

## Economic situation research of a company in the context of participation in the capacity market

### General Information

In regard to the publication in the Journal of Laws of the Act of July 23, 2021, amending the Act on the capacity market and certain other acts (Journal of Laws of 2021, item 1505), we inform that starting from the upcoming certification for the main auction, capacity providers submitting certification applications will be obliged to demonstrate that the given company along with related entities (economic unit) is not in a difficult economic situation within the meaning of Article 2(18)(a), (b), (c), or (e) of 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 (Official Journal of the European Union L 187 of 26.06.2014, p. 1, as amended). According to the aforementioned Commission Regulation (EU), **a company in a difficult situation shall be understood as a company where at least one of the following circumstances occurs:**

- a) In the case of a limited liability company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital. For the purposes of this provision, 'limited liability company' refers in particular to the types of company mentioned in Annex I of Directive 2013/34/EU (1) and 'share capital' includes, where relevant, any share premium.
- b) In the case of a company where at least some members have unlimited liability for the debt of the company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses. For the purposes of this provision, 'a company where at least some members have unlimited liability for the debt of the company' refers in particular to the types of company mentioned in Annex II of Directive 2013/34/EU.
- c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.
- d) Where the undertaking has received rescue aid and has not yet reimbursed the loan or terminated the guarantee, or has received restructuring aid and is still subject to a restructuring plan.
- e) In the case of an undertaking that is not an SME, where, for the past two years: (1) the undertaking's book debt to equity ratio has been greater than 7,5 and (2) the undertaking's EBITDA interest coverage ratio has been below 1,0.

### **Documents attached to the certification application**

During the certification process for the auction, it will be necessary to include the following documents:

1. Statement that regarding the capacity provider and the group of entities associated with it treated as a whole (economic unit), there are no circumstances as referred to in Article 19(1)(11) of the amended Act on the capacity market.

This obligation arises directly from Article 19(1)(11) of the amended Act on the capacity market, according to which the certification application includes a statement that there are no circumstances as referred to in Article 2(18)(a), (b), (c), or (e) of 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. The circumstances indicated in the aforementioned Article 2(18)(a), (b), (c), or (e) of Commission Regulation (EU) No 651/2014 indicate when a given company is in a difficult situation.

The examination of the condition relating to the prohibition of granting state aid to companies in difficult situations **concerns the applicant, i.e., the capacity provider and the group of entities associated with it** treated as a whole (rather than each entity associated with the applicant).

The definition of associated enterprises has been explained in Article 3(3) of Appendix I to Commission Regulation (EU) No 651/2014. Linked enterprises mean enterprises that are in one of the following relationships:

- a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise ;
- b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise ;
- c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
- d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

Further explanations regarding the examination of the economic situation of associated entities are available on the UOKiK website at: <https://www.uokik.gov.pl/wyjasnienia2.php> - under the tab "Examination of the economic situation in the case of associated entities".

The statement that regarding the capacity provider and the group of entities associated with it treated as a whole (economic unit), there are no circumstances as referred to in Article 19(1)(11) of the Act on the capacity market, can be signed by the user of the registry authorized to submit the certification application for the auction based on Appendix 4.3 to the Capacity Market Regulation.

**NOTE! The suggested statement template is available at:**

<https://www.pse.pl/certyfikacja-do-aukcji>

2. Form of information presented when applying for aid other than aid in agriculture or fisheries, de minimis aid, or de minimis aid in agriculture or fisheries, prepared in accordance with the template attached as Appendix No. 1 to the Regulation of the Council of Ministers of March 29, 2010 (Journal of Laws of 2010, No. 53, item 312) concerning the scope of information presented by the entity applying for aid other than aid in agriculture or fisheries, de minimis aid, or de minimis aid in agriculture or fisheries, signed by persons registered in the relevant register as authorized to represent this entity to which the information contained in the aforementioned form pertains;

In accordance with **Article 37(5) of the Act of April 30, 2004, on proceedings concerning state aid** (Journal of Laws of 2021, item 743), an entity applying for aid other than de minimis aid or de minimis aid in agriculture or fisheries is obliged to provide, together with the application for aid, information concerning the applicant and its economic activity, as well as information about the received state aid, including in particular the date and legal basis of its grant, form, and purpose, or a statement of non-receipt of aid. The template of the form that the applicant should complete is attached to the Regulation of the Council of Ministers of March 29, 2010, regarding the scope of information presented by the entity applying for aid other than de minimis aid or de minimis aid in agriculture or fisheries (Journal of Laws of 2010, No. 53, item 312, as amended).

**NOTE! The template of the form concerning state aid is available on the websites:**

**Sejm of the Republic of Poland "ISAP - Internetowy System Aktów Prawnych"**

<http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000238>

**Office of Competition and Consumer Protection**

[https://uokik.gov.pl/wzory\\_formularzy\\_pomocy\\_de\\_minimis.php](https://uokik.gov.pl/wzory_formularzy_pomocy_de_minimis.php)

3. **Financial statements for the last 3 financial years, prepared in accordance with accounting regulations.**

In accordance with the provisions of § 2(1) and (2) of the aforementioned regulation, issued on the basis of Article 37(6) of the Act of April 30, 2004, on proceedings concerning state aid (Journal of Laws of 2021, item 743), the applicant shall provide to the entity granting aid, in addition to the identification data and information about the conducted economic activity (**on the form concerning state aid**), **information concerning its economic situation**, including approved **financial statements for the last 3 financial years**, prepared in accordance with accounting regulations.