



EUROPEAN COMMISSION

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SENSITIVE*: *COMP Operations*

Subject: State Aid SA. 102454 (2022/N) – Spain and SA.102569 (2022/N) - Portugal – Production cost adjustment mechanism for the reduction of the electricity wholesale price in the Iberian market

Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts, on 20 May 2022 and 23 May 2022 respectively, the Kingdom of Spain (“Spain” or the “Spanish state”) and the Portuguese Republic (“Portugal” or the “Portuguese state”) notified a measure aiming to reduce the electricity wholesale price in the Iberian electricity market by supporting the input costs of fossil fuel technologies, which have a key influence on price setting in the Iberian electricity market (the “measure”).
- (2) On 24 May 2022, Spain provided replies to questions from the Commission. On 26 May 2022 and 6 June 2022, Spain and Portugal provided additional information in reply to queries from the Commission from 24 May 2022 and 2 June 2022.
- (3) Spain and Portugal exceptionally agree to waive their rights deriving from Article 342 of the Treaty on the Functioning of the European Union (“TFEU”), in

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conjunction with Article 3 of Regulation 1/1958¹ and to have this decision adopted and notified in English.

2. DESCRIPTION OF THE MEASURE

2.1. Context, objective and justification of the measure

- (4) Spain and Portugal explained that national and international energy markets are currently facing the most significant supply and price tensions in recent decades. According to them, the current crisis could be explained by a cumulative set of circumstances that together put a strong upward pressure on all fossil fuel prices, and in particular on that of natural gas. Those circumstances include the economic recovery from the COVID-19 crisis as gas demand quickly returned to pre-pandemic levels and exceeded supply², as well as lower Russian gas pipeline supplies, low gas storage levels, and related geopolitical uncertainties. The Russian military aggression against Ukraine, the sanctions imposed by the EU or its international partners and the counter measures taken, for example by Russia, have compounded the energy crisis, increasing the supply risks and adding new pressure that resulted in a further escalation of energy prices.
- (5) Spain and Portugal submitted that national and international natural gas hubs have been exposed to extreme volatility of natural gas prices as a result of the crisis. The price of natural gas on the Iberian gas market³ reached an average of EUR 92 per MWh during the first five months of 2022, which is double its average price in 2021 and around six times higher than its average price in 2019, before the effect of the COVID-19 pandemic. The long-term average price between 2015 and 2020 was EUR 18 per MWh.⁴ This high gas price affected day-ahead electricity prices in the Iberian electricity market, which averaged EUR 213 per MWh in the first five months of 2022, compared to EUR 112 per MWh in 2021, and EUR 48 per MWh in 2019. The long-term average price between 2015 and 2020 was EUR 47 per MWh.⁵ Notably as a consequence of the high and volatile prices on the gas market, which market participants expect to be long lasting, prices for electricity to be delivered in the future have also increased.⁶ The average price for the delivery of

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

² Quarterly report on European gas markets, Volume 14 (issue 4, covering fourth quarter of 2021), Market Observatory for Energy DG Energy, p. 5-14.

³ The natural gas market in the Iberian Peninsula is organised by market operator MIBGAS S.A. Mercado Ibérico del Gas (MIBGAS), responsible for its operational functions and financial administration of its services, according to the principles of efficiency, transparency and objectivity, non-discrimination and independence.

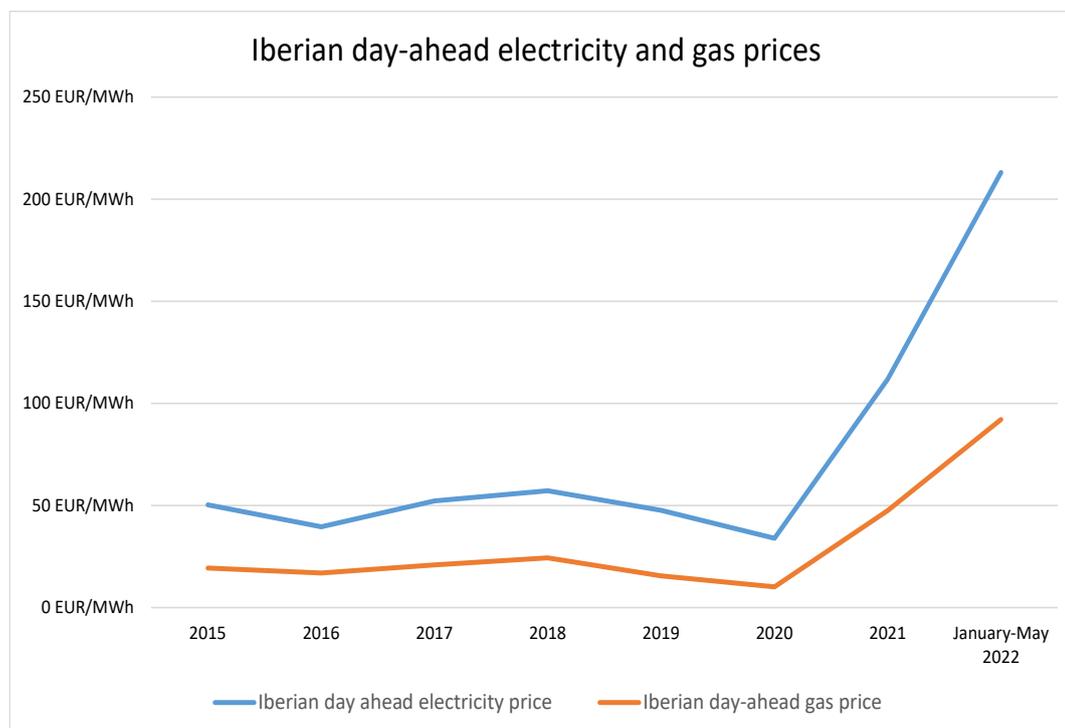
⁴ Organised Gas Market annual reports, <https://www.mibgas.es/en/publications?menu=5#Reports>

⁵ Monthly reports of the OMIE market, <https://www.omie.es/en/publications>

⁶ For a more detailed explanation of price increases for electricity, see Commission Communication COM(2021) 660 final on Tackling rising energy prices: a toolbox for action and support of 13 October 2021: *“The current electricity price increase is primarily due to global demand for gas soaring as economic recovery is picking up. Rising demand has not been matched by increasing supply with effects felt not only in the EU but also in other regions of the world. In addition, lower-than-expected gas volumes have been observed coming from Russia, tightening the market as the heating*

baseload electricity in the next year (year-ahead contract) increased from EUR 44 per MWh in 2020 to EUR 90 per MWh in 2021 to EUR 133 per MWh in the first five months of 2022.⁷ Future prices for electricity currently traded on the market remain high until at least the end of 2023 (staying above EUR 140 per MWh all year), albeit with a certain drop in prices after the first quarter of 2023 (from EUR 167.50 per MWh in the first quarter 2023 to EUR 154.50 per MWh in the second quarter).⁸

Figure 1: Development of day-ahead electricity and gas prices on the Iberian Peninsula



Source: BloombergNEF, MIBGAS

- (6) The rise in day-ahead electricity prices in the Iberian electricity market has had an immediate negative impact on Spanish households and small and medium size enterprises (SMEs) that are supplied under a regulated electricity tariff, i.e. ‘Precio voluntario para el pequeño consumidor’ (‘PVPC’) or a tariff for vulnerable consumers (Bono Social), which is designed as a discount on the PVPC (and thus consumers wishing to benefit from the Bono Social need to make use of the

season approaches. Though it has fulfilled its long-term contracts with its European counterparts, Gazprom has offered little or no extra capacity to ease pressure on the EU gas market. Delayed infrastructure maintenance during the pandemic has also constrained gas supply. As natural gas prices are a fundamental determinant of electricity prices in most of the EU, these dynamics underpin most of the current increase in the latter. In addition, electricity prices also increased because of seasonal weather conditions (low water and wind over summer). This has resulted in lower production of renewables in Europe’. This situation was further worsened following the aggression against Ukraine by Russia; see Commission Communication COM(2022) 108 final, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, of 8 March 2022.

⁷ Platts Market Data.

⁸ SPEL base futures by quarter, OMIP data on 1 June 2022, <https://www.omip.pt/en/dados-mercado?date=2022-06-01&product=EL&zone=ES&instrument=FTB>.

PVPC). To implement the PVPC, the Spanish transmission system operator ('TSO') Red Eléctrica de España (REE) publishes every day at 8.15 p.m. CET the hourly electricity tariffs that will be applied the following day. The hourly price is the result of adding the cost of energy production (which notably reflects the hourly price resulting from the day-ahead energy market), the transmission and distribution tariffs and the charges for the energy consumed (e.g. to finance renewable support costs).⁹ The recent steep increases in the day-ahead electricity prices have thus directly and immediately affected electricity bills of 10.6 million households and SMEs supplied under the PVPC, which represent approximately 40 % of all households and SMEs and 10 % of the total Spanish consumption. Spain submitted that it is planning a reform of the PVPC aimed at reducing its dependence on spot market developments and taking into account prices of futures contracts. The Spanish authorities explained that it has not been possible to complete the reform by the time of the notification due to the low liquidity and high volatility of future markets in the Iberian Peninsula. However, they expect the reform to take effect by October 2022. While in Portugal most household customers are not directly exposed to price fluctuations on the wholesale market, the Portuguese authorities state that prices under new contracts or for those exposed to wholesale market developments have markedly increased. The same applies for new contracts in Spain.

- (7) The rising electricity prices have affected virtually every type of economic activity. Spain and Portugal explained that they consider that the crisis creates a serious disturbance in their economies. The Commission described in the Temporary Crisis Framework¹⁰ that the aggression against Ukraine by Russia, the sanctions imposed by the EU or its international partners and the counter measures taken, by Russia have created significant economic uncertainties, disrupted trade flows and supply chains and led to exceptionally large and unexpected price increases, especially in natural gas and electricity, but also in numerous other input and raw materials and primary goods, including in the agri-food sector. The Commission acknowledged that those effects taken together have caused a serious disturbance in the economy of all Member States. Spain and Portugal highlighted that, in addition to the abovementioned elements, electricity prices in Portugal and Spain have very sharply increased and that (notably due to the PVPC tariff) that increase has had an immediate negative effect on electricity consumers, including many vulnerable households. They also stress that the Iberian Peninsula is not strongly interconnected with the rest of the Union (recital (12)).
- (8) Spain and Portugal also recalled the conclusions of the European Council meeting of 24 and 25 March 2022, which, in addition to requesting a comprehensive and ambitious plan to phase out dependency on Russian gas, oil and coal imports,

⁹ “The hourly price curve is the result of adding the cost of energy production, the payments for transmission and distribution tolls and the charges for the energy consumed. The production cost is made up of the hourly price resulting from the day-ahead energy market, operated by the Iberian Electricity Market Operator (OMIE); the ancillary services managed by Red Eléctrica de España in its capacity as system operator, in addition to other costs considered under the current legislation.” <https://www.ree.es/en/activities/operation-of-the-electricity-systemvoluntary-price-small-consumer-pvpc>.

¹⁰ Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 131 I, 24.3.2022, p. 1).

acknowledged that sustained high energy prices had an increasingly negative impact on citizens and businesses.¹¹

- (9) To mitigate the impact on vulnerable consumers and European businesses in the short term, the European Council invited Member States to continue to make use of the toolbox of measures outlined by the Commission in its Communication of 13 October 2021¹² as well as of the Temporary Crisis Framework. The European Council further noted that emergency temporary measures in the electricity market to mitigate the impact of fossil fuel prices in electricity production can be assessed urgently by the Commission as regards their compatibility with the provisions of the Treaties and the Electricity Market Regulation¹³, and that due account should be given to the temporary nature of the measures and the level of electricity interconnectivity between the intervention area concerned and the single market for electricity. Moreover, the Commission Communication of 18 May 2022 on “*Short-term energy market interventions and long-term improvements to the electricity market design – a course for action*” (‘the May Communication’)¹⁴ recognises that temporary measures can be applied on the wholesale electricity market in order to mitigate the impact of high gas prices. For instance, national measures to subsidise the cost of gas used for power generation (e.g. to introduce a reference price for gas used for electricity production) with a view to lowering prices on the electricity market are considered by some Member States. It further notes that such measures should be designed in a way compatible with the EU Treaties, in particular with regard to the absence of restrictions to cross border exports, sectoral legislation and State aid rules and notified to the Commission for approval.
- (10) Against this background, the Spanish and Portuguese authorities explained that they have already adopted a series of measures aiming to alleviate the negative effects of the energy crisis, which are outside the scope of this decision. In the case of Spain, such measures include increased social support payments and fuel allowances for vulnerable households, a temporary suspension of the generation tax on power plants, reductions in VAT rates and excise taxes on electricity for vulnerable consumers, reductions in charges for the use of the network and a temporary deduction of market revenues (infra-marginal rents) for non-CO₂ emitting power plants (the windfall profit tax). Spain has also implemented several measures under the Temporary Crisis Framework.¹⁵ The estimated total budgetary

¹¹ European Council conclusions of 24 and 25 March 2022 available here: [2022-03-2425-euco-conclusions-en.pdf \(europa.eu\)](https://ec.europa.eu/euco/conclusions-en.pdf).

¹² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling rising energy prices: a toolbox for action and support; COM/2021/660 final.

¹³ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ L 158, 14.6.2019, p. 54).

¹⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Short-Term Energy Market Interventions and Long Term Improvements to the Electricity Market Design – a course for action COM(2022) 236 final.

¹⁵ E.g. SA.102650 (2022/N) designed to support production costs of milk producers; SA.102645 designed to support fishing vessel companies; SA.102616 designed to support rail freight undertakings; SA.102615 designed to support transport sector due to increases in fuel prices; and SA.102613 designed to support the gas intensive industry. All those measures were approved by the Commission in the course of April and May 2022.

impact of those measures is in the range of EUR 8.5 billion. Portugal reduced the electricity network access tariff and used the energy sector extraordinary contribution to mitigate the increase in the energy component of the final electricity price, with a combined budgetary impact of approximately EUR 0.74 billion.

- (11) As regards the interaction of the measure with the existing taxation on windfall profits in Spain (which is outside the scope of this decision), the Spanish authorities confirmed that for the time periods when both measures are applied in parallel¹⁶ :
- a. the windfall profit tax will only be applied to the difference between the gas price cap applicable under the measure during the period of parallel application and the gas price applied under the windfall taxation measure¹⁷; and
 - b. where purchases of electricity are subject to the obligation to pay the cost contribution (notably for contracts other than those signed prior to 26 April 2022), the amount of the contribution to be paid by the customer will not be considered as revenue subject to the windfall profit tax when calculating the windfall profit tax as the cost contribution is channelled into the budget of the measure.
- (12) Owing to its geographical position, the Iberian Peninsula has a limited connection with the rest of the European electricity network, limited to certain interconnectors between Spain and France. Those have a commercial exchange capacity¹⁸ of 2 800 MW, which compares with 42 000 MW of hourly peak demand registered in Spain and 10 000 MW of hourly peak demand registered in Portugal in 2021. Another way of measuring the level of interconnection is comparing the commercial exchange capacity at the border with the installed electricity generation capacity inside the Iberian Peninsula. By that measure, the degree of electricity interconnection capacity between the Iberian Peninsula and the rest of Europe is approximately 2 %.¹⁹ Taken separately, the degree of interconnection of Portugal is 8 % and the degree of interconnection of Spain is 6.5 %.²⁰ The Commission has set an interconnection target of at least 10 % by 2020 and 15 % by 2030 to encourage EU countries to interconnect their installed electricity production capacity.²¹ Those

¹⁶ The windfall taxation measure, which is out of the scope of the present decision, is currently applicable until the end of June 2022 but could be prolonged.

¹⁷ The windfall taxation measure taxes producers of electricity for revenue from the power market due to marginal prices being higher than they would be at a reference gas price, which is set at EUR 20 per MWh of gas. Exceptions apply.

¹⁸ Capacity made available for electricity trading by TSOs.

¹⁹ This figure is calculated as the relation between the commercial capacity of Spain with France and the sum of the installed electricity generation capacity of Spain and Portugal.

²⁰ Higher individual levels of interconnections are explained by the fact that when looking at Spain individually, for instance, one has to take into account not only the interconnectors with France, but also the interconnectors with Portugal. Thus, the numerator of the figure (interconnection capacity) increases, while the denominator (installed generation capacity of Spain only) decreases compared to the figure for the whole Iberian Peninsula, resulting in a higher level of interconnectivity for Spain alone. The same reasoning applies with regard to Portugal.

²¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions and the European

cross-border capacity ratios correspond to the import capacity over EU's Member States' installed generation capacity. Thus, neither of the two Member States would meet those targets at present.

- (13) The measure aims at lowering electricity wholesale prices in the Iberian electricity market ('MIBEL') by supporting part of the fuel costs incurred by fossil fuel power plants, in light of the fact that they have a key influence over the prices in the electricity market (see recitals (20) to (23)). Due to the high level of integration between the electricity markets of mainland Spain and Portugal,²² the measure is adopted and implemented in a coordinated manner in both countries.
- (14) Spain expects that the measure will create more stability and predictability for electricity prices on the Iberian electricity market and could also facilitate the implementation of structural measures such as the reform of the PVPC (see recital (28)) that Spain will implement (see recital (6)), thus increasing the resilience of the system in the future. The PVPC reform could also be accompanied by other measures outside the scope of this decision aiming to improve the liquidity of the forward market on both the supply and demand side.

2.2. Legal basis

- (15) The legal basis for the measure is:
- For Spain: Real Decreto-ley 10/2022, de 13 de mayo, por el que se establece con carácter temporal un mecanismo de ajuste de costes de producción para la reducción del precio de la electricidad en el mercado mayorista (Royal Decree Law 10/2022 of 13 May temporarily establishing a mechanism for adjusting production costs to reduce the price of electricity in the wholesale market – the “Spanish Royal Decree Law”²³).
 - For Portugal: Decreto-Lei n.º 33/2022, de 14 de maio²⁴ (the “Portuguese Decree-Law”) and Diretiva n.º11/2022, de 14 de maio²⁵ (the “Portuguese Directive”²⁶).

Investment Bank A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

²² A high level of interconnection between the two countries compared to a relatively small size of Portuguese electricity system results in electricity prices in Portugal being the same as or no more than 1 % higher or lower than in Spain in more than 95 % of hours of the year. Quarterly report on European electricity markets Volume 13 (issue 4, fourth quarter of 2020), Market Observatory for Energy DG Energy, p. 23-25.

²³ The Spanish Royal Decree Law makes the effective entry into force of the measure contingent on its approval by the Commission.

²⁴ Summary: Estabelece um mecanismo excepcional e temporário de ajuste dos custos de produção de energia elétrica no âmbito do Mercado Ibérico de Eletricidade (Decree-Law n.º 33/2022 of 14 May Establishing an exceptional and temporary mechanism to adjust the costs of electricity production within the scope of the Iberian electricity market).

²⁵ Summary: Aprova as obrigações declarativas no âmbito do mecanismo de ajustamento de custos no Mercado Ibérico da Eletricidade (Approves reporting obligations under the cost adjustment mechanism in the Iberian electricity market).

²⁶ The Portuguese Decree-Law does not include a standstill clause. Portugal explained that this is because the MIBEL spot market rules are, according to the MIBEL agreement (Agreement of Santiago

2.3. Administration of the measure

- (16) Operador del Mercado Ibérico Español ('OMIE')²⁷, which is established jointly by Spain and Portugal, is the nominated electricity market operator ('NEMO') and has the legal monopoly for running the energy spot markets in the Iberian Peninsula. OMIE is responsible for administering the measure in the day-ahead and intraday markets. The OMI Group is structured into two holding companies, OMEL and OMIP SGPS. Each of those companies holds 50 % of the two managing companies for the Iberian electricity market: OMIE, which manages the day-ahead and intraday markets, and OMIP - Pólo Português, S.G.M.R., S.A (OMIP SGMR), which manages the forward market. Both OMEL and OMIP SGPS are privately owned, with their shareholders made up principally of energy companies and financial institutions.²⁸
- (17) The TSOs, i.e. REE in Spain and Rede Eléctrica Nacional, S.A. (REN) in Portugal, are responsible for the settlement of electricity traded in the balancing market. They are also responsible, under the supervision respectively of the Spanish and Portuguese national regulatory authorities ("NRAs"), the Comisión Nacional de los Mercados y la Competencia in Spain and the Entidade Reguladora dos Serviços Energéticos in Portugal for the collection and administration of the congestion income referred to in recitals (52) to (56).
- (18) REE is part of the Red Eléctrica Group, 80 % of whose shares are in private hands with the remaining 20 % belonging to the Sociedad Estatal de Participaciones Industriales, the Spanish State-owned investment company. REN is entirely privately owned.
- (19) OMIE's activities in the wholesale electricity market are fully regulated jointly by the Spanish State and Portuguese State, whereas REE's and REN's activities on the same market are fully regulated by the Spanish State and Portuguese State, respectively.

2.4. The nature and form of the measure

- (20) The EU day-ahead electricity market is based on a marginal pricing method (also known as the 'pay-as-clear' system).²⁹ The key feature of that market design is that

de Compostela), updated by the Spanish legislation with Portugal's prior agreement. Therefore, the standstill provisions in the Spanish legislation will be applicable indirectly also for Portugal.

²⁷ OMIE is the NEMO for managing the Iberian Peninsula's day-ahead and intraday electricity markets pursuant to Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ L 197, 25 July 2015, p. 24).

²⁸ <https://www.grupoomi.eu/en/shareholder-structure>

²⁹ See, notably, Article 38(1)(b) Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ L 197, 25.7.2015, p. 24). The day-ahead market is a market where electricity is bought and sold on the day before the actual production and delivery. Such trading is typically organised by a power exchange, in this case OMIE, in the form of an auction where generators and electricity traders meet and offer generation volumes or demand consumption volumes specifically for each hour of the day. Electricity can be also bought or sold through bilateral contracts between two parties outside of the power exchange. Such bilateral contracts with physical delivery, which make up only a small minority of the Iberian electricity market, are excluded from the application of the measure (see article 2 paragraph 2 of the Spanish Royal Decree Law). The day-ahead market is the most important of all electricity markets affected by the measure

the price is set by the last generation source necessary to meet demand at a given moment in the European market-coupling system (the so-called marginal power plant). Producers offering their electricity in the market are sorted by a European algorithm according to their bids in a so called merit order, starting with the least costly sources to run (such as renewable or nuclear generation) up to the most expensive power plants (typically coal- and gas-fired generators), including power plants in other bidding zones and Member States. This means that low-marginal-cost technologies (e.g. nuclear, wind, hydro and solar) will almost always run, barring instances of very low demand. The last plant needed to meet the demand within a certain time frame sets the price and all producers are paid the same price, provided that their bids come under the final clearing price. In many instances, it is a fossil fuel power plant (e.g. coal- or gas-fired power plant), which is the most expensive plant in terms of operating costs, that will set or influence the clearing price.³⁰ Besides fossil fuel power plants, the marginal plant can also be for example a hydro-power plant (see recital (22)).

- (21) According to the 2021 Annual Report of OMIE,³¹ gas-fired power plants play an important role in setting or influencing prices in the majority of hours in day-ahead auctions in the MIBEL market, thus having a key influence on the average wholesale price of electricity in Spain and Portugal.
- (22) In particular, data published by OMIE show that in Spain, in 2021, hydro power plants set the price in 54.9 % of hours, renewable generation sources, sources co-generating heat and power (CHP generators) and waste-to-energy power plants in 23.6 % of hours, gas-fired power plants in 15.9 % of hours, pumping hydro power

because it decides the dispatch of various generation technologies within a bidding zone (influencing the structure of the electricity mix in both Spain and Portugal and with it also the costs of the measure) and due to the fact that prices observed in that market are the primary source of information for market participants (electricity traders) about prices of products they offer to final consumers.

Since electricity consumption must match production at all times, market participants such as electricity traders, generators, and often also large industrial or commercial power consumers need to balance their electricity production and/or consumption or that of their customers on a permanent basis to ensure that the amount of electricity bought and consumed (in the case of demand) or generated and sold (in the case of supply) is always evened out. After the auctions on day-ahead markets are closed, existing shortfalls or surpluses can be and usually are evened out through intraday trading in which electricity for a particular time of the day is traded closer to the delivery time, up to several minutes before the actual delivery. While day-ahead trading uses market clearing price principles, where the last accepted bid sets the price for all transactions, prices in the integrated European intraday market (XBID) are set in a ‘pay-as-bid’ process. This means prices are assessed in continuous trading based on each transaction that is completed. Intraday trading exists primarily to limit shortfalls or surpluses of electricity in market participants’ portfolios, which helps them meet their commitments and reduce potential imbalance costs. Those are costs which the TSO, responsible for keeping the electricity system stable and balanced as a whole, charges to the market participants if they are found either to be in surplus or in shortfall as regards their position. In order to keep the system stable at all times, the TSO procures balancing management services on the balancing market (for instance an increase or decrease of generation output or an increase or decrease of consumption by a large industrial plant). By the virtue of its design, the measure affects also intraday and balancing markets, which are, however, of much lesser importance as far as costs of electricity supply for final consumers are concerned.

³⁰ Commission Staff Working Document accompanying the Report from the Commission Energy prices and costs in Europe SWD/2020/951 final, pp. 20-21.

³¹ Evolución del Mercado de electricidad: Informe anual. Available at https://www.omie.es/sites/default/files/2022-03/informe_anual_2021_es.pdf.

plants in 10.2 % of hours, and coal-fired power plants in 1.5 % of hours.³² In Portugal the picture is very similar for the same year: hydro power plants set the price in 55.8 % of hours, renewable, cogenerating and waste-to-energy sources in 22.7 % of hours, gas-fired power plants in 15.9 % of hours, pumping hydro generation in 9.7 % of hours, and coal-fired power plants in 1.7 % of hours. The Spanish and Portuguese authorities explained that gas power plants have a higher influence on price setting than the abovementioned figures suggest due to the bidding behaviour of hydro power plants. As hydro power plants have close to zero (or limited in the case of pumped storage) operating costs, the decision whether to produce electricity now or later is mainly based on opportunity cost considerations. The opportunity costs, or water value, are mainly determined by the possibility to save (or pump) the water and use it in the hours with the highest electricity prices. The water value, in turn, is influenced by fossil fuel technologies with high operating costs, because hydro generators act flexibly and, in a calculated way, bid at prices close to the prices of fossil fuel power plants.³³ Thus, even if fossil fuel power plants in Spain and Portugal appear as price-setting only in a limited number of hours, their operating costs in fact affect electricity prices most of the time.

- (23) Since coal no longer plays a significant role in the Spanish electricity mix (less than 2 % of the total generation in 2021) and Portugal stopped coal-fired electricity generation altogether in 2021, gas has become the main determinant of prices in the Iberian electricity market (see recitals (39) to (40)). The measure thus aims to cap the maximum gas price that operators of fossil fuel and other price-setting power plants take into account when submitting their bids in the Iberian electricity market.
- (24) The measure provides support in the form of a payment to the operators of fossil fuel power plants (except for those subject to regulated revenues such as certain CHP plants or plants outside the Spanish mainland) to cover part of their fuel costs. This includes both gas-fired and coal-fired power plants. By reducing the operating cost of the plants with the highest influence in setting wholesale electricity prices, the measure aims to reduce the price of electricity on both the wholesale and retail market. The payment functions as a direct grant aimed to finance part of the fuel cost.
- (25) The measure will be financed in part by the income of the Spanish TSO stemming from congestion in the interconnector between France and Spain as a result of cross-border electricity trade between the two countries (the so called congestion income, see recitals (52) to (57)) and in part by contributions imposed in the same manner by Spain and Portugal on certain buyers on the wholesale market (see recitals (44) to (50)).

³² The percentages do not add up to 100 % as in certain hours more than one technology can set the price at the same time as their bids are equal at the point in which demand meets supply.

³³ This is consistent with relevant literature: e.g. Alnæs, E. N., Grøndahl, R. B., Fleten, S.-E., & Boomsma, T. K. (2015). Insights from Actual Day-Ahead Bidding of Hydropower. *International Journal of Sustainable Energy Planning and Management*, 7, pp. 34–54. <https://doi.org/10.5278/ijsepm.2015.7.4>. Further observations into the phenomenon are offered by Jahns, Christopher; Podewski, Caroline; Weber, Christoph (2019) : Supply curves for hydro reservoirs: Estimation and usage in large-scale electricity market models, HEMF Working Paper, No. 01/2019, University of Duisburg-Essen, House of Energy Markets & Finance, Essen.

- (26) Spain and Portugal confirm that aid under the measure is not conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. This is irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA.

2.5. Budget and duration of the measure

- (27) The estimated budget of the measure is EUR 8.4 billion for Spain and Portugal combined (EUR 6.3 billion for Spain and EUR 2.1 billion for Portugal). The Spanish and Portuguese authorities explained however that the budget of the measure may vary depending on, in particular, the actual gas price in the Iberian gas market (which influences the extent of the support and, hence, the size of the contribution imposed on unhedged buyers in the wholesale electricity market), the size of the supported thermal generation gap³⁴ necessary to complement renewable and nuclear shares of the electricity mix (which influences the contribution), and the difference between wholesale electricity prices in Spain and France (which influences the volume of cross-border demand for electricity and additional revenues funding the measure). The higher the market gas price or the thermal gap is, the higher the budgetary needs are. The higher the difference between Spanish and French wholesale electricity prices, the higher the revenue from congestion income and thus the lower the remaining budgetary needs of the measure.
- (28) Aid may be granted under the measure as from the notification of the Commission's decision approving the measure until no later than 31 May 2023. Spain explained that the measure aims to provide temporary relief to electricity consumers in the Iberian Peninsula and also allow the authorities some time to enact reforms of the PVPC tariff with the aim of decreasing the exposure of vulnerable households and SMEs to spot market prices. The reforms are outlined in the Spanish Royal Decree Law (Disposición adicional quinta). The Spanish Royal Decree Law obliges the Spanish Government to reform the Real Decreto 216/2014 setting out the methodology to calculate the PVPC tariff before 1 October 2022, for a start of application of the amended PVPC in early 2023.

2.6. Beneficiaries

- (29) The beneficiaries of the measure are gas-fired power plants and coal power plants, as well as combined heat and power (CHP) plants as long as those do not benefit from a support scheme under which their remuneration is regulated.³⁵
- (30) Spain and Portugal confirm that the aid under the measure will not be granted to undertakings under sanctions adopted by the EU, including but not limited to: a) persons, entities or bodies specifically named in the legal acts imposing those sanctions; b) undertakings owned or controlled by persons, entities or bodies targeted by sanctions adopted by the EU; or c) undertakings active in industries

³⁴ I.e. total demand minus renewable and nuclear generation. In others words, the amount of fossil fuel generation necessary to complement renewable and nuclear generation to meet the demand at any given time.

³⁵ Regulated CHPs already receive support to produce and do not influence prices in the electricity market since they bid in a similar fashion to infra-marginal low-cost producers.

targeted by sanctions adopted by the EU, insofar as the aid would undermine the objectives of the relevant sanctions.

- (31) Spain and Portugal confirm that the measure may not in any way be used to undermine the intended effects of sanctions imposed by the EU or its international partners and will be in full compliance with the anti-circumvention rules of the applicable regulations.³⁶ In particular, natural persons or entities subject to the sanctions will not benefit directly or indirectly from any such measures.

2.7. Sectoral and regional scope of the measure

- (32) The measure is open to gas-fired power plants, coal power plants and combined heat and power (CHP) plants (as long as they are not beneficiaries of regulated tariffs). It applies to the peninsular territory of Spain,³⁷ as well as Portugal.

2.8. Basic elements of the measure

- (33) The measure consists in a support payment to fossil fuel power plants (gas-fired power plants, coal-fired power plants and CHP plants that do not benefit from a regulated tariff) in the Iberian Peninsula, with the aim of reducing their production costs and, correspondingly, the bids they submit to the day-ahead auction in the wholesale electricity market. The support payment will also be granted for their production in the intraday and balancing markets, thus covering all the relevant short-term timeframes of the electricity market.³⁸ However, the production of fossil fuel power plants or CHP plants carried out under physical bilateral contracts³⁹ will not benefit from support under the measure if the delivery falls within the duration of the measure.
- (34) Spain and Portugal explained that as fossil fuel technologies benefitting from support under the measure act as price setters in the Iberian electricity market or influence bidding behaviour of other important price setting technologies such as hydro, their lower bids should reduce wholesale electricity prices on the Iberian day-ahead, intraday and balancing markets (see recital (22)).
- (35) The measure is expected to ultimately result in lower electricity prices in particular for Spanish and Portuguese consumers. They will benefit from those reduced wholesale prices, either directly, in the case of consumers with dynamic price contracts, which directly reflect changes to wholesale prices in final consumption

³⁶ For example, Article 12 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1).

³⁷ Excluding the Balearic Islands, which do not participate in Iberian electricity market. Since local generators do not submit bids in relevant Iberian electricity markets (day-ahead, intraday or balancing) and cannot influence prices, their inclusion is not necessary for the functioning of the measure.

³⁸ Thus, power plants get the payment for all their production on short-term markets, independent of the timeframe on the short-term market in which the electricity was sold. This aims at avoiding incentives to shift production between different short-term markets.

³⁹ Contracts taking place outside a power exchange between an electricity generator and an electricity trader or consumer for a physical delivery of a specific amount electricity over a specific time frame. As those volumes are not traded on an exchange, they do not directly influence prices on the day-ahead market.

prices (including those under the regulated PVPC tariff), or indirectly through suppliers passing on cost reductions in the price of electricity to their consumers. The lower wholesale prices in Spain and Portugal may have as an indirect consequence that Portuguese and Spanish producers sell their electricity through the interconnection between Spain and France into other Member States, provided that the price they can achieve there is higher than the price they can achieve in Spain and Portugal. This may increase overall electricity production in Spain and Portugal. However, such exports will remain limited (max. 2 % of Spanish and Portuguese production capacity), due to the limited interconnection between Spain and France.

- (36) The beneficiaries of the measure are expected to submit bids in the relevant (day-ahead, intraday or balancing) market of MIBEL with their best production forecast, taking into account the amount of support they will receive under the measure. The support payment will be calculated and paid out for each trading day based on the following formula:

$$Y = \frac{(P_{GN} - P_{GNT})}{0.55}$$

where,

Y is the unit amount of support, in EUR per MWh (for electricity production).

P_{GN} , is the reference for the market-based natural gas price. For the purpose of the formula, day-ahead prices of natural gas negotiated in the Iberian organised natural gas market (MIBGAS)⁴⁰ will be used.

P_{GNT} , is the level of the cap of the natural gas price (the maximum level of internalisation of gas price in the electricity market). The gas price cap will start at EUR 40 EUR per MWh and will gradually rise as shown in the table below:

0.55 reflects the assumed average efficiency (55 %) of gas-fired power plants that influence prices most often in the Iberian electricity market, which the national governments argue is representative for most gas-fired generation assets on the Iberian Peninsula.

Table 1: Evolution of the gas price cap in the support calculation formula

Month	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10	#11	#12
Gas price cap EUR/MWh	40	40	40	40	40	40	45	50	55	60	65	70

- (37) The support payment will be calculated and published on a daily basis, before the day-ahead electricity auction, based on the known day-ahead market price of natural gas. Thus, all market agents will know the level of support they can expect and will be able to adjust their bids accordingly, effectively reducing their bids by the amount of the support payment in EUR per MWh. If individual market participants were to not adjust their bids accordingly, Spanish and Portuguese

⁴⁰ <https://www.mibgas.es/en/market-results>

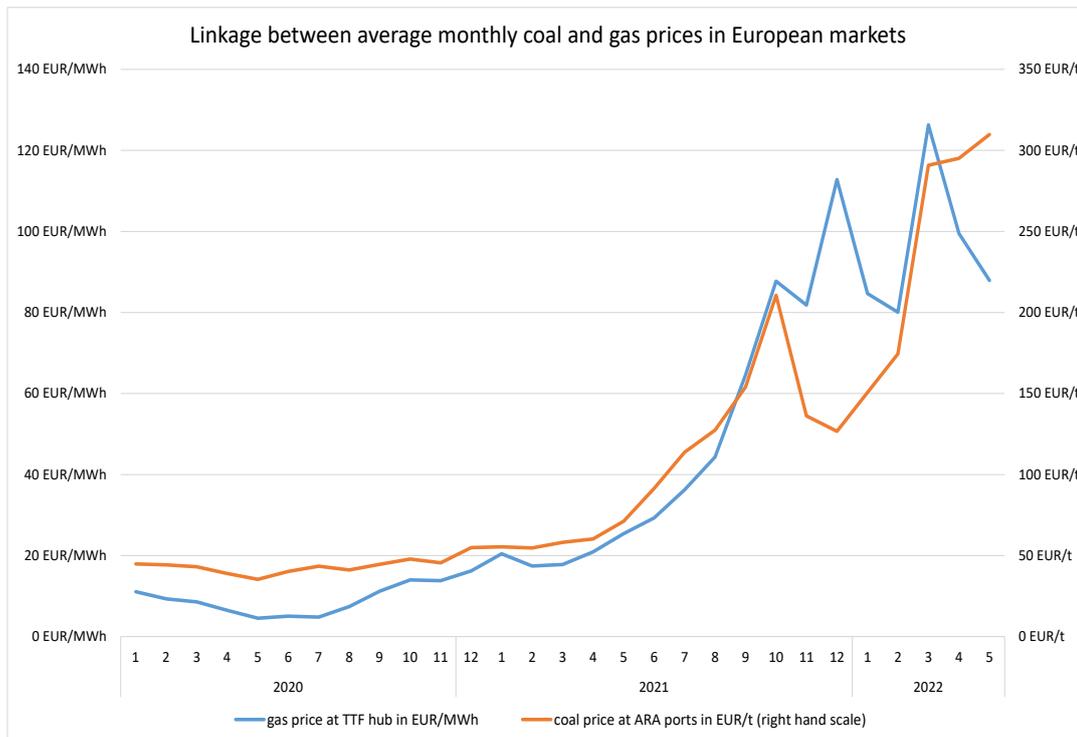
authorities would expect those market participants to be outbid on the market by other market participants.⁴¹ If a large share of market participants were to not adjust their bids, the measure would have a significantly reduced impact on price, but the Spanish and Portuguese authorities explained that this would be prevented by stringent monitoring and penalty provisions. Article 5 of the Spanish Royal Decree law sets out that market operators are obliged to fully internalise the amount of the support payment in their bids. Article 12 of the Spanish Royal Decree Law sets out that any manipulation, change or circumvention of bids would be considered a grave offence under the national regulatory framework. In particular, reducing or withholding bids or the provision of incorrect data are considered grave offences. Similar provisions are included in Article 3(2) and Article 12 of the Portuguese Decree-Law.

- (38) The Spanish and Portuguese authorities explained that the progressivity of the gas price cap and the fact that it gradually converges with current gas prices⁴² in the market will enable electricity consumers to adapt to market conditions and prevent too big price shocks when the measure expires, at the end of May 2023. According to them, maintaining a period of six months at the price of EUR 40 EUR per MWh ensures that the initial shock is sufficiently mitigated and gives market participants time and visibility to prepare for the coming price increases.
- (39) Although the calculation of the support payment is made on the basis of natural gas prices (both the reference and price cap in the formula above are linked to the natural gas price), the support payment will be made for each MWh of electricity produced, so that all technologies eligible under the measure will receive the same amount of compensation, regardless of their input fuel or production costs. The Spanish and Portuguese authorities explained that this is meant to ensure that the merit order is not distorted since all technologies typically setting or influencing wholesale prices will receive the same level of support per MWh of electricity produced and thus their relative positions vis-à-vis one another remain unchanged. Furthermore, the Spanish and Portuguese authorities argue that the price of coal is closely correlated to the price of gas, as evidenced from Figure 2.

Figure 2: Correlation between average monthly coal and gas prices in European markets

⁴¹ According the ENTSO-E Transparency Platform there are approximately 80 gas-fired power units in Spain and Portugal with a total installed capacity of more than 28 GW. Their utilisation rates vary considerably, in 2021 they were 17 % on average in Spain and 34 % on average in Portugal, pointing towards plenty of spare production capacity. There is relatively low market concentration in the sector. Among the largest players is Naturgy with 7.4 GW of gas-fired power plants, Iberdrola with around 6 GW of gas-fired plants and CHP units and Endesa with 3.8 GW of gas-fired power plants.

⁴² On 24 May 2022, the day-ahead price (MIBGAS) in Spain was EUR 75 per MWh, and in Portugal EUR 74.5 per MWh. The price for the delivery in the first quarter of 2023 was EUR 73.63 per MWh and the price for the delivery in the year 2023 EUR 66.1 per MWh. The figures were retrieved from <https://www.mibgas.es/en> on 24 May 2022.



Source: Platts data / European Commission

- (40) The Spanish and Portuguese authorities submitted that even if gas prices were to increase without a matching increase in coal prices, this would not improve the economic situation of coal-fired generation compared to normal market functioning, as also without the measure, such an improvement in relative fuel cost would result in higher profit margins for coal-fired generation. National law does however cater for the event that this difference would be so big that it could result in coal production costs falling below those of low marginal cost generators.
- (41) The “third additional provision” in the Spanish Royal Decree Law enables the Spanish Government to stop paying the support under the measure to coal-fired power plants if it results in coal-fired power plants having operating costs and submitting bids lower than those of low-cost generators (mainly nuclear and renewables such as wind and solar whose production costs are close to zero). This is to cater for the unlikely possibility that coal prices, which are typically highly interlinked with gas prices, diverge significantly from the gas price trend. This serves as an additional safeguard against possible changes in the merit order where highly polluting coal-fired power plants replace nuclear and renewable generation sources. Similarly, Spain has confirmed that in the event of a spike in gas prices without a parallel spike in coal prices, independent of whether or not gas power plants remained marginal, the Government would activate the third additional provision in the Spanish Royal Decree Law, suspending the payment of the support to coal plants. Since there are no more functioning coal-fired plants left in Portugal, its Decree-Law does not contain any safeguard in that respect.
- (42) Since the application of the measure requires full traceability of the bids and dispatch of all technologies receiving support, CHP producers eligible under the measure will be required to create an independent bidding and scheduling unit for each eligible CHP plant, so that OMIE and the TSOs REN and REE can reliably identify the eligible installations and measure the energy produced by them. Other

types of beneficiaries, namely coal- and gas-fired power plants, already fulfil this criterion. This will also allow the Spanish and Portuguese authorities, especially the NRAs, to monitor the extent to which the fossil fuel power plants reduce their bids proportional to the support payment they receive.

- (43) The calculation of the total support to be paid to beneficiaries and the actual settlement of market revenues, support payments and contributions in each trading period will be carried out by OMIE for all electricity traded in day-ahead and intraday markets, while the Spanish and Portuguese TSOs will be responsible for those tasks when settling transactions in the balancing market and for energy accounted for in other ancillary services (such as curtailment). The outcome of the settlement will be published both by OMIE and the two TSOs.
- (44) The total cost of the measure, calculated as a sum of all support payments in a given trading period, shall be financed in part by contributions⁴³ imposed and levied by OMIE and the respective TSOs on the buyers of electricity in the Iberian wholesale electricity market, in proportion to the amount of electricity purchased by them for that period, and in part by congestion income (recitals (52) to (57)).⁴⁴ Since the amount of electricity purchased by each buyer differs from hour to hour, the contribution will vary from hour to hour, depending on the quantity of energy bought by those required to pay it.
- (45) Several categories of electricity buyers in Spain and Portugal are exempted from the obligation to pay the contribution, namely:
- a. pumped hydro storage generators when in pumping mode;
 - b. systems of energy storage, including batteries;
 - c. power plants to the extent they provide ancillary services;
 - d. wholesale electricity market buyers, for that part of their electricity purchases for which they have entered into contracts for the supply of electricity at a fixed price⁴⁵ prior to 26 April 2022.⁴⁶

⁴³ Article 7(4) of the Spanish Royal Decree Law provides “[t]he total cost or income associated with the settlement of the adjustment mechanism carried out by the market operator in each trading period referred to in the previous paragraph shall entail a payment obligation or a charge, which shall be distributed by the market operator to all the purchasing units of the players in the Iberian electricity market, in proportion to the energy scheduled for that period in their final schedule after the continuous market”.

Article 7(6) of the Spanish Royal Decree Law provides “[t]he cost or income associated with the settlement of the adjustment mechanism carried out by the system operator in each hourly period referred to in the previous paragraph shall entail a payment obligation or a charge, which shall be distributed by the system operator to all the purchasing units of the Iberian electricity market participants in their respective area, in proportion to their energy measured in plant bars for that period”.

⁴⁴ See Annex I for estimates on the distribution of costs between the contribution to be paid by buyers and the share of congestion income used for financing the measure.

⁴⁵ Those may, for instance, include forward hedging instruments offered by exchanges, bilateral contracts (such as long-term power purchase agreements) cleared by exchanges or contracts concluded between two parties without any clearing and with physical delivery.

- (46) The Spanish and Portuguese authorities clarified that the exemption in recital (45) does not cover renewals, price revisions or extensions of contracts mentioned in recital (45) point (d), nor contracts to supply electricity at a fixed price which were entered into at a date not prior to 26 April 2022.
- (47) Based on data from their respective NRAs, the Spanish and Portuguese authorities estimated that in the first month of the implementation of the measure, the contribution will be imposed and levied on purchases of electricity on the wholesale market equivalent to more than 41 % of total Spanish and 30 % of total Portuguese electricity consumption. This share should gradually rise to 100 % and 76 % respectively by the expiry of the measure, excluding the purchase of electricity in the cases mentioned in recital (45) points a to c. Portugal explained that part of the electricity consumption in its territory is excluded from the coverage of the adjustment cost since this is renewable electricity falling under the feed-in-tariff schemes purchased by a single buyer (the Portuguese Supplier of Last Resort- SU ELETRICIDADE, S.A.) who then resells it to final consumers at conditions and via mechanisms that predate the implementation of the measure and are not influenced by the fluctuations of spot prices in the MIBEL market. Electricity consumption not hedged through financial instruments of bilateral contracts in Spain comes mainly from the PVPC tariff users as well as from industrial undertakings who either buy their electricity directly from the market or have the linkage to the evolution of the spot wholesale market prices contained in their electricity contracts.
- (48) The Spanish and Portuguese authorities explained that most fixed-price contracts in the MIBEL market have a one-year duration. As old contracts end or are revised or extended, the contribution will be levied across a gradually increasing number of buyers, decreasing the cost of the measure per unit of electricity consumed and increasing the overall positive impact of the measure for those consumers exposed to spot prices. Moreover, Spain and Portugal submitted that the 12-month application period of the measure should allow consumers to benefit from the adjustment mechanism, even if they are not currently directly exposed to spot prices, since the new contracts they enter into should reflect the expectations of lower spot prices for the entire duration of the measure. This is corroborated by the fall in expected prices for future delivery of electricity in the MIBEL zone, which occurred after 26 April 2022 when market participants received information about the main elements of the measure, especially the levels of the capped gas price for the electricity sector.⁴⁷

⁴⁶ The Spanish and Portuguese authorities explained that this cut-off date is chosen as it represents the day in which political consensus on the main elements of the measure was reached and made public. See, for instance, Goncalves, Sergio, Binnie, Isla: UPDATE 2-EU agrees to let Spain, Portugal cap cost of gas for power, 26 April 2022, Reuters, available at <https://www.reuters.com/article/eu-energy-gas-iberia-idUSL5N2WO5FY>.

⁴⁷ Data about electricity futures trading on EEX power exchange show that the price of electricity for delivery in the last quarter of 2022 in Spain fell from EUR 212 per MWh on 25 April 2022 to EUR 181 per MWh on 26 April 2022 and continued to fall on 27 April 2022 when it reached EUR 155 per MWh. This was a decline of 27 %. The effects of the announcement were still visible on 1 June 2022 when the same product traded at EUR 162 per MWh. (<https://www.eex.com/de/marktdaten/strom/futures/#%7B%22snippetpicker%22%3A%22EEX%20Spanish%20Power%20Futures%22%7D>)

- (49) According to Spanish and Portuguese authorities, the contribution paid by market participants (typically electricity suppliers) is expected to be passed on to final consumers along with the lower wholesale prices resulting from the implementation measure. For users of the PVPC tariff in Spain, the contribution will be mandatorily passed on in full into the tariff, as required in Article 13 of the Spanish Royal Decree Law.⁴⁸ Both Spain and Portugal have a high number of competing suppliers for electricity. The total number of electricity retail suppliers in Spain was 366 in 2020, with 34 suppliers in Portugal in the same year. The share of the largest generator in Spain was 20 %, whereas the share in Portugal was 39 %.⁴⁹
- (50) Spain and Portugal maintain that, despite the contribution imposed and levied on wholesale market participants, the final price of electricity for consumers affected by the measure will be comparatively lower than the electricity price before the implementation of the measure, as the achieved reduction in wholesale prices is expected to be higher than the respective contribution. Thus, while wholesale electricity market buyers, for that part of their electricity purchases for which they have entered into contracts for the supply of electricity at a fixed price prior to 26 April 2022 will not be affected by the measure before the renewal of their contracts, as they will neither benefit from the reduction in wholesale electricity prices, nor will they be required to contribute to the costs, Spain expects that household consumers on the PVPC tariff (and thus fully exposed to price variations in the wholesale electricity price) will benefit from an average reduction in electricity prices of approximately 15 %; for unhedged industrial consumers the reduction is estimated to be around 18 to 20 %.⁵⁰ The Spanish and Portuguese authorities have provided a summary of the underlying calculations and a description of the main assumptions, an excerpt of which is provided in Annex I.
- (51) Spain and Portugal explained that the legal basis of the measure contains a ‘suspension clause’ (second additional provision of the Spanish Royal Decree Law and the Portuguese Decree Law) according to which Spain and Portugal may temporarily or definitively suspend the application of the measure, in the unlikely situation in which the costs of the measure exceed its benefits, thus at least if the contribution to finance the measure would be higher than the reduction in wholesale prices the measure would be suspended or terminated.
- (52) In addition to the contribution from electricity buyers, the measure foresees another source of financing of the adjustment cost, namely part of the congestion income obtained through monthly explicit auctions of the interconnection capacity between

⁴⁸ Paragraph 1 of that provision states “*The cost of the adjustment set out in Article 7 shall be a component of the final hourly price of the mainland market, for the purposes laid down in the sixth additional provision of Royal Decree 216/2014 of 28 March 2007 establishing the methodology for calculating voluntary prices for small electricity consumers and their legal arrangements for contracting*”.

⁴⁹ Eurostat electricity market indicators, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Electricity_market_indicators#Electricity_markets_-_retail.

⁵⁰ Spain explained that the positive impact on the price for industrial consumers is slightly higher than for households due to the lower share that network charges, taxes and levies represent in their electricity bills. This is because industrial consumers tend to use the capacity of their connection more efficiently, consuming stable amounts throughout the day, which translates into lower costs of network upkeep per MWh consumed.

Spain and France and part of the congestion income from day-ahead auctions with implicit allocation of interconnection capacity on the same border (when the interconnection capacity is allocated automatically by the matching algorithm during the day-ahead auction in the electricity market) .

- (53) Congestion income are the revenues of the TSOs that originate in situations where there is congestion in an interconnector, i.e. where the capacity of the electricity interconnector between two bidding zones (in this case between Spain and France) is not sufficient to meet the demand. The congestion typically causes prices in two separate zones to diverge and the power exchange administering the cross-border capacity receives congestion income either through monthly or annual auctions in the case of long-term capacity bookings or depending on the size of the price difference and the amount of electricity flowing in the case of day-ahead and intraday flows.
- (54) In the latter case the congestion income arises from the different prices that the seller receives (e.g. in Spain) and the buyer pays (e.g. in France) when electricity flows from the lower price area (e.g. Spain) to the higher price area (e.g. France). The seller acting in a lower price area receives lower price for electricity compared to the price the other party pays for electricity in the higher price area, and the power exchange receives surplus income, which it then transfers to the TSOs. The congestion income between TSOs on each side of the interconnector is typically shared on an equal 50-50 split, unless otherwise agreed⁵¹.
- (55) The Electricity Market Regulation and in particular Article 19 thereof, sets out rules on how the congestion income should be used. It aims at ensuring that such income is primarily used for guaranteeing the availability of the capacity of the interconnectors (firmness) and for optimising the usage of the interconnectors or covering costs resulting from investments in interconnectors.
- (56) According to Spain, the Spanish TSO will first use all the congestion income from annual auctions (40 % of the interconnection capacity between France and Spain) to cover the objectives described in Article 19 of the Electricity Market Regulation. Furthermore, the congestion income from monthly auctions will first be used to cover the priority objectives of Article 19(2)(a) of the Electricity Market Regulation. After that, any remaining income up to an amount equal to the one of the same month from the previous year will be sent to the Spanish NRA in order to reduce the cost of network charges, as allowed under Article 19(3) of the Electricity Market Regulation. The amount still in excess (the “excess congestion income”) of the two abovementioned items will be used to cover part of the adjustment cost of the measure. Additionally, all congestion income of the Spanish TSO stemming from day-ahead and intraday cross-border trade flows between France and Spain will be used to cover part of the adjustment cost.
- (57) In particular, Article 14 of the Spanish Royal Decree Law provides that *“Exceptionally, while the adjustment mechanism regulated in this Royal Decree-Law is in force, the additional value of the net congestion income obtained in the monthly capacity allocation auctions on the interconnection with France will be*

⁵¹ See Article 6 ACER Decision on Congestion income distribution methodology, 17 December 2021, https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions_annex/ACER%20Decision%2016-2021%20on%20CIDM%20-%20Annex%20I_0.pdf.

used to reduce the total cost of the adjustment calculated in accordance with Article 7(4) [...] The market operator [OMIE] is to distribute the income corresponding to the additional congestion income from the monthly capacity allocation auctions at the border with France that take place after the entry into force of the adjustment mechanism, apportioning them between all hours of the calendar month following that in which the additional net congestion income is paid by the system operator to the specific account designated for that purpose by the market operator provided that such income is made 3 working days before the start of the following calendar month..." (unofficial translation by the Commission services).

2.9. Cumulation

- (58) The Spanish and Portuguese authorities confirm that aid granted under the measure cannot be cumulated with other aid or aid under *de minimis* Regulations⁵² or the General Block Exemption Regulation⁵³ received from other local, regional, or national authorities to cover the same eligible costs.

2.10. Transparency, monitoring and reporting

- (59) The Spanish and Portuguese authorities undertake that they will publish on a single national or regional website (www.boe.es for Spain and <https://portal diplomatico.mne.gov.pt/sobre-nos/gestao-e-transparencia/instrumentos-de-gestao> for Portugal) the following information: the full text of the measure or the individual aid granting decision and its implementing provisions, or a link to it; the identity of the granting authority/(ies); the identity of the individual beneficiary(ies), the aid instrument and amount of aid granted to each beneficiary(ies); the objective of the aid, the date of granting, the type of undertaking (for example SME, large company); the Commission's aid measure reference number; the region where the beneficiary is located (at NUTS level 2) and the principal economic sector of the beneficiary(ies) (at NACE group level).
- (60) The Spanish and Portuguese authorities also confirm that they will provide quarterly reports on the implementation and impact of the measure on wholesale prices, final prices and market functioning to the Commission.

3. ASSESSMENT

3.1. Lawfulness of the measure

- (61) The Spanish Royal Decree Law makes the effective entry into force of the measure contingent on its approval by the Commission. The Portuguese Decree-Law does

⁵² Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1) and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p.8).

⁵³ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, (OJ L 187 of 26.6.2014, p. 1)

not have an equivalent disposition, because the MIBEL spot market rules are, according to the MIBEL agreement (Agreement of Santiago de Compostela), updated by the Spanish legislation with Portugal's prior agreement. Therefore, the implementation of the measure will only proceed following its approval by the Commission both in Spain and Portugal. By notifying the measure before putting it into effect and by making its entry into force conditional on the approval by the Commission, both Spain and Portugal have respected their obligations under Article 108(3) TFEU.

3.2. Existence of State aid

- (62) According to 107(1) TFEU, *“save as otherwise provided in the Treaties, 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”*.
- (63) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

3.2.1. Imputability

- (64) The measure and its parameters are provided for in national legislation, more precisely the Spanish Royal Decree Law in Spain and the Portuguese Decree Law in Portugal (see recital (15)).
- (65) As stated in recitals (16) and (17), Spain and Portugal have appointed three private undertakings, namely OMIE, REE and REN to administer the measure, including the mandatory contributions imposed on unhedged customers that will finance in part the measure, covering part of the beneficiaries' fuel costs. The fact that OMIE, REE, and REN are privately owned undertakings (see recitals (16) and (18)) does not change the conclusion in recital (67) as those undertakings have no margin of discretion when carrying out the tasks entrusted to them by the Spanish and Portuguese States.
- (66) Furthermore, congestion income, which will be used to finance the measure in part, will be administered by the respective TSOs under the supervision of the respective NRAs.
- (67) For the reasons set out above, the measure is imputable to both the Spanish and Portuguese States.

3.2.2. Existence of State resources

- (68) For a measure to amount to aid within the meaning of Article 107(1) TFEU, it has to be granted directly or indirectly through State resources. The concept of “intervention through State resources” covers not only measures which are granted

directly by the State, but also those granted through a public or private body appointed or established by the State to administer that measure.⁵⁴ In this sense, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.⁵⁵

- (69) The mere fact that the measure is not financed directly from the State budget is not sufficient to exclude State resources being involved. It follows from the case law of the Union Courts that it is not necessary to establish in every case that there has been a transfer of money from the budget or from a public entity for the advantage granted to one or more undertakings to be capable of being recognised as State aid within the meaning of Article 107(1) TFEU.⁵⁶
- (70) The originally private nature of the resources does not prevent them being regarded as State resources within the meaning of Article 107(1) TFEU.⁵⁷ Hence, the mere fact that a measure benefiting certain economic operators in a given sector is partially financed by contributions imposed by the public authority and levied on the undertakings concerned is not sufficient to take away from that measure its status of aid granted by the State within the meaning of Article 107(1) TFEU.⁵⁸
- (71) State resources are present in particular where the Member State finances a measure by introducing a compulsory measure (e.g. a surcharge) to be paid by companies or by consumers.⁵⁹ In particular, the judgments in *Covestro* and *FVE Holýšov*, have clarified that it is irrelevant for the presence of State resources:
- a. Whether the entity that collects the receipts of the compulsory measure is State-owned or private;

⁵⁴ Judgment of 22 March 1977, *Steinike & Weinlig v Germany*, 76/78, EU:C:1977:52, paragraph 21; judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58; judgment of 30 May 2013, *Doux Elevage and Cooperative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 26; judgment of 19 December 2013, *Association Vent de Colère!*, C-262/12, EU:C:2013:851, paragraph 20; judgment of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 19; judgment of 9 November 2017, *Commission v TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 44.

⁵⁵ Judgment of 30 May 2013, *Doux Elevage and Cooperative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 34; judgment of 27 September 2012, *France v Commission*, T-139/09, EU:T:2012:496, paragraph 36; judgment of 19 December 2013, *Association Vent de Colère!*, C-262/12, EU:C:2013:851, paragraph 21.

⁵⁶ See judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 36; judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 70; judgment of 19 December 2013, *Association Vent De Colère!*, C-262/12, EU:C:2013:851, paragraphs 19 to 21 and judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 25, and judgment of 19 March 2013, *Bouygues Telecom v Commission*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 100.

⁵⁷ See judgment of 12 December 1996, *Air France v Commission*, T-358/94, EU:T:1996:194, paragraphs 63 to 65.

⁵⁸ Judgment of 27 September 2012, *France v Commission*, T-139/09, EU:T:2012:496 paragraph 61.

⁵⁹ See, most recently, judgment of 6 October 2021, *Covestro Deutschland v Commission*, T-745/18, EU:T:2021:644, paragraphs 95 to 97 and 118 to 119, and judgment of 16 September 2021, *FVE Holýšov I s. r. o. v Commission*, C-850/19 P, EU:C:2021:740, paragraph 46.

- b. Whether the compulsory measure is imposed on intermediary actors, such as electricity suppliers, or final consumers.
- (72) As a preliminary remark, it should be observed that the adjustment measure is not financed from the budget of either the Spanish State or the Portuguese State. Nonetheless, in line with the case-law cited above, the measure involves State resources as is demonstrated below.
- (73) In respect of the excess congestion income, it is clear that this income is generated based on clear legal obligations under national and Union law, which do not give any discretion to the collecting TSOs.
- (74) As set out in recitals (52) to (57), congestion income arises from the difference in electricity price between two bidding zones. The congestion income at the border to France is administered by the Spanish TSO, under the supervision of the Spanish NRA.
- (75) Moreover, as explained in recitals (56) to (57), when the measure comes into force, part of that income will be paid to the beneficiaries to cover part of their fuel costs. Accordingly, this support is wholly or partially financed by revenues flowing to an authority which acts on behalf of the State, based on requirements under EU and national law, in this case the Spanish TSO, and which are paid by undertakings that bid for access to the interconnector between the Iberian bidding zone and the French bidding zone.
- (76) It follows that the congestion income thus received by the TSO remains under the control of the NRA and cannot be used for purposes other than those provided by the law being exclusively allocated to the objectives of the scheme by the legislative and regulatory provisions examined.
- (77) Therefore, it can be concluded that the congestion income amounts to State resources within the meaning of Article 107(1) TFEU, because the State exercises control over it.
- (78) Moreover, as set out in recitals (44) and (45), under Spanish and Portuguese legislation, the other part of the costs of the measure (in addition to the congestion income) is to be financed by contributions imposed and levied by OMIE and the respective TSOs on the buyers of electricity (unless exceptions apply (see recital (45))) in the Iberian wholesale electricity market, in proportion to the amount of electricity purchased by them for that period. OMIE and the respective TSOs have no discretion in this respect and are obliged by law to impose the contribution.
- (79) This amounts to a payment obligation imposed on purchasers on the wholesale market (e.g. electricity suppliers and final consumer buying directly on the wholesale market).
- (80) Furthermore, as explained in recital (49), Article 13 of the Spanish Royal Decree establishes a mandatory pass-on of the payment obligation imposed on electricity providers to certain unhedged final consumers (those under the PVPC regulated prices) stating that “*the cost of the adjustment [...] shall be a component of the final hourly price of the mainland market*”. Moreover, the Spanish and Portuguese authorities expect suppliers to pass on the payment obligation to other unhedged customers.

- (81) As described in recital (47), over the lifetime of the measure, the percentage of hedged customers is expected to dwindle resulting in a corresponding increase in the percentage of customers with respect to whom the pass on described above will apply in practice.
- (82) Furthermore, both Spain and Portugal control the mechanism for collecting and allocating the funds at issue, the market operator and the TSOs acting as mere intermediaries in the execution of that mechanism, which is regulated in its entirety by State provisions (see recitals (16) to (19)).
- (83) In that regard, the revenue collected under the measure is paid to the market operator and TSO to offset the fuel costs incurred by the beneficiaries. The revenue generated by the measure is exclusively allocated to the objectives of the measure by the legislative and regulatory provisions examined.
- (84) Accordingly, both the congestion income and the contributions levied by the Spanish and Portuguese States can be deemed State resources within the meaning of Article 107(1) TFEU.

3.2.3. *Existence of a selective advantage*

- (85) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention. Article 107(1) TFEU also requires that a measure, in order to constitute State aid, is selective in the sense that it favours “certain undertakings or the production of certain goods”.⁶⁰
- (86) The Court of Justice has clarified that a measure intending to offset a supposed structural or competitive disadvantage suffered by the beneficiary as a result of an action of a public authority does not escape the classification as State aid unless the measure represents the compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations⁶¹, in accordance with the criteria established in the *Altmark* judgment.⁶²
- (87) As set out in recitals (24) and (33), the measure de facto first requires eligible fossil fuel power plants to submit bids in the MIBEL market which are lower than they would have submitted in the absence of the measure, thus reducing their income compared to what they would have received under normal market operations. The measure then provides support to those beneficiaries which offsets that difference. Should eligible fossil fuel power plants elect not to participate in the mechanism, they will in effect be excluded from participating in the wholesale electricity market.

⁶⁰ Judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60; and of 29 April 1999, *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.

⁶¹ Judgment of 26 October 2016, *Orange v Commission*, C-211/15 P, EU:C:2016:798, paragraphs 44 and 45.

⁶² Judgment of 24 July 2003, *Altmark*, C-280/00, EU:C:2003:415.

- (88) Accordingly, while initially those beneficiaries are put at a disadvantage by the measure, since that disadvantage is immediately offset, those beneficiaries nonetheless still benefit from an advantage within the meaning of Article 107(1) TFEU.
- (89) In addition, since the beneficiaries are not entrusted with a public service obligation, one of the cumulative criteria established in the *Altmark* judgment, the exception to existence of an advantage set out in *Altmark* does not apply.
- (90) Furthermore, the measure is selective because it favours only specific electricity producers and the aid is not accessible to other electricity producers that are in a comparable legal and factual situation in that they produce electricity and sell it on the market.
- (91) Therefore, it follows that the support under the measure confers a selective advantage within the meaning of Article 107(1) TFEU.

3.2.4. Distortion of competition

- (92) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.⁶³
- (93) The electricity generation sector, in which the beneficiaries of the measure are active, is open to competition. The cost of fuel represents a significant operating cost for those power plants that use natural gas or coal to generate electricity. A partial relief from those costs lowers the production costs of those beneficiaries compared to their competitors. The measure hence threatens to distort competition in the electricity market.

3.2.5. Effect on trade between Member States

- (94) In accordance with settled case-law, for the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has an actual effect on trade between Member States but only to examine whether the aid is liable to affect such trade.⁶⁴ In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.
- (95) The beneficiaries of the measure are active in the electricity sector, which is open to trade between Member States. The measure is therefore liable to affect trade between Member States.

⁶³ Judgment of 17 September 1980, *Phillip Morris*, 730/79, EU:C:1980:209, paragraph 11 and Judgment of 15 June 2000, *Alzetta Mauro and others v Commission*, T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 80.

⁶⁴ Judgments of 26 October 2016, *Orange v Commission*, C-211/15 P, EU:C:2016:798, paragraph 64, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 29.

3.2.6. Conclusion on the existence of aid

- (96) In view of the above, the Commission concludes that the measure constitutes aid within the meaning of Article 107(1) TFEU. The Spanish and Portuguese authorities do not contest that conclusion.

3.2.7. Exceptions from paying the contribution

- (97) The measure provides for a number of exceptions from the obligation to pay the contribution (see recital (45)). Those exceptions could in principle constitute State aid to the buyers of electricity exempt from paying the contribution. There are four exceptions in total provided for under Spanish and Portuguese law. These concern purchases of electricity for (i) pumped hydro storage generators when in pumping mode, (ii) systems of energy storage, including batteries, (iii) power plants to the extent they provide ancillary services and (iv) wholesale electricity market buyers, for that part of their electricity purchases for which they have entered into contracts for the supply of electricity at a fixed price⁶⁵ prior to 26 April 2022.
- (98) All exceptions result directly from the law. They are imputable to the State and stem from State resources. However, the Commission considers that those exceptions do not confer a selective advantage on the purchasers.
- (99) The existence of a selective advantage can be determined via the so-called three-step-test developed by the Court in the *Azores*⁶⁶ judgment.
- (100) The first step consists in determining the system of reference for the payment obligation that exceptions apply to. The second step requires determining whether the measure departs from the system of reference by differentiating between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. In the third step, if the measure in question constitutes a derogation from the reference system, it must be verified whether the derogation could be justified by the nature or the general scheme of the reference system. For tax measures, the Court has recognised a large margin of discretion for Member States in their design⁶⁷. Thus, the three-step-test needs to take into account that only *manifestly inconsistent* deviations from the reference framework could result in a selective advantage.
- (101) The reference framework should be defined as obliging all purchasers of electricity which are benefitting from the measure via reduced wholesale prices and are purchasing electricity with a view to its final use to pay a contribution.

⁶⁵ Those may, for instance, include forward hedging instruments offered by exchanges, bilateral contracts (such as long-term power purchase agreements) cleared by exchanges or contracts concluded between two parties without any clearing and with physical delivery.

⁶⁶ Judgment of 6 September 2006, Portuguese Republic v Commission, C-88/03, EU:C:2006:511. The Court confirmed the applicability of the 3-step test also for the material selectivity assessment, see judgment of 8 September 2011, *Paint Graphos and others*, C-78/08 to C-80/08, EU:C:2011:550.

⁶⁷ Judgments of 26 April 2018 in, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias*, C-234/16 and C-235/16, EU:C:2018:281; *ANGED v Generalitat de Catalunya*, C-233/16, EU:C:2018:280; *ANGED v Diputación General de Aragón*, C-236/16 and C-237/16, EU:C:2018:291.

- (102) Under such a reference framework, the exceptions for (i) pumped hydro storage in pumping mode and (ii) systems of energy storage such as battery storage are in line with the reference framework. Indeed, such storage systems consume electricity at one point in time, only to produce electricity from storage at a later point in time. They therefore shift electricity consumption in time. While the electricity stored and the electricity released are not identical in volume (there are technical losses due to the conversion from one energy carrier in another), excluding such consumption from paying the contribution is not manifestly inconsistent with the reference framework, as the storage consumption is fundamentally different in purpose from the final consumption of electricity, representing an intermediate step in the electricity supply chain. Furthermore, if such electricity was subject to payment of the contribution, it would be subject to double payment, as the electricity released from storage will later be consumed and the purchase for this consumption will be subject to the contribution.
- (103) Similarly, electricity consumed by power plants providing ancillary services is electricity consumed “within the electrical system” itself. This electricity is consumed in order to ensure stability of the electric network, maintaining system frequency and voltage within secure limits. Thus, it is fundamentally different from electricity consumed by final customers outside the electricity system, and a different treatment is within the large margin of discretion accorded to Member States.
- (104) As regards wholesale electricity market buyers, for that part of their electricity purchases for which they have prior to 26 April 2022 entered into contracts for the supply of electricity at a fixed price, the reasoning is different. This electricity is bought for consumption, and it is technically not different from other final consumption. However, the economic situation is starkly different. Whereas wholesale market buyers which buy on the spot market benefit from the reduced spot prices brought about by the measure, purchases based on long-term contracts which were concluded before the measure was known to the public did not account for those reduced spot prices. The impact of the measure on spot market buyers is thus the sum of on one hand the reduced wholesale prices and on the other hand the contribution. If, as expected by the national authorities, the wholesale price reduction is larger than the contribution, the total impact on the measure for spot market buyers is positive. On the other hand, a market participant on a pre-existing long-term contract would only pay the contribution without benefitting from reduced wholesale prices. Excluding those market participants from the payment obligation for the contribution is thus consistent with the pursued objective of reducing prices of electricity. Even if, notwithstanding the large margin of appreciation of Member States, this was considered as derogating from the reference framework, the derogation would be justified by the nature or the general scheme of the reference system.
- (105) Accordingly, the four exceptions provided for in the measure are in line with the reference framework and do not depart from that reference system (or any such deviations are justified by the nature of the reference system). Thus their operators do not benefit from a selective advantage.
- (106) The exceptions from the obligation to pay the contribution therefore do not provide a selective advantage and thus do not entail the granting of aid.

3.3. Compatibility of the aid

3.3.1. Legal basis for the compatibility assessment and existence of a serious disturbance

- (107) Since the measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that measure is compatible with the internal market.
- (108) The Spanish and Portuguese authorities invoke as legal basis for the compatibility assessment of the measure Article 107(3)(b) TFEU, which states that the Commission may declare compatible with the internal market aid “*to remedy a serious disturbance in the economy of a Member State*”. In this context, the Commission recalls that the Union courts have ruled that the disturbance must affect the whole or an important part of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in line with the need to make a strict interpretation of any exceptional provision such as Article 107(3)(b) TFEU.⁶⁸ That interpretation has been consistently applied by the Commission in its decision-making.⁶⁹
- (109) As described in point 35 of the Temporary Crisis Framework, the Commission has acknowledged that “*the aggression against Ukraine by Russia, the sanctions imposed the EU or its international partners and the counter measures taken, for example by Russia have created significant economic uncertainties, disrupted trade flows and supply chains and led to exceptionally large and unexpected price increases, especially in natural gas and electricity, but also in numerous other input and raw materials and primary goods, including in the agri-food sector. Those effects taken together have caused a serious disturbance of the economy in all Member States. Supply chain disruptions and increased uncertainty have direct or indirect effects that affect many sectors. In addition, rising energy prices affect virtually every economic activity in all Member States. The Commission considers accordingly, that a wide range of economic sectors in all Member States are affected by a serious economic disturbance*”.
- (110) On that basis, the Commission laid down, in the Temporary Crisis Framework, the criteria for the assessment of State aid measures that Member States may take to remedy that serious disturbance. In particular, the Temporary Crisis Framework explains in point 36 that State aid is “*justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, if it serves to remedy the liquidity shortage faced by undertakings that are directly or indirectly affected by the serious disturbance of the economy caused by the Russian military aggression against Ukraine, the sanctions imposed by the EU or by its*

⁶⁸ Judgment of 15 December 1999, *Freistaat Sachsen and others v Commission*, T-132/96 and T-143/96, EU:T:1999:326, paragraph 167.

⁶⁹ Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1; Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 et seq.; and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See Commission Decision in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1); Commission Decision in Case NN 25/08 *Rescue aid to Risikoabschirmung WestLB* (OJ C 189, 26.7.2008, p. 3); Commission Decision of 4 June 2008 in *State aid C 9/08 SachsenLB* (OJ L 104, 24.4.2009, p. 34); and Commission Decision of 16 June 2017 in case SA.32544 (2011/C) *Restructuring of TRAINOSE S.A* (OJ L 186, 24.7.2018, p. 25).

international partners, as well as the economic counter measures taken, for example by Russia". In addition to aid aiming to remedy the liquidity shortages of affected undertakings (see sections 2.1, 2.2., and 2.3), the Temporary Crisis Framework lays down, in section 2.4, the conditions under which temporary support could be provided to "*alleviate exceptionally severe increases in the price of natural gas and electricity which undertakings may not be able to pass on or adapt to in the short term*". The stated purpose of such support is "*to mitigate the consequences for undertakings and help them cope with the steep cost increases as a consequence of the current crisis, and also reduce the inflationary pressure from energy price increases*".

- (111) Given the intended goal of the aid under the Temporary Crisis Framework and its detailed conditions (see points 52 and 53), the Commission considers that the measure under assessment does not fall within the scope of the Temporary Crisis Framework.
- (112) In particular, the measure intends to reduce the impact of high gas prices on electricity prices in the Iberian electricity market (see recital (13)), thus facilitating the implementation of market reforms to increase the future resilience of the system (see recital (14)) and ultimately mitigating the effects of the energy crisis on final consumers of electricity. This type of measure does not fall within the categories of aid concerned in sections 2.1 to 2.4 of the Temporary Crisis Framework. In particular, the measure does not intend to remedy a liquidity shortage of fossil fuel power plants but to reduce their production costs, and thus their bids in the wholesale electricity market (see recital (33)). While the measure benefits directly fossil fuel power plants, aid under section 2.4 of the TCF is intended to benefit only final consumers of electricity or gas (see point 52e. of the Temporary Crisis Framework), and not consumption of natural gas to generate electricity.
- (113) In view of the above, the Commission considers that the Temporary Crisis Framework does not provide an appropriate basis for the compatibility assessment of the measure.
- (114) As regards the characteristics of the serious disturbance invoked by Spain and Portugal, the Commission notes that they largely overlap but also go beyond those of the serious disturbance recognised by the Commission in the Temporary Crisis Framework (see recital (109)) as affecting all Member States.
- (115) In particular, Spain and Portugal argue that the serious disturbance of their economies started before the aggression against Ukraine by Russia, was caused by a cumulative set of factors (see recital (4)), and is expected to persist beyond the duration of the Temporary Crisis Framework (currently 31 December 2022) (see recital (5)).
- (116) In addition, the unique approach of the PVPC directly exposes a large number of vulnerable households to wholesale electricity price increases (see recital (6)), which are passed on at much greater speed and thus with much less time for consumers to adapt than in other Member States. Furthermore, Spain and Portugal have a high number of LNG terminals, enabling them to import significant quantities of natural gas even in case of full interruption of supplies from Russia. The combination of those factors means that the serious disturbance is more directly based on rapid increases of wholesale energy prices and that market signals

for reduced demand are, compared to other Member States, of somewhat lower importance to ensure security of supply.

- (117) As recognised in the May Communication, “*temporary national measures to subsidise the cost of gas used for power generation (e.g. to introduce a reference price for gas used for electricity production) with a view to lowering prices on the electricity market [...] should be [...] tailored for regions with very limited interconnection capacity, high influence of gas in price setting and consumers particularly exposed to wholesale electricity prices*”. The Communication thus recognises the specific challenges for regions with limited interconnection capacity, high influence of gas in price setting, and consumers particularly exposed to wholesale electricity prices.
- (118) The Commission agrees that the specific combination of factors, which include limited interconnection capacity, high exposure of consumers to wholesale prices and a high influence of gas in price setting for electricity affect the nature of the serious disturbance to the economy in the Iberian Peninsula, distinguishing it from that identified by the Commission in the Temporary Crisis Framework.
- (119) Therefore, for the reasons outlined above, the Commission agrees that Spain and Portugal’s economies are confronted with serious disturbance which, while generally similar in nature and based on most of the same root causes, to an extent goes beyond that which is set out in the Temporary Crisis Framework. This disturbance affects the entire territory of the Iberian Peninsula.
- (120) In view of the above, the Commission considers that Article 107(3)(b) TFEU is the correct legal basis for the compatibility assessment of the measure.
- (121) The Commission will now assess whether the measure complies with the general criteria for appropriateness, necessity and proportionality for compatibility under Article 107(3)(b) TFEU and will check that the measure does not infringe relevant Union law.

3.3.2. *Appropriateness*

- (122) In order to be considered *appropriate*, aid has to be well targeted to its objective, in this case to remedy a serious disturbance in the entire economy. The measure must be an appropriate policy instrument and the aid and its design must be appropriate to achieve the intended objective.
- (123) The Commission has assessed whether the objectives of the measure, i.e. to lower electricity prices and protect vulnerable consumers (and thus remedy the serious disturbance to the economy) cannot be best achieved by other less distortive policy means.
- (124) The Commission recalls that, as described in the Communication of 13 October 2021, “*Tackling rising energy prices: a toolbox for action and support*”, policies aiming to achieve a more efficient use of energy could, in the medium term, achieve lower prices, while the effects of high energy prices on vulnerable households and firms could be mitigated via measures of a general nature that are non-selective, and long term power purchase agreements (PPAs) could be used to ensure stable prices for certain consumer categories. As explained in the May Communication, the Commission considers that the measures in the toolbox

represent “*the first and most fundamental line of action to address the crisis at the level of the consumers most affected*”.

- (125) The Commission notes that, since the beginning of the crisis, Spain and Portugal have implemented a series of more general measures aiming to reduce energy prices or mitigate their effects on consumers. Both Spain and Portugal have used a number of short-term measures proposed in the toolbox (see recital (10)). Energy demand has also reduced as a consequence of price increases. However, despite those efforts, and due to the wholesale electricity price in the Iberian electricity market, which remains exceptionally high, the situation continues to be extremely difficult to bear by both households and undertakings (see recital (5)).
- (126) Further to the measures in the toolbox, the May Communication proposes additional short-term measures that Member States can take in the gas and electricity sectors to tackle effectively the impact of sustained high energy prices on consumers and companies. Those measures include gas market interventions to address the cause of the crisis,⁷⁰ measures to prepare for a full disruption of Russian gas supplies,⁷¹ but also interventions in the electricity markets taking into account the national and local context. The latter may include, among others⁷², temporary national measures to subsidise the cost of gas used for power generation and the use of congestion income, in exceptional and duly justified cases, to finance emergency measures targeting consumers. The Commission has thus recognised that the current crisis demands a clear policy response beyond the measures in the toolbox and that a temporary national measure subsidising the cost of gas used for power generation can be considered (see also recital (9)).
- (127) Furthermore, the report of the EU Agency for the Cooperation of Energy Regulators (ACER), in its Final Assessment of the EU Wholesale Electricity Market Design⁷³ (the “ACER report”) which, among other things, looks at various exceptional measures contemplated by policy makers in the current emergency situation, concedes that “*lowering the bid price of gas-fuelled power plants [...] would in principle reduce the impact of high gas prices on electricity prices*”, while at the same time warning about the numerous implementation challenges and risks of such a measure.
- (128) The ACER report also presents a spectrum of structural – interventional measures in respect of the market which Member States may implement, from least to most distortive. That spectrum mirrors the toolbox and the May communication, with the least distortive being measures to protect vulnerable consumers directly, for

⁷⁰ For example, the EU Energy Platform which should help secure energy supply at fair prices, extending retail price regulation for natural gas, emergency liquidity support measures for commodity traders and energy companies, revision of the internal trading rules of European gas exchanges.

⁷¹ For example, existing EU instruments to address a potential security of supply shock, a coordinated approach to identify essential consumers which are not already protected under the existing legal framework and emergency plans, a temporary EU price cap on natural in a major disruption scenario.

⁷² For example, taxation or regulatory measures which are aimed at removing infra-marginal rents of certain baseload electricity generators to help finances support for vulnerable customers, a temporary extension of regulated retail prices to cover also small and medium-sized enterprises.

⁷³ ACER’s Final Assessment of the EU Wholesale Electricity Market Design of 29 April 2022, available at: [ACER’s Final Assessment of the EU Wholesale Electricity Market Design.pdf \(europa.eu\)](#)

example through energy vouchers or direct cash transfers, efforts to reduce the overall energy bill, or to stimulate energy efficiency. The next least distortive is a windfall profit tax. This is followed in turn by a measure targeting the price of gas power plants in the electricity merit order. As described in the preceding recitals, Spain and Portugal have endeavoured to limit their interventions to the least distortive, passing to next least distortive measure only where they concluded that the prior measures have reached their limit.

(129) Therefore, the Commission accepts that a temporary intervention in the electricity market to subsidise the cost of gas used for power generation is, in principle, apt and appropriate to reduce electricity prices and mitigate impacts on vulnerable consumers, and thus to remedy a serious disturbance to the economy.

(130) The measure as proposed is thus appropriate in light of its objective.

3.3.3. *Necessity*

(131) In order to fulfil the *necessity* criterion, the aid measure must be necessary for the attainment of the intended objective (i.e. to remedy a serious disturbance in the economy), in the sense that, without it, market forces alone would not succeed in getting the recipient undertakings to adopt conduct likely to assist the attainment of that objective. Aid which improves the financial situation of the recipient undertakings but is not necessary for the attainment of the intended objective cannot be considered to be compatible with the internal market.

(132) The Commission notes that the expectations of the electricity market actors are that energy prices will remain high for the rest of 2022 and the first two quarters of 2023 and, to a more limited extent, in the following years, with a small reduction in forward prices (to nonetheless still historically high values) after the first quarter of 2023 (see recital (5)), a forecast that factors in the uncertainty due to the current geopolitical tensions and the aggression against Ukraine by Russia. Any further disruptions of Russian gas supplies to the EU in the forthcoming weeks or months are likely to result in even higher levels of gas and electricity prices. Therefore, the Commission considers that the current situation of exceptionally high energy prices is unlikely to be resolved by market forces alone in the short term to medium term and warrants an appropriate policy response.

(133) By lowering fuel costs of power generators with a key influence on setting wholesale electricity prices, the measure will significantly reduce operating costs of those power plants. Given the stringent monitoring and penalty provisions (see recital (37)), the high number of market participants in the Iberian electricity market, the significant excess capacity compared to demand, and the fact that marginal power generation assets are distributed amongst a number of market participants, the Commission considers that those reductions in operating costs will very likely result in lower bids by those power generators. This, in turn, has a high likelihood of reducing wholesale prices resulting from the European market coupling process, notably for the bidding zones of the Iberian (the Spanish and the Portuguese bidding zone) electricity market. This appears all the more plausible as, following the announcement of the measure on 26 April 2022, forward prices in Spain and Portugal have already dropped, which partly appears due to market participants pricing in the effects they expect from the measure.

(134) As there is a number of market participants competing on electricity retail markets in Spain and Portugal, it appears plausible that cost reductions on the wholesale market will be passed on to final consumers. Spain expects that household consumers on the PVPC tariff (and thus fully exposed to price variations in the wholesale electricity price) will benefit from an average reduction in electricity prices of around 15 %, while for unhedged industrial consumers the reduction is estimated to be around 18 to 20 % (see recital (50)). Portugal also expects reductions in retail electricity prices. While exact reductions in prices for consumers are difficult to predict and depend on a number of factors, including the individual contractual situation of a given consumer, the Commission finds it plausible to expect price reductions as a consequence of the measure. The measure is thus necessary.

3.3.4. Proportionality

(135) Finally, aid must be *proportionate*, meaning that it must be limited to that necessary to achieve its stated objective, reducing to a minimum consequential distortions of competition.

(136) With regards to the duration of the measure, the Commission notes positively that Spain and Portugal are limiting it to a maximum of 12 months, i.e. until the 31 May 2023 at the latest (see recital (28)). As described in recital (14), the measure represents thus a temporary intervention aiming to provide stability and relief from exceptionally high energy prices until other structural solutions to a wider problem of affordability of electricity for in particular vulnerable consumers in Spain are implemented, including via a reform of the PVPC. As explained by the Spanish authorities, such reforms are only possible with sufficient advance notice to allow suppliers to prepare and purchase electricity on the forward market. As the Spanish and Portuguese wholesale markets are very closely integrated, the reform process for the Spanish PVPC also explains the need to maintain the measure for the same duration in Portugal as it would not be possible to end the measure earlier in one Member State than in the other.

(137) As regards the level of prices established under the measure, the Commission notes that the expected impact of the measure on electricity prices at the time of ending the measure is largely consistent with the prices on forward electricity markets on the Iberian electricity market, which currently see a drop by around 8 %, from EUR 167.50 per MWh in the first quarter of 2023 to EUR 154.50 per MWh in the second quarter of 2023, when the market expects the measure to be over (see recital (5) and Annex I). Thus, market prices towards the end of the measure are already similar to those under the measure.

(138) By gradually increasing the natural gas price cap used as a basis for calculating support (see recital (36)), the measure also incentivises market participants to prepare for the phase out of the measure, e.g. by reducing demand (e.g. through investment in more efficient processes or insulation) or hedging for future price increases with long-term contracts.

(139) As the measure provides for a gradually increasing natural gas price cap, which towards the end of the period is already expected to be close to market prices, the focus of the measure over time becomes more of a backstop against new gas price increases rather than a measure for significant direct fuel cost reductions. The biggest share of fuel cost reductions is thus concentrated, based on current market

expectations, in the year 2022 (thus parallel to the period of application of the Temporary Crisis Framework).

- (140) It is also noted that Spain and Portugal submit that the Iberian Peninsula has a low degree of integration with the European electricity system with an electricity interconnection capacity with France of approximately 2 %, which is significantly below the EU target of at least 10 % by 2020 and 15 % by 2030 (see recital (12)). The Commission considers that while that target is set for individual Member States (rather than the Iberian Peninsula as a whole), Spain considered separately also currently meets neither of those targets and is not on track to meet them in the near future. Also, particularly due to the low number of other marginal technologies, notably the low number coal-fired power plants remaining in Spain, and their complete absence in Portugal, natural gas prices have higher impact on marginal prices compared to many other Member States. Particularly as regards Spain, the current construction of the PVPC also has the consequence that vulnerable household consumers are particularly exposed to variations of wholesale prices and immediately affected by price increases on the wholesale market.
- (141) The measure is adopted and will be implemented by Spain and Portugal in a coordinated manner, and will apply on the entire Iberian Peninsula. Its impact on markets in other Member States than those applying the measure is limited by the interconnection capacity at the border between Spain and France,
- (142) The Commission notes positively the fact that the measure exempts from the obligation to pay the contribution wholesale electricity market buyers, for that part of their electricity purchases for which they have entered into contracts for the supply of electricity at a fixed price prior to 26 April 2022 (see recital (45)). Thus, the contribution is imposed and levied only on unhedged customers, which at the beginning of the implementation of the measure are estimated to represent about 41 % of total Spanish and 30 % of total Portuguese electricity consumption, shares of which are expected to gradually increase to about 100 % and 76 % of total Spanish and Portuguese consumption, as hedging contracts expire (see recital (47)). The Commission recognises that mitigating price risks through financial hedging represents an important activity of undertakings active in the energy sector and that the measure may result in those undertakings losing the incentive to hedge over the duration of the measure, which may also hamper the liquidity of future markets. It is thus welcomed that the Spanish and Portuguese authorities intend to take additional measures to improve the liquidity of the forward market, both on the supply and demand side (see recital (14)). As the measure is limited in time, it also maintains incentives to hedge for the period after the end of the measure.
- (143) The Commission furthermore notes that the other three exemptions, which benefit electricity producers that consume themselves electricity, and storage systems, which serve to smoothen out demand peaks, are fully in line with the objective of the measure, i.e. to reduce the electricity price (see section 3.2.7). Imposing the levy on them would be counter-productive, as it would increase the electricity price.
- (144) The measure also includes a number of safeguards aiming to ensure that it does not distort the merit order and does not lead to inefficient dispatch decisions. In particular, Spain and Portugal submit that the support payment made to eligible technologies for each MWh of electricity produced should ensure that the merit

order is not distorted since the technologies typically setting or influencing wholesale prices will receive the same level of support and thus maintain their relative positions vis-à-vis one another, and that hydro power plants (which do not receive the support but are often marginal) are expected to follow the price signals of fossil fuel generation (see recital (39)). An additional safeguard against changes in the merit order, catering for the specific situation when coal prices would diverge significantly from gas prices, will ensure that the support payment to coal-fired power plants is stopped⁷⁴ if it results in coal-fired power plants having operating costs and submitting bids lower than those of low-cost generators (for example, nuclear and renewables such as wind and solar whose production costs are close to zero) (see recital (40) and (147)).

(145) The measure does not provide for a greater amount of aid than what is necessary to achieve its objective. The aid is calculated with reference to the difference between the market gas price, and a price cap which starts at EUR 40 per MWh and increases over time. The starting point of EUR 40 per MWh is considerably lower than current gas prices, but still more than double the average price for natural gas in Spain and Portugal between 2015 and 2020, which was of EUR 18 per MWh. Similarly, while the measure is expected to result in a significant reduction to electricity prices, the expected price for purchases on the wholesale market (including the contribution) of EUR 168.40 per MWh over the course of the measure is more than three times the average over the 2015-2020 period (of EUR 47 per MWh) (see recital (5)). This reduces revenues of generators, notably including inframarginal generators. This notably includes low-marginal-cost generators such as RES and nuclear generators. It is important to note that the measure does not reduce wholesale prices below levels which were prevalent on wholesale markets when investments were realised, and that prices are expected to remain at levels which are generally considered sufficient to enable investments in low marginal cost generation. Given the expected price levels, the measure is also expected to maintain significant incentives for demand reduction and for the shifting of demand from high-priced to lower-priced hours. This effect becomes even stronger over time, with the increase of the price cap which is expected to gradually get closer to market prices.

(146) By using an efficiency factor of 0.55 for the conversion of gas to electricity, the Spanish and Portuguese authorities have selected an efficiency rating which they argue is representative for most gas-fired generation assets on the Iberian Peninsula. This appears plausible also when compared with data from the International Energy Agency, which indicates that this value is in the range of gas-fired generation assets built before or around 2010⁷⁵ and does not result in overcompensation while maintaining incentives for more efficient plants to run first.

⁷⁴ The Commission notes that the respective mechanism is not automatic. However, it considers that this is sufficient, as the scenario it caters for (i.e. where dispatch order would be affected) is rather extreme.

⁷⁵ See IEA Energy Technology Systems Analysis Programme which indicates for April 2010, a period where most affected generation assets had been built, an efficiency of 52-60 % for modern combined-cycle gas turbines if running at full load, and 50-52 % if running at 50 % of capacity, see https://iea-etsap.org/E-TechDS/PDF/E02-gas_fired_power-GS-AD-gct_FINAL.pdf.

- (147) The measure also does not result in overcompensation for coal fired generation. While the compensation is calculated on the basis of gas prices, this accurately reflects the economics of coal-fired power plants in situations where gas is the price-setting technology. While this means that coal generation maintains its revenues whereas the revenues of inframarginal generation are reduced, this is due to the fact that coal can in certain market situations be a marginal generation technology and that not reducing the cost of coal generation in those hours would result in increased wholesale prices, thereby reducing the effectiveness of the measure. By providing that it will use the “Third additional provision” in the Spanish Royal Decree Law to stop paying the support under the measure to coal-fired power plants if this payment would result in coal-fired power plants having operating costs and submitting bids lower than those of low-cost generators (mainly nuclear and renewables such as wind and solar whose production costs are close to zero), the Spanish authorities also ensure that coal is unable to displace low marginal cost generation. Finally, Spain confirmed that in the event of a spike in gas prices without a parallel spike in coal prices, independent of whether or not gas power plants remained marginal, the Government would activate the third additional provision in the Spanish Royal Decree Law, suspending the payment of the support to coal plants. That would thus also avoid unnecessarily high compensation in such periods, should they arise. Since there are no more functioning coal-fired plants left in Portugal, this issue does not arise there.
- (148) As regards interaction of the measure with the existing taxation on windfall profits in Spain, the Spanish authorities have confirmed that for the time period when both measures are applied in parallel, the windfall tax will take into account the effects of the measure and will not apply to the cost contribution (to the extent the cost contribution increases the wholesale price for some purchasers of electricity) as an additional windfall profit (see recital (11)) because it is not received by the generators of electricity subject of the windfall profit tax. The parallel application of both measures therefore does not appear to create any additional distortions.
- (149) The mechanism can be expected to contribute to lower wholesale electricity prices on the MIBEL market. While concrete reductions depend on a number of assumptions, the assumptions underlying the expected effects in Annex I are plausible and in line with market price developments.
- (150) The mechanism influences price formation on the wholesale market for electricity and thus threatens to affect competition in the internal energy market. The Commission notes that in the case at hand the exceptionally high energy prices clearly result from exogenous factors, namely the exceptionally high fossil fuel prices after the Russian invasion in Ukraine. The high electricity prices are therefore not attributable to the individual economic performance of the supported generators. The Commission thus considers that the distortive competition effects of the measure in the short term could be acceptable in view of the exceptional circumstances leading to the high energy prices and the specific situation of the Iberian Peninsula, which has limited interconnection capacity with the rest of European markets.
- (151) It cannot be excluded that indirectly, the mechanism increases demand for electricity produced in Portugal and Spain, either through an increase in domestic consumption as a result of lower prices, or through marginally increased exports to France. Depending on the overall electricity mix, this could result in a slight

increase of demand for natural gas on the Iberian Peninsula. Even if that was to happen, it is not expected to result in a worsening of the security of gas supplies in the Union. First, to the extent that the measure can result in increased export of electricity from the Iberian Peninsula to other parts of the internal market for electricity, this can also result in reduced consumption of fossil fuel for power generation in markets outside the Iberian Peninsula by displacing generation from other power plants. Second, the Iberian Peninsula has a particularly high number of LNG regasification terminals. This means that it is less dependent on gas supplies via pipeline, notably from Russia, than other areas of the Union. An increase in gas demand in the Iberian Peninsula, which would result in a decrease of demand in other parts of the Union, could thus result in an improved security of supply at Union level in case of interruptions of gas supply from the Russian Federation.

- (152) The increase in demand for electricity through lower prices can also be expected to result in a limited increase (or rather a reduced reduction in view of very high prices) of greenhouse gas emissions. However, the mechanism fully maintains the obligations and incentives of the carbon emissions trading system. Given the time limited nature of the mechanism, the reduction of the support over time, the fact that the measure maintains the general incentives to reduce greenhouse gas emissions in line with Directive 2003/87/EC⁷⁶, and the serious disturbance to the economy to be remedied, a limited increase in greenhouse gas emissions as an indirect effect of the measure is however exceptionally justifiable.
- (153) Given the specific geographical situation of the Iberian Peninsula, the market conditions in Portugal and Spain and the abovementioned impact on security of supplies in natural gas at Union level in the current situation of particularly tight and unstable gas supplies, the Commission considers the measure to be proportionate notwithstanding the potentially distortive effect of any measure that influences price formation on the wholesale market for electricity.
- (154) In view of the above, the Commission considers that the measure is proportionate as it is limited to the minimum needed for lowering wholesale and final electricity prices in the Iberian electricity market, and thus for addressing the serious disturbance of the economy which Spain and Portugal are facing.

3.3.5. Compliance with relevant Union law

- (155) If the supported activity or aid measure or the conditions attached to it, including its financing method when it forms an integral part of it, entail a violation of relevant Union law, the aid cannot be declared compatible with the internal market.⁷⁷

⁷⁶ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading, OJ L 275, 25.10.2003, p. 32.

⁷⁷ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

3.3.5.1. Articles 30 and 110 TFEU

- (156) According to settled case law, any levy that has the aim of financing a State aid measure and forms an integral part of that measure needs to comply in particular with Articles 30 and 110 TFEU.⁷⁸
- (157) For a levy to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market.⁷⁹
- (158) As regards the first of those conditions (revenue from the charge being necessarily allocated for the financing of the aid), it is recalled that the measure is financed fully and exclusively through the excess congestion income and the contribution described in recital (44). Both the excess congestion income and the total amount of the contribution will be allocated to offset in part the cost of support under the measure. The excess congestion income and the revenues from the contribution are therefore necessarily allocated for the financing of the measure.
- (159) As regards the second of those conditions (revenue from the charge having a direct impact on the aid amount), the impact of the excess congestion income and of the contribution on the amount of the aid under the measure is assessed below in turn.
- (160) As regards the congestion income, such income does not constitute a charge imposed on products, but rather a payment for the allocation of a scarce resource (connection capacity). The level of that payment is the outcome of a non-discriminatory allocation process that is harmonised under Union law and is neither linked to nor dependent on the amount of aid under the measure.⁸⁰ In particular, for explicit capacity allocation (used for longer-term capacity allocation), that payment is the outcome of an auction, directly selling the capacity to the highest bidder. For short-term capacity allocation, that allocation is automatically included in the algorithm calculating auction outcomes and cross-border flows in the internal energy market (so-called implicit allocation). For implicit allocation, if there is no price difference between two bidding zones, there is no congestion income, whereas any price difference between bidding zones that remains after transmission capacity has been fully used automatically results in congestion income.
- (161) As regards the contribution, it is recalled that the revenue from such a contribution is not the only source of financing of the measure, the other source of financing being the excess congestion income. As explained in recital (160), the congestion income does not constitute a levy. In addition, the level of that income is neither linked to nor dependent on the amount of aid under the measure. It is also noted

⁷⁸ Judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraphs 40 to 59.

⁷⁹ Judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 99 and the case law cited.

⁸⁰ This includes all congestion income, including the increase in congestion income expected as a consequence of applying the measure. Only a share of that congestion income is allocated to the financing the measure.

that, if the level of the excess congestion income were to increase, the revenues from the contribution that would be required to finance the measure would decrease.

- (162) In the light of the above, the Commission cannot exclude that the excess congestion income and the contribution may have a direct impact on the amount of aid under the measure.
- (163) However, the Commission considers that it is not necessary, for the purposes of this decision, to decide whether those sources of financing are hypothecated to the measure, since, for the reasons indicated below (recitals (164) to (173)), neither of those sources, if they were considered hypothecated, would breach Articles 30 and 110 TFEU.
- (164) It is recalled that, according to settled case law,⁸¹ 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 used to support activities that specifically benefit the taxed domestic products. Such a charge would include a levy if the advantages which those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect to custom duties, contrary to Article 30 TFEU. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 TFEU and will be contrary to this provision as regards the proportion used to offset the burden borne by the domestic products.
- (165) In the present case, the Commission considers that neither the excess congestion income, nor the contribution, if they were considered hypothecated, would breach Articles 30 and 110 TFEU for the reasons set out below.
- (166) As regards the congestion income, it is recalled that such income does not constitute a tax or a charge having equivalent effect, but rather constitutes a payment for the allocation of a scarce resource (connection capacity) for the reasons explained in recital (160). Furthermore, the calculation and use of the congestion income is harmonised under Union law. The congestion income can also for that reason not be assimilated to a charge having an equivalent effect or to discriminatory internal taxation within the meaning of Articles 30 and 110 TFEU, respectively.⁸²
- (167) As regards the contribution, the Commission needs to verify whether it constitutes a tax or a charge having equivalent effect, which discriminates between Spanish and Portuguese production of electricity from gas, on the one hand, and such production imported from other Member States, on the other hand.

⁸¹ Judgments of 11 March 1992, *Compagnie Commerciale de l'Ouest and Others*, C-78/90 to C-83/90, EU:C:1992:118, paragraph 27; and of 27 October 1993, *Scharbatke*, C-72/92, EU:C:1993:858, paragraph 10; see also, to that effect, judgment and of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraphs 40 to 57.

⁸² Judgment of 6 December 2018, *FENS*, C-305/17, EU:C:2018:986, paragraph 31 and the case law cited.

- (168) For a number of reasons, this is not the case.
- (169) First, in light of the objective and design of the measure, including the fact that it does not distort the merit order (recitals (33) and (39)), the limited interconnection capacity of the Iberian Peninsula with the rest of the European markets (recital (12)), and the general rules underpinning the functioning of the wholesale electricity market, the measure, including the contribution, it is not expected to determine the trade flows into the Iberian Peninsula on the day-ahead market. Moreover, taking into account the abovementioned elements, direct participation of foreign production in the MIBEL day-ahead market is not technically or practically feasible. Instead, imports and exports on the day-ahead market are determined by an algorithm determining the most efficient outcome based on different price levels and technical limitations of the system.
- (170) Second, electricity from gas-fired power plants that is sold in bilateral contracts does not benefit from the measure. Therefore, there is no distortion of competition on the market for bilateral contracts between gas fired power plants.
- (171) Third, in view of the very limited interconnection and differences in technical and regulatory requirements, there is no indication whatsoever that a gas fired power plant in France or any other Member State would want to directly participate in the MIBEL day ahead or intraday market.
- (172) Therefore, for the purpose of assessing the measure and the contribution gas-fired power plants in Spain or Portugal participating directly in the MIBEL day-ahead or intraday market are not in a comparable legal or factual situation to power plants in other Member States.
- (173) In the light of the above, the Commission considers that neither the excess congestion income, nor the contribution, if they were considered hypothecated, would breach Articles 30 and 110 TFEU.

3.3.5.2. Article 10 of the Electricity Market Regulation and Article 5 of the Directive (EU) 2019/944 on free price formation

- (174) The measure aims to reduce wholesale electricity prices in the Iberian Electricity Market by way of supporting part of the fuel costs incurred by fossil fuel power plants⁸³. The measure is expected to ultimately provide relief to Spanish, Portuguese and other energy consumers who will benefit from these reduced wholesale electricity prices⁸⁴. The measure implemented by Spain and Portugal therefore has the intention and the effect of downward regulating electricity prices⁸⁵; it leads to a situation where the electricity prices applicable to the suppliers on the wholesale market will change as a consequence of the State intervention, instead of being based only on supply and demand.

⁸³ See e.g. recitals and Article 1 of Decreto-Lei n.º 33/2022 de 14 de maio (“this decree-law provides for an exceptional and temporary regime for setting prices on the MIBEL”).

⁸⁴ See recital (35).

⁸⁵ It may be noted that the refund to certain generators of the costs above a certain gas price interferes also with demand and supply in the gas wholesale market. However, the justification developed for the intervention in the electricity market also applies to possible market-distortive effects in the gas wholesale market.

- (175) The EU-wide Internal Energy Market is based on the principle of free price formation. Article 3(a) of the Electricity Market Regulation sets out that prices shall be formed on the basis of demand and supply. Article 3(b) further states that market rules shall encourage free price formation and shall avoid actions which prevent price formation on the basis of demand and supply. Price interventions for the supply of electricity, that is, prices set by State intervention, as opposed to being determined solely by supply and demand, are measures which by their very nature constitute an obstacle to achieving a well-functioning, competitive internal electricity market.
- (176) The principle of free price formation is reflected in several further provisions. Article 10 of the Electricity Market Regulation requires that any policy or measure restricting wholesale price formation should be either eliminated or, if not possible, appropriate actions should be taken to mitigate the impact of that policy or measure on bidding behaviour. The system of EU wide market coupling, as set out in Articles 7 to 17 of the Electricity Market Regulation and in Commission Regulation (EU) 1222/2015, is based on free price formation. The same principle is established in Article 5(1) of the Electricity Directive 2019/944/EC, which provides that suppliers shall be free to determine the price at which they supply electricity to customers.
- (177) Nevertheless, under exceptional circumstances, Directive (EU) 2019/944 recognises the possibility of interventions in price setting for the supply of electricity with the aim of protecting consumers⁸⁶. Such interventions, however, should not override the principle of open markets, should be reserved to clearly defined circumstances and beneficiaries, and should be limited in duration⁸⁷. It follows that Directive (EU) 2019/944 recognises that direct or indirect interventions in price formation might exceptionally be justified, for example, where supply is severely constrained due to factors outside the responsibility of the generators, causing significantly higher electricity prices than normal, or in the event of a market failure which cannot be remedied by other remedies of regulatory authorities and competition authorities.
- (178) By way of example, in C-265/08 *Federutility*⁸⁸, the Court stressed that consumer protection objectives must be balanced with energy market liberalization objectives. The Court issued guidance (equally applicable to the electricity sector) clarifying that Member States are allowed to “assess whether, in the general economic interest, [...], it is necessary to impose on undertakings operating in the gas sector public service obligations in order, in particular, to ensure that the price of the supply of natural gas to final consumers is maintained at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued”. Protection against unreasonable price increases could therefore be considered, exceptionally, and on a temporary basis, as a legitimate objective overriding the

⁸⁶ See e.g. Article 5 of the Electricity Directive, which provides for an explicit exemption to apply regulated prices for retail consumers, notably energy poor and energy vulnerable consumers, during a transitional period.

⁸⁷ Recital 23 of Electricity Directive 2019/944.

⁸⁸ *Federutility*, para 18.

principles of free price formation, in particular as long as the situation of the energy sector is of such nature that protection of final consumers cannot be achieved by less restrictive measures.

- (179) Proportionality entails that the State intervention in the formation of wholesale electricity prices should not go beyond what is necessary to achieve the objective (in this case, protecting consumers from exceptionally high prices), be proportionate in terms of beneficiaries and effects on the market, and be limited in time. Furthermore, where there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages must not be disproportionate to the aims pursued, and should not go beyond what is necessary to achieve their objective.
- (180) State interventions that impose certain obligations on market operators, such as the intended measure, which expects the beneficiaries of the measure to adjust their bids accordingly and may distort the positive effects of price formation based on demand and supply, need to be appropriate to achieving a legitimate aim. As set out above, shielding the citizens and the economy against the detrimental effects of a severe economic crisis, caused by a price shock resulting from the Russian invasion of Ukraine, appears to be a legitimate aim.
- (181) The Commission also considers that the indirect intervention in price formation can be considered as not exceeding what is necessary and proportionate to achieving the aim of protecting consumers from extremely high electricity prices.
- (182) In its assessment, the Commission has considered several factors which significantly limit the negative impact of the measure on the internal market. State interventions in price formation can have a particularly negative effect on energy markets, for instance, when they cement or reinforce the dominant position of a company on a market, when they distort competition between EU generators by compensating companies which perform poorly in the market, or when they are coupled with a limitation of cross-border capacities, fragmenting the EU market. This is not the case with the measure at stake.
- (183) The measure is triggered by a number of specific circumstances which distinguish the Spanish/Portuguese measure from other forms of price interventions.
- (184) First, the measure is a reaction to an extreme, lasting and unprecedented increase in electricity prices, exceptionally exacerbated by the increase in the price of natural gas following to the military aggression by Russia against Ukraine. Unlike in other price intervention cases, the high prices are not the result of a poor economic performance of the supported generators, and the measure is not directly or indirectly shielding undertakings with poor economic performance against pressure from competing operators with a better performance. The reasons for the price increase are purely due to exogenous factors, which are outside the control of the supported generators.
- (185) Second, the current price increase is particularly harmful for consumers on the Iberian Peninsula. Due to its specific geographic location, the Iberian Peninsula still has limited interconnection capacity with the rest of European markets, as set out in recital (12). This limits the possibility for consumers in Spain and Portugal to limit price increases by imports from cheaper electricity from other Member States.

- (186) Third, consumers in the Iberian electricity market are much more immediately exposed to the dramatic rise in the wholesale electricity prices than consumers in most other regions of Europe. This is due to the high prevalence of dynamic contracts, notably via the PVPC, which exposed consumers in the Iberian electricity market directly and immediately to the steep price increases on the wholesale electricity market. The measure is designed to protect and support consumers by passing on the benefit of reduced wholesale prices, either directly in the case of retail prices subject to the PVPC or indirectly through suppliers passing on cost reductions in the price of electricity. The measure is not intended to shield consumers from normal price volatility, but rather as an exceptional intervention in a situation of unprecedented price peaks, caused by a cumulation of exogenous factors.
- (187) Fourth, the measure is designed in a manner that limits the negative impact on wholesale markets. By choosing a compensation model, it reduces immediate changes in the merit order. Moreover, the wholesale electricity prices resulting from the measure will still allow the recovery of investment costs for infra-marginal technologies and provide price signals to the market. It is particularly important to note that the measure is not accompanied by any measures to limit cross-border flows of electricity. On the contrary, the measure will not lead to restrictions to cross-border electricity trade and thereby not lead to market fragmentation. This is particularly important because functioning cross-border electricity markets are key to ensuring secure electricity supplies in Europe at all times.
- (188) Avoiding limitations to cross-border trade is also important in view of the principle of solidarity. This principle requires that Member States, notably when taking measures with potential impact on other Member States, conduct an analysis of the effects of the national measure on interests of other Member States and of the European Union as a whole - for example in the field of security of supply⁸⁹. Taking into account that the measure at stake balances the interests involved in an appropriate manner and does not lead to limitations of cross-border exchanges of electricity, it appears to be in line with the principle of solidarity.
- (189) Fifth, the measure does not appear to reinforce a dominant position of an electricity supplier on the Spanish or Portuguese electricity market. The measure will therefore not unduly distort the level playing field between Spanish electricity generators, which is characterised by a number of competing electricity suppliers, none of them having a dominant position⁹⁰.

⁸⁹ See judgement of 15 July 2021, *Poland vs. Commission*, C-848/19 P, ECLI:EU:C:2021:598, notably paragraphs 52, 53 and 71.

⁹⁰ L See e.g. Progress report on the internal energy market, Annex I of the 2020 report on the State of the Energy Union, COM (2020) 950 final, which sets out that the number of electricity suppliers in Spain and Portugal increased while the main market players lost market shares (p.24) and that in Spain the largest 4 electricity suppliers have a combined market share of approximately 70 % whereas in Portugal the largest five electricity suppliers have a combined market share of slightly more than 80 % (figure 11).

The total number of electricity retail suppliers in Spain was 366 in 2020, with 34 suppliers in Portugal in the same year. The share of the largest generator in Spain was 20 %, whereas the share in Portugal

- (190) Finally, the measure is limited in time and will only apply as a temporary relief to electricity consumers in the Iberian Peninsula. Both Spain and Portugal have announced a limitation of the duration of the measure to 12 months, and at the latest until 31 May 2023. As set out in (recital (28)), Spain also intends to reform the PVPC before this date, thereby reducing the need for such a measure.
- (191) Therefore, it can be concluded that the intended measure does not go beyond what is necessary to address the issue of exceptionally high electricity prices in the Iberian Peninsula.
- (192) In light of the very exceptional circumstances described above and the transitory character of the measure, and taking into account that the measure appears in line with the principles set out in the May Communication and in the conclusions of the European Council meeting of 24 and 25 March 2022⁹¹, the Commission therefore considers that it does not interfere with the objectives of the Directive and the Regulation.

3.3.5.3. Article 19 of the Electricity Market Regulation– EU rules on congestion income

- (193) As explained in recitals (52) to (57), the measure will be partially financed by a share of the congestion income at the border between Spain and France. As stated in recital (54), congestion income arises across an interconnection due to price differences on each side of bidding zone borders. The higher the price difference, the greater the income generated. Conversely, the greater the levels of interconnection, the more arbitrage opportunities and, therefore, the lower the price differences at a bidding zone border and the congestion income revenues generated.
- (194) Congestion income is an important source of revenues for TSOs. However, the use of congestion income is subject to strict rules. This is because incentives for TSOs to develop new interconnection capacity may be hampered by the fact that additional interconnection capacity usually decreases congestion income. This may result in underinvestment in interconnection capacity and, hence, in a sub-optimal level of cross-border transmission capacity.
- (195) The rules on the use of congestion income pursuant to Article 19 of the Electricity Market Regulation are meant to address this conflict of interests, by ensuring that congestion income are primarily used to reduce congestion. Only where congestion cannot be reduced, e.g. by building new interconnection, congestion income can be used for other purposes.
- (196) Congestion income at the Spanish-French border is expected to increase considerably due to the increased price differential between these two zones, resulting from the implementation of the measure in the Iberian Peninsula. It follows that the expected steep increase of the congestion income at the Spanish-French border is not due to an underinvestment in capacities, but to the time-

was 39 % (Eurostat electricity market indicators, see https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Electricity_market_indicators#Electricity_markets_-_retail).

⁹¹ See EUCO 1/22 of 25 March 2022, point 16.

limited price intervention of the Spanish and Portuguese government which, in an internal energy market, will lead to higher exports to France as long as it is applied.

- (197) At the same time, the Spanish TSO will remain obliged to invest the congestion income with priority into projects to reduce the congestion, as provided for in Article 19(2) of the Electricity Market Regulation. The Commission understands that already in previous years it was not possible to use all congestion income for the reduction of congestion, pursuant to Article 19(2) the Electricity Market Regulation.
- (198) According to the information received from the Spanish government, for the remaining congestion income, a distinction will be made between (a) the income that corresponds to the amount of the same month of the previous year and (b) the (significant) additional congestion income that is exclusively due to the Spanish/Portuguese price intervention. The part of the income which corresponds to the level of previous years will be used as provided for in Article 19 of the Electricity Market Regulation, i.e. TSOs will use it for the priority objectives set out in the Regulation and send the remainder to the Spanish NRA to reduce the cost of network charges. Only the part that exceeds the congestion income of the previous year will be used to decrease electricity prices, through the measure.
- (199) No explicit rules exist in Article 19 for the situation of a temporary very high additional congestion income, which is expected to reach a multiple of previous levels, resulting from State intervention. However, the Commission considers that the use of the congestion income for the limited time of the price intervention can be considered compatible with the principles of Article 19.
- (200) It was the very purpose of Article 19 of the Electricity Market Regulation to avoid that TSOs consider congestion income as “usual” income instead of taking steps to reduce congestion. However, Article 19 acknowledges that there are situations where it is not possible to use all the money for investments into new infrastructure. In this case, it is considered appropriate to give the income back to consumers in the form of reduced network tariffs.
- (201) The measure at stake follows a similar logic. In a situation where a State measure, triggered by an exogenous crisis, leads to exceptionally high congestion income for a limited time, and since the measure was meant to provide immediate relief for consumers in an imminent economic crisis, it appears justified to give the part of the congestion income which results from the support to certain generators back to consumers. Indeed, as described above, the support to generators under the measure can be expected to translate into a price reduction at consumer level.
- (202) Hence, the Commission considers that the part of the congestion income which is causally linked to the price intervention on the Iberian electricity market can exceptionally be used to finance emergency measures targeting consumers. In light of the very exceptional circumstances justifying the adoption of the measure, including the crisis-induced significant increase of the congestion income, the specific design of the measure, the purpose of which is to shield consumers from the current high energy prices, and its limited period of application, the Commission considers that the measure does not interfere with the objectives set out in Article 19 of the Electricity Market Regulation, taking into account the flexibilities allowed by short-term measures that have been put forward by the Commission to tackle the energy crisis, as set out in the May Communication.

(203) In light of the above, the Commission considers that the notified aid measure does not infringe relevant Union law.

3.3.6. Conclusion on the compatibility assessment

(204) The Commission considers that the measure is compatible with the internal market within the meaning of Article 107(3)(b) TFEU.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to have agreed to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

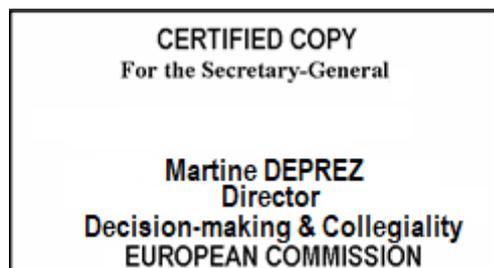
Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President



Annex 1 – Spanish and Portuguese assumptions on impacts of the measure on electricity prices, on costs of the measure and on the contribution of congestion income

	Month #1	Month #2	Month #3	Month #4	Month #5	Month #6	Month #7	Month #8	Month #9	Month #10	Month #11	Month #12	Monthly average
Basic wholesale price in ES-PT without the measure (€/MWh)	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00	213.00
Gas reference price in ES-PT (€/MWh)	40.00	40.00	40.00	40.00	40.00	40.00	45.00	50.00	55.00	60.00	65.00	70.00	48.75
Adjusted wholesale electricity price without adjustment contribution (€/MWh)	110.63	110.63	110.63	110.63	110.63	110.63	119.72	128.81	137.90	146.99	156.08	165.17	126.54
Total wholesale price for consumers before congestion income (€/MWh)	183.7	196.1	173.7	174.1	177.3	160.5	166.6	161.2	169.5	175.5	173.7	181.2	174.4
Electricity wholesale price France	233.00	245.00	266.00	266.00	266.00	367.50	367.50	367.50	369.00	369.00	369.00	152.25	303.15
Share of congestion income used for paying for the adjustment contribution (€/MWh)	7.12	6.90	6.41	6.07	5.79	9.05	7.57	6.54	5.68	5.85	4.96	0.31	6.02
Total wholesale price for consumers with congestion income (€/MWh)	176.60	189.25	167.32	168.07	171.55	151.46	159.07	154.70	163.77	169.64	168.72	180.84	168.4

Source: Spanish and Portuguese authorities.

Assumptions:

- Historical values of the “thermal gap” (share of electricity generation covered by CO₂-emitting technologies) for the year 2021 and for the first three months of 2022 have been used, disaggregated on a monthly basis, as well as historical values for the year 2021 and for the first three months of 2022 for the demand have been considered for calculating both the total cost of measure and how this cost has been distributed among the demand.

- The generation mix is extrapolated using recent historical values for the year 2021 and the first three months of 2022 for one rolling year in order to take into account the seasonality of the generation mix itself (depending e.g. on water availability, temperature, solar and wind availability,...), considering that the data used has an underlying use of hydro capacity below the average values of the last 10 years (stress conditions into the thermal portfolio) due to the limited water availability in 2022.
- Another key element considered when calculating the total exposure of the demand to the total adjustment cost, is the share of that demand that has some kind of hedging scheme, notably long-term power supply contracts with fixed prices not exposed to spot prices, that prevents them from paying the adjustment cost. In that regard, national regulatory authorities (ERSE and CNMC) have provided the best information known of total share of both the Portuguese and Spanish demand with hedging instruments (70 % of Portuguese demand has some kind of hedging instruments, while 59 % of Spanish demand is not exposed to the spot markets). Those values have been incorporated into the simulations with an assumed lineal and proportional monthly rate of renovation of those contracts.
- The calculations are based on an expected natural gas market price of 96.31 EUR/MWh and a CO₂ price of 80 EUR/t.