

## COMMISSION DECISION

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**

(notified under document C(2011) 1363)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/528/EU)

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 called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup>, and having regard to their comments,

Whereas:

## 1. PROCEDURE

- (1) On 27 June 2008 Austria pre-notified changes that it planned to make to the Green Electricity Act ('the Act'), which the Commission had found to be compatible with the internal market in 2006 in the form in which it then stood <sup>(2)</sup>. On 4 September 2008 Austria notified a new version of the Act; that version is the subject of this Decision.
- (2) By letter dated 28 October 2008, the Commission requested additional information. After a reminder had been sent, Austria submitted additional information by letter dated 22 December 2008. Following a meeting with Austrian representatives on 11 February 2009, the Commission requested further information by letter dated 19 February 2009. Austria provided that information in a letter dated 17 March 2009. By letter of 8 May 2009 the Commission requested further information, which Austria supplied by letters dated 9 and 19 June 2009.
- (3) On 9 July 2008 the Commission received a complaint from the Austrian Chamber of Employees (*Bundesarbeitskammer*) relating to a measure in the Act for the benefit of energy-intensive businesses.

- (4) On 22 July 2009 the Commission adopted a hybrid decision: it approved the measures in favour of green electricity producers, which it found to be in line with the Community guidelines on State aid for environmental protection ('the Environmental Aid Guidelines'/the Guidelines) <sup>(3)</sup>, but decided to initiate a formal investigation in respect of the exemption mechanism for energy-intensive businesses <sup>(4)</sup>.
- (5) By letter dated 23 July 2009 the Commission informed Austria of this decision and asked Austria to provide all information necessary for the assessment of the measure.
- (6) The Commission published its decision in the *Official Journal of the European Union* <sup>(5)</sup>, and invited interested parties to submit their comments.
- (7) By letter of 19 August 2009 Austria requested an extension of the deadline for a reply, which the Commission accepted by letter of 9 September 2009. Austria ultimately submitted its comments on 8 October 2009.
- (8) In the meanwhile, by letter dated 7 October 2009, the Austrian Chamber of Employees had submitted observations on the measure for the benefit of energy-intensive businesses. The Commission asked Austria to comment on these observations. Austria submitted comments on 23 December 2009, and supplied further information on 23 April 2010.
- (9) By letters dated 21 June 2010 and 19 July 2010 the Commission requested additional information from Austria, which was provided on 13 September 2010. At Austria's request, a meeting between the Commission and Austrian representatives took place on 9 July 2010.
- (10) In a letter dated 24 November 2010 Austria stressed the importance of the Green Electricity Act to the country, and asked for a decision in the case by the beginning of December 2010. The Commission replied to that letter on 7 December 2010. A further meeting with Austrian representatives took place on 9 December 2010.

<sup>(1)</sup> OJ C 217, 11.9.2009, p. 12.

<sup>(2)</sup> Commission Decision of 4 July 2006 on State aid measures NN 162a/03 and N 317a/06 — Support of electricity production from renewable sources under the Austrian Green Electricity Act (feed-in tariffs) (OJ C 221, 14.9.2006, p. 8).

<sup>(3)</sup> OJ C 82, 1.4.2008, p. 1.

<sup>(4)</sup> State aid measure C 24/09 (ex N 446/08), C(2009) 3538 final (OJ C 217, 11.9.2009, p. 12).

<sup>(5)</sup> See footnote 1.

- (11) By letter of 30 December 2010 Austria recalled the arguments it had put forward in favour of the measure in the course of the proceedings, and asked the Commission to approve the exemption mechanism for energy-intensive businesses. The Commission replied to that letter on 25 January 2011.

## 2. DETAILED DESCRIPTION OF THE MEASURE

- (12) In its opening decision of 22 July 2009 the Commission authorised the amended Act, with the sole exception of Section 22c, which establishes the exemption mechanism for energy-intensive businesses. The description here will therefore confine itself to that mechanism.

### 2.1. The exemption mechanism for energy-intensive businesses

- (13) Section 3 of the Act states that Austria is to grant a concession to one or more undertakings to perform the tasks of a green electricity settlement centre (*Ökostromabwicklungsstelle*, a 'settlement centre'). In particular, concessionaires are to buy green electricity from producers at a fixed price, and to sell that electricity to electricity suppliers at a fixed price. Electricity suppliers are obliged to purchase a percentage of their overall supply from a settlement centre: the percentage required corresponds to the average share of green electricity in the overall electricity mix in Austria.

- (14) Currently, Austria has granted a single countrywide concession to a single settlement centre, *Abwicklungsstelle für Ökostrom AG (OeMAG)*. OeMAG is an ordinary public limited company, governed by private rather than public law, and is audited by a chartered accountant. It is monitored by the Austrian Federal Ministry of Economic Affairs and Labour and by E-Control GmbH, the Austrian energy regulator. The essential components in the implementation of the measure for the benefit of energy-intensive businesses (such as the arrangements for allocating electricity to electricity traders, the price to be paid by traders, or the contribution to be made by final consumers) are laid down in advance by the authorities, by statute or executive order. Any dispute between the undertakings involved is to be settled in the ordinary courts of law rather than by administrative proceedings.

- (15) OeMAG is a public limited company owned by transmission system operators, banks and industrial undertakings: a 24,4 % stake is held by Verbund-APG, and the rest is held by VKW Netz AG, TIWAG Netz AG, CISMO GmbH, Oesterreichische Kontrollbank AG, Investkredit Bank AG, and Smart Technologies, with 12,6 % each. Verbund-APG is a wholly owned subsidiary of Verbund AG (Österreichische Elektrizitätswirtschafts-Aktiengesellschaft, Verbundgesellschaft); a 51 % stake in Verbund AG is held by the Republic of Austria. VKW Netz AG is owned by Illwerke AG, 95,5 % of the shares in which are held by the Province of Vorarlberg. TIWAG-

Netz AG is owned by TIWAG AG, which itself is wholly owned by the Province of the Tyrol. CISMO GmbH is owned by Oesterreichische Kontrollbank AG and by transmission system operators and electricity and gas undertakings. Oesterreichische Kontrollbank AG is owned by Austrian banks. Investkredit Bank AG is owned mainly by the *Volksbanken*. Smart Technologies is owned by Siemens. Thus publicly controlled shareholders hold 49,6 % of the shares in OeMAG, and privately controlled shareholders 50,4 %. The Commission has no evidence to suggest that the publicly controlled shareholders can exercise control or at least joint control over OeMAG.

- (16) Section 22c(1) of the Act establishes a mechanism that entitles energy-intensive businesses to ask their electricity supplier not to supply them with green electricity. In order to be eligible, the energy-intensive businesses have to show that they comply with the following two conditions:

- (a) they must qualify for the reimbursement available under the Energy Tax Rebate Act (*Energieabgabevergütungsgesetz*); and
- (b) their green electricity spending must be equal to at least 0,5 % of their net production value.

The exemption is granted on application to the energy regulator, E-Control.

- (17) If the exemption is granted, electricity suppliers are legally banned from charging the additional costs of green electricity to these large electricity consumers.

- (18) Section 22c(5) of the Act states that contracts between electricity distributors and large electricity consumers must provide that the distributor is not to supply green electricity to the customer and is not to pass on the additional costs of green electricity. Any contractual provision to the contrary is null and void <sup>(6)</sup>.

- (19) If an energy-intensive business is exempted from the purchase obligation, it has to make a compensatory payment to OeMAG equal to 0,5 % of its net production value in the preceding calendar year (Section 22c(2) of the Act).

<sup>(6)</sup> Section 22c(5) of the Act: 'Verträge zwischen Stromhändlern und Endverbrauchern haben für den Fall des Vorliegens eines Bescheids nach Abs. 1 zwingend vorzusehen, dass diesen Endverbrauchern ab dem Zeitpunkt der Entlastung der Quote der Stromhändler (§ 15 Abs. 1 Z 3 und Abs. 1a) kein Ökostrom, der den Stromhändlern von der Ökostromabwicklungsstelle zugewiesen wird (§ 19 Abs. 1), geliefert wird und keine Überwälzung von Ökostromaufwendungen erfolgt. Entgegenstehende Vertragsbestimmungen sind nichtig'.

## 2.2. Summary of the opening decision

- (20) In the notification, Austria argued that the exemption mechanism should be assessed independently from the general scheme of aid to green producers, since it concerned only the 'private business relationship' between energy-intensive undertakings and distributors. Austria argued that the exemption did not constitute State aid, and that if it did it was in any event compatible with the internal market by analogy with Chapter 4 of the Environmental Aid Guidelines.
- (21) On the question of the presence of State aid, the Commission in its opening decision found that the exemption from the financing mechanism could not be assessed separately from the financing mechanism itself. The Commission considered that an exception or exemption was always inseparably linked to the relevant rule, so that the exemption was an integral part of the general scheme and had to be assessed accordingly under State aid law. In addition, the legislation permitted distributors with a large share of exempted customers to apply for exemption from the feed-in tariff; thus the scheme could also cause direct losses to OeMAG, which strengthened the conclusion that State aid was involved <sup>(7)</sup>.
- (22) The Commission expressed doubts with regard to the compatibility of the exemption mechanism with the State aid rules. For these reasons the Commission decided to open a formal investigation into the mechanism.
- (23) Pending a final decision on the part of the Commission, Austria granted the benefits provided for in the exemption mechanism <sup>(8)</sup> on the basis of the provision in the Temporary Framework allowing aid of up to EUR 500 000 to be given in the period from 1 January 2008 to 31 December 2010 <sup>(9)</sup>. The Commission approved this arrangement as part of State aid measure No N 47a/09 *Limited amounts of compatible aid under the Temporary Framework* ('Österreichregelung Kleinbeihilfen') <sup>(10)</sup>. This scheme may be applied to firms that were not in difficulty on 1 July 2008, in all sectors of

the economy with the exception of fisheries and primary production of agricultural products. More than 2 000 undertakings have benefited under the measure.

## 3. OBSERVATIONS PUT FORWARD BY AUSTRIA

- (24) As in the pre-notification and notification stages, Austria continues to take the view that the measure for the benefit of energy-intensive businesses does not constitute State aid, because it does not involve the use of State resources and is not selective.
- (25) But even if the exemption mechanism did constitute State aid, Austria considers that it could in any event be declared compatible with the internal market by analogy with Chapter 4 of the Environmental Aid Guidelines, with Article 25 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) <sup>(11)</sup>, and with Article 17 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity <sup>(12)</sup> (Energy Tax Directive).

### 3.1. State resources and imputability

- (26) With regard to State resources, Austria takes the view that the Act is analogous to the German Renewable Energy Act (*Erneuerbare-Energien-Gesetz*), which in Austria's understanding does not involve the use of State resources. Austria refers in this regard to the ruling of the Court of Justice in the *PreussenElektra* case <sup>(13)</sup>.
- (27) In Austria's opinion the exemption mechanisms established by the Austrian Green Electricity Act and the German Renewable Energy Act share the following features:

- (a) in both systems the additional cost resulting from the guaranteed feed-in tariff is borne by electricity suppliers, who have to buy a certain proportion of renewable energy at a fixed price;
- (b) in both systems electricity suppliers are free not to buy renewable electricity for those of their clients who are exempt from the obligation to take such renewable electricity;

<sup>(7)</sup> Section 15(1a) of the Act: 'Weisen Stromhändler der Ökostromabwicklungsstelle nach, dass sie Endverbraucher beliefern, die einen Bescheid nach § 22c Abs. 1 erwirkt haben, so ist dieser Umstand von der Ökostromabwicklungsstelle bei der Festlegung der Quoten für die Stromhändler (§ 15 Abs. 1 Z 3) ohne Verzögerung zu berücksichtigen. Hinsichtlich dieser Strommengen, für die keine Zuweisung erfolgen darf, erhöht sich die Quote aller Stromhändler für die übrigen Stromlieferungen. Sofern eine Quotenanpassung aufgrund der geltenden Marktregeln nicht unmittelbar durchgeführt werden kann, ist die Ökostromabwicklungsstelle ermächtigt, den als Folge des Entfalls von Zuweisungsmöglichkeiten anfallenden Energieüberschuss im Sinn des § 15 Abs. 4 bestmöglich zu verwerten'.

<sup>(8)</sup> Austrian submission of 9 September 2010, p. 5, replying to the Commission's request for information of 19 July 2010.

<sup>(9)</sup> Commission Regulation (EC) No 1998/2006 (OJ L 379, 28.12.2006, p. 5).

<sup>(10)</sup> OJ C 106, 8.5.2009, p. 8.

<sup>(11)</sup> OJ L 214, 9.8.2008, p. 3.

<sup>(12)</sup> OJ L 283, 31.10.2003, p. 51.

<sup>(13)</sup> Case C-379/98 [2001] ECR I-2099.

- (c) in both systems the obligation to buy renewable electricity from producers is imposed upon market participants who are not acting in a public service role; these market participants are entitled by law to pass on the additional costs to electricity suppliers, and purchase obligations and prices are determined by law;
- (d) in both systems, the regulator verifies that there is no overcompensation of an undertaking that has an obligation to purchase renewable electricity from producers.
- (28) In paragraphs 42–48 of the opening decision, the Commission explained in detail why and in what respects the measure under assessment was comparable to the measure considered by the Court of Justice in the *Essent* case<sup>(14)</sup>. Austria disputes these findings, on the following grounds.
- (a) OeMAG is not a body designated by the State for the purpose of collecting a charge. In Austria's understanding the grid operators in Germany play exactly the same role as OeMAG did in Austria.
- (b) OeMAG is a private undertaking, and not a body governed by public law like the corporations that were discussed in the judgments in *Air France*<sup>(15)</sup> and *Salvat Père*<sup>(16)</sup>. The State has no powers to appoint members of the management or the supervisory board, nor has it any supervisory powers or veto rights over OeMAG's decisions. The State has no power to take over OeMAG's functions.
- (c) Any litigation involving OeMAG is a matter for the ordinary courts.
- (d) The only public control to which OeMAG is subject is an ex post audit by the Austrian Court of Auditors.
- (e) The State budget does not cover any losses made by OeMAG. The role of the public authorities is limited to fixing the prices for the purchase and sale of renewable electricity. There is therefore no burden on the State budget of the kind shown in *Sloman Neptun*<sup>(17)</sup> and *Pearle*<sup>(18)</sup>.
- (f) E-Control enjoys no discretion as to whether to grant an exemption under Section 22c of the Act.
- (g) The total amount of money the electricity suppliers pay to OeMAG is not affected by the exemption

mechanism. All that changes is the distribution of the overall amount between the different categories of final electricity consumer.

### 3.2. Selectivity

- (29) Austria argues that the exemption for energy-intensive businesses does not constitute State aid, because it is not selective.
- (30) Energy-intensive businesses are exempted only partially from financing the support provided to producers of green electricity. They have to make a compensatory payment of 0,5 % of their net production value directly to OeMAG, and thus continue to contribute to the financing of the support for the production of green electricity.
- (31) Citing the judgment in *Adria-Wien Pipeline*<sup>(19)</sup>, Austria argues that the measure is not restricted to certain sectors of the economy de jure, nor is it selective de facto. But even if there is prima facie selectivity, it is in any event justified by the rationale of the system.
- (32) *De jure selectivity*: The Green Electricity Act does not restrict the measure to certain sectors of the economy or to undertakings of a certain size, nor does it include any other selective criteria. In support of its argument Austria submits that there is nothing in the case-law to suggest that the selectivity test for State aid is satisfied merely because a net production value threshold has been laid down. In addition, Austria points out that the measure is not restricted to particular sectors of the economy or to undertakings of a certain size, nor is it subject to any other selective criteria: under the temporary arrangements in operation, the measure affects 19 different sectors and approximately 2 300 undertakings. Thus the measure is not selective de jure.
- (33) *De facto selectivity*: According to Austria, the high number of sectors and undertakings affected by the exemption mechanism and the fact that the measure is not restricted to certain sectors or to undertakings of a certain size, or subject to any other selective criteria, show that the measure is de facto a general measure. Austria submits that this position too is supported by the *Adria-Wien Pipeline* case. In *Adria-Wien Pipeline* the Court of Justice had to consider a partial reimbursement of an energy tax which was granted to undertakings if the tax exceeded 0,35 % of their net production value. The Court held that 'National measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid within the meaning of Article 92 of the EC Treaty [now Article 107 of the TFEU] ... where they apply to all undertakings in national territory, regardless of their activity'<sup>(20)</sup>.

<sup>(14)</sup> Case C-206/06 [2008] ECR I-5497.

<sup>(15)</sup> Case T-358/94 [1996] ECR II-2109.

<sup>(16)</sup> Case T-136/2005 [2007] ECR II-4063.

<sup>(17)</sup> Joined Cases C-72/91 and C-73/91 [1993] ECR I-887.

<sup>(18)</sup> Case C-345/02 [2004] ECR I-7139.

<sup>(19)</sup> Case C-143/99 [2001] ECR I-8365.

<sup>(20)</sup> *Adria-Wien Pipeline*, paragraph 16.

(34) *Justification by the rationale of the system:* With regard to the structure of the refinancing and exemption mechanism, Austria takes the view that the design of the differentiation of charges is analogous to what exists in other tax- and fee-financed systems. The differentiation takes account of the capacity of undertakings to bear additional charges; it is in line with the rationale of the system, and consequently does not constitute State aid. Austria considers that this position has also been taken by the Commission in two earlier State aid decisions <sup>(21)</sup>.

(35) Further, Austria points out that the exemption mechanism does not impair the environmental benefits provided by the Act, since the amount of aid available for supporting the production of green electricity is not reduced. Reducing environmental charges for certain businesses is the only way to establish a sustainable financing mechanism for green electricity, which is necessary in order to ensure support for renewable energy sources.

### 3.3. Compatibility

(36) On the question of compatibility, Austria submits that Chapter 4 of the Environmental Aid Guidelines can be applied to the exemption mechanism by analogy.

(37) Chapter 4 of the Guidelines (points 151–159) sets out requirements for State aid granted in the form of reductions of or exemptions from environmental taxes. It provides for two types of assessment. First, if the aid is in the form of a reduction of or exemption from an environmental tax that has been harmonised under Community law, the measure is compatible provided the beneficiaries pay at least the Community minimum tax level set by the Energy Tax Directive <sup>(22)</sup>. If the measure provides for reductions of or exemptions from harmonised environmental taxes that go beyond these minimum tax levels, or reductions of or exemptions from environmental taxes that have not been harmonised, the Member State has to provide detailed information on the necessity and proportionality of the measure.

(38) Austria proposes that Chapter 4 of the Guidelines, regarding aid in the form of reductions of or exemptions from environmental taxes, should be applied by analogy here. In Austria's opinion the measure can be assessed by

analogy in particular with the provisions on harmonised environmental taxes. On this legal basis, the exemption mechanism can be held compatible provided that the undertakings in question pay the minimum tax level set by the Energy Tax Directive, i.e. EUR 0,50 per MWh, which indeed they do. It follows that the additional relief from the feed-in tariff system in the form of a partial exemption from contributing to its financing can be considered compatible, since the contribution that still has to be made to the financing of support for the production of green electricity continues to function as a supplement to the minimum electricity tax.

(39) Austria considers that the exemption mechanism leads at least indirectly to a higher level of environmental protection. In its view, the exemption mechanism is necessary in order to render possible a general increase in the amount that electricity consumers pay for renewable electricity.

(40) Austria supports this argument by comparing the wordings of point 152 of the Environmental Aid Guidelines and Article 25 of the General Block Exemption Regulation <sup>(23)</sup>. After comparing the wordings of the General Block Exemption Regulation in several language versions, Austria comes to the conclusion that Article 25 of the Regulation is broader in scope than point 152 of the Guidelines: the reductions in environmental taxes referred to in point 152 of the Guidelines require energy taxes that have been fully harmonised, but from Article 25 of the Regulation it is clear that reductions in environmental taxes — such as reductions in an electricity charge under the Energy Tax Directive — are exempted provided that the conditions of the Energy Tax Directive are fulfilled. The exemption mechanism for energy-intensive businesses in fact reproduces the requirements for tax reductions in the Energy Tax Directive. The rationale, the evaluations and the approach in the Energy Tax Directive and provisions that refer to it, such as Article 25 of the General Block Exemption Regulation, are consequently applicable to the proposed exemption mechanism. Both the exemption mechanism and the system for placing the cost on electricity consumption meet the conditions of the Energy Tax Directive, and are therefore justified under Article 25 of the General Block Exemption Regulation, or compatible with the internal market by analogy with that Article <sup>(24)</sup>.

(41) Austria refers here to the *Joint paper on the revision of the Community guidelines on State aid for environmental*

<sup>(21)</sup> N 271/06, Denmark, tax relief for supply of surplus heating (OJ C 41, 24.2.2007, p. 2); N 820/06, Germany, tax relief for certain energy-intensive processes (OJ C 80, 13.4.2007, p. 4).

<sup>(22)</sup> Directive 2003/96/EC.

<sup>(23)</sup> Regulation (EC) No 800/2008.

<sup>(24)</sup> Austria's comments on the Commission's opening decision of 22 July 2009, submitted on 9 September 2010.

protection and Energy Tax Directive of 7 July 2006<sup>(25)</sup>. The joint paper made it clear that Member States needed flexibility in order to be in a position to differentiate reasonably. It was part of the nature and logic of environmental taxes and charges that there should be exemptions or differentiated rates. The Member States therefore felt that the Environmental Aid Guidelines and the General Block Exemption Regulation should be interpreted broadly.

- (42) Finally, Austria submits detailed argument to show that similar systems are in place in other Member States, and stresses that the Green Electricity Act is largely comparable to the German Renewable Energy Act. Since energy-intensive businesses in Austria compete with undertakings in other Member States (e.g. Germany) and outside the EU, the exemption mechanism is essential in order to ensure that they are not placed at a disadvantage in international competition.

#### 4. OBSERVATIONS RECEIVED FROM THIRD PARTIES

- (43) The Austrian Chamber of Employees submitted observations on the opening of the formal investigation. The organisation, which had 3,2 million members, considered that the financing system of the Green Electricity Act involved State aid. It did not share Austria's view that the exemption mechanism for energy-intensive consumers was compatible with State aid law. The mechanism placed an additional burden on small and medium-sized enterprises (SMEs) and households, which were obliged to pay the extra costs of green energy even though they were not the main consumers. This would lead to distortion of competition at the expenses of SMEs.
- (44) The Chamber of Employees referred to the Commission decision of 4 July 2006, in which the Commission concluded that the feed-in tariffs constituted State aid<sup>(26)</sup>. Since the legal framework governing the feed-in tariffs had not changed since that time, the Chamber argued that the support system provided for in the Green Electricity Act of 2008 continued to involve State aid. The Chamber wondered how Austria could now defend a position different from the one it had expressed when it notified the earlier version of the Act.
- (45) The Chamber did not agree with Austria that the exemption of large consumers from the purchase obligation, as provided in the Act, should be regarded in the same light as the cap on energy taxes. Austria, citing an earlier Commission decision approving a cap on energy taxes, was now also seeking approval for the exemption

mechanism for large consumers of electricity; this was not admissible. The Chamber considered that the analogy was not a legitimate one.

- (46) The cap on energy taxes was State aid, granted through the tax system, which was aimed at least indirectly at an improvement in environmental protection, whereas the exemption from the purchase obligation for energy-intensive businesses did not pursue any environmental objective and could not be subsumed under the Environmental Aid Guidelines.
- (47) Since the Act provided specifically for the exemption of large consumers from such a purchase obligation, the provision could not be regarded as a reduction of or exemption from environmental taxes within the meaning of Chapter 4 of the Guidelines.
- (48) Further, even if Chapter 4 could be applied by analogy, the exemption mechanism would not be compatible with it, for the following reasons. The measure was not limited to a period of 10 years. In current market conditions price elasticity was sufficient to ensure that any increase in the production costs of the industries concerned (such as paper and steel) could be passed on to consumers; this meant that the exemption mechanism did not meet the condition in point 158(c) of the Guidelines.
- (49) The exemption was not proportional, because energy-intensive consumers were not required to consume green electricity, so that the movement of renewable energy prices towards market price level would be delayed. SMEs and households alone had to pay for the extra costs of producing green electricity, although they consumed only small volumes of energy. The exemption mechanism consequently also failed to meet the condition in point 159(a) of the Guidelines.
- (50) Nor were there any agreements of the kind referred to in 159(c) of the Guidelines by which large energy consumers committed themselves to achieve the objectives of the Act. Finally, the exemption mechanism for large consumers did not contribute to energy efficiency or environmentally friendly use of energy, but on the contrary excepted those consumers from any share in achieving EU-wide environmental objectives.
- (51) Section 22 of the Act was consequently an operational aid measure *sui generis*, which did not produce any environmental benefit and did not fall under the Environmental Aid Guidelines. Since this aid was not limited

<sup>(25)</sup> Published by Germany, Denmark, the Netherlands, Finland, Sweden and Austria.

<sup>(26)</sup> See footnote 2.

in time, and was not scheduled to decrease over time, and since it distorted competition mainly at the expense of SMEs, it should not be authorised.

## 5. ASSESSMENT

(52) The Commission has examined the notified measure in the light of Articles 107 ff. of the TFEU and Articles 61 ff. of the EEA Agreement <sup>(27)</sup>.

(53) The Commission points out, first of all, that the notified legislation contains two separate measures, both of which were considered under State aid law in the Commission's opening decision of 22 July 2009 <sup>(28)</sup>. The Act provides for aid in the form of a feed-in tariff for the benefit of producers of green electricity. It also contains a provision by which energy-intensive businesses can — under certain conditions — be partially exempted from the obligation to pay the feed-in tariff. In its decision of 22 July 2009 the Commission accepted that the feed-in tariffs for the benefit of green electricity producers constituted State aid compatible with the internal market, but it expressed doubts as to whether the exemption mechanism was compatible with the State aid rules, and accordingly opened a formal investigation into this aspect of the Act. In the decision of 22 July 2009 the Commission approved the support for producers of green electricity as compatible State aid, but it did not take a final position on the question whether the exemption of energy-intensive businesses from the purchase obligation constituted State aid, and if so whether this exemption mechanism was compatible with the State aid rules. These questions have been considered in the formal investigation that has led up to the present Decision. As explained below, however, the finding in the decision of 22 July 2009 that the funds channelled through OeMAG to green electricity producers are State resources is important for the determination of the presence of State resources in the mechanism that exempts energy-intensive businesses from contributing to these funds.

### 5.1. Presence of State aid

(54) A measure constitutes State aid caught by Article 107(1) TFEU if: first, it confers an advantage on the recipients; second, it is financed by the State or through State resources; third, it favours selected undertakings or economic activities; and, fourth, it has the potential to affect trade between Member States and to distort or threaten to distort competition in the internal market.

<sup>(27)</sup> The assessment conducted here is based on both the TFEU and the EEA Agreement. For the sake of simplicity, however, reference will be made only to the provisions of the TFEU.

<sup>(28)</sup> Commission decision regarding State aid measure C 24/09 (ex N 446/08) — The Austrian Green Electricity Act — potential aid to large electricity consumers.

#### 5.1.1. Advantage

(55) Where the possible advantage results from an exemption or a partial exemption from a regulatory charge, the only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question <sup>(29)</sup>.

(56) In the present case, the objective pursued by the measure in question is to raise revenue from electricity users in order to finance the production of electricity from renewable sources. Energy-intensive businesses are in the same factual and legal situation as all other electricity users, as they all consume electricity and purchase their electricity from electricity suppliers, which in turn have the obligation to purchase a certain amount of renewable electricity at a price fixed by legislation (the 'clearing price' (*Verrechnungspreis*)). In the absence of the exemption mechanism, energy-intensive businesses would have to pay their electricity suppliers the additional costs of green electricity as shown in their electricity bill. This is the way in which electricity suppliers pass on the additional costs resulting from their obligation to purchase green electricity from the settlement centre. Other electricity users that are in the same factual and legal situation, as they all purchase electricity, do not enjoy this possibility. The exemption mechanism consequently favours energy-intensive businesses in comparison with all other electricity consumers.

(57) On the basis of an exemption granted by E-Control, energy-intensive businesses are entitled to ask not to be supplied with green electricity, and the electricity suppliers are prohibited, by law, from passing on to the exempted undertakings any costs they incur as a result of their obligation to buy green electricity from the settlement centre. Instead, energy-intensive businesses pay the equivalent of 0,5 % of their net production value to the centre.

(58) The effect of the exemption mechanism, therefore, is to cap the contribution of energy-intensive industries to the revenues of the centre at a certain level. They are thus partially exempt by law from a charge which they would have had to bear under normal market conditions. The exemption mechanism consequently confers an advantage on the undertakings which are eligible for it.

<sup>(29)</sup> Court of Justice in Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 28–31, and Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41.

(59) According to Austria, the relief may amount to a total of up to EUR 44 million annually<sup>(30)</sup>. The measure thus constitutes an advantage to these energy-intensive businesses.

#### 5.1.2. State resources and imputability

It is settled case-law that an advantage can be categorised as State aid under Article 107(1) TFEU only if it is granted directly or indirectly through State resources and the use made of the resources is imputable to the State<sup>(31)</sup>.

(60) In that regard Austria puts forward a twofold argument. First, the funds under the control of OeMAG do not constitute State resources. Second, even if the funds under the control of OeMAG do constitute State resources, the reduction in OeMAG's revenues due to the exemption mechanism does not reduce State resources, because there is no involvement of the State at the level below OeMAG (i.e. at the level of the energy-intensive consumers and electricity distributors).

(61) The Commission observes that the exemption mechanism for energy-intensive businesses reduces the revenues of the settlement centre — OeMAG — as the electricity suppliers are not obliged to purchase green electricity for those energy-intensive businesses that have been granted an exemption, and the direct payment made to OeMAG by the energy-intensive businesses is lower than what OeMAG would have received had the energy-intensive businesses not been exempted.

(62) Accordingly, the Commission needs to establish whether the resources which on the basis of the Green Electricity Act are under the control of the settlement centre, that is OeMAG, constitute State resources. If that is the case, the measure under assessment leads to a reduction in State revenue, and is therefore financed from State resources.

(63) In the *Essent* case<sup>(32)</sup>, SEP, an undertaking owned by a number of Dutch electricity generating companies, had been entrusted by the State with a public service obligation to collect revenues from a surcharge imposed on the users of the electricity grid. The law allowed SEP to use the revenues of the surcharge only for the purpose set out in the law, that is to say in order to defray stranded costs incurred by the electricity undertakings in the context of the liberalisation of the electricity market.

(64) The Court of Justice found that the surcharge collected by SEP constituted a State resource, because the following conditions were met:

(a) the surcharge was a charge imposed upon private entities by an act of public authority (paragraphs 47–66 of the judgment);

(b) the State had given SEP the task of operating an economic service of general interest, namely the task of collecting the charge (paragraph 68);

(c) SEP was not entitled to use the proceeds from the charge for purposes other than those provided for by the law, and it was strictly monitored in carrying out its task (paragraph 69).

(65) The judgment made it clear that the measure in question differed from that considered in *PreussenElektra*, because there 'the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources'<sup>(33)</sup>. In its opening decision of 22 July 2009 the Commission observed that OeMAG had been set up and licensed by the Austrian State, and in its founding documents had been given the task of administering the resources needed to support green electricity. The Commission concluded that the fact that OeMAG was private was not enough to show that the measure did not involve State aid. In particular, the notified measure was not comparable to the scheme in *PreussenElektra*. The *PreussenElektra* case was concerned with relations between private undertakings, without the involvement of any intermediate body, whereas the Green Electricity Act in Austria had given OeMAG the task of collecting and distributing the funds intended for the generation of green electricity.

(66) The Court also distinguished the *Essent* case from the cases of *Pearle* and *PreussenElektra*: in *Pearle*, the funds collected by a professional body were used not for a policy decided by the public authorities, but for a private advertisement campaign; while in *PreussenElektra*, private electricity undertakings which were required to purchase renewable electricity at a fixed price were using their own resources, and not the proceeds of a charge they had collected on behalf of the State (paragraphs 72–74).

(67) In the present case, therefore, the Commission must assess whether OeMAG has been designated by the State to collect and administer a charge, as SEP was, or whether it is using its own funds, as the undertakings in *PreussenElektra* were<sup>(34)</sup>.

(68) **Presence of a charge:** The Commission first needs to establish whether the money collected by OeMAG constitutes a charge. Sections 10 and 19 of the Green Electricity Act require electricity suppliers to purchase a certain volume of renewable electricity at a price above the market price, called the 'clearing price' (*Verrechnungsspreis*). Section 22b of the Act states that the level of the

<sup>(30)</sup> Austrian submission of 9 September 2010, replying to the Commission's request for information of 19 July 2010.

<sup>(31)</sup> Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397, paragraph 24.

<sup>(32)</sup> See footnote 14.

<sup>(33)</sup> *Essent*, paragraph 74.

<sup>(34)</sup> To this effect see also *Essent*, paragraph 74.



clearing price is to be set annually by order of the Federal Minister for Economic Affairs and Labour, and goes on to lay down default values. The difference between the market price for electricity and the clearing price, which is set by an act of public authority, constitutes a charge on electricity. In the present case the charge is not paid to other market players engaged in ordinary commercial business, as it was in *PreussenElektra*, which led the Court to find that no State resources were involved. Here payments are made to a body that has the specific task of collecting and distributing these funds solely for purposes in the public interest.

(69) **Designation of a private body to collect and administer the charge:** The Act provides that the charge is to be levied, not by the State, but by a legal entity that holds a concession to act as a settlement centre. A concession to act as settlement centre for the whole of Austria is currently held by OeMAG. The concession gives OeMAG the public service obligation of collecting a charge in the form of the clearing price from all electricity suppliers.

(70) Electricity suppliers are generally free to pass that charge on to electricity consumers, and from an economic point of view it can be assumed that they will normally do so. However, the Act prohibits them from passing the charge on to those energy-intensive businesses which have been exempted in accordance with Section 22c of the Act from the obligation to purchase renewable electricity.

(71) The Commission concludes that OeMAG has been entrusted by the State with an economic service of general interest, namely collecting and administering the charge.

(72) **Control of the funds and use for a purpose designated by law:** Section 23 of the Act requires OeMAG to hold the revenues from the clearing price in a dedicated bank account. The funds collected on this account can be used only for the purpose of purchasing renewable electricity. OeMAG must grant access at any time to all documents concerning the account to the Federal Ministry of Economic Affairs and Labour or to the Austrian Court of Auditors. Irrespective of the ownership structure of OeMAG, Section 15 of the Act also requires the Court of Auditors to carry out ex post audits of OeMAG.

(73) The Commission concludes that OeMAG has to use the funds for a purpose designated by law, and that the State exercises strict control over their use.

(74) In line with the *Essent* and *Steinike* cases, the Commission concludes that the funds collected and administered by OeMAG constitute State resources.

(75) Austria has presented a series of arguments in support of its view that the situation of OeMAG is comparable to that in *PreussenElektra* rather than that in *Essent*. It will be shown in the following recitals that these arguments do not withstand scrutiny.

(76) The Commission observes first of all that Austria compares the Green Electricity Act to the German Renewable Energy Act, as it was earlier and as it is now, citing the judgment of the Court of Justice in *PreussenElektra* <sup>(35)</sup>. But that comparison is not relevant to the question at issue here. In the present Decision the Commission is examining only the proposed measure, and will not try to assess the German or any other similar legislation: each case must be dealt with on its own merits. With reference to the arguments put forward, however, it must be observed that the Austrian legislation differs substantially from the German Act that was considered in *PreussenElektra*. In *PreussenElektra* the Court of Justice found that only advantages granted directly by the State or by a private body designated or established by the State could involve the use of State resources. The Court then found that the purchase obligation imposed on private electricity supply undertakings did not involve any direct or indirect transfer of State resources. The scheme notified here is thus not identical to the scheme considered in *PreussenElektra*. As it said in its opening decision of 22 July 2009, the Commission takes the view that the Austrian scheme involves the use of resources that are imputable to the State. The Austrian scheme differs from the German one in particular in that it provides for an intermediate body such as OeMAG which is designated by the State, and the State monitors and checks the collection and distribution of the resources administered by that body. The Commission also finds that the Austrian scheme may allow direct payments from the State to OeMAG.

<sup>(35)</sup> Case C-379/98 *PreussenElektra* [2001] ECR I-2099. The Court of Justice had to consider the German feed-in tariff system of 1998; it found that the scheme did not involve State aid. The German Act directly regulated relations between producers of green electricity and electricity distributors by requiring private electricity distributors to buy electricity produced from renewable sources in their area of supply at a minimum price known as the 'feed-in tariff' (*Einspeisetarif*). Distributors were then free to decide how the additional cost of green electricity should be recovered from consumers. To ensure that purchases of green electricity were shared fairly, energy undertakings had to compensate one another for the volumes of green electricity bought. This gave them larger or smaller volumes of green electricity purchased depending on their market shares.

- (77) With regard to the current German Renewable Energy Act, it should be observed that that measure is not the subject of this Decision; the Commission has not yet made an assessment of it, and consequently cannot enter into detailed consideration of a supposed analogy between the Austrian Green Electricity Act and the current German Renewable Energy Act.
- (78) Austria argues furthermore that OeMAG is a private undertaking, and not a body governed by public law like the corporations that were discussed in the judgments in *Air France* and *Salvat Père*. The Austrian authorities can exercise control over OeMAG only by verifying its accounts *ex post* and by withdrawing its concession.
- (79) The Commission points out in this regard that it is clear from the judgment in *Essent* that where the State designates a body to collect and administer the revenues of a charge, there is no need to draw any distinction according to whether that body is public or private. In its findings the Court did not give any indication as to whether SEP was publicly or privately owned; it follows that this fact was not relevant to its judgment. This is in line with point 106 of the conclusions of Advocate-General Mengozzi in *Essent*, and with the judgment of the Court of Justice in *Steinike* <sup>(36)</sup>.
- (80) Therefore, the fact that OeMAG is a privately controlled undertaking does not preclude the presence of State resources. The decisive question is whether it has been designated by the State to collect a charge and administer it.
- (81) Austria further argues that the State budget does not cover any losses that may be made by OeMAG, and that the role of the public authorities is limited to setting the prices for the purchase and sale of renewable electricity; there is therefore no burden on the State budget of the kind that was shown in *Sloman Neptun* and *Pearle*.
- (82) The Commission observes that it was shown in *Essent* that money at the disposal of a private entity that had been designated by the State to collect and administer a charge constituted a State resource. Accordingly, a reduction in the level of the charge paid by certain undertakings subject to the charge is sufficient to constitute a burden on the State.
- (83) With regard to the Austria's argument that E-Control enjoys no discretion in exempting energy-intensive busi-
- nesses from the purchase obligation, the Commission points out that, as Advocate-General Mengozzi explained in point 109 of his opinion in *Essent*, the fact that the body designated to collect and administer the charge enjoys no discretion is without bearing on the question whether these funds constitute State resources.
- (84) Austria's last argument is that the overall amount of money the electricity suppliers pay to OeMAG is not affected by the exemption mechanism, which changes only the distribution of the overall amount between the different categories of final electricity consumers; the Commission observes that the fact that a loss of State revenues may be offset by an increase in State revenues from other sources has no bearing on the question whether State resources are being used. What is decisive is that an undertaking enjoys an advantage, and that this advantage reduces the revenues to the State from that undertaking. It is obvious that the State will ultimately have to find other sources of revenue to make good the shortfall.
- (85) The Commission concludes that the facts in the present case correspond to the facts considered in *Essent* and *Steinike*: all the tests for the presence of State resources established in *Essent* and *Steinike* are satisfied. The measure being assessed is therefore financed from State resources.
- (86) The use of the funds under the control of OeMAG is regulated by law, namely by the Green Electricity Act. The use of the funds is therefore imputable to the State.

#### Conclusion

- (87) It follows that the exemption mechanism leads to a loss of State resources, and is imputable to the State.

#### 5.1.3. Selectivity of the measure

- (88) The Commission points out that even if the measure might in theory appear to be neutral in terms of both undertakings and economic sectors, it may still be selective in practice.
- (89) Austria argues that the exemption mechanism does not constitute State aid since it is not selective but is a general measure open to all undertakings and sectors. First, Austria submits that the 0,5 % threshold in the notified scheme does not impose any restriction in terms of specific industries, size of undertaking or other selective criteria <sup>(37)</sup>. Second, Austria has found that the measure in fact affects 2 300 undertakings in 19 different sectors; it says this shows that the measure is indeed open to all undertakings and sectors of the economy.

<sup>(36)</sup> Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21: 'The prohibition contained in Article 92(1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid. In applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid.'

<sup>(37)</sup> Austria provided this data on the basis of experience with the application of an adapted version of the scheme, with aid intensities below the notification thresholds.

## The 0,5 % threshold

- (90) A measure is selective if it favours only certain undertakings or the production of certain goods. It is not selective if it applies to all undertakings in national territory, regardless of their activity.
- (91) The Commission finds that the fact that there is only a 0,5 % threshold does not suffice to qualify the notified scheme as a general measure. On the contrary, the Commission finds that as a result of this threshold not all undertakings in the national territory can take advantage of the notified measure.
- (92) Austria has submitted that the notified measure is reserved for undertakings whose costs increase by more than 0,5 % of their net production value as a result of their contribution to the support of green electricity. The Commission notes that these conditions are very similar to the requirements of the definition of an 'energy-intensive business' in Article 17(1)(a) of the Energy Tax Directive<sup>(38)</sup>. Austria argues that the 0,5 % threshold does not suffice to qualify the notified measure as selective. In Austria's view this conclusion is supported by the judgment of the Court of Justice in *Adria-Wien Pipeline*. In that judgment the Court had to consider a partial reimbursement of an energy tax which was granted to firms if the tax exceeded 0,35 % of their net production value. The Court held that 'National measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid within the meaning of Article 92 of the EC Treaty [now Article 107 of the TFEU] ... where they apply to all undertakings in national territory, regardless of their activity'<sup>(39)</sup>.
- (93) However, the Commission considers that that judgment does not preclude a finding of selectivity with regard to the 0,5 % threshold in the case at hand. The judgment was a preliminary ruling, given in response to an application by an Austrian court which was concerned with

the existing scheme of energy tax rebates. The Austrian court submitted two questions. First, it asked whether the fact that under the existing scheme the tax rebate was granted only to undertakings engaged in the production of goods meant that the rebate was selective. Second, it raised the hypothetical question how the Court would assess a tax rebate that was not confined to undertakings engaged primarily in the production of goods but applied to all undertakings, regardless of their activity.

- (94) On the first question, the Court found that the restriction of the tax rebate to manufacturers did make the measure selective. In view of the hypothetical nature of the second question, that is to say how it would assess a tax rebate open to all sectors of the economy, the Court answered in rather general terms. It said that a measure was selective if it favoured certain undertakings or the production of certain goods, and was not selective if it benefited all undertakings in national territory without distinction<sup>(40)</sup>. The Court concluded that national measures did not constitute State aid 'if they apply to all undertakings in national territory, regardless of their activity'<sup>(41)</sup>. The Court did not give any indication whether a measure subject to a 0,35 % threshold should be considered to be applicable to all undertakings. This was noted by Advocate-General Jacobs in his opinion in a subsequent case before the Court: 'the effect of the 0,35 % threshold was not examined by the Court of Justice in *Adria-Wien*'<sup>(42)</sup>. The Court did not need to decide whether the exemption mechanism as such (i.e. without the restriction to undertakings engaged primarily in the production of goods) was selective de facto. Thus the Court did not rule out the possibility that the 0,35 % threshold might be selective if it had the effect that in practice the measure was not open to all undertakings in national territory.
- (95) Indeed the Commission takes the view that the Court gave some indication that such a threshold could be selective even if the measure was open to a number of different sectors. In its reply to the second question, the Court said in particular that 'neither the large number of eligible undertakings nor the diversity and the size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy'<sup>(43)</sup>. According to the case-law, many measures that are not sector-specific can be regarded as selective if de facto they are not open

<sup>(38)</sup> Article 17(1)(a) of the Energy Tax Directive states that 'An "energy-intensive business" shall mean a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3,0 % of the production value or the national energy tax payable amounts to at least 0,5 % of the added value.'

<sup>(39)</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 36.

<sup>(40)</sup> *Adria-Wien Pipeline*, paragraphs 34–35.

<sup>(41)</sup> *Adria-Wien Pipeline*, paragraph 36.

<sup>(42)</sup> Opinion of Advocate-General Jacobs in Case C-368/04 *Transalpine Ölleitung*, point 72.

<sup>(43)</sup> *Adria-Wien Pipeline*, paragraph 48.

to all undertakings in national territory<sup>(44)</sup>. It follows that even measures which are open to all sectors can be considered selective on the grounds that de facto they are not open to all undertakings in the territory concerned.

(96) This view is also reflected in a Commission decision on the Austrian energy tax rebate<sup>(45)</sup>. Following the judgment of the Court of Justice that has just been discussed, Austria broadened the measure to include undertakings from all sectors. In its assessment of the amended scheme, however, the Commission found that the measure was still selective, because even if formally speaking the rebate was open to all undertakings, in practice the only undertakings that would benefit would be those with a high energy consumption in relation to their net production value<sup>(46)</sup>. The Commission concluded that the tax rebate constituted unlawful (i.e. not notified) State aid, and was incompatible with the internal market<sup>(47)</sup>.

(97) The effects of the Commission decision subsequently led an Austrian administrative court to request a preliminary ruling from the Court of Justice<sup>(48)</sup>. The questions submitted by the Austrian court related to the scope of the effects of the illegality of the tax rebate, and the Court of Justice did not reopen the issue of selectivity. The question was however discussed by the Advocate-General. In his opinion the Advocate-General said that 'as the Commission points out, to grant rebates only to service undertakings (in addition to production undertakings) not excluded by the 0,35 % threshold would be simply to enlarge the circle of beneficiaries of the aid. It would not however deprive the aid of its effects as such, since a criterion of selectivity would remain'<sup>(49)</sup>. He also took the view that 'The Commission's reasoning in its 2004 decision is convincing as regards the selective nature of the 0,35 % threshold in the amended scheme'<sup>(50)</sup>.

<sup>(44)</sup> The Court of First Instance had to consider an aid scheme in the Basque country which took the form of a tax credit for investments over a threshold of ESP 2 500 million: it held that the scheme was de facto selective because the tax concession was available only to undertakings with significant financial resources (Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1385, paragraph 39 (an appeal against this judgment was dismissed by the Court of Justice in Joined Cases C-186/02 P and C-188/02 P *Ramondín SA and Others v Commission* [2004] ECR I-10653, paragraphs 60 ff.). In another case the Court of Justice found that an aid scheme for the purchase of commercial vehicles was selective de facto in particular because it excluded large enterprises (Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 50).

<sup>(45)</sup> Commission Decision 2005/565/EC of 9 March 2004 on an aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity in 2002 and 2003, recitals 47 to 49 (OJ L 190, 22.7.2005, p. 13).

<sup>(46)</sup> Decision 2005/565/EC, recital 46.

<sup>(47)</sup> Decision 2005/565/EC, recitals 68 to 70.

<sup>(48)</sup> Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957.

<sup>(49)</sup> Opinion of Advocate-General Jacobs in Case C-368/04 *Transalpine Ölleitung*, point 73.

<sup>(50)</sup> Opinion of Advocate-General Jacobs in *Transalpine Ölleitung*, point 72.

(98) The Commission concludes that the 0,5 % threshold at issue in the present case is a selection criterion which limits the benefit of the notified measure to energy-intensive undertakings and excludes undertakings which are not energy-intensive. Irrespective of the number of sectors that qualify, the threshold means that not all undertakings in the national territory can benefit under the notified measure. Consequently, the threshold renders the notified measure selective.

(99) The Commission also observes that to qualify for the exemption mechanism under assessment here, undertakings must be eligible for an energy tax rebate under the Austrian Energy Tax Rebate Act, which was the subject of the Commission decision on the Austrian energy tax rebate. The Commission's reasoning in that decision consequently applies mutatis mutandis to the present case.

#### Focus on the production of goods

(100) As regards Austria's second line of argument, the Commission finds that the notified measure is selective also because in practice it focuses primarily on a limited number of undertakings active in the production of certain energy-intensive goods. According to the case-law of the Court of Justice, a measure must be analysed not by reference to its causes or aims but in relation to its effects<sup>(51)</sup>. This means that even though in formal terms a measure is open to all sectors and all undertakings, it may still be considered selective if it is not open to all undertakings in national territory in practice. The Court of Justice has held that 'Neither the high number of benefiting undertakings nor the diversity and importance of the industrial sectors to which those undertakings belong warrant the conclusion that [a] scheme constitutes a general measure of economic policy'<sup>(52)</sup>.

(101) In its investigation the Commission found that the notified scheme focused primarily on a very few undertakings, most of which were engaged in the production of goods. On 9 September 2010 Austria submitted data gathered on the basis of the scheme as it currently applied, that is to say with aid intensities below the notification thresholds. Of the approximately 300 000 undertakings in Austria, according to this information, the number that applied for benefits under the scheme was only about 2 000, or less than 1 % of all Austrian undertakings. As the scheme was applied, approximately 66 % of the benefits went to undertakings in the

<sup>(51)</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13.

<sup>(52)</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 32.

'production of goods' <sup>(53)</sup>. The Commission observes that if Austria were to increase the aid intensities above the de minimis thresholds under which the scheme is provisionally operating, the measure would most probably focus even more on undertakings active in the production of goods. This is demonstrated by the fact that, on the basis of the information provided by Austria, only 12 undertakings would benefit from aid intensities higher than under the version of the scheme currently applying, and that of these only two operate in the transport sector, while 10 are engaged in the production of goods <sup>(54)</sup>.

- (102) The Commission concludes that the notified scheme will provide little or no benefit to the majority of the sectors of the Austrian economy, and will benefit mainly undertakings active in one of the branches of the production of goods. Irrespective of the number of sectors in which undertakings might benefit as a result of the measure, the measure focuses mainly on undertakings active in the production of goods, and is therefore to be considered selective de facto.

#### Conclusion

- (103) The Commission concludes that the notified exemption mechanism is selective, both because it provides for a 0,5 % threshold, which confines the measure to energy-intensive undertakings, and because those undertakings are active primarily in the production of goods.

#### Measures justified by the nature and general scheme of the system

- (104) The Commission notes that even where a measure has a selective character it does not fulfil the condition of selectivity if it is justified by the nature or the general scheme of the system of which it is part <sup>(55)</sup>. The Court of Justice has consistently held that it is for the Member State to demonstrate that this is so <sup>(56)</sup>.
- (105) According to the Court, 'a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on

the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives'. It is only the latter mechanisms that can be justified by the nature or the general scheme of the tax system of which the measure is part <sup>(57)</sup>. Any extrinsic objectives have to be considered at the stage when the aid is being assessed for compatibility <sup>(58)</sup>.

- (106) Austria considers that the differentiation of charges introduced by Section 22c of the Act is intended to allow for the varying capacity of undertakings to bear additional charges. Austria also takes the view that the exemption mechanism does not impair the environmental benefits provided for by the Act, since the amount of aid available to support the production of green electricity is not reduced. Austria contends that only by reducing environmental charges for certain businesses is it possible to establish a sustainable financing mechanism for green electricity, which is necessary in order to ensure support for renewable energy sources.

- (107) The Commission notes in this regard that the intrinsic objective of the system established by the clearing price is to raise revenues for the specific purpose of promoting renewable energy. The exemption mechanism, however, pursues the objective of improving the competitiveness of energy-intensive businesses by reducing their electricity price, and thereby improving the acceptability of the system based on the clearing price. This objective is extrinsic to the rationale and general scheme of the system.

- (108) The Court of Justice has held that the pursuit of such an extrinsic objective cannot be relied upon to justify a measure by reference to the nature or general scheme of the tax system <sup>(59)</sup>. It can be analysed only when the aid has to be assessed for compatibility <sup>(60)</sup>.

- (109) In support of its view that the exemption mechanism is justified by the rationale and general scheme of the system, Austria cites two State aid decisions; but there the situation was different. State aid measure No N 271/06, the Danish tax on surplus heat, sought not to improve competitiveness but to place the tax treatment of all energy products on an equal footing. State aid measure No N 860/06, the German energy tax exemption for dual-use processes, was based on the principle that energy products should be taxed only when they were used for heating or fuel purposes.

<sup>(53)</sup> Within this sector there is a certain concentration on subsectors such as the production of wood, paper, food, glass, ceramics, metals and chemicals.

<sup>(54)</sup> Austria's submission of 9 September 2010 (p. 17 and Table 5 on p. 17), replying to the Commission's request for information of 19 July 2010.

<sup>(55)</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 33; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 28–31; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I 8365, paragraph 41.

<sup>(56)</sup> Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 81.

<sup>(57)</sup> See footnote 56.

<sup>(58)</sup> Case C-487/06 P *British Aggregates Association v Commission* [2008] ECR I-10505, paragraphs 84–92.

<sup>(59)</sup> Case C-88/03 *Portugal v Commission* (cited in footnote 31), paragraph 82, which refers to regional development and social cohesion as extrinsic political objectives.

<sup>(60)</sup> See footnote 58.

(110) It follows that the notified exemption for energy-intensive industries is not justified by the nature or general scheme of the system of which it is part.

#### Conclusion

(111) The Commission concludes that the notified measure fulfils the condition of selectivity because it is selective *de facto* and is not justified by the nature and general scheme of the system.

#### 5.1.4. Distortion of competition and impact on trade

(112) The beneficiaries of the measure, which in the Commission's view constitutes operating aid, are for the most part engaged in the production of energy-intensive goods such as metal or paper products<sup>(61)</sup>. These are industries where there is trade between Member States, and undertakings in one Member State are subject to competition from undertakings in others. The measure in question is therefore liable to distort competition and to affect trade in the internal market.

#### 5.1.5. Conclusion

(113) The Commission concludes that the exemption mechanism constitutes State aid within the meaning of Article 107(1) TFEU, because it has the effect of reducing State resources and thereby conferring a selective advantage on energy-intensive businesses. Consequently, the measure has the potential to affect trade between Member States and to distort competition in the internal market.

### 5.2. Lawfulness of the aid

(114) Austria has undertaken not to put the aid into effect until the European Commission has approved it. Austria notified the measure before putting it into effect, and has thus complied with its obligation under Article 108(3) TFEU<sup>(62)</sup>.

### 5.3. Compatibility of the aid

(115) Under Article 107(3) TFEU the Commission may declare State aid compatible with the internal market. It is settled case-law that the burden of proof for demonstrating that a measure is compatible lies on the Member State<sup>(63)</sup>.

<sup>(61)</sup> See footnote 54.

<sup>(62)</sup> Pending a final Commission decision, Austria has been granting the benefit of the exemption mechanism as *de minimis* aid.

<sup>(63)</sup> Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others v Commission* [1999] ECR II-3663, paragraph 140; Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 81.

(116) In aid cases falling under Article 107(3) TFEU the Commission has wide discretion<sup>(64)</sup>. In the exercise of its discretion it has issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market under Article 107(3) TFEU. The Court of Justice has consistently held that the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States<sup>(65)</sup>.

(117) In the first place, therefore, it must be considered whether the notified aid falls within the scope of one or more sets of guidelines or notices, and can be declared compatible with the internal market because it satisfies the tests of compatibility set out therein.

(118) Austria claims that the notified measure falls within the scope of the Environmental Aid Guidelines<sup>(66)</sup>, or that the Environmental Aid Guidelines are applicable by analogy. In addition, it also claims that the aid falls within the scope of the General Block Exemption Regulation<sup>(67)</sup>.

(119) However, there are clearly defined situations in which operating aid may be granted. In particular, operating aid in the form of reductions of taxes may be granted, on specific conditions, under Chapter 4 of the Environmental Aid Guidelines<sup>(68)</sup> or under Article 25 of the General Block Exemption Regulation<sup>(69)</sup>. Under certain conditions aid may also be assessed directly under Article 107(3)(c) TFEU.

#### 5.3.1. The Environmental Aid Guidelines

(120) The Environmental Aid Guidelines define their scope of application as follows<sup>(70)</sup>:

<sup>(64)</sup> Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 56; Case C-39/94 *Syndicat français de l'Express international (SFEI) and Others v La Poste and Others* [1996] ECR I-3547, paragraph 36.

<sup>(65)</sup> Case C-313/90 *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) and Others v Commission* [1993] ECR I-1125, paragraph 36; Case C-311/94 *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* [1996] ECR I-5023, paragraph 43; Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 53.

<sup>(66)</sup> See footnote 3.

<sup>(67)</sup> Regulation (EC) No 800/2008.

<sup>(68)</sup> See footnote 3.

<sup>(69)</sup> Regulation (EC) No 800/2008.

<sup>(70)</sup> See footnote 3.

- (58) These Guidelines apply to State aid for environmental protection. They will be applied in accordance with other Community policies on State aid, other provisions of the Treaty establishing the European Community and the Treaty on European Union and legislation adopted pursuant to those Treaties.
- (59) These Guidelines apply to aid to support environmental protection in all sectors governed by the EC Treaty. They also apply to those sectors which are subject to specific Community rules on State aid (steel processing, shipbuilding, motor vehicles, synthetic fibres, transport, coal agriculture and fisheries) unless such specific rules provide otherwise.'
- (121) Point 70(1) of the Guidelines defines 'environmental protection' as 'any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy'. Point 151 states that for a measure to fall within the scope of the Guidelines it is enough that it should improve the level of environmental protection indirectly.
- (122) Austria considers that the exemption mechanism contributes indirectly to environmental protection, for two reasons: it is a necessary precondition for ensuring political support for increasing the clearing price to a higher level, which is necessary to finance the further increase in the production of renewable electricity; and it increases the price of electricity use, thereby giving an incentive to be more energy-efficient.
- (123) On the first argument, the Commission observes that there is no necessary link between the clearing price and an increase in the level of production of renewable electricity. By virtue of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC ('the Renewable Energy Directive')<sup>(71)</sup>, Austria is under an obligation to increase production of electricity from renewable sources. It is, however, free to choose how it wishes to finance this. It could, for example, use tax revenues. Thus the exemption mechanism is not necessary in order to increase production of renewable energy.
- (124) With regard to the second argument, the Commission observes that the exemption mechanism functions as a
- cap. The average electricity price paid by energy-intensive businesses consequently decreases for each additional kilowatt-hour they consume above the threshold. Rather than encouraging energy efficiency, the exemption mechanism actually reduces it.
- (125) The Commission concludes that the exemption mechanism does not fall within the scope of the Environmental Aid Guidelines.
- (126) But even if the measure did fall within the scope of the Guidelines — which it does not — the Commission observes that it could not be declared compatible on this basis, as the tests of Chapter 4 of the Guidelines are not satisfied, for the following reasons.
- (127) For purposes of the assessment of compatibility, Chapter 4 of the Guidelines distinguishes between harmonised and non-harmonised environmental taxes. The parafiscal levy represented by the clearing price is not an environmental tax that has been harmonised at Union level. The Renewable Energy Directive sets obligatory targets for renewable energy, but leaves it to the Member States to decide how they achieve these targets.
- (128) The exemption mechanism would therefore have to be assessed under the rules for non-harmonised environmental taxes in Chapter 4 of the Guidelines<sup>(72)</sup>.
- (129) According to those provisions, the Member State has to provide information on the respective sectors or categories of beneficiaries covered by the exemptions or reductions, on the situation of the main beneficiaries in each sector concerned and on how the taxation may contribute to environmental protection. The exempted sectors should be properly described, and a list of the largest beneficiaries for each sector should be provided (considering notably turnover, market shares and size of the tax base)<sup>(73)</sup>. On the basis of this information the Commission has to assess whether the reductions of or exemptions from environmental taxes are necessary and proportional. With regard to necessity, the choice of beneficiaries must be based on objective and transparent criteria, and the environmental tax without reduction must lead to a substantial increase of production costs that cannot be passed on to consumers without leading to important sales reductions<sup>(74)</sup>. With regard to proportionality, the Member State has to demonstrate that each

<sup>(71)</sup> OJ L 140, 5.6.2009, p. 16.

<sup>(72)</sup> As explained above, the Commission considers that the feed-in tariff is clearly not a harmonised environmental tax.

<sup>(73)</sup> Point 156 of the Guidelines.

<sup>(74)</sup> Point 158 of the Guidelines.

individual beneficiary pays a proportion of the national tax level which is broadly equivalent to its environmental performance, or at least 20 % of the national tax, unless a lower rate can be justified, and that the reductions or exemptions are conditional on the conclusion of agreements aimed at achieving environmental objectives <sup>(75)</sup>.

- (130) Although the Commission repeatedly asked it to do so, however, Austria did not provide this information <sup>(76)</sup>. The Commission has consequently been unable to assess whether the aid is necessary and proportional or how it might contribute to the protection of the environment.

### 5.3.2. Analogy with Chapter 4 of the Guidelines

- (131) Given that the notified exemption mechanism does not contribute to environmental protection even indirectly, the Commission has considered whether it might be approved by analogy with Chapter 4 of the Environmental Aid Guidelines.

- (132) According to Austria, the exemption mechanism can be assessed by analogy with the rules on tax reductions for harmonised energy taxes set out in points 152–153 of the Environmental Aid Guidelines. Chapter 4 of the Guidelines provides for two types of assessment of reductions of environmental taxes, which may lead to different conclusions. First, it lays down rules for the reduction of energy taxes harmonised under the Energy Tax Directive, which can be declared compatible without further analysis provided the minimum tax levels set out in the Energy Tax Directive are respected. Second, it lays down specific rules for the assessment of reductions of environmental taxes that have not been harmonised and reductions of harmonised energy taxes that are below the minimum tax levels set in the Energy Tax Directive. In either case the Member State has among other things to provide detailed information on the necessity and proportionality of the measure. Austria argues that the Commission could approve the exemption mechanism for para-fiscal levies on the basis that the beneficiaries pay at least the minimum levels of Austrian energy taxes.

- (133) The Commission observes that there are no precedents in its own decisions or in the judgments of the European courts in which the rules for the assessment of

harmonised energy taxes under Chapter 4 of the Environmental Aid Guidelines were applied to para-fiscal levies by analogy.

- (134) According to the settled case-law of the Court of Justice, a rule of Union law can be applied by analogy if the following two conditions are met. First, the rules applicable to the case must be very similar to the ones which it is sought to have applied by analogy. Second, the rules applicable to the case must contain an omission which is incompatible with a general principle of EU law and which can be remedied by analogy <sup>(77)</sup>. In view of these conditions, the Commission observes that analogy can be invoked in EU law only in exceptional circumstances.

### Similarity of the rules

- (135) First, the rules applicable to the case must be very similar to the ones which it is sought to have applied by analogy. Since Chapter 4 of the Environmental Aid Guidelines deals with reductions of or exemptions from environmental taxes, the rules governing the notified levies under the Green Electricity Act should be similar to those applying to environmental taxes.

However, the Commission finds that the legal position with regard to environmental taxes under EU law is not comparable to the legal position with regard to para-fiscal levies under EU law. While there are no specific rules in EU law with regard to para-fiscal levies, there are specific rules on energy taxes. These include in particular the minimum tax levels set by the Energy Tax Directive, and exceptions to these minimum levels under the conditions set out in Chapter 4 of the Environmental Aid Guidelines and Article 25 of the General Block Exemption Regulation. For para-fiscal levies there are no rules on exemptions or reductions and no rules on minimum levels either.

- (136) The Commission concludes that the para-fiscal levies established under the Austrian scheme are not governed by rules similar to those which apply to environmental taxes under EU law.

### Omission (*lacuna*) incompatible with EU law

- (137) Second, the rules applicable to the case must contain an omission which is incompatible with a general principle of EU law and which can be remedied by analogy.

<sup>(75)</sup> Point 159 of the Guidelines.

<sup>(76)</sup> Austria did not reply to the questions on this point asked by the Commission on 21 June 2010 and 19 July 2010.

<sup>(77)</sup> Case 165/84 *Krohn v Bundesanstalt für Landwirtschaftliche Marktordnung* [1985] ECR 3997, paragraph 14; Case 6/78 *Union française de Céréales v Hauptzollamt Hamburg-Jonas* [1978] ECR 1675.



(138) However, measures which do not fall within the scope of the Environmental Aid Guidelines can nevertheless be assessed under Article 107(3)(c) TFEU. The Commission has consequently found no omission in the Guidelines that might be grounds for assessing the notified measures by analogy. This conclusion is the same whether the analogy is to be drawn with harmonised or non-harmonised taxes.

(139) Furthermore, the absence of rules on exemptions from parafiscal levies could not in any event be remedied by analogy to the rules that govern reductions of energy taxes under EU law. If the rules governing reductions of harmonised energy taxes were to be applied by analogy to non-harmonised parafiscal levies, undertakings would be able to meet the minimum tax levels set in the Energy Tax Directive by paying such parafiscal levies. Such an approach is therefore not in the spirit of the Energy Tax Directive. The Commission considers that the minimum rates in the Energy Tax Directive were set solely with a view to their application within the harmonised energy tax system. Using them as a benchmark outside the harmonised area would give them an application that they were not meant to have. The minimum rates were clearly not set with the aim of defining the overall burden that energy-intensive businesses ought to bear as a result of environmental regulatory measures, such as in particular those arising out of financing mechanisms for feed-in tariffs. Such an approach would also overlook the fact that State aid policy accepts a lenient attitude to tax exemptions above a harmonised minimum level because a level playing field is ensured at least to some extent by compliance with the minimum rates that are applicable in all Member States. This argument does not apply to the burdens stemming from feed-in tariff systems, which are not harmonised, and where any deviation from the standard contributions can cause distortion of competition.

(140) It follows that the absence of rules on the reduction of parafiscal levies does not constitute an omission which is incompatible with a general principle of EU law and which could be remedied by analogy with the existing rules on reductions of harmonised energy taxes.

(141) In any event, even if those rules could be applied by analogy, the exemption mechanism could not be considered compatible, for the reasons set out in recitals 129–133.

#### Conclusion

(142) The Commission concludes that it cannot draw an analogy between the notified exemption mechanism and the rules for the assessment of reductions of harmonised energy taxes under Chapter 4 of the Environmental Aid Guidelines, and that it consequently cannot approve the exemption mechanism on the basis of such an analogy.

#### 5.3.3. Analogy with Article 25 of the General Block Exemption Regulation

(143) The Commission has also considered whether it could approve the exemption mechanism on the basis of an analogy with Article 25 of the General Block Exemption Regulation.

(144) Austria takes the view that the differences between the wordings of Chapter 4 of the Environmental Aid Guidelines and Article 25 of the General Block Exemption Regulation leave some room for an approval of the measure by analogy with Article 25 of the Regulation. Austria points out that point 152 of the Environmental Aid Guidelines reads as follows:

'In order to be approved under Article 87 of the EC Treaty, reductions of or exemptions from harmonised taxes, in particular those harmonised through Directive 2003/96/EC, must be compatible with the relevant applicable Community legislation and comply with the limits and conditions set out therein',

(145) whereas Article 25 of the General Block Exemption Regulation reads as follows:

'Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Directive 2003/96/EC shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled' <sup>(78)</sup>.

(146) Austria concludes that Article 25 of the Regulation may be broader in scope than point 152 of the Guidelines. While point 152 of the Guidelines may apply only to taxes harmonised by the Energy Tax Directive, Austria argues, Article 25 of the Regulation requires only that the exemption mechanism respect the minimum tax levels set in the Energy Tax Directive, even if it is not a harmonised energy tax. Article 25 of the Regulation

<sup>(78)</sup> Article 25(2) of the General Block Exemption Regulation states that 'The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by Directive 2003/96/EC' (the Energy Tax Directive). Article 25(3) of the General Block Exemption Regulation states that 'Tax reductions shall be granted for maximum periods of 10 years. After such 10-year period, Member States shall re-evaluate the appropriateness of the aid measures concerned'.

can therefore be applied to reductions of non-harmonised environmental taxes, which can be found compatible provided that the overall taxation system respects the minimum energy tax levels. Austria acknowledges that the contributions paid under the Green Electricity Act are not a tax<sup>(79)</sup>, but submits that the notified exemption mechanism can be assessed and approved by analogy with the provision on environmental taxes in Article 25 of the General Block Exemption Regulation.

(147) In the Commission's view, however, there is no scope for an analogy with Article 25 of the General Block Exemption Regulation. First, the rules applicable to the case are not similar to the ones which it is sought to have applied by analogy. The wording of Article 25 of the General Block Exemption Regulation clearly indicates that the Article applies only to environmental taxes harmonised under the Energy Tax Directive. Classification as an energy tax is thus a 'condition' for the applicability of Article 25 of the Regulation. This interpretation is supported by the fact that it follows from the rationale of the system of the General Block Exemption Regulation that it cannot have a scope wider than the Environmental Aid Guidelines to which it refers. Article 25 of the Regulation therefore clearly applies only to energy taxes harmonised by the Energy Tax Directive. As explained above, the contributions paid under the Green Electricity Act are not environmental taxes, and the rules of the Energy Tax Directive do not apply to them. It follows that the rules governing energy taxes are not similar to the rules governing the Austrian feed-in tariffs. Second, the rules applicable to the case do not contain an omission which is incompatible with a general principle of EU law and which can be remedied by analogy. Tax reductions or similar measures which are not covered by the General Block Exemption Regulation are not automatically incompatible with EU law: they merely have to abide by the general obligation to notify under Article 108 TFEU. They can then be assessed and found compatible under the Environmental Aid Guidelines, or, if the Guidelines do not apply, directly under Article 107(3)(c) TFEU. It follows that the rules applicable to the assessment of the Austrian aid scheme do not contain an omission incompatible with EU law.

(148) The Commission concludes that it cannot draw an analogy between the contributions paid under the Green Electricity Act and the harmonised energy taxes referred to in Article 25 of the General Block Exemption Regulation, that it consequently cannot approve the exemption mechanism on the basis of such an analogy.

<sup>(79)</sup> Austrian submission of 9 September 2010, p. 19, replying to the Commission's request for information of 19 July 2001.

#### 5.3.4. Compatibility under Article 107(3)(c) TFEU

(149) The Commission notes that Austria has not claimed that the exemption mechanism can be declared compatible directly on the basis of Article 107(3)(c) TFEU. It is for the Member State to put forward any grounds of compatibility<sup>(80)</sup> and to demonstrate that the conditions thereof are met, and for this reason alone Austria is prevented from relying on this ground of compatibility.

(150) The Commission has nevertheless considered whether it could declare the exemption mechanism compatible on this legal basis.

(151) Article 107(3)(c) TFEU states that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered to be compatible with the internal market. According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest<sup>(81)</sup>, is necessary for the attainment of this objective<sup>(82)</sup>, and does not adversely affect trading conditions to an extent contrary to the common interest.

(152) Accordingly, it is established Commission practice that measures may be declared compatible directly under Article 107(3)(c) TFEU if they are necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade<sup>(83)</sup>. The Commission considers it appropriate here to ask the following questions:

1. Is the aid measure aimed at a well-defined objective of common interest?

<sup>(80)</sup> See footnote 63.

<sup>(81)</sup> Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

<sup>(82)</sup> Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

<sup>(83)</sup> Community framework for State aid for research and development and innovation, point 1.3 (OJ C 323, 30.12.2006, p. 1); Community guidelines on State aid for environmental protection, point 1.3 (OJ C 82, 1.4.2008, p. 1).

2. Is the aid well designed to deliver the objective of common interest? In particular:

- (a) is the aid measure an appropriate and necessary instrument, or are there other, more suitable instruments?
- (b) is there an incentive effect, or in other words does the aid change the behaviour of undertakings?
- (c) is the aid measure proportional, or in other words could the same change in behaviour be obtained with less aid?

3. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

#### Objective of common interest

- (153) Austria submits that the main objective of the measure is environmental protection. However, as demonstrated above in recitals 126–129, the exemption mechanism does not contribute to environmental protection.
- (154) In addition, any environmental effect of the measure is to be achieved through an overall increase in feed-in tariffs, which in Austria's opinion would not be possible without ensuring the continued competitiveness of energy-intensive businesses by means of the notified exemption mechanism. As the Austrian authorities in fact acknowledge in their submissions, the objective of the exemption mechanism is to improve the competitiveness of energy-intensive businesses in Austria vis-à-vis their competitors in other Member States. In its decisions the Commission has never accepted that such aid contributes to an objective of common interest.
- (155) The only exception to this practice is Chapter 4 of the Environmental Aid Guidelines. But even where the Commission accepts a reduction of an environmental tax, it still requires that a minimum level of tax be paid. This means that the total contribution to overall tax revenues of the undertaking benefiting from the tax reduction still increases with each unit of pollution. In the present case the situation is different. The contribution is capped at 0,5 % of the net production value. Any additional units of pollution are no longer subject to the parafiscal levy. Thus the contribution per unit of pollution decreases for each additional unit. Rather than encouraging resource efficiency, therefore, the system provides an incentive for using additional resources.
- (156) The Commission consequently considers that the aid does not contribute to an objective of common interest.

#### Appropriate policy instrument

- (157) According to the case-law, 'operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 92(3) [now Article 107(3) TFEU]'<sup>(84)</sup>. As the courts have said, 'According to the relevant case-law, the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any of the objectives of the aforesaid exceptions'<sup>(85)</sup>. In the case at hand the Commission finds that the exemption mechanism constitutes operating aid, because it relieves the beneficiaries from part of their electricity procurement costs, which they would normally have had to bear in their day-to-day operations.
- (158) Even if the improvement of competitiveness was an objective of common interest, therefore, the Commission considers that operating aid would in any event not be an appropriate policy instrument for achieving that objective.
- (159) With regard to environmental taxes the Commission has accepted a limited exception to this principle, but with a specific objective in mind. Reductions of and exemptions from environmental taxes concerning certain sectors or categories of undertakings are admissible under Chapter 4 of the Environmental Aid Guidelines if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation, and to create further incentives to improve on environmental protection. Here the Commission has taken the view that this type of aid might be necessary to address negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation.
- (160) However, the Commission finds that the contributions to the support of green electricity from which the beneficiaries are to be exempted under the notified scheme do not constitute an environmental tax within the meaning of points 70(14) and 151 of the Guidelines. Taxes are charges which are paid into the general budget of the State. The contributions from which the beneficiaries are to be exempted under the notified scheme are not paid into the general budget of the State. They are used exclusively to finance the contributions to OeMAG, which supports green electricity producers through feed-in tariffs. Consequently, these contributions do not constitute an environmental tax.

<sup>(84)</sup> Case T-459/93 *Siemens SA v Commission* [1995] ECR II-1675, paragraph 48.

<sup>(85)</sup> Case T-459/93 *Siemens SA v Commission* [1995] ECR II-1675, paragraph 48. See also Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, 8 July 2010, not yet reported, paragraphs 46-48; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 30, with further references.

- (161) The Commission considers that any exception from the general rule of incompatibility of operating aid which is stated in the Environmental Aid Guidelines should be interpreted strictly. Being an exception, therefore, Chapter 4 of the Guidelines must be restricted to environmental taxes.
- (162) Furthermore, as explained above, the application of Chapter 4 of the Guidelines to parafiscal levies would contradict the objectives of those rules and of the Energy Tax Directive with regard to harmonised energy taxes. Such an approach might also result in the general application of these provisions to parafiscal levies in the area of environmental protection (e.g. parafiscal levies on waste or the like). Such a wide application goes beyond the scope and the objectives of Chapter 4 of the Guidelines.
- (163) Consequently, the Commission considers that operating aid in the form of reductions of parafiscal levies is not an appropriate instrument for improving environmental protection. The Commission has never yet applied the conditions of Chapter 4 of the Environmental Aid Guidelines to other types of charges and parafiscal levies.
- (164) The Commission observes that the volume of an environmental tax, even if only the reduced rate applies, is directly proportionate to the level of pollution created by the undertaking in question. In the present case, however, the contribution is capped at a certain level. Any consumption that goes beyond that level is no longer taxed. This exemption mechanism deprives the parafiscal levy of any incentive for resource-efficient behaviour.
- (165) In the event that it were to be accepted that operating aid in the form of reductions of parafiscal levies was an appropriate policy instrument, the operating aid involved would have to be tested for necessity and proportionality in the same way as reductions of non-harmonised environmental taxes under Chapter 4 of the Environmental Aid Guidelines<sup>(86)</sup>, because the assessment of non-harmonised environmental taxes under Chapter 4 reflects the general principles of the detailed economic analysis under Article 107(3)(c) TFEU
- (166) According to those provisions, the Member State has to provide information on the respective sectors or categories of beneficiaries covered by the exemptions or reductions, on the situation of the main beneficiaries in each sector concerned and on how the taxation may contribute to environmental protection. The exempted sectors should be properly described and a list of the largest beneficiaries for each sector should be provided (considering notably turnover, market shares and size of the tax base)<sup>(87)</sup>. On the basis of this information the Commission has to assess whether the reductions of or exemptions from environmental taxes are necessary and proportional. With regard to necessity, the choice of beneficiaries must be based on objective and transparent criteria, and the environmental tax without reduction must lead to a substantial increase of production costs that cannot be passed on to consumers without leading to important sales reductions<sup>(88)</sup>. With regard to proportionality, the Member State has to demonstrate that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to its environmental performance, or at least 20 % of the national tax, unless a lower rate can be justified, or that the reductions or exemptions are conditional on the conclusion of agreements aimed at achieving environmental objectives<sup>(89)</sup>.
- (167) Although the Commission repeatedly asked it to do so, however, Austria did not provide this information<sup>(90)</sup>. The Commission has consequently been unable to assess whether the aid is necessary and proportional or how it might contribute to the protection of the environment.
- (168) Finally, Austria also failed to show that the exemption mechanism would have any incentive effect.

#### Distortion of competition and impact on trade

- (169) According to the case-law, operating aid threatens to distort competition and to affect trade<sup>(91)</sup>. In the present case, the distortive effect is aggravated by the fact that those undertakings eligible for the exemption mechanism already receive operating aid in the form of a reduced rate of energy taxation. Granting them a second form of operating aid, which in addition is not limited in time, would lead to distortion of competition and affect trade to an extent contrary to the common interest.

<sup>(87)</sup> See footnote 73.

<sup>(88)</sup> See footnote 74.

<sup>(89)</sup> See footnote 75.

<sup>(90)</sup> Austria did not reply to the questions on this point asked by the Commission on 21 June 2010 and 19 July 2010.

<sup>(91)</sup> Case T-459/93 *Siemens SA v Commission* [1995] ECR II-1675, paragraph 48.

<sup>(86)</sup> As already explained, the Commission considers that the feed-in tariff is clearly not a harmonised environmental tax.

## Conclusion

- (170) The Commission concludes that the exemption mechanism cannot be declared compatible under Article 107(3)(c) TFEU.

### 5.4. Conclusion

- (171) In the light of the considerations set out above the Commission has assessed the support scheme for green electricity producers and the exemption mechanism for energy-intensive businesses. In its opening decision of 22 July 2009 the Commission found that the support scheme for green electricity producers constituted State aid, but was compatible with the internal market. The decision initiated a formal investigation into the exemption mechanism; the Commission now finds that that measure too constitutes State aid caught by Article 107(1) TFEU. However, the Commission considers that the exemption mechanism is pure operating aid, and is not eligible for any of the exemptions that the TFEU allows from the general prohibition of State aid.

Having regard to all the facts brought to the Commission's attention, the Commission concludes that the State aid that Austria plans to grant to energy-intensive businesses must be considered incompatible with the internal market,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The State aid in the form of a partial exemption from the obligation to purchase green electricity which Austria plans to grant to energy-intensive businesses is incompatible with the internal market.

The aid may accordingly not be implemented.

#### *Article 2*

Austria shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

#### *Article 3*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 8 March 2011.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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