	4.79	6.95
Auction for wind-power plants IC>350 kW The auction began on 2 April 2013 and ended on 27 August 2013	7.53	4.39	5.21

<sup>9</sup> Value-Added Tax

<sup>10</sup> Installed Capacity

Auction	Maximum possible FiP (EUR ct/kWh without VAT <sup>9</sup> )	Electricity market price (EUR ct/kWh without VAT)	Auction winners price (EUR ct/kWh without VAT)
Auction hydro-power plants 10 kW < IC ≤ 1000 kW The auction began on 22 January 2015 and ended on 25 May 2015	7	3.96	7
Auction for wind-power plants IC > 350 kW The auction began on 18 February 2015 and ended on 21 July 2015	6.10	3.29	5.6

Source: Lithuanian authorities

- (22) The Lithuanian authorities indicated that the NCECP establishes the FiT for small-scale installations on the basis of the same approved methodology as the one used to establish the maximum FiP for auction procedures.
- (23) The aid is paid to each installation, independently of the technology of the installation, for a period of 12 years. The Lithuanian authorities indicated that that period is, for all technologies, below the typical lifetime of each type of RES plant which is as follow:
- (a) 20 years for wind and solar power plants;
  - (b) 28 years for hydro power plants;
  - (c) 15 years for biomass and biogas power plants.
- (24) The maximum FiP and the FiT for small scale installations have been established at a level ensuring that future cash flows net present value (NPV) after 12 years would be equal to zero (i.e. that the discounted negative cash flow fits to discounted positive cash flow) based on the following formula:

$$NPV_t = \frac{CF_1}{(1+r)^1} + \frac{CF_2}{(1+r)^2} + \dots + \frac{CF_t}{(1+r)^t} - \frac{|CF_0|}{(1+r)^0} = 0$$

Where:

t = period of granting the FiP (i.e. 12 years)

CF = cash flow (negative before the granting of FiP and positive within the period of application of FiP)

r = discount value (WACC<sup>11</sup>)

<sup>11</sup> WACC = Weighted Average Cost of Capital

- (25) The Lithuanian authorities provided the following Table presenting the applicable WACC throughout the support period:

	Solar	Wind	Biogas	Biomass	Hydro
2012	8%	8%	8%	8%	8%
2013					
QI	7,08%	8%	7,08%	8%	8%
QII	6,66%	6,66%	6,66%	6,66%	6,66%
QIII	5,86%	6,66%	6,66%	5,86%	6,66%
QIV	5,89%	6,66%	6,66%	5,86%	6,66%
2014					
QI	5,89%	6,66%	6,66%	5,86%	6,66%
QII	6,99%	6,99%	6,99%	6,99%	6,66%
QIII	6,99%	6,99%	6,99%	7,56%	6,66%
QIV	6,99%	6,99%	6,99%	7,56%	6,66%
2015					
QI	7,74%	7,74%	7,74%	7,74%	7,74%
QII	7,74%	7,74%	7,74%	7,74%	7,74%
QIII	7,74%	7,74%	7,74%	7,74%	8,04%
QIV	7,34%	7,34%	7,34%	7,74%	8,04%

- (26) The levels of the maximum FiP applicable to auction procedure and the FiT for small-scale installations were regularly reviewed by the NCECP. The reviewed FiP only applied to auctions launched after the review and once fixed, the actual FiP for any given project is maintained for the entire period of support of the plant.
- (27) The electricity produced by the RES power plants is sold either on the electricity market or to a purchasing company, i.e. the TSO or the DSO.

## 2.4. Financing and budget

### 2.4.1. Financing mechanism

- (28) The Government Resolution No 916 of 18 July 2012 established that the RES support scheme is financed through a levy imposed on final electricity consumers based on their electricity consumption (the “RES levy”). The RES levy is collected into a Fund dedicated to the financing of various energy policies including the public support to RES producers and the compensation of additional costs incurred by companies mandated to purchase electricity from RES producers (see recital (32) below).
- (29) The NCECP Resolution No 03-328 adopted on 23 December 2011 established that the RES levy was collected by the TSO and DSO, depending on whether the consumer was connected to the transmission or distribution grid. The collected RES levy was then transferred to the Fund which was initially administered by Litgrid AB (the TSO). Government Resolution No 1157 of 19 September 2012 provided that the administrator of the Fund, which is in charge of collecting, paying and administrating the funds, shall be an undertaking owned directly or indirectly by the State.

- (30) By Government Resolution No 1338 of 7 November 2012, the Lithuanian authorities appointed UAB Baltpool as the administrator of the Fund as of 1 January 2013. Baltpool is owned by UAB EPSO-G (67%), and AB Klaipėdos Nafta (33%). EPSO-G is fully owned by the Lithuanian State and Klaipėdos Nafta's controlling shareholder is the Lithuanian State.
- (31) The Government Resolution No 1157 was modified in 2015 and, since 1 October 2015, the features of the financing mechanism of the aid measure are as follows: The administrator of the Fund sends invoices to final consumers on the basis of their electricity consumption. Consumers are required to pay the levy to Baltpool (if they are connected to the transmission grid) or the DSO (if they are connected to the distribution grid). The amounts collected by Baltpool and the DSO are transferred to the Fund. The TSO and the DSO receive compensation from the Fund for the balancing costs they face due to an increase of RES electricity.
- (32) Section V of the Government Resolution No 1157 sets out the principles for the allocation of the FiP/FiT to RES producers: each month, the RES producers selling electricity to a Purchasing Company<sup>12</sup> issues an invoice with the price to be paid for the electricity purchased. The Purchasing Company pays the RES producer for the volume of electricity purchased at a price including the support granted to RES producers, and then issues an invoice to Baltpool with the price of electricity purchased, which includes the FiP/FiT. By paying the invoice, Baltpool compensates the Purchasing Companies for having paid the FiP/FiT. RES producers selling electricity directly on the market send their invoices directly to Baltpool, which, upon paying the invoice, compensates them for the electricity produced and sold.

