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**Subject: State Aid SA.100103 (2022/N) – Portugal
Compensation for indirect ETS costs in Portugal for 2021-2030**

Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts, by electronic notification dated 14 October 2022, Portugal notified to the European Commission (the “Commission”), in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”), a scheme to compensate undertakings for a share of their indirect emission costs, that is to say the costs resulting from the EU Emission Trading System (“ETS”) passed on in electricity prices (“the measure”).
- (2) The Commission services requested additional information by emails of 17 and 19 October 2022. The Portuguese authorities replied to those requests by emails of 18 and 27 October 2022, respectively.
- (3) By letter dated 6 October 2022, Portugal exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958¹ and to have this Decision adopted and notified in English.

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

S. Ex.^a o Ministro dos Negócios Estrangeiros
João Gomes Cravinho
Palácio das Necessidades
Largo do Rilvas
1399-030 Lisboa
PORTUGAL

2. DESCRIPTION OF THE MEASURE

- (4) The measure compensates certain undertakings for increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to the EU ETS, so called indirect emission costs, as defined in the Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021² (“the ETS Guidelines post-2021”).

2.1. Legal basis, duration, budget, financing and granting authority

- (5) The legal basis for the measure is:
- Article 12(8) of Decree Law No. 12/2020 of 6 April 2020 laying down the legal regime applicable to greenhouse gas emission allowance trading, transposing Directive (EU) 2018/410;
 - Ministerial Ordinance No. 203/2021 of 28 September 2021, amended by Ministerial Ordinance No. 231/2021 of 2 November 2021 (the “Ministerial Ordinance”); and
 - Article 7(1) of the Decree-Law no. 42-A/2016³, as amended by Decree-Law no. 114/2021⁴.
- (6) According to the Ministerial Ordinance, the entry into force of the measure is conditional to its approval by the Commission (Article 14).
- (7) The measure covers indirect emission costs incurred in years 2021 to 2030.
- (8) The aid, in the form of a direct grant, will be paid to the beneficiary, upon request, in year $t + 1$ for costs incurred in year t . The first payments will be made in 2022 on the basis of the eligible costs for year 2021 and last payments in 2031 for costs incurred in 2030.
- (9) The estimated total budget is EUR 175 million for 2021–2030. The annual budget is established on the basis of Article 7(1) of the Decree-Law no. 42-A/2016, as amended by Decree-Law no. 114/2021. The estimated annual budget is distributed as follows:

² Communication from the Commission — Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021 (OJ C 317, 25.9.2020, p. 5), as supplemented by the Communication from the Commission supplementing the Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post 2021 (OJ C, 528, 30.12.2021, p. 1).

³ <https://dre.pt/dre/detalhe/decreto-lei/42-a-2016-75150234>.

⁴ <https://data.dre.pt/eli/dec-lei/114/2021/12/15/p/dre>.

Year	2022	2023	2024	2025	2026
Estimated budget (EUR million)	25	25	25	25	15
Year	2027	2028	2029	2030	2031
Estimated budget (EUR million)	15	15	10	10	10

- (10) The measure is financed by Portugal’s EU allowance (“EUA”) auctioning revenues. The annual revenues are transferred to a separate State budget account, managed by the Environmental Fund, a State body set up to support several environmental and climate policies, including the financing of the measure.
- (11) Where the resources of the fund in a given year exceed the actual aid provided to the beneficiaries, based on the maximum aid intensity of 75 %, the surplus is capitalised and can be used to finance other policies of the Environmental Fund. Where the available budget in a given year is not sufficient to cover the total aid requested by all eligible beneficiaries for the year in question, the aid intensity will be reduced proportionally to the available budget for all eligible beneficiaries (see recital (30)).
- (12) The granting authority will be the Environmental Fund. The strategic guidance of the Environmental Fund is under the responsibility of the member of the Government responsible for the Environment area, and is materialised through general or specific guidelines, in any area of intervention of the Fund, through binding government orders.
- (13) Under the terms of the Ministerial Ordinance, the Environmental Fund receives and assesses the applications and makes payments for applications considered eligible. The Portuguese Environment Agency (APA)⁵ is the State agency that validates the technical information provided by the applicants and calculates the maximum aid amounts, in cooperation with the Environmental Fund.

2.2. Beneficiaries

- (14) The beneficiaries are installations that are active in one of the sectors or sub-sectors listed in Annex II to the Ministerial Ordinance, which corresponds to Annex I of the ETS Guidelines post-2021. All sectors listed in the Annex II to the Ministerial Ordinance will be eligible under the measure. The Portuguese authorities limit eligibility to those installations that are covered by the EU ETS, arguing that they face compliance costs compared to installations not covered by the EU ETS within the same sector and subsector. The Portuguese authorities consider that those installations are in a different factual situation.
- (15) Applicants must submit the following information in relation to the year for which they request the aid (year t), in a form to be made available on the Environmental Fund’s website:

⁵ The APA is the competent authority for the management of the EU greenhouse gases allowances system, see Article 4 of decree-law No. 12/2020 of 6 April 2020.

- (a) identification of the beneficiary and the facilities owned that are the object of aid;
 - (b) sector(s) or sub-sector(s) in which the beneficiary is active (identified by their NACE and PRODCOM code);
 - (c) the actual output in year t, expressed in tonnes, of each aided installation per sector(s) or sub-sector(s);
 - (d) the actual electricity consumption in year t, expressed in MWh of each aided installation per sector(s) or subsector(s) for the period (if any aid is granted on the basis of a fall back electricity consumption efficiency benchmark); and
 - (e) the amount of any State aid received and the amount of any other forms of EU funding, indicating the respective scope.
- (16) In addition, to be eligible to support under the measure, applicants must prove that:
- (a) they have their tax and social security situation regularised, respectively, with the tax authorities and social security requirements;
 - (b) they are in compliance with all the applicable legal regimes in environmental matters;
 - (c) the members of their corporate bodies have not been convicted of certain crimes related to damage against the nature, violation of urban rules, pollution, or activities dangerous to the environment;
 - (d) the members of their corporate bodies have not been subject to a sanction for an environmental administrative offense or to accessory sanctions under Portuguese law; and that
 - (e) the company does not qualify as a firm in difficulty within the meaning of the Guidelines on State aid for rescuing and restructuring firms in difficulty⁶.
- (17) The Ministerial Ordinance requires that the aid granted complies with the provisions of the ETS Guidelines post-2021. The Portuguese authorities explained that this requirement extends to point 11 on recovery and that no aid will be granted to undertakings that are subject to an outstanding recovery order following a previous Commission decision declaring aid to be illegal and incompatible with the internal market.
- (18) Furthermore, applicants must show that they comply, when applicable, with the obligation to carry out an energy audit under Article 8 of Directive 2012/27/EU⁷ as transposed by the Decree-Law no. 68-A/2015⁸, either as a

⁶ Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

⁷ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

stand-alone energy audit or within the framework of a certified Energy Management System or Environmental Management System. The Portuguese authorities will verify that the beneficiaries comply with that obligation.

- (19) In addition, the applicants subject to the obligation referred to in recital (18) must demonstrate that:
- (a) they implement the recommendations of the audit report, to the extent that the pay-back time for the relevant investments does not exceed three years and that the costs of their investments are proportionate (i.e. the investment costs do not exceed the aid amount received over three years); or alternatively
 - (b) they reduce the carbon footprint of their electricity consumption so as to cover at least 30 % of their electricity consumption from carbon-free sources; or alternatively
 - (c) they invest a significant share of at least 50 % of the aid amount in projects that lead to substantial reductions in the installation's greenhouse gas emissions and well below the applicable benchmark used for the free allocation in the EU ETS.
- (20) The Portuguese authorities have submitted that applicants will need to demonstrate that they are in compliance with one of the obligations indicated in recital (19) point a), b) or c) as follows:
- (a) For point a), if the applicant has already implemented the relevant recommendations, it must deliver a report and supporting documents to prove compliance. If the applicant has not yet implemented the relevant recommendations, it must provide an investment plan and complete the corresponding investments within three years from the granting of the aid. The Portuguese authorities will perform *ex-post* verifications on an annual basis.
 - (b) For point b), beneficiaries can prove compliance with that obligation through on-site or near-site renewable energy generation facilities, carbon-free power purchase agreements or guarantees of origin. If the applicant already complies with the requirement under point b), it must provide the relevant supporting documents to prove compliance. If the applicant does not comply with that requirement yet, it must provide an investment plan with baseline analysis and post-investment projections of electricity consumption in the installation and complete the corresponding investments within three years from the granting of the aid. The Portuguese authorities will perform *ex-post* verifications on an annual basis.

⁸ Decree-Law no. 68-A/2015 of 30 April 2015, as amended, implements the mandatory energy audit requirements contained in Article 8 of Directive 2012/27/EU. Under this Decree-Law, companies that are not small and medium-sized enterprises (SMEs) are subject to an energy audit of, among other assets, buildings and vehicles, before 5 December 2015 and at least every four years from the date of the previous energy audit.

- (c) For point c), the applicant must provide an investment plan with baseline analysis and post-investment projections of greenhouse gases and the applicable benchmark of the installation, and it must complete the corresponding investments within three years from the granting of the aid. The Portuguese authorities will perform *ex-post* verifications on an annual basis.
- (21) If, after the *ex-post* verifications, it appears that the beneficiary has not complied with its obligations, it will be required to reimburse the aid already received for the relevant year(s).

(22) The expected number of beneficiaries is around 26.

2.3. Aid amount calculation

- (23) The maximum aid amount payable per installation will be calculated according to the two formulas outlined in point 28 of the ETS Guidelines post-2021.
- (24) Where electricity consumption efficiency benchmarks have been published, the formula of point 28(a) of the ETS Guidelines post-2021 applies. Where no product-related electricity consumption efficiency benchmarks are published, the formula of point 28(b) of the ETS Guidelines post-2021 applies.
- (25) For the purpose of calculating the aid under the formula set out in point 28(b) of the ETS Guidelines post-2021, a fall-back electricity consumption efficiency benchmark of the baseline electricity consumption will be used, as envisaged by Annex II to the ETS Guidelines post-2021 (Article 7(3) of the Ministerial Ordinance).
- (26) The measure adopts the definitions of point 15 of the ETS Guidelines post-2021 for all the elements of the formulas. Annex II to the ETS Guidelines post-2021 establishing the product-specific electricity consumption efficiency benchmarks and annual reduction rates and Annex III establishing the regional CO₂ emission factors apply.
- (27) The Ministerial Ordinance (Annex IV) establishes that, if an installation manufactures both products for which the electricity consumption efficiency benchmark is listed in Annex II of the ETS Guidelines post-2021 and products for which the fall-back electricity consumption efficiency benchmark is applicable, the electricity consumption for each product is apportioned according to the respective tonnage of production of each product. If an installation manufactures products that are eligible for aid and products that are not eligible for aid, the maximum aid payable is calculated only for the products that are eligible for aid.
- (28) The maximum aid intensity will be 75 % of the indirect emission costs incurred. The aid intensity will be the same for all eligible beneficiaries.
- (29) Additionally, Article 10(2) of the Ministerial Ordinance establishes that the amount of tax exemption on energy and oil products⁹ received is deducted from the maximum amount of aid under the measure. Article 10(3) of the Ministerial Ordinance defines a minimum threshold of aid under the measure to be provided

⁹ ETS installations benefit from the tax exemption on energy and oil products established by Article 89(1)(f) of the Excise Tax Code, approved by Decree-Law 73/2010 of 21 June 2010, as amended.

(50 % of the maximum aid amount based on the 75 % maximum aid intensity) following this deduction¹⁰. The Portuguese authorities explained that Portugal began to phase out fossil fuel incentives in 2018 and that the deduction of that exemption from the aid amount creates an incentive to this phase out process.

- (30) If for a given year the available budget does not allow the eligible costs provided for in the application to be accepted in full, the final aid amounts will be reduced proportionally to the available budget for all eligible beneficiaries . For that purpose, the Environmental Fund will apply a single corrective factor corresponding to the ratio between the overall eligible costs incurred by all eligible beneficiaries and the available budget.

2.4. Cumulation

- (31) In accordance with points 33 to 35 of the ETS Guidelines post-2021, aid under the measure may be cumulated with:
- (a) any other State aid in relation to different identifiable eligible costs;
 - (b) any other State aid in relation to the same eligible costs, partly or fully overlapping, and with any other State aid without identifiable eligible costs, only if such cumulation does not result in exceeding the maximum aid intensity or aid amount applicable under the measure.
- (32) In addition, aid under the measure will not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in exceeding the maximum aid intensity applicable under the measure.
- (33) The Ministerial Ordinance establishes that, with the application, the beneficiary must declare all State aid it has received.
- (34) Portugal submitted that the amount of possible *de minimis* aid received is checked by consulting the centralised *de minimis* registry.

2.5. Transparency, reporting and monitoring

- (35) The Portuguese authorities undertake to comply with and apply the transparency requirements set out in points 56 to 58 of the ETS Guidelines post-2021.
- (36) The Ministerial Ordinance establishes that the information required in points 59 and 60 of the ETS Guidelines post-2021 is made available yearly from the Ministry of Environment to the Ministry of Foreign Affairs¹¹. Portugal commits to keep the detailed record referred to in point 61 of the ETS Guidelines post-2021 for at least 10 years. The Ministerial Ordinance also provides for the respect of the publication obligation of point 62 of the ETS Guidelines post-2021.

¹⁰ For example, if beneficiary A has EUR 1 000 of energy products tax exemption and a maximum calculated aid amount of EUR 30 000, the final aid granted would be EUR 29 000. If beneficiary B has EUR 20 000 of energy products tax exemption and a maximum calculated aid amount of EUR 30 000, the final aid granted would be 50 % of the maximum calculated aid, i.e., EUR 15 000 (since in this case the difference between maximum calculated aid amount [EUR 30 000] and the tax exemption [EUR 20 000] would be equal to EUR 10 000, which would be a value lower than 50 % of the maximum calculated aid [EUR 15 000]).

¹¹ Article 12(2) and Annex V of the Ministerial Ordinance.

3. ASSESSMENT OF THE MEASURE

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

- (37) In order for a measure to constitute State aid within the meaning of Article 107(1) TFEU, it has to fulfil four conditions. First, the aid must be imputable to the State and involve State resources. Second, the measure must confer a selective advantage to certain undertakings or the production of certain goods. Third, the measure must be liable to affect trade between Member States. Fourth, the measure must distort or threaten to distort competition in the internal market.
- (38) The compensation is granted by the Environmental Fund, a public body which acts under the guidance and upon binding orders of the member of the Government responsible for the Environment, based on the Decree Law No. 12/2020 and on the Ministerial Ordinance (see recitals (5) and (12)). The compensation is funded through Portugal's EUA auctioning revenues that are transferred to a separate State budget account managed by the Environmental Fund and treated similarly to any other State revenues (see recital (10)). Hence, the measure is imputable to the State and financed through State resources. It confers an advantage to the beneficiaries by compensating for costs they would have borne under normal market conditions. The aid is selective since it is granted only to the undertakings active in certain sectors (see recital (14)). Those sectors are all exposed to international competition as noted in point 20 of the ETS Guidelines post-2021, making it likely the aid can affect trade between Member States and distort competition.
- (39) Therefore, the Commission considers that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Lawfulness of the aid

- (40) By notifying the measure before its implementation, the Portuguese authorities have fulfilled their obligations under Article 108(3) TFEU (see recital (6)).

3.3. Compatibility

3.3.1. Legal basis for the assessment of the compatibility of the aid

- (41) The Commission has assessed if the measure can be considered compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- (42) Aid to undertakings to compensate for EU ETS allowance costs passed on in electricity prices falls within the scope of the ETS Guidelines. The Commission assessed the measure's compatibility on the basis of section 3.1 of the ETS Guidelines post-2021, which sets out the conditions under which aid may be deemed compatible.

3.3.2. The aid facilitates the development of an economic activity

3.3.2.1. Contribution to the development of an economic activity

- (43) According to Article 107(3)(c) TFEU, the Commission may consider to be compatible with the internal market aid to facilitate the development of an

economic activity, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

- (44) The measure supports beneficiaries active in one of the sectors or sub-sectors listed in Annex I of the ETS Guidelines (see recital (14)), which correspond to sectors and sub-sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.
- (45) Therefore, the Commission considers that the measure contributes to the development of certain economic activities, namely sectors deemed to be exposed to a genuine risk of carbon leakage due to indirect emission costs.

3.3.2.2. Facilitation of an economic activity and incentive effect

- (46) To be declared compatible with the internal market under Article 107(3)(c) TFEU, the aid must effectively facilitate the development of an economic activity (or of an economic area). State aid has an incentive effect if it incentivises the beneficiary to change its behaviour towards the development of a certain economic activity pursued by the aid and if the change in behaviour would not occur without the aid¹².
- (47) According to point 25 of the ETS Guidelines, for the aid to have an incentive effect and actually prevent carbon leakage, it must be applied for and paid to the beneficiary in the year in which the costs are incurred or in the following year.
- (48) The measure foresees that the aid will be paid to the beneficiary in the year following the one in which the costs were incurred (year t + 1) (see recital (8)). This is in line with point 25 of the ETS Guidelines.
- (49) The Commission therefore concludes that the aid has an incentive effect and facilitates the development of certain economic activities.

3.3.2.3. Compliance with other relevant provisions of EU law

- (50) State aid that contravenes provisions or general principles of EU law cannot be declared compatible¹³.
- (51) Beneficiaries must comply with their obligations under Article 8 of Directive 2012/27/EU on energy efficiency (see recital (18)).
- (52) Therefore, the Commission considers that the measure does not infringe other relevant provisions of EU law.

3.3.3. *The aid does not unduly affect trading conditions to an extent contrary to the common interest*

3.3.3.1. Positive effects of the aid

- (53) The measure will contribute to the development of sectors exposed to a genuine risk of carbon leakage due to indirect emission costs (see recital (45)).
- (54) Addressing the risk of carbon leakage serves an environmental objective since the aid aims to avoid an increase in global greenhouse gas emissions due to shifts of

¹² See judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742.

¹³ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

production outside the Union, in the absence of a binding international agreement on reduction of greenhouse gas emissions, as explained in point 20 of the ETS Guidelines post-2021.

3.3.3.2. Need for State intervention

- (55) Point 20 of the ETS Guidelines post-2021 requires that the objective of the aid is to prevent a significant risk of carbon leakage due to EU ETS allowance costs passed on in electricity prices supported by the beneficiary, if its competitors from third countries do not face similar CO₂ costs in their electricity prices and the beneficiary is unable to pass on those costs to product prices without losing significant market share.
- (56) According to point 21 of the ETS Guidelines post-2021, for the purposes of those guidelines, a significant risk of carbon leakage is considered to exist only if the beneficiary is active in a sector or subsector listed in Annex I of the ETS Guidelines post-2021. Moreover, according to point 22 of the ETS Guidelines post-2021, if Member States decide to grant the aid only to some of the sectors listed in Annex I, the choice of sectors must be made on the basis of objective, non-discriminatory and transparent criteria.
- (57) The beneficiaries of the measure are installations that are active in one of the sectors or sub-sectors listed in Annex I of the ETS Guidelines post-2021 and, in addition, Portugal requires them to be covered by the EU ETS (see recital (14)). The Portuguese authorities confirmed that all sectors listed in that annex will be eligible for aid under the measure. As the EU ETS does not cover all installations within a given sector but only those above certain thresholds as described in Annex I of the ETS Directive, the Commission agrees that installations covered by the EU ETS can be considered in a different factual situation compared to installations not covered by the EU ETS. Therefore, the Portuguese requirement for beneficiaries to be an installation covered by the EU ETS is based on objective, non-discriminatory and transparent criteria, in compliance with point 22 of the ETS Guidelines post-2021.
- (58) Hence, the Commission concludes that the aid is necessary to realise the measure's well-defined objective, namely contributing to the development of sectors exposed to a genuine risk of carbon leakage due to indirect emission costs and, moreover, avoiding an increase in global greenhouse gas emissions due to shifts of production from the Union to other countries with lower ambition for emission reduction.

3.3.3.3. Appropriateness of the aid

- (59) According to point 24 of the ETS Guidelines post-2021, for the purpose of compensating indirect ETS costs, State aid is considered an appropriate instrument independently of the form in which it is granted. In this context, compensation taking the form of a direct grant is considered an appropriate instrument.
- (60) Under the measure, the support will take the form of a direct grant (see recital (8)). Therefore, the Commission considers the type of aid chosen is appropriate to address the risk of carbon leakage.

3.3.3.4. Proportionality of the aid

- (61) According to point 27 of the ETS Guidelines post-2021, the aid is proportionate and has a sufficiently limited negative effect on competition and trade if it does not exceed 75 % of the indirect emission costs incurred. The electricity consumption efficiency benchmark ensures that support to inefficient production processes remains limited and maintains the incentive for dissemination of most energy-efficient technologies.
- (62) The measure does not provide for full compensation, as this could remove the incentive for beneficiaries to further reduce electricity consumption. The maximum aid intensity will be 75 %, in compliance with point 27 of the ETS Guidelines post-2021. As noted above, the aid intensity may be lower depending on the available budget (see recital (28)).
- (63) The maximum aid amount payable per installation will be calculated according to the two formulas in point 28 of the ETS guidelines post-2021 (see recital (23)).
- (64) The measure adopts the definitions of point 15 of the ETS Guidelines post-2021, for all the elements of the formulae. Annex II to the ETS Guidelines post-2021 establishing the electricity consumption efficiency benchmarks and annual reduction rates, and Annex III to the ETS Guidelines post-2021 establishing the regional CO₂ emission factors apply (see recitals (25) and (26)).
- (65) The measure also complies with points 29 and 30 of the ETS Guidelines post-2021. In particular, if an installation manufactures products for which a product-specific electricity consumption efficiency benchmark is applicable and products for which the fall-back electricity consumption efficiency benchmark is applicable, the electricity consumption for each product must be apportioned according to the respective tonnage of production of each product. If an installation manufactures products that are eligible for aid and products that are not eligible for aid, the maximum aid payable shall be calculated only for the products that are eligible for aid (see recital (27)).
- (66) According to point 23 of the ETS Guidelines post-2021, within the eligible sector, Member States need to ensure that the choice of beneficiaries is made on the basis of objective, non-discriminatory and transparent criteria and that the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation. The eligibility conditions and the procedure laid down in the measure referred to in recitals (15) and (16) comply with those requirements. Moreover, the aid intensity remains the same for all beneficiaries in a given year (recital (28)).
- (67) Concerning the deduction of the tax exemption on energy and oil products referred to in recital (29), based on the explanation provided by the Portuguese authorities, this deduction is based on objective, transparent and non-discriminatory criteria in line with point 23 of the ETS Guidelines post-2021.
- (68) The duration of the measure does not exceed the duration of the ETS Guidelines post-2021 (see recital (7)). Therefore, the measure complies with point 36 of the ETS Guidelines post-2021.

3.3.3.5. Cumulation

- (69) The measure's provisions on cumulation are in line with the requirements set out in points 33 to 35 of the ETS Guidelines post-2021 (see recitals (31) to (34)).

3.3.3.6. Energy audits and management systems

- (70) The Portuguese authorities will verify that beneficiaries comply with their obligation to carry out an energy audit under Article 8 of Directive 2012/27/EU, either as an independent energy audit or as part of a certified energy management system or certified environmental management system (see recital (18)). The measure therefore complies with point 54 of the ETS Guidelines post-2021.
- (71) In addition, the Portuguese authorities will verify that beneficiaries comply with one of the requirements of point 55(a), (b) and (c) of the ETS Guidelines post-2021 within three years from the granting of the aid (see recitals (19) and (20)).
- (72) The Commission considers that a reasonable period of time for implementing those obligations is in line with point 55 of the ETS Guidelines post-2021. The Commission considers that the three-year deadline provided for under the measure for implementing those obligations (recital (20)) is reasonable.
- (73) The measure therefore complies with point 55 of the ETS Guidelines post-2021.

3.3.3.7. Transparency, reporting and monitoring

- (74) The Portuguese authorities undertake to comply with the requirements set out in points 56 to 62 of the ETS Guidelines on transparency, monitoring and reporting in relation to the measure (see recitals (35) and (36)).

3.3.3.8. Firms in difficulty or subject to an outstanding recovery order

- (75) According to point 10 of the ETS Guidelines post-2021, aid may not be awarded to firms in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty. Moreover, according to point 11 of the ETS Guidelines post-2021, when assessing aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring aid to be illegal and incompatible with the internal market, the Commission will take account of the amount of aid still to be recovered¹⁴. In practice, it will assess the cumulative effect of both aid measures and may suspend the payment of the new aid until the outstanding recovery order is implemented.
- (76) Under the measure, no aid will be granted to (i) undertakings in difficulty within the meaning of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty, and to (ii) undertakings subject to an outstanding recovery order following a previous Commission decision declaring aid to be illegal and incompatible with the internal market (see recitals (16) and (17)).

¹⁴ See in this respect the joint Cases T-244/93 and T-486/93, TWD Textilwerke Deggendorf GmbH v Commission EU:T:1995:160, and the Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

- (77) Therefore, the measure complies with points 10 and 11 of the ETS Guidelines post-2021.

3.3.3.9. Remaining distortions of trading conditions

- (78) Compensation for indirect ETS costs risks distorting competition between undertakings within the same sector active in different EU Member States (intra-sector competition). This is because only some countries may put a compensation scheme in place for the fourth EU ETS trading period from 2021 to 2030¹⁵.
- (79) Additionally, the measure may create a limited risk of competition distortions to the extent that products of certain eligible sectors may compete with products manufactured in sectors that are not eligible for indirect cost compensation (inter-sector competition).
- (80) Those risks are however mitigated by the fact that the measure complies with all the conditions laid down in the ETS Guidelines post-2021, which set a list of eligible sectors, a maximum aid intensity, aid calculation formulas and electricity consumption efficiency benchmarks at Union-level. Moreover, under the measure, the same aid intensity will be applied to all beneficiaries in a given year depending on the available budget (see recital (28)).

3.3.3.10. Conclusion on distortion of competition and balancing test

- (81) As explained above, the measure will facilitate the development of sectors exposed to a significant risk of carbon leakage due to indirect emission costs and will contribute to avoid an increase in global greenhouse gas emissions (see recitals (45) and (54)).
- (82) Moreover, the necessity, appropriateness and proportionality of the aid limits its impact on competition and trade. The Commission concludes that even if an impact on intra-sector and inter-sector competition cannot be excluded, it appears that the negative effects of the aid are sufficiently limited for the overall balance of the measure to be positive.

¹⁵ See the impact assessment report for the ETS Guidelines post-2021, p. 13 (available at: https://ec.europa.eu/competition/state_aid/what_is_new/2020_ets_revision/impact_assessment_report_ets_2021_en.pdf).

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)(c) of the Treaty on the Functioning of the European Union.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President