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Complaint concerning alleged State aid

Complainant: Fortum Oyj, P.O.Box 1, FI-00048 FORTUM

Country: Finland

State Aid would be granted by Central government.

The Finnish government proposes to introduce a tax on domestic hydro, wind and nuclear power plants. So called 'windfall-profits' earned by energy power plants that have allegedly benefited from the introduction of the EU Emissions trading system ("EU ETS") would be subject to the proposed tax.

Only certain hydro, wind and nuclear power plants, i.e. plants taken into operation before the planning of the EU ETS in 2004, would be subject to the proposed tax. The targeted power plants would hence be treated unequally with the rest of the sector. Introduction of the proposed tax would constitute a selective aid to similar power plants that are not subject to the proposed tax. The proposed tax is not within the general nature and the logic of the Finnish energy taxation system and constitutes State Aid to other carbon-free power plants generating electricity that are exempt from the proposed tax. No justification to the aid to these power plants can be found.

The policy choices adopted by the Finnish Government results in infringements of the laws of EU. Firstly, the proposed tax is against the objectives of the EU ETS Directive. The proposed tax would increase the fiscal burden on certain plants without offsetting the added burden with environmental benefits, i. a. investments increasing the level of environmental protection.

Secondly, electricity would be taxed twice: at input and output in contravention to the Energy Tax Directive that only permit tax on output unless justified by environmental reasons. Thirdly, the proposed tax would also contradict with the fundamental rights under the EU law as further explained in this complaint.

In conclusion the proposed windfall tax does not contribute to any well-defined objective of common interest. Further the negative effects the proposed tax will have on trade between the member states and on competition between energy producers clearly exceeds its potential positive effects.

1. **Fortum Oyj (hereinafter "Fortum")** operates in the generation, distribution and sales of electricity and heat as well as related expert services. Fortum's operations focus on the Nordic countries, Russia, Poland and the Baltics. In 2012, Fortum's sales totalled € 6.2 billion. It employs approximately 10,400 people. Fortum's shares are quoted on NASDAQ OMX Helsinki.

The Government Bill 140/2013: the reasoning of the windfall tax

2. The Finnish Authorities propose a windfall tax on certain nuclear and hydro power plants applicable with effect from 2014¹. Referring to the Bill, the reason for introducing the windfall tax is that the EU ETS has increased the price of electricity in the Nordic countries. Since nuclear energy, wind and hydro power produce no carbon dioxide emissions, they, according to the Finnish Authorities, benefit the most from the higher prices. The benefit, in other words, so-called windfall profit, results from emission trading and is based on the impact of the EU ETS on electricity wholesale prices.
3. In the common Nordic/Baltic electricity market, Nord Pool Spot², the wholesale price of the electricity, calculated and changing by the hour, is based on electricity production costs of the most expensive power station. This is referred to as the "marginal production form". The Finnish Authorities consider that in a system based on marginal cost pricing, production technologies with lower prices, especially hydro, wind and nuclear power receive significant economic advantages because the prices of these carbon and emission-free power types will not change as a result of emission trading.
4. To eliminate the advantage the Finnish Authorities propose to introduce a windfall tax on the alleged windfall profits. The term "windfall profit" is defined as undue profit as the Finnish Authorities consider the benefit gained for unjustified reasons. The proposed tax would be levied on nuclear, wind or hydro power plants taken into operation before the planning of the EU ETS, in 2004³.
5. The proposed tax is targeted only to energy companies that own a nuclear, wind power plant or hydro power plant. It is expected that the proposed tax will increase the production costs of these nuclear, wind and hydro power plants. The Finnish Government estimates the proposed tax to concern altogether 130 hydro power plants, four nuclear power plants and 10 to 15 wind power plants. The proposed tax is expected to increase the fiscal revenue of the Government by € 50 million a year. Half of this would be paid by Fortum.

¹ Government Bill 140/2013 (the "Bill").

² Nord Pool Spot AS is owned by the Nordic transmission system operators Statnett SF, Svenska Kraftnät, Fingrid Oyj, Energinet.dk and the Baltic transmission system operators Elering, Litgrid and Augstsprieguma tikls (AST). It was established as a company in 2002 as the world's first market for trading power. Today it is also the world's largest market of its kind, and provides the leading market for buying and selling power in the Nordic and Baltic regions, as well as Germany and Great Britain.

³ Bill, p. 5.