#### 2.4.2. Exemptions

- (33) As a general rule, all electricity consumers shall pay the RES levy for the electricity they consume: Section IV of the Government Regulation No 1157 of 19 September 2012 provides that undertakings shall pay the RES levy on electricity consumed for their economic needs and that auto-generators (including auto-generators using CHP<sup>13</sup>) shall pay the RES levy both the electricity they produce and consume and for the electricity they produce and sell to third parties through direct electricity lines.
- (34) Section V of the Government Regulation No 916 of 18 July 2012 establishes the following exemptions from the payment of the RES levy:
- (a) The volume of electricity produced by RES installations and consumed for their own needs (i.e. RES auto-generators) ;
  - (b) The volume of electricity necessary for ensuring a technological process of electricity production, including production of electricity through CHP;

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<sup>12</sup> Between 2011 and 2013, the Purchasing Companies were the TSO and the DSO. As of 2013, pursuant to Order of the Energy Minister No 1-3 of 7 January 2013, the State owned company AB Lietuvos Energija was designated to purchase electricity from RES producers connected to the electricity transmission network, replacing the TSO.

<sup>13</sup> Combined Heat and Power, meaning the simultaneous generation in one process of thermal energy and electrical energy.



- (c) The volume of electricity purchased by the TSO and the DSO to compensate natural losses of electricity through the grid;
- (d) The volume of electricity produced by small RES installations<sup>14</sup>, which is put into the electricity network and subsequently taken back from the grid, within one calendar year, for their own consumption; (using the grid as a “virtual storage” for the electricity produced by these small RES installations);
- (e) The volume of electricity consumed for carrying out data processing, Internet server services (hosting) and associated activities in strategic technological development objects by investors with whom the Government has concluded investment agreements under the procedure laid down in the Civil Code of the Republic of Lithuania<sup>15</sup>.

#### 2.4.3. Budget

- (35) The total budget of the scheme amounts to EUR 491 million for the period 2011-2017 and the overall budget until the end of the support in 2029 will amount to EUR 1242 million.
- (36) The Table below presents the expenditure for RES support per category between 2011 and 2017 (in EUR million):

	2011	2012	2013	2014	2015	2016	2017
Support to RES production (FiP/FiT)	28.34	31.39	52.93	64.73	81.13	89.07	106.72
Release from balancing responsibilities	1.53	3.56	5.42	4.88	3.13	5.67	6.41
Partial compensation for connection costs	0.23	0.049	0.131	-0.049 <sup>16</sup>	5.14	0.545	0.045

*Source: Lithuanian authorities*

<sup>14</sup> For this exemption, small installations are defined as installations with an installed capacity below 10 kW for households and below 100 kW for legal entities.

<sup>15</sup> Approved by the Commission on 8 November 2016 - SA.46285 (2016/N) – Lithuania – Prolongation of the duration until 31 December 2020 and evaluation plan of regional aid scheme for the promotion of the development of strategic information and communication technology (ICT) projects on strategic ICT sites – C(2016) 6990 final

<sup>16</sup> Lithuania indicated that negative tariffs occurred in 2014 due to the mismatch between projected and annual costs: the budget is approved for the coming year based on costs projects. In case of difference between the actual and the projected costs, such costs difference is deduced from the budget and the payments for the coming years.

## 2.5. Cumulation

- (37) Article 20(17) of the 2011 Law on RES provided that RES power plants could only participate in the auction procedures if they had not received any support for the acquisition of the equipment of the plant. Participants also have to provide evidence to the NCECP that they do not receive any other support from another RES support programme.

## 2.6. Complaint

- (38) The complainants describe themselves as industrial companies<sup>17</sup> and competitors of the State aid beneficiaries as the complainants are active in the energy sector as producers of electricity and heat.
- (39) The complainants describe the energy sector in Lithuania as characterised by “an intricate network of public support that covers almost every aspect of the national energy market”. The complainants contest in particular the support granted to the RES producers as introduced by the 2011 RES law, to the CHP producers, to the electricity production and reserves necessary to ensure security of supply, to the development of electric power capacities necessary to ensure security of supply, energy independence and reliability of the electricity grid, to strategic projects relating to the improvement of energy security, to the Administrator of the Fund and to solar producers for the infringements of legitimate expectations of these undertakings. The complainants indicate being obliged to pay the levy financing support to all these activities and contest the exemptions granted to some categories of electricity consumers. The complainants claim these support measures constitute State aid within the meaning of Article 107(1) TFEU.
- (40) As the present decision relates only to the support granted to RES producers, only the aspects of the complaint relating to this specific support and its financing (including the exemptions attached to it) will be presented and addressed. The other aspects of the complaint will be presented and addressed at a later stage.
- (41) On the existence of State aid within the meaning of Article 107(1) TFEU, the complainants explain that:
- a) The aid is imputable to the State and is granted through State resources: both the support to RES producers and its financing are established by law and the State establishes the rules and appoint the entities in charge of managing the financing of the support scheme;
  - b) The measure is selective as the aid is granted only to certain companies. Only some of these companies have been selected through auction procedures. The complainants mention in particular that support to RES power plants with an installed capacity below 30 kW is granted without auction procedure;

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<sup>17</sup> Achema is active in the production of nitrogen fertilizers and chemical products. ORLEN Lietuva is active in the refining of crude oil and in the wholesale of oil products. Lifosa is a fertilizer manufacturer and exporter mainly focused on the production of diammonium phosphate, a nitrogen-phosphorus fertiliser. The LPK is an association and lobby group in Lithuania representing the interests of large industrialists and employers. LPK indicated being an umbrella organisation uniting 47 trade and 9 regional associations. Achema, ORLEN Lietuva and Lifosa are members of LPK.

- c) The measure confers an advantage on the beneficiaries as it ensures the beneficiaries a higher price for their electricity than they would have got on the market. In addition, beneficiaries do not have to bear balancing responsibilities and network connection costs;
  - d) The measure is likely to distort competition and affect trade between Member States as the Lithuanian electricity market has been liberalised and electricity producers are engaged in trade between Member States.
- (42) The complainants rely on several letters from the Lithuanian Competition Council assessing various measures related to the RES support scheme as constituting State aid within the meaning of Article 107(1) TFEU.
- (43) The complainants argue that the support to RES producers has not been notified to the Commission prior to its entry into force and therefore constitute an illegal State aid.
- (44) The complainants also argue that the aid measure is not in line with State aid rules, neither under the 2008 Community guidelines on State aid for environmental protection<sup>18</sup> (“2008 EAG”) nor under the Guidelines on State aid for environmental protection and energy 2014-2020<sup>19</sup> (“2014 EEAG”):
- a) The measure does not pursue an objective of common interest: there is no environmental or any other result to be achieved by the support activities in the energy sector and these activities do not go beyond EU standards;
  - b) The measure is not proportional, as the aid to RES producers do not take into account gradually decreasing production costs due to technological development as per point 48 of the 2008 EAG;
  - c) The measure has no incentive effect as balancing responsibilities and connection costs are compensated whereas they constitute normal business costs (which should not be compensated through State aid as per paragraph 49 of the 2014 EEAG). The exception foreseen in paragraph 124(b) of the 2014 EEAG in case no liquid intra-day markets exist is not applicable as a functioning intra-day market exists in Lithuania;
  - d) The aid measure is not in compliance with the transparency requirements set out in section 3.2.7 of the 2014 EEAG;
  - e) The measure does not comply with paragraph 121 of the 2014 EEAG as the RES levy is not limited in time and the support to RES producers is granted for a 12 years period.
- (45) The complainants also consider that the exemptions from paying the levy granted to, among other categories, RES auto-generators unduly favour these installations. RES auto-generators are exempted from paying this levy when auto-generators using conventional fuels have to pay the levy imposed on the energy they consume from the grid and the energy they auto-generate, resulting in a clear discrimination. Moreover, the levy imposed on auto-generators is higher than the

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<sup>18</sup> OJ C 82 of 01.04.2008, p.1

<sup>19</sup> OJ C 200 of 28.06.2014, p.1

levy imposed on electricity consumers as the levy to be paid by auto-generators also take into account the electricity produced by auto-generators and consumed by other undertakings receiving the electricity directly from them. In this regard, the complainants refer to Article IV 16.1 to 16.3 of Resolution No 1157 of 19 September 2012.

- (46) Finally, in their complaint from March 2017, the complainants explain that RES producers can also receive support on the basis of Articles 40 to 42 of the 2011 Law on RES which establish a National Programme for the development of renewable energy sources.

## **2.7. Observations of Lithuania on the complaint**

- (47) The Lithuanian authorities provided answers to the complaint in July 2016 and April 2017. These replies cover the claims on the various activities (as described in recital (39) above) but the present decision will only retain the arguments specifically related to the support granted to RES producers and its financing.

### *On the RES support scheme*

- (48) First, Lithuania is of the opinion that transparency requirements are not applicable to the RES support scheme as they only have to be applied to aid granted after 1<sup>st</sup> July 2016 and therefore are not applicable to the aid granted under the RES support scheme as no new aid has been granted after 31 July 2015.
- (49) Second, on the limitation of the scheme to 10 years indicated in point 121 of the 2014 EEAG, Lithuania considers that this point merely suggest that following 10 years of validity, each scheme must be re-notified to the Commission for its repeated consideration. Moreover, point 121 of the 2014 EEAG regulates only the validity and the re-notification of State aid schemes; however it does not suggest that individual measures granted under the scheme be re-notified to the Commission following 10 years of application.

### *On the levy financing the RES support scheme*

- (50) Regarding the levy, Lithuania explained that it decided that fair distribution of costs should be primarily based on the actual consumption of electricity as customers benefit from investments into the electricity network even if, at certain point in time, they do not consume any electricity supplied through electricity transmission grids. At the same time, it could be noticed that industrial auto-generators, by running their own fossil fuel facilities to produce electricity pollute the environment. Hence, by deciding to consume such electricity they must contribute to the production of much cleaner electricity produced by renewable energy sources in proportion to their overall electricity demand, as any other customer purchasing electricity produced by power plants using fossil fuels.

### *On the National Programme for the development of renewable energy sources*

- (51) On the National Programme, Lithuania explained that Articles 41-42 of the 2011 Law on RES established the mere possibility to provide support for renewable energies. These articles did not establish any support scheme on their own, nor did they provide for a promise of the State to support renewable energies from special funds.

- (52) Moreover, Article 42 of the 2011 Law on RES specifically excluded possibility of undertakings to receive support from special funds established under Article 41 in case such undertakings already benefited from the RES support scheme, subject to the present decision.
- (53) Lithuania also indicated that other measures covered by the National Programme concern State aid measures approved by the Commission (support for the production of biofuels in agriculture sector and use of biofuels in transport sector<sup>20</sup>, and the present RES support scheme).

## **2.8. Discrimination of imported electricity**

- (54) As part of the State aid notification, the Lithuanian authorities evaluated possible discrimination against imported electricity, since, while the financing for the scheme is levied also on imported electricity, it is used to finance only domestic production of electricity from RES.
- (55) The amount of the levy imposed on the imported renewable electricity consumed in Lithuania has been approximated as the average share of imports for consumption needs in Lithuania from the neighbouring Member States (Estonia, Latvia, Poland and Sweden) multiplied by the renewable electricity share in total electricity production in each of the respective neighbouring Member States (according to Eurostat database) for the years 2011-2017. Lithuania established the exact amount of physical imports and divided them among Estonia, Latvia, Poland and Sweden based on the flow data of the interconnectors with those countries. Taking into account these assumptions, the levy from imported and consumed renewable electricity is estimated to amount to EUR 104,2 million for the whole support period.
- (56) In order to remedy any potential discrimination, Lithuania committed to investing the above-mentioned amount in projects favouring European electricity market in the form of an increased potential for electricity flows between continental Europe and the Baltic States. On 28 June 2018, an agreement was reached between the Baltic States, Poland and the European Commission on the synchronization of the Baltic States with continental Europe's electricity grids. This agreement foresees the synchronization project through an additional direct current submarine cable between Poland and Lithuania. In September 2018, Lithuanian TSO completed a study that identified the list of projects needed to synchronize and to operate in a synchronous regime. This project list includes 1) construction of "LitPol link 3" direct current submarine cable which was identified as the prime project and together with 2) a new distribution station in Darbėnai and 3) a new electricity transmission line in Darbėnai would benefit to the electricity system in the Baltic States and European Union. The total amount to be invested by the Lithuanian authorities in these three projects will approximately amount to EUR 399,75 million.

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<sup>20</sup> Commission decision SA.48184 (2017/N) – Prolongation of biofuel support scheme, OJ C 80 of 2.3.2018, p.1

### 3. ASSESSMENT OF THE MEASURE

#### 3.1. Existence of aid

- (57) Under Article 107(1) TFEU, any aid granted by a Member State 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, is incompatible with the internal market.
- (58) In determining whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, the Commission has to apply the following criteria: the measure must confer an advantage on certain undertakings or certain sectors (selective advantage), be imputable to the State and involve State resources, distort or threatens to distort competition, and be liable to affect trade between Member States.

##### 3.1.1. *Selective advantage on certain undertakings or certain sectors*

- (59) Producers of electricity from RES are advantaged because, through the RES support measure, they obtain more revenues for their electricity than what they would obtain on the market.
- (60) Furthermore, producers of electricity are in a factual and legally comparable situation, regardless of the method they use to produce the electricity, in the sense that they all feed electricity into the grid, for which they obtain revenues. The RES support measure is thus selective because it favours only producers of renewable electricity and is not accessible for other electricity producers.

##### 3.1.1.1. Exemption from the RES levy for certain categories of electricity consumers

- (61) Measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute State aid<sup>21</sup>.
- (62) The Court has also ruled in respect of exemptions from charges that in order to prove that an advantage is selective, the Commission has to prove that the measure at stake creates differences between undertakings, which, with regard to the objective of the measure in question, are in a comparable factual and legal situation. The concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question<sup>22</sup>. The burden of proof for that latter part of the test is on the Member State.
- (63) According to Article 19 of Regulation No 916, the levy financing the support to RES producers is collected from electricity consumers for the electricity quantity

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<sup>21</sup> Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13, and Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 23

<sup>22</sup> Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraph 42, and Case C-279/08 P, *NOx emission trading scheme*, paragraph 62

actually consumed by them, including electricity produced from renewable sources. In other words, the objective of the system is to provide a charge on the consumption of electricity for the financing of the RES support. The collection of the full RES levy therefore constitutes the reference system.

- (64) However, Regulation No 916 provides for exemptions for certain categories of final electricity consumers (see section 2.4.2 above). They constitute at first sight advantage derogation for these consumers, who would be liable to pay the full RES levy.
- (65) The Commission recalls that the purpose of the RES levy is to support the production of electricity from renewable energy sources. The Commission does not consider that the various categories of consumers benefiting from the exemptions listed in recital (34) above are in a different legal and factual situation to other electricity consumers in the light of the purpose of the RES levy system. All these undertakings consume electricity for the production of goods or services (including the further production of energy) and are therefore liable to pay the charge on consumption. Moreover, all these undertakings benefit in the same way from CO<sub>2</sub> emission reductions induced by the production of electricity from renewable energy sources that the RES levy finances.
- (66) The Commission further notes that the exemptions are defined by reference to the full RES levy and do not seem to constitute another kind of levy, which further confirms that the full RES levy constitutes the rule and the point of reference.
- (67) The Commission therefore concludes that the exemptions at stake are *prima facie* selective, as they provide for derogations from the RES levy (based on consumption) to certain electricity consumers. However, as is explained below, the Commission considers that Lithuania duly demonstrated that the exemptions listed in recital (34)(a) to (c) are justified by the logic and nature of the system.
- (a) Exemption for electricity used to generate electricity
- (68) This exemption is in line with the logic generally underpinning charges raised on the consumption of energy, which would exclude charging energy consumed in the process of electricity generation. This logic corresponds for instance to Article 14(1)(a) of Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity<sup>23</sup> which sets that Member States shall exempt energy products and electricity used to produce electricity from taxation. Since the Directive foresees such an exemption and given that this exemption is applied in a non-discriminatory and straightforward manner to all electricity producers, the Commission considers that the exemption of electricity used to generate electricity is within the nature and the logic of the charge system concerned<sup>24</sup>.
- (b) Exemption for electricity purchased to compensate natural losses from the electricity network

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<sup>23</sup> OJ L 283, 31/10/2003 p. 51-70

<sup>24</sup> See also Commission decision of 23 July 2014 in Case SA.38632 (2014/N) – Germany – EEG 2014 – Reform of the Renewable Energy Law, recital 169.

- (69) The electricity purchased by the TSO and the DSO to compensate natural losses from the electricity network is distinct from the electricity that is consumed for the economic needs of the TSO and the DSO<sup>25</sup>. Such purchase of electricity is a compensation of an inevitable physical phenomenon occurring in the electricity network. The electricity losses in transportation are not as such consumed by the TSO and the DSO, but are inherently related to their transportation activity, key to the electricity network. The Commission therefore considers that it is within the nature and the logic of the charge system to exempt the TSO and the DSO from the levy for this specific purchase of electricity.
- (c) Exemption for electricity produced and consumed by RES producers (auto-generators)
- (70) An exemption to the payment of the RES levy is granted to RES auto-generators for the volume of electricity they produce and consume themselves and small RES installations or the volume of electricity they put on “virtual storage” in the electricity grid.
- (71) The Lithuanian authorities confirmed that, in practice, no installation benefiting from the RES levy exemption for auto-generators or virtual storage has also benefited from the FiP or the FiT. As the scheme ended in 2015, it appears that no new beneficiary would in the future be in the situation of benefitting from the RES support scheme and the exemption from the RES levy. As regards virtual storage, as before 2017, the possibility to use the electricity grid as virtual storage was only allowed for households and public entities, none of these were able to participate into auction procedures and therefore did not receive support for the production of renewable electricity.
- (72) The Lithuanian authorities have informed the Commission that no auto-generators benefit from the RES support scheme. However, they still contribute, through auto-generation, to the objective of the scheme that is increasing the consumption of electricity produced from renewable energy sources (unlike other electricity consumers that do not contribute to that objective). Therefore, it can be accepted that it is within the logic of the system that no RES levy is imposed on electricity produced from renewable energy sources that did not benefit from the RES support scheme<sup>26</sup>.
- (d) Exemption for electricity consumed for carrying out data processing, hosting and associated activities
- (73) In its decision of 8 November 2016 on Case SA.46285 (2016/N)<sup>27</sup>, the Commission already concluded that the exemption constitutes State aid within the meaning of Article 107(1) TFEU. The decision also concludes that the exemption,

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<sup>25</sup> The TSO and the DSO have to pay the RES levy for the electricity they consume for their economic needs (e.g. lighting of premises), as any other electricity consumer according to Government Regulation No 1157.

<sup>26</sup> See also Commission decision of 23 July 2014 in Case SA.38632 (2014/N) – Germany – EEG 2014 – Reform of the Renewable Energy Law, recital 168.

<sup>27</sup> Commission decision of 8 November 2016 – SA.46285 (2016/N) – Lithuania – Prolongation of the duration until 31 December 2020 and evaluation plan of regional aid scheme for the promotion of the development of strategic information and communication technology (TIC) projects on strategic ICT sites – C(2016) 6990 final.



but that it is compatible with the internal market pursuant to Article 107(3)(a) TFEU.

### 3.1.2. *Imputability of the measure to the State*

- (74) The support for renewable electricity is imputable to the State as the support has been established by law (the 2011 Law on RES).

### 3.1.3. *Existence of State resources*

- (75) According to established case law, only advantages which are granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) TFEU. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State<sup>28</sup>. Thus, resources do not need to transit through the State budget to be considered as State resources. It is sufficient that they remain under public control<sup>29</sup>.
- (76) As results from established case law and constant practice, proceeds of levies imposed by the State, which are managed and apportioned in accordance with the provisions of the legislation constitute State resources within the meaning of Article 107(1) TFEU even if they are managed by public or private entities separate from the public authorities<sup>30</sup>.
- (77) The Commission observes that the RES support scheme is financed by the TSO and the DSO. The support scheme provides for a mechanism for full compensation of the additional costs incurred by the TSO and the DSO for buying the electricity from RES producers at prices beyond market prices. This compensation is financed through the RES levy, a surcharge on electricity consumed, imposed and determined by the State (see recital (28) above). The Fund fed by this surcharge is managed by Baltpool, a public entity, in accordance with the rules established by the State.
- (78) On that basis, the Commission concludes that the support is financed from State resources given that it is financed from the proceeds of RES levy imposed by the State and which are managed and apportioned in accordance with the provisions of the Lithuanian legislation (in particular Government Resolutions No 916 and No 1157). Like in the case giving rise to the judgment of 19 December 2013 in the case *Association Vent de Colère*<sup>31</sup>, the State has, within the framework of the Law on RES, created a system where the cost incurred by the TSO and the DSO are fully compensated by the surcharge imposed on electricity consumers.

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<sup>28</sup> Case 76/78 *Steinike & Weinlig v Germany*, EU:C:1977:52, paragraph 21; Cases C-72/91 & C-73/91, *Sloman Neptune v Bodo Ziesemer*, EU:C:1993:97 paragraph 19, and Case T-47/15, *Germany v Commission*, ECLI:EU:T:2016:281, paragraph 81.

<sup>29</sup> Case C-482/99 *France v Commission*, EU:C:2002:294, paragraph 37

<sup>30</sup> Case C-206/06, *Essent Netwerk Noord and Others*, ECLI:EU:C:2008:413; Case C-262/12, *Vent de Colère*, ECLI:EU:C:2013:851, paragraph 25.

<sup>31</sup> Case C-262/12, *Vent de Colère*, ECLI:EU:C:2013:851

#### 3.1.4. *Threat of distortion of competition and trade*

- (79) As from the liberalisation of the Lithuanian electricity market, electricity producers are engaged in trade between Member States so that the advantage granted to the RES producers is likely to distort competition and affect trade between Member States. The renewable electricity is sold on the spot market where it enters in competition with all sources of electricity.

#### 3.1.5. *Conclusion on the existence of aid*

- (80) The Commission concludes that the RES support scheme under the 2011 Law on RES is imputable to the State and financed through State resources, confers a selective advantage to producers of electricity from renewable sources in Lithuania and is liable to distort competition on the electricity market and affect trade between Member States. Therefore, it constitutes State aid within the meaning of Article 107(1) TFEU.
- (81) Regarding the exemptions from the RES levy for certain categories of final electricity consumers, the Commission concludes that exemptions described under recital (34) (a), (b) and (c) are not selective as they are justified by the logic and nature of the system. Exemption described under recital (34) (d) is already dealt by another decision and is therefore excluded from the scope of this decision.

### **3.2. Legality**

- (82) The scheme has already entered into force. By implementing the measure in advance of a Commission decision in its compatibility, Lithuania has breached the standstill obligation set out in Article 108(3) TFEU and the measure therefore constitutes unlawful aid.

### **3.3. Compatibility of the aid measures**

- (83) Considering the environmental objective of the scheme (promoting the generation of electricity from renewable sources), the Commission has assessed the compatibility of the measure according to Article 107(3)(c) TFEU and in the light of the applicable environmental aid guidelines.
- (84) Considering that the aid was granted during the period covering the applicability of different Guidelines (see recitals (10) and (13) above), the Commission will assess the aid to RES producers pursuant to:
- a) The 2008 Community Guidelines on State aid for environmental protection from 2011 to 28 June 2014; and
  - b) The Guidelines on State aid for environmental protection and energy 2014-2020 from 29 June 2014 to 31 July 2015.

#### 3.3.1. *Compatibility of the RES support scheme with the 2008 EAG*

- (85) The scheme aims to support production of electricity from renewable sources and therefore meets the objective of common interest set out in point 18 of the 2008 EAG. Lithuania confirmed that aid has only been granted to energy from renewable sources as defined by point 70(5) of the 2008 EAG.

- (86) In accordance with point 107 of the 2008 EAG the aid may compensate the difference between the costs of producing electricity from renewable energy sources and the market price of energy concerned. As per point 109 a) of the 2008 EAG, the aid may include a normal return on capital and may be granted until the plant has been fully depreciated according to normal accounting rules. In the notified scheme, the FiP complements the electricity market price but is equal to or lower than a maximum FiP established by the NCECP on the basis of the costs of the technology concerned (see recital (20) above). The maximum FiP is established according to a formula including a WACC set between 4,88% and 8,04% (see recital (25) above) which is in line with the level of WACC accepted in similar projects<sup>32</sup> and ensure a normal return on capital.
- (87) As regards support to small-scale installations, the calculation methodology ensures that the support only covers the difference between the production costs (including a normal return on capital) and the electricity market price. The aid is granted for 12 years, which is a lower period than the typical lifetime of each type of supported RES plant (see recital (23) above).
- (88) The NCECP ensures that both the maximum FiP and the FiT for small scale installations are established at a level ensuring that future cash flows NPV after 12 years would be equal to zero (i.e. that the discounted negative cash flow fits the discounted positive cash flow). It can therefore be concluded that the measure is proportionate and there is no overcompensation.
- (89) Under Article 42(3) of the 2011 Law on RES, the aid granted to RES producers under the 2011 Law on RES cannot be cumulated with an investment aid (see recital (37) above). This is in line with point 109 b) of the 2008 EAG which states that any investment aid granted to the beneficiary must be deducted from production costs when determining the amount of operating aid.
- (90) Point 142 of the 2008 EAG establishes that the aid must have an incentive effect, meaning that the aid should result in the aid recipient changing its behaviour so that the level of environmental protection is increased. As per point 146(c) of the 2008 EAG, to demonstrate the incentive effect of the aid measure, the Member State must provide information demonstrating that the investment would not be sufficiently profitable without the aid. As showed in recital (21) above, the production costs of electricity from renewable energy sources have been higher than the electricity market price. Hence, without the notified aid, there would have been an insufficient incentive to undertake generation of electricity from renewable energy sources as such activity would have been unlikely to be economically viable. The aid was therefore necessary and changed the beneficiaries' behaviour.
- (91) Based on these considerations, the Commission concludes that the scheme complies with the conditions of the 2008 EAG.

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<sup>32</sup> See, for example, decision on Case SA.36023 (2014/NN) – Estonia – Support scheme for electricity produced from renewable sources and efficient cogeneration (OJ C 44 of 6.2.2015, p.1)

### 3.3.2. *Compatibility of the RES support scheme with the 2014 EEAG*

- (92) The Commission has assessed the support scheme based on the 2014 EEAG. In particular, it has assessed the support to the production of renewable electricity under section 3.3 (aid to energy from renewable sources) of the 2014 EEAG.

#### 3.3.2.1. Objective of common interest

- (93) According to paragraph 31 of the 2014 EEAG, Member States need to define precisely the objective of common interest pursued and explain the expected contribution of the scheme to that objective.
- (94) The RES support scheme aims at providing support for the production of electricity from renewable energy sources within the meaning of paragraphs 19(5) and 19(11) of the 2014 EEAG.
- (95) The RES support scheme contributes to achieving the overall national target set out in the Directive 2009/28/EC for Lithuania: reaching 23% of energy from renewable sources in gross final consumption of energy by 2020. The scheme is therefore directed at the objective of common interest of promoting the deployment of renewable energy. The purpose of the scheme as described in recital (11) above is therefore considered an objective of common interest.
- (96) Paragraph 117 of the 2014 EEAG requires that aid to hydropower has to comply with the Water Framework Directive<sup>33</sup> and in particular Article 4(7) thereof. The Commission notes that under the notified scheme aid to hydropower installations is subject to the compliance with environmental requirements (in particular in terms of water body preservation and species protection).
- (97) The Commission notes that the scheme was introduced in 2011 and ended in 2015 and therefore is in line with paragraph 121 of the 2014 EEAG.

#### 3.3.2.2. Need for State intervention

- (98) According to subsection 3.2.2 of the 2014 EEAG, Member States need 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 the production of renewable electricity, 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 of the 2014 EEAG. The preliminary investigation has not revealed any indication of the contrary. As explained in recital (20) above and showed in the Table in recital (21) above, the electricity market price in Lithuania remains below the production costs of renewable electricity for all types of technology which confirms that a residual market failure remains.

#### 3.3.2.3. Appropriateness and incentive effect of the aid

- (99) According to paragraph 40 of the 2014 EEAG, the support measure must be an appropriate instrument to address the policy objective concerned. According to paragraph 116 of the 2014 EEAG, in relation to aid to energy from renewable

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<sup>33</sup> See footnote 5

sources, the Commission presumes the appropriateness of aid and the limited distortive effects of the aid provided that all other conditions are met.

- (100) According to paragraph 49 of the 2014 EEAG, Member States must demonstrate that the aid has an effect of incentivising the beneficiaries to change their behaviour in line with the objective of common interest pursued. In particular, the Commission considers that aid has no incentive effect for the beneficiary if work on the project has already started prior to the aid application by the beneficiary to the national authorities (paragraph 50 of the 2014 EEAG).
- (101) Lithuania applies a competitive bidding process for all aid granted to new renewable energy installations, other than small-scale installations. The design of such bidding process ensures that the beneficiary applies for the aid before works are started and the financial information follows from the bidding process. As regards small-scale installations, the Commission notes that, in the absence of aid, electricity from renewable energy sources would probably not be generated as the production costs are higher than the electricity market price and the installations would therefore not be financially viable. The Lithuanian authorities confirmed that activities which started before the submission of an application are not eligible for aid. The aid has therefore an incentive effect, since it incentivises the beneficiaries to change their behaviour and invest in renewable energy projects.

#### 3.3.2.4. Proportionality of the aid

- (102) According to paragraph 69 of the 2014 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. Paragraph 109 of the 2014 EEAG indicates that market instruments, such as auctioning or competitive bidding processes to select beneficiaries of aid to renewable sources should normally ensure that subsidies are reduced to a minimum.
- (103) As set out in recital (20) above, Lithuania has set out a capping mechanism within the auctions that reflect the average production costs including a WACC ensuring a normal return on capital. The cap is introduced to avoid overcompensation. However, it does not limit the competitive nature of the auctions. The Commission considers that the auctions established by Lithuania are competitive and established on the basis of clear, transparent and non-discriminatory criteria and therefore in line with paragraph 126 of the 2014 EEAG. For small-scale installations, the calculation of the FiT set the level of support to what is necessary to cover only the difference between the production costs (including a normal return on capital) and the electricity market price. Production costs are updated regularly. The FiT is established, through the formula described in recital (24) above, at a level ensuring that future cash flows NPV after 12 years would be equal to zero (i.e. that the discounted negative cash flow fits the discounted positive cash flow).
- (104) The notified scheme is in line with paragraph 129 of the 2014 EEAG, as the duration of FiP and FiT payments for individual RES installation operator is limited to 12 years (therefore not exceeding the lifetime of the projects) and Lithuania confirmed that the aid granted by means of the notified support scheme cannot be cumulated with any other aid (including any investment aid).

### 3.3.2.5. Distortion of competition and balancing test

- (105) According to paragraph 90 of the 2014 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 aid will in principle not be viewed as an undue distortion of competition since it is inherently linked to its very objective.
- (106) The notified scheme aims at supporting producers of electricity from renewable energy sources. By its very nature, the notified scheme is therefore favouring environmentally friendly technologies for producing electricity at the expense of producers of electricity from conventional fuels.
- (107) Furthermore, according to paragraph 116 of the 2014 EEAG, the Commission presumes the limited distortive effects of aid to renewables provided all other conditions are met. The Commission considers therefore that the notified measure does not have undue distortive effects because the applicable conditions laid out in Section 3.3.2.1 of the 2014 EEAG are fulfilled, as discussed above.
- (108) Consequently, the Commission concludes that the distortion of competition caused is limited and outbalanced by the positive impact of the support scheme for the environment.

### 3.3.3. *Conclusion on compatibility*

- (109) The Commission therefore finds that the notified RES support scheme is in line with the requirements of respectively the 2008 EAG and the 2014 EEAG and, hence, it is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

## **3.4. Compatibility with other Treaty provisions**

- (110) In accordance with paragraph 29 of the 2014 EEAG, as the scheme has the aim of supporting generation of electricity from renewable sources and is financed through a levy on domestic electricity consumption, the Commission has examined its compliance with Articles 30 and 110 TFEU.
- (111) 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, 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<sup>34</sup>.

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<sup>34</sup> 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.

- (112) If domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including consumption on imported electricity), then the method of financing, which imposes a burden on imported electricity not benefitting from this financing, risks having a discriminatory effect on imported electricity from renewable energy sources and thereby violate Article 30 and/or 110 TFEU<sup>35</sup>.
- (113) The notified aid scheme is financed through a levy (the RES levy) paid by electricity consumers. The tariff is levied on electricity consumption, which may therefore also cover electricity imported from other EEA States. The Commission has therefore examined whether the financing mechanism could entail discrimination against imports within the meaning of Articles 30 and 110 TFEU.
- (114) As any potential discrimination incurred by the RES levy takes place only for electricity consumed in Lithuania, the Commission accepts that transit electricity that is not consumed in Lithuania can be excluded from the calculation of the amount of electricity discriminated upon. Calculated on this basis, the levy from imported and consumed electricity from renewable energy sources is estimated to be no higher than EUR 104,2 million.
- (115) In order to remedy the potential discrimination, Lithuania committed to investing the above-mentioned amount in projects favouring European electricity market in the form of an increased potential for electricity flows between continental Europe and the Baltic States (see recital (56) above).
- (116) The Commission thus concludes that the potential breach of Articles 30 and 110 TFEU by the financing method of the aid scheme could be effectively remedied.

### **3.5. Complaint**

- (117) The Commission considers that the scheme for promoting electricity production from renewable energy sources constitutes State aid for the reasons laid down in Section 3.1 above. Furthermore, the Lithuanian authorities have implemented the support measure in advance of a Commission decision on its compatibility, in breach of the standstill obligation set out in Article 108(3) TFEU.
- (118) On the compatibility of the support measure, the Commission found the RES support scheme in line with the 2008 EAG and the 2014 EEAG for the reasons laid down in Section 3.3 above. The Commission notes that, contrary to the understanding of the complainants, the provisions contained in paragraphs 106, 124 b) and 126 of the 2014 EEAG were not applicable at the time the scheme was in place since they became applicable only as of 2016 (or 2017 for the provision of paragraph 126 of the 2014 EEAG). This relates in particular to the obligation for beneficiaries to bare balancing responsibilities (paragraph 124 b) of the 2014 EEAG), the obligation to select beneficiaries through a tender procedure (paragraph 126 of the 2014 EEAG) and the transparency requirements regarding beneficiaries of public support (paragraph 106 of the 2014 EEAG). The Commission therefore considers that the considerations of the complainants summarised in recitals (41)b) and (44)c) and d) should be dismissed.

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<sup>35</sup> 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* (OJ C325 of 02.10.2015)

- (119) On the duration of the RES support scheme, the Commission observes that whilst paragraph 121 of the 2014 EEAG provides for a 10-year limitation period, this limitation refers to the period in which the beneficiary may apply for and become entitled to the aid in question. The 10-year limitation period does not refer to the support period during which the beneficiary receives the aid. In the present case, this concerns the auction period, which lasted from 2012 to 2015, and the RES support scheme thus does not exceed the 10-year period established by paragraph 121 of the 2014 EEAG. As regard the maximum period during which a beneficiary can receive aid, both the 2008 EAG (in point 109) and the 2014 EEAG (in paragraph 129) state that this period should not exceed the depreciation period of the installation. This condition is met in the present case, as explained in recital (23) above. The claim of the complainants presented in recital (44) e) above should thus be dismissed.
- (120) Likewise, the Commission disagrees with the complainants that the measure is not proportionate in that it does not take into account the decreasing production costs of renewable electricity. The Commission notes that the measure decreases the amount of aid for new beneficiaries as production costs decrease (see Table in recital (21) above). It is a general practice and in line with private investors' legitimate expectations that the support schemes set the amount of compensation taking into account the production costs at the beginning of the investment and that this is not revised down during the entire support period.
- (121) The Commission also considers that the exemptions from the RES levy either do not constitute State aid (see recitals (67) to (72) above) or were already assessed and accepted in another decision (see recital (73) above). On the fact that the auto-generators also pay the RES levy for the volume of electricity they produce and sell to other undertakings through direct lines, the Commission notes that the complainants do not argue that the auto-generators cannot pass on the costs incurred by the RES levy to their clients and therefore the Commission does not consider such imposition system as discriminatory.
- (122) On the claim that RES producers can also receive support on the basis of Articles 40 to 42 of the 2011 Law on RES concerning the National Programme for the development of renewable energy sources, the Lithuanian authorities clarified that no cumulation of aid is allowed as established under Article 42(3) of this Law. The Lithuanian authorities indicated that a RES producer benefiting from support under the notified scheme cannot receive aid through the other measures foreseen in the National Programme for the development of renewable energy sources. The Commission therefore considers that the elements presented by the Lithuanian authorities convincingly address the complainants' claim.

### **3.6. Authentic language**

- (123) As set out in recital (8) above, Lithuania has waived its right to have the decision adopted and notified in Lithuanian and agreed to have the decision adopted and notified in English. The authentic language of this decision will therefore be English.



#### **4. CONCLUSION**

The Commission regrets that Lithuania put the support scheme for power plants producing electricity from renewable energy sources into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid measure 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.

Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission