

COMMISSION DECISION (EU) 2016/695**of 17 July 2013****on the aid scheme SA.30068 C 33/2010 (ex N 700/2009) — Aid to non-ferrous metal producers for CO₂ costs of electricity***(notified under document C(2013) 4420)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By letter dated 17 December 2009, Germany notified the Commission of the aid scheme for the support of non-ferrous metal producers. On 16 February and on 9 July 2010, the Commission requested additional information, which was provided by Germany on 10 May 2010 and on 21 September 2010.
- (2) By letter dated 17 November 2010, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the TFEU in respect of the aid (hereinafter 'opening decision').
- (3) On 21 February 2011, Germany submitted observations on the opening decision.
- (4) The opening decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid.
- (5) The Commission received comments from several interested parties. On 24 August 2011, it forwarded them to Germany, which was given the opportunity to react. Germany's comments were received by letter dated 26 September 2011.

2. DETAILED DESCRIPTION OF THE AID**2.1. OBJECTIVE**

- (6) The subject-matter of the present Decision is a scheme by which Germany wished to grant aid to non-ferrous metal producers to compensate them for indirect CO₂ costs, included in the electricity price, incurred in 2009. According to Germany, the German non-ferrous metal industry, that is to say the producers of primary aluminium (NACE-Code 24.42), zinc (NACE-Code 24.43) and copper (NACE-Code 24.44), was in economic difficulties.
- (7) Germany gives two reasons for this situation: first, the financial crisis of 2008 that led to a drop in world prices for non-ferrous metals at the London Metal Exchange (hereinafter 'LME'), secondly, electricity prices that remained high due to the influence of indirect CO₂ costs caused by the EU Emissions Trading System (ETS).

⁽¹⁾ OJ C 111, 9.4.2011, p. 22.

⁽²⁾ Cf. footnote 1.

Germany argues that the combination of low prices for non-ferrous metals and high electricity prices weakened the competitiveness of non-ferrous metal producers in the Union in comparison with producers outside the Union.

- (8) Germany submits that this competitive disadvantage risked incentivising non-ferrous metal producers to reduce production capacity or even to move their production to countries outside the Union which were not subject to high CO₂ costs. The relocation of the German non-ferrous metal production could then have severe impacts on downstream industries (such as the construction sector, car industry, engine building, construction of air- and space-craft) which are of great importance to the German and European industrial sector. Furthermore, such relocation would lead to higher CO₂ emissions on a global level, since in many countries outside the Union the production was not subject to a binding emission cap ('carbon leakage').
- (9) Germany concludes that the envisaged measure is a proportionate instrument to prevent capacity shifts and relocations and to avoid their negative implications on the industrial sector in the Union as well as on EU CO₂ reduction efforts.
- (10) Before the notification of the present scheme, Germany had submitted (and subsequently withdrawn) an earlier notification with an identical scheme, but where the justification lay in improving the competitiveness of German non-ferrous metal producers in comparison with producers in other EU Member States and in countries outside the Union.

2.2. LEGAL BASIS

- (11) The scheme is based on the Act on the second supplementary budget of 2 July 2009, and in particular title 683 03 (*Gesetz über den zweiten Nachtragshaushalt vom 2. Juli 2009*), and on the Administrative Regulation on the Support for the Production of Climate-Friendly Non-Ferrous Metals of 6 August 2009 (*Richtlinie zur Förderung der Herstellung von klimaschonenden NE-Metallen vom 6. August 2009*).

2.3. BENEFICIARIES

- (12) The aid is open to producers of aluminium, zinc (with the exception of lead and tin) and copper, under the conditions that the production plant is based in Germany, the electricity consumption is more than 10 GWh per year and the electricity costs account for more than 15 % of gross value added. The costs for the first GWh of yearly electricity consumption are excluded from compensation (*Selbstbehalt*, that is to say retention). Germany submits that 11 beneficiaries filed applications. It appears that 80 % of the aid would go to three aluminium producers of which one alone ([...] (*)) would receive [...] % of the aid.

2.4. BUDGET AND DURATION

- (13) The scheme was intended to have a budget of at least EUR 40 million for the second half of 2009 ⁽³⁾. The aid scheme contains a standstill clause and the aid would only be disbursed after approval by the Commission.