Analysis

6. According to Article 107 of the Treaty on the Functioning of the European Union ("TFEU") any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market, unless the State aid measure finds its justification in the TFEU.
7. Fortum submits that the proposed Scheme of imposing tax on the alleged windfall profits targeting only certain carbon-free energy power plants as defined in the Bill ("the Scheme") is a State aid measure distorting competition by favoring certain other energy power plants and production types of electricity.
8. Since electricity is traded freely in the Nordic/Baltic combined electricity market, the Scheme affects trade between the Member States.
9. The Scheme should be considered incompatible with the internal market for reasons set forth in the following sections of this complaint.

A. Use of State resources

10. The alleged aid would be granted in the form of the proposed tax exemption. The Finnish Authorities propose to tax certain electricity generation capacity while exempting the rest of the electricity generation capacity from the tax. Therefore, there would be a tax exemption, and State resources would clearly be involved in the Scheme.

B. Economic advantage

11. As some power plants in the same energy sector i.e. power plants producing the same product in a carbon-free way, are taxed, and others are not, there is an advantage emanating from State resources to the carbon-free power plants that are not taxed. As a result two theoretical undertakings with differing mix of power plants in operation but with the same power production capacity would be taxed in a different manner.

C. Selectivity

a. Main criteria of the Selectivity

12. Firstly, the main criterion in applying Article 107 of the Treaty to a tax measure is that the tax measure is selective. Under the Article 107 the tax measure is selective if it provides in favor of certain undertakings in the Member State an exception to the application of the tax system without any justification. Consequently, the common tax system applicable should be defined according to point 16 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation⁴.
13. Secondly, it must be analyzed whether the exceptions to the system or differences within that system are justified '**by the nature or general scheme**' of the tax system. In order to

⁴ OJ C 384, 10.12.1998, p. 3.

be justified, the exceptions to the tax system should derive directly from the basic or guiding principles of the tax system in the Member State concerned. If this is not the case, then State aid is involved⁵.

b. *General tax regime for the power plants in Finland*

14. In this case the applicable tax system in Finland is the separate real estate tax regime for power plants. This tax regime imposes a tax equally on all power plants on the basis of the value of such plants, defined as value of buildings and other constructions on such land. The proposed Scheme will be *sui generis*, added on top of this general system, and the key provisions of the new system will deviate from the general tax principles and regime applicable to all power plants in Finland.
15. As submitted *supra*, the tax would be tied to the capacity to generate electricity, i.e. to the alleged windfall profits, not ownership of the plant like the general system. The proposed tax also deviates from normal real estate tax due to the fact that there would not be depreciations applicable on the value of the plant. In the Bill, this is precisely motivated by the fact that nominal efficiency would *de facto* be taxed⁶.
16. The proposed tax is based on procurement (replacement) value of the plant buildings, dams, channels and other permanent constructions but not the land. As stated above, the tax applies to all hydro, nuclear and wind power plants that have been built before 2004 (with rated power above 1 MW).
17. The purpose of the Scheme is to tax undue profits on certain power production methods. This aim of the tax has clearly no relation to the value of the real estate. As an example, the Finnish Authorities justify the proposed tax by claiming that carbon-free plants that have been taken into operation earlier than 2004 would gain undue profits because the taxed power plants are not installations subject to the EU ETS. Clearly the date of the start of the operation does not relate in any direct way to the value of such real estate.
18. The proposed tax rate would be based on the generation capacity of electricity on a specific power plant, not on the ownership of the power plant in the same manner as above referred general real estate tax regimes applicable to power plants (e.g. tax on land and tax on generation buildings and installations) are.
19. The proposed tax also deviates from the general real estate tax regime due to the fact that no depreciations would be applied on the value of the power plant. As explained above in point 16, the tax imposed on the power plants is based on the nominal efficiency of such power plant.
20. If, according to the Bill the power plant would not be in operation for longer periods, the tax would not be levied. Equally in this respect the tax would also be based on the generation of the power, not on the ownership of the power plant like a normal real estate tax would be.

⁵ Ibid.

⁶ Bill, p. 19.

21. The purpose of the proposed tax is to tax profits carbon-free plants receive in consequence of the introduction of the EU ETS. Naturally, the general real estate tax is not dependent on the EU ETS.
22. To satisfy the general nature of the tax system, the tax should be equally imposed on all power plants earning similar profits. Accordingly this is not the case because certain plants in similar situations are not subject to the tax. Power plants subject to the tax would include all nuclear, wind and hydro power plants taken into operation on or after year 2004 as well as Finnish power plants using biomass.
23. In conclusion, the Scheme discriminates openly between the producers of the same goods in the same market using carbon-free production methods without justified grounds and confers an advantage on certain power plants by relieving the exempted power plants of the proposed tax.
24. The proposed tax cannot fall within the nature and the logic of the Finnish energy taxation system as it confers economic advantage to the power plants not subject to the proposed tax even though the power plants generate carbon free electricity in similar circumstances. The Bill treats differently and provides exemption to carbon-free power plants that have come to operation on or after year 2004, and/or certain other carbon-free plants benefiting from the EU ETS (for instance, biomass production plants).
25. This discrimination is not in compliance with the general nature and the logic of the Finnish energy taxation system. Thus the Scheme differs from the nature or general scheme of the Finnish Energy Taxation System. As explained, in fact, while the proposed tax is disguised as a real estate tax, the purpose of the tax according to the bill is to tax earnings of the plant, not the real estate value.
26. Therefore it can be concluded that the proposed Scheme is selective.

c. Further elements relating to the selectivity

27. In addition, there are further elements to be analyzed relating to the criteria contributing to the selectivity of the proposed Scheme. First of all, the arbitrary choice of the year 2004 is not based on actual facts or research.
28. In order to be able to justify the different treatment of the power plant on the basis of their age the Finnish Government should have been able to demonstrate that the effects of the EU ETS on electricity prices is dependent on the chosen year. The only explanation of the Finnish Government is that the carbon free power plants that were taken into operation on or after year 2004 were able to take into account the regulatory and market requirements of the EU ETS i.e. the knowledge of the new system. It do not explain how this matter would cause disadvantage to these power plants but only assumes that this reason would suffice to justify the power plants to be exempt from the tax.
29. However, the changes in the Nordic electricity prices should not be reasoned by the knowledge of the EU ETS as the Finnish Government has proposed. This approach is completely irrelevant and without justification.
30. In addition, it should be noted that at present carbon allowance price level the proposed tax would in many cases exceed any possible gain from the EU ETS. In fact, the theoretical

benefit from the EU ETS, with current carbon allowance prices, is at maximum around € 2-3 per MWh according to the calculation set out in the Bill. In contrast, the effect of the planned tax is in most cases many times higher than what would be required in order to eliminate the benefits of the EU ETS. For instance, for Fortum the highest tax level among the power plants would be about 8 €/MWh.

31. Statistics of the Nord Pool Spots as well as Nasdaq OMX indicates that, last time the carbon allowance price was above € 7 per MWh was more than a year ago. The carbon prices are not expected to rise significantly in the foreseeable future. As a matter of fact, even the Bill refers to a maximum price of € 10 MWh within the next 20 years. This would result in an excess price, i.e. benefit of € 5 per MWh. The proposed tax would actually be an additional penalty for many of the power plants subject to the proposed tax.

32. Therefore, it can be concluded that discrimination on grounds of age of the affected power plant is not based on logic and/or objective criteria. It is rather an arbitrary choice of which the result is distortion of competition.

d. Unreasonably different taxation among the power plants subject to the proposed tax selectivity

33. Because of the fact that the tax rate to be applied is (i) based on the nominal efficiency of the power plant and (ii) the amount of tax on the tax rate multiplied by the procurement value of the power plant, the carbon-free plants subject to the tax would be treated in a discriminative manner: For instance, in Fortum's case the lowest tax on a power plant would amount to less than 0,50 €/MWh and the highest to 8 €/MWh. Therefore the treatment of the power plants subject to the proposed tax varies to a great extent without justification. The proposed tax treats more efficient power plants in more discriminative manner than those less effective. Hence, fiscal burden for some of the power plants would be unreasonably high and disproportionate considering the aim of the proposed tax.

e. Treatment of the CHP power plants

34. The exemption of the CHP power plants from the scope of the proposed tax is yet another concrete circumstance of the lacking logic in the Scheme. The Bill provides no objective justification when it exempts these power plants from the proposed tax. The justification of the Finnish Government is based on the fact that CHP power plants' main product is heat even if these power plants produce also electricity: approximately 27 percent of the electricity generated in Finland comes from CHP power plant. The amount is by no means insignificant.

35. Furthermore, the Finnish Government justifies the tax exemption of all CHP power plants by claiming that CHP power plants have to buy carbon allowances to cover their emissions. This is true only in regard to the CHP power plants using fossil fuels but not to power plants using biomass that in the context of the EU ETS is considered a carbon-free product.

36. In practice, biomass is used only in CHP power plants in Finland. Again, approximately 15 percent of the electricity generated in Finland comes from CHP power plants using biomass as a fuel. Therefore, the amount of electricity generated by the power plants using biomass, in operation before or after year 2004, is not insignificant by any means.

37. A complete exemption of all CHP power plants would in practice exempt also biomass based electricity production without justification. This fact was completely ignored in the Bill.
38. In conclusion, taking into account all above referred aspects it is evident that the proposed Scheme is selective and not within the nature and logic of the Finnish energy taxation system. Therefore, there is an aid element involved.

D. Infringements of EU law resulting from the implementation of the proposed Scheme

39. The Commission has exclusive control over State Aid, like the proposed Scheme at issue. Even though the Finnish Government has full competency to define the logic and nature of the energy taxation system employed, its discretion is exercised under the supervision of the Commission.
40. Fortum contends that the Scheme cannot contain or result in solutions contravening other fields of EU law. Therefore Fortum also draws the Commission's attention to the following elements and effects of the proposed Scheme:

a. Infringement of the Energy Tax Directive and the Excise Duty Directive

41. The Scheme is contrary to the Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity⁷ (the Energy Tax Directive). According to the Article 14.1 (a) of the Energy Tax Directive, electricity generation is exempt from double taxation, and can only be taxed at output (i.e. on consumption level by the purchasers of the electricity, not in the course of the generation of the electricity) unless input taxation is justified by environmental reasons.
42. As already mentioned, the Finnish Authorities would impose the proposed tax on undue profits.
43. According to the Bill, the applicable tax rate depends on the efficiency of the plant. The efficiency of the plant is related to generation of electricity, in other words, to the input level. Therefore, the proposed tax in this respect is an input tax which is paid in course of and in connection with the generation of the electricity contrary to the Energy Tax Directive.
44. The Finnish Government does not even claim that the proposed tax would be applied for reasons of environmental policy as required by the article 14.1 (a) of the Energy Tax Directive.
45. The Council Directive 2008/118/EC concerning the general arrangements for excise duty and repealing Directive 92/12/EEC⁸ ("the Excise Duty Directive") in its Article 1 determines rules on levying excise duties in the EU in order to prevent additional indirect taxes from improperly obstructing trade.
46. Thus the Member States' discretion in determining the applicable excise taxes is limited: "Member States may levy other indirect taxes on excise goods for specific purposes, pro-

⁷ OJ L 283, 31.10.2003, p. 51.

⁸ OJ L 9, 14.1.2009, p. 12.

vided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.”

47. As explained above, the windfall tax pursues the same objectives as the already harmonised excise duty on electricity. The allocation of the proceeds of the tax do not either comply with the requirement that they should be allocated to specific measures. The proceeds are destined to fund general governmental expenditure as part of the national budget.
48. The tax is levied once a year on the basis of a declaration by the operator of the installation. Thus the collection of the tax differs from the general chargeability system attributable to harmonised indirect taxation. The tax is levied at a point in time not coinciding with the Energy Tax Directive or the Council Directive 2006/112/EC on the common system of value added tax⁹ (“the VAT Directive”).
49. It can thus be concluded that the proposed tax would constitute unjustified double taxation at input and output in the electricity generation. Furthermore, the tax would also be prohibited under the Excise Duty Directive. The nature and logic of the Finnish energy taxation system cannot be based on an infringement of the Energy Tax Directive and/or the Excise Duty Directive.

b. *Infringement of the EU ETS Directive*

50. The tax also contravenes the objectives and incentives in the EU ETS. First of all, it penalizes certain production forms which the EU ETS aims to incentivize regardless of the age of the relevant power plant. Furthermore, as stated above, in point 34, the tax levels are disproportionately high compared to the alleged windfall profit. The proposed tax is an extra burden to carbon free power plants and thus a deviation from the incentives of the EU ETS to advance carbon neutrality and energy-efficiency.
51. According to point 23 of the recitals to the EU ETS Directive, the objective of the EU ETS is to allow Member States to introduce only such policies, including levies, taxes and other fiscal restraints concerning the EU ETS that are consistent with the incentives and the objectives of the EU ETS Directive. This principle was also upheld in joined Cases C 566/11, C 567/11, C 580/11, C 591/11, C 620/11 and C 640/11 *Iberdrola et al.*, points 55-59.
52. Further, the EU ETS Directive states in point 20 of its recitals that it “*will encourage the use of more energy-efficient technologies*”. If investments were made in plants after year 2004 a tax base of these plants would become higher due to higher replacement values and, hence, the Bill would cause higher tax burden to such power plants.
53. Fortum contends that the proposed tax is not consistent with the EU ETS Directive.
54. The proposed tax would increase the fiscal burden on certain power plants thus decreasing the funds available to upgrades improving their energy-efficiency and carbon-neutrality. Furthermore, any generation enhancing investment would only increase the tax. This does

⁹ OJ L 347, 11.12.2006, p. 1.

not encourage the owners to make any environmental-friendly and energy-efficient investments in the power plants subject to the windfall tax. It only penalizes these plants.

55. By levying a tax on carbon-free power plants, the proposed Scheme disrupts the incentives of the EU ETS, which are aimed at penalizing carbon emissions and enhancing low and no-carbon activities regardless of their age. Therefore, the proposed tax, and consequently, the nature and logic of the Finnish energy taxation system would contravene with the objectives of the EU ETS and the EU ETS Directive.

c. Infringement of the fundamental rights under the EU law

56. Finally, the Scheme would infringe the fundamental rights under the EU law and especially the Charter of Fundamental Rights of the European Union (the "Charter"). Under Article 51(1), the Charter is applicable to the Member States only when a Member State implements European Union law. The Charter will apply in this case as the proposed tax emanates from the implementation of the EU ETS and consequently, of the implementation of EU law.
57. Fortum claims that the proposed tax is not compatible with the principle of equal treatment and with the principles of the protection of legitimate expectations and legal certainty.
58. The principle of equal treatment (Article 20) and the prohibition of discrimination (Article 21) require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion. The key test is whether the difference is necessary for a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.
59. The different treatment of carbon-free power plants generating the same product in the same energy sector cannot be considered necessary for achieving the aims of the EU ETS. On the contrary, the proposed Scheme runs counter to the objectives of the EU ETS as stated above.
60. Fortum has also demonstrated that the Scheme lacks justification with regard to the nature and general scheme of the Finnish energy taxation system. The aid element in the Scheme cannot find justification in the environmental protection either. The Scheme is discriminatory and not based on objective criteria.
61. With respect to the principles of the protection of legitimate expectations and legal certainty, well established in the case law of the Court¹⁰, the Scheme does not respect these principles.
62. Taking into consideration that that a number of considerable upgrades and investments have been made in power plants taken into operation before year 2004. These upgrades have increased the value of the power plants and the basis of tax for such power plant. The proposed tax would retroactively change the status of these investments and may cause

¹⁰ I.a. Case C-376/02 *Goed Wonen* [2005] ECR I-344, C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-0000, and Case 74/74 *CNTA SA v. Commission* [1975] ECR 533.

stranded costs which the power plant is not able to recoup because of the change in the Finnish tax regulation. These are the typical cases in which the protection of legitimate expectations and legal certainty would be contradicted due to a new tax regulation.

63. Also, the plant owners have been entitled to rely on the logic of the EU ETS and its incentives as explained *infra* in points 50 to 55. With regard to their situation, it is therefore easy to see that also in these cases the protection of legitimate expectations and legal certainty would be affected.

64. These circumstances also question the nature and logic of the proposed Scheme. A Scheme infringing on the fundamental rights under the EU law without justification of the chosen policy choices cannot be in compliance with the nature and logic of the Finnish energy taxation system.

E. Effect on competition

65. The proposed Scheme will affect the Nordic interconnected electricity markets. A part of carbon neutral power plants in Finland are taxed, which increases the competitive power of those power plants not taxed but operating in the same Nordic/Baltic wholesale electricity market. The taxed plants' competitive position may also be affected with regard to plants covered by the EU ETS. Thus actual effect on competition can be identified. The trade between the Nordic/Baltic countries would be seriously affected if certain Finnish power plants would face the tax burden of the proposed tax.

F. Effect on trade between Member States

66. Electricity is freely traded within the interconnected Nordic electricity markets. There are therefore trade effects.

G. Justification for the Scheme / Prior Notification / De Minimis

67. The Scheme is not compatible with the Internal Market.

68. There is no justification based on environmental protection or other reasons due to which the Finnish Government would have right to subsidize the activities of certain carbon free power plants by levying tax on certain other carbon-free plants in the same situation.

69. The proposed Scheme is notified to the Commission.

70. Fortum also estimates that the advantages granted exceed *de minimis* level as set out by the Commission due to which the Aid cannot be considered to fall under the *de minimis* rule.

Anonymity / Confidentiality

71. This submission contains no confidential information.

Other pending procedures

72. Fortum has not lodged other complaints concerning the proposed Scheme.

Espoo, 23 November, 2013

FORTUM OYJ



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Enclosures: the Government Bill 140/2013