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Subject: State Aid SA.44671 (2019/NN) – Ireland
Alleged illegal state aid granted to the fossil fuel sector in the form of reduced business rates

Sir,

1. PROCEDURE

(1) On 4 February 2016 the Irish Wind Farmers Association (hereafter IWFA[1], Complainant) lodged a complaint pursuant to Article 24 of the Procedural Regulation 1589/2015[2] informing the Commission about an alleged unlawful state aid granted to fossil fuel electricity producers in Ireland in the form of reduced business tax rates (resulting from the methodology applied to calculate the Net Annual Value of the property).

(2) By letter dated 21 March 2016, the Commission services requested the IWFA to indicate the confidential information embedded in the complaint or, alternatively to provide a non-confidential version of its complaint, in order to forward it to the Member State concerned for comments.

(3) On 8 April 2016, the Commission services forwarded the complaint to the Irish authorities. The Irish authorities submitted observations and information on 9 June 2016.

(4) By a letter dated 15 July 2016, Commission services informed the IWFA that following the *prima facie* examination of the case the practice of the Irish

[1] The IWFA (Irish Wind farmers Association) is an Irish trade association representing the interests of companies active in the production of electricity through windfarms.

[2] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union , OJ L 248, 24.9.2015, p. 9

Mr. Simon Coveney, TD
Minister of Foreign Affairs and Trade,
Department of Foreign Affairs and Trade
80, St. Stephen's Green,
Dublin 2,- IRELAND

Telephone: +32 2 299. 11. 11 - Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel,
BELGIQUE/BELGIË - Tel. +32 22991111

authorities described in the complaint did not amount to state aid within the meaning of Article 107 (1) TFUE.

(5) By letter dated 4 August 2016, the IWFA provided with additional information and requested information from Member State pursuant to Article 12(2) of the Procedural Regulation 1589/2015. Furthermore, it requested the Commission to adopt a decision to initiate the formal investigation procedure pursuant to Article 4(4) of the Procedural Regulation.

(6) On 12 January 2017, Commission services sent to the Complainant an assessment of its additional information and confirmed the previous preliminary assessment of the calculation of the Net Annual Value ("NAV") of the property for the purpose of the property tax.

(7) On 12 February 2017, the IWFA submitted additional information and invited the Commission to reconsider its preliminary assessment.

(8) On 5 April 2017, the IWFA explained that the complaint covers "*the situation of County Limerick but that to the extent it nonetheless concerns national legislation it applies to the business rates approach followed on a nationwide basis*".

(9) By email of 23 May 2017 the Complainant asked for the complaint to be put on hold.

(10) On 31 October 2017, the IWFA sent a letter with the updated information and enclosed a table showing the differences in valuation of fossil fuel producers of electricity and other competitors in the Irish counties of Offaly.

(11) On 25 October 2018, Commission services addressed a third letter to the Complainant stating that the additional information it had provided did not bring forward any new elements justifying that the previous findings on the absence of state aid in the methods applied for calculation of Net Annual Value of the property should be reconsidered.

(12) On 23 November 2018, the Complainant submitted additional observations in order to justify that the measure entails state aid.

(13) On 21 May 2019, the Commission forwarded the Complainant's comments and requested additional information from Ireland, which replied on 14 June 2019.

2. DETAILED DESCRIPTION OF THE MEASURE

(14) The measure under assessment concerns one aspect of the calculation of the business tax rates for electricity generation facilities in Ireland, which relates to the methods of calculation of the Net Annual Value, the annual rental value of a property at a specific valuation date.

(15) The Irish business rate is an annual property tax applied and levied on non-domestic and business properties in Ireland. This tax is levied by the relevant local authorities from the owners of these properties. It aims to contribute to the funding, in part, of the costs of services provided by local authorities.

(16) The determination of the amount of tax due is based on the valuation of the property for business rate purposes, which is carried out at national level by the Valuation Office of Ireland (hereafter "VOI") based on its Net Annual Value (hereafter "NAV"). The Valuation Office of Ireland is an independent Government Office. Its decisions are subject to appeal before the Valuation Tribunal, which determines appeals against decisions of the VOI on the valuation of commercial properties for rating purposes. VOI members are appointed by the Minister of Housing, Planning & Local Government. Membership comprises a Chairperson, Deputy Chairpersons and Ordinary Members drawn mainly from the legal and property valuation professions. The Valuation Tribunal and the Commissioner of Valuation/Valuation Office are separate bodies, independent of each other.

(17) The NAV represents the annual rent that a hypothetical tenant would be prepared to pay for the subject property. The business rate due is calculated by multiplying the NAV of the property by the Annual Rate of Valuation (hereafter "ARV"), which is set each year by the local authority when it ratifies the budget for the forthcoming year.

(18) The 2001 Valuation Act (hereafter "Valuation Act[3]"), which is the currently applicable Valuation Act in Ireland and repealed all the previous Valuation Acts, provides for the revaluation of all properties in Ireland by the VOI. The process commenced in 2005. The revaluation exercise was concluded in the Dublin City Council and Waterford rating areas in 2013. The revaluation orders of Kildare, Leitrim, Longford, Offaly, Sligo, Westmeath were published in 2017 and became effective in 2018. To date, the VOI has not revaluated properties located in the following six counties: Clare, Cork, Kerry, Galway, Mayo and Donegal.

(19) The Valuation Act specifies which parts of the property should be valued. Schedule 3 of the Act defines the "relevant property" to be taken into account and expressly refers to electricity generating stations including, where appropriate, wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers. As far as electricity generators are concerned, the entire property is a rateable property.

(20) The Valuation Act sets out a number of different methods for determining the NAV of a property, namely the "Rental method", the "Tone of the list method", and the "Contractor's method"- while the "Receipt and Expenditure (R&E) method" was developed by case law. These methods can be described as follows:

(a) As regards the "Rental" method, where there is direct evidence of the rental value of the property, that value will serve as the NAV. This method is the preferred one, when the information of the rental value is available. In practice due to the absence of direct evidence of electricity generation facilities being leased, this method is not fit for the valuation of utilities.

(b) Concerning the "Tone of the list" method, this method can be used where the rental method is not available. This method foresees that the value of the property depends on the values, as they appear on the valuation list relating to the same rating authority area as that property is located in, of other properties

[3] Valuation (Amendment) Act 2015 (10/2015), s. 46(2)

comparable to that property. This method does not apply in the specific exercise of revaluation, which consists precisely in establishing new valuation lists and therefore cannot rely on existing valuation lists.

(c) "Contractor's method" is described in Section 50 of the Valuation Act as a "*[...] a method of valuation relying on the notional cost of constructing or providing the property or part is used […]. The net annual value of the property or part, for the purposes of that section, shall, […] be an amount equal to 5% of the aggregate of the replacement cost, depreciated where appropriate, of the property or part and the site value of the property […]*".

(d) "Receipt and Expenditures" (R&E): this method is not provided for in the Valuation Act. It has been developed by the case law of Irish Courts and applies to properties that are seldom or are difficult to replicate, typically utilities. It seeks to replicate the thought process that a putative tenant might go through when assessing the profitability of a commercial venture involving the renting of such property.

(21) Finally, the Commission notes that the Complainant does not propose any quantification of the measure, alleged to benefit to the fossil fuel generators. This amount is subject firstly to the finalisation of the revaluation of the NAV in all the counties of the Republic of Ireland; secondly, the valuation can be revised based on the judgement by the Valuation Tribunal, as exposed above in recital (16).

3. ARGUMENTS OF THE IWFA (THE COMPLAINANT)

(22) According to the Complainant, the measure entails incompatible and unlawful State aid within the meaning of Article 107(1) TFUE. While the Complainant provides arguments to show the presence of undertakings exercising economic activity, distortion of competition and effect on trade, the description hereby focuses on the problematic issues of advantage and selectivity of the measure.

3.1. Economic advantage

(23) According to the Complainant the measure entails an economic advantage within the meaning of Article 107(1) TFEU.

(24) The Complainant alleges that there is an unwritten hierarchy between the different valuation methods. According to this unwritten hierarchy, the "Contractor's method" should be applied in last resort. Therefore, the Receipt & Expenditure, or any of the three other methods, should be applied in priority to any property tax.

(25) In practice, the application of the "Contractor's method" for fossil fuel has led to the calculation of lower NAVs than the NAVs, which was applied to windfarms, resulting from the Receipt and Expenditures. The Complainant considers indeed that the way in which the "Contractor's method" is used, to determine the applicable business rate for fossil fuel electricity producers, confers an advantage upon them by relieving them of charges (i.e. reduced payment of business rates) that would normally be borne. The "Contractor's method" used for the calculation of NAV for fossil fuel producers leads to a lower business rate (annual property tax) than the valuation method "Receipt and Expenditures" (R&E) applied to

properties of other electricity producers, such as windfarms, ultimately determining an advantage for fossil fuel producers.

(26) The Complainant alleges that the setting of the NAV for fossil fuel generators and windfarms owners/operators is discriminatory based on observations made on specific alleged samples (e.g. initially the Limerick county in 2016 and county of Offaly in 2017).

(27) For instance, the Complainant claims the North Wall 104 MW gas power station's NAV was valued at EUR 834,000, i.e. EUR 8,019 per MW, whereas the Athea1 34.35 MW wind farm's NAV was valued at EUR 2,431,000, i.e. EUR 70,771.47 per MW. This NAV valuation directly influences the final due business rates, resulting in the North Wall plant payable business rate of EUR 2,037 per MW, whilst the Athea1 payable business rate is EUR 17,055 per MW. The Complainant provided the analysis both in the context of the initial complaint and in a subsequent letter dated 12 February 2017.

3.2. Selectivity

(28) The Complainant considers the measure selective. In this case, the measure selectively benefits fossil fuel producers of electricity in Ireland:

(a) The Complainant describes the reference framework as the business rate regime applicable to all businesses in Ireland. According to the Complainant, the Valuation Act foresees an unwritten hierarchy and given criteria in the applicability of the different valuation methods. It is not open to the discretion of the Valuation Office to choose one or another method to value a given property. According to this unwritten hierarchy, the "Contractor's method" should apply only as last resort.

(b) According to the Complainant, the measure derogates to this framework to the benefit of fossil fuel energy producers at a nation-wide level. For all revaluations completed, the VOI should have assessed whether the "Tone of the list" method could be applicable and then turn to the application of the "R&E" method, as done in the UK. Instead, the VOI directly applied the "Contractor's method" to fossil fuel electricity producers in such a way that it led to a lower NAV, compared to the other electricity generators' NAV, such as windfarms. These undertakings are nonetheless, in light of the objective assigned to the tax system of the Member State concerned, in a comparable factual and legal situation. However, the VOI did not correct the differences noticed between fossil fuel plants and windfarm installations.

(c) According to the Complainant, the difference between the tax rate applicable to fossil fuel electricity producers and to other competing electricity producers, is not either in line with the internal logic of the business rates, which does not justify such derogation.

3.3. Incompatibility of the measure with State aid rules

(29) The Complainant also argues that the measure is incompatible with the internal market because the 2014-2020 EEAG do not provide for the possibility to consider compatible the aid granted to the fossil fuel sector in the form of a rebate

on the applicable business rate, which in that would has the form of an operating aid.

4. REPLIES FROM THE IRISH AUTHORITIES

(30) In its reply dated 9 June 2016, confirmed and complemented? on 14 June 2019, the Irish authorities argue on the contrary that the measure does not entail State aid, for the following reasons.

(31) Preliminarily, in their replies, the Irish authorities clarified the general method applied by the Valuation Office of Ireland ("VOI"), when assessing the Net Annual Values (NAVs) of properties. They confirmed the absence of hierarchy between the four methodologies, and the general principle of equality of treatment between comparable properties as the key objective of rating law as determined by the Valuation Tribunal. Ireland also clarified that the application of different methodologies, for a given property, should not in principle give raise to a different calculation of Net Annual Value, but it cannot be excluded that NAV can be lowered based on the same factual complaint, namely a difference of treatment between comparable properties. Thus, in any case the Valuation Tribunal can still lower the NAV resulting in a lower "tax bill", as mentioned above in recital (16).

(32) In general- across all sectors- even in absence of a hierarchy, Irish Authorities acknowledged that the "Contractor's method" is generally a method of last resort and that there is a preference for the "R&E" method.

(33) In practice, in the specific sector of energy generation facilities, only two methodologies could apply to electricity generators, namely the "R&E" and the "Contractor's method". Firstly, the "Tone of the list", which bases itself on existing valuation lists, does not apply on the specific exercise of the revaluation, which consists in issuing new lists. Secondly, the "Rental evidence" approach does not apply because there is no direct evidence of electricity generation facilities being leased in Ireland.

(34) Whereas, according to Irish Authorities, the complaint of 2016 was considered to be premature, as the NAVs were not finally determined in all the counties of the Republic of Ireland, as exposed in recital (18), updated information has been provided on 14 July 2019.

(35) The Irish authorities clarified that business rates consist in a tax on the value of relevant property. They are not a tax on electricity output. Therefore, a comparison of undertakings based on the NAV per MW (Mega Watt) is not relevant.

(36) The Irish authorities have confirmed that, the Commissioner of Valuation has applied to both wind farms and fossil fuel power stations the general rules concerning business rates as laid down in the legislation and case-law. In particular, in the valuation of windfarms, the Commissioner of Valuation applied a scheme of valuation which was derived from an examination of "R&E" valuations carried out on ten windfarms and supported by the evidence of the "R&E" and the "Contractor's method".

(37) Fossil fuel plants have been valued using both the "Contractor's method" and "R&E"method. Reliable development costs associated with the development of fossil fuel plants have generally been available while sufficiently detailed and reliable open market accounts to support the valuation of fossil fuel plants for rating purposes have not been available to the Commissioner of Valuation.

(38) There is no evidence that the use of a different evidential method is not justified by the objective differences between these properties given their physical and locational differences, and given they operate under different market and commercial conditions.

(39) On the concrete examples provided by the Complainant, as far as the Limerick Windfarms are concerned, the Commissioner of Valuation applied a scheme of valuation, which derived from an examination of both "R&E" valuations carried out on ten windfarms, supported by the evidence of the "R&E", qualified as "comparative method".

(40) Ireland explained the reason why, on the contrary, the "Contractor's method" was applied to the only fossil fuel of the County of Limerick. The Irish authorities explained that reliable development costs associated with the development of fossil fuel plants have generally been available, which allowed for a valuation under the "Contractor's method" approach. Conversely, the absence of available individual financial statements, for this plant, obliged the VOI to revert to the last available method, the "Contractor's method". In the specific case of the only fossil fuel plant located in the county of Limerick, the Irish authorities explained that it forms part of a larger industrial complex. It is an extensive industrial facility located on an island in the estuary of the river Shannon completed in the early 1980s and not a dedicated electricity generating station. As consequence, the "R&E", based on the assessment of a putative rent of the part of the property related to the fossil fuel generator only, could not apply in this particular case.

(41) Ireland provided further examples, showing that the "R&E" method has been used to determine the NAV for three fossil fuel plants, one in the county of Longford and two in the county of Offaly.

(42) More in general, the comparison at the level of the NAV, between windfarms and fossil fuel generators, is difficult to perform. The Irish authorities present indeed windfarms and fossil fuel power stations, as intrinsically different, which therefore affects the rent that a hypothetical tenant might be willing to bid. The differences in NAVs between windfarms and fossil result indeed not from the method used to calculate them, but mainly from the lower operating costs borne by windfarms, which result in more significant operating margins (e.g. EBITDI[4]) and therefore in higher NAVs.

(43) Lastly, as regards the analysis at the level of the actual business rates paid, the comparison proposed by the Complainant is certainly erroneous because the NAV is not the only parameter to compute such business rates. Each rating authority area has a different 'multiplier' and valuation levels can vary from one local authority to another, and year-to-year.

