

DECISIONS

COMMISSION DECISION (EU) 2017/1797

of 23 May 2017

on the aid schemes SA.42393 (2016/C) (ex 2015/N) implemented by Germany for certain end-consumers (reduced CHP surcharge) and SA.47887 (2017/N) which Germany is planning to implement in order to extend the CHP support scheme as regards CHP installations used in closed networks

(notified under document C(2017) 3400)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given notice to the parties concerned to submit their comments ⁽¹⁾ and having regard to their comments,

Having regard also to the Treaty on the Functioning of the European Union, and in particular of Article 108(3) thereof,

Whereas:

1. PROCEDURE

- (1) On 28 August 2015, the German authorities notified to the Commission the draft bill on the Reform of the Combined Heat and Power Generation Act (*Kraft-Wärme-Kopplungsgesetz*, 'the KWKG 2016, as notified'), which was then adopted into law on 21 December 2015. The KWKG 2016 replaced the Combined Heat and Power Generation Act of 19 March 2002 ('the KWKG 2002').
- (2) By letter dated 24 October 2016 ('the Opening Decision'), the Commission informed the German authorities that it had approved the support to Combined Heat and Power (CHP) installations, storage facilities and district heating/cooling networks granted under the KWKG 2016, as notified, but that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the reductions of the CHP surcharge for certain end-consumers granted under the KWKG 2016, as notified.
- (3) The Opening Decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid measures.
- (4) The Commission received comments from interested parties. It forwarded them to the German authorities, who were given the opportunity to react; their comments were received on 13 January 2017 by letter dated the same day.
- (5) The German authorities submitted their comments on the Opening Decision on 10 November 2016. Further to requests for information of 6 February 2017, 29 March 2017 and 28 April 2017, they provided additional information on 10 February 2017, 31 March 2017 and 2 May 2017.
- (6) The German authorities also informed the Commission that the provisions governing the CHP surcharge and the reductions of the CHP surcharge for certain end-consumers which were the object of the formal investigation procedure had been amended by a law of 22 December 2016 amending the provisions on electricity production from cogeneration and autogeneration (*Gesetz zur Änderung der Bestimmungen zur Stromerzeugung aus Kraft-Wärme-Kopplung und zur Eigenerzeugung*, the 'Law of 22 December 2016').

⁽¹⁾ OJ C 406, 4.11.2016, p. 21.

⁽²⁾ Commission Decision of 24 October 2016 on State aid SA.42393 (2016/C) (ex 2015/N) — Germany — Reform of support for cogeneration in Germany — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 406, 4.11.2016, p. 21).

- (7) On 29 March 2017 the German authorities notified to the Commission a planned modification of the support to CHP installations that the Commission had approved on 24 October 2016. The notification of that amendment was registered under SA.47887 (2017/N). On 3 April 2017 the German authorities provided additional information. The preliminary assessment of that amendment pursuant to Article 108(3) TFEU and Article 4 of Council Regulation (EU) 2015/1589 ⁽³⁾ is included in the present decision (Section 7).
- (8) On 25 April 2017, in both procedures, the German authorities informed the Commission that they exceptionally accept that the decision in both cases SA.42393 and SA.47887 be adopted and notified in the English language.

2. DETAILED DESCRIPTION OF THE AID MEASURE IN RESPECT OF WHICH THE FORMAL INVESTIGATION PROCEDURE HAS BEEN OPENED (REDUCED CHP SURCHARGES)

2.1. Presentation of the KWKG 2016: objectives and context

- (9) The KWKG 2016 (as notified and as amended) aims at improving the energy efficiency of energy production in Germany by increasing the net electricity production from CHP installations to 110 TWh/year by 2020 and to 120 TWh/year by 2025, as compared to the current yearly production of 96 TWh/year. The German authorities expect that such an increase would contribute to an additional reduction by 4 million tonnes of CO₂ emissions by 2020 in the electricity sector as in Germany electricity from CHP installations displaces separated production of heat and electricity by coal-fired power plants. It forms part of the different measures adopted in the framework of the *Energiewende* (energy transition).
- (10) Under the KWKG 2016 aid is granted to new, modernised and retrofitted high-efficiency CHP installations ⁽⁴⁾. Also, in order to maintain the current production level of 15 TWh/year of existing installations in the district heating sector and possibly bring it back to a previous level of 20 to 22 TWh/year, Germany grants support to existing gas-fired CHP installations in the district heating sector until 2019. The KWKG 2016 further supports new heat/cooling storage facilities or retrofitted storage facilities, as they increase the flexibility of CHP facilities, and can therefore help further reducing CO₂ emissions in the electricity sector. Finally, aid can be granted for the construction or expansion of heating/cooling networks given that using CHP installations in connection with district heating increases the energy efficiency of the system. All those aid measures were approved by the Commission in its Opening Decision ⁽⁵⁾.
- (11) The KWKG 2016, as notified, entered in force on 1 January 2016. It did not suspend the entry into force of the provisions on the surcharge and reductions of the surcharge. The Law of 22 December 2016 amends the provisions governing the CHP surcharge and the reductions of the CHP surcharge for certain end-consumers (the 'KWKG 2016, as amended') entered into force on 1 January 2017.
- (12) The KWKG 2002 that the KWKG 2016 has replaced was already pursuing objectives of climate protection, environmental protection and energy efficiency. Specifically, it already provided for premium payment to operators of CHP installations with the objective of reducing CO₂ emissions in Germany by 10 million in 2005 and at least 20 million in 2010 (compared to 1998). The premium was established by the KWKG 2002 and came on top of the price obtained for the sale of the electricity. The support under the KWKG 2002 was also financed from a surcharge (also designated hereinafter as the 'CHP surcharge') and the KWKG 2002 provided reductions of this surcharge to certain end-consumers. However the KWKG 2002 has not been notified the Commission pursuant to Article 108(3) TFEU.

2.2. The CHP surcharges and the reductions for certain end-consumers

2.2.1. Normal CHP surcharge and reductions for certain end-consumers under the KWKG 2016

- (13) The support for CHP installations, storage facilities and district heating/cooling networks is financed by a surcharge imposed on electricity that is supplied to end-consumers through the public electricity grid or through a closed distribution network ('the CHP surcharge'). It is collected by network operators as a supplement to network charges. That surcharge is designated as the *KWKG-Umlage* in the KWKG 2016 (see paragraph 26(1) of the KWKG 2016). Network operators have to keep separate accounts in respect of the collected CHP surcharge (paragraph 26(1) of the KWKG 2016, as notified, and paragraph 26(3) of the KWKG 2016, as amended).

⁽³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽⁴⁾ Coal and lignite CHP installations are excluded from the support under the KWKG 2016.

⁽⁵⁾ Cf. footnote 1.

- (14) The amount of the CHP surcharge is calculated each year by the transmission system operators as a uniform rate per kWh supplied to end-consumers connected to the public grid or to closed distribution networks.
- (15) Paragraph 27b of the KWKG 2016, as amended provides that electricity that is stored is subject to the CHP surcharge when it is withdrawn from the storage facility and not when it is fed into the storage facility.
- (16) Some categories of end-consumers benefit however from a reduced rate established in accordance with the KWKG 2016. For end-consumers with a yearly consumption of more than 1 GWh ('Category B end-consumers'), the KWKG 2016, as notified, established a maximum CHP surcharge of 0,04 EUR cent/kWh. The other category of end-consumers benefitting from a reduced CHP rate are end-consumers active in the manufacturing sector consuming more than 1 GWh and for which the electricity cost represents more than 4 % of turnover ('Category C end-consumers'). For the latter category of end-consumers, the KWKG 2016, as notified, establishes a maximum CHP surcharge of 0,03 EUR cent/kWh (paragraph 26(2) of the KWKG 2016, as notified). End-consumers paying the full CHP surcharge are called 'Category A end-consumers'.
- (17) The CHP surcharge rates (in EUR cent/kWh) ⁽⁶⁾ that were applicable under the KWKG 2016, as notified, for the year 2016 are set out in Table 1 below:

Table 1

CHP surcharge rates in 2016

Category A	Category B	Category C
0,445	0,04	0,03

- (18) Based on the forecasts ⁽⁷⁾ made by transmission network operators to determine the CHP surcharge in 2016 ⁽⁸⁾, the German authorities have provided the following figures showing the relative size of each category and the importance of the reductions:

Table 2

Relative share in consumption and in the CHP funding by each end-consumer category

	Total	Cat. A	Cat. B	Cat. C
Forecasted consumption in GWh	485 149	259 748	143 883	81 518
Share of total consumption	100 %	53,54 %	29,66 %	16,80 %
CHP surcharge 2016 (EUR cent/kWh), rounded		0,445	0,04	0,03
Forecasted CHP surcharge (total in million EUR)	1 239	1 157	58	24
Share of total revenue	100 %	93 %	5 %	2 %
Notional ⁽¹⁾ CHP surcharge 2016 (EUR cent/kWh), rounded	0,255			

⁽⁶⁾ See https://www.netztransparenz.de/de/file/KWKG-Aufschlaege_2016_V01.pdf

⁽⁷⁾ Germany indicated that final figures would not be available before second semester 2017.

⁽⁸⁾ Forecasts available under: https://www.netztransparenz.de/de/file/KWKG_Prognose_2016_nach_KWKG_2016_internet.pdf

	Total	Cat. A	Cat. B	Cat. C
Difference compared to notional CHP surcharge		– 0,19 ⁽²⁾	0,215 ⁽³⁾	0,225 ⁽⁴⁾
Advantage (in million EUR) — rounded		– 494	310	184

⁽¹⁾ The notional CHP surcharge is the surcharge that would apply to all users if Categories B and C end-consumers were not benefitting from reductions.

⁽²⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge for Category A end-consumers would be 0,19 EUR ct/kWh lower.

⁽³⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge would be 0,215 EUR ct/kWh higher for Category B end-consumers (comparison with the notional CHP surcharge).

⁽⁴⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge would be 0,225 EUR ct/kWh higher for Category C end-consumers (comparison with the notional CHP surcharge).

- (19) Reductions of the CHP surcharge were introduced by the KWKG 2002. For end-consumers with a yearly consumption of more than 100 000 kWh ('Category B end-consumers'), the KWKG 2002 established a maximum CHP surcharge of 0,05 EUR ct/kWh. For end-consumers active in the manufacturing sector consuming more than 100 000 kWh and for which the electricity cost represents more than 4 % of turnover ('Category C end-consumers'), the KWKG 2002 established a maximum CHP surcharge of 0,025 EUR ct/kWh.

2.2.2. The CHP surcharge and the reductions under the KWKG 2016 as amended on 22 December 2016

- (20) The German authorities indicated that as of 1 January 2017 the reductions would be granted only to electro-intensive users that are eligible for reductions of the EEG surcharge (i.e. the surcharge that is levied in Germany on electricity in order to finance the support to renewables under the EEG Act) on the basis of paragraph 63(1) of the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*, EEG 2014 ⁽⁹⁾) read in conjunction with paragraph 64 of the EEG (see paragraph 27a of the KWKG 2016, as amended). That requirement implies that:

- (a) the undertaking must belong to one of the sectors listed in Annex 4 to the EEG;
- (b) the electricity that is subject to the EEG surcharge and that has been used by the undertaking itself was at least 1 GWh in the last financial year at the consumption point concerned;
- (c) the undertaking concerned can be classified at the consumption point concerned in one of the sectors of Annex 4 to the EEG;
- (d) the electro-intensity of the undertaking reaches:
 - 14 % for undertakings of list 1 of Annex 4 to the EEG,
 - 20 % for undertakings of list 2 of Annex 4 to the EEG;
- (e) the undertaking must have a certified energy or environmental management system in place. If it consumes less than 5 GWh, it can use alternative systems of improvement of the energy-efficiency.
- (f) the electro-intensity of the undertaking is calculated as the ratio between the electricity costs and the arithmetic mean of the gross added value ('the GVA') over the 3 last closed accounting years. The relevant electricity costs correspond to the undertaking's assumed electricity consumption multiplied by the assumed electricity price. The assumed electricity consumption corresponds to the arithmetic mean over the last 3 closed accounting years ⁽¹⁰⁾. The assumed electricity price corresponds to the average retail electricity price applying to undertakings with a similar level of electricity consumption.

⁽⁹⁾ The EEG 2014 is available under http://www.gesetze-im-internet.de/eeg_2014/. The EEG 2014 has been published in the German Official Gazette on 24 July 2014 (BGBl I 2014 No 33, p. 1066).