2.5. FORM OF THE AID AND CALCULATION MODALITIES

- (14) The beneficiaries had to apply for the aid to the Federal Office of Economics and Export Control (BAFA). The individual aid amounts depend on the electricity consumption of the respective applicants. Only the electricity consumption directly linked to the production process is eligible for aid. For aluminium, the compensation is granted only for electricity cost of electrolysis, for copper and zinc also for other electricity-intensive production processes (e.g. electric arc furnaces). In the case of zinc and copper, a differentiation between primary and secondary production is allegedly impossible and unnecessary because the energy-intensity differentiation is marginal.

(*) Covered by the obligation of professional secrecy.

(3) The figure is only a pre-estimate. The actual amount would have been determined by the beneficiaries' consumption and by the availability of budgetary resources. Germany has given a more specific figure of EUR 47,2 million.

- (15) The aid would be made available to the beneficiaries in the form of a direct grant. It is financed through the federal budget and granted as compensatory payments for the CO₂ costs of all electricity consumed above 1 GWh per year. The aid is calculated on the basis of the applicants annual electricity consumption (minus 1 GWh) multiplied by an amount in EUR per MWh which is defined at sub-sector level (aluminium, copper, zinc).
- (16) According to Germany, the basis of the calculation is a CO₂ price of EUR 19 per MWh. This is said to correspond to 0,75 % of the average EU CO₂ allowance price in the second half of 2009 equal to EUR 24. From this amount, the German authorities deduct a safety margin of 10 % to establish the maximum compensation of EUR 17 per MWh for aluminium. The compensation factors for the other metals are lower, with EUR 16 per MWh for zinc and EUR 9 per MWh for copper. The exact aid figure per beneficiary depends on the electricity consumption in the second half of 2009, since the aid is allocated based on the actual consumption of the beneficiaries and on the abovementioned price per MWh of electricity consumed to produce aluminium, zinc and copper.
- (17) In case of closure of production or its relocation outside of Germany by the end of 2010, beneficiaries would have to pay back any aid they might have received until then.

3. THE OPENING DECISION

- (18) In its opening decision, the Commission expressed doubts on the compatibility of the scheme with the internal market and invited interested parties to comment on different aspects of the aid.
- (19) Noting that specific frameworks and guidelines did not seem to apply, the Commission examined the three grounds put forward by Germany under Articles 107(3)(b) and 107(3)(c) TFEU.
- (20) First, Germany argued that the notified scheme was intended to remedy a serious disturbance of its economy within the meaning of Article 107(3)(b) TFEU. On this point, the Commission questioned whether the fall in non-ferrous metal prices in 2008/2009 really constituted a serious disturbance of the economy and whether the non-ferrous metal producers were as closely linked to the downstream industries as Germany contended ⁽⁴⁾.
- (21) Secondly, Germany submitted that the notified scheme constituted aid to facilitate the development of certain economic activities or of certain economic areas, as laid down in Article 107(3)(c) TFEU, to the benefit of German producers of primary aluminium, zinc and copper. In a first line of reasoning, Germany argued that the indirect CO₂ costs which were passed on through electricity prices carried the risk that non-ferrous metal producers in Germany would reduce production capacity and possibly even relocate to countries outside the Union, thus inducing carbon leakage.
- (22) However, the Commission expressed doubts on several aspects of this line of reasoning:
- It was unclear whether the aid was necessary and appropriate, since, on the basis of the information submitted by Germany, the carbon leakage risk could not be established. In particular, the Commission had no information on the beneficiaries' costs. Moreover, some of the beneficiaries appeared to be profitable throughout the period concerned, which made it unclear whether they were really under pressure to relocate. Finally, it had not been established that there was a real risk of relocations to countries outside the Union or the EEA ⁽⁵⁾.
 - It was also unclear whether the aid, which was limited to the second half of 2009, would have the incentive effect on the beneficiaries to maintain their production sites in Germany ⁽⁶⁾.
 - The Commission also questioned the proportionality of the scheme, since Germany had not provided sufficient information showing that overcompensation would be avoided ⁽⁷⁾.

⁽⁴⁾ OJ C 111, 9.4.2011, p. 22, recitals 92 *et seq.*

⁽⁵⁾ OJ C 111, 9.4.2011, p. 22, recitals 51 *et seq.*

⁽⁶⁾ OJ C 111, 9.4.2011, p. 22, recital 69.

⁽⁷⁾ OJ C 111, 9.4.2011, p. 22, recitals 71 *et seq.*

- Finally, the Commission had doubts on the balance of interests affected by the scheme, since it could not be excluded that the aid would lead to serious distortions of competition, in particular to the detriment of non-ferrous metal producers in other EU/EEA Member States, in particular those who enjoyed a natural location advantage due to cheaper electricity ⁽⁸⁾.
- (23) In a second line of reasoning, Germany claimed that the scheme constituted aid to facilitate the development of certain economic activities or of certain economic areas, within the meaning of Article 107(3)(c) TFEU, in order to prevent job losses in the non-ferrous metal industry and downstream industries. In this respect, the Commission doubted whether the prevention of job losses could be considered an objective of common interest, whether downstream industries would actually be as severely affected, and whether State aid was the appropriate instrument to achieve this objective ⁽⁹⁾.

4. COMMENTS FROM INTERESTED PARTIES

- (24) Between 3 May and 13 May 2011, the Commission received observations from twelve interested parties:
- Six of them were non-ferrous metal producers who had applied for aid ([...], [...], [...], [...], [...]) or who owned a subsidiary that was a potential beneficiary ([...]). [...], [...] and [...] are aluminium producers. [...] produces copper and [...] zinc.
- Five of them were trade associations: three at the German level representing the chemical industry (*Verband der chemischen Industrie* — VCI), the industrial users of energy (*Verband der Industriellen Energie- und Kraftwirtschaft* — VIK) and the non-ferrous metal industry (*Wirtschaftsvereinigung Metalle* — WVM); and two at the European level representing the metal industry (Euroalliages, Eurométaux).
- One submission was made by a German trade union, the *Industriegewerkschaft Bergbau, Chemie, Energie* (IG BCE).
- (25) All interested parties took a generally favourable view on the aid scheme ⁽¹⁰⁾. They argued that the carbon leakage risk had already been recognised by Union legislation, so that it was not necessary to prove it. Even if proof was required, they took the view that the existence of such a risk for the non-ferrous metal industry was established, given that the industry was a price taker on the world market and given that the electricity suppliers passed on the CO₂ costs already before 2013 (that is to say before the Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 ('ETS Guidelines') would be applicable).
- (26) They also contended that the scheme had an incentive effect, as the mere announcement of the measure had prompted some of the producers to keep production going. They finally insisted that the aid did not distort competition, but remedied a significant, ETS-related distortion of competition in comparison with producers in countries outside the EU/EEA. To support that statement, some potential beneficiaries and one trade association have indicated that electricity prices in the Union were converging so that relocations would not take place within the Union but outside. Other interested parties, however, such as the German trade union, seemed to indicate that the producers in Germany were hit harder by indirect ETS costs than producers in other Union Member States, where long-term contracts kept prices down.

5. COMMENTS FROM GERMANY

- (27) In its comments on the opening decision, Germany reaffirmed that the notified scheme would be compatible with the internal market. The two rationales of the scheme — namely the financial and economic crisis as well as the compensation for sectors and subsectors threatened by carbon leakage — were said to have been recognised by the Union as factors to be taken into account in State aid control.

⁽⁸⁾ OJ C 111, 9.4.2011, p. 22, recital 75.

⁽⁹⁾ OJ C 111, 9.4.2011, p. 22, recitals 76 *et seq.*

⁽¹⁰⁾ Some of the interested parties however took a broader stance by speaking out in favour of long-term support and by making specific recommendations on how this support should be shaped by the (then upcoming) ETS Guidelines. The ETS Guidelines have since been adopted (OJ C 158, 5.6.2012, p. 4).

- (28) In particular, Germany reiterated its view that the existence of a carbon leakage risk for the beneficiaries in 2009 was already established by existing Union legislation, namely Directive 2009/29/EC of the European Parliament and of the Council ⁽¹⁾ and Commission Decision 2010/2/EU ⁽²⁾, and that in any case Germany had already submitted sufficient evidence to prove the existence of such a risk. This would also be demonstrated by recent plant closures in Germany and the United Kingdom. Moreover, Germany claimed that the aid scheme would be an appropriate instrument to prevent carbon leakage, as the alternatives mentioned by the Commission's opening decision would not be as effective.
- (29) Germany also reiterated their view that the aid would be proportional, given in particular the short period of six months. While they conceded that the scheme might entail overcompensation, Germany highlighted that, in order to remedy this, the scheme provided for a 10 % deduction and a basic retention (equivalent to indirect costs of 1 GWh of consumption). In addition, Germany declared their readiness to amend the calculation of the aid amounts on the basis of a corresponding Commission proposal. Finally, Germany referred to a Communication from the Commission to the Council and the European Parliament on the competitiveness of the metals industries of 22 February 2008, 'A contribution to the EU's growth and jobs strategy' and to another Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 28 October 2010, 'An Integrated Industrial Policy for the Globalisation Era — Putting Competitiveness and Sustainability at Centre Stage', where the Commission underlined both the importance of preserving the competitiveness of the metal industry and of the energy-intensive industries in general ⁽³⁾.
- (30) In reply to the submissions made by interested parties, Germany noted that none raised concerns about possible distortions of competition within the internal market, but that, rather, all of the interested parties, and notably the trade associations representing possible competitors of the beneficiaries at national and European level, were supporting the aid. Germany also noted that the interested parties provided additional information and arguments which, in their view, underlined the existence of a carbon leakage risk for the non-ferrous metal industry in the second half of 2009.

6. ASSESSMENT OF THE AID

- (31) The Commission has examined the notified measure in the light of Articles 107 *et seq.* TFEU and Articles 61 *et seq.* of the EEA Agreement ⁽⁴⁾. After considering the comments submitted by Germany and by interested parties, the Commission finds that its analysis of the notified scheme made in the opening decision remains valid, subject to the explanation provided in the following, as no new elements have been brought forward that could change this assessment.

6.1. PRESENCE OF STATE AID

- (32) A measure constitutes State aid caught by Article 107(1) TFEU if the following four conditions are met: first, it confers an advantage on the recipients. Secondly, it is financed by the State or through State resources. Thirdly, it favours selected undertakings or economic activities. Finally, it has the potential to affect trade between Member States and to distort or threaten to distort competition in the internal market.
- (33) As the Commission held in its opening decision, the scheme fulfils all of these conditions ⁽⁵⁾: the aid stems from State resources since it would be financed by the German federal budget. It would confer an advantage on the beneficiaries by mitigating 'the charges which are normally included in the budget of an undertaking' ⁽⁶⁾ (that is to say electricity costs). It is selective since it would be granted only to the beneficiaries in specified sectors (aluminium, copper and zinc) defined *ex ante*, and — within those sectors — it would be further limited to large electricity end-users (those consuming more than 10 GWh per year). It has the potential to affect trade between Member States and to distort competition because the beneficiaries are active in sectors which are exposed to

⁽¹⁾ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 5.6.2009, p. 63).

⁽²⁾ Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ L 1, 5.1.2010, p. 10).

⁽³⁾ COM(2008) 108 final and COM(2010) 614 final.

⁽⁴⁾ The assessment conducted here is based on both the TFEU and the EEA Agreement. For the sake of simplicity, however, reference will be made only to the provisions of the TFEU.

⁽⁵⁾ OJ C 111, 9.4.2011, p. 22, recitals 29 *et seq.*

⁽⁶⁾ Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13.

intra-Union competition. Even irrespective of whether there are actual trade flows of certain non-ferrous metals between Member States, Union producers compete on the world market and an advantage granted to one of them would potentially result in sales reductions for others or in hampering sales increases.

- (34) The notified measure thus constitutes State aid pursuant to Article 107(1) TFEU. This is undisputed by Germany and by the interested parties.

6.2. LAWFULNESS OF THE AID

- (35) The draft law implementing the notified scheme states that the payment of the aid is subject to approval by the European Commission. Therefore Germany has fulfilled its obligation according to Article 108(3) TFEU by notifying the aid measure before its implementation.

6.3. COMPATIBILITY WITH THE INTERNAL MARKET

- (36) Since the scheme constitutes State aid, the Commission needs to assess whether it is compatible with the internal market. By way of derogation from the general prohibition of State aid laid down in Article 107(1) TFEU, aid may be declared compatible if it is covered by one of the categories laid down in Article 107(3).
- (37) Germany views the scheme as compatible aid and has argued that the aid scheme is intended to remedy a serious disturbance in the economy of a Member State within the meaning of Article 107(3)(b) TFEU.
- (38) Germany further holds the aid to be compatible on the basis of Article 107(3)(c) TFEU, as the scheme should facilitate the development of certain economic activities or of certain economic areas.
- (39) In principle, the Commission has wide discretion in matters falling under Article 107(3) TFEU ⁽¹⁷⁾, and it has issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market. It is settled case-law that the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States ⁽¹⁸⁾.
- (40) It must be stated from the outset that the State aid which Germany proposes to grant to German non-ferrous metal producers can be classified as operating aid, that is to say, 'aid intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities' ⁽¹⁹⁾. Such aid has been found by the Court of Justice '[to affect] trading conditions to an extent contrary to the common interest' ⁽²⁰⁾ and cannot in principle be considered compatible.
- (41) Nevertheless, there are clearly defined situations where operating aid may exceptionally be granted. The Commission will therefore assess the proposed measures as regards compatibility. It is necessary to assess first whether the notified aid falls into the scope of application of one or more guidelines or notices. If this is the case, the Commission is bound for the exercise of its discretion under Article 107(3) TFEU by the relevant guidelines or notices. If this is not the case, the Commission needs to verify whether the aid can be declared directly compatible with the internal market based on Article 107(3)(b) and/or Article 107(3)(c) TFEU.

6.3.1. Specific Guidelines, Frameworks and Regulations

- (42) In its opening decision, the Commission already excluded the application of some of the guidelines. This was true for the Community guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²¹⁾, which apply to

⁽¹⁷⁾ Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 56, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36.

⁽¹⁸⁾ Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 36; Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 43; Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 53.

⁽¹⁹⁾ Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 48.

⁽²⁰⁾ Case C-86/89 *Italy v Commission* [1990] ECR I-3891, paragraph 18.

⁽²¹⁾ OJ C 244, 1.10.2004, p. 2. The application of those Guidelines has been prolonged by a recent Communication (OJ C 296, 2.10.2012, p. 3).

undertakings in difficulties, and notably to undertakings which fulfil the criteria under their domestic law for being the subject of collective insolvency proceedings. However, the aid scheme notified by Germany expressly excludes undertakings in insolvency proceedings or applying for insolvency from its scope ⁽²²⁾, and Germany has not argued that the potential beneficiaries of the scheme should otherwise be considered to be undertakings in difficulties within the meaning of these Guidelines.

- (43) The Commission also excluded the application of Commission Regulation (EC) No 800/2008 ⁽²³⁾. While Regulation (EC) No 800/2008 provides a framework for certain types of investment of employment aid, the notified scheme was not covered by any of the exemptions of that Regulation ⁽²⁴⁾.
- (44) As far as the Community guidelines on State aid for environmental protection ⁽²⁵⁾ are concerned, the Commission found that there was no provision in those Guidelines which specifically addressed carbon leakage ⁽²⁶⁾. Therefore, the possibility for a Member State to grant aid in order to prevent carbon leakage is not covered by those Guidelines.
- (45) Finally, the Commission held that the aid scheme did not fall within the scope of the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ('Temporary Framework') ⁽²⁷⁾ designed 'to unblock bank lending to companies and thereby guarantee continuity in their access to finance'. This was because the aid scheme was not about facilitating the access of the potential beneficiaries to finance, as Germany itself had recognised ⁽²⁸⁾.
- (46) As for the Guidelines on national regional aid for 2007-2013 ⁽²⁹⁾, the Commission took the view that, for the time being, the aid scheme did not appear to be covered by these Guidelines ⁽³⁰⁾. It is clear from its objective that the notified scheme is not intended to alleviate handicaps specific to the regions in which the beneficiaries are set (such as a particularly low living standard or low population density).
- (47) Neither Germany, nor interested parties have submitted any additional information on the possible application of Regulation (EC) No 800/2008, the Community guidelines on State aid for environmental protection, the Temporary Framework or the Guidelines on national regional aid for 2007-2013, and the Commission therefore has no reason to depart from its initial assessment.
- (48) Since the opening decision, the Commission has issued the ETS Guidelines ⁽³¹⁾. Section 3.1 of these Guidelines sets out the conditions under which Member States may grant State aid for the partial compensation of ETS costs passed on in electricity prices ('indirect ETS costs'). However, recital 6 of the Guidelines defines the scope of application as follows: 'Since the provisions introduced by Directive 2009/29/EC will apply as from 1 January 2013, State aid cannot be deemed necessary to lessen any burden resulting from this Directive before that date. Consequently, the measures covered by these Guidelines may only be authorised for costs incurred on or after 1 January 2013'. The scope of the Guidelines is limited to the third ETS trading period ('ETS-3'), which starts in 2013, given that, on the one hand, the Commission had not received any clear evidence of the existence of carbon leakage already before that period while, on the other hand, evidence gathered and the studies undertaken indicated that such a risk might materialise with the tightening of the cap on ETS allowances and with the increased shift from free allocation to auctioning.
- (49) Therefore, the Commission concludes that the scheme does not fall within the scope of any guidelines.

6.3.2. Article 107(3)(b) of the TFEU

- (50) Pursuant to Article 107(3)(b) TFEU, the Commission may declare compatible with the internal market aid 'to remedy a serious disturbance in the economy of a Member State'. A serious disturbance in the economy is any

⁽²²⁾ OJ C 111, 9.4.2011, p. 22, recital 36.

⁽²³⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty ('General Block Exemption Regulation') (OJ L 214, 9.8.2008, p. 3).

⁽²⁴⁾ OJ C 111, 9.4.2011, p. 22, recital 39.

⁽²⁵⁾ OJ C 82, 1.4.2008, p. 1.

⁽²⁶⁾ OJ C 111, 9.4.2011, p. 22, recitals 41 *et seq.*

⁽²⁷⁾ OJ C 83, 7.4.2009, p. 1.

⁽²⁸⁾ OJ C 111, 9.4.2011, p. 22, recital 40.

⁽²⁹⁾ OJ C 54, 4.3.2006, p. 13.

⁽³⁰⁾ OJ C 111, 9.4.2011, p. 22, recitals 37 *et seq.*

⁽³¹⁾ See footnote 10.

economic disturbance which results in serious economic and social difficulties and affects the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. As an exception, the provision is to be interpreted narrowly ⁽³²⁾.

- (51) Germany invoked the economic crisis of 2008 which led to falling non-ferrous metal prices at the London Metal Exchange (LME), while the electricity costs charged to industry remained constantly high, notably because of the ETS. Accordingly, the non-ferrous metal producers are described as price takers in the sense that they had no ability to either influence the LME prices or to pass on higher production costs to their customers. However, owing to their close cooperation and interdependence with downstream industries (notably the automotive and electronic sectors), capacity reductions or even the relocation of plants would have a considerable impact on other economic sectors. Germany alleges that there is the risk of a crisis-induced and irreversible loss of whole value chains.
- (52) Interested parties have echoed Germany's remarks and have cautioned against a loss of non-ferrous metal production capacity. For instance, [...] points to the difficulties European industry has experienced in the supply of rare earths from China and states that, for downstream industries that require non-ferrous metals, similar difficulties may lie ahead if the Union-based production capacity was not preserved. Interested parties such as [...] have also underlined the close cooperation between non-ferrous metal producers and their downstream customers in the development of new products and in promoting innovation. They fear that this innovative potential could be irreversibly lost if non-ferrous metal production was not supported.
- (53) In 2009, the Commission adopted the Temporary Framework ⁽³³⁾. As stated in recital 45, with that Framework, the Commission recognised that the financial crisis constituted a serious disturbance of the economy of the Member States, the disturbance consisting of the immediate impact of the crisis on the banking sector as well as the indirect impact on the real economy to the extent that companies had problems finding an affordable access to finance. This, however, is not the disturbance Germany intended to address with its scheme.
- (54) On the question whether the economic situation of the non-ferrous metal producers in the second half of 2009 may constitute a serious disturbance within the meaning of Article 107(3)(b) TFEU, the formal investigation procedure has not produced any elements that would establish such a disturbance. Indeed, the Commission takes the view that the provision of Article 107(3)(b) TFEU has to be interpreted narrowly, in the sense that it is intended to address large-scale disturbances affecting numerous sectors of the economy, or sectors whose functioning is vital for the economy as a whole because they play a systemic role. In this context, the Court of First Instance of the European Union has ruled that the disturbance must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory ⁽³⁴⁾. The Commission has consequently decided that a serious economic disruption is not remedied by an aid that 'resolve[s] the problems of a single recipient ..., as opposed to the acute problems facing all operators in the industry' ⁽³⁵⁾. This case-law shows that Article 107(3)(b) requires disturbance of a certain magnitude. So far, it has not been demonstrated that a significant part of the German economy suffered from a serious disturbance. Moreover, it is unclear how a serious disturbance of a Member State economy should be alleviated by granting State aid to only 11 beneficiaries.
- (55) The argument that a declining non-ferrous metal production in Germany would severely impact downstream industries is to some extent contradicted by a point made by interested parties: one non-ferrous metal producer highlighted the trade intensity of non-ferrous metal production in Germany and Europe by stressing that so far, European producers still had the advantage of customer proximity over their overseas competitors. While the latter had to invest in warehousing to supply the European market, the former could produce on demand, being close to the production sites of their customers. However, the producer who raised this point feared that this advantage could soon be wiped out by rising electricity costs, at relatively low additional costs for customers: Indeed, if electricity costs in Europe were to rise even more, it could become more interesting for customers — rather than to rely on Union-based producers — to purchase non-ferrous metals from overseas producers (who would ship their products to Europe and stock them in warehouses). According to this view, the downstream industries would in principle be able to source from the world market without being threatened in their

⁽³²⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, paragraph 167; Case C-301/96 *Germany v Commission* [2003] ECR I-9919, paragraph 106.

⁽³³⁾ See footnote 27.

⁽³⁴⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen et al v Commission* [1999] ECR II-3663, paragraph 167.

⁽³⁵⁾ Case NN 25/2008 (ex CP 15/2008) WestLB risk shield, Germany (http://ec.europa.eu/competition/state_aid/cases/225266/225266_843256_6_1.pdf, paragraph 41).

existence. Rather, the very possibility that upstream producers could relocate shows that downstream industries could perfectly rely on suppliers from outside Germany.

- (56) In any event, the German authorities have not submitted sufficient evidence that the economic difficulties of the three sectors in question are of such a scope or would impact related sectors to such an extent that the situation under investigation would constitute a serious disturbance in the economy of a Member State within the meaning of Article 107(3)(b) TFEU.

6.3.3. Article 107(3)(c) of the TFEU

- (57) Article 107(3)(c) TFEU states that ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’ may be considered to be compatible with the internal market. According to the Court’s case-law, the Commission may declare State aid compatible with the internal market if the State aid pursues an objective of common interest ⁽³⁶⁾, if it is necessary to reach this objective ⁽³⁷⁾, and if it does not adversely affect trading conditions to an extent contrary to the common interest.
- (58) It is established Commission practice ⁽³⁸⁾ that measures may be declared compatible directly under Article 107(3)(c) TFEU if they are necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade. In this regard, the Commission considers it appropriate to assess the following questions:
- (1) Is the aid measure aimed at a well-defined objective of common interest?
 - (2) Is the aid well designed to deliver the objective of common interest? In particular:
 - (a) Is the aid measure an appropriate and necessary instrument, i.e. are there other, better-suited instruments?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
 - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?
- (59) Germany has relied on two lines of reasoning to justify the compatibility of the aid under Article 107(3)(c) TFEU: First, Germany has argued that the aid was necessary to prevent the closure of plants in Germany due to the relocation to third countries which were not part of the ETS and had no comparable CO₂ costs (prevention of carbon leakage). Secondly, it has argued that the aid was necessary to prevent a relocation of German plants to third countries that would be damaging both in terms of industrial structure and of employment (prevention of loss of employment).

6.3.3.1 The prevention of carbon leakage

Objective of common interest

- (60) Environmental protection is recognised to constitute an objective of common interest. Given that environmental legislation in the Union could result in a relocation of CO₂ emissions to other parts of the world where they would still constitute an environmental risk, the prevention of such carbon leakage can be considered as being part of the objective of environmental protection. This has been made clear by Union legislation, namely the Directive 2009/29/EC ⁽³⁹⁾, which states, in its recital 27:

‘Member States may deem it necessary to temporarily compensate certain installations which have been determined to be exposed to a significant risk of carbon leakage for costs related to greenhouse gas emissions passed on in electricity prices. Such support should only be granted where it is necessary and proportionate and should ensure that the Community scheme incentives to save energy and to stimulate a shift in demand from “grey” to “green” electricity are maintained.’

⁽³⁶⁾ Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

⁽³⁷⁾ Cf. Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99, *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

⁽³⁸⁾ Community framework for state aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1), point 1.3; Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1), point 1.3.

⁽³⁹⁾ See footnote 11.

- (61) Moreover, the prevention of carbon leakage has been acknowledged as an environmental objective in the ETS Guidelines ⁽⁴⁰⁾, and in particular in points 7 and 8:
- ‘7. Under Article 10a(6) of the ETS Directive, Member States may grant State aid in favour of sectors or subsectors deemed to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices (hereinafter referred to as “indirect emission costs”), in order to compensate for those costs in accordance with State aid rules. For the purposes of these Guidelines, “carbon leakage” describes the prospect of an increase in global greenhouse gas emissions when companies shift production outside the Union because they cannot pass on the cost increases induced by the EU ETS to their customers without significant loss of market share.
8. Addressing the risk of carbon leakage serves an environmental objective, since the aid aims to avoid an increase in global greenhouse gas emissions due to shifts of production outside the Union, in the absence of a binding international agreement on reduction of greenhouse gas emissions. At the same time, aid for indirect emission costs may have a negative impact on the efficiency of the EU ETS. If poorly targeted, the aid would relieve the beneficiaries of the cost of their indirect emissions, thereby limiting incentives for emission reductions and innovation in the sector. As a result, the costs of reducing emissions would have to be borne mainly by other sectors of the economy. Furthermore, such State aid may result in significant distortions of competition in the internal market, in particular whenever undertakings in the same sector are treated differently in different Member States due to different budgetary constraints. Therefore, these Guidelines need to address three specific objectives: minimising the risk of carbon leakage, preserving the EU ETS objective to achieve cost-efficient decarbonisation and minimising competition distortions in the internal market.’
- (62) The prevention of carbon leakage can therefore be related to the objective of common interest of preserving the environment and in particular the climate.

Necessity and appropriateness

- (63) The aid granted must be an appropriate and necessary instrument to achieve the envisaged objective. An instrument is appropriate and necessary if there are no other less distortive instruments to achieve the same results.
- (64) In the case at hand, in order to determine whether the aid to be paid out under the notified scheme is necessary and appropriate, it must first be established that the eligible sectors (German aluminium, copper and zinc production) were, in the second half of 2009, subject to a risk of carbon leakage.
- (65) Germany has argued that the carbon leakage risk for 2009 had already been established, notably by Decision 2010/2/EU ⁽⁴¹⁾. The risk is said to have been present already in the second ETS trading period (2008-2012, ‘ETS-2’), with the transition to the third ETS trading period not constituting, according to Germany, a ‘qualitative leap’.
- (66) In its opening decision, the Commission, inter alia, recalled that Member States had agreed to introduce the mechanisms to prevent carbon leakage in Directive 2009/29/EC ⁽⁴²⁾ only as of 2013. This seemed justified since as of 2013 a stricter cap on CO₂ emissions would apply, which was expected to lead, all other things being equal and based on the assumptions made at the time, to higher CO₂ prices ⁽⁴³⁾. In addition, the Commission noted that the debate on the carbon leakage risk during the second ETS trading period (2008-2012) was not conclusive as to the extent of such a risk. One more recent study suggests the possibility of existence of carbon leakage in 2009 in the aluminium sector, but not for copper and zinc production. In any event, it seemed appropriate to establish coherent Union-wide criteria for such aid ⁽⁴⁴⁾. For the third ETS trading period, such criteria can be found in the ETS Guidelines.
- (67) Interested parties have made the same argument as Germany, namely that the carbon leakage risk for the non-ferrous metal industries had already been recognised both by Article 10a(6) of Directive 2009/29/EC and by Decision 2010/2/EU. They therefore questioned the need for a separate assessment as outlined by the Commission in its opening decision.

⁽⁴⁰⁾ See footnote 10.

⁽⁴¹⁾ See footnote 12.

⁽⁴²⁾ See footnote 39.

⁽⁴³⁾ OJ C 111, 9.4.2011, p. 22, recital 53.

⁽⁴⁴⁾ OJ C 111, 9.4.2011, p. 22, recital 54.

- (68) Some of the interested parties have also insisted that the assessment should not be too strict: given that the Commission had found, in its opening decision, that the major beneficiaries had been profitable throughout the whole period covered by the scheme ⁽⁴⁵⁾, some of these non-ferrous metal producers highlighted that the profitability of their German operations was actually relatively low, sometimes below the rate of return that was acceptable for this kind of industry, and that it would be too restrictive to say that aid would only be necessary and have an incentive effect if the beneficiary was on the verge of insolvency proceedings.
- (69) Moreover, some of the producers, such as [...], [...], [...] and [...], stated that carbon leakage was not limited to the question of whether a plant would eventually close down and relocate outside the Union. Rather, the issue was whether beneficiaries would consider investing in their German operations or to abstain from any investment. They claimed that the notified scheme had the effect of encouraging such investments and that it was the prospect of receiving the aid that incentivised them to keep production going and to undertake significant investments in the plants in Germany.
- (70) These arguments however are unconvincing. To begin with, the claim that the carbon leakage risk for the second half of 2009 has already been established in the ETS Directive is erroneous. Article 10a(6