Brussels, 22nd November 2022

Dear Ms Simson,

On behalf of Eurelectric, the European electricity association, I am writing to you to express our concerns about Council Regulation (EU) 2022/1854 on emergency intervention to address high energy prices, and in particular, how setting up a cap on market revenues is being implemented across Member States. **The current patchwork of national implementation measures is harming the integrated internal electricity market and undermining investments** in much-needed renewable and low-carbon infrastructure. **We urge the Commission to provide clear guidance and examples of best practices to Member States on how to properly implement the Regulation.** Failure to do so will continue to undermine investor confidence at the very time when it is needed most and could have negative consequences for security of supply and gas consumption.

We are fully aware of the scale and impact of the unprecedented energy price crisis in Europe. Both our customers and our member companies have been significantly affected. Action is needed. Since the beginning of the crisis, we have called for EU-wide solutions to the crisis and recently, we co-operated with European policymakers around the Regulation for an EU-wide temporary revenue cap on electricity market revenues.

Unfortunately, given the flexibility mechanisms outlined in Article 8 - which allow Member States to adopt 'go it alone' measures beyond the EU Regulation, and the lack of detailed rules for implementation - we are not observing EU-wide solutions. Indeed, we notice that already in Member States such as Poland, Belgium, and Spain, to name only a few, **authorities already have or are planning to extend the interpretation of the windfall profits for inframarginal technologies beyond what has been established in the Regulation, and hence risk applying the cap on supposed revenues that have not actually been realised.**

- In Poland for example, the Law adopted by the Polish Sejm on 27 October in particular fails to factor in the existence of financial instruments, Corporate Renewable Power Purchase Agreements, or any form of hedging. It is therefore in direct breach of the EU Regulation Article 2.5 whereby the cap must apply to market revenues defined as "realised market income."
- In Spain, the National Regulator is considering obtaining as windfall profits revenues that were never received by companies, breaching the principle that windfall profits should not apply to revenues that have not been obtained (as underlined by the Commission in its Communication of 8 March and then in the EU Council Regulation of 6 October).
- Likewise in Belgium, the draft law approved in first reading by the Belgium government does not allow for nuclear power plants to prove their real market revenues, a possibility that is granted to other technologies.

Furthermore, other Member States have introduced, or are considering introducing, revenue caps much lower than the agreed 180 EUR/MWh or for longer implementation periods. Belgium, for instance, proposes a cap at 130 EUR/MWh in its draft approved by the government in the first reading, while also extending the application period foreseen in the EU regulation: Belgium decided to retroactively apply the inframarginal cap from 1 August 2022, while the measures, and specifically the cap on inframarginal rent, are intended to be temporary and extraordinary in nature.

Elsewhere, we would also flag that in some Member States, we see that the deployment of the solidarity contribution deviates from what is foreseen in the Council Regulation. In Spain and Czech Republic for example, the solidarity contribution for oil and gas companies could soon also be imposed on electricity companies. This creates a combination of caps and taxes and is in contradiction with the

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EU Regulation which makes very clear that the solidarity contribution is only for oil and gas sectors whose earnings are not being capped, so that they also contribute; it cannot be an additional burden on the electricity sector that is already covered by the cap on inframarginal revenues. This also penalises clean electrification, as opposed to other forms of fossil fuel energy.

As outlined in the REPowerEU strategy, the solution to this crisis is clean direct electrification. We need a massive, immediate deployment of renewables. However, the regulatory uncertainty created is having a real impact on our investments in renewables. We observe this clearly with our member companies, many of whom have international portfolios and are increasingly seeing Europe as a less attractive investment destination.

We call on the Commission to issue clear and strong guidance and examples of best practices to the Member States on how to implement the Regulation based on a **self-assessment/declaration** of the electricity producers and audits by NRAs, which, by definition, must respect the limits established in the EU framework. The Guidance Document should ensure the correct implementation of the price cap by:

- **Taking into account the complexity of estimating "market revenues" and considering all revenue/cost streams across timeframes and transactional instruments. In particular:**
  - It should ensure a broad definition of hedging prevails in all Member States, including proxy and portfolio hedges, baseload contracts and complex products, at group level.
  - It must ensure a right calculation of market revenues (e.g. avoid capping/taxing the same revenue twice). As such, windfall profits refer to market revenues and should not be applied to revenues that have not been obtained by the companies.
- **Duly taking into account corporate structure and jurisdictions[1].**
- **Allowing producers to calculate the actual net market revenue value for the delivery period of the measure (minimum one month or ideally the foreseen delivery period of the measure)** as a result of all electricity transactions for that given period and then apply the cap accordingly.
- **Considering the impact of the inframarginal revenue cap at the national level on other countries** (EU as well as very well-interconnected third countries) and the possible collateral damages for the continental European electricity market.
- **Avoiding any retrospective application of the revenue cap.**
- **Ensuring the right incentive for efficient market behaviour and participation in all markets across Member States**, by applying the cap on market revenues to only 90 % of revenues exceeding the cap.

We provide more detailed recommendations on what the Guidance should contain in this document.

We look forward to your feedback and working together to find the best solutions to get Europe out of this crisis.

Yours sincerely,
Kristian Ruby

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[1] Hence, as an example, address the reality that energy companies often have power generation in one Member State and conduct portfolio hedging out of another Member State, e.g. power generated at a wind park in the Netherlands may well be part of portfolio hedging done out of group trading entity (trading floor) situated in Denmark. Thus, avoiding taxation takes place in the Netherlands if the hedging price made out of Denmark is below the cap.