

# Competition & Regulatory Newsletter

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## European Commission approves State aid measures contributing to EU environmental and climate goals

The European Commission has recently approved a number of State aid measures designed to further environmental goals.<sup>1</sup> The Commission concluded that the measures advanced the EU's environmental and climate objectives, without unduly hindering competition in the Single Market. The measures highlight the focus of State aid spending on environment and energy saving objectives in recent years - a trend that looks set to continue for some time to come.

This article discusses three of the Commission's recent decisions and concludes with some data that illustrates this trend.

### Polish support for cogenerated electricity and surcharge reductions for large energy consumers

The Commission recently [approved](#) a €5 billion State aid package for cogenerated electricity installations and surcharge reductions for large energy consumers in Poland.<sup>2</sup> Cogeneration, also known as combined heat and power (CHP), involves the use of power stations to generate electricity and useful heat simultaneously. Cogeneration is a more efficient use of fuel as it utilises otherwise wasted heat from the electricity generating process.

The scheme, which replaces a previous measure that expired in 2018, will provide support to both new and existing CHP installations by way of a premium on top of the market price. The premium awarded will mostly be set through a competitive bidding process. However, in exceptional circumstances, it will be determined administratively (to cover the difference between generation costs and the market price of electricity). The support will be provided for the full useful life of eligible installations, up to a maximum period of 15 years.

For further information on any competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

<sup>1</sup> Decisions include the approval of: (i) Polish support for cogenerated electricity and surcharge reductions for large energy consumers, announced 15 April 2019; (ii) an Irish scheme for renewable heat generation, announced 15 April 2019; (iii) €54 million of support for a waste-to-energy highly efficient cogeneration plant in Poland, announced 15 April 2019; (iv) a €385 million scheme designed to support the production of electricity from renewable sources in Lithuania, announced 23 April 2019; and (v) Dutch plans to grant €706,600 of State aid to De Meerlanden Holding NV, announced 23 April 2019.

<sup>2</sup> It also opened an investigation into reduced surcharges to finance the Poland capacity mechanism.

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The Commission examined the scheme under its [2014 Guidelines on State aid for environmental protection and energy \(2014 Guidelines\)](#), which allow Member States to support the production of electricity from renewable energy sources, subject to certain conditions. In this case, the rules permit Polish support for CHP installations as (i) the cost of cogenerating electricity exceeded market price, (ii) the support is necessary to trigger investment; and (iii) it does not result in overcompensation. The Commission therefore concluded that the scheme is “*in line with EU environmental and climate objectives, without unduly distorting competition in the Single Market*”.

The scheme will be financed by a surcharge levied on final electricity consumers in amounts based on their level of energy consumption. In order to reduce the impact of this surcharge on large energy consumers, Poland proposed that such consumers would benefit from a reduction on the surcharge. The 2014 Guidelines allow such a reduction for energy-intensive companies who are active in certain sectors and exposed to international trade to ensure their continued global competitiveness. The Commission agreed that the proposed reductions would achieve this aim without unduly distorting competition.

### Production of electricity from renewable sources in Lithuania

On 23 April 2019 the Commission then [approved](#) a €385 million scheme designed to support the production of electricity from renewable sources in Lithuania. The scheme will support installations that generate electricity from renewable energy sources including wind, solar and hydropower. Eligible installations will receive support in the form of a premium, set through a competitive bidding process. Lithuania hopes that the scheme will enable it to reach its 2025 target of renewable energy sources in gross final energy consumption - currently set at 38 per cent.

The Commission concluded that the measure would contribute to the EU’s environmental objectives, without unduly distorting competition. It would provide an incentive to operate installations that use renewable sources while being proportionate and limited to the minimum necessary (because it only covered the difference between the market price of electricity and cost of production).

Commenting on the scheme, Commissioner Margrethe Vestager said: “*The scheme will contribute to Lithuania’s transition to low carbon and environmentally sustainable energy supply, in line with the EU environmental objectives and our state aid rules.*”

### CO2 capture technology in the Netherlands

On the same day that the Commission approved the Lithuania electricity scheme, it also [approved](#) Dutch plans to grant €706,600 of State aid to De Meerlanden Holding NV. Meerlanden provides a variety of environmental services across the Netherlands including waste processing, pest control, street cleaning and recycling services.

Meerlanden will use the aid to install CO2 capture technology in its biomass digester in the province of Noord-Holland. Using this technology, Meerlanden plan to capture CO2 before it enters the atmosphere, following which it will feed the gas into a pipeline network owned by OCAP CO2 B.V. (OCAP). The captured CO2 will then be transported by OCAP to greenhouses in the Greenport area of Aalsmeer. The measure reduces the need for greenhouses to produce their own CO2 (using their heating systems) in the

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summer months. It is expected to reduce emissions by 2.4 kiloton of CO<sub>2</sub> per year and produce an annual energy saving of 65,000m<sup>3</sup> of natural gas.

Again, applying the 2014 Guidelines, the Commission found that the measure would contribute to the EU's environmental and climate goals, without unduly distorting competition.

### State aid and the environment - a growing trend

These three recent clearances are a continuation of a longstanding and growing trend. The Commission's [State Aid Scoreboard 2018](#) notes that in 2017, Member States spent €116.2 billion (0.76 per cent of EU GDP) on State aid, up from €106.6 billion (0.72 per cent of EU GDP) in 2016. Whilst only 11 per cent of all reported, active measures concerned environmental protection and energy saving, these measures accounted for 53 per cent of total State aid spending (excluding agricultural aid). By comparison, the proportion of aid earmarked for environmental purposes in 2008 was just 24 per cent.

The 2018 Scoreboard also explains that *“a large share of this spending is due to the approval under EU State aid rules of renewable energy initiatives, to help Member States meet their energy security and environmental targets and achieve the Energy Union strategy on the transition to a low-carbon, secure and competitive economy.”* In fact, 19 Member States reported increased spending on environmental and energy saving objectives between 2016 and 2017.

Given the long-term nature of the EU and Member States' strategy and targets in this area, this trend looks set to continue for some time to come.

## Other developments

### Merger control

#### Hong Kong Communications Authority conditionally clears HKBN/WTT merger

The Hong Kong Communications Authority (CA) [announced](#) on 17 April 2019 that it had decided to accept the commitments offered by the merging parties in relation to the proposed acquisition of WTT Holding Corp. (WTT) by HKBN Ltd. (HKBN), and not to commence an investigation under the Competition Ordinance (Ordinance). The Ordinance retains a merger control regime in Hong Kong for the telecommunications industry known as the 'Merger Rule'. The Merger Rule applies only to mergers involving carrier licensees under the Telecommunications Ordinance (TO), and the CA has concurrent jurisdiction with the Hong Kong Competition Commission in relation to the Merger Rule. Both WTT and HKBN hold carrier licences under the TO.

The CA conducted a competition assessment of the proposed transaction and identified two potential competition issues, namely: (i) the difficulties of competing fixed network operators in accessing those buildings which are not exclusively for residential use and where both merging parties have installed their own in-building telecommunications systems; and (ii) the risk of the downstream rivals, which have entered into wholesale agreements with the merging parties, becoming captive customers of the merged

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entity during a transitional period and thereby weakening their ability to compete with the merged entity during that period.

The merging parties offered commitments pursuant to section 60 of the Ordinance to address the concerns, before subsequently revising them to address issues raised in the representations from the industry and interested parties during the public consultation in February 2019. In the revised commitments accepted by the CA, the merged entity undertakes to: (i) facilitate access by competing fixed network operators to certain buildings where WTT and HKBN have already installed their own in-building telecommunications system; and (ii) continue to provide wholesale services to retail fixed telecommunications service providers, based on existing terms of wholesale agreements for three years.

This is the first case involving commitments under section 60 of the Ordinance. It is also the first case under the Ordinance in which the CA has identified potential competition issues. The timeline of the CA's assessment therefore serves as a useful indicator of the duration of any merger review by the CA. The proposed transaction was announced on 7 August 2018, initially with a long stop date of 6 February 2019.<sup>3</sup> Six months later, on 13 February 2019 the CA published the draft commitments for public consultation and issued its decision on 17 April 2019, over eight months after the initial announcement. It is also worth noting that, as a result of the merging parties offering commitments, the CA did not conduct a formal investigation under section 39 of the Ordinance, which would have entailed a significantly longer process (including potentially bringing proceedings before the Competition Tribunal).

## Antitrust

### CAT ordered to re-examine class certification in MasterCard claim

On 16 April 2019 the Court of Appeal (Court) [set aside](#) the Competition Appeal Tribunal (CAT)'s order which rejected an application to certify a £14 billion opt-out collective action by Mr Walter Merricks, acting as class representative, to claim damages from MasterCard. The case has been remitted back to the CAT for re-hearing.

The proposed collective proceedings are intended to combine follow-on actions arising out of a 2007 European Commission decision finding that MasterCard's multilateral interchange fees on cross-border payments breached EU competition law, as subsequently upheld by the European Courts.

In its order of July 2017 the CAT had rejected a claim for certification of the collective action brought by Mr Merricks, the former consumer ombudsman, dismissing the application after finding it did not meet the certification criteria. In particular, the CAT found that the claims were not eligible for inclusion in a collective proceeding as there was not sufficient commonality in issues between the claims.

The Court set aside the CAT's order for three main reasons:

- **Commonality of claims:** Lord Justice Patton noted that the CAT erred in its assessment of the commonality of claims: the proper test at the certification stage should be that the claim has a "*real*

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<sup>3</sup> This was subsequently [extended](#) to 6 May 2019 on 18 January 2019.

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*prospect of success*". Instead, the CAT had gone beyond this threshold and had treated the certification stage like a mini-trial.

- **Evidence on pass-on:** The Court found that the CAT was entitled to assess the credibility of the proposed methodology to assess the level of pass-on to the represented class and that there was, or was likely to be, evidence available to operate methodology. However, it was "*not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value*".<sup>4</sup>
- **Distribution of aggregate damages:** The Court also held there was no requirement for aggregate damages to be distributed on a compensatory basis as envisaged by the CAT. Lord Justice Patten ruled that it was for a trial judge to consider the issue of distribution and the CAT had compounded its error of refusing certification on this ground by requiring "*an individual calculation of loss for the purposes of distribution*".<sup>5</sup> The Court further noted that the CAT is not required when assessing whether to make a collective proceedings order (CPO) to consider more than whether the claims are suitable for an aggregate award of damages which, by definition, does not include the assessment of individual loss.

This is the third attempt to obtain a CPO under the "opt-out" collective redress procedure introduced in 2015 for claims in the CAT. Its success would likely have a profound effect on the viability of future collective action claims.

MasterCard has indicated it intends to ask the Supreme Court for permission to challenge the Court's ruling.

## State aid

### European Commission consults on 'fitness for purpose' review of State aid rules

On 17 April 2019 the European Commission announced a [consultation](#) on its "fitness check" evaluation of regulations adopted as part of the State Aid Modernisation Programme, which was issued in May 2012,<sup>6</sup> and also the 2008 Railway Guidelines and the 2012 Communication on short term export credit. The Commission's objective for this fitness check is to evaluate whether the rules comprising the Programme are still fit for purpose and have contributed to achieving the EU 2020 policy objectives. Moreover, a number of the measures within the Programme are due to expire in 2020. Consequently the Commission is keen to assess their effectiveness.

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<sup>4</sup> *Walter Merricks CBE v Mastercard Incorporated & Ors* [2019] EWCA Civ 674, para. 44.

<sup>5</sup> *Ibid.*, para. 61.

<sup>6</sup> The Regulations, Guidelines and Communications comprising the State Aid Modernisation Project are: the General Block Exemption Regulation, the De Minimis Regulation, the Guidelines on regional aid, the Guidelines on energy and environment aid, the Guidelines on State aid for risk finance investments, the Guidelines on rescue and restructuring aid, the Communication on important projects of common European interest, the Framework for State aid for research and development and innovation, and the Guidelines on State aid to airports and airlines.

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In particular, the fitness check will take into account: (i) the general objective of the Programme; (ii) the specific objectives of the legal framework; and (iii) current and (already known) future challenges. The Commission has launched an online questionnaire seeking views by 10 July 2019 with a working paper on the results expected in Q1 2020.

The questions address five distinct topics:

- **Effectiveness:** Along with specific questions on individual Regulations and Guidelines, the Commission aims to assess whether the Programme has: (i) met its objectives; (ii) led to clearer rules; and (iii) reduced the risk of subsidy races between Member States by enabling the Commission to scrutinise particularly important cases. The questionnaire also asks whether setting the threshold for post-award evaluation of the effectiveness of State aid schemes at €150 million is an appropriate threshold.
- **Efficiency:** the questionnaire seeks views on whether the costs involved in complying with State aid rules are proportionate to the benefits of having the rules in the first place, and whether the rules have reduced the administrative burden on Member States.
- **Relevance:** the Commission asks whether the Programme is still relevant in the context of new technological developments and changes in EU priorities.
- **Coherence:** It seeks responses on whether the Programme continues to be coherent with changes to other areas of EU legislation. The questionnaire provides examples such as the Capital Markets Union, Investment Plan for Europe and the Cohesion and Regional policy.
- **Added value:** the Commission seeks feedback whether the Programme has helped deliver EU policies more efficiently and, in that sense, has ‘added value’.

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