The Czech Ministry of Industry and Commerce has begun to collect information from photovoltaic plants in the Czech Republic regarding their revenues and support drawn from the state for the purpose of a systematic examination of potential overcompensation from state support. The legislation that would allow the Czech authorities to perform official inspections and impose definite measures in accordance with a European Commission decision addressed to the Czech Republic is yet to be drafted; however, once adopted into law, a number of owners might face an important decrease in support in the future or even be obligated to repay a part of the support.

PHOTOVOLTAIC PLANTS IN CZECH REPUBLIC FACING SYSTEMATIC EXAMINATION OF POTENTIAL OVERCOMPENSATION: STATE SUPPORT MAY BE DECREASED IN FUTURE OR LEVIED

By Martina Milotová[*]

Introduction

At the beginning of 2018, the Czech Ministry of Industry and Commerce sent out questionnaires to the owners of photovoltaic plants ("PVP") with the aim of collecting information about their revenues and the amount of state support drawn by each PVP since its commissioning.

The Czech Republic is thereby taking the first step in order to comply with its commitments toward the European Commission assumed in the Commission's decision on state support in the field of electricity production from renewable resources.[1]

European Commission's decision on support and commitments assumed by Czech Republic

The European Commission was seized by the Czech Republic with notification of support granted in the field of electricity production from renewable resources to plants commissioned between 1 January 2006 and 31 December 2012.

The Czech Republic explained to the European Commission in the notification that, in the concerned period, the production of electricity from renewable resources was supported by (i) guaranteed purchased prices, or (ii) green bonuses paid on top of the electricity market price; both fixed by the Czech Energy Regulation Authority ("Operating Aid"). In addition, the market of electricity from renewable energy was regulated by eligibility for tax exemptions and, in the later period (when the purchase price of the production technologies substantially decreased) by levies imposed on the plants commissioned within a certain period. The guaranteed prices and the green bonuses should be calculated and fixed by the Czech Energy Regulation Authority in consideration of the type of the plant so that the investment into the production plant is paid off from the revenues within a 15-year period from the commissioning of the plant. This rule shall be respected in applying the tax exemptions and levies as well. Under such setting, the Internal Rate of Return ("IRR") of the plants should vary between 6.3 and 8.4%.

The European Commission considered such IRR adequate and concluded, in general, that the setting presented by the Czech Republic resulting in such IRR to be in compliance with the internal market.

[1] C (2016) 7827, "State Aid SA.40171 (2015/NN) – Czech Republic, Promotion of electricity production from renewable energy sources", issued on 26 November 2016, published on 23 January 2017

The European Commission, however, pointed out that the Czech Republic does not have any system in place to review whether there was any cumulation of several types of support (on top of the Operating aid) that might lead to "overcompensation" for certain plants and to adjust the level of the support in order to avoid or remedy such overcompensation.

According to the Commission, overcompensation may arise, in particular, under two types of circumstances:

(i) Cumulation of Operating Aid and investment aid for purchasing renewable energy production technology;
(ii) Disproportion between the amount of the Operating Aid and actual operating costs of the PVP (that might have arisen due to an unexpected decrease in the operating costs not reflected in time into the amounts of the Operating Aid).

Based on the European Commission's assessment, the Czech Republic should introduce a review system for "fighting" already occurred or impending overcompensation that would allow the Czech authorities, if an overcompensation is, indeed, revealed, to decrease future support to the concerned plant, shorten the period during which the support shall be provided or draw back the amount that constitutes the overcompensation.

Current informal actions on part of Czech authorities

The purpose of the currently circulated questionnaires is to collect background information based on which the Czech authorities will decide which plants will be subject to individual inspection. According to the quoted decision of the European Commission, the individual inspections shall only concern those plants where the Operating Aid was cumulated with investment or other operating aid. Other plants shall only be subject to random inspections. In addition, the inspections shall not concern undertakings that drew the support in an amount that does not exceed EUR 200,000 during 3-year period (*de minimis* support).

This first wave of questionnaires should only concern plants commissioned in 2006-2008 as according to the quoted Commission's decision, the inspection of those plants shall be completed by February 2019. Other waves of questionnaires will probably follow.

Missing empowerment for further (formal) steps and legislative plans

The steps made so far by the Ministry constitute merely an informal inquiry[2], as the review system has not yet been implemented into the legal order and thus, the Czech authorities are not authorized to perform official inspections or impose any measures.

There is a planned amendment to the relevant legal regulations[3]; however, not even a draft of a bill of law has yet been published.[4] Therefore it is not yet clear how the commitments assumed in the

[2] Filling in the questionnaire is voluntary. Although not filling in the questionnaire might trigger the attention of the authorities when deciding which plants should be inspected by the random inspections.

[3] In particular Act no. 165/2012 Coll., on supported resources of energy, and Act no. 458/2000 Coll., Energy Act

Commission's decision will be reflected into Czech law, in particular which definite measures to prevent or remedy the overcompensation will be implemented.

The Ministry of Industry and Commerce has published a document entitled "Commitments to implement an inspection mechanism for the proportionality of support for electricity from renewable energy resources"[5] in which it summarizes the commitments from the Commission's decision (as well as from the later decision of the Commission relating to support to PVP commissioned from 2009) and describes, in general, how the commitments should be fulfilled.

It results from the document that the inspections should be carried out by the State Energy Inspection.[6]

As for the measures to be adopted if an overcompensation is revealed by an inspection, the Ministry indicates, only in a general manner, that an impending overcompensation might be dealt with in the new legislation by a deducting formula that would allow a decrease in the amount of the support in the future or a shortening of the period during which the support shall be provided[7], and an already occurred overcompensation might be dealt with by levies on the revenues of the PVP in upcoming years.

The document does not provide any further details. Therefore, it is not clear how a preventive and remedy measure should be construed and applied in practice, in particular what the amount of the deduction or the levies shall be, and the owners of PVPs will need to wait, for further details in this sense, until publication of a bill of law or other relevant materials.

However, it is already clear that adopting the new legislation might result, for some PVPs, in paying back a part of the resources obtained from support that exceeds the level considered by the Commission as adequate.

Conclusion

Currently, the Czech Ministry of Industry and Commerce is taking informal steps in order to save time and prepare the background for official inspections to be carried out once the relevant legislation is prepared and adopted into law. Although there is not yet any authorization in the current legislation that would allow the Czech authorities to carry our such inspection and to impose any measures, the commitment to implement such review and remedy system results from the Commission's decision that

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[4] The intention was to prepare the bill of law by the end of 2017. However, due to the autumn elections for the Chamber of Deputies and the resulting political situation (where the government has not yet been able to obtain the required majority for a vote for confidence), the schedule is being postponed.

[5] In Czech „Závazky na zavedení mechanismu kontroly přiměřenosti podpory elektřiny z podporovaných zdrojů energie", published on the website of the Ministry of Industry and Commence on 6 October 2017.

[6] It is also worth noting that according to the document published by the Ministry, the threshold *de minimis* should be applied on a total of support for one owner and not for each PVP. The owners of several PVPs might, therefore, more simply exceed the threshold.

[7] The deducting formula should allow a deduction of the amount of support drawn by other means (for example, investment support) and should be reflected in the price decisions of the Energy Regulation Authority determining the guaranteed price for electricity from renewable energy resources and green bonuses.

is directly applicable for the Czech Republic and it is expected that the Ministry, the Government and other bodies of the legislative process should proceed as soon as possible in adopting the relevant legislation in order to ensure that the deadline for completing the first wave of inspections by February 2019 is respected. The particular contents of the new legislation implementing the Commission's decision is not yet known, however its adoption might result for several PVPs owned by an enterprise that drew more than EUR 200,000 from the state support within a period of three years (in particular for those, who drew, besides Operating Aid, also investment support) in a decrease in future support or shortening of the period during which they would be entitled to draw the support or even, in the worst case scenario, in returning a part of the already drawn support, most probably through levies on future revenue of the PVP.

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