⁽¹⁰⁾ This methodology to determine electro-intensity of the undertaking has been approved by the Commission in State aid cases SA.38632 and SA.44679 (see Commission Decision of 23 July 2014 on State aid SA.38632 (2014/N) — Germany — EEG 2014 (OJ C 325, 2.10.2015, p. 4) and Commission decision of 20 December 2016 on State aid SA.44679 (2016/N) — Germany — Modification of the method used to define electro-intensity under the EEG (OJ C 68, 3.3.2017, p. 10).

- (21) For an undertaking fulfilling those conditions, the CHP surcharge is capped as follows:
- (a) consumption up to 1 GWh: no cap — full CHP surcharge;
 - (b) for the rest of the consumption: 15 % of the full CHP surcharge.
- (22) However, the total amount of the surcharge is limited for all consumption points benefitting from a reduction to the following percentages applied to the arithmetic mean of the GVA of the undertaking over the last 3 closed accounting years to:
- (a) 0,5 % of the GVA for undertakings reaching at least 20 % of electro-intensity;
 - (b) 4 % of the GVA for undertakings having an electro-intensity below 20 %.
- (23) In any event, the reduction of the CHP surcharge resulting from the caps may not result in an amount that is lower than 0,03 EUR ct/kWh for the electricity above 1 GWh.
- (24) For the year 2017, the amended KWKG 2016 establishes the level of the full CHP surcharge at 0,438 EUR ct/kWh (paragraph 37 of the KWKG 2016, as amended).

2.2.3. The adjustment plan

- (25) The German authorities have indicated the following CHP surcharge rates for the period 2011-2016:

	Full rate (in EUR ct/kWh)	Cat. B end-consumers		Cat. C end-consumers	
		(in EUR ct/kWh)	% of full rate	(in EUR ct/kWh)	% of full rate
2011	0,03	0,03	100	0,025	83
2012	0,002	0,05	2 500	0,025	1 250
2013	0,126	0,06	48	0,025	20
2014	0,178	0,055	31	0,025	14
2015	0,254	0,051	20	0,025	10
2016	0,445	0,04	9	0,03	7

- (26) The German authorities explained that the surcharge being established based on the estimated financing needs for the support and with a correction mechanism when estimates had been too high (or too low), the surcharge for Category A end-consumers has sometimes been very low, either because the estimated support was low in a given year or because of corrections for previous years in which the surcharge had been too high. This was for instance the case in 2012 where the CHP surcharge was low because of a correction due to the 2009 CHP surcharge which proved to be too high compared to real figures. By contrast the surcharge for Category C end-consumers remained fixed, representing therefore in 2012 a higher percentage of the normal surcharge.
- (27) The German authorities presented an adjustment plan for end-consumers of categories B and C. This plan aims at bringing progressively the CHP surcharges paid by the categories B and C end-consumers to a level of 100 % in the case of non-electro-intensive users and to a level of 15 % of the full CHP surcharge in the case of electro-intensive users by 2019.
- (28) The adjustment plan starts in 2011. Given that the surcharges paid by Category B or category C end-consumers represented in total for 2011 and 2012 more than 100 % of the normal surcharge, the adjustment plan applies to non-electro-intensive users only as of 2013. Category B consumers actually paid for 2013-2016 in total more than what the adjustment plan requires (21 % instead of up to 12,5 %), they will thus in practice have to be adjusted as of 2017 only. Category C consumers will be adjusted as of 2016 because for the period 2013-2015 they paid in total more than what the adjustment plan required (13 % instead of up to 12,5 %).

- (29) As for electro-intensive users, they paid in total for the period 2011 to 2016 15 % of the CHP surcharge. The adjustment plan will in practice apply to them as of 2017.
- (30) For the years 2017 and 2018 the adjustment plan is based on the rule that the surcharge represents double the surcharge of the previous year, i.e. the surcharge will amount to 0,060 EUR ct/kWh or 0,080 EUR ct/kWh in 2017, depending on the end-consumers belonging to Category B or C and 0,120 EUR ct/kWh or 0,160 EUR ct/kWh in 2018, depending on the end-consumers belonging to Category B or C. In 2019, they will pay 100 % of the surcharge. However, for electro-intensive users, the CHP surcharge will be capped at 15 % of the full CHP surcharge.
- (31) The adjustment plans follows the following path:

(%)

	Cat. B end-consumers (non-electro-intensive)	Cat. C end-consumers (non-electro-intensive)	Electro-intensive user
2011	7	7	7
2012	8,1	8,1	8,1
2013	9,2	9,2	9,2
2014	10,3	10,3	10,3
2015	11,4	11,4	11,4
2016	12,5	12,5 (0,056 EUR ct/kWh)	12,5
2017	18,3 (0,08 EUR ct/kWh)	13,7 (0,06 EUR ct/kWh)	13,7 (0,06 EUR ct/kWh) if former category C end-consumer and 15 if former category B end-consumer.
2018	36,5 (0,16 EUR ct/kWh)	27,4 (0,12 EUR ct/kWh)	15
2019	100	100	15

- (32) In case that the CHP surcharge paid in the past was lower than the level set in the adjustment plan, the beneficiaries will be requested to pay the difference.
- (33) This is the case for non-electro-intensive users belonging to Category C. For 2016 they will be requested to pay additional 0,026 EUR ct/kWh given that they paid 0,03 EUR ct/kWh while they should have paid 0,056 EUR ct/kWh according to the adjustment plan (see paragraph 36 of the KWKG 2016, as amended). This amount will be included in the final bill for 2016. However, the undertaking will not have to pay the additional 0,026 EUR ct/kWh if the total value of the reductions for the period 2014-2016 does not exceed EUR 160 000. Germany indicated that this threshold ensures that the reductions do not fulfil all criteria of the state aid within the meaning of the regulation adopted pursuant to Article 2 of the Council Regulation (EC) No 994/98 ⁽¹⁾ (*de minimis*).
- (34) The adjustment plan has been enacted as from 2016 in the Law of 22 December 2016 (paragraph 36 of the KWKG 2016, as amended).

2.3. Further details on the establishment and collection of the CHP surcharge

- (35) In order to make sure that each network operator is compensated for the extra costs resulting from his compensation obligation, the KWKG 2016 organises a system by which the burden resulting from the purchase and compensation obligations is spread evenly between transmission network operators in proportion to the consumption of end-consumers connected to their network or the distribution networks connected to their

⁽¹⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

transmission networks and then compensated entirely to them through the CHP surcharge which is proportionate to the consumption in their respective network, as well (paragraphs 26-28 of the KWKG 2016, as notified and paragraph 29 of the KWKG 2016, as amended). That system can be summarised as follows:

- (a) network operators collect the CHP surcharge from end-consumers connected to their grid;
 - (b) all distribution network operators can require full compensation of the extra-costs (resulting from their obligation to pay premiums to CHP-installations connected to their grid, see recital 65 of the Opening Decision) from their respective transmission network operator; the burden is thus transferred to the transmission network operators;
 - (c) transmission network operators balance the financial burden out between themselves in such a way that each of them bears the same burden in proportion to the consumption of end-consumers (directly or indirectly) connected to their grid; then
 - (d) transmission network operators obtain compensation from the distribution network operators so that each network operator bears the same burden in proportion to the consumption of end-consumers connected to their respective distribution networks and in proportion to the CHP surcharge collected. In concrete terms, that implies that distribution network operators transfer the monies collected from the CHP surcharge to their respective transmission system operator (given that they already also transferred the entire financial burden to them under step b above) ⁽¹²⁾.
- (36) That system is maintained under the KWKG 2016, as amended; it is however spelled out in greater detail and in a clearer way in the KWKG 2016, as amended. There is one change in respect of how the CHP surcharge is collected from beneficiaries: following the amendments introduced by the Law of 22 December 2016, the reduced CHP surcharge that electro-intensive users pay is collected directly by the transmission system operators (paragraph 27(2) of the KWKG 2016, as amended).
- (37) As already described in the Opening Decision (recital 79), the KWKG 2016, as notified, establishes the methodology to be used by transmission network operators to calculate the CHP surcharge. The level of the CHP surcharge is on the one hand a function of the projected aid amount and the projected supplies of electricity to the end-consumers connected to the public grid and the closed distribution networks. On the other hand it will take into account corrections for preceding years and reductions for certain categories of end-consumers. The law also sets a yearly limit to the budget of the scheme and hence the total CHP surcharge (paragraph 29 of the KWKG 2016, as notified).
- (38) This methodology is maintained in the KWKG 2016 as amended (paragraph 26a of the KWKG 2016, as amended). For 2017, though, the KWKG 2016, as amended, deviates from this methodology and sets the level of the normal CHP surcharge rate directly in the law (at 0,438 EUR ct/kWh, see paragraph 37(1) of the KWKG 2016, as amended).

2.4. Duration

- (39) The German authorities committed to renotify the reductions of the CHP surcharge at the latest 10 years from the date of adoption of the final Commission decision.

2.5. Recipient(s)

- (40) Before the amendments made by the Law of 22 December 2016, there were two categories of beneficiaries of reductions.
- (41) On the one hand, recipients were so-called Category B end-consumers, i.e. end-consumers with a yearly consumption of more than 1 GWh (see also recital 15 above). The German authorities submitted that they do not possess exact information on the sectors in which beneficiaries of Category B would be active but indicated that companies of the manufacturing sectors generally had consumption above 1 GWh with the exception of 17 sectors in which average consumption is below 1 GWh/a listed in Table 23 to the Opening Decision.

⁽¹²⁾ That step is now explained in more explicit terms under paragraph 28(3) of the KWKG, as amended.

- (42) Also, the information provided during the preliminary investigation phase showed that undertakings active in the service sectors have generally consumption levels below 1 GWh with the exception of a few sectors like hospital care and hotels (see Tables 6 and 7 of the Opening Decision and recital 127 of the Opening Decision).
- (43) On the other hand, before the amendments made by the Law of 22 December 2016, the second category of beneficiaries of reductions were so-called Category C end-consumers, i.e. end-consumers active in the manufacturing sector and consuming more than 1 GWh and for which the electricity cost represents more than 4 % of turnover.
- (44) The German authorities did not provide detailed information on the sectors or types of undertakings that would comply with those conditions but indicated that most of them would qualify as electro-intensive users within the meaning of the 'Besondere Ausgleichregelung' under the EEG ('the BesAR').
- (45) After the amendments introduced by the Law of 22 December 2016, beneficiaries of reductions will be electro-intensive users fulfilling the criteria described under recital 20 above. That is, electro-intensive users within the meaning of the BesAR. In that connection, the German authorities had indicated during the preliminary investigation phase that companies benefitting from reduced EEG surcharges and included in the BesAR were mainly active in the sectors set out in table 3 below.

Table 3

Overview of the sectors of the BesAR

Economic activities [WZ 2008]	Number of delivery points	Privileged electricity [GWh]
0800 Mining and quarrying except energy producing materials	171	516
1000 Manufacture of food products	414	3 754
1100 Manufacture of beverages	38	364
1300 Manufacture of textiles	63	687
1600 Manufacture of wood and of products of wood and cork, except furniture; etc.	142	3 038
1700 Manufacture of pulp, paper and paper products	118	11 843
1800 Manufacture of paper and paper products etc.	28	353
1900 Manufacture of coke and refined petroleum products	15	[...] (*)
2000 Manufacture of chemicals and chemical products	283	28 421
2200 Manufacture of rubber and plastic products	351	3 984
2300 Manufacture of glass and glass products, ceramic, etc.	285	7 550
2400 Manufacture of basic metals	280	24 351
2500 Manufacture of fabricated metal products, except machinery and equipment	205	1 453
2600 Manufacturing of computers, etc.	21	337
2700 Manufacture of electrical equipment	26	799
2800 Machinery	21	474
2900 Manufacture of motor vehicles, trailers and semi-trailers	30	320
3100 Manufacture of furniture	5	[...] (*)
3800 Waste collection, treatment and disposal activities; etc.	90	544
4900 Land transport and transport via pipeline services	130	12 443
Aid to other sectors	61	1 624
Total	2 777	105 935

(*) Business secret

Source: BAFA, May 2016.

- (46) The German authorities also indicated that the beneficiaries would amount under the new reduction regime to around 2 000 manufacturing companies with an estimated total yearly electricity consumption of around 100 TWh.

2.6. Objective of reduced CHP surcharges

- (47) The German authorities have explained that in their views the reductions are needed in order to maintain the CHP support as that support is only possible if the levies do not jeopardise the competitiveness of the companies concerned. The German authorities fear that the full surcharge could in the medium term lead to an important reduction of investments and a weakening of the value chains in Germany and add that without the reductions the CHP support as well as the related objective of energy efficiency and reduced CO₂ emissions would not be accepted anymore.
- (48) The German authorities finally stressed that the burden of the CHP surcharge adds to the burden already resulting from the EEG surcharge, which is also aimed at providing sufficient financial resource to finance support to renewable energy, the latter being a policy that is — like CHP support — aiming at decarbonisation of electricity production in Germany.

2.7. Grounds for initiating the procedure

- (49) In its Opening Decision the Commission acknowledged the similarities between the CHP support and renewable support and the similarities between CHP surcharges and renewable surcharges. It acknowledged that there might be reasons to finance CHP support from electricity surcharges and that in order to ensure a regular but also sustainable financing source for the support and thus maintain the ambitious climate change objectives pursued with CHP support, reductions for certain end-consumers might be needed. However, the Commission had doubts as to proportionality and necessity of the aid measures and hence the distortion of competition.
- (50) The Commission also indicated that it would use the eligibility and proportionality criteria of recitals 185 to 192 of the Guidelines on State aid for environmental protection and energy 2014-2020 ⁽¹³⁾ ('the EEAG') as guidance and observed in this respect that the reductions granted by Germany were not limited to the same categories of users, in particular the reductions did not seem to be limited to undertakings that would be electro-intensive and facing international competition (and hence not being able to pass on their costs to customers).
- (51) The Commission therefore opened the formal investigation procedure.

3. COMMENTS FROM INTERESTED PARTIES AS REGARDS THE REDUCED CHP SURCHARGE

3.1. Comments from BV Glas

- (52) The Commission received comments from BV Glas, the trade association of the German glass industry. BV Glas indicates that the glass industry employs directly 53 000 people in Germany, has a turnover of EUR 9,2 billion (2015), that the sector has a high exposure to trade and that most of the glass-making companies qualify as Category C end-consumers.
- (53) BV Glas submits that the measure does not qualify as State aid given that it does not involve financial flows from the State budget. It does not provide any details in support of this view but merely observes that the CHP surcharge is similar to the EEG surcharge which it also considers as not qualifying as a State resource and refers to the comments it sent to the Commission in the framework of procedure SA.33995 (2013/C) ⁽¹⁴⁾. It also considers that the measure does not provide for an advantage, is not selective and has no impact on trade and competition without further explanations.

⁽¹³⁾ OJ C 200, 28.6.2014, p. 1.

⁽¹⁴⁾ State aid case SA.33995 (2013/C) (ex 2013/NN) on the aid scheme implemented by Germany for the support of renewable electricity and of energy-intensive users (see Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ L 250, 25.9.2015, p. 122)).

- (54) BV Glas further considers that the reductions granted to Categories B and C end-consumers are compatible with the internal market as they are necessary to secure the *Energiewende* in Germany and the related climate protection objectives. Without the reductions the climate change objective pursued by the support measures financed from the surcharge would be put at risk: on the one hand without reductions, the CHP surcharge is unsustainable for the sectors concerned. It would result in so many job losses that the CHP support policy (and ambitious climate change goals) would need to be abandoned; in addition, the industry would likely move towards countries with less ambitious climate policies. The proportionality of the measure results from the fact that concerned beneficiaries still pay a certain share of the CHP surcharge.
- (55) In particular for the glass industry, the disappearance of CHP surcharges would imply a 17-fold increase of the surcharge which would add on to the energy tax, the EEG surcharge and increased network charges resulting from an increased renewable share in production mix. In this respect BV Glas underlines that investments in the glass industry in Germany are decreasing, which is due to high energy surcharges. BV Glas further points to value chains linked to the glass industry; they would also disappear if the glass industry were to delocalise.
- (56) BV Glas also considers that the limitation of Category C reductions to end-consumers active in the manufacturing sector is not discriminatory and also within the logic of the system because the manufacturing sector is generally a price taker contrary to service providers, faces intense international competition and cannot pass on costs to customers. BV Glas further submits that the service sector generally has lower CO₂ emissions and delocalisation of service activities would not imply risks of carbon leakage; also, they would generally relocate to another Member State and not outside the Union.
- (57) BV Glas also explains that the glass industry has already reached a high degree of energy efficiency and that an increased charge rate would not incentivise further reductions. BV Glas further explains that electro-intensive users are constantly incentivised to improve energy-efficiency given the high share that energy prices represent in total production costs (often between 20 % and 50 %). It has also underlined that the German glass industry continuously improved its energy efficiency rate over the years and that the German glass industry is taking part in several initiatives aimed at improving energy efficiency. It is also part of an agreement (through the BDI) by which the industry has committed to improve energy efficiency by 1,35 % per year.
- (58) Finally, BV Glas considers that legitimate expectations prevent recovery in the present case given that the Commission concluded in a 2002 decision that a previous version of the KWKG did not constitute aid.

3.2. Trimet

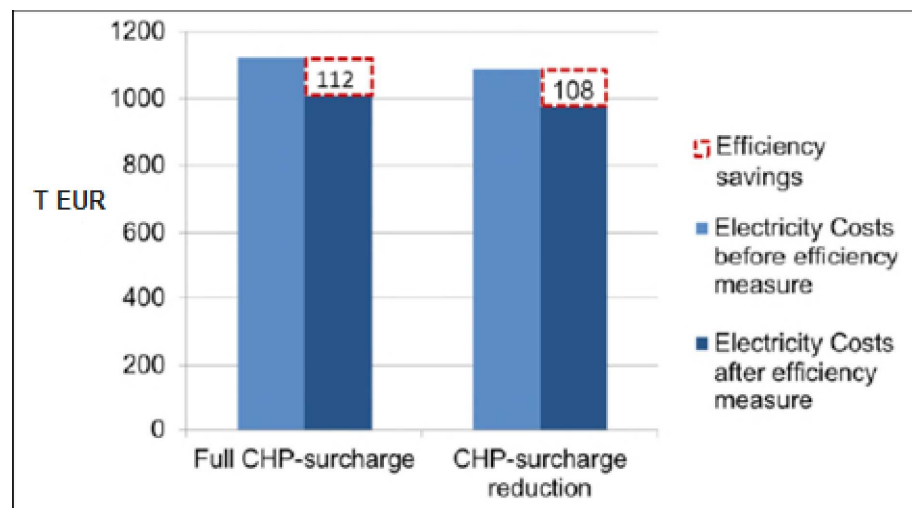
- (59) The Commission also obtained a short letter from Trimet in which Trimet views the reductions as necessary as the full surcharge would represent an amount of around EUR [...] (*) and would thereby eat up a large part of the group result. Trimet indicated that it was in favour of limiting the reductions to electro-intensive users eligible for reductions of the EEG surcharge under the BesAR.

4. COMMENTS SUBMITTED BY THE GERMAN AUTHORITIES AFTER THE OPENING DECISION AS REGARDS THE REDUCED CHP SURCHARGE

- (60) The German authorities consider that opening the formal investigation procedure was unjustified because it demonstrated during the preliminary investigation phase that the reductions are necessary and proportionate. It does not provide any additional elements on this point but indicates that the reduction system was amended and that the reductions are now granted to electro-intensive users only that are facing international competition.
- (61) The German authorities stress that the new reduction system introduced by the Law of 22 December 2016 is entirely built on the eligibility and proportionality criteria used for granting reductions of the EEG surcharge under the BesAR that the Commission approved in case SA.38632 (2014/N) Germany — EEG 2014 — Reform of the Renewable Energy Law.

(*) Business secret

- (62) The German authorities further explain that the objective of the CHP surcharge is to contribute to the common aim of energy efficiency and environmental protection. They admit that reductions of electricity prices in general could in theory reduce the incentive to save electricity but that this is not the case here because for electro-intensive users the electricity price in itself is a sufficient incentive to become more energy-efficient. Even a reduced CHP surcharge increases the electricity costs of those companies and the incentive to become more energy-efficient.
- (63) The German authorities give the example of a company with a total yearly energy consumption of 10 GWh that has a saving potential of 1 GWh. The potential savings would amount to EUR 112 000 if the full CHP surcharge was paid. With a reduced CHP surcharge savings would still amount to EUR 109 000 ⁽¹⁵⁾. The German authorities underline that the example shows that electricity savings pay off also with CHP surcharge reduction. Additionally, beneficiaries generally use a certified energy management system. With rising awareness the likelihood that companies will identify and implement energy efficiency measures will therefore potentially increase. Moreover, due to the parallelism between the reduction schemes of CHP surcharge and EEG surcharge, the incentives for energy-efficiency would be increased further by the EEG surcharge.



- (64) The German authorities stress that the new system of reductions introduced by the Law of 22 December 2016 targets electro-intensive users subject to international competition i.e. the ones at threat of bankruptcy or delocalisation if they would have to bear the full CHP surcharge but that those companies will nevertheless still contribute to financing the support (in principle 15 % of the surcharge unless the surcharge reaches a certain level of GVA).
- (65) The German authorities note that the reductions have a limited impact as the CHP surcharge in relative terms is not so high. In any event negative impacts would be outweighed by positive impact.
- (66) Also, based on the data available for companies eligible to a reduced EEG surcharge, the German authorities simulated that the full CHP surcharge would amount to 0,255 EUR cent/KWh if no reductions were to apply ('notional' CHP surcharge in the table below) and that this surcharge rate would still represent between 1 and 9 % of GVA for a sample of around 100 companies eligible to reduced EEG levies and having a consumption above 1 GWh. It provided updated figures during the formal investigation showing that for the 20 first eligible companies to the BeSAR (in terms of consumption), the notional CHP surcharge would represent between 0,8 and 6 % (based on 2015 figures) of the companies' GVA and the full CHP surcharge (amounting to 0,445 EUR ct/kWh) would represent between 1 % and 11 % of GVA.

⁽¹⁵⁾ Assumption: Electricity tariff after EEG surcharge reduction 11,2 EUR cent/kWh.

- (67) It also submitted the following simulation to illustrate the possible impact of a full surcharge on companies:

Table 4

Simulation of the impact of a full surcharge

	Notional CHP surcharge	Surcharge under the CHP law 2016	End-consumer	Consumption (GWh)	Burden w/out privilege (GWh)	Burden under the CHP law KWKG 2016 (EUR)	Increase in burden by factor
Cat B	0,255	0,04	Industry 1	10	0,0255	8 050	3,17
			Industry 2	100	0,255	44 050	5,79
Cat C	0,255	0,03	Industry 3	1 000	2,55	304 150	8,38

- (68) Germany finally stressed that the burden of the CHP surcharge adds to the burden already resulting from the EEG surcharge.

5. DETAILED DESCRIPTION OF THE NOTIFIED AID SCHEME SUBJECT TO PRELIMINARY EXAMINATION (SA.47887)

- (69) The support to new CHP installations with installed capacity between 1 and 50 MWe¹ that was notified by the German authorities as SA.42393 (2015/N) and approved by the Opening Decision is to be granted as of the winter 2017/2018 to operators selected in tenders (see recital 91 of the Opening Decision). Participation in those tenders was to be subject to the condition that the entire electricity produced in the CHP installation is injected into the public grid and that if the electricity produced by the CHP installation is directly consumed by the owner of the CHP installation or is injected into a closed distribution network without being first injected into the public grid, the installation concerned would not be eligible to participate in the tender. The German authorities had indicated that without that exclusion a level playing field in the tender would not have been ensured. It explained that given that self-consumed CHP electricity is eligible for a reduced EEG surcharge CHP installations used for self-consumption would have had a systematic advantage over CHP installations feeding electricity into the grid (see recital 94 of Opening Decision).
- (70) On 29 March 2017, the German authorities informed the Commission that they were considering using the empowerment laid down in paragraph 33a(2)(b)(bb) of the KWKG 2016, as amended, to allow the participation in tenders of CHP installations whose electricity is injected into a closed distribution network instead of being injected in the public grid. CHP installations used for autoconsumption would however remain ineligible for participation in the tenders support and are not concerned by the notified amendment.
- (71) Concerning CHP installations used in closed distribution networks, the German authorities explained that the exclusion had initially been based on the following assumptions: when the production and the consumption occurs in the same closed network, network charges can be lower compared to a constellation where all the consumption is produced by CHP installations outside the closed distribution network. This can — in certain circumstances — allow the operator of the CHP installation in the closed distribution network to obtain a better price for the electricity produced compared to an operator injecting electricity into the public grid. In a tender in which operators compete for a fixed premium that will be paid on top of the market price, operators of CHP installations to be used in closed distribution networks could have benefitted from a competitive advantage and if that competitive advantage had been systematic and significant, it would have allowed those operators to bid strategically above their costs and this would have resulted in overcompensation. The German authorities added that the above mentioned effect could also be possible outside closed distribution networks but that an advantage for the operator of a CHP installation is only feasible if only a few end-consumers are connected to the same grid. Therefore in a public grid, the effect does generally not lead to a distortion of competition.
- (72) However, after having conducted a more detailed study of the issue, the German authorities have observed that closed distribution networks come in different constellations and that generally network charges are not saved or the savings are rather low and the risks of strategic bidding mentioned in recital 71 above is much lower than assumed. That conclusion results from a number of observations that the German authorities could make in the meantime.

- (73) First, for the strategic bidding to materialise, the CHP installation would need to obtain a much better price for the electricity produced, which implies that the saving of network charges has to be substantial. For a measurable effect, the production would need to be sold for a high share to local consumption. Otherwise there would be no potential to obtain better prices.
- (74) Secondly, the beneficiaries of lower network charges are all the end-consumers in the closed distribution network, regardless if they conclude an energy supply contract with the CHP operator or not. Therefore the CHP operator would have to make contracts with all or at least with the majority of the end-consumers. If there are many end-consumers connected to the closed distribution network, free rider behavior is likely to be the result. The end-consumers would not be willing to pay the CHP operator higher prices as network charges would be lower anyway. As CHP installations are long-term assets, the operator furthermore would have to make sure to have long term contracts with the majority of the end-consumers connected to the closed distribution network, which again reduces the possibility to obtain (much) higher prices from the end-consumers.
- (75) Thirdly, end-consumers in closed distribution networks are often industrial users who are entitled to reduced network fees because of different exemptions in paragraph 19 of the Electricity Network Fee Regulation (*Stromnetzentgeltverordnung*). As the reductions are based on the stable or specific consumption profile of the end-consumers concerned and not to the fact that the network is a closed distribution network, there is only little or no margin for significant reductions of network fees which could be used to negotiate higher prices.
- (76) As a result, the German authorities observed that the supposed competitive advantage was not necessarily significant and would also not be systematic so that the strategic bidding risk would also be much lower than initially feared (if existing at all). The German authorities are therefore contemplating to allow the participation of CHP installations producing electricity that is injected into a closed distribution network to the tenders without any further changes in the tender design. If however further enquiries during the ongoing legislative procedure show that there remains a distortion of competition and that specific measures in the tender design are needed, the German authorities committed to notify these effects and any countermeasures to the Commission. In any event, the German authorities committed to include into the evaluation of the CHP support scheme also the participation of CHP installations producing electricity that is injected into closed distribution networks.
- (77) The German authorities confirmed that the CHP installations concerned are the CHP installations described under recitals 23 and 63 of the Opening Decision and for which the German authorities had provide the following LCOE calculations.

Table 5

LCOE calculations for projects implemented by contractors, outside the BesAR, larger than 100 kWel, over 15 years (2016-2030) up to 10 MW and over 20 years (2016 to 2035) above 10 MW, discount rate 30 % per year — in EUR cents/kWh (2013 values)

Sector in which the client of the contractor is active	manufacture of automotive components	automobile manufacturer	automobile manufacturer	automobile manufacturer	automobile manufacturer	automobile manufacturer
Installation type	BHKW 5	BHKW 5	DT 1	GT 1	BHKW 6	GUD 1
El. Capacity	2 000 kW	2 000 kW	5 000 kW	10 000 kW	10 000 kW	20 000 kW
Full-load hours	4 500 h/a	8 000 h/a	5 500 h/a	5 500 h/a	5 500 h/a	5 000 h/a
Self-consumption rate	50 %	100 %	100 %	100 %	100 %	80 %
LCOE	10,42	7,22	12,13	8,42	8,49	11,56
Average market price	6,77	6,25	6,25	6,25	6,25	5,87
Difference between LCOE and market price	3,65	0,97	5,88	2,17	2,24	5,7

- (78) Like the other CHP-installations that can take part in the tenders, they will have to be high-efficiency CHP installations to be eligible.
- (79) The aid to the CHP installations selected in the tender will be granted as premium on top of the market price during 30 000 full load operating hours. No premium will be paid when the value of hour contracts is null or negative on the spot exchange (day ahead) for Germany (paragraph 7(8) KWKG 2016 as notified, paragraph 7(7) of the KWKG 2016, as amended). The electricity generated during this period is not taken into account for the calculation of the number of full load hours during which support can be granted. Also the CHP operator is responsible for balancing.

6. ASSESSMENT OF THE REDUCTIONS OF THE CHP SURCHARGE

6.1. Existence of State aid within the meaning of Article 107(1) of the Treaty

- (80) Pursuant to Article 107(1) of the Treaty, 'save as otherwise provided in the Treaties, 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'.
- (81) In determining whether a measure constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission has to assess whether the measure:
- (a) confers an advantage on certain undertakings or certain sectors (selective advantage);
 - (b) is imputable to the State and involve State resources;
 - (c) distorts or threatens to distort competition;
 - (d) is liable to affect trade between Member States.

6.1.1. Selective advantage

- (82) As recalled by the Court in its judgment of 21 December 2016 in the Joined Cases *Commission v World Duty Free Group* and *Commission v Banco Santander and Santusa* ⁽¹⁶⁾, for establishing the selectivity of a tax measure or a levy, it is necessary to determine whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system.
- (83) In its Opening Decision the Commission had found that in principle the CHP surcharge is to be paid on each kWh supplied to end-consumers through the public grid or the closed distribution network operated by the respective network operators. That surcharge is a uniform surcharge by kWh. As described under Sections 2.2.1 and 2.3 above, the system for determining the surcharge remained basically unchanged under the KWKG 2016, as amended and remains based on the principle of a uniform CHP surcharge. The normal CHP surcharge amounted to 0,445 EUR ct/kWh in 2016 and amounts to 0,438 EUR ct/kWh in 2017.
- (84) Hence, by limiting the CHP surcharge respectively to 0,04 EUR cent/kWh and to 0,03 EUR cent/kWh, the KWKG 2016, as notified, reduces the CHP surcharge of companies qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Also, by limiting the CHP surcharge respectively to 0,056 EUR ct/kWh in 2016, to 0,06 and 0,08 EUR ct/kWh in 2017 and to 0,12 EUR ct/kWh and 0,16 EUR ct/kWh in 2018 the KWKG 2016, as amended, reduces the financial burden for undertakings qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Also by limiting the CHP surcharge to 15 % of the full surcharge (and to 0,5 % or 4 % of their GVA) for the electro-intensive users fulfilling the conditions set out in recital 20 above the KWKG 2016, as amended, reduces the financial burden for undertakings qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Such a reduction constitutes an advantage ⁽¹⁷⁾.

⁽¹⁶⁾ Judgment of 21 December 2016, *Commission v World Duty Free Group*, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 60.

⁽¹⁷⁾ Judgment of 11 December 2014, *Austria v Commission*, T-251/11, ECLI:EU:T:2014:1060, paragraph 112; Judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 55.

- (85) The advantage is also selective. Indeed, as far as Category C is concerned, the reduction is limited to the manufacturing sector only. Within this sector, the reduction is further granted only to companies having an annual consumption of more than 1 GWh and having electricity costs that represent more than 4 % of their turnover (which excludes further manufacturing sectors as they typically do not reach those values, see recital 127 of the Opening Decision). The same observation applies to the reductions granted to electro-intensive users fulfilling the conditions set out in recital 20 above. The reductions are selective given that they are granted to undertakings active in specific sectors only and within the sector the reductions are granted only to undertakings reaching 1 GWh of consumption at a given consumption point and when they reach a certain electro-intensity threshold.
- (86) As to Category B, the advantage is limited to undertakings reaching an annual consumption level of 1 GWh. The Commission notes further that although Category B seems open to all sectors, the 1 GWh threshold *de facto* excludes several sectors and undertakings of the economy which typically never reach that consumption threshold.
- (87) However, in the light of the objective pursued by the surcharge (contribute to the CHP support), end-consumers of Categories B or C and electro-intensive users are in a comparable legal and factual situation. In particular, those end-consumers consume electricity injected into the public grid or closed network as the end-consumers of Category A. They benefit also similarly to end-consumers of Category A from the lower level of CO₂ emissions due to high energy efficient CHP support financed by the CHP surcharge.
- (88) The German authorities did not submit any comments on the selectivity of the measure.
- (89) BV Glas seems to argue that the fact that the reductions are limited to the manufacturing sector would be in the logic of the system because undertakings active in the manufacturing sectors are generally price takers and cannot pass on their extra costs to customers while service sectors would generally pass on surcharges to customers.
- (90) The Commission notes first that when the Commission has established that a given measure creates differences between undertakings which, with regard to the objective of the measure in question, are in a comparable factual and legal situation, it is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question ⁽¹⁸⁾. The German authorities have not claimed that the reductions would be in the nature and general scheme of the CHP surcharge. In particular, it has not claimed that the CHP surcharge would rest on the principle that the CHP surcharge is imposed on undertakings only if they can pass on their extra costs to their customers. In addition, the eligibility conditions do not support the — unsubstantiated — assumption that the normal charge system of the CHP surcharge rests on the principle that the CHP surcharge is imposed on undertakings only if they can pass on their extra costs to their customers.
- (91) First, eligibility for reductions under the KWKG 2016, as notified does not depend on the undertakings demonstrating that they cannot pass on their extra costs to their customers. Second, no elements have been provided demonstrating that all sectors and undertakings benefitting from the Category B and C reductions *de facto* cannot pass on their extra costs and that those excluded from the reductions can all pass on their extra costs. Third, BV Glas's arguments that it is normal that the reductions would be limited to undertakings active in the manufacturing sector is at odds with reductions granted to Category B end-consumers: they can be active in the service sector and do not need to be electro-intensive. As to the KWKG 2016, as amended, the German authorities did not submit that the CHP surcharge was based on the ability of end-consumers to pass on costs. Also, the inability to pass on costs is not a formal eligibility condition for the reductions.
- (92) The Commission therefore concludes that the reductions cannot be viewed as within the logic of the CHP surcharge system and maintains its conclusion that the reductions under examination constitute a selective advantage for the beneficiaries of the reductions.
- (93) The German authorities have also introduced paragraph 27b in the KWKG 2016, as amended, which provides that electricity that is stored is subject to the CHP surcharge when it is withdrawn from the storage facility and not when it is fed into the storage facility. The Commission considers that that provision is in the nature and

⁽¹⁸⁾ Judgment of 8 September 2011, *Commission v the Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 32.

general scheme of the CHP surcharge (and thus does not constitute a selective advantage): it aims at avoiding double taxation, a principle that is generally applied in tax or levy systems. That provision is in line with the principle that the surcharge is due when electricity is taken from the grid and consumed. Germany has explained that electricity that is stored in the storage facility has however not yet been consumed. The Commission therefore considers that the exemption provided under paragraph 27b in the KWKG 2016, as amended, is not selective.

6.1.2. State resources and imputability

- (94) The Commission found in its Opening Decision that the reductions were imputable to the State as all reductions were granted by law (KWKG 2016) and were thus imputable to the State. In addition, the Commission observed that the BAFA (i.e. the Federal Office for Economic Affairs and Export Control, a higher federal authority subordinated to the Federal Ministry for Economic Affairs and Energy) is in charge of verifying that only eligible operators obtain the support.
- (95) The Commission further found in its Opening Decision that the reductions were financed from State resources.
- (96) In that respect, the Commission first observed that in order to finance the CHP support, Germany introduced a special surcharge, the CHP surcharge (see paragraph 26 of the KWKG 2016, as notified, and paragraph 26 of the KWKG 2016, as amended, establishing the CHP surcharge and giving the right to network operators to impose the CHP surcharge on end-consumers), and defined its purpose (i.e. the financing of State policies in the energy field: CHP-support and the investment subsidies for storage and district heating/cooling networks) and the methodology to determine its amount, which for some categories of end-consumers is set directly by the State (Category B and Category C end-consumers and electro-intensive users). Also, deficits and surpluses of the collected CHP surcharge (in comparison to the support needed) are corrected in the following year, thereby ensuring that network operators are entirely compensated for the extra costs resulting from their obligation to pay the support, but also implying that they cannot use the revenue from the surcharge for anything else than the financing of the support of CHP electricity, heating and cooling storage, and district heating/cooling. On that basis, the Commission concluded that, like in the case giving rise to the judgment of 19 December 2013 in the case *Association Vent de Colère!* ⁽¹⁹⁾, the State had, within the framework of the KWKG 2016, created a system where the costs incurred by the network operators in connection to the support of CHP electricity, storage facilities and district heating/cooling networks are fully compensated by the CHP surcharge imposed on electricity end-consumers. That circumstance distinguishes the present case from the case giving rise to the judgment of 13 March 2001 in the case *PreussenElektra* ⁽²⁰⁾, as in the latter case the electricity suppliers had to finance the additional costs from their own means. In addition, neither the CHP support granted to generators of CHP electricity nor the investment subsidies granted to operators of district heating and cooling networks and of storage facilities constitute prices or fees for goods or services. Indeed, the CHP support is paid by the network operators to operators of CHP installations although the electricity is not sold to the network operators but to third parties; in certain cases, it is even consumed by the operator of the CHP installation itself. Also, as far as the district heating/cooling networks and the storage facilities are concerned, they remain in the ownership of the operator asking for the subsidy and the payment of the subsidy does not entitle the electricity network operators to any right in respect of the district heating/cooling networks and storage facilities concerned (on the support to district heating/cooling networks and the storage facilities, see recitals 33 to 45 of the Opening Decision).
- (97) The Commission further noted in the Opening Decision that transmission network operators play a special role in the system. They have been entrusted with the calculation of the CHP surcharge based on the methodology set out in the KWKG 2016 and manage the financial flows of the CHP surcharge. The financial burden resulting from the support to CHP, district heating network and heating systems is entirely transferred to them; they then have to ensure that the financial burden is equally spread between transmission network operators (in proportion to category A, B and C end-consumers connected to their grid) and they are being transferred the CHP surcharge from distribution network operators to compensate them for the financial burden resulting from the support. They also have to warn the BAFA in case the budget would be exceeded. In that regard they display similarities

⁽¹⁹⁾ Judgment of 19 December 2013, *Vent De Colère and Others*, C-262/12 ECLI:EU:C:2013:851.

⁽²⁰⁾ Judgment of 13 March 2001, *PreussenElektra*, C-379/98 ECLI:EU:C:2001:160.

with the situation of the Samenwerkende Elektriciteits-Productiebedrijven NV in the case giving rise to the judgment of 17 July 2008 in the case *Essent Network Noord* ⁽²¹⁾ and with that of the Transmission System Operators in the case giving rise to the judgment of 10 May 2016 in the case *Germany v Commission* (EEG 2012) ⁽²²⁾.

- (98) Furthermore, the Commission had also found in its Opening Decision that the following elements confirmed that the CHP surcharge is under State control: the CHP surcharge has to be placed on a separate account so that the regulator can verify the absence of cross-subsidies between the various activities of the network operators. In addition, the law requires that the invoicing between transmission network operators be controlled by an auditor or a chartered accountant. Finally, the law also limits the total budget of the measure and the total amount of the surcharge. When there is a risk that the budget would be exceeded, transmission network operators have to warn the BAFA which will then calculate new but reduced support rates to ensure that the budget is not exceeded. This is a further confirmation that the CHP surcharge constitutes a resource under the control of the State.
- (99) The German authorities did not submit any comments on this point. BV Glas has commented that the measure does not constitute State aid because it is not burdening the State budget. However, the Commission notes in this respect that according to settled case law, resources do not need to transit through the State budget to be considered as State resources. It is sufficient that they remain under public control ⁽²³⁾. Indeed, advantages which are granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) of the Treaty. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State ⁽²⁴⁾.
- (100) Based on those elements, the Commission maintains its conclusion that the CHP surcharge qualifies as State resource and that as a result, the reduced CHP surcharge rates are also financed from State resources. Those reductions are financed from State resources as the CHP support. Any reduction of the CHP surcharge has been set up in the law and involved state control to the same extent as the full CHP surcharge (see above). Therefore, also the reduction of the CHP surcharge must be considered as financed from State resources ⁽²⁵⁾.

6.1.3. Effect on trade and impact on competition

- (101) As regards reductions of CHP surcharges, they can distort competition between undertakings within the same sector as not all undertakings are eligible (depending on their consumption level for and/or the respective importance of electricity costs compared to turnover for and/or depending on the respective importance of electricity costs compared to GVA) and are also likely to affect trade between Member States and competition with undertakings in other Member States. Indeed, the undertakings benefitting from reductions are typically active in certain manufacturing sectors where electricity costs represent a larger share of production costs (metal industry, paper and chemical sector, glass-making industry, refineries, wood industry, food and feed sector, see Opening Decision recital 127 and also Table 3 above). Companies active in sectors like the chemical sector, the paper industry, automobile manufacturing and automotive supply are in competition with undertakings located in other Member States.
- (102) BV Glas submitted that there was no impact on competition but did not explain why. BV Glas seems to imply that there would be no impact on competition because the measure aims at reducing a competitive disadvantage compared to undertakings in other Member States. Given that CHP surcharges also exist in other Member States

⁽²¹⁾ Judgment of 17 July 2008, *Essent Network Noord and Others*, C-206/06, ECLI:EU:C:2008:413.

⁽²²⁾ Judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281.

⁽²³⁾ Judgment of 16 May 2002, *France v Commission*, C-482/99 EU:C:2002:294, paragraph 37, and judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 83.

⁽²⁴⁾ To this effect, see judgment of 22 March 1977, *Steinike & Weinlig*, C-78/76, EU:C:1977:52, paragraph 21; judgment of 17 March 1993, *Sloman Neptun v Bodo Ziesemer*, Joined Cases C-72/91 and C-73/91, EU:C:1993:97, paragraph 19, and judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 81.

⁽²⁵⁾ See also judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 112, and judgment of 11 December 2014, *Austria v Commission*, T-251/11, ECLI:EU:T:2014:1060, paragraph 76.

(for instance in France ⁽²⁶⁾), that argument is not supported by the facts. In addition, it is established case law that the fact that a measure is aimed at harmonising through unilateral measures competition conditions between Member States would not prevent such a measure from being qualified as State aid ⁽²⁷⁾.

6.1.4. Conclusion on the existence of State aid

- (103) The Commission therefore concludes that the reductions of the CHP surcharge granted to Categories B and C end-consumers and to electro-intensive users foreseen in KWKG 2016 involve State aid within the meaning of Article 107 of the Treaty.

6.2. Existing aid/new aid and lawfulness of the aid

- (104) BV Glas has underlined that the KWKG 2016 is very similar to the KWKG 2002 and therefore constitutes existing aid.
- (105) The Commission notes, however, that while there are many similarities between the KWKG 2002 and the KWKG 2016, that cannot lead to the conclusion that the aid scheme of the CHP surcharge reductions as provided for by the KWKG 2016 would qualify as an existing aid scheme.
- (106) It is true that the Law of 12 May 2000 for the protection of electricity generation on the basis of CHP ('the KWKG 2000'), one of the precursors of the KWKG 2016, had been considered not to involve State aid by the Commission ⁽²⁸⁾. However, as the Commission noted in its Opening Decision (recital 288), the KWKG 2000 has been abolished already in 2002 and replaced by the KWKG 2002 which was in turn replaced by the KWKG 2016.
- (107) The aid measure can thus not be regarded as existing aid, in particular since there are several substantial differences between the KWKG 2000 and the KWKG 2016 and actually already between the KWKG 2000 and the KWKG 2002.
- (108) The first difference being that the reductions of the CHP surcharge which are the subject matter of the formal investigation did not exist in the KWKG 2000 and the Commission did not examine them in its decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 ⁽²⁹⁾.
- (109) In addition, under the KWKG 2000, the law simply established a purchase obligation together with the price to be paid for that good. There was a burden sharing between network operators. The law, however, did not establish any CHP surcharge to finance the support and as mentioned in the previous recital there were no reduced CHP surcharges for certain categories of end-consumers.
- (110) The KWKG 2016 is different from the KWKG 2000 in the following respects: first the purchase obligation has been replaced by the obligation to pay a premium for electricity that is most of the time not purchased by the network operator. Second, the KWKG 2016 also provides for support for electricity that is auto-consumed, i.e. aid that is not even injected into the grids operated by network operators. Third, the KWKG 2016 also provides for support to heat storage and district heating networks, i.e. infrastructure not related to the electricity grid. Fourth, the law guarantees that network operators are fully compensated for their extra costs through the CHP surcharge established by the law and the transmission network operators centralise financial flows linked to premium payments and the CHP surcharge. The CHP surcharge is a uniform surcharge per kWh across all networks. Fifth, the law contains a maximum budget that also limits the increase of the CHP surcharge. And sixth, the KWKG 2016 provides for a cap to the CHP surcharge for Category B and Category C end-consumers. Finally, support for CHP installations, district heating networks etc. is available only after having obtained an authorisation from the BAFA. Such a confirmation of eligibility for support did not exist under the KWKG 2000.

⁽²⁶⁾ Commission Decision of 27 March 2014 on State aid SA.36511 (2014/C) (ex 2013/NN) — France — Support mechanism for renewable energies and caps on the CSPE — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 348, 3.10.2014, p. 78).

⁽²⁷⁾ Judgment of 1 February 2017, *Portovesme v Commission*, C-606/14 P, ECLI:EU:C:2017:75, paragraph 91.

⁽²⁸⁾ Commission Decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (OJ C 164, 10.7.2002, p. 5).

⁽²⁹⁾ Ibidem.

- (111) Already the KWKG 2002 presents several important alterations to the KWKG 2000: obligation to pay a premium on top of market price (instead of mere purchase obligation of electricity for a given price), guarantee provided by law that network operators will be compensated for the extra costs resulting from the obligation to pay the premium, creation of the uniform CHP surcharge, central role of transmission network operators in centralising the financial flows linked to support payments and CHP surcharge and introduction of caps to the CHP surcharge for two categories of end-consumers (Category B and Category C). Also the obligation to obtain an authorisation from the BAFA to obtain access to support was introduced in 2002. In 2009, the KWKG 2002 was amended to provide support also for auto-consumption and for district heating networks. In 2012, the KWKG 2002 was amended to include also support for heating and cooling storage facilities as well as for district cooling networks. The budget limitation was introduced by the KWKG 2016.
- (112) Based on these elements, the Commission thus concludes that the KWKG 2016 shares several features with the KWKG 2002 but that it cannot qualify as an existing aid measure given that the decision in case NN 68/2000 ⁽³⁰⁾ did not concern the KWKG 2002 but the KWKG 2000 and given that the KWKG 2016 presents several substantial alterations compared to the KWKG 2000.
- (113) The similarities between the KWKG 2002 and the KWKG 2016 (obligation to pay a premium on top of market price, guarantee provided by law that network operators will be compensated for the extra costs resulting from the obligation to pay the premium, introduction of a uniform CHP surcharge and introduction of reduced CHP surcharge for certain end-consumers, central role of transmission network operators in centralising the financial flows linked to support payments and CHP surcharge, authorisation from the BAFA to obtain access to support) and the differences to the KWKG 2000 actually lead to the conclusion that reductions of the CHP surcharge granted under the KWKG 2002 qualified as State aid already. The Commission acknowledges that pursuant to Article 1(a)(iv) in conjunction with Article 17 of Regulation (EU) 2015/1589 only the CHP surcharge reductions that were granted 10 years before 24 October 2016 qualify as existing aid.
- (114) In addition Germany submitted the adjustment plan starting from 2011 thus explicitly recognising that the CHP surcharge reductions as from 2011 did involve new state aid compared to the KWKG 2002.

6.3. Compatibility with the internal market

- (115) In the Opening Decision, the Commission concluded that the State aid to high-efficiency CHP installations, to storage facilities and to energy-efficient district heating/cooling networks granted under the KWKG 2016 was compatible with the internal market.
- (116) In its Opening Decision, the Commission however raised doubts as to whether the reduced CHP surcharges for Category B and Category C end-consumers could be declared compatible with the internal market on the basis of Article 107(3) c) TFUE.
- (117) The compatibility assessment below only covers the reductions granted to Category B and Category C end-consumers since 2007 and to electro-intensive users described under recital 20 above. This Decision does not cover reductions granted to railway undertakings on payments of the CHP surcharge. Those reductions were approved under decision SA.43666 ⁽³¹⁾.
- (118) The capped surcharge relieves Category B and Category C end-consumers and electro-intensive users from a part of the CHP surcharge that they would normally have had to bear in their day-to-day operations as part of their electricity costs; it thus reduces operating costs for the companies concerned.
- (119) Article 107(1) of the Treaty provides for the general principle of prohibition of State aid within the Union. Article 107(2) and 107(3) of the Treaty provide for exemptions to that principle.
- (120) As the Commission noted in its Opening Decision, the reductions do not fall within the scope of the EEAG. First the CHP surcharge does not qualify as environmental tax within the meaning of Section 3.7.1 of the EEAG. Indeed, the CHP-surcharge pursues a specific objective namely financing of a support for CHP installations. The CHP-surcharge in contrast to environmental taxes does not have a behavioural steering effect (see paragraphs 167 and 181 of the EEAG). It does not aim at changing the behaviour of the CHP surcharge payers itself. Thus the assessment of its reductions under Section 3.7.1 may be excluded. The CHP surcharge presents many similarities

⁽³⁰⁾ Ibidem.

⁽³¹⁾ Commission Decision of 22 August 2016 on State aid SA.43666 (2015/N) — Germany — Reduction of the KWKG surcharge for railways (OJ C 406, 4.11.2016, p. 1).

with renewable surcharges that are dedicated to the funding of the support to renewable electricity as it indirectly pursues the environmental objective of reducing CO₂ emissions of electricity production through the financing of cogeneration support. However, Section 3.7.2 of the EEAG applies only to surcharges dedicated to the funding of the support of the energy from renewable sources thus does not cover funding of energy efficiency measures like high energy efficient CHP. No other Commission Guidelines can apply to the notified measure.

(121) However, the Commission may declare an aid measure compatible directly under Article 107(3)(c) of the Treaty if it is necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade. Those conditions can be considered as fulfilled if the following questions can be answered in the affirmative:

- (a) Is the aid measure aimed at a well-defined objective of common interest? ⁽³²⁾
- (b) Is it targeted towards a situation where aid can bring about a material improvement that the market alone cannot deliver (for example because it addresses a market failure)?
- (c) Is the aid measure well designed to deliver the objective of common interest (necessity of the aid)? ⁽³³⁾ In particular:
 - Is the aid measure an appropriate and necessary instrument, i.e. are there other, better-placed instruments?
 - Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - Is the aid measure proportionate, i.e. could the same change in behaviour be obtained with less aid?
- (d) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

6.3.1. *Objective of common interest*

(122) The Commission observed in its Opening Decision that the CHP surcharge is dedicated to the funding of the support for high-efficiency cogeneration and therefore indirectly contributes to the achievement of the objectives pursued by those support measures, i.e. reducing the environmental impact of electricity production by increasing the energy efficiency of energy production and reducing CO₂ emissions in the electricity sector, which the Commission found to correspond to an objective of common interest.

(123) The Commission also observed that reductions of CHP surcharges dedicated to finance support for cogeneration of heat and power can also indirectly contribute to the objective of the support measures financed from the surcharges (i.e. the increase of energy efficiency of energy production and the reduction of CO₂ emissions linked to electricity consumption) because they can help securing a sufficient financing base for the support measures themselves in a similar way to how reductions in the funding of support for renewable electricity help securing a sufficient financing base for renewable electricity support (see Section 3.7.2 of the EEAG and in particular paragraph 182 of the EEAG). Hence, if reductions are needed to secure the financing of those support measures, they would also indirectly contribute to the objectives pursued by the support measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision.

(124) The Commission also observed that the Union has not established mandatory targets per Member State for the production of high-efficiency CHP electricity, contrary to what is the case for renewable energies. The funding needs for supporting CHP installations are thus generally lower than funding needs for the support to renewable energy, which makes it less imperative to finance the support measures from a levy on electricity consumption. However, the Directive 2012/27/EU of the European Parliament and the Council ⁽³⁴⁾ has set a 20 % headline

⁽³²⁾ Judgment of 14 January 2009, *Kronoply v Commission*, T-162/06, ECLI:EU:T:2009:2, especially paragraphs 65, 66, 74 and 75.

⁽³³⁾ Judgment of 7 June 2001, *Agrana Zucker und Stärke v Commission*, Case T-187/99, ECLI:EU:T:2001:149, paragraph 74; judgment of 14 May 2002, *Graphischer Maschinenbau v Commission*, Case T-126/99, ECLI:EU:T:2002:116, paragraphs 41-43; judgment of 15 April 2008, *Nuova Agricast*, Case C-390/06, ECLI:EU:C:2008:224, paragraphs 68-69.

⁽³⁴⁾ 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).

target on energy efficiency and provides for indicative national efficiency targets to which high-efficiency CHP installations, energy-efficient district heating networks and storage systems can make an important contribution. In addition Member States are under the obligation to assess their potential for the implementation of energy efficiency measures, including CHP installations, district heating and storage facilities and to deploy the identified potential. As a result, financing needs for energy efficiency support measures could also potentially become significant, thereby increasing the need for Member States to be able to finance the measures from energy consumption levies. In addition, the target of 27 % improvement in energy efficiency for 2030 that the European Council endorsed on 23 October 2014 ⁽³⁵⁾ will continue to lead the Union and its Member States towards further reductions of CO₂ emissions and towards further energy savings.

- (125) To avoid that electricity end-consumers particularly affected by the financing costs of the promotion of high-efficiency CHP (and the related promotion of energy-efficient district heating networks and heat storage facilities connected to CHP installations) could be put at a significant competitive disadvantage, Germany may need to grant partial reductions, in particular since the CHP surcharge adds up to the EEG surcharge in order to finance a set of support measures in the electricity sector to reduce CO₂ emissions and fight against climate change. Indeed, bankruptcy or delocalisation of too many undertakings particularly impacted by the EEG or the CHP surcharge might erode the financing basis: instead of paying a reduced surcharge, the relevant companies would not contribute at all to the financing implying an even higher financial effort from other end-consumers to finance the support of CHP, again reducing acceptability of the surcharge and hence of the support of CHP as such.
- (126) In its Opening Decision, the Commission had observed that while the CHP surcharge was not aimed at creating incentives to reduce energy consumption but only at financing energy efficiency measures, it should be avoided that the magnitude of the reductions induce companies to be less energy-efficient, as this would run counter to the objective of the supported energy efficiency measures.
- (127) Concerning the risk of reducing the incentives to be energy-efficient, the German authorities have submitted that the reductions do not eliminate incentives for electro-intensive users to be energy-efficient given that the CHP surcharge represents only a small portion of electricity costs. The mere electricity price in itself, given the high share of energy costs compared to total production costs, provides for an incentive to increase energy efficiency (see recitals 62 and following above). Also BV Glas submitted that electro-intensive users are constantly incentivised to improve energy-efficiency given the high share that energy prices represent in total production costs (often between 20 and 50 %).
- (128) The Commission agrees that for electro-intensive companies exposed to international trade the mere electricity price in itself can provide an incentive to increase energy efficiency given that for energy-intensive energy represents a high share of production costs. This incentive will be more important for companies facing a certain level of international trade as the competitive pressure will induce companies to be efficient. As also those companies will have to pay at least 15 % of the CHP-surcharge, this minimum contribution will actually reinforce incentives that electro-intensive companies facing international competition have to invest in energy efficiency measures. No elements were provided though to demonstrate that the reductions would not eliminate incentives for undertakings that are not electro-intensive. However, the German authorities have limited the reductions to electro-intensive users that face a certain level of international competition as of 1 January 2017 and the great part of beneficiaries in 2016 could be considered as energy-intensive users. It has also subjected the reductions to participation in an energy or environmental management system. Finally, as will be examined more in detail below, the German authorities have maintained an own contribution of 15 % of the CHP surcharge. The Commission therefore concludes that the reductions, as amended, will not remove incentives for electro-intensive users to increase their energy-efficiency. As the period 2011-2018 and as regards non-electro-intensive users, the German authorities submitted an adjustment plan which will increase incentives for energy-efficiency for non-electro-intensive users.
- (129) Based on those elements, the Commission concludes that the reduced CHP surcharges contribute to a common objective.

⁽³⁵⁾ Conclusions of the European Council of 23-24 October 2014.

6.3.2. *Need for State intervention, appropriateness of aid and incentive effect*

- (130) Under Sections 3.3.1.2, 3.3.2.2, 3.3.4.2 and 3.3.5.2 of its Opening Decision, the Commission concluded that the promotion of high-efficiency cogeneration installations, energy-efficient district heating/cooling networks and heating/cooling storage installations would not be delivered by the market alone and that the aid measures (and their financing) were needed to incentivise the investments into and/or operation of those installations and facilities.
- (131) The aid measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision are all directed at increasing energy-efficiency of energy production and at reducing the carbon footprint of electricity production and thus consumption. They are aimed at fighting against climate change.
- (132) While the CHP surcharge is not the only conceivable financing means, it is appropriate to finance aid measures for the production of high-efficiency cogenerated electricity, energy-efficient district heating networks and heat storage facilities on the basis of a surcharge on electricity consumed by end-consumers connected to the grid and withdrawn from this grid, because of the close link between the supported measures and the electricity withdrawn from the grid. Also, such a surcharge provides a relatively stable financing stream and does not impair budgetary discipline. Those are the reasons why such a financing system is often used to finance support for the production of renewable electricity. As already mentioned in recital 125 above, financing needs for energy efficiency support measures could become significant, thereby increasing the need for Member States to be able to finance the measures from electricity surcharges.
- (133) The Commission considers therefore that a reduced CHP surcharge could be deemed necessary to reach the objectives of energy efficiency and environmental protection pursued by the measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision if in the absence of reductions the CHP surcharge financing those measures and the objective pursued by those measures would be put at risk.
- (134) That could be the case if the payment of the full CHP surcharge would imply the delocalisation or bankruptcy of too many undertakings or sectors. That would in turn significantly reduce the acceptability of the CHP surcharge as well as the number of surcharge payers and would risk jeopardising the aid measures as such.
- (135) The Commission indicated in its Opening Decision (recital 274) that the criteria developed under paragraphs 185, 186 and 187 of the EEAG could serve as guidance in order to identify sectors at risk of delocalisation or bankruptcy in case of too high energy surcharges aimed at the financing of cogeneration support. That seems appropriate in particular given that, on the one hand, the measures that are financed from the CHP surcharge serve the same environmental objective as the measures that are financed from the renewable surcharges falling within the scope of Section 3.7.2 of the EEAG (fight against climate change by reducing CO₂ emissions resulting from electricity production) and given that, on the other hand, the CHP surcharge in Germany adds to the renewable surcharges (the EEG surcharge in Germany) and is structured in a similar way. As it is levied in proportion to electricity withdrawn from the grid, the CHP surcharge will impact in particular undertakings for which electricity costs represent an important share of gross added value and which cannot easily pass on their costs to end-consumers without losing important market shares given the intensity of the international trade of the sector in which they are active. Those are the undertakings that the criteria set out under paragraphs 185, 186 and 187 of the EEAG aim at identifying.
- (136) During the preliminary investigation the German authorities had explained that the reduced CHP surcharges were needed to ensure the competitiveness of the companies (energy users) concerned and that ultimately they would be needed to secure the financing for the support measures. However, the German authorities had not provided sufficient information to show that the reduced CHP surcharges were needed for all types of undertakings or sectors included within categories C and B end-consumers to secure the financing of aid measures laid down in the KWKG 2016, as notified. It had only provided information related to electro-intensive users exposed to international competition and eligible for reductions of renewable surcharges acknowledging, however, that end-consumers in Categories B and C were not all such undertakings.
- (137) In its Opening Decision, the Commission observed that it had accepted that some sectors with high electro-intensity and high exposure to international trade were very likely to be significantly affected by the full EEG surcharge and that this threat to their competitiveness and viability would be sufficiently material to jeopardise

support for renewable energies ⁽³⁶⁾. Assuming that beneficiaries would correspond to companies eligible for support under the EEG, the full CHP surcharge would, for a significant number of those companies, represent between 1 % and 9 % of GVA. That would constitute indeed a sizable burden, in particular since it would be added to the burden resulting already from the EEG surcharge, a surcharge that finances measures pursuing the same environmental objective as the measures financed from the CHP surcharge.

- (138) During the formal investigation procedure, the German authorities did not provide any additional information allowing the Commission to verify which share of the beneficiaries would indeed correspond to undertakings eligible for reduced EEG surcharges or for reductions under Section 3.7.2 of the EEAG, nor did it provide information that would demonstrate the necessity of reductions also for companies that are neither electro-intensive nor facing international competition. Also, while BV Glas maintains that all reductions are needed, it did not submit information that would indicate that also reductions for non-electro-intensive users would be needed. In fact, the information submitted by BV Glas is limited to electro-intensive users. However as of 1 January 2017 reductions will be limited to electro-intensive users that are qualifying for reductions of the renewable surcharge (i.e. to EIU at risk of relocation or bankruptcy). Non-electro-intensive users of Category B and C will not be eligible for reductions any more. For non-electro-intensive users, the German authorities provided an adjustment plan under which reductions will be phased out totally by 2019, also the reductions granted to non-electro-intensive users starting in 2011 have been adjusted based on an adjustment plan submitted to the Commission (see also Section 6.4 below on the adjustment plan).
- (139) Based on those elements, in particular the modifications and adjustment plan provided by the German authorities ensuring that the reductions are limited to electro-intensive users exposed to international trade, the Commission concludes that the reductions are appropriate and necessary to ensure the sustainability of the financing of cogeneration support and have an incentive effect.

6.3.3. Proportionality

- (140) In its Opening Decision, the Commission observed that reductions cannot correspond to full exemptions or be so significant as to jeopardise the purpose of the support measure because they result in too heavy a burden on the other end-consumers (recital 269 of the Opening Decision). Also, too significant reductions increase the distortion of competition resulting from them. This is why under the EEAG, as far as reductions in the funding of support for energy from renewable sources are concerned, undertakings eligible for reductions should pay a minimum contribution corresponding in principle to 15 % of the normal levy (see paragraph 188 of the EEAG), with additional reductions possible when the levy represents more than a certain share of the GVA of the company (paragraph 189 of the EEAG).
- (141) In its Opening Decision (recital 282), the Commission had indicated that it would use paragraphs 188 and 189 of the EEAG as guidance to assess the proportionality of the reductions. That seems appropriate in particular given that, on the one hand, the measures that are financed from the CHP surcharge serve the same environmental objective as the measures that are financed from the renewable surcharges falling within the scope of Section 3.7.2 of the EEAG (fight against climate change by reducing CO₂ emissions resulting from electricity production) and given that, on the other hand, the reductions aim at ensuring the sustainability of the financing of those support measures by limiting the burden for undertakings or particularly affected by energy surcharges but still requiring from them a sufficient own contribution.
- (142) The Commission had observed in its Opening Decision (recital 283) that the German authorities had not shown during the preliminary investigation that the caps of 0,04 and 0,03 EUR cent/kWh were limited to the necessary minimum. The German authorities did not show that less significant reductions would not have been acceptable. It has insisted on the cumulation effect with the EEG but did not provide concrete information related to the beneficiaries of the reductions that would compare the ratio between the reduced CHP surcharge and the GVA with the ratio between slightly higher CHP surcharges (for instance 15 %) and the GVA or with the ratio between the reduced CHP surcharge cumulated to the reduced EEG surcharge and the GVA.

⁽³⁶⁾ See Commission Decision of 23 July 2014 on State aid SA.38632 (2014/N) — Germany — EEG 2014 (OJ C 325, 2.10.2015, p. 4).

- (143) The German authorities did not provide any additional information during the formal investigation. BV Glas has submitted that the reductions were limited to the minimum necessary but without explaining why the reductions would be limited to the minimum.
- (144) However, Germany modified the KWKG 2016 and as a result, reductions are limited as of 1 January 2017 to electro-intensive users that are qualifying for reductions of the renewable surcharge and the surcharge will be at least 15 % of the surcharge (see recital 21 above). Non-electro-intensive users will not be eligible for reductions anymore. Also the German authorities provided an adjustment plan for previous Category B and C end-consumers under which reductions will be phased out totally by 2019 for Category B and C end-consumers who do not qualify as electro-intensive users and under which the reductions granted to non-electro-intensive users in the past were adjusted starting in 2011. The German authorities also provided an adjustment plan for previous Category B and C end-consumers who qualify as electro-intensive users starting in 2011.
- (145) Based on those elements, in particular the modifications introduced as of 1 January 2017 to the level of reductions and the adjustment plan provided by the German authorities, the Commission concludes that the reductions of the CHP surcharges are proportionate to the objective pursued.

6.3.4. *Distortion of competition*

- (146) The Commission had observed in its Opening Decision that it had during the preliminary investigation phase not obtained enough elements that would enable the Commission to assess the overall balance of the potential distortion of competition and trade between Member States. Moreover, as the necessity, appropriateness, incentive effect and the proportionality of the aid measure had not yet been demonstrated, the Commission had doubts that the aid measure ensured that the distortions of competition resulting from the relief of companies from part of their operating costs were limited and that the overall balance of the measure would be positive.
- (147) The German authorities have underlined in their comments on the Opening Decision (recital 287) that the distortions are limited given the positive impact of the measures financed from the CHP surcharge and given that with the amendments adopted on 22 December 2016 the reductions will be limited to the minimum necessary to ensure the sustainability of the CHP surcharge.
- (148) Concerning the positive impacts, the Commission had observed in its Opening Decision that the measures financed from the CHP surcharge were aimed at important reductions in terms of CO₂ emissions and were also important for improving the integration of cogenerated electricity into the electricity market. Those positive impacts are summarised under recitals 9 and 10 above.
- (149) The Commission further notes that Directive 2012/27/EU has set a 20 % headline target on energy efficiency and obliges Member States to assess their potential for the implementation of energy efficiency measures, including CHP installations, district heating and storage facilities and to deploy the identified potential. In addition, the 2030 target of 27 % improvement in energy efficiency that the European Council endorsed on 23 October 2014 ⁽³⁷⁾ will continue to lead the Union and its Member States towards further reductions of CO₂ emissions and towards further energy savings. As a result, there are financing needs for energy efficiency support measures and they could also potentially become more significant in the future given that the 20 % target has not yet been reached and will after that have to be further improved to reach the 2030 target. Therefore, ensuring the availability and sustainability of financial means for CHP installations, district heating and storage facilities is an important element to pave the way for increased energy efficiency of energy production and further CO₂ emission reductions. Indeed, the Commission also found in its Opening Decision that there were still market failures in this domain and that support measures were still needed to increase energy efficiency.
- (150) Further, the Commission notes that with the amendments introduced on 22 December 2016 Germany limits the eligibility for reductions to undertakings eligible for reductions under the BesAR, i.e. to undertakings and sectors which are the most at risk of delocalisation and bankruptcy in case of payment of the full surcharge and hence which would constitute the largest threat to the sustainability of the surcharge. Also, beneficiaries are still required to contribute their share to the financing of the energy efficiency measures and the reductions do not undermine beneficiaries' incentives to remain energy-efficient.

⁽³⁷⁾ Conclusions of the European Council of 23-24 October 2014.

- (151) Finally, the Commission notes that the reductions are granted to all undertakings active in the same sector when they are in the same situation in terms of electro-intensity.
- (152) On this basis, the Commission concludes that the overall balance of the aid measure is positive in that its positive effects outbalance the possible distortion of competition.

6.4. Adjustment plan

- (153) The reduced CHP surcharges were introduced in 2002 by the KWKG 2002. The German authorities have mentioned in that respect that in 2002 the Commission found that the then applicable KWKG 2000 did not contain State aid and did not indicate to Germany that the KWKG 2002 would be a notifiable act ⁽³⁸⁾. They submitted that the fact that the Commission did not object to the KWKG 2002 and declared the KWKG 2000 as not constituting aid would raise legitimate reasons that the reductions of the CHP surcharges did not constitute aid, at least until 2014 when the Commission adopted the 2014 EEAG and made clear that renewable or CHP support schemes financed from surcharges would constitute aid. Also BV Glas submits that Commission decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (the ‘2002 Commission Decision’) created legitimate expectations that the KWKG 2002 and then the KWKG 2016 did not contain any aid.
- (154) Nevertheless, Germany submitted to the Commission an adjustment plan starting in 2011 and progressively adjusting Category B and Category C end-consumers to the eligibility and proportionality criteria introduced by the Law of 22 December 2016 and incorporated in the KWKG 2016, as amended (i.e. reductions limited to electro-intensive users fulfilling the conditions set out in recital 20 above and reductions limited to 85 % of the CHP surcharge or to 4 % or 0,5 % of GVA, depending on the electro-intensity of the undertaking).
- (155) It aligns the payments of CHP surcharges of all previous Category B and C end-consumers who qualify as electro-intensive users to the levels compatible by 2018. While the Commission assesses this adjustment plan on the basis of Article 107(3)c TFUE solely, the comparison with assessment criteria set out in EEAG with regard to the adjustment of RES-surcharge reductions applied before 1 July 2014 shows that the progressive adjustment of CHP surcharge foreseen in the submitted plan would allow to consider the past payments of CHP surcharges compatible with the internal market.
- (156) In fact the plan foresees a progressive increase of the CHP surcharge for the categories B and C end-consumers from 2011 on so that in 2019 they will have to pay the full CHP surcharge (100 %). This path is stricter than the transitional provision with regard to reductions in funding of RES foreseen in EEAG. For the EIU, the plan foresees an adjustment to 15 % already in 2018, thus earlier than the Commission requires with regard to the adjustment of reductions in funding of RES (see paragraph 193 EEAG). Thus the Commission considers that the implementation of the submitted adjustment plan would render the reductions of CHP-surcharges in the past compatible with the internal market.
- (157) Given that the CHP-surcharges paid by Category B and category C end-consumers represented in total for 2011 and 2012 more than 100 % of the full CHP-surcharge paid by Category A of end-consumers, the adjustment plan applies to non-electro-intensive users only as of 2013. Category B consumers actually paid for 2013-2016 in total more than what the adjustment plan requires (21 % instead of up to 12,5 %), they will thus in practice have to be adjusted as of 2017 only. Category C consumers will be adjusted as of 2016 because for the period 2013-2015 they paid in total more than what the adjustment plan required (13 % instead of up to 12,5 %).
- (158) As for electro-intensive users, they paid in total for the period 2011 to 2016 15 % of the CHP surcharge. The adjustment plan will in practice apply to them as of 2017.

⁽³⁸⁾ Commission decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (OJ C 164, 10.7.2002, p. 5).

- (159) Thus in light of the actual amounts of CHP-surcharge paid by the beneficiaries in the previous years the implementation of the adjustment plan will not require any increase of the surcharge in past years, except for 2016 for Category C end-consumers who do not qualify as electro-intensive users. However, this increase of the CHP surcharge has already been enacted in the law of 22 December 2016 and the increased CHP surcharge for this category of end-consumer has been included in the final bill for 2016. Indeed, under paragraph 36 of the KWKG 2016 as amended, an additional surcharge of 0,026 EUR ct/kWh is due, unless reductions for the period 2014-2016 are below EUR 160 000 (i.e. 20 % below the *de minimis* threshold).
- (160) The Commission also finds that the starting point of the adjustment plan in 2011 is justified. Indeed in June 2010 the European Council agreed upon a 20 % energy efficiency target to be reached by 2020. In the course of 2010 and 2011, the EU adopted several Action Plans and Communications ⁽³⁹⁾ stressing the importance of energy efficiency and the need to step up efforts, including in energy generation and including through schemes, to increase energy efficiency. This together with also Directive 2012/27/EU induced Member States to step up support measures and surcharges, including CHP-surcharge, started to increase as a result.
- (161) Concerning legitimate expectations that would arise from the 2002 Commission Decision, the Commission notes that its 2002 Decision did not relate to reductions of a CHP surcharge and it is unclear how it could then raise legitimate expectations as to the absence of aid. In any event, assuming that there could have been legitimate expectations based on the 2002 Commission Decision and based on the status of the case law (*PreussenElektra* ⁽⁴⁰⁾), those legitimate expectations would have ended by 2011 at the latest as several developments in case law and case practice would have lead a prudent and alert economic operator to realise that it was no longer possible to assume that reductions of CHP surcharge would not constitute aid.
- (162) The Court of Justice has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community institution has caused him to entertain expectations which are justified by precise assurances provided to him. However, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted ⁽⁴¹⁾.
- (163) Indeed, in the meantime, the Court clarified in its *Essent* judgment of 17 July 2008 ⁽⁴²⁾ the boundaries of the *PreussenElektra* judgment ⁽⁴³⁾ and concluded that also qualifies as State resource a surcharge imposed by the State and managed by an entity designated by the State even if the monies do not transit via a fund or account directly managed by the State; in addition, on 22 July 2009, the Commission opened the formal investigation procedure on a cap introduced by an Austrian law that exempted companies in energy intensive industries from the

⁽³⁹⁾ See Conclusions of the European Council of 17 June 2010. The Conclusions of the European Council of 17 June 2010 confirmed the energy efficiency target as one of the headline targets of the Union's new strategy for jobs and smart, sustainable and inclusive growth. Under this process and in order to implement this objective at national level, Member States are required to set national targets in close dialogue with the Commission and to indicate, in their National Reform Programmes, how they intend to achieve them. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 — A Strategy for competitive, sustainable and secure energy (COM(2010) 639 final of 10 November 2010). It places energy efficiency at the core of the Union energy strategy for 2020 and outlines the need for a new energy efficiency strategy that will enable all Member States to decouple energy use from economic growth. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: See also Conclusions of the European Council of 4 February 2011 acknowledging that the Union energy efficiency target was not on track and that determined action is required to tap the considerable potential for higher energy savings in buildings, transport, products and processes. See also Communication of 8 March 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Efficiency Plan 2011. The Communication confirmed that the Union is not on track to achieve its energy efficiency target. To remedy that, the Energy Efficiency Plan 2011 spelled out a series of energy efficiency policies and measures covering the full energy chain, including energy generation of heat and electricity and underlying that waste heat should be recovered where possible and a greater use of high efficient cogeneration should be made where possible.

⁽⁴⁰⁾ Judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160.

⁽⁴¹⁾ Judgment of 22 June 2006, *Forum 187 v Commission*, Joined Cases C-182/03, C-217/03, ECLI:EU:C:2005:266, paragraph 147.

⁽⁴²⁾ Judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, ECLI:EU:C:2008:413.

⁽⁴³⁾ Judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160.

obligation to purchase green electricity if expenses for green electricity were larger than 0,5 % of their respective production value ⁽⁴⁴⁾. On 8 March 2011, the Commission confirmed its position in a final decision that the Austrian cap for energy-intensive users under the Green Electricity Act constituted State aid ⁽⁴⁵⁾.

- (164) The Commission notes also that the adjustment plan leads in practice to an adjustment for Category C end-consumers who do not qualify as electro-intensive users in 2016. In 2016, any prudent and alert economic operator would have realised that before believing that the reductions constituted no aid, it was prudent to wait for the Commission's position, in particular since it was known that the KWKG 2016 had been notified to the Commission for approval.
- (165) Finally, the Commission notes that the adjustment plan avoids too high and too abrupt financial disruptions for individual undertakings and in that sense also contributes to the sustainability of the financing of the CHP support as described under recitals 124 and following above.
- (166) For the reductions of CHP-surcharges applied prior to the starting date of the adjustment plan the Commission considers that in light of the development state of high efficient CHP (period prior to the establishment of 20 % EU-energy efficiency target) the amounts of reductions awarded under the KWKG 2002 after November 2006 could be considered as not fulfilling all the criteria in Article 107(1) TFUE and thus falling under the Regulation pursuant to Article 2 of Council Regulation (EC) No 994/98 which was applicable at the time (*de minimis* aid) or that the reductions granted from December 2008 until December 2010 would fall under the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis ⁽⁴⁶⁾.

6.5. Conclusion

- (167) The Commission finds that Germany has unlawfully implemented reduced CHP surcharges for certain end-consumers in breach of Article 108(3) of the Treaty. However, the Commission finds that those reductions as amended by the Law of 22 December 2016 and as complemented by the adjustment plan are compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty.

7. PRELIMINARY EXAMINATION OF THE INTENDED EXTENSION OF CHP SUPPORT BASED ON THE KWKG 2016, AS AMENDED BY THE LAW OF 22 DECEMBER 2017

- (168) As described under recital 7 the German authorities notified an amendment to the CHP support scheme that the Commission approved on 24 October 2016. That amendment consists in changing the conditions to be fulfilled by CHP installations in order to be eligible for participation in the tenders to be organised as of winter 2017/2018 to select CHP projects that will benefit from support. As a result of that amendment, CHP installations injecting electricity into closed distribution networks will also be eligible for participation in the said tenders ('the amendment'). CHP used for autoconsumption would however remain ineligible for support and are not concerned by the notified amendment. The following section contains the preliminary examination pursuant to Article 4 of Regulation (EU) 2015/1589 of that amendment.

7.1. Existence of aid

- (169) As a result of the amendment described under Section 5 above, a further category of CHP operators would be eligible to take part in the tenders to obtain a fixed premium on top of the market price for electricity. The amendment would thus increase the circle of beneficiaries of the approved aid scheme. It does not change the Commission's assessment of the existence of aid made in recitals 123, 128 to 137, 139 and 144(a) of the Opening Decision. The amendment therefore also constitutes an aid scheme.
- (170) In particular, the amendment gives the CHP installations concerned access to the tenders organised for CHP installations injecting the electricity into public grids. CHP installations selected in the tender will obtain a premium on top of the market price. It provides them with an advantage over other electricity producers who are only obtaining the market price for the electricity they produce. As only operators of CHP installations and

⁽⁴⁴⁾ Commission Decision of 22 July 2009 on State aid SA.26036 (C 24/2009) — Austria — Aid to Large Electricity Consumers (OJ C 217, 11.9.2009, p. 12).

⁽⁴⁵⁾ Commission Decision 2011/528/EU of 8 March 2011 on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ L 235, 10.9.2011, p. 42).

⁽⁴⁶⁾ OJ C 83, 7.4.2009, p. 1.

only certain types of CHP operators can take part in the tender, the advantage is selective. The support is financed from the CHP surcharge described under Sections 2.2 and 2.3 above and is therefore financed from State resources for the reasons set out above under Section 6.1.2 above. The advantage is also likely to affect trade between Member States and competition. Indeed, the operators of CHP installations injecting electricity into closed distribution networks are in competition with electricity providers injecting electricity into public grids. As electricity injected in public grids is subject to trade between Member States and competition between Member States, also the amendment extending the possibility for CHP installations injecting electricity in closed distribution networks is likely to affect trade and competition between Member States.

7.2. Legality

- (171) As the addition of a new category of CHP installations eligible to take part in the tenders has not yet been adopted, Germany has complied with its obligations under Article 108(3) of the Treaty.

7.3. Compatibility

7.3.1. *Contribution to an objective of common interest.*

- (172) The objective of the support remains the same as described in recital 148 of the Opening Decision: it is directed at an increased level of environmental protection through promoting electricity from high energy-efficient cogeneration. The Commission notes in this respect that CHP installations which would become eligible to participate in the tenders would continue to be subject to the high-efficiency requirement in line with paragraph 139 of the EEAG.
- (173) The Commission therefore concludes that the amendment contributes to an objective of common interest in the same way as the original scheme did (see in this regard Section 3.3.1.1 of the Opening Decision).

7.3.2. *Need for State intervention and incentive effect*

- (174) CHP installations injecting electricity into a private grid correspond to the type of CHP installations referred to in the Opening Decision as 'Kontraktor' (see recital 23 of the Opening Decision) and for which the German authorities have provided Levelised Cost of Energy calculations and comparison with market price projections (see Table 5 above).
- (175) Member States need to demonstrate that State aid is necessary to remedy a market failure that otherwise would remain unaddressed (cf. paragraph 37 of the EEAG). In the case of cogeneration, the Commission presumes that energy efficiency measures target negative externalities by creating individual incentives to attain environmental targets for energy efficiency and for the reduction of greenhouse gas emissions (cf. paragraphs 35 and 142 of the EEAG).
- (176) According to paragraph 49 of the EEAG, the Member State must demonstrate that the aid has the effect of incentivising the beneficiaries to change their behaviour in line with the objective of common interest pursued.
- (177) The calculations provided by the German authorities (see Table 5) show that the production costs of electricity from high-efficiency CHP (LCOE) are higher than the electricity market price and that without support such activity would be unlikely to be economically viable.
- (178) CHP installations that are concerned by the amendment will obtain support only if selected in a competitive bidding process; there is thus no need to comply with the form requirement contained in paragraph 51 of the EEAG (see paragraph 52 of the EEAG).
- (179) The Commission therefore concludes that the German authorities have demonstrated that the aid for CHP installations injecting electricity into private grids is needed and that the aid scheme will have an incentive effect.

7.3.3. *Appropriateness of the aid, proportionality and avoidance of undue distortion of competition*

- (180) In line with paragraph 145 of the EEAG, State aid may be considered an appropriate instrument to finance energy efficiency measures, independent of the form in which it is granted. Premiums on top of market price are appropriate aid instruments to compensate CHP plants for the higher production costs of electricity from highly efficient cogeneration as they target the additional cost element that is not covered by the market price.

- (181) The notified amendment would add a new category of CHP operators who could participate to the tender in order to obtain a premium on top of the market price. It corresponds to operating aid for the production of electricity in highly energy-efficient CHP installations, thus paragraph 151 of the EEAG is applicable for the assessment of proportionality.
- (182) For the assessment of proportionality, paragraph 151 of the EEAG makes reference to the conditions applying to operating aid for electricity from renewable energy sources as established in Section 3.3.2.1 of the EEAG.
- (183) The CHP plants concerned by the amendment fall into the category defined in paragraph 151(a) of the EEAG: the electricity produced will be sold to the public (albeit a more limited number of customers than electricity sold into the public grid).
- (184) For the assessment of proportionality, paragraph 151 of the EEAG makes reference to the conditions applying to operating aid for electricity from renewable energy sources as established in Section 3.3.2.1 of the EEAG.
- (185) According to paragraph 124 of the EEAG, the aid must be granted as a premium in addition to the market price whereby the generators sell their electricity directly on the market. In addition, the beneficiaries must be subject to standard balancing responsibilities, unless no liquid intra-day balancing markets exist and finally the scheme must ensure that generators have no incentive to generate electricity when market prices are negative.
- (186) The aid scheme complies with paragraph 124(a) of the EEAG given that the aid paid to selected undertakings will be paid out as a premium on top of the market price and the operator of the CHP installation has to sell the electricity on the market (see recital 79 above). The operator is also subject to normal balancing responsibilities (see recital 79 above). Finally, the scheme does not create any incentives to produce at time of negative prices. Indeed the aid is paid out as a fixed premium and for a limited amount of full load hours. This increases the incentives to sell the electricity at times of higher demand, as this will maximise the revenues and conversely reduces incentives to produce at times of negative prices. In addition, Germany suspends the support at times of negative prices (see recital 79 above).
- (187) Paragraph 126 of the EEAG requires that, from 1 January 2017, aid is granted in a competitive bidding process.
- (188) The amendment complies with this requirement as it consists in adding a category of CHP operators eligible to take part in the tenders that will be organised as of winter 2017/2018. As for the issue of strategic bidding, the Commission notes that the German authorities conducted a study into the economics of CHP installations injecting electricity into private grids which revealed that the competitive advantage was much more limited than initially thought (if at all existing), so that the risk of strategic bidding was sufficiently low for making it possible to include this kind of CHP installations in the same tender. In addition, the German authorities indicated that they will include this element into the evaluation of tenders and further indicated that if signs of strategic bidding are detected, the German authorities would address them in the framework of the tender design and notify the amendments to the eligibility conditions and tender design to the Commission.

7.3.4. *Transparency*

- (189) The amendment does not alter the commitment provided by the German authorities to implement all conditions laid down in Section 3.2.7 of the EEAG. The measures comply with the transparency provision.

7.3.5. *Conclusion*

- (190) Based on the reasons set out in Sections 7.3.1 to 7.3.4, the Commission concludes that the support to new highly-efficient CHP installations used in closed distribution networks is in line with the EEAG, in particular Section 3.4 thereof, and is therefore compatible with the internal market pursuant to Article 107(3)(c) TFUE,

HAS ADOPTED THIS DECISION:

Article 1

The reductions of the CHP surcharges which Germany has implemented pursuant to KWKG 2016 in breach of Article 108(3) TFUE are compatible with the internal market pursuant to Article 107(3)c TFUE following the amendments of 22 December 2016.

Article 2

Individual aid granted on the basis of the aid schemes referred to in Article 1 does not constitute State aid within the meaning of Article 107(1) of the Treaty if, at the time it was granted, it fulfilled the conditions laid down in the Regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 which was applicable at the time the aid was granted.

Article 3

The Commission accepts the adjustment plan for the period 2011-2019 as notified by Germany. Germany shall inform the Commission of the implementation of the adjustment plan.

Article 4

The Commission does not raise objections to the extension of the aid scheme approved by the Decision C(2016) 6714 to new highly-efficient CHP installations used in closed distribution networks, which Germany is planning to implement on the basis of paragraph 33a(2)(b)(bb) of the KWKG 2016, as amended by the Law of 22 December 2016, on the grounds that the extension of the aid scheme is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 May 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission
