

**COMMISSION DECISION (EU) 2015/1585****of 25 November 2014****on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users)***(notified under document C(2014) 8786)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having 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) Through a complaint received in December 2011, the Commission was informed that Germany had implemented State aid for the support of renewable electricity and for energy-intensive users ('EIU') by way of a cap on the surcharge financing the support of renewable electricity (*EEG-Umlage* or 'EEG-surcharge').
- (2) By letter dated 18 December 2013, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of that aid ('Opening Decision').
- (3) The Opening Decision was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the aid.
- (4) The Commission forwarded comments received from interested parties to Germany, which was given the opportunity to react; its comments were received by letters dated 20 January and 14 November 2014.
- (5) By letter dated 22 September 2014, Germany waived its right under Article 342 of the Treaty in conjunction with Article 3 of Regulation (EEC) No 1/1958 <sup>(3)</sup> to have this Decision adopted in German and agreed that this Decision be adopted in English.

**2. DETAILED DESCRIPTION OF THE AID****2.1. The EEG-Act 2012**

- (6) The EEG-Act 2012 (*Erneuerbare-Energien-Gesetz*) was adopted on 28 July 2011 and entered into force on 1 January 2012 <sup>(4)</sup>. It has been substantially altered by the EEG-Act 2014 <sup>(5)</sup>. The Commission approved the new aid scheme resulting from that substantial alteration on 23 July 2014 <sup>(6)</sup>.

<sup>(1)</sup> OJ C 37, 7.2.2014, p. 73, and OJ C 250, 1.8.2014, p. 15.

<sup>(2)</sup> Cf. footnote 1.

<sup>(3)</sup> Regulation No 1 determining the languages to be used by the European Economic Community (OJ Series I, Volume 1952-1958, p. 59).

<sup>(4)</sup> Gesetz für den Vorrang Erneuerbarer Energien (Erneuerbare-Energien-Gesetz — EEG), as amended by Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien, Bundesgesetzblatt, Part I, p. 1634, and by Gesetz zur Änderung des Rechtsrahmens für Strom aus solarer Strahlungsenergie und zu weiteren Änderungen im Recht der erneuerbaren Energien vom 17. August 2012, Bundesgesetzblatt, Part I, p. 1754.

<sup>(5)</sup> Gesetz zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts vom 21. Juli 2014, Bundesgesetzblatt, Part I, p. 1066.

<sup>(6)</sup> State aid case SA.38632 (2014/N) — Germany: EEG 2014 — Reform of the Renewable Energy Law (not yet published in the Official Journal).

- (7) On the first level of the system established by the EEG-Act 2012, network operators (in most cases the Distribution System Operators, 'DSOs') are obliged to purchase electricity produced within their network area from renewable energy sources ('RES electricity') and from mine gas ('RES electricity' and electricity produced from mine gas are referred to together as 'EEG electricity'). The purchase prices are fixed by law ('feed-in tariffs'). Instead of requesting payment of the feed-in tariffs, producers of RES electricity and electricity from mining gas also have the possibility to sell their electricity directly on the market ('direct marketing'). When they do so, they are entitled to obtain a market premium from the network operator. The amount of that market premium is also fixed by law.
- (8) On the second level, network operators have to immediately transfer the EEG electricity to their respective Transmission System Operators ('TSOs'), of which there are four in Germany, which in turn are under the obligation to compensate the network operators for the entire cost resulting from the feed-in tariffs and the market premiums.
- (9) The EEG-Act 2012 also establishes an equalisation mechanism whereby the financial burden resulting from the purchase obligation is spread between four TSOs so that ultimately every TSO covers the costs of a quantity of electricity that corresponds to the average share of EEG electricity compared to the total electricity delivered to the final consumers in each area served by the individual TSO in the previous calendar year (§ 36 EEG-Act 2012). This is the third level.
- (10) TSOs are obliged to sell the EEG electricity on the spot market. They can do so alone or together. If the price obtained on the spot market is not sufficient to cover the financial burden resulting from their payment obligations towards the network operators, TSOs are entitled by law to ask electricity suppliers to pay a share of this burden proportionate to the respective quantity of electricity delivered by the electricity suppliers to their final consumers. The share must be determined in such a way that each electricity supplier bears the same costs for each kilowatt-hour of electricity delivered by it to a final consumer. Monthly advance payments must be made for payment of this surcharge. The EEG-Act 2012 explicitly designates this charge that the TSO recovers from electricity suppliers as constituting the EEG-surcharge (see § 37(2) of the EEG-Act 2012). The four TSOs are obliged to indicate all payments they have received on a joint EEG account and to publish that account (§ 7 AusglMechV<sup>(7)</sup>). This is the fourth level.
- (11) The four TSOs together have to determine the EEG surcharge for the year  $n + 1$  in October (§ 3 Absatz 2 AusglMechV). The methodology they have to use and the elements on which they have to base their calculation are set out in the *Ausgleichsmechanismusverordnung* (AusglMechV) and in the *Ausgleichsmechanismus-Ausführungsverordnung* (AusglMechAV)<sup>(8)</sup>. Those legal texts do not leave the TSO any discretion. In particular, § 3 AusglMechV states the following:

### '§ 3 EEG-Surcharge

- (1) The transmission system operators calculate the EEG-Surcharge according to § 37 paragraph 2 of the Renewable Energy Act [i.e. the EEG-Act 2012] in a transparent manner as:
1. the difference between the projected revenues referred to in paragraph 3, points 1 and 3 for the following calendar year and the forecast expenditure referred to in paragraph 4 for the following calendar year, and
  2. the difference between the actual income referred to in paragraph 3 and the actual expenditure referred to in paragraph 4 at the time of calculation.
- (2) The EEG-surcharge for the following calendar year has to be published before 15 October of each calendar year on the website of the transmission system operator in aggregated form and must be indicated in cent per kilowatt-hour delivered to consumers; § 43 paragraph 3 of the Renewable Energy Act shall apply accordingly.

(7) Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus vom 17. Juli 2009, Bundesgesetzblatt, Part I, p. 2101, as amended by Article 2 of Gesetz vom 17. August 2012, Bundesgesetzblatt, Part I, p. 1754.

(8) Verordnung zur Ausführung der Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus (Ausgleichsmechanismus-Ausführungsverordnung — AusglMechAV) vom 22. Februar 2010, Bundesgesetzblatt, Part I, p. 134, as amended by the Zweite Verordnung zur Änderung der Ausgleichsmechanismus-Ausführungsverordnung vom 19. Februar 2013, Bundesgesetzblatt, Part I, p. 310.

- (3) Revenues are:
1. income from the day-ahead and intraday marketing pursuant to § 2,
  2. income from the EEG-surcharge,
  - 2a. income from payments according to § 35 paragraph 2 of the Renewable Energy Sources Act provided that the balancing exercise according to § 35 paragraph 3 of the Renewable Energy Act presents a positive balance for the transmission system operator,
  3. income from interests referred to in paragraph 5,
  4. income from the settlement of balancing energy for the EEG balance group, and
  5. income under § 35 paragraph 4 or § 38 of the Renewable Energy Act and paragraph 6.
- (4) Expenditures are:
1. feed-in tariffs and compensation payments according to § 16 or § 35, paragraph 1 of the Renewable Energy Act,
    - 1a. payments of premiums pursuant to §§ 33g or 33i or § 35 paragraph 1a of the Renewable Energy Act,
    - 1b. payments according to § 35 paragraph 1b of the Renewable Energy Act,
  2. repayments under paragraph 6,
  3. payments for interest referred to in paragraph 5,
  4. costs necessary for the settlement of intraday transactions,
  5. costs necessary for the settlement of balancing energy for the EEG balance group,
  6. costs necessary for the preparation of day-ahead and intraday forecasts,
  7. costs necessary for the establishment and operation of an installation register, provided that the transmission system operator are required to operate such a register on the basis of a decree adopted pursuant to § 64e Number 2 of the Renewable Energy Act.
- (5) Differences between revenue and expenditure are subject to an interest. The interest rate for one calendar month amounts to 0,3 percentage points above the monthly average of the euro interbank offered rate set for the procurement of one-month money of the first addresses in the countries participating in the European Monetary Union (EURIBOR) for a period of one month.
- (6) If there are entitlements as a result of discrepancies between the monthly payments according to § 37 paragraph 2 sentence 3 of the Renewable Energy Act and the final settlement pursuant to § 48 paragraph 2 of the Renewable Energy Act, they have to be compensated until 30 September of the year following the feeding-in.
- (7) When forecasting the revenues and expenditures referred to in paragraph 1, point 1 to calculate the EEG-surcharge, transmission system operators are allowed to take into account a liquidity reserve. It may not exceed 10 % of the difference referred to in paragraph 1, point 1.:
- (12) Hence, the four TSOs determine jointly the EEG-surcharge on the basis of the forecasted financial needs for the payment of feed-in tariffs and premiums, the forecasted revenues from the sale of the EEG electricity on the spot market and the forecasted consumption of electricity. In addition, a series of revenues and costs linked to the management of the EEG-surcharge have to be taken into account for its calculation. For 2012, the EEG-surcharge amounted to 3,592 ct/kWh. In 2013, it was 5,277 ct/kWh. In 2014, the surcharge amounts to 6,240 ct/kWh.

- (13) It furthermore follows from the provisions described in recital 11 that the EEG-surcharge ensures that all of the additional costs which the network operators and the TSOs incur as a result of their legal obligations under the EEG-Act 2012 vis-à-vis the producers of EEG electricity and the network operators respectively are compensated via the EEG-surcharge. If, in a given year, the revenues from the EEG-surcharge exceed the costs, the surplus is carried over into the next year, and the EEG-surcharge reduced accordingly; if there is a shortfall, the EEG-surcharge is increased accordingly. Those adjustments are automatic and do not require any further intervention of the legislator or the executive branch.

## 2.2. The green electricity privilege

- (14) According to § 39 EEG-Act 2012, the EEG-surcharge is decreased for electricity suppliers in a given calendar year by 2 cents per kilowatt hour (ct/kWh), where the EEG electricity they deliver to all of their final consumers fulfils certain conditions (so-called *green electricity privilege*).
- (15) The reduction is granted when the supplier has bought EEG electricity directly from national EEG electricity producers under direct marketing arrangements within the meaning of § 33b No 2 of the EEG-Act 2012 (that is to say, direct marketing arrangements where the EEG electricity producer does not apply for support under the EEG-Act 2012) and the amount of EEG electricity bought reaches the following thresholds:
- (a) at least 50 % of the electricity the supplier delivers to all of their final consumers is EEG electricity; and
- (b) at least 20 % of the electricity is wind or solar electricity within the meaning of §§ 29 to 33 of the EEG-Act 2012.
- (16) The reduction of 2 ct/kWh will be applied on the entire electricity portfolio. This means that if a supplier sources 50 % of its electricity from conventional energy sources, whilst the other half of its electricity is EEG electricity purchased under the direct marketing arrangements described in recital 15, the supplier receives a payment of 4 ct/kWh. That payment can be passed on in part or entirely to the producers of EEG electricity.
- (17) In that respect, Germany has explained that electricity suppliers which apply for the privilege only receive the 2 ct/kWh reduction on their whole portfolio if at least 50 % of it is EEG electricity. In order to avoid or minimise the risk of narrowly missing the 50 % target (in which case the full EEG surcharge would be due on the whole portfolio), electricity suppliers purchase EEG electricity with a safety margin, that is to say, in excess of the 50 % needed, sometimes ranging up to 60 %. In that case, in order to calculate the cost advantage that can potentially be passed on to EEG electricity producers, the EEG-surcharge reduction obtained for the whole portfolio, that is to say, 2 ct/kWh, needs to be divided by a higher EEG electricity share. For a share of 60 % for instance, the actual cost advantage that could be passed on would amount not to 4 ct/kWh, but to merely 3,3 ct/kWh. On average, the maximum advantage resulting from the *green electricity privilege* was 3,8 ct/kWh in 2012, 3,2 ct/kWh in 2013 and 3,9 ct/kWh in 2014.
- (18) In order to determine the extent of historical potential discrimination under Articles 30 and 110 of the Treaty, with a view to finding a remedy to it, Germany has estimated that between 1 January 2012 and 31 July 2014, which is the period when the EEG-Act 2012 was in force, the imports of guarantees of origin corresponding to EEG electricity plants that would have been eligible for support under the EEG-Act 2012 amounted to 1,3 TWh.

Year	2012	2013	2014
Eligible EEG electricity imports backed by guarantees of origin (in GWh)	519	283	547

- (19) Germany submits that if all those imports had benefited from the *green electricity privilege*, at approximately 4 ct/kWh, the revenues foregone under the EEG surcharge from electricity suppliers purchasing that electricity would have amounted to approximately EUR 50 million. Germany has committed to reinvest that amount into interconnectors and European energy projects.

### 2.3. The capped EEG-surcharge for energy-intensive undertakings

- (20) The EEG-Act 2012 does not impose an obligation on electricity suppliers to pass on the EEG-surcharge to customers. However, the EEG-Act 2012 establishes how the electricity supplier has to indicate the EEG-surcharge on the electricity bill, where the EEG-surcharge is passed on. In practice, all electricity suppliers pass on the EEG-surcharge in its entirety.
- (21) § 40 EEG-Act 2012 limits the amount of the surcharge that can be passed on by electricity suppliers to EIUs: upon request, the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* ('BAFA'), a public authority, will issue an administrative act that prohibits the electricity supplier from passing on the totality of the EEG-surcharge to an end-user when the end-user is a manufacturing undertaking with high electricity consumption<sup>(9)</sup>. That provision is referred to as the 'special compensation rule' (*Besondere Ausgleichsregelung*, 'BesAR').
- (22) § 40 EEG-Act 2012 states that that limitation is intended to reduce the electricity costs for those undertakings in order to maintain their international competitiveness, in so far as this is compatible with the goals of the EEG-Act 2012 and the limit imposed is still compatible with the interest of the electricity users as a whole.
- (23) § 41(1) EEG-Act 2012 subjects the limitation of the EEG-surcharge to the following conditions:
- (a) the electricity purchased from an electricity supplier and used by the undertakings themselves was at least 1 GWh in the previous financial year;
  - (b) the ratio of the electricity costs to be borne by the undertaking to its gross added value was at least 14 % in the previous financial year;
  - (c) the EEG-surcharge was passed on to the undertaking in the previous financial year;
  - (d) the undertaking has undergone a certified energy audit (that condition does not apply to undertakings whose electricity consumption is less than 10 GWh).
- (24) The general rule in § 41(3) No 1 is that for an EIU, the EEG-surcharge is gradually capped as follows:
- (a) consumption up to 1 GWh: no cap — full EEG-surcharge;
  - (b) consumption between 1 GWh and 10 GWh: 10 % of the EEG-surcharge;
  - (c) consumption between 10 GWh and 100 GWh: 1 % of the EEG-surcharge;
  - (d) consumption above 100 GWh: 0,05 cent/kWh.
- (25) If an EIU has a consumption above 100 GWh and if costs of electricity represent more than 20 % of gross added value, the different thresholds described in recital 24 do not apply, and the EEG-surcharge will be limited to 0,05 cent/kWh for the EIU's entire electricity consumption (§ 41(3) No 2).
- (26) The decision of the BAFA is binding not only upon the electricity supplier, but also upon the TSO. This means that where the BAFA has decided that an EIU only needs to pay a reduced EEG-surcharge to its electricity supplier, the EIU's electricity supplier's obligation to pay the EEG-surcharge to the TSO is in turn reduced accordingly. This will be taken into account when the TSO establishes the EEG-surcharge. Any disputes on the decision of the BAFA are to be brought to the administrative courts, because that decision is an administrative act. Therefore, those decisions are also immediately executable.

### 2.4. The adjustment plan

- (27) In order to bring the reductions of the EEG-surcharge in line with the provisions in points 196 *et seq.* of the Guidelines on State aid for environmental protection and energy 2014-20<sup>(10)</sup> ('2014 Guidelines'), Germany has submitted an adjustment plan.

<sup>(9)</sup> The cap is also granted to railway undertakings. This cap is not examined in the framework of this decision. The Commission reserves the right to assess § 42 EEG-Act 2012 in a separate procedure.

<sup>(10)</sup> OJ C 200, 28.6.2014, p. 1.

- (28) For undertakings which have benefited from BesAR, but which paid less than they should have according to the rules laid down in Section 3.7.2 of the 2014 Guidelines (notably the eligibility criteria in points 185, 186 and 187 and the proportionality criteria in points 188 and 189), the adjusted EEG-surcharge for 2013 must not exceed 125 % of the surcharge that they actually paid in that year. The adjusted surcharge due for 2014 must not exceed 150 % of the same base value, that is to say, the surcharge that was actually paid in 2013. In order to speed up the recovery, and as the consumption data for the years concerned is not yet available for all undertakings concerned by recovery, Germany will, as a first step, use the electricity consumption that was submitted in the applications to calculate a preliminary recovery amount, to be recovered immediately to fulfil the *Deggendorf* requirement<sup>(1)</sup>. Germany will, as a second step, apply the actual consumption data of the years concerned in order to determine the final recovery amounts and take the necessary steps to ensure recovery or repayment on the basis of those final amounts.
- (29) From 2015, the adjustment mechanism is modified. According to §103(3) of the EEG-Act 2014<sup>(2)</sup>, the BAFA will limit the EEG-surcharge to be paid by EIUs in the years 2015 to 2018 in such a way that the EEG-surcharge for a given year  $x$  may not exceed the double of the EEG-surcharge that was paid in the business year preceding the year of application ( $x - 2$ ). While the EEG-surcharge will thus be adjusted upwards each year, the surcharge to be paid in 2015 will be capped at the double of the surcharge of 2013, as will the surcharges in the following years until 2018.

### 2.5. Transparency, EEG-account and monitoring by the State

- (30) A certain number of control, supervision and enforcement tasks have been entrusted to the Federal Networks Agency (*Bundesnetzagentur*, 'BNetzA').
- (31) EEG electricity producers, network operators, TSOs and electricity suppliers are obliged to make the data required for the correct implementation of the EEG-system available to each other. The EEG-Act 2012 establishes in detail what type of information must be transmitted systematically to other operators and at what time of the year. Network operators, TSOs and electricity suppliers can require that the data be audited by an accountant.
- (32) The EEG-Act 2012 established a dispute settlement body entrusted by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with the task of clarifying questions and resolving disputes between EEG electricity producers, network operators, TSOs and electricity suppliers (*Clearingstelle*).
- (33) In addition, network operators and TSOs are obliged, according to the EEG-Act 2012 and implementing decrees (the *AusglMechV* and the *AusglMechAV*) to publish certain data on their websites (amount of EEG electricity purchased and at what price). TSOs have to keep all transactions linked to the EEG-Act 2012 separate from the rest of their activities. They are obliged to keep separate financial accounts for all financial flows related to the EEG-Act 2012, and there must be a separate bank account, administered jointly by the four TSOs, for all expenses and revenues linked to the EEG-Act 2012 (§ 5 *AusglMechAV*).
- (34) TSOs are under the obligation to publish, on a common website designated as 'EEG-account', monthly aggregated revenues resulting from the sale of EEG electricity on the spot market and from the EEG-surcharge and aggregated costs (compensation to network operators and other costs related to the management of the system). They are also under an obligation to publish in advance the forecasted EEG-surcharge for the following year.
- (35) The EEG-Act 2012 has established the obligation for installations to be registered with a public body. The registration will be a condition for entitlement to receive feed-in tariffs. The register has not yet been established but there is already a separate obligation in place for solar installations and liquid biomass installations to be registered in order to benefit from feed-in tariffs. The BNetzA manages the solar installation register and the *Bundesanstalt für Landwirtschaft und Ernährung* manages the liquid biomass installations register.
- (36) Network operators and TSOs have to transmit to the BNetzA the details which they receive from the installation operators (installation location, production capacity, etc.), the network level (distribution or transmission) at which installations are connected, aggregated and individual tariffs paid to installations, the final invoices sent to electricity suppliers and the data required to verify the accuracy of the figures thus provided. Electricity suppliers

<sup>(1)</sup> Cases T-244/93 and T-486/93, *TWD Textilwerke Deggendorf v Commission*, ECLI:EU:T:1995; 160.

<sup>(2)</sup> Gesetz zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts vom 21. Juli 2014, Bundesgesetzblatt, Part I, p. 1066.

are required to communicate to the BNetzA the amount of electricity supplied to their customers and their final accounts. The BNetzA also has audit powers as regards owners of EEG electricity installations so as to monitor how network operators and TSOs have complied with their obligations.

- (37) TSOs also have to transmit detailed data to the BNetzA relating to the establishment of the EEG-surcharge. In particular, they have to provide data related to the different revenues and expenditures entries that is used for the calculation of the EEG-surcharge, § 7(2) AusglMechV.
- (38) Those benefiting from a capped EEG-surcharge must, upon request, provide the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with all information necessary in order to enable it to assess whether the objectives under § 40 will be met.
- (39) The BNetzA has been entrusted with ensuring that:
- TSOs sell on the spot market the electricity for which feed-in tariffs are paid in accordance with applicable rules (that is to say, the AusglMechV),
  - TSOs properly determine, set and publish the EEG-surcharge,
  - TSOs properly charge electricity suppliers for the EEG-surcharge,
  - feed-in tariffs and premiums are properly charged by network operators to TSOs,
  - the EEG-surcharge is reduced only for electricity suppliers fulfilling the conditions of § 39.
- (40) As to the determination of the EEG-surcharge, the BNetzA has numerous enforcement powers and tasks related to the different cost and revenue items that TSOs are allowed to include in the calculation of the EEG-surcharge. First, the BNetzA has the power to establish, in agreement with the competent ministries <sup>(13)</sup>, the rules for the determination of items that are regarded as income or expenses for the establishment of the EEG-surcharge and the applicable interest rate. On that basis, the BNetzA has further detailed in the AusglMechAV what types of costs could be taken into account. Second, the BNetzA is to be provided with all the relevant elements and documents relating to the calculation of the EEG-surcharge. Third, the BNetzA can request additional information, including the accounts (§ 5(3) AusglMechAV). Finally, the TSOs are under an obligation to demonstrate the accuracy and necessity of certain cost items, before they can be taken into account for the calculation of the EEG-surcharge (see for instance § 6(2) AusglMechAV).
- (41) The BNetzA has power to give instructions to TSOs and to establish standard forms for the data that TSOs have to transmit to it.
- (42) The BNetzA also has the power to establish requirements, in agreement with the Federal Ministry for Environment, Nature Conservation and Nuclear Safety, related to the marketing of EEG electricity by the TSOs on the spot market and to establish incentives for the best possible marketing of the electricity. This was done by means of the AusglMechAV.
- (43) The BNetzA has enforcement powers. It can, for instance, issue orders when TSOs do not establish the EEG-surcharge in accordance with the rules (see § 38 No 5; § 61(1) No 2). It can also set the level of the EEG-surcharge. § 6(3) AusglMechAV indicates that the difference between the EEG-surcharge in the collected amounts and the EEG-surcharge in the level authorised by the BNetzA in accordance with an enforceable decision of the BNetzA pursuant to § 61(1) Nos 3 and 4 of the EEG-Act 2012 also constitutes either revenue or expense within the meaning of § 3(3) and (4) of the AusglMechV. Unlike what Germany is claiming, this is evidence that the BNetzA can take enforceable decisions to correct the level of the surcharge. The legal basis for this is § 61, paragraphs 1 and 2, in conjunction with §§ 65 *et seq.* *Energiewirtschaftsgesetz* (EnWG) <sup>(14)</sup>, which are provisions that enable the BNetzA to take binding decisions which apply to private operators. The BNetzA can also impose fines (see § 62(1) and (2) EEG-Act 2012).
- (44) The BNetzA itself is subject to certain reporting obligations and has to communicate certain data to the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and to the Federal Ministry of Economics and Technology for statistical and evaluation purposes.

<sup>(13)</sup> According to § 11 AusglMechV, the BNetzA can enact regulations in agreement with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (now Federal Ministry for the Environment, Nature Conservation, Construction and Nuclear Safety) and the Federal Ministry of Economics and Technology (now Federal Ministry for Economic Affairs and Energy).

<sup>(14)</sup> Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz — EnWG) vom, 7. Juli 2005, Bundesgesetzblatt, Part I, p. 1970, 3621, as amended by Article 3(4) of Gesetz vom 4. Oktober 2013, Bundesgesetzblatt, Part I, p. 3746.

- (45) The Federal Environmental Agency (*Umweltbundesamt*, 'UBA') keeps the register of guarantees of origin in accordance with Article 15 of Directive 2009/28/EC of the European Parliament and of the Council <sup>(15)</sup>. In that respect, the UBA is responsible for issuing, transferring and cancelling the guarantees of origin.

### 3. THE DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE

- (46) On 18 December 2013, the Commission decided to initiate the formal investigation procedure as it considered that the EEG-Act 2012 constituted State aid for EEG electricity producers, electricity suppliers benefitting from the *green electricity privilege*, and EIU and had doubts as to the compatibility of that aid with the internal market.
- (47) As regards the existence of State aid, the Commission reached the preliminary conclusion that the EEG-Act 2012 involved the conferral of selective economic advantages (i) on producers of electricity from RES and mine gas, notably through the feed-in tariffs, and (ii) on energy-intensive users, through the reduction of their EEG-surcharges.
- (48) The Commission also came to the preliminary conclusion that these advantages were financed from State resources, given in particular (i) that the German legislator appeared to have introduced a special levy intended to finance the support for EEG electricity production, the EEG-surcharge, (ii) that the German legislator and the executive branch had designated the TSOs to collectively administer that surcharge according to rules laid down by the State in the EEG-Act 2012 and in implementing regulations, and (iii) that the TSOs were closely monitored in the administration of that resource.
- (49) While the support for EEG electricity was found to be compatible with the internal market on the basis of Article 107(3)(c) of the Treaty, the Commission voiced doubts as to whether the reductions of the EEG-surcharge could be found compatible on the basis of the Treaty, and in particular Article 107(3)(b) and (c) of the Treaty.
- (50) Finally, the Commission expressed doubts as to whether the financing of the support for EEG electricity under the EEG-Act 2012 complied with Articles 30 and 110 of the Treaty, given that although the EEG-surcharge only benefited EEG electricity production in Germany, it was also imposed on the consumption of imported EEG electricity the producers of which may have been eligible for support under the EEG-Act 2012 had they been located in Germany.

### 4. COMMENTS FROM INTERESTED PARTIES

- (51) Interested parties submitted their observations on the Opening Decision and on the application of the 2014 Guidelines to this Decision pursuant to point 248 of the 2014 Guidelines.
- (52) Most interested parties argued that the EEG-Act 2012 should not be seen as involving State aid either at the level of EEG electricity producers, or in favour of the EIUs. They take the view that the German State has merely organised a system based on (successive) payments between private operators where those operators use their own financial resources. The mere fact that that system originates in State legislation (the EEG-Act 2012 and its implementing provisions), or the involvement of the BNetzA, the Bundesanstalt für Ernährung und Landwirtschaft, the UBA and the BAFA, the attributions of which are allegedly limited, cannot, in their view, alter the innately private nature of the system. This analysis is mostly based on the Court judgments in the cases *PreussenElektra* <sup>(16)</sup> and *Doux Élevage* <sup>(17)</sup>. If there is any aid at all, the interested parties argue that it should be considered to be existing aid in the light of the Commission's decision on a previous German scheme in case NN 27/2000 <sup>(18)</sup>.
- (53) Moreover, interested parties have contended that the reductions in the EEG-surcharge are compatible with the internal market on the basis of either Article 107(3)(b) or (c) of the Treaty. The EEG-Act 2012 is described by those parties as pursuing a dual objective of supporting the development of EEG electricity production and of preserving Germany's and the Union's industrial basis. The interested parties submit that any aid involved in the EEG-Act 2012 is an appropriate and proportionate means of achieving that dual objective. In any case, they state that the Commission should not apply the 2014 Guidelines to this case, because such application would be retroactive. It should also refrain from recovery due to the need to protect the beneficiaries' legitimate expectations that the aid was lawfully granted.

<sup>(15)</sup> 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 (OJ L 140, 5.6.2009, p. 16).

<sup>(16)</sup> Case C-379/98, *PreussenElektra v Schleswig*, ECLI:EU:C:2001:160.

<sup>(17)</sup> Case C-677/11, *Doux Élevage*. ECLI:EU:C:2013:348.

<sup>(18)</sup> OJ C 164, 10.7.2002, p. 5.

- (54) In contrast, the German Association of Energy Consumers (*Bund der Energieverbraucher*), which initially complained to the Commission about the EEG-Act 2012, argued that the reductions in the EEG-surcharge do indeed constitute State aid, within the meaning of Article 107(1) of the Treaty, to energy-intensive users and that they harm those German undertakings and consumers that have to pay a higher EEG-surcharge without benefiting from similar reductions. The Association further contended that the reductions cannot be found compatible on the basis of Article 107(3)(c) of the Treaty. These arguments were also made by several German citizens.
- (55) The arguments submitted by interested parties are addressed in more detail in Section 7.

#### 5. COMMENTS FROM GERMANY ON THE OPENING DECISION AND ON THIRD PARTY COMMENTS

- (56) Germany points out that most of the actors in the system established by the EEG-Act 2012 are private, something which was already the case under *PreussenElektra*, and that those actors are not part of public administration. The only State involvement is in the adoption of the legislation and the strict control of its implementation. The public authorities involved, notably the BNetzA and the BAFA, are said to strictly comply with their limited attributions, without managing any funds. According to Germany, those authorities have no discretion. Further, Germany notes that the EEG-surcharge as such is not set by the State, but is based on a market mechanism, given that it depends on the revenues made from the EEG electricity sales on the spot market. Finally, Germany stresses that the EEG-Act 2012 does not require suppliers to pass on the surcharge to consumers, which means the pass-on is a matter of the electricity suppliers' pricing policy. Moreover, none of the operators involved in the system have special powers originating in public law; rather, they have to rely on the civil courts to enforce their payment claims against each other.
- (57) Germany made the following legal arguments, which are similar to those submitted by interested parties, namely
- the absence of selective economic advantages, on the grounds that the support for EEG electricity meets the criteria of the *Altmark* judgment <sup>(19)</sup> and that the reductions for energy-intensive users merely amount to mitigating an existing disadvantage of the German industry;
  - the absence of State resources and of State control, due to the incomparability of the legal and factual situation in the EEG-Act 2012 with the situations examined by the Court in cases *Essent* <sup>(20)</sup> and *Vent de colère* <sup>(21)</sup>;
  - the fact that, if they constitute State aid at all, the payments made under the EEG-Act 2012 would constitute existing aid in the light of the Commission's decision in State aid case NN 27/2000;
  - the compatibility of any aid granted with the internal market on the basis of Article 107(3)(b) and (c);
  - the absence of an infringement of Articles 30 and 110 of the Treaty due to the fact that imported EEG electricity cannot be compared with that which is domestically produced, notably in view of the recent *Ålands Vindkraft* ruling <sup>(22)</sup>.

- (58) Germany's arguments are examined and rebutted in more detail in Section 7.

#### 6. COMMITMENTS PROVIDED BY GERMANY

- (59) As mentioned above in recital 19, Germany provided the following commitment concerning the reinvestment of EUR 50 million into interconnectors and European energy projects:

'For the EEG 2012, a global solution could be conceived for both the Grünstromprivileg and the Article 30/110 issue. The solution would consist of the reinvestment into interconnectors or similar European energy projects of the estimated amount of the alleged discrimination. The reinvestment could be made in parallel to the progress of the relevant project. On the basis of the figures communicated by Germany, the reinvestment should amount to EUR 50 million for the period January 2012-July 2014. Again, Germany offers this commitment by safeguarding its legal position (no discrimination).'

<sup>(19)</sup> Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

<sup>(20)</sup> Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413.

<sup>(21)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851.

<sup>(22)</sup> Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037.

- (60) In addition, Germany provided the following commitment concerning the adjustment plan mentioned in recitals 27 *et seq.*:

'Recovery [the recoverable amount] in respect of a given undertaking results from the difference of the relevant EEG costs as determined on the basis of the Guidelines on State aid for environmental protection and energy 2014-20 ("2014 Guidelines") and of the EEG costs as determined on the basis of the EEG-Act 2012. In that respect, the adjustment plan limits the payment to be made on the basis of the 2014 Guidelines to a maximum of 125 % (for the year 2013) and to a maximum of 150 % (for the year 2014) of the payment made in respect of the year 2013 according to the EEG-Act 2012. Negative recovery amounts are not taken into account.'

## 7. ASSESSMENT OF THE AID

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

- (61) According to Article 107(1) of the Treaty, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (62) In determining whether a measure constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission has to apply the following criteria: the measure must be imputable to the State and involve State resources, it must confer an advantage on certain undertakings or certain sectors which distorts or threatens to distort competition and is liable to affect trade between Member States.

#### 7.1.1. Existence of selective advantages affecting trade and competition

- (63) In its Opening Decision, the Commission found that the EEG-Act 2012 involved two types of selective advantages affecting trade and competition.
- (64) The first advantage was conferred on producers of EEG electricity. Indeed the Commission found that the feed-in tariffs and premiums guaranteed the producers of EEG electricity a higher price for the electricity they produce than the market price. The same was true for direct marketing of EEG electricity that resulted in a right to a reduced EEG-surcharge under § 39 of the EEG-Act 2012, as that provision enabled the producers of EEG electricity to obtain a higher price for their electricity than the market price. The measure was selective because it only benefited producers of EEG electricity. Moreover, the electricity market had been liberalised and electricity producers were active in sectors where trade between Member States took place (recital 76 of the Opening Decision).
- (65) The second advantage consisted in the reduction of the EEG-surcharge for certain EIUs under the BesAR. The Commission found that EIUs in the manufacturing sector enjoyed an advantage because their EEG-surcharge was capped. §§ 40 to 41 EEG-Act 2012 relieved them from a burden that they would normally have to bear. Indeed, the cap prevented TSOs and electricity suppliers from recovering the additional costs for the support of EEG electricity from EIUs. The measure was also considered to be selective because only EIUs from the manufacturing sector could benefit from it. Finally, the measure was liable to distort competition and affect trade between Member States because the beneficiaries were producers of energy-intensive goods (for example ferrous and non-ferrous metal producers, paper industries, chemical industry, cement producers) and were active in sectors in which trade between Member States took place (recitals 77 to 80 of the Opening Decision).
- (66) Germany takes the view that there is no economic advantage either at the level of EEG electricity producers, or at the level of EIUs which benefit from the BesAR, for the following reasons.
- (a) EEG electricity producers are said not to receive any economic advantage resulting from the EEG-surcharge in itself even if it were to be considered a State resource given that the feed-in tariffs at which they are remunerated are independent from the EEG-surcharge. Rather, the EEG-surcharge merely compensates the losses incurred by the TSOs. Moreover, the remuneration of the EEG electricity producers allegedly satisfies the criteria of the *Altmark* ruling <sup>(23)</sup>.

<sup>(23)</sup> Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraphs 87 to 93. The *Altmark* criteria have been set out by the Court of Justice to clarify under what circumstances a compensation provided by a public authority for the performance of a Service of General Economic Interest ('SGEI') qualifies as State aid under Article 107(1) of the Treaty.

- (b) Concerning EIUs, Germany argues that the BesAR does not grant an economic advantage, but rather compensates for a competitive disadvantage suffered by those undertakings in comparison with their competitors in other Member States (which have lower RES financing costs) <sup>(24)</sup> and third countries (which mostly face no comparable burdens).
- (67) Some interested parties have disputed the findings that the reduced EEG-surcharge constituted an economic advantage liable to distort competition. Rather, the measure was said to restore the competitive level-playing field in the Union, given that the industrial electricity costs were higher in Germany than elsewhere. In addition, some interested parties note that beneficiaries consuming more than 10 GWh per year incur financial costs associated with mandatory energy efficiency audits.
- (68) Germany and interested parties have also challenged the finding that the economic advantages are selective and liable to affect competition and trade, notably because the BesAR is said to apply to all undertakings in the manufacturing industry and to undertakings of all sizes. Some interested parties argue that the reductions are not selective as beneficiaries are not in a comparable situation to other undertakings, given that the principal eligibility criteria are electro-intensity and electricity consumption and given that electro-intensive undertakings face a much bigger threat from the EEG-surcharge than undertakings that are not. Further, they argue that even if the reduced surcharges were *prima facie* selective, they would be inherent to the nature and logic of the EEG electricity support system: without the reductions, EEG electricity support could not be financed as EIU would relocate outside Germany.
- (69) The arguments submitted by Germany and interested parties are unconvincing.

#### 7.1.1.1. Level playing field between undertakings in different Member States

- (70) First, the fact that an undertaking is compensated for costs or charges it has already incurred does not in principle exclude the existence of an economic advantage <sup>(25)</sup>. Nor is the existence of an advantage ruled out by the mere fact that competing undertakings in other Member States are in a more favourable position <sup>(26)</sup>, because the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure. Nevertheless, if one excludes taxes and levies, electricity prices for industrial consumers are lower in Germany than in other Member States on average.
- (71) The General Court has recently reconfirmed the principle that the existence of an advantage has to be assessed irrespective of the competitive playing field in other Member States <sup>(27)</sup>. The General Court found that the very nature of the preferential tariff, that is to say, the fact that *Alcoa Trasformazioni* was reimbursed the difference between the electricity prices charged by ENEL and the rate provided by the 1995 decree, is enough to conclude that the undertaking concerned was not bearing all the charges which should have normally burdened its budget <sup>(28)</sup>. The General Court went further to conclude that the existence of an advantage results from the simple description of the price differentiation mechanism, that is to say, a compensation mechanism, the purpose of which is to exonerate a company from the payment of a part of the price for electricity necessary for producing goods that are sold on the territory of the Union <sup>(29)</sup>. Moreover, the General Court restated <sup>(30)</sup> the principle that State aid must be assessed on its own merits and not in the light of its objectives, such as the remediation of imperfect competition on a certain market.
- (72) Similarly, the reductions of the EEG-surcharge granted under the BesAR improve the beneficiaries' financial situation by relieving them from a cost burden they would have to bear under normal conditions. Indeed, if it was not for the BesAR and the decision of the BAFA, they would have to pay the full EEG-surcharge like any other electricity consumer. Germany has stressed the necessity of the reductions in order to sustain the beneficiaries' competitiveness in comparison with EIUs in other Member States and third countries. In doing so, Germany implicitly acknowledges that the beneficiaries receive an economically advantageous treatment.

<sup>(24)</sup> In support of this argument, Germany cites the Council of European Energy Regulators' (CEER) report of 25 June 2013, titled 'Status Review of Renewable and Energy Efficiency Support Schemes in Europe' (in particular, the tables at pages 18-20).

<sup>(25)</sup> Case C-387/92, *Banco Exterior de España*, ECLI:EU:C:1994:100, paragraph 13; Case C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, paragraph 25; Case C-6/97, *Italy v Commission*, ECLI:EU:C:1999:251, paragraph 15; Case C-172/03, *Heiser*, ECLI:EU:C:2005:130, paragraph 36; Case C-126/01, *GEMO SA*, ECLI:EU:C:2003:622, paragraphs 28 to 31 on the free collection and disposal of waste.

<sup>(26)</sup> Case 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, paragraph 17. See also Case T-55/99, *CETM v Commission*, ECLI:EU:T:2000:223, paragraph 85.

<sup>(27)</sup> Case T-177/10, *Alcoa Trasformazioni v Commission*, ECLI:EU:T:2014:897, paragraphs 82 to 85.

<sup>(28)</sup> Case T-177/10, *Alcoa Trasformazioni v Commission*, ECLI:EU:T:2014:897, paragraph 82.

<sup>(29)</sup> Case T-177/10, *Alcoa Trasformazioni v Commission*, ECLI:EU:T:2014:897, paragraph 84.

<sup>(30)</sup> Case T-177/10, *Alcoa Trasformazioni v Commission*, ECLI:EU:T:2014:897, paragraph 85.

## 7.1.1.2. Selectivity

- (73) As far as the allegations of the non-selectivity of the BesAR are concerned, it must be recalled that ‘neither the large number of eligible undertakings nor the diversity and 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>(31)</sup>, as long as other sectors, such as for instance services, are excluded from the scope of beneficiaries. This is already the case here as only the manufacturing sector benefits from the aid (without any need for the Commission to examine further reasons for selectivity). Therefore, the reductions in the EEG surcharge do not apply to undertakings that are in a comparable situation with the beneficiaries. Moreover, the different reductions in the EEG surcharge depending on the consumption result in differentiations between entities in the same legal and factual situation, that is to say, energy-intensive users, and are in themselves selective.
- (74) Concerning the argument that the scope of the BesAR and the differentiations are justified by the nature and general scheme of the system, it should be recalled that ‘a measure which creates an exception to the application of the general tax system may be justified if it results directly from the basic or guiding principles of that tax system. In that context, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and 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’<sup>(32)</sup>. However, neither environmental protection, nor the preservation of the industry’s competitiveness qualify as basic or guiding principles inherent to the system of the surcharge. To the contrary, they are external objectives attributed to that system. Like in other cases before<sup>(33)</sup>, the objective of environmental protection cannot in the case at hand alter the finding that the reductions in the EEG-surcharge constitute State aid. First, the preservation of competitiveness is not even listed among the law’s objectives in § 1 of the EEG-Act 2012. To the contrary, it is actually specified in § 40, second sentence, that the preservation of competitiveness is subject to the condition that it does not jeopardise the objectives set out in § 1 of the EEG-Act 2012.

## 7.1.1.3. Advantage deriving from the EEG-surcharge; Altmark case-law

- (75) As regards Germany’s claim that the RES-surcharge in itself does not constitute an advantage to EEG electricity producers, the Commission maintains that the support measures improve the EEG electricity producers’ financial situation beyond what they would be able to earn when selling their electricity at the market price. The EEG-surcharge serves to finance those support measures. Contrary to what Germany claims, the fact that the feed-in tariffs may or may not be influenced by the level of the EEG-surcharge is irrelevant for determining whether these tariffs constitute an economic advantage.
- (76) Germany has submitted that the support for EEG electricity producers constitutes adequate compensation for the discharge of public service obligations within the meaning of the *Altmark* case.
- (77) In *Altmark*, the Court of Justice decided that a State measure would not be caught by Article 107(1) of the Treaty where that measure had to be regarded ‘as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings [did] not enjoy a real financial advantage and the measure thus [did] not have the effect of putting them in a more favourable competitive position than the undertakings competing with them’<sup>(34)</sup>.
- (78) However, that finding was subject to four conditions<sup>(35)</sup>:
- (a) ‘First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.’
- (b) ‘Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.’

<sup>(31)</sup> Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, paragraph 48.

<sup>(32)</sup> Joined cases C-78/08 to C-80/08, *Paint Graphos*, ECLI:EU:C:2011:550, paragraph 69.

<sup>(33)</sup> Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, paragraph 38 *et seq.*; Case C-172/03, *Heiser*, ECLI:EU:C:2005:130; Case C-487/06 P, *British Aggregates Association v Commission*, ECLI:EU:C:2008:757, paragraphs 86 to 92; Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, paragraphs 43, 52 *et seq.*

<sup>(34)</sup> Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraph 87.

<sup>(35)</sup> Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paragraphs 89 to 93.

- (c) 'Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.'
- (d) 'Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'
- (79) Germany argues that the support of RES producers fulfils the first condition due to the existence of an objective of common interest, laid down in Article 3(1) of Directive 2009/28/EC of promoting the use of renewable energy. In addition, according to Germany, Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council <sup>(36)</sup> shows that the promotion of renewable energy can be the subject-matter of public service obligations imposed on undertakings operating in the electricity sector.
- (80) Germany also considers the second *Altmark* criterion to be met. According to Germany, the parameters for the compensation of EEG electricity producers have been established in advance in an objective and transparent manner in the EEG-Act 2012.
- (81) Germany considers the third criterion to be fulfilled since the Commission has concluded in its Opening Decision that EEG electricity producers will not be overcompensated.
- (82) Finally, Germany contends that the level of support to EEG electricity producers has been determined on the basis of an analysis of the costs which a typical, well run and adequately endowed undertaking would have incurred in discharging its obligations. In that respect, Germany refers to the Commission's conclusion in the compatibility assessment of the Opening Decision that the support measures to EEG electricity producers have an incentive effect and are proportionate. Both facts allegedly demonstrate that the beneficiaries of the feed-in tariffs are well run.
- (83) The Commission finds those arguments unconvincing.
- (84) The first *Altmark* criterion requires that the provider of the public service must be entrusted with a public service obligation.
- (85) Under the EEG-Act 2012 producers are not under an obligation to produce, but are reacting to an economic incentive provided by the German State.
- (86) Therefore, the Commission concludes that the first *Altmark* criterion is not met.
- (87) As the *Altmark* criteria are cumulative, without having to examine if the second, third and fourth criteria are met, the Commission concludes that, Germany's arguments that the feed-in tariffs for RES producers constitute an adequate compensation for the discharge of public service obligations within the meaning of the *Altmark* case cannot be accepted.

#### 7.1.1.4. Van der Kooy, Danske Busvognmænd and Hotel Cipriani

- (88) Concerning the reductions from the EEG-surcharge under the BesAR, Germany as well as some interested parties have quoted the Court judgment in *Van der Kooy* and the General Court judgments in *Danske Busvognmænd* and *Hotel Cipriani* to argue that the reductions do not constitute an economic advantage <sup>(37)</sup>.

<sup>(36)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(37)</sup> Joined cases 67/85, 68/85 and 70/85, *Kwekerij Gebroeders van der Kooy et al.*, ECLI:EU:C:1988:38; Case T-157/01, *Danske Busvognmænd v Commission*, ECLI:EU:T:2004:76; Joined cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al. v Commission*, ECLI:EU:T:2008:537.

- (89) In *Van der Kooy*, the Court of Justice ruled that a preferential tariff for natural gas granted to undertakings engaged in hothouse horticulture would not constitute aid if it was, 'in the context of the market in question, objectively justified by economic reasons such as the need to resist competition on the same market from other sources of energy the price of which was competitive' <sup>(38)</sup>. However, contrary to the claims of Germany and of other interested parties, the issue at stake, that was referred to by the Court, was competition on the same market between different fuels and how a company selling such fuels can set its tariffs in accordance to it, that is to say, the application of the private investor test in a market economy. The question was whether the greenhouse companies would switch to coal because of the higher prices for gas and whether the preferential tariffs could therefore constitute rational economic behaviour on the part of the gas company. In the case at hand, there is no indication that Germany behaved like a private investor, and Germany has in fact never claimed that the reductions from the EEG-surcharge granted to EIUs should be considered as fulfilling the private investor test.
- (90) In addition, the *obiter dicta* in the rulings of the General Court in *Danske Busvognmænd* <sup>(39)</sup> and *Hotel Cipriani* <sup>(40)</sup> have in the meantime been overruled by the Court of Justice and more recent rulings from the General Court. In *Comitato 'Venezia vuole vivere'* <sup>(41)</sup>, the Court made it clear that that a measure is deemed not to constitute an advantage only when a State measure represents compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations, if those undertakings do not enjoy a real financial advantage and if the measure does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them <sup>(42)</sup>. The Court added that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid <sup>(43)</sup>. Moreover, measures designed to compensate for possible disadvantages to which undertakings established in a certain region of a Member State are exposed are capable of constituting selective advantages <sup>(44)</sup>.
- (91) Similarly, the General Court has found that the case-law in *Danske Busvognmænd* does not apply when charges that normally burden an undertaking's budget are relieved by the State. The General Court restated the principle that the scope of compensation, that is to say, of removing competitive disadvantages, does not remove its character of State aid within the meaning of Article 107(1) of the Treaty <sup>(45)</sup>.
- (92) In a later judgement, the General Court recognised that the objective of compensating for competitive disadvantages of undertakings, pursued by the reductions in certain contributions, could not remove from those advantages their character as aid within the meaning of Article 107(1) of the Treaty. Therefore a measure intended to offset a structural disadvantage cannot escape the classification as State aid, unless the criteria established in *Altmark* <sup>(46)</sup> are fulfilled.
- (93) Therefore, the line of argumentation raised by Germany and by certain interested parties cannot be accepted.
- (94) The Commission concludes that the measure entails selective advantages to producers of EEG electricity that are likely to affect competition and trade between Member States.

#### 7.1.2. Imputability

- (95) In its Opening Decision, the Commission held that the advantages were imputable to the German State, because the feed-in tariffs and premiums, the EEG-surcharge and the cap of that surcharge resulted from State legislation and implementing decrees and because the capping of the surcharge was established only after the BAFA, a public body, had checked that the legal conditions were met.
- (96) Germany and third parties have disputed the imputability on the ground that the State has merely enacted legislation and the network operators are acting on their own accord.

<sup>(38)</sup> Joined cases 67/85, 68/85 and 70/85, *Kwekerij Gebroeders van der Kooy et al.*, ECLI:EU:C:1988:38, paragraph 30.

<sup>(39)</sup> Case T-157/01, *Danske Busvognmænd v Commission*, ECLI:EU:T:2004:76, paragraph 57.

<sup>(40)</sup> Joined cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al. v Commission*, ECLI:EU:T:2008:537, paragraph 185.

<sup>(41)</sup> Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al. v Commission*, ECLI:EU:C:2011:368.

<sup>(42)</sup> Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al. v Commission*, ECLI:EU:C:2011:368, paragraph 92.

<sup>(43)</sup> Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al. v Commission*, ECLI:EU:C:2011:368, paragraph 95.

<sup>(44)</sup> Case C-71/09 P, *Comitato 'Venezia vuole vivere' et al. v Commission*, ECLI:EU:C:2011:368, paragraph 96.

<sup>(45)</sup> Case T-295/12, *Germany v Commission*, ECLI:EU:T:2014:675, paragraph 144; Case T-309/12 — *Zweckverband Tierkörperbeseitigung v Commission*, ECLI:EU:T:2014:676, paragraph 261.

<sup>(46)</sup> Case T-226/09, *British Telecommunications et al. v Commission*, ECLI:EU:T:2013:466, paragraph 71.

- (97) The question of imputability may require a careful assessment where only the behaviour of publicly owned enterprises is concerned. However, there is no doubt about the fact that actions of the State's public administration and of the legislator are always imputable to the State <sup>(47)</sup>.

### 7.1.3. Existence of State resources

- (98) Concerning the support for producers of EEG electricity, the Commission came to the preliminary conclusion in the Opening Decision that under the EEG-Act 2012, the TSOs had been designated by the State to administer the EEG-surcharge and that the revenues from the EEG-surcharge constituted a State resource (recital 138).
- (99) The State has not only defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also provided the financial resources to cover the costs of the support to EEG electricity. Contrary to what was the case in *Doux Élevage* <sup>(48)</sup>, the EEG-surcharge is created and imposed by the legislature, that is to say, the State, and is not merely a private initiative of the TSOs which the State renders compulsory in order to prevent free-riding. The State has defined the purpose and destination of the surcharge: it serves to finance a support policy developed by the State and is not an action decided by the TSOs. The TSOs are not free to establish the surcharge as they want and are strictly monitored in the way the surcharge is calculated, levied and managed. The way they sell the EEG electricity is also monitored by the State. The provisions governing the establishment of the EEG-surcharge ensure that the surcharge provides sufficient financial cover to pay for the support for EEG electricity as well as for the costs stemming from the management of the system. Those provisions do not allow for the collection of additional revenue beyond the coverage of those costs. The TSOs are not allowed to use the EEG-surcharge to finance any other type of activity, and financial flows are to be kept on separate accounts (recital 137 of the Opening Decision).
- (100) According to the case-law of the Court of Justice, both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State are included in the concept of State resources within the meaning of Article 107(1) of the Treaty <sup>(49)</sup>. Therefore, the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude the possibility that State resources are involved <sup>(50)</sup>. Moreover, the originally private nature of the resources does not prevent them from being regarded as State resources within the meaning of Article 107(1) of the Treaty <sup>(51)</sup>. The fact that the resources are not, at any time, the property of the State does also not prevent them from constituting State resources, if they are under the control of the State <sup>(52)</sup> (see recitals 82, 83 and 84 of the Opening Decision).
- (101) Thus, in several cases, the Court of Justice has held that contributions levied from private operators could constitute State aid due to the fact that a body had been specifically designated or established to administer those contributions in line with the State's legislation <sup>(53)</sup> (see recitals 85 to 89 of the Opening Decision). Indeed, as 'the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of [Article 107], even if they are administered by institutions distinct from the public authorities.' <sup>(54)</sup>.
- (102) The Commission therefore concluded in the Opening Decision, referring to the findings of the General Court <sup>(55)</sup>, that the relevant criterion in order to assess whether the resources were public, whatever their initial origin, was that of the degree of intervention of the public authority in the definition of the measures in question and their methods of financing.
- (103) While the Court excluded the existence of State resources in *PreussenElektra* and in *Doux Élevage*, this was due to the specific circumstances of those cases. In *PreussenElektra* <sup>(56)</sup>, there was neither a surcharge or contribution, nor a body established or appointed to administer the funds, as the obligations imposed on the private operators had

<sup>(47)</sup> Cf the conclusions of AG Wathelet, Case C-242/13, *Commerz Nederland*, ECLI:EU:C:2014:308, paragraphs 75 *et seq.*

<sup>(48)</sup> Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348.

<sup>(49)</sup> Case C-78/76, *Steinike & Weinlig v Germany*, ECLI:EU:C:1977:52, paragraph 21.

<sup>(50)</sup> Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348, paragraph 35.

<sup>(51)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraphs 16 to 20.

<sup>(52)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 21.

<sup>(53)</sup> Case C-78/76, *Steinike & Weinlig v Germany*, ECLI:EU:C:1977:52, paragraph 21; Case 173/73, *Italy v Commission*, EU:C:1974:71, paragraph 16; Case 259/85, *France v Commission*, ECLI:EU:C:1987:478, paragraph 23; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 66.

<sup>(54)</sup> Case 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, paragraph 16.

<sup>(55)</sup> Case T-139/09, *France v Commission*, ECLI:EU:T:2012:496, paragraphs 63 and 64.

<sup>(56)</sup> Case C-379/98, *PreussenElektra v Schleswag*, ECLI:EU:C:2001:160.

to be met by them with their own money. In *Doux Élevage*, there was indeed a contribution rendered compulsory by the State, but the private organisation was free to use the revenues from that contribution as it saw fit. There was therefore no element of State control over the funds collected.

- (104) When applying these principles to the support system established by the EEG-Act 2012, the Commission came to the following preliminary conclusions:
- (105) Through the EEG-Act 2012, the State has introduced a special levy, the EEG-surcharge, and has defined its purpose, which is the financing of the difference between the costs TSOs incur in purchasing EEG electricity and the revenue they generate from selling this electricity. The calculation method for determining the surcharge level is also set in the EEG-Act 2012, as is the principle that deficits and surpluses are corrected in the following year. This ensures that TSOs incur no losses, but also implies that they cannot use the revenue from the surcharge for anything else than the EEG financing. The Commission concluded that, unlike in *PreussenElektra*, the State had provided those undertakings with the required financial resources to finance the support for EEG electricity (see recitals 97 to 103 of the Opening Decision).
- (106) Moreover, the Commission held that the TSOs had been designated to administer the surcharge. They have to:
- purchase EEG electricity produced in their area either directly from the producer when it is directly connected to the transmission line or from distribution system operators (DSOs) at feed-in tariffs, or pay the market premium. As a result the EEG electricity as well as the financial burden of the support provided for by the EEG-Act 2012 are centralised at the level of each of the four TSOs;
  - apply the *green electricity privilege* to suppliers which ask for it and fulfil the relevant conditions, set out in § 39(1) of the EEG-Act 2012;
  - equalise between themselves the amount of EEG electricity so that each of them purchases the same proportion of EEG electricity;
  - sell the EEG electricity on the spot market according to rules defined in the EEG-Act 2012 and its implementing provisions, which can be done jointly;
  - jointly calculate the EEG-surcharge, which has to be the same for each kWh consumed in Germany, as the difference between revenues from the sale of EEG electricity and expenditure linked to the purchase of EEG electricity;
  - jointly publish the EEG-surcharge in a specific format on a joint website;
  - publish also aggregate information on the EEG electricity;
  - compare the forecasted EEG-surcharge with what it should really have been in a given year and adapt the surcharge for the following year;
  - publish forecasts for several years in advance;
  - collect the EEG-surcharge from electricity suppliers;
  - (each) keep all financial flows (expenditure and revenues) linked to the EEG-Act 2012 in separate bank accounts.
- (107) Finally, the Commission concluded that TSOs were being strictly monitored by the State in the administration of the surcharge (recitals 110 to 113 of the Opening Decision). The monitoring is performed by BNetzA, which also has the necessary enforcement powers. The BNetzA in particular monitors the way in which the TSOs sell the EEG electricity for which feed-in tariffs are paid on the spot market, that TSOs properly determine, set and publish the EEG-surcharge, that TSOs properly charge electricity suppliers for the EEG-surcharge, that feed-in tariffs and premiums are properly charged to the TSOs, and that the EEG-surcharge is only reduced for electricity suppliers fulfilling the conditions of § 39 of the EEG-Act 2012. The BNetzA also receives information from the TSOs on the support for EEG electricity and on the charging of the suppliers. Finally, the BNetzA can set fines and adopt decisions, including decisions influencing the level of the EEG-surcharge. The Commission also concluded that the BAFA, a State entity, grants the entitlements to a capped EEG-surcharge for EIUs following the application from the potential beneficiaries.

- (108) Germany disputes the involvement of State resources. First, it states that the EEG support mechanism only involves private undertakings, be it the operators of the EEG electricity plants, the network operators, the TSOs or the electricity suppliers, each category of which is predominantly privately owned, even though the State or public bodies retain ownership of an important number of those undertakings. When imposing obligations on them, the EEG-Act 2012 does not differentiate on the basis of whether the undertakings are in private or public ownership. As far as public bodies are involved in the process (BNetzA, BAFA, UBA), they allegedly do not control either the collection or the use of the resources, but are limited to a role of supervising the legality and the functioning of the system.
- (109) Secondly, Germany stresses that the level of the EEG-surcharge is not determined by the EEG-Act 2012, nor by a public body. The level of the EEG-surcharge is determined by the operation of the market, given that the TSOs first sell the EEG electricity on the spot market and then determine the remaining costs, which need to be covered by the EEG-surcharge.
- (110) Several interested parties have shared Germany's analysis that the EEG-Act 2012 does not constitute State aid. In particular, they dispute the Commission's preliminary findings that the EEG-surcharge is administered by private bodies designated by the State. They also contend that BNetzA, rather than exercising control over the revenue stemming from the EEG-surcharge or the level of the surcharge itself, is merely monitoring legality without having any influence on the management of the funds. Finally, while the reduction of the EEG-surcharge is based on the EEG-Act 2012 and implemented by the BAFA, this allegedly cannot change the private nature of the funds, since payments occur between private undertakings and at no point leave the private sector, so that the State cannot exercise control over them. In addition, it is submitted that the pass-on of the EEG-surcharge from TSOs to electricity suppliers, and subsequently from electricity suppliers to electricity consumers is left to the discretion of the TSOs and electricity suppliers respectively, which makes the surcharge an element of the private undertakings' pricing policy and by no means a State-imposed charge.
- (111) However, these arguments cannot alter the preliminary conclusion reached in the Opening Decision.

#### 7.1.3.1. Existence of a surcharge introduced by the State

- (112) Concerning Germany's argument that the EEG-surcharge never enters or transits through the State budget, it is sufficient to recall, as was already done in recital 100, that the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved, as long as the State has designated or established a body to administer the funds.
- (113) Germany has stressed that the EEG-surcharge payments which the electricity suppliers have to make to the TSOs are of a private nature, given that the TSOs have no authority or powers stemming from public law to enforce their claim for compensation against the suppliers. Rather, like any other private undertaking, they have to rely on the civil courts. However, this analysis fails to take into account that the payments in question are not based on freely negotiated contracts between the parties concerned, but on legal obligations (*gesetzliche Schuldverhältnisse*) which the State has imposed on them. The TSOs are therefore bound by law to recover the EEG-surcharge from the electricity suppliers.
- (114) In that respect, it is settled case-law<sup>(57)</sup> that the entities designated to administer the aid can be either public or private bodies. Therefore, the fact that the TSOs are private operators cannot as such exclude the existence of State resources. Moreover, the Court has found that '[t]he distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State'<sup>(58)</sup>. In *Sloman Neptun*<sup>(59)</sup>, the Court of Justice found that State resources are involved when the system at issues seeks, through its object and general structure, to create an advantage which would constitute an additional burden for the State or for the private bodies designated or established by the State<sup>(60)</sup>. Therefore it is enough for the advantage to reduce the resources a private body is entitled to for State resources to be involved. The reduced EEG-surcharge to be paid by the EIUs has exactly this effect of reducing the amounts collected from the EIUs by the electricity suppliers.

<sup>(57)</sup> Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 70; Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 20.

<sup>(58)</sup> Case C-72/91, *Sloman Neptun v Bodo Ziesemer*, ECLI:EU:C:1993:97, paragraph 19.

<sup>(59)</sup> Case C-72/91, *Sloman Neptun v Bodo Ziesemer*, ECLI:EU:C:1993:97.

<sup>(60)</sup> Case C-72/91, *Sloman Neptun v Bodo Ziesemer*, ECLI:EU:C:1993:97, paragraph 21.

- (115) The fact that electricity suppliers are not obliged to pass on the EEG-surcharge to electricity consumers does not lead to the finding that the collected revenues are private, as long as the electricity suppliers themselves are under an obligation, stemming from the EEG-Act 2012, to pay the surcharge to the TSOs. Again, this obligation is not based on a contract into which the operators could enter freely, but is a legal obligation (*gesetzliches Schuldverhältnis*) stemming directly from the State's legislation. Moreover, as stated in recital 100, the originally private nature of the resources does not prevent them from being regarded as State resources. Unlike in *PreussenElektra*, where private operators had to use their own resources to pay the purchase price for a product, the TSOs have been collectively designated to administer a surcharge which the electricity suppliers are obliged to pay without receiving anything equivalent in return.
- (116) According to Germany, some national courts have examined the EEG-surcharge and the monies collected through it and have actually concluded that the State has no control over them. In one case Germany is referring to <sup>(61)</sup>, the national court noted that by creating a self-sustaining system for the pursuit of a public policy objective, the German State had to a certain extent outsourced the financing of RES support to private operators. For this reason, the national court considered that the EEG-surcharge did not constitute a special contribution (*Sonderabgabe*) within the meaning of German constitutional law because the proceeds from the EEG-surcharge were not allocated to the State budget and because the public authorities did not have the funds at their disposal, even indirectly. The Commission therefore notes that the national court's conclusion was limited to the application of national constitutional law, and in particular to the interpretation of the legal concept of the 'special contribution'. The national court did not address the question whether the EEG-Act 2012 involved State aid within the meaning of Article 107(1) of the Treaty. While there may be similarities between the test applied by the national court for the purposes of German constitutional law and the assessment which the Commission has to carry out under Article 107(1) of the Treaty, it follows from the case-law of the Court of Justice that resources do not need to flow into the State budget or be the property of the State to be considered State resources. Given that State resources can also be present when a public or private body has been established or appointed to administer them, the concept of State resources is wider than the test applied by the national court under German constitutional law <sup>(62)</sup>.

#### 7.1.3.2. Designation of the TSOs to administer the surcharge

- (117) Germany disputes the Commission's finding that the TSOs have been collectively designated to administer a State resource. According to Germany, the TSOs are not subject to any entrustment by the State. Rather the different operators that are covered by the EEG-Act 2012, like all operators in the economy, merely settle private claims amongst themselves arising from the rights offered to them by law.
- (118) However, the Commission considers that the EEG-Act 2012 clearly entrusts TSOs with a series of obligations and monitoring tasks in relation to the EEG system making them the central point in the functioning of the system (see recital 106). Each of the four German TSOs centralises, for its own area, all the EEG electricity and all the costs resulting from the acquisition of EEG electricity and the payment of market premiums, and the costs resulting from the administration of the EEG-surcharge. They also centralise each the proceeds of the EEG-surcharge for their area. Therefore, it is clear that the TSOs do not just settle private claims between themselves, but are implementing their legal obligations under the EEG-Act 2012.

#### 7.1.3.3. Monitoring by the State, notably the BNetzA

- (119) Germany and interested parties further contend that the attributions of the public authorities, notably the BNetzA and the BAFA, are too limited to give them any significant measure of control over the EEG-surcharge. The BNetzA and the BAFA only supervise the legality of actions of the private operators involved and if necessary impose administrative sanctions (BNetzA), or ascertain an EIU's right to benefit from a reduced surcharge (BAFA). They cannot influence the financial flows and they do not decide the level of the EEG-surcharge. According to Germany, the fact that the EEG-Act 2012 sets the method for calculating the surcharge as well as the transparency requirements, as well as the supervision carried out by the BNetzA, are aimed only at preventing the unjust enrichment by one of the private operators along the line of payment. However, this then has to be enforced by the private operators by bringing proceedings before the civil courts.
- (120) Contrary to the assertions of Germany and the interested parties, the BAFA issues an administrative decision when establishing the entitlements to a capped EEG-surcharge for EIUs following the application from the

<sup>(61)</sup> Oberlandesgericht Hamm, judgment of 14 May 2013, ref. 19 U 180/12.

<sup>(62)</sup> Cf. Case C-78/76, *Steinike & Weinlig v Germany*, ECLI:EU:C:1977:52, paragraph 21.

potential beneficiaries. That decision can only be challenged before German administrative courts and not before civil courts, and is self-executing. Furthermore, the BNetzA has important enforcement powers under the EnWG, which it can use to fine all operators involved in the system and enforce compliance with the EEG-Act 2012.

- (121) Moreover, the Court of Justice recently confirmed in *Elcogás* that State resources are involved even when the State body that was entrusted with the distribution of the collected amounts, does not enjoy discretion in this regard <sup>(63)</sup>.
- (122) More specifically, contrary to what the Commission held in recital 134 of the Opening Decision, Germany and interested parties argue that the BNetzA cannot set the level of the EEG-surcharge. However, as was already established in recital 43, § 6(3) *AusglMechAV* shows that the BNetzA can take enforceable decisions to correct the level of the surcharge. Moreover, the extent to which the BNetzA has exercised its powers is irrelevant as long as it had them. The BNetzA may simply not have considered it necessary to take any enforceable decisions.

#### 7.1.3.4. The finding of State control in general

- (123) Germany and several interested parties have criticised the Commission for allegedly unduly considering the different steps and relationships in the EEG-system as a whole in order to argue that the system was under State control. They claim that, had the Commission examined the steps separately and focused only on one set of relationships at a time (EEG electricity producer — DSO/TSO; TSO — BNetzA; TSO — supplier; supplier — consumer), the Commission would have had to conclude that there was no State control. Allegedly, the BAFA's role is limited to assessing eligibility, and the BAFA has no ability to exercise discretion in this.
- (124) To the contrary, it is Germany and the interested parties which err by assuming a too fragmented view of the financing system set up by the EEG-Act 2012. In *Bouygues*, the Court held: 'As State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded [...] that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention.' <sup>(64)</sup> The Court went on to state that this 'could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another' <sup>(65)</sup>. This is exactly the situation of the EEG-system. The EEG-Act 2012, and the powers and actions of BNetzA, BAFA, UBA and Bundesanstalt für Landwirtschaft und Ernährung are so very closely interlinked and dependant on each other that they can only be viewed as inseparable.
- (125) Germany also contends that the Commission has wrongly inferred State control from the way surpluses and deficits are managed in the EEG account. First, Germany notes that there is no connection between the EEG account and the State budget: the State does not compensate for a deficit in the EEG account, nor — as was the case in *Essent* — are any surpluses allocated to the State budget. In fact, both deficits and surpluses determine the level of the EEG-surcharge in the following year. They are therefore equalised between the private operators involved. The State has no say in this.
- (126) However, the Commission considers that State control over the resources does not mean that there have to be flows from and to the State budget <sup>(66)</sup> involving the respective resources. In order for the State to exercise control over the resources, it is enough that it fully regulates what is supposed to happen in the event of a deficit or a surplus in the EEG account. The decisive element is that the State has created a system where the costs incurred by the network operators are fully compensated by the EEG-surcharge and where the electricity suppliers are empowered to pass on the surcharge to consumers.
- (127) Germany also points out that regulation and supervision of flows of private money alone cannot constitute State aid. Germany compares the system established by the EEG-Act 2012 to other fields of economic regulation, such as consumer protection in banking, the obligation of drivers to subscribe to car insurance, or price regulation in telecoms and health. Germany argues that the regulation of a private economic activity as such does not as such

<sup>(63)</sup> Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 29.

<sup>(64)</sup> Case C-399/10 P, *Bouygues et al. v Commission*, ECLI:EU:C:2013:175, paragraph 103.

<sup>(65)</sup> Case C-399/10 P, *Bouygues et al. v Commission*, ECLI:EU:C:2013:175, paragraph 104.

<sup>(66)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 19; Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 24.

entail State control. The BNetzA does no more, according to Germany, than ensuring consumer protection. However, there is a significant difference between those fields where the State merely provides a protective framework for consumers and the situation at hand. Here, the State has enacted a separate piece of legislation, the EEG-Act 2012, the primary purpose of which is not consumer protection. Here, the State ensures a continuous flow of money across the sector in order to serve the policy goals of that legislation. Moreover, it is settled case-law<sup>(67)</sup> that funds financed through compulsory charges imposed by the legislation of a Member State, managed and apportioned in accordance with the provisions of that legislation, must be regarded as State resources within the meaning of Article 107(1) of the Treaty even if they are managed by entities separate from the public authorities. Therefore, the EEG-Act 2012 cannot be compared with State measures which the State does not influence or for which it does not ensure financing.

- (128) According to Germany, the situation is comparable to that in *Doux Élevage*. In *Doux Élevage*, the Court found that the revenues collected from the contributions did not transit through the State budget, that the State did not forego revenue, that the funds remained private at all times and that non-payments had to be brought before the civil courts<sup>(68)</sup>. Moreover, the contributions were not ‘constantly under public control’ and were not ‘available to State authorities’<sup>(69)</sup>, and in fact, the public authorities were not permitted to exercise control over the contributions ‘except to check their validity and lawfulness’<sup>(70)</sup>. Despite the claims of Germany, the case at hand is not comparable with *Doux Élevage*. The difference lies in the fact that in *Doux Élevage*, ‘it is the inter-trade organisation that decides how to use the resources, which are entirely dedicated to pursuing objectives determined by that organisation’<sup>(71)</sup>. In the case at hand, the purpose of the EEG-surcharge has been set by the State and the implementation is fully controlled by the State. Moreover, while in *Doux Élevage*, the French authorities limited themselves to rendering a pre-existing voluntary contribution compulsory for all operators in the relevant trades, in the case at hand, the State has established the whole mechanism of calculating and equalising the costs between the private operators.
- (129) When assessing State control, Germany argues that the Commission’s use of the word ‘State’ is ambiguous. As evidenced by *Doux Élevage*, ‘State’ should primarily encompass the executive, that is to say, the government and administrative agencies, but not generally applicable legislation passed by parliament. The mere fact that the State has legislated for the *AusglMechV* does not constitute State control.
- (130) However, the ‘State’ criterion has to be understood widely. First, the Court has repeatedly held that the concept of the State naturally also encompasses the legislator<sup>(72)</sup>. Moreover, as mentioned in recital 124, State control is exercised by a series of regulatory and control measures that should not be assessed on a stand-alone basis. In the case at hand, the relevant legislation goes into so much detail that the system ensures State control without needing further involvement of State authorities. In addition, the BNetzA has significant powers to influence the process.
- (131) In contrast, Germany argues that the EEG-Act 2012 differs significantly from the situation in *Essent*. In the latter case, the level of the charge was defined by the law regardless of what costs it needed to cover. Moreover, surpluses in excess of NLG 400 million were transferred to the State budget. In contrast, the level of the EEG-surcharge is determined by the TSOs based on the sales on the spot market, and the State has no possibility to influence this. Moreover, the EEG account’s surpluses are kept within the system, as they influence the surcharge in the following year.
- (132) As shown in recital 126, State control over the resources does not mean that there have to be flows from and to the State budget<sup>(73)</sup> involving the respective resources. Moreover, in the case at hand the level of the EEG-surcharge is calculated in accordance with regulatory provisions taking into account the market price obtained by the TSOs. As explained in recital 13 of the Opening Decision, the way in which the TSOs calculate the EEG-surcharge after they know the price obtained on the spot market, is fully regulated and laid down in the EEG-Act 2012.

<sup>(67)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 25; Case 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, paragraph 16.

<sup>(68)</sup> Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348, paragraph 32.

<sup>(69)</sup> Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348, paragraph 36.

<sup>(70)</sup> Case C-677/11, *Doux Élevage*, ECLI:EU:C:2013:348, paragraph 38.

<sup>(71)</sup> See footnote 69.

<sup>(72)</sup> Case C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, paragraphs 102 to 113.

<sup>(73)</sup> Case C-262/12, *Association Vent de Colère!*, ECLI:EU:C:2013:851, paragraph 19; Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314, paragraph 24.

- (133) Moreover, Germany contends that while in *Essent*, one specific body had been entrusted with the administration of the charge, the EEG-Act 2012 actually imposes obligations on an indefinite number of private operators, that is to say, network operators, TSOs and electricity suppliers, and those obligations are defined in a general manner. This is not an entrustment, and such a large number of private operators cannot be considered to be designated by the State to administer a charge. As stated in recital 118, the TSOs, and not other operators, are the entities designated to administer the EEG-surcharge. Moreover, there does not appear to be any legal ground which would prohibit a Member State from entrusting more than one entity with administering State resources.
- (134) Germany and interested parties also stress the alleged differences between the EEG 2012-Act and the recent judgment in *Vent de colère* <sup>(74)</sup>: In France, the relevant contribution was collected from consumers by a State-run fund, while in Germany, the private TSOs collect the EEG-surcharge from private suppliers, which can then pass it on to consumers. In France, the level of the contribution was determined by ministerial decree, while in Germany, it is calculated by the TSOs on the basis of their actual costs. In France, in the event of a deficit, the State would step in, while in Germany, a deficit will need to be borne by the TSOs before being compensated for by an increase of the surcharge in the following year.
- (135) By arguing that State resources are only present if the State's executive has the funds at its disposal, Germany is misinterpreting the case-law. As explained in recital 130, the concept of the State is not limited to the executive, as it also encompasses the legislator, nor is it required that the State can dispose of the funds as if they were part of its own budget. As shown in recital 114, it is irrelevant whether the entity administering the State resources is private or public. Moreover, the TSOs calculate the EEG-surcharge on the basis of their costs in a manner that is laid down in the EEG-Act 2012 and the fact that the State has introduced a market-mechanism in the system does not affect the existence of State resources. The State also determines what is to be done in the event of a deficit. Indeed, the State does not pay for the deficit itself, but regulates and controls the manner in which the deficit is covered, ultimately also by the EEG-surcharge.
- (136) In addition, Germany argues that *Vent de colère* requires a discretionary power of the State to dispose of the financial resources at any time, while in the EEG-Act 2012, the State, having merely enacted legislation, has no such discretionary power. According to Germany, the Commission has insufficiently distinguished between true means of executive control and mere legislative activity. State control implies the fact that the State has a discretionary power to dispose of the financial resources. In *Vent de colère*, paragraph 21, the Court reconfirms this finding.
- (137) According to Germany, the absence of State control is also evidenced by the fact that the State cannot determine the level of the EEG-surcharge. In fact, given that the level of the surcharge depends on the revenue TSOs generate from selling the EEG electricity on the spot market, it is entirely determined by the market. The Commission acknowledges that the State does not always determine the exact level of the EEG-surcharge, but it determines the manner in which it is to be calculated taking into account the selling price of the electricity. Moreover, the State may introduce market mechanisms in the financing system without relinquishing control over the financing. In that respect, the Commission sees no difference between a public charge set by State authorities and a legal obligation imposed by the State through legislation. In both cases, the State organises a transfer of financial resources through legislation and established for what purposes these financial resources may be used.
- (138) Therefore, the Commission maintains its assessment that the support for RES electricity producers and electricity production from mine gas through feed-in tariffs is financed by State resources.

#### 7.1.4. *Distortive effect on competition and trade*

- (139) Finally, the advantages to both EEG electricity producers and EIUs appear to be liable to distort competition and to affect trade, given that the beneficiaries operate in sectors where markets have been liberalised and where trade between Member States takes place.

#### 7.1.5. *Conclusion on the existence of State aid*

- (140) The Commission therefore concludes that the EEG-Act 2012 involves State aid within the meaning of Article 107 of the Treaty both for the benefit of EEG electricity producers and, under the BesAR, for the benefit of EIUs.

<sup>(74)</sup> See footnote 21.

## 7.2. Existing aid/new aid and lawfulness of the aid

- (141) In its Opening Decision, the Commission stated that the German renewable energy law that had entered into force on 1 April 2000 ('EEG-Act 2000'), the precursor of the EEG-Act 2012, had been considered not to involve State aid by the Commission (Commission Decision in case NN 27/2000) <sup>(73)</sup>. However, the Commission considered that the changes introduced by the EEG-Act 2012 had been substantial and that aid granted on the basis of the EEG-Act 2012 constituted new aid, not covered by the previous Commission decision (recital 150 of the Opening Decision).
- (142) This has been contested by Germany and by several interested parties.
- (143) Germany and the interested parties argue that the successive changes that have occurred between the initial version of the EEG-Act 2000 and the EEG-Act 2012 have not substantially altered the aid scheme, so that the EEG-Act 2012 constitutes existing aid.
- (144) Germany nevertheless concedes that there are two differences between the EEG-Act 2012 and the EEG-Act 2000:
- (a) there has been a change in the equalisation mechanism: the original physical flow of EEG electricity to suppliers is replaced by the TSOs' obligation to sell the EEG electricity themselves on the spot market. In exchange for the payment of the EEG-surcharge for a given amount of electricity, the electricity suppliers may label that amount as EEG electricity. According to Germany, that means that the electricity suppliers acquire the 'renewable quality' of electricity, and thus the ability to indicate to consumers to what extent they have paid the surcharge (cf. §§ 53(1) and 54(1) EEG-Act 2012).
  - (b) the BesAR does not exist in the EEG-Act 2000.
- (145) Apart from those two differences, the mechanism described in recitals 7, 8 and 9 is according to Germany identical to what was provided in the EEG-Act 2000. In particular, it argues that the essential feature, namely that electricity suppliers compensate the TSOs' additional costs from purchasing EEG electricity by using their own financial resources was already part of the EEG-Act 2000.
- (146) The Commission maintains its finding that the State aid involved in the EEG-Act 2012 constitutes new aid, because the EEG-Act 2012 constitutes a substantial alteration compared to the EEG-Act 2000.
- (147) Indeed, the changes acknowledged by Germany, namely the change in the equalisation mechanism and the introduction of the BesAR, constitute substantial alterations.

### 7.2.1. Change in the equalisation mechanism

- (148) As a preliminary remark, the Commission points out that, while it considered in 2002 that the EEG-Act 2000 did not involve the transfer of State resources, this assessment was made shortly after the *PreussenElektra* judgment. However, further Court rulings have since clarified and even restricted *PreussenElektra*: Based on the rulings in *Essent*, *Vent de colère* and *Elcogás*, it would seem that under the initial equalisation mechanism, the TSOs had already been entrusted by the State with the administration of an aid scheme, which was financed by means of a surcharge levied from the electricity suppliers.
- (149) The decisive point is that the equalisation mechanism has been substantially altered. It is no longer composed of a chain of obligations for physical electricity purchases (network operators from EEG electricity producers; TSOs from network operators; electricity suppliers from TSOs). Now, the physical transfer is interrupted at the level of the TSOs, which have to market the EEG electricity. That marketing has been decoupled from the equalisation mechanism. The latter is purely about the financial allocation of costs between the different operators. The TSOs have been given responsibility by the State for centralising and computing those costs, and collecting them from the electricity suppliers.
- (150) Further, the EEG-Act 2000 was silent as to whether electricity consumers should also be made to participate in the costs for producing EEG electricity. That decision was left to the competent regulator, which at the time still had the power to regulate electricity prices for final customers. The EEG-Act 2012 explicitly allows suppliers to pass on costs to their customers, and de facto they all pass them on.

<sup>(73)</sup> OJ C 164, 10.7.2002, p. 5.

- (151) In addition, the BNetzA, which had no role under the EEG-Act 2000, is given powers to monitor those financial flows and to enforce compliance with the EEG-Act 2012, in particular for purposes of consumer protection. The BAFA, which also had no role under the EEG-Act 2000, takes the decision to grant a reduction from the EEG-surcharge to certain undertakings on the basis of the criteria laid down in the EEG-Act 2012.

#### 7.2.2. *The Besondere Ausgleichsregelung (BesAR)*

- (152) The logical corollary to the inclusion of electricity consumers in the burden-sharing is the reduction in the surcharge granted to energy-intensive undertakings. Under the EEG-Act 2012, the BAFA, which had no particular role to play under the EEG-Act 2000, is responsible for certifying, by way of administrative decisions, that the EIUs satisfy the conditions of the BesAR. Some interested parties have argued that the mere fact that some electricity consumers benefit from a capped surcharge cannot affect the private nature of the financial resources contributed by them. However, the Commission considers that the existence of the BesAR constitutes additional evidence for the fact that the EEG-Act 2012 is no longer based on purchase obligations involving private resources, but on a comprehensive system of cost allocation, based to a certain degree on considerations of distributive justice, organised by the State and monitored by State authorities.
- (153) In conclusion, the numerous differences between the EEG-Act 2000 and the EEG-Act 2012 are summarised in the following table. They demonstrate that the EEG-Act 2012 constituted a new system altogether.

Feature	EEG-Act 2000	EEG-Act 2012
Passing on of the surcharge.	Successive obligations of the operators to purchase the EEG electricity.	The passing on of costs is decoupled from the transfer of the EEG electricity.
Equalisation mechanism on the third level.	Cost equalisation is coupled with the purchase of EEG electricity.	Equalisation of the costs resulting from the spot market sales of the EEG electricity.
Final consumers have to bear the costs, but some benefit from a cap.	Not provided for.	BesAR: EIUs can ask for reductions in their surcharge.
Role of the BNetzA.	No role.	Supervision and enforcement of the determination of the surcharge.
Role of the BAFA.	No role.	Authorises the reduction of the surcharge.
Level of the surcharge.	0,2 ct/kWh (2000).	6,24 ct/kWh (2014).
Feed-in of EEG electricity.	Less than EUR 1 bn (2000).	More than EUR 20 bn (2013).

- (154) Given that the EEG-Act 2012 only applies to reductions in the EEG-surcharge granted for the years 2013 and 2014, only the reduction granted in those two years involve State aid <sup>(76)</sup>.

### 7.3. **Compatibility with the internal market**

- (155) In the Opening Decision, the Commission concluded that the State aid for the producers of EEG electricity could be declared compatible with the internal market. However, it raised doubts as to whether the granting of that aid could be assessed independently from its financing mechanism, that is to say, the EEG-surcharge. It also reached the preliminary conclusion that the EEG-surcharge violates Article 30 or 110 of the Treaty.

<sup>(76)</sup> The EEG-Act 2012 came into force on 1 January 2012, so that the first reductions for which EIUs could apply under that law were those granted in 2013. The reductions granted in respect of the year 2012 were based on a different law preceding the EEG-Act 2012 and are therefore not examined in this procedure.

- (156) In the Opening Decision, the Commission also raised doubts as to whether the BesAR could be declared compatible with the internal market on the basis of Article 107(3) of the Treaty.

7.3.1. *Legal basis and scope for the compatibility assessment of the BesAR*

- (157) The compatibility assessment only covers new aid granted on the basis of the EEG-Act 2012. Reduced payments of the EEG-surcharge that took place in 2012 had their legal basis in the administrative act issued by BAFA at the end of 2011. Therefore, they are covered by Article 1(b)(ii) of Council Regulation (EC) No 659/1999 <sup>(77)</sup>.
- (158) This Decision does not cover reduced payments of the EEG-surcharge by railway undertakings. The Commission reserves the right to assess § 42 EEG-Act 2012 in a separate procedure.
- (159) The Commission has assessed the compatibility of the BesAR with the internal market on the basis of Sections 3.7.2 and 3.7.3 of the 2014 Guidelines.
- (160) The Commission has applied the 2014 Guidelines from 1 July 2014. Those Guidelines include the substantive rules for the assessment of reductions in the funding of support for energy from renewable energy sources, including reductions that were granted before 1 July 2014 (point 248). The State aid under examination must therefore be assessed on the basis of the 2014 Guidelines.
- (161) According to the case-law, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States <sup>(78)</sup>. Germany accepted the 2014 Guidelines on 31 July 2014. None of the parties has argued that the Guidelines depart from the rules in the Treaty.
- (162) Interested parties have, however, contested the legality of point 248. They consider that the application of the 2014 Guidelines to aid that was granted before 1 July 2014 contravenes several general principles of Union law, namely the principle of legal certainty and the principle of non-retroactivity of detrimental measures <sup>(79)</sup>, as well as the principle that State aid should be assessed on the basis of the rules applicable when the aid scheme is introduced.
- (163) The interested parties err, however, when they consider that the second paragraph of point 248 constitutes retroactive application. According to the case-law, Union law differentiates between the immediate application of a new rule to future effects of an ongoing situation <sup>(80)</sup> and the retroactive application of the new rule to a situation that had become definitive prior to its entry into force (also referred to as an existing situation) <sup>(81)</sup>. In addition, it is settled case-law of the Union Courts that operators cannot acquire legitimate expectations until the institutions have adopted an act closing the administrative procedure, which has become definitive <sup>(82)</sup>.
- (164) As the Court has ruled, unlawful State aid constitutes an ongoing situation. The rules governing the application of law in time dictate that the immediate application of new rules of compatibility to unlawful aid does not constitute a retroactive application of those new rules <sup>(83)</sup>.

<sup>(77)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

<sup>(78)</sup> Judgement in *Germany and Others v Kronofrance*, C-75/05 and C-80/05, ECLI:EU:C:2008:482, paragraph 61, with further references.

<sup>(79)</sup> The interested parties have referred to the following case-law: Case C-260/91, *Diversint*, ECLI:EU:C:1993:136, paragraph 9; Case C-63/83, *Regina v Kirk*, ECLI:EU:C:1984:255, paragraphs 21 *et seq.*; Case C-1/73, *Westzucker*, ECLI:EU:C:1973:78, paragraph 5; Case C-295/02, *Gerken*, ECLI:EU:C:2004:400, paragraphs 47 *et seq.*; Case C-420/06, *Jäger*, ECLI:EU:C:2008:152, paragraphs 59 *et seq.*; Case C-189/02 P, *Dansk Rørindustri et al. v Commission*, ECLI:EU:C:2005:408, paragraph 217.

<sup>(80)</sup> Case C-334/07 P, *Commission v Freistaat Sachsen*, ECLI:EU:C:2008:709, paragraph 43; Case T-176/01, *Ferrière Nord v Commission*, ECLI:EU:T:2004:336, paragraph 139.

<sup>(81)</sup> Case 68/69, *Bundesknappschaft v Brock*, ECLI:EU:C:1970:24, paragraph 6; Case 1/73 *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker*, ECLI:EU:C:1973:78, paragraph 5; Case 143/73, *SOPAD v FORMA et. al.*, ECLI:EU:C:1973:145, paragraph 8; Case 96/77, *Bauche*, ECLI:EU:C:1978:26, paragraph 48; Case 125/77, *Koninklijke Scholten-Honig NV et. al. v Floofdproduktschaap voor Akkerbouwprodukten*, ECLI:EU:C:1978:187, paragraph 37; Case 40/79, *P v Commission*, ECLI:EU:C:1981:32, paragraph 12; Case 270/84, *Licata v ESC*, ECLI:EU:C:1986:304, paragraph 31; Case C-60/98 *Butterfly Music v CEDEM*, ECLI:EU:C:1999:333, paragraph 24; C-334/07 P, *Commission v Freistaat Sachsen*, ECLI:EU:C:2008:709, paragraph 53; Case T-404/05 *Greece v Commission*, ECLI:EU:T:2008:510, paragraph 77.

<sup>(82)</sup> Case C-169/95, *Spain v Commission*, ECLI:EU:C:1997:10, paragraph 51 to 54; Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA v Commission*, ECLI:EU:T:2003:217, paragraph 205.

<sup>(83)</sup> Joined Cases C-465/09 P to C-470/09 P, *Diputación Foral de Vizcaya and Others v Commission*, ECLI:EU:C:2011:372, paragraphs 125 and 128.

- (165) For those reasons, the Commission is required to assess the BesAR on the basis of the 2014 Guidelines. It has no discretion to deviate from those Guidelines in its assessment. As the Opening Decision was published in the Official Journal before 1 July 2014, the Commission has invited Germany and interested parties to submit their observations on the application of the 2014 Guidelines to the case at hand.

#### 7.3.1.1. Observations from Germany and from third parties

- (166) Several interested parties have argued that the 2014 Guidelines should not apply to the capped EEG-surcharges, but rather that the Commission should conduct a compatibility assessment on the basis of Article 107(3)(b) or (c) of the Treaty.
- (167) First, those parties have submitted that the reductions in the EEG-surcharge could be found to be compatible with the internal market on the basis of Article 107(3)(b) of the Treaty, given that they promote the execution of an important project of common European interest (the promotion of renewable energy as required by Directive 2009/28/EC) or, failing this, that they are intended to remedy a serious disturbance in the economy of Germany (the threat of deindustrialisation as a result of the RES costs).
- (168) The interested parties also argued that the reductions could be found to be compatible on the basis of Article 107(3)(c) of the Treaty, on the grounds that they have the objective of promoting the development of renewable energy while preventing carbon leakage and preserving an industrial basis in the Union. In that respect, the interested parties concerned argue that the BesAR is the appropriate instrument for reconciling the different aspects of that multiple objective. They also state that that instrument is proportionate since the beneficiaries of the BesAR still contribute to the financing. They also argue that the measure is proportionate on the grounds that electricity taxes and the EEG-surcharge are essentially similar (both being as charges on electricity consumption) and that the minimum rate of taxation on electricity consumed by businesses determined by the Union, as set out in Table C of Annex I to Council Directive 2003/96/EC<sup>(84)</sup>, is 0,05 ct/kWh, that is to say the same as the minimum EEG-surcharge. Finally, interested parties argue that the EEG-Act 2012 does not distort competition or trade, since it does not fully counteract the distortion caused in the first place by the higher EEG-surcharge borne by German undertakings, compared to equivalent taxes or levies faced by undertakings in other Member States.
- (169) On the application of Article 107(3)(b) and (c), comparable arguments were made by Germany in its reply to the Commission's Opening Decision.
- (170) Secondly, the interested parties contend that the Commission cannot examine the reductions separately under a distinct legal basis for compatibility than the one that was used for examining the support for EEG electricity. Rather the Commission should have assessed (and approved) the reductions, being part of the financing, jointly with the renewable energy support in the Opening Decision. This is explained with reference to the case-law of the Court according to which the Commission must take into account the method of financing of the aid in a case where that method forms an integral part of the measure<sup>(85)</sup>.
- (171) Thirdly, even if the 2014 Guidelines were to apply, the interested parties argue that in view of points 248 and 250 of the 2014 Guidelines, those Guidelines could apply retroactively only to unlawful aid, but not to existing aid. However, even if the capped EEG-surcharges were to constitute State aid (which is disputed), they would need to be considered existing aid due to their implicit approval by the Commission in case NN 27/2000<sup>(86)</sup>.
- (172) Fourthly, the interested parties claim that the 2014 Guidelines, in particular the rules concerning adjustment plans in Section 3.7.3, should be interpreted in a manner that would safeguard the beneficiaries' legitimate expectations: in other words, the progressive adjustment should be sufficiently small in the years 2013 and 2014 as to exclude recovery. Such legitimate expectations have arisen, according to those parties, from the Commission decision in case NN 27/2000.

<sup>(84)</sup> Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

<sup>(85)</sup> Case C-261/01, *Van Calster*, ECLI:EU:C:2003:571, paragraph 49; Case C-333/07, *Société Régie Networks*, ECLI:EU:C:2008:764, paragraph 89.

<sup>(86)</sup> See above footnote 75.

## 7.3.1.2. Assessment

- (173) These arguments cannot alter the assessment in this Decision the applicability of the 2014 Guidelines presented in recitals 157 to 165.
- (174) First, as far as the application of Article 107(3)(c) of the Treaty is concerned, point 10 of the 2014 Guidelines states that, in those specific Guidelines, ‘the Commission sets out the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty’. According to the Court of Justice, ‘the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty’<sup>(87)</sup>. As the 2014 Guidelines set out *ex ante*, in a general and transparent manner, the compatibility conditions for the exception laid down in Article 107(3)(c) of the Treaty, the Commission is bound to apply those Guidelines.
- (175) There is no scope for an application by analogy of the rules on electricity taxation, because the 2014 Guidelines contain a complete set of rules for the assessment of the reduction of RES surcharges.
- (176) As far as the derogations in Article 107(3)(b) of the Treaty are concerned, the 2014 Guidelines do not contain any criteria as to how the Commission will exercise its discretion in the application of Article 107(3)(b). It is true that the Commission has adopted a communication on ‘Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest’<sup>(88)</sup>, which is applied from 1 July 2014. However, according to point 52 of that communication, ‘in the case of non-notified aid, the Commission will apply this communication if the aid was granted after its entry into force, and the rules in force at the time when the aid was granted in all other cases’. This means that the criteria laid down in the communication cannot be applied to the surcharge reductions examined in this Decision. Rather, the Commission has to apply the rules laid down in the 2008 Guidelines<sup>(89)</sup>.
- (177) In the Opening Decision, the Commission expressed doubts as to whether the BesAR could be found compatible with the internal market pursuant to Article 107(3)(b) of the Treaty in accordance with points 147 to 150 of the 2008 Guidelines. Those doubts were raised in particular because the reductions did not seem to relate to a project and a fortiori not a project which would be ‘specific and clearly defined in respect of the terms of its implementation’. In addition, it remained anyhow questionable whether such a project could be considered as being ‘of common European interest’, that is to say, where the advantage provided would extend to the Union as a whole. Finally, it was doubtful whether the aid in question, namely the reductions in the EEG-surcharge, would ‘present an incentive to the execution of the project’ (recitals 211 and 212 of the Opening Decision).
- (178) Those doubts have not been alleviated. Germany argues that both the achievement of the RES targets and the preservation of industrial competitiveness have to be considered to constitute one, if not several, projects of common European interest. Germany refers to the Commission’s ‘Europe 2020’ strategy, which lists ‘promoting a more resource efficient, greener and more competitive economy’ as a priority<sup>(90)</sup>. However, as important policy goals as they may be, the development of renewable energy sources and the promotion of competitiveness cannot be understood as specific projects in the literal sense. It would be even less possible to define such projects in terms of their implementation including their participants, their objectives and effects, as was required in point 147(a) of the 2008 Guidelines. If projects of common European interest were to be construed so as to encompass mere policy goals as such, the limits of Article 107(3)(b) would be stretched beyond their wording, and the requirement of targeting a specific, well-defined project would be rendered meaningless. This would go against ‘the need for a narrow interpretation of the derogations from the general principle that State aid is incompatible with the common market’<sup>(91)</sup>.
- (179) More importantly, as the General Court made clear in *Hotel Cipriani*, ‘an aid measure can benefit from the derogation provided for in [Article 107(3)(b) of the Treaty] only if it does not benefit mostly the economic operators of one Member State rather than the Community as a whole’. That criterion is not fulfilled where the

<sup>(87)</sup> Case C-310/99, *Italy v Commission*, ECLI:EU:C:2002:143, paragraph 52.

<sup>(88)</sup> OJ C 188, 20.6.2014, p. 4.

<sup>(89)</sup> Community Guidelines on State aid for environmental protection of 2008 (OJ C 82, 1.4.2008, p. 1).

<sup>(90)</sup> COM(2010) 2020 final, p. 10.

<sup>(91)</sup> Case C-301/96, *Germany v Commission*, ECLI:EU:C:2003:509, paragraph 106.

national aid scheme merely seeks to improve the competitiveness of the undertakings concerned <sup>(92)</sup>. Indeed, the BesAR is intended only to ease the cost burden of energy-intensive undertakings in Germany and thereby to improve their competitiveness.

- (180) Finally, in view of the need for a narrow interpretation of the derogations from the general principle that State aid is incompatible with the internal market, mentioned in recital 178, the mere fact that electricity costs increase for a large number of industrial users cannot be regarded as a serious disturbance of the economy of the Member State concerned.
- (181) Therefore, the Commission could not have approved the BesAR pursuant to Article 107(3)(b) of the Treaty.
- (182) Secondly, concerning the argument summarised in recital 170, the aid granted to energy-intensive undertakings through reduced EEG-surcharges is clearly distinct and separable from the support for renewable energy. The beneficiaries of the latter are a different group compared to the group of beneficiaries of the former. Moreover, the reductions do not immediately serve the purpose of financing the support for renewable energy, but to the contrary, actually run counter to that purpose since their immediate effect is to decrease the revenue available for the RES financing. This is evidenced by the fact that the EEG-surcharge had to be increased for all other non-privileged users in order to safeguard the financing.
- (183) Thirdly, concerning the argument summarised in recital 171, the BesAR has to be considered to constitute unlawful aid falling in the remit of point 248 of the 2014 Guidelines: Indeed, as already explained in recitals 141 *et seq.*, the EEG-Act 2012 has substantially altered the aid scheme approved by the Commission decision adopted in case NN 27/2000.
- (184) The fourth argument concerning the beneficiaries' legitimate expectations is examined further in recital 257, as it only relates to recovery.

#### 7.3.1.3. Alternative assessment under the 2008 Guidelines

- (185) The General Court has on several occasions and contrary to the case-law of the Court of Justice taken the view that unlawful aid has to be assessed on the basis of the rules in force at the time when it was granted. Therefore, the Commission has carried out an alternative assessment pursuant to Article 107(3)(c) of the Treaty on the basis of the 2008 Guidelines.
- (186) The result is that the Commission would have had to declare the operating aid granted on the basis of the BesAR incompatible in its entirety, for the reasons set out in recitals 187 *et seq.*
- (187) The Opening Decision states that at the time of its adoption, there were no specific State aid rules that would recognise that exemptions or reductions from charges that serve to finance RES support could be considered as necessary to achieve an objective of common interest and therefore be authorised on the basis of Article 107(3)(c) of the Treaty.
- (188) Furthermore, the Commission had prohibited similar operating aid notified by Austria in 2011 <sup>(93)</sup>. That prohibition is in line with the case-law of the Court, according to which operating aid as such affects trading conditions to an extent contrary to the common interest, and can therefore not be declared compatible with the internal market <sup>(94)</sup>. In that Decision, the Commission also explained why no analogy could be made to the rules on electricity taxation.
- (189) For those reasons, the Commission could also not have authorised the aid in question pursuant to Article 107(3)(c) of the Treaty on the basis of the substantive rules in force at the time the aid was granted.

<sup>(92)</sup> Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.*, ECLI:EU:T:2008:537, paragraph 337.

<sup>(93)</sup> SA.26036 (C24/09) — Austria, State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ L 235, 10.9.2011, p. 42).

<sup>(94)</sup> Judgment in *Germany v Commission* ('Jadekost'), C-288/96, ECLI:EU:C:2000:537, paragraph 77, with further references.

### 7.3.2. Costs resulting from the support for energy from renewable energy sources

- (190) According to point 184 of the 2014 Guidelines, reductions can only be granted in respect of costs resulting from the support to energy from renewable sources.
- (191) However, as the Commission established in its decision in case SA.38632 (2014/N) concerning the EEG-Act 2014 ('EEG 2014 Decision'), the EEG-surcharge also serves to finance support for the production of electricity from mine gas. Mine gas is not a renewable energy source within the meaning of point 19(5) of the 2014 Guidelines. Reductions from surcharges aimed at financing support for other sources of energy are not covered by Section 3.7.2 of the 2014 Guidelines <sup>(95)</sup>.
- (192) In that respect, Germany indicated in the context of the notification procedure in case SA.38632 (2014/N) that no reduction in the funding of the support to electricity from mine gas would be granted given that, under the EEG-Act 2014, energy-intensive undertakings need to pay the full surcharge for the first GWh of consumption at each consumption point concerned. Indeed, the revenue from the full surcharge on the first GWh is higher than the amount of subsidy paid in respect of electricity produced from mine gas <sup>(96)</sup>.
- (193) In 2012, the amount of support for mine gas (EUR 41,4 million) represented 0,25 % of the total amount of support under the EEG-Act 2012 for that year. Forecasts show that the volume of mine gas is likely to remain constant in the future or even decrease slightly <sup>(97)</sup>.
- (194) On that basis, the Commission found that for the beneficiaries of the BesAR under the EEG-Act 2014, the payment of the EEG-surcharge on the first GWh of consumption would already by far exceed the amount of support for mine gas <sup>(98)</sup>. Moreover, the Commission concluded that when multiplying the percentage of EEG support paid in respect of mine gas (0,25 %) by the EEG-surcharge (6,24 ct/kWh in 2014), the result is 0,016 ct/kWh. That amount is below the minimum surcharge which the BesAR beneficiaries had to pay even beyond the first GWh of consumption (0,05 ct/kWh) <sup>(99)</sup>.
- (195) The EEG-Act 2012 features two alternative caps. Under the first alternative (§ 41(3) No 1), which is a degressive cap, beneficiaries must still pay the full surcharge for the first GWh of consumption, and the minimum surcharge to be paid for consumption beyond 100 GWh of consumption is 0,05 ct/kWh. Under the second alternative (§ 41(3) No 2), which concerns undertakings with the highest energy-intensity, the surcharge is capped at 0,05 ct/kWh for the beneficiary's whole consumption. In both cases, beneficiaries still pay more than the fraction of the surcharge which could be allocated to the support of mine gas (0,016 ct/kWh in 2014, and, on the basis of an EEG-surcharge of 5,277 ct/kWh in 2013, 0,013 ct/kWh).
- (196) Therefore, the payment of the minimum surcharge of 0,05 ct/kWh in 2013 and 2014, in addition to the obligation to pay the surcharge for the first GWh for some of the beneficiaries, ensured that no reduction was granted to energy-intensive undertakings from the financing of electricity from mine gas <sup>(100)</sup>.

### 7.3.3. Eligibility

- (197) Point 185 of the 2014 Guidelines provides that the aid should be limited to sectors that are exposed to a risk to their competitive position due to the costs resulting from the funding of support to energy from renewable sources as a function of their electro-intensity and their exposure to international trade. Accordingly, the aid can only be granted if the undertaking belongs to the sectors listed in Annex 3 to the 2014 Guidelines.
- (198) In addition, according to point 186 of the 2014 Guidelines, Member States can include an undertaking in their national scheme granting reductions from costs resulting from renewable support if the undertaking has an electro-intensity of at least 20 % and belongs to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines.

<sup>(95)</sup> EEG decision 2014, recital 293.

<sup>(96)</sup> EEG decision 2014, recitals 294 and 295.

<sup>(97)</sup> EEG decision 2014, recital 295.

<sup>(98)</sup> With 2707 eligible consumption points in 2014 and a EEG-surcharge at 6,24 ct/kWh, the surcharge revenue generated from payments for the first GWh of consumption equals EUR 168 916 800. See EEG decision 2014, recital 296.

<sup>(99)</sup> EEG decision 2014, recital 296.

<sup>(100)</sup> Cf. EEG decision 2014, recital 297.

- (199) Finally, point 187 of the 2014 Guidelines provides that Member States can impose additional eligibility criteria provided that within the eligible sectors the choice of beneficiaries is made on the basis of objective, non-discriminatory and transparent criteria and that the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation.
- (200) To the extent that aid in the form of a reduction in or exemption from the burden related to funding support for electricity from renewable sources was granted before the date of application of those Guidelines to undertakings that are not eligible according to the criteria in recitals 197 and 198 of this Decision, such aid can be declared compatible provided that it is in line with an adjustment plan (point 197 of the 2014 Guidelines).
- (201) Germany has indicated that only a number of the beneficiaries of the BesAR in 2013 and 2014 were eligible for State aid in the form of reductions in the funding of support for electricity from renewable sources in accordance with Section 3.7.2 of the 2014 Guidelines. Germany has therefore submitted an adjustment plan (see Annex II) which is examined in Section 7.3.5 for those beneficiaries that were not eligible. Germany has also explained that all beneficiaries which could be included in the national scheme on the basis of point 186 of the 2014 Guidelines belong to sectors listed in Annex 5 to the 2014 Guidelines.
- (202) For the calculation of the gross value added ('GVA'), which is necessary for the application of points 185 to 192 of the 2014 Guidelines and which is defined in Annex 4 thereto, § 41 EEG-Act 2012 uses the GVA at market prices over the last business year before the application for the surcharge reduction. Points 1 and 2 of Annex 4 to the 2014 Guidelines require the use of the GVA at factor costs as well as the arithmetic mean over the most recent three years for which data is available. Germany explained that such data was not available, because applications for the reductions for the years 2013 and 2014 only included GVA at market prices of the most recent business year for which data was available (that is to say 2011 and 2012). Similarly, Germany explained that, for the purpose of calculating electricity costs, average retail electricity prices were not available for all undertakings, at least not for higher consumption bands; instead, the calculation of electricity costs would be based on the actual electricity costs incurred in the years 2011 and 2012, as those figures were the ones submitted by the undertakings in their applications for the reductions in 2013 and 2014. According to point 4 of Annex 4 to the 2014 Guidelines, the definition of an undertaking's electricity costs is notably based on the undertaking's assumed electricity price. On the basis of Germany's explanations, the Commission concluded in its decision in case SA.38632 (2014/N) that the transitional rules in the EEG-Act 2014 allowing the use of GVA data at factor costs based on the last business year or the last two business years, as well as the use of real electricity costs of the last business year, were in line with the 2014 Guidelines, and in particular with point 195 (recitals 311 to 314 of that Decision). This was because that data, that is to say the GVA at factor costs based on the last year and the real electricity costs of the last year, would be applied only on a transitional basis until the data required by Annex 4 to the 2014 Guidelines had been gathered. This reasoning applies *a fortiori* to the assessment of the EEG-surcharge reductions that occurred in the years 2013 and 2014, and on the basis of this reasoning, it can also be accepted that GVA data at market prices is used for the purposes of assessing compatibility of State aid granted under the BesAR in 2013 and 2014 in the form of reductions in the funding of support for electricity from renewable sources according to Section 3.7.2 of the 2014 Guidelines.
- (203) The Commission concludes that the EEG-Act 2012 only partially meets the eligibility rules laid down in points 185 and 186 of the 2014 Guidelines. Beneficiaries for which those criteria are not met should therefore be subject to recovery, the details of which are examined in Section 7.3.5 concerning Germany's adjustment plan.

#### 7.3.4. Proportionality

- (204) Point 188 of the 2014 Guidelines provides that aid is considered to be proportionate if the aid beneficiaries pay at least 15 % of the additional costs without reduction.
- (205) Member States can however further limit the amount of the costs resulting from financing aid to renewable energy to be paid at undertaking level to 4 % of the gross value added of the undertaking concerned. For undertakings having an electro-intensity of at least 20 %, Member States can limit the overall amount to be paid to 0,5 % of the gross value added of the undertaking concerned. Finally, when Member States decide to adopt the limitations of respectively 4 % and 0,5 % of gross value added, those limitations must apply to all eligible undertakings (points 189 and 190 of the 2014 Guidelines).

- (206) Germany has indicated that in some cases, the capped EEG-surcharge paid by the beneficiaries in the years 2013 and 2014 was not proportionate on the basis of the criteria in the 2014 Guidelines<sup>(101)</sup>. Germany has therefore submitted an adjustment plan (see Annex II) which is examined in Section 7.3.5.
- (207) The Commission concludes that the capped EEG-surcharges only partially fulfil the proportionality criteria in points 188 and 189 of the 2014 Guidelines. Beneficiaries for which those criteria are not met should therefore be subject to recovery, the details of which are examined in Section 7.3.5 concerning Germany's adjustment plan.

#### 7.3.5. *The adjustment plan*

- (208) According to points 193 *et seq.* of the 2014 Guidelines, Member States are to apply the eligibility and proportionality criteria set out in Section 3.7.2 of the 2014 Guidelines and described above in Sections 7.3.3 and 7.3.4 of this Decision at the latest by 1 January 2019. Aid granted in respect of a period before that date will be considered compatible if it satisfies the same criteria. In addition, the Commission considers that all aid granted to reduce the burden related to funding support for electricity from renewable sources in respect of the years preceding 2019 can be declared compatible with the internal market to the extent that it complies with an adjustment plan.
- (209) That adjustment plan must entail progressive adjustment to the aid levels resulting from the application of the eligibility and proportionality criteria set out in Section 3.7.2 of the 2014 Guidelines and described in Sections 7.3.3 and 7.3.4.
- (210) To the extent that aid was granted in respect of a period before the date of application of those Guidelines, the plan must also provide for a progressive application of the criteria for that period.
- (211) Where, as specified in recital 200, aid was granted before the date of application of the 2014 Guidelines to undertakings that are not eligible according to the criteria described in Section 7.3.3 of this Decision, such aid can be declared compatible provided that the adjustment plan foresees a minimum own contribution of 20 % of the additional costs of the surcharge without reduction, to be established progressively and at the latest by 1 January 2019 (point 197 of the 2014 Guidelines).
- (212) Germany has submitted an adjustment plan (Annex II), described in recitals 27 *et seq.*, which provides for a progressive increase in the EEG-surcharge for all beneficiaries subject to recovery. The starting point is the EEG-surcharge that was actually paid in 2013; it is obtained by multiplying the beneficiary's reduced EEG-surcharge in 2013 by the beneficiary's actual electricity consumption in that same year (the 'basic surcharge'). According to the adjustment plan, the surcharges for 2013 and 2014 will be readjusted so as not to exceed 125 % and 150 % of the basic surcharge. As of 2015, the upward adjustment will be potentially bigger, as the cap is then brought to 200 % of the basic surcharge. In subsequent years up to 2018, the surcharge for year  $x$  will be similarly capped at 200 % of the surcharge of the year  $x - 2$ .
- (213) Concerning the years under examination in this Decision, that is to say, the years 2013 and 2014, the adjustment plan provides for a progressive increase in the EEG-surcharge for all beneficiaries for which the eligibility and proportionality criteria of the 2014 Guidelines were not met. The increase is set to continue after 2014, so that it can be assumed that the levels required by the 2014 Guidelines will be met by 1 January 2019, both for undertakings which are in principle eligible, but did not pay a high enough surcharge, and for undertakings which are not eligible and therefore need to meet the minimum own contribution of 20 % of the additional costs of the surcharge set out in point 197 of the 2014 Guidelines. In addition, the Commission notes that the adjustment plan takes all relevant economic factors linked to the renewable policy into account and that Germany notified it within the deadline set out in point 200 of the 2014 Guidelines.
- (214) As far as the years 2013 and 2014 are concerned, the adjustment plan is therefore in line with the requirements in Section 3.7.3 of the 2014 Guidelines. According to point 194 of the 2014 Guidelines, the reductions as modified by the adjustment plan can therefore be considered to be compatible with the internal market.

<sup>(101)</sup> For the application of the GVA data and electro-intensity data, see recital 202 of this Decision.

### 7.3.6. Conclusion on compatibility

- (215) The reduced EEG-surcharges for energy-intensive undertakings in 2013 and 2014 are compatible with the internal market only in so far as the following conditions are fulfilled:
- (a) the reduction in the surcharge is granted only in respect of costs resulting from support for energy from renewable sources;
  - (b) the beneficiaries meet the eligibility criteria laid down in points 185, 186 and 187 of the 2014 Guidelines, as examined in Section 7.3.3 of this Decision; and
  - (c) the reduction in the EEG-surcharge is proportionate according to the criteria set out in points 188 and 189 of the 2014 Guidelines, as examined in Section 7.3.4 of this Decision.
- (216) For beneficiaries for which one or more of the conditions described in recital 215 are not met, the Commission exceptionally considers that State aid granted on the basis of the BesAR in 2013 and 2014 can be declared compatible with the internal market, to the extent that it is ensured that beneficiaries pay at least 125 % of the basic surcharge defined in recital 212 for the year 2013 and 150 % of the basic surcharge for the year 2014. In order to ensure that result, recovery should take place as follows:
- (a) for the reduction granted in respect of 2013, recovery should correspond to the difference between the surcharge that should have been paid if all conditions in recital 215 had been met and the EEG-surcharge that was actually paid in 2013; however, the total EEG-surcharge, including the amount recovered, of the undertaking subject to recovery must not exceed 125 % of the EEG-surcharge that was actually paid in 2013;
  - (b) for the reduction granted in respect of 2014, recovery should correspond to the difference between the surcharge that should have been paid if all criteria in recital 215 had been met and the EEG-surcharge that was actually paid in 2014; however, the total EEG-surcharge, including the amount recovered, of the undertaking subject to recovery must not exceed 150 % of the EEG-surcharge that was actually paid in 2013.

### 7.4. Compliance with other Treaty provisions

- (217) In accordance with point 29 of the 2014 Guidelines, as the EEG-surcharge has the aim of financing support for EEG electricity, the Commission has examined its compliance with Articles 30 and 110 of the Treaty.
- (218) According to the case-law, a charge which is imposed on domestic and imported products according to the same criteria may nevertheless be prohibited by the Treaty if the revenue from such a charge is intended to support activities which specifically benefit the taxed domestic products.
- (219) If the advantages which those products enjoy wholly offset the burden imposed on them, the effects of that charge are apparent only with regard to imported products and that charge constitutes a charge having equivalent effect, contrary to Article 30 of the Treaty. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the charge in question constitutes discriminatory taxation for the purposes of Article 110 of the Treaty, and the proportion used to offset the burden borne by the domestic products will be contrary to that provision<sup>(102)</sup>.
- (220) The Commission has considered, in its long-standing decision practice<sup>(103)</sup> and in line with the case-law of the Court<sup>(104)</sup>, that the financing of national support schemes for RES by means of a parafiscal levy on electricity consumption may discriminate against imported RES. Indeed, if domestic electricity production is supported by aid that is financed through a charge on all electricity consumption (including consumption of imported

<sup>(102)</sup> Joined Cases C-128/03 and C-129/03, AEM, ECLI:EU:C:2005:224, paragraphs 44 to 47; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 42.

<sup>(103)</sup> State aid decision N 34/90; State aid decision N 416/99; State aid decision N 490/00; State aid decision N 550/00; State aid decisions N 317/A/2006 and NN 162/A/2003; State aid decisions N 707 and 708/02; State aid decision N 789/02; State aid decision N 6/A/2001; Commission decision 2007/580/EC; Commission decision 2009/476/EC; State aid N 437/09.

<sup>(104)</sup> Joined Cases C-128/03 and C-129/03, AEM, ECLI:EU:C:2005:224, paragraphs 44 to 47; Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraphs 58 and 59.

electricity), then the method of financing, which imposes a burden on imported electricity not benefiting from that financing, risks having a discriminatory effect on imported electricity from renewable energy sources and thereby infringes Articles 30 and/or 110 of the Treaty <sup>(105)</sup>.

- (221) In addition, in its Opening Decision, the Commission observed that the EEG-Act 2012 may *prima facie* have a discriminatory effect in that § 39 EEG-Act 2012 provides for the rate of the EEG surcharge to be reduced in the case of so-called direct marketing. The reduced rate applies only when the supplier has purchased 50 % of his electricity portfolio from national EEG electricity producers and seems therefore to constitute a discriminatory charge within the meaning of Article 110 of the Treaty.
- (222) The Commission also considered that where the surcharge was raised on imports that would not have benefited from support under the EEG-Act 2012 if they had been produced in Germany (for instance electricity produced from facilities that have been in operation for more than 20 years), the surcharge would comply with Articles 30 and 110 on the grounds that, in this particular case, there is no difference in treatment between the national production and the imports.
- (223) Germany disputes that the EEG-Act 2012 could result in discrimination within the meaning of Articles 30 and 110 of the Treaty, for the following reasons: first, it claims that there is no similarity between the imported products on which the EEG-surcharge is imposed and the domestic products financed by it. This is because the EEG-surcharge finances RES *installations*, whereas it is imposed on the consumption of RES *electricity*.
- (224) Even if the surcharge was to be considered to finance RES electricity, there would still be a difference between the electricity on which the surcharge is imposed and the electricity that the surcharge promotes. The reason is that Germany's RES target, set by Article 3(3) and part A of Annex I to Directive 2009/28/EC, can only be fulfilled by RES electricity that has either been domestically produced or imported on the basis of a cooperation mechanism with the Member State where the electricity has been produced (Article 5(3) of that Directive). Therefore, in the absence of a cooperation mechanism, any imported RES electricity does not count towards the target. From the perspective of the consumers, such electricity cannot therefore be considered to be similar to domestic RES electricity.
- (225) As far as the *green electricity privilege* is concerned (§ 39 of the EEG-Act 2012), Germany claims that it cannot be considered to be discriminatory because it actually implements Directive 2009/28/EC. Directive 2009/28/EC sets a national target for the share of energy from renewable sources, and it allows the Member States to set up support schemes and measures of cooperation (Article 3(3)). Under Article 5(3) of the Directive, RES electricity that is produced domestically counts towards the target. RES electricity produced in other Member States does in principle count towards the target when it is covered by a cooperation agreement between the Member States concerned. The conclusion of such agreements is not mandatory, but left to the Member States' discretion. According to Germany, it follows from those provisions of the Directive that Germany is entitled to support domestic RES electricity production only. It also follows from those provisions that Germany is not compelled either to grant access to its support scheme to RES electricity producers from other Member States, or to let such producers benefit from the *green electricity privilege*.
- (226) In addition, Germany claims that if the *green electricity privilege* was made available to producers located in other Member States, there would be a risk that this would result in overcompensation of such producers, who could begin to cherry-pick between the different national support systems. It would also pose a threat to the financing mechanism of the EEG-Act 2012, since more and more non-domestic producers would want to make use of the *green electricity privilege*, and the amount of electricity on which the EEG-surcharge was actually imposed would continuously decrease, thereby eroding the base of the financing. This would in practice run counter to the objectives of Directive 2009/28/EC, which authorises the establishment of national support systems for the purposes of increasing renewable energy production.
- (227) This interpretation is confirmed, according to Germany, by the recent *Ålands Vindkraft* ruling <sup>(106)</sup>. In that case, concerning a national system which provided for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that Member State, the Court of Justice held that such a system constituted a measure having equivalent effects to quantitative restrictions on imports, in principle incompatible with the obligations resulting from Article 34 of the Treaty. However, the system could be justified by overriding requirements relating to protection of the environment <sup>(107)</sup>.

<sup>(105)</sup> Case 47/69 *France v Commission*, ECLI:EU:C:1970:60, paragraph 20; EEG 2014 Decision, recitals 329 *et seq.*

<sup>(106)</sup> Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037.

<sup>(107)</sup> Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037, paragraphs 75, 119.

- (228) Finally, according to Germany, the EEG-surcharge does not constitute a charge within the meaning of either Article 30 or 110 of the Treaty. Rather, it is a mere refund claim which the TSOs have against electricity suppliers, given that the TSOs are considered to perform services for the suppliers. Germany refers to the case-law of the Court of Justice, according to which 'a charge which is imposed on goods by reason of the fact that they cross a frontier may escape classification as a charge having equivalent effect as prohibited by the Treaty, if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products, and imported or exported products alike, if it represents payment for a specific service actually and individually rendered to the trader of a sum in proportion to that service or, in certain circumstances, if it is levied on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law' <sup>(108)</sup>.
- (229) Germany considers the second and the third of the alternative criteria mentioned in the Court judgment to be fulfilled. First, Germany claims that the EEG-surcharge constitutes an adequate payment for a specific service rendered, namely the fact that the TSOs relinquish the renewable quality of the RES electricity transmitted, which is acquired by the electricity suppliers, as explained in recital 144 <sup>(109)</sup>. From Germany's point of view, by paying the EEG-surcharge to the TSOs, the electricity suppliers receive something in return, that is the fact that a share of the electricity comes from renewable energy sources. Germany therefore argues that, contrary to the situation in the *Essent* case <sup>(110)</sup>, where there was no service in return for the payments, the EEG-surcharge does correspond to a service rendered. Secondly, the EEG-surcharge is allegedly imposed in order to fulfil obligations imposed by Union law, namely by Directive 2009/28/EC.
- (230) The Commission cannot agree with the reasoning provided by Germany.
- (231) First, while it is true that the EEG-surcharge finances the setup of renewable energy installations, it supports the production of the electricity generated in those installations. This is evidenced by the fact that the EEG-surcharge is levied per kilowatt-hour of electricity consumed. Secondly, the similarity between domestically produced EEG electricity and imported EEG electricity cannot be altered by the mere fact that imported EEG electricity does not count towards the target set by Directive 2009/28/EC. According to the case-law of the Court, similarity has to be assessed 'on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use' <sup>(111)</sup>. The question of similarity needs to be distinguished from the difference in treatment: A difference in treatment only exists in relation to imported electricity that would have been eligible under the EEG-Act 2012 if it had been produced in Germany. In that respect, the question whether imported RES electricity counts towards the target set by Directive 2009/28/EC is irrelevant.
- (232) Moreover, the Commission disagrees with Germany's assertion that the EEG-surcharge does not constitute a charge within the meaning of Articles 30 and 110 of the Treaty. First, as the Court held in *Essent*, it is irrelevant for the application of Articles 30 and 110 of the Treaty that the charge is not levied by the State directly, but by the TSOs <sup>(112)</sup>. Secondly, there appears to be no service or asset for which the EEG-surcharge paid by the electricity suppliers would constitute an adequate payment. The renewable quality as such is of no avail to the electricity suppliers, given that it is transmitted separately from the actual EEG electricity. The payments made by the suppliers are also not proportionate to the service rendered, since their payments differ according to how many non-privileged customers they have, whereas the supposed service rendered, namely that the electricity has renewable quality, is indivisible and the same for all. Thirdly, the EEG-surcharge is not imposed on account of *inspections*, and it is also directly not imposed on account of *obligations* stemming from Union law. Directive 2009/28/EC obliges Germany to introduce measures to ensure a steady increase in the share of energy from renewable sources (Article 3(2) of the Directive); the implementation is left to Germany's discretion, both as regards the specific measures (Article 3(3) of the Directive) and the way in which they are financed.
- (233) As the Commission held in its Opening Decision, Articles 30 and 110 only prohibit the financing of a support scheme for national production by means of a discriminatory charge imposed on imported products. They do not oblige the Member State to extend the benefit of the support scheme to imported products. This Decision,

<sup>(108)</sup> Case C-130/93, *Lamaire*, ECLI:EU:C:1994:281, paragraph 14.

<sup>(109)</sup> Germany however recognises that the EEG-surcharge does not constitute a remuneration for the provision of RES electricity as such, which is sold on the spot market.

<sup>(110)</sup> Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413.

<sup>(111)</sup> Case 171/78, *Commission v Denmark*, ECLI:EU:C:1980:54, paragraph 5.

<sup>(112)</sup> Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 46.

like previous decisions on national support schemes for renewable energy <sup>(113)</sup>, does not put into question the fact that support under the EEG-Act 2012 is limited to national production. However, when drafting their support schemes, Member States may not introduce discriminatory charges within the meaning of Articles 30 and 110 of the Treaty.

- (234) The *Ålands Vindkraft* ruling does not alter the assessment regarding Articles 30 and 110 of the Treaty. First, the sole question in that case was whether a national support system for renewable energy producers needed to be accessible for producers located in other Member States (the Court held that this was not the case). The judgment was not concerned with the question whether, in addition, such a national support system may be financed through a discriminatory charge imposed also on economic operators located in other Member States. Secondly, at the request of the Swedish court, the Court provided an interpretation of Article 34 on quantitative restrictions to the free movement of goods; the reference for a preliminary ruling was not concerned with Articles 30 and 110 on discriminatory duties and taxes, in respect of which, consequently, the Court said nothing. Thirdly, the Court found that Sweden's refusal to grant the claimant access to its certificate system, while constituting a measure having equivalent effect to a quantitative restriction, was justified by grounds of environmental policy and proportionate in achieving that environmental policy objective <sup>(114)</sup>. However, discriminatory measures that infringe Articles 30 and 110 are not justifiable, even on environmental grounds: the Commission can see no instance where environmental protection (or, for that matter, any other overriding requirement of general interest) could be furthered by the imposition of a pecuniary obligation that would make economic operators in other Member States pay more than their domestic competitors.
- (235) However, while maintaining its position that the EEG-surcharge does not infringe Articles 30 and 110 of the Treaty, Germany has provided a commitment to invest in interconnectors and similar European energy projects (see description in recital 19). Those investments would be equivalent to the estimated amount of alleged discrimination.
- (236) The usual remedy for violations of Articles 30 and 110 of the Treaty is reimbursement of the charges imposed. However, the reinvestment of the share of the revenue from a parafiscal levy that was collected from imports into projects and infrastructure that specifically benefits imports has been recognised by the Commission as being a suitable remedy to historical potential discrimination under Articles 30 and 110 of the Treaty <sup>(115)</sup>.
- (237) To determine the share of past revenue from the EEG-surcharge that needs to be allocated to such investments, the first step is to estimate the imports of eligible EEG electricity into Germany. Germany has indicated that in the period of application of the EEG-Act 2012, between January 2012 and July 2014, the share of guarantees of origin corresponding to RES electricity that could be supported under the EEG-Act 2012 amounted to approximately 1 349 GWh: 519 GWh in 2012, 283 GWh in 2013 and 547 GWh in 2014. The much larger share of guarantees of origin not included in this amount corresponds to large, old hydropower plants, which would not be eligible under the EEG-Act 2012. However, since guarantees of origin can be traded separately, they are in themselves not sufficient to determine the extent to which EEG electricity is actually imported. Germany has indicated that the actual imports would have been lower, but has been unable to provide information on the extent to which the calculated imported green electricity described would have been covered by physical import contracts.
- (238) The second step is to evaluate the extent to which imported green electricity was discriminated against. The discrimination lies in the fact that, although both domestic EEG electricity production and EEG imports contribute to the EEG-surcharge, it is only domestic EEG electricity production that benefits from it (within the limits of eligibility conditions).
- (239) As such, the discrimination can be measured by the level of the EEG-surcharge faced by imported EEG electricity. However, it must be noted that any reimbursement would not cover the whole surcharge as such, but would be limited to the hypothetical form of support received (feed-in tariffs, market premiums or *green electricity privilege*). Indeed, given that the domestic EEG electricity producers also pay the surcharge, but receive the EEG-support, a difference in treatment would only arise to the extent that imports have to pay the surcharge without receiving any support. In essence, discrimination is equivalent to the level of support withheld from imported EEG electricity.

<sup>(113)</sup> See for instance State aid SA.33384 (2011/N) — Austria, *Ökostromgesetz 2012*, C (2012) 565 final.

<sup>(114)</sup> See footnote 107.

<sup>(115)</sup> State aid SA.15876 (N490/2000) — Italy, *Stranded costs of the electricity sector* (OJ C 250, 8.10.2005, p. 10).

- (240) Concerning the feed-in tariffs and the market premiums, the Commission notes that as these vary from one EEG technology to the other, it would be necessary to establish the different types of EEG electricity that were actually imported, and in what quantities, in order to apply those forms of support to imports. However, as Germany has explained that data on actual EEG imports was not available, it is not possible to measure discrimination by applying the specific feed-in tariff or market premium to the corresponding amount of imports.
- (241) In contrast, the advantage resulting from the *green electricity privilege* can be more easily established: Germany has indicated that the advantage resulting from the *green electricity privilege* was in practice lower than 4 ct/kWh. This is because electricity suppliers which apply for the privilege only receive the 2 ct/kWh reduction on their whole portfolio if they succeed in having at least 50 % of the electricity coming from RES. In order to avoid or minimise the risk of narrowly missing the 50 % target (in which case the full EEG surcharge would be due on the whole portfolio), electricity suppliers purchase EEG electricity with a safety margin, that is to say, in excess of the 50 % needed, sometimes up to 60 %. In that case, in order to calculate the cost advantage that can potentially be passed on to RES electricity producers, the EEG-surcharge reduction obtained for the whole portfolio, that is to say, 2 ct/kWh, needs to be divided by a higher RES share. For a share of 60 % for instance, the actual cost advantage that could be passed on would amount not to 4 ct/kWh, but to merely 3,3 ct/kWh. On average, the maximum advantage resulting from the *green electricity privilege* was 3,8 ct/kWh in 2012, 3,2 ct/kWh in 2013 and 3,9 ct/kWh in 2014.
- (242) It appears that the *green electricity privilege* was slightly higher than the EEG-surcharge in 2012, but lower than the surcharges in 2013 and 2014. It also appears that the *green electricity privilege* was lower than the advantage included in some of the feed-in tariffs (after deduction of the market price), for instance for solar power, but higher than the advantage included in other feed-in tariffs, for instance wind power. But even if the *privilege* may to some extent understate the actual magnitude of discrimination, it must be borne in mind that the amounts of guarantees of origin overstate the magnitude of imports. Therefore, the Commission's view is that the method used by Germany (described in recitals 238 *et seq.*) is appropriate. The advantage arising from the *green electricity privilege*, taken in conjunction with the figures on imported guarantees of origin, can be viewed as a reasonable proxy for the extent to which imported EEG electricity was discriminated against under the EEG-Act 2012.
- (243) Using the values for eligible EEG electricity imports set out in recital 237 and the values for the *green electricity privilege* set out in recital 241, the amount to be reinvested equals EUR 50 million<sup>(116)</sup>. Hence, the Commission views Germany's commitment to investing EUR 50 million (see recital 19) in interconnectors and European energy projects as remedying the historical potential discrimination under Articles 30 and 110 of the Treaty.

## 8. AUTHENTIC LANGUAGE

- (244) As mentioned under Section 1 of this Decision, Germany has waived its right to have the decision adopted in German. The authentic language will therefore be English.

## 9. CONCLUSION AND RECOVERY

- (245) Given that the historic violation of Articles 30 and 110 of the Treaty by the EEG surcharge has been remedied, the Commission concludes that the support for EEG electricity producers, which was found to be compatible in recitals 187 and 200 of the Opening Decision, is also compliant with the internal market in so far as its financing mechanism is concerned.
- (246) The Commission concludes that Germany has unlawfully implemented the aid for the support of EEG electricity production and for energy-intensive undertakings in breach of Article 108(3) of the Treaty.
- (247) The aid should be recovered to the extent that it is incompatible with the internal market.
- (248) Recovery should only cover the reductions from the EEG-surcharge granted in respect of the years 2013 and 2014 (hereinafter 'the years concerned').

<sup>(116)</sup> 19,7 (for 2012) + 9,1 (for 2013) + 21,3 (for 2014) = EUR 50,1 million.

- (249) The recoverable amounts should be limited, for each of the years concerned, to the difference between the compatible amount for that year, as determined according to recitals 251, 252 and 253, and the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned.
- (250) The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned is in principle obtained by applying the reduced surcharge for that year to the beneficiary's electricity consumption in that same year. However, in order to speed up the recovery, and as the consumption data for the years concerned is not yet available for all undertakings concerned by recovery, Germany will, as a first step, use the electricity consumption that was submitted in the applications to calculate a preliminary recovery amount, to be recovered immediately. Germany will, as a second step, apply the actual consumption data of the years concerned in order to determine the final recovery amounts and take the necessary steps to ensure recovery or repayment on the basis of those final amounts (this second step in the recovery process is referred to as the 'correction mechanism').
- (251) The first step in determining the compatible amount lies in the application of Section 3.7.2 of the 2014 Guidelines. The undertaking which benefited from the reduction must belong to the sectors listed in Annex 3 to the 2014 Guidelines (point 185 of the 2014 Guidelines) or, failing this, the undertaking must have an electro-intensity of at least 20 % and belong to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines (point 186 of the 2014 Guidelines). For the application of point 186 of the 2014 Guidelines, as explained in recital 202, the data submitted in the applications made in respect of the years concerned may be used.
- (252) Moreover, if the undertaking is eligible on the basis of recital 251, the undertaking must pay at least 15 % of the additional costs without reduction (point 188 of the 2014 Guidelines). However, the payable amount can be limited at undertaking level to 4 % of the gross value added of the undertaking concerned. Moreover, for undertakings having an electro-intensity of at least 20 %, the payable amount can be limited to 0,5 % of the gross value added of the undertaking concerned (point 189 of the 2014 Guidelines). For the application of point 189 of the 2014 Guidelines, as explained in recital 202, the data submitted in the applications made in respect of the years concerned may be used. If the undertaking is not eligible on the basis of recital 251, the payable amount is, according to Section 3.7.2 of the 2014 Guidelines, in principle equivalent to the EEG-surcharge without reduction, subject to the transit rule in point 197 of the 2014 Guidelines.
- (253) If, for either of the years concerned, the payable amount determined on the basis of recital 252 is higher than the amount that was actually paid by the beneficiary in that year, the provisions of the adjustment plan will apply as set out in recital 212: For 2013, the compatible amount should not exceed 125 % of the surcharge that was actually paid in 2013 (that is to say, the same year). For 2014, the compatible amount should not exceed 150 % of the surcharge that was actually paid in 2013 (that is to say, the previous year). As explained in recital 250, the surcharge that was actually paid in 2013 and 2014 may, for the purpose of determining the preliminary recovery amount, be based on electricity consumption data included in the undertaking's application for the reduction in 2013 and 2014. For the purpose of the correction mechanism, the actual electricity consumption data for 2013 and 2014 will be used once it is available.
- (254) If the payable amount determined on the basis of recitals 251, 252 and 253 is not higher than the amount that was actually paid by the beneficiary in either of the years concerned, there will be no recovery.
- (255) Where the total amount of aid received by a beneficiary is less than EUR 200 000 and where the aid meets all the other criteria of either Commission Regulation (EU) No 1407/2013<sup>(17)</sup> or Commission Regulation (EC) No 1998/2006<sup>(18)</sup>, such aid should be deemed not to constitute State aid in the sense of Article 107(1) of the Treaty, and should therefore not be subject to recovery.
- (256) Where the total amount of aid received by a beneficiary is more than EUR 200 000, of which an amount of less than EUR 200 000 has to be recovered, Regulations (EC) No 1998/2006 and (EU) No 1407/2013 do not apply, because the aid concerns the same eligible costs and cumulation is therefore excluded (Article 5(2) of Regulation (EU) No 1407/2013 and Article 2(5) of Regulation (EC) No 1998/2006). Such amounts should therefore have to be recovered.

<sup>(17)</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

<sup>(18)</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

(257) The Commission has further examined whether there are any obstacles to recovery pursuant to Article 14 of Regulation (EC) No 659/1999. As described in recital 172, some interested parties have argued that the adjustment in 2013 and 2014 should be as small as possible in order to safeguard the beneficiaries' legitimate expectations, and that no recovery should take place. However, for the reasons stated in recitals 146 *et seq.*, the Commission's decision in case NN 27/00 cannot give rise to legitimate expectations on the part of the beneficiaries, given that the EEG-Act 2012 is different from the EEG-Act 2000 and was adopted more than 10 years later and that in particular the BesAR did not exist in the EEG-Act 2000,

HAS ADOPTED THIS DECISION:

#### Article 1

The State aid for the support of electricity production from renewable energy sources and from mine gas, including its financing mechanism, granted on the basis of the *Erneuerbare-Energien-Gesetz 2012* (EEG-Act 2012), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market subject to the implementation of the commitment set out in Annex I by Germany.

#### Article 2

The Commission accepts the adjustment plan submitted by Germany in respect of the years 2013 and 2014, as set out in Annex II.

#### Article 3

1. The State aid consisting of reductions in the surcharge for the funding of support for electricity from renewable sources (EEG-surcharge) in the years 2013 and 2014 for energy-intensive users (*Besondere Ausgleichsregelung*, BesAR), unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty, is compatible with the internal market if it falls into one of the four categories set out in this paragraph.

Where the State aid was granted to an undertaking which belongs to a sector listed in Annex 3 to the Guidelines on State aid for environmental protection and energy 2014-20 (2014 Guidelines), it is compatible with the internal market if the undertaking paid at least 15 % of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which are subsequently passed on to their customers. If the undertaking paid less than 15 % of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4 % of its gross value added or, for undertakings having an electro-intensity of at least 20 %, at least 0,5 % of gross value added.

Where the State aid was granted to an undertaking which does not belong to a sector listed in Annex 3 to the 2014 Guidelines but had an electro-intensity of at least 20 % in 2012 and belonged, in that year, to a sector with a trade intensity of at least 4 % at Union level, it is compatible with the internal market if the undertaking paid at least 15 % of the additional costs faced by electricity suppliers due to obligations to buy renewable energy which were subsequently passed on to electricity consumers. If the undertaking paid less than 15 % of those additional costs, the State aid is nevertheless compatible if the undertaking paid an amount that corresponds to at least 4 % of its gross value added or, for undertakings having an electro-intensity of at least 20 %, at least 0,5 % of gross value added.

Where the State aid was granted to an undertaking eligible for compatible State aid on the basis of the second or third subparagraph, but the amount of the EEG-surcharge paid by that undertaking did not reach the level required by those subparagraphs, the following parts of the aid are compatible:

- (a) for 2013, the part of the aid which exceeds 125 % of the surcharge that the undertaking actually paid in 2013;
- (b) for 2014, the part of the aid which exceeds 150 % of the surcharge that the undertaking actually paid in 2013.

Where the State aid was granted to an undertaking not eligible for compatible State aid on the basis of the second or third subparagraph, and where the undertaking paid less than 20 % of the additional costs of the surcharge without reduction, the following parts of the aid are compatible:

- (a) for 2013, the part of the aid which exceeds 125 % of the surcharge that the undertaking actually paid in 2013;
  - (b) for 2014, the part of the aid which exceeds 150 % of the surcharge that the undertaking actually paid in 2013.
2. Any aid that is not covered by paragraph 1 is incompatible with the internal market.

#### Article 4

Individual aid granted on the basis of the aid schemes referred to in Articles 1 and 3 does not constitute aid if, at the time it was granted, it fulfilled the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 <sup>(119)</sup> which was applicable at the time the aid was granted.

#### Article 5

Individual aid granted on the basis of the aid schemes referred to in Articles 1 and 3 which, at the time it was granted, fulfilled the conditions laid down by the regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98, or by any approved aid scheme, is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

#### Article 6

1. Germany shall recover the incompatible aid referred to in Article 3(2) from the beneficiaries according to the method described in Annex III.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(120)</sup>.
4. Germany shall cancel all outstanding payments of aid under the scheme referred to in Article 3(2) with effect from the date of adoption of this Decision.

#### Article 7

1. Recovery of the incompatible aid referred to in Article 3(2) shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision by recovering the incompatible aid granted.
3. Where Germany recovers only the preliminary recovery amounts set out in paragraph 4 of Annex III, Germany shall ensure that the correction mechanism described in paragraph 4 of Annex III is implemented within one year following the date of notification of this Decision.

#### Article 8

1. Within two months following notification of this Decision, Germany shall submit the following information:
  - (a) the list of beneficiaries that have received aid referred to in Article 3(1) and (2) and the total amount of aid received by each of them under the scheme;

<sup>(119)</sup> Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

<sup>(120)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

- (b) the total preliminary recovery amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision, including the commitment set out in Annex I;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid and that the commitment set out in Annex I is complied with.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 3(2) has been completed and the commitment set out in Annex I is fully implemented. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

#### *Article 9*

Germany has committed to reinvest EUR 50 million in interconnectors and in European energy projects. Germany shall keep the Commission informed of the implementation of this commitment.

#### *Article 10*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 November 2014.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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## ANNEX I

**COMMITMENT SUBMITTED BY GERMANY ON 7 JULY 2014**

'Article 110/30 issue for existing installations and Grünstromprivileg (EEG 2012)

For the EEG 2012, a global solution could be conceived for both the Grünstromprivileg and the Article 30/110 issue. The solution would consist of the reinvestment into interconnectors or similar European energy projects of the estimated amount of the alleged discrimination. The reinvestment could be made in parallel to the progress of the relevant project. On the basis of the figures communicated by Germany, the reinvestment should amount to EUR 50 million for the period January 2012-July 2014. Again, Germany offers this commitment by safeguarding its legal position (no discrimination).'

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## ANNEX II

## COMMITMENT SUBMITTED BY GERMANY ON 4 JULY 2014

Die Rückforderung bezogen auf ein Unternehmen ergibt sich aus der Differenz der entsprechenden EEG-Kosten nach Umwelt- und Energiebeihilfeleitlinien (EEAG) und der nach EEG 2012 bemessenen EEG-Kosten. Dabei begrenzt der Anpassungsplan die nach EEAG zu leistende Zahlung auf max. 125 % (für 2013) bzw. max. 150 % (für 2014) der nach EEG 2012 für 2013 geleisteten EEG-Zahlung (vgl. folgende schematische Darstellung). Negative Rückforderungsbeträge werden nicht berücksichtigt.

Schematische Darstellung der Berechnung

$$\text{Rückforderung}_{2013} = Z(\text{Anpassplan})_{2013} - Z(\text{EEG2012})_{2013}$$

$$\text{Mit: } Z(\text{Anpassplan})_{2013} = \text{Minimum von } Z(\text{EEAG}) \text{ und } 125 \% \times Z(\text{EEG2012})_{2013}$$

Rückforderung<sub>2013</sub>: Rückforderung für das Jahr 2013

Z(Anpassplan)<sub>2013</sub>: Zahlung gemäß Anpassungsplan für 2013

Z(EEAG)<sub>2013</sub>: Zahlung gemäß EEAG für 2013

Z(EEG2012)<sub>2013</sub>: Für 2013 nach EEG2012 tatsächlich geleistete EEG-Zahlung

Aufgrund der Dringlichkeit einerseits und zur Begrenzung des ohnehin als sehr hoch einzuschätzenden administrativen Aufwandes andererseits ist es nötig, für die Berechnung der unternehmensbezogenen Rückforderungsbeträge ausschließlich auf dem BAFA schon vorliegende Zahlen zurückzugreifen (\*). Daher werden die spezifischen Unternehmensdaten (Bruttowertschöpfung zu Marktpreisen, Strombezugsmenge, Stromkosten) der Anträge für 2013 bzw. 2014 verwendet ("Bescheiddaten"), die sich auf das entsprechende Nachweisjahr beziehen (maßgebendes Geschäftsjahr des Unternehmens in 2011 (Voraussetzungsjahr) für Begrenzung in 2013 (Begrenzungsjahr); maßgebendes Geschäftsjahr des Unternehmens in 2012 für Begrenzung in 2014). Demzufolge wird für die Berechnung u. a. jeweils die spezifische Bruttowertschöpfung zu Marktpreisen verwendet, da die Daten für die Bruttowertschöpfung zu Faktorkosten nicht vorliegen. Weiterhin erfordert diese Vorgehensweise, dass der gesamte Berechnungsvergleich auf der angemeldeten Strombezugsmenge im Voraussetzungsjahr beruht, die von der in dem betreffenden Begrenzungsjahr tatsächlich verbrauchten Strommenge abweicht.

#### Jahresbezug der verwendeten Werte:

	Bescheid für 2013	Bescheid für 2014
Bruttowertschöpfung (zu Marktpreisen)	2011	2012
Strommenge	2011	2012
Stromkosten	2011	2012'

(\* ) Original footnote: "Die unternehmensbezogenen Daten des Jahres 2013 liegen dem BAFA nicht vor. Unternehmensbezogene Daten des Jahres 2014 existieren naturgemäß noch nicht."

## Translation

'Recovery [the recoverable amount] in respect of a given undertaking results from the difference of the relevant EEG costs as determined on the basis of the Guidelines on State aid for environmental protection and energy 2014-20 ("2014 Guidelines") and of the EEG costs as determined on the basis of the EEG-Act 2012. In that respect, the adjustment plan limits the payment to be made on the basis of the 2014 Guidelines to a maximum of 125 % (for the year 2013) and to a maximum of 150 % (for the year 2014) of the payment made in respect of the year 2013 according to the EEG-Act 2012 (see diagram). Negative recovery amounts are not taken into account.

Diagram: method of calculating recovery

$$\text{Recovery}_{2013} = \text{P(Adjustment plan)}_{2013} - \text{P(EEG2012)}_{2013}$$

$$\text{P(Adjustment plan)}_{2013} = \text{Minimum of P(EEAG) and } 125 \% \times \text{P(EEG2012)}_{2013}$$

Recovery<sub>2013</sub>: Recovery in respect of the year 2013

P(Adjustment plan)<sub>2013</sub>: Payment due according to the adjustment plan for 2013

P(EEAG)<sub>2013</sub>: Payment due according to the 2014 Guidelines for 2013

P(EEG2012)<sub>2013</sub>: Actual payment made on the basis of the EEG-Act 2012 for 2013

In view of the urgency, and in order to limit the administrative effort, which is estimated to be very high, it is necessary to calculate the undertakings' recovery amounts solely on the basis of the data which is already available to the BAFA (\*). Hence, use will be made of the company-specific data (on gross value added at market prices, electricity consumption and electricity costs) which was submitted in the undertakings' applications for 2013 and 2014, but which corresponds to the year for which evidence had to be submitted (that is to say, the business year of 2011 for a reduction granted in 2013, and the business year of 2012 for a reduction granted in 2014). Accordingly, the calculation is based on the gross value added at market prices, as the data concerning the gross value added at factor costs is not available. Moreover, the compared calculation must be based on the electricity consumption data which was submitted in the applications and which corresponds to the year for which evidence had to be submitted. That electricity consumption data is different from the data on the electricity that was actually consumed in the year for which the reduction is granted.

### Reference years of the values used:

	BAFA decision for 2013	BAFA decision for 2014
Gross value added at market prices	2011	2012
Electricity consumed	2011	2012
Electricity costs	2011	2012'

(\*) Original footnote: "Company-specific data for 2013 is not available to the BAFA. Company-specific data for 2014 does not exist yet."

## ANNEX III

**RECOVERY METHOD**

1. Recovery shall only cover the reductions from the EEG-surcharge granted in respect of the years 2013 and 2014 ('the years concerned').
2. The recoverable amount shall be equivalent, for each of the years concerned, to the difference between the compatible amount for that year, as determined in accordance with paragraphs 5 to 8, and the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned, as determined in accordance with paragraphs 3 and 4.

*The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned*

3. The amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned shall be obtained by applying the reduced surcharge for that year to the beneficiary's electricity consumption in that same year.
4. By way of derogation of paragraph 3, Germany may, as a first step, use the electricity consumption that was submitted in the beneficiary's application for the year concerned to calculate a preliminary recovery amount. In that case, the preliminary recovery amount shall be recovered without delay, and Germany shall, as a second step, determine the final recovery amount on the basis of the actual consumption data and take the necessary steps to ensure recovery or repayment on the basis of that final amount ('correction mechanism').

*The compatible amount*

5. If the beneficiary belongs to a sector listed in Annex 3 to the 2014 Guidelines (point 185 of the 2014 Guidelines), or if the beneficiary has an electro-intensity of at least 20 % and belongs to a sector with a trade intensity of at least 4 % at Union level, even if it does not belong to a sector listed in Annex 3 to the 2014 Guidelines (point 186 of the 2014 Guidelines), the beneficiary is eligible for aid in the form of reductions in the funding of support for electricity from renewable sources. For the application of point 186 of the 2014 Guidelines, the data submitted in the application made in respect of the year concerned may be used.
6. If the beneficiary is eligible on the basis of paragraph 5, the compatible amount is equivalent to 15 % of the EEG-surcharge without reduction (point 188 of the 2014 Guidelines). However, the compatible amount may be limited at undertaking level to 4 % of the gross value added of the undertaking concerned. Moreover, for undertakings having an electro-intensity of at least 20 %, the compatible amount may be limited to 0,5 % of the gross value added of the undertaking concerned (point 189 of the 2014 Guidelines). For the application of point 189 of the 2014 Guidelines, the data submitted in the application made in respect of the year concerned may be used.
7. If the beneficiary is not eligible on the basis of paragraph 5, the compatible amount is equivalent to 20 % the EEG-surcharge without reduction (point 197 of the 2014 Guidelines).
8. If, for either of the years concerned, the compatible amount determined on the basis of paragraphs 6 and 7 is higher than the amount of EEG-surcharge that was actually paid by the beneficiary in the year concerned, the compatible amount shall be limited as follows:
  - (a) for 2013, the compatible amount shall not exceed 125 % of the amount of EEG-surcharge that was actually paid by the beneficiary in the year 2013 (that is to say, the same year);
  - (b) for 2014, the compatible amount shall not exceed 150 % of the amount of EEG-surcharge that was actually paid by the beneficiary in the year 2013 (that is to say, the previous year).

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