[4] Earnings Before Interest, Tax, Depreciation and Impairment.

(44) Finally, the Republic of Ireland argued that there was no evidence of an advantage because there is no evidence that the measure as applied by the VOI induces an improvement of the financial situation of the fossil fuel generators. The objective differences between these properties, given their physical and locational differences, do not allow for a comparison based on the NAV by MW, as alleged by the Complainant.

(45) Furthermore, the Irish authorities consider that the measure is not selective and thus does not entail state aid, on the following grounds:

(a) As regards the reference framework:

– The Irish authorities clarified that business rates are a tax on the value of relevant property, and not a tax on electricity output, as already explained above in recital (33) (b). An analysis based on a comparison of the NAVs per MW would therefore ignore the basis of these business rates, depending on the valuation of property, which are themselves, based on the rent that a hypothetical tenant would bid. The exercise is not to ascribe a tax to output, but rather to a given property.

– The methods consist in evidential tools of the VOI to support a stated opinion on whether the estimated rent is fair or excessive. The use of a specific valuation method depends on the circumstances of the case and available evidence.

– The Valuation Act does not prescribe a hierarchy of methods to apply in evaluations. It does not provide for their application in a hierarchical manner. However, the Republic of Ireland recognises that it is generally acknowledged that rental evidence is the best evidence, whilst the "Contractor's method" is a method of last resort, because VOI aims primarily to estimate rent.

(b) the calculation of the NAVs by the VOI for fossil fuel generators does not entail any derogation of the reference framework:

– The reference framework is indeed the same as applied to both windfarms and fossil fuel stations. The measure is the estimate of rent that a hypothetical tenant would pay. There is no discretion of the Commissioner of Valuation or any other State authority concerning that test: both windfarms and fossil fuel plants are subject to the same reference framework, which is a provision of general application.

– More specifically, over the course of the Limerick revaluation, county on which the complaint initially referred to, the VOI revalued eleven electricity-generating facilities. Ten of these were standalone windfarms, whilst the only fossil fuel generating facility is part of an industrial facility.

– All ten windfarms were valued accordingly with the reference framework – underpinned by the evidence from the "Receipts and Expenditure" method, accordingly with the reference framework.

The Irish authorities consider that the windfarm facilities have not been penalised by the application of the "R&E" method. For instance, for one given windfarm installation, while the application of the "Contractor's method" would have incurred a NAV of EUR 203,000, the application of the "R&E" method, actually applied by the VOI, led to a more favourable value of EUR 188,840. If the "Contractor's method" had been directly applied to windfarms in Limerick, eight out of ten of those windfarms would have a marginally higher NAV.

– As regards fossil fuel generators, there is also no evidence which suggests that fossil fuel electricity producers have benefitted from a derogation to the reference framework. The Irish authorities consider that the elements of the complaint which suggest that fossil fuel providers pay lower rates (or have lower valuations) is not supported by any analysis or empirical evidence.

– The Irish Authorities submitted further information showing that several fossil fuel producers (at least three in Offaly and Longford counties) were subject to the "R&E" method, while several others were subject to the "Contractor's method", concentrated in the Dublin county. The same information from Irish Authorities shows that also for other energy producers- notably from Biomass or CHP- located in the same counties (Dublin) the "Contractor's method" was used.

– The "Contractor's method" assesses NAV by reference to the notional cost of constructing or providing the property. It applies in circumstances where individual financial statements are not readily available.

– More precisely, in the case of the single fossil fuel facility in Limerick, this facility forms part of a larger industrial complex. This fossil fuel facility was valued using the "Contractor's method", because it was the only appropriate method by which the fossil fuel element of the facility could have been valued as part of the Limerick revaluation. This fossil fuel generator is part of a larger industrial facility located on an island in the estuary of the river Shannon, completed in the early 1980s, and not a dedicated electricity generating station. The property has in site a 150MW Combined Heat & Power (CHP) plant. The entire manufactory is one relevant property and could therefore only be valued as one relevant property based on evidence derived from the "Contractor's method". The total NAV of the entire facility is EUR 9.943 million. This valuation includes the CHP plant, which is valued at €4.572 million. Therefore, there has been no deviation from the reference system at all. Had the existence of accurate accounts given a fair representation of the asset earning potential, a hypothetical tenant would have not considered it necessary to adopt the "Contractor's method". To summarise, the "R&E" method could not apply because the complexity of the site does not allow the VOI to have a view on the rent that a putative landlord

would pay for the part of the property related to the fossil fuel generator only, because it is embedded in a much larger site.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of aid

(46) Pursuant to Article 107(1) TFEU, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". According to the settled case-law of the Court[5] in order for a national measure to qualify as State aid within the meaning of Article 107(1) TFUE the following cumulative conditions have to be met:

(47) Firstly, the measure has to be granted from State resources. Secondly, it has to confer an economic advantage on undertakings. Thirdly, the advantage has to be selective. Lastly, the measure has to distort or threaten to distort competition and affect trade between Member States.

(48) In the present case the Commission considers it appropriate to look first at the presence of a selective economic advantage in the alleged aid measure.

5.2. Advantage

(49) Article 107 TFEU defines as State aid measures that *inter alia* have the effect of "*favouring certain undertakings or the production of certain goods*". The word "favouring" is interpreted in practice as economic advantage or an advantage that a beneficiary would have not received in the absence of a State intervention. In addition, this advantage must selectively favour one undertaking or a group of undertakings in relation to other undertakings that do not benefit from this advantage.

(50) When it performs its assessment, the effects of the measure on the undertaking are relevant, and not the cause or the objective of the State intervention[6]. The Commission considers therefore that whenever the financial situation of an undertaking improves, because of State intervention, an advantage is present. To this purpose, the Commission assesses the financial situation of the undertaking following the measure, compared with its financial situation if the measure had not been introduced[7].

(51) In the present case, it should be established whether the application of one specific method of valuation, the "Contractor's method", to calculate the NAV in order to establish the annual property tax to be paid by a number of owners of power generation installations run on fossil fuels improves their financial situation, compared with the application of alternative valuation methods such as the "R&E" method, as applied to their competitors as Windfarms.

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5 See for instance, ECJ judgment of 19 December 2018, A-Brauerei, C-374/17, ECLI:EU:C:2018:1024, paragraph 19.

6 See for instance ECJ judgment, Italy v Commission, 173/73, ECLI:EU:C: 1974:71, paragraph 13.

7 Idem.

(52) In this regard, the Commission firstly notes that the Complainant does not propose any quantification of the measure, alleged to benefit the fossil fuel generators. This amount is firstly still subject to the finalisation of the revaluation of the NAV in all the counties of the Republic of Ireland; secondly, the valuation can be revised based on the judgement by the Valuation Tribunal, as exposed above in recital (16).

(53) The Commission also notes that the Valuation Act does not prescribe the application of a particular valuation method to a specific category of property. In theory, the VOI considers all the available methodologies to calculate the NAVs of the taxed property. In theory also, all the methodologies should entail, for a given property, a similar NAV.

(54) In practice, the effective application of a particular valuation method is rather due to the evidence available enabling to determine the Net Annual Value of the property. As explained by Irish authorities reliable development costs associated with the development of fossil fuel power generation plants have been available to the Valuation Office in Ireland for a number of plants, which allowed for a calculation of their NAV under "Contractor's method". Conversely, individual financial statements specific to the fossil fuel generation installations, necessary to apply the "R&E" method were not available to the Valuation Office[8].

(55) In any event, there is no evidence showing that the application of other valuation method "R&E" would have led to a higher NAV of the power generators run by fossil fuels where the "Contractor's method" was used. Irish Authorities have demonstrated that the purpose of the different methodologies is to reach a similar result (NAV) and that equality of treatment between comparable properties is the key objective of rating law, underlying judgments rendered by the Valuation Tribunal. Irish Authorities showed that it was the case for windfarms, where the application of both the "R&E" and "Contractor's method" lead, for a given facility, to a similar estimate of NAV.

(56) Irish authorities also explained in recital (33) (f) that the absence of application of the "R&E" methodology to a number of fossil fuel generators is explained by the lack of available financial information necessary to apply such methodology, as illustrated for the county of Limerick. For example, the only fossil fuel facility located in this county, is embedded in a larger industrial complex; therefore, there is no specific financial information available, which could provide the estimated rent that a putative owner would be able to pay for the share of the property related to the fossil fuel generator only. For other cases of fossil fuel plants, valued through the "Contractor's method", Irish Authorities have confirmed that sufficiently detailed and reliable open market accounts to support the valuation under the "R&E" approach were not available.

[8] Due to the absence of direct evidence of electricity generation facilities being leased, the "Rental method" does not apply in this case. In addition, due to the specific nature of the revaluation exercise, which consists in issuing new valuation lists, the "Tone of the list" approach is not applicable either, because this approach precisely relies on valuation list related to the same rating authority area as that property is located in. The "Tone of the list" method only applies to the revision exercise (revision of existing lists), and not to the revaluation exercise (production of new list).

(57) In addition, Irish Authorities have shown that NAV is only one of the parameters to calculate the amount of the annual property tax next to the annual rate of valuation. The latter is determined by each local authority each year. Thus it cannot be established that the owners of electricity generation installations run by fossil fuels in general would benefit from a lower annual property tax due to "Contractor's method".

(58) For the establishment of an economic advantage it is irrelevant what annual property tax is due by other installation owners like windfarm installations. This comparison is relevant for the selectivity assessment.

(59) Therefore the Commission concludes that it cannot be established that the valuation methods applied to owners of electricity generation installations based on fossil fuels provided an economic advantage to the latter which they would not have received if a different valuation method were to be applied.

(60) Lastly, the Commission notes that in the decision C 4/2005 related to United Kingdom's application of the tax on non-domestic property to telecommunications infrastructure in the United Kingdom[9], which specifies the Commission's case practice as regards business rates for property taxation, the Commission concluded there "*there is no evidence that the application of a different valuation method [for different undertakings] resulted in an advantage for these firms in comparison with their competitors*".

5.3. Selectivity of the measure

(61) In any event, the Commission considers that the alleged tax advantage to the owners of power generation installations run by fossil fuels, if established, would not be selective.

(62) In accordance with settled case-law the selectivity of the advantage is a constituent factor in the concept of 'State aid' within the meaning of Article 107(1) TFEU. The Court has also held that a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it[10].

(63) The objective of the annual property tax in Ireland is to tax the value of the property held by the taxable person (owner). As described in recital (17) above, the amount of this tax is a combination of the estimated NAV and of the annual rate of valuation, set up on a local basis. This formula is applied to all property owners in Ireland liable to pay the annual property tax.

(64) The Valuation Act, as stated above, does not prescribe a specific valuation method in order to establish NAV for a specific category of properties, in particular fossil fuel power generation installations, thus it does not establish any different treatment as to the category of properties in this respect. The

9 OJ L 383, 28.12.2006, p. 70.

10 See for instance, ECJ judgment of 19 December 2018, A-Brauerei, C-374/17, ECLI:EU:C:2018:1024, paragraph 22; judgment of 21 December 2016, Commission v World Duty Free Group and Others, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 86.

Commission thus concludes that the Irish legal framework does not contain any legal criteria leading to a more favourable tax treatment of the fossil fuel power generation installations. Therefore, Irish law does not provide any selective advantage to the latter.

(65) The Commission notes that selectivity can be also *de facto*, meaning that the structure of the tax measure is such that its effects significantly favour a particular group of undertakings.

(66) The Valuation Office of Ireland must comply with available methodologies in order to determine the NAV of the property subject to the annual property tax. The Valuation Act does not prescribe an explicit hierarchy of methods to be used in revaluation, nor provides for their application in a hierarchical manner.

(67) As explained above (40), the Valuation Office of Ireland applies to properties a valuation method depending on the availability of reliable information allowing to establish the Net Annual Value of the property. Furthermore, the Commission observes that the national tax authorities relied on the NAV as established by VOI. The latter when calculating NAV had to take into consideration all the applicable valuable methods when several were available. The fact that the "Contractor's method" was applied in a limited number of counties (eg Dublin, Limerick and Fingal) reflects the absence of available information to use the "R&E" method, and does not prejudge the application of the method in other counties. Furthermore, Ireland has confirmed that the "R&E" method was applied to fossil fuel plants in the counties of Longford and Offaly, which also shows the absence of the alleged "unwritten" hierarchy of methods, mandating the "Contractor's method" for fossil fuel generators.

(68) The Commission observes that the application of the "R&E" method, does not depend on the availability of financial accounts in general, but on the financial information targeted to the fossil fuel generators, which may be included in larger industrial complex. Ireland explained that the operating margin (e.g. EBITDI – earnings before interest, tax, depreciation and impairment), was a relevant metric to inform a hypothetical tenant's rental bid. This information is difficult, if not impossible, to obtain for this kind of complex properties, and therefore the "R&E" method cannot be applied.

(69) The Commission notes that the application of the "Contractor's method" to a number of power generation installations run by fossil fuels can be explained by the nature of these properties and the available data. As explained above, this method is in practice applied when the three other methods cannot be applied, due to the absence of information. The "Rental method" is normally not applied for electricity generation, because there is no direct evidence of electricity generation facilities being leased and therefore there is no rental evidence for the electricity generation sector. The "Tone of the list" approach relies on existing valuation list in a given area, and therefore does not apply to the specific context of the revaluation exercise, which consists in establishing new valuation lists. The "Receipt and expenditures" method assumes that a hypothetical tenant's rental bid derives from the operating margin of the tenant. Therefore, in the absence of specific and individual financial statutory information for a power plant, the "R&E" method cannot be applied.

(70) The fact that for windfarms the "R&E" valuation methodology has been applied does not lead to a conclusion that there is a selective tax advantage to the power generation installations run on fossil fuels.

(71) In fact, as explained by Irish authorities "R&E" method is suitable for properties for which individual statutory accounts are available. This is precisely the case for wind power generators and several fossil fuel plants in Longford and Offaly, whilst it is not the case for facilities enshrined in complex industrial sites, as for the fossil fuel plant of the county of Limerick and for those other cases of fossil fuel plants, where sufficiently detailed and reliable open market accounts to support the valuation were not available to national authorities.

(72) Furthermore, the Commission notes that, contrarily to the assertion from the Complainant, the application of different methods, for a given facility, gives in theory similar NAVs. This was satisfactorily demonstrated by Ireland through the calculation of the NAVS of ten windfarms plants in the county of Limerick under each of the methods as above mentioned (37) (38). The differences in NAVs does not result from the method which is applied, but from the cost structure of the facilities. Because windfarms have lower operating costs, they generate a more significant operating margin and are therefore exposed to a more significant NAVs and business tax rates, all other things being equal. Irish Authorities have shown that the VOI has applied exactly the same methodology to windfarms and to fossil fuel plants and has considered all the methodologies available.

(73) Finally, regarding the particular allegation of the complaint relying on the comparison of the annual property tax value per MW between the windfarms and the fossil fuels power installations the Commission notes that such comparison between power generators facilities in terms of EUR per MW of installed capacity does not enter in the logic of the reference framework since the objective of the tax at hand is to tax **the value** of the relevant property **not the output** (capacity of the installation). Therefore, such comparison is erroneous and not relevant to establish selectivity of the tax measure.

(74) In light of the above, the Commission considers that the NAV determination of certain power generation installations run on fossil fuels and then the annual property tax is not selective and can be explained by the availability of detailed and reliable financial information.

(75) Consequently, the Commission concludes that the measures does not entail a selective advantage, and therefore cannot be qualified as state aid within the meaning of Article 107(1) TFUE.

6. CONCLUSION

The Commission has decided that the measure does not constitute State aid within the meaning of Article 107(1) TFUE.

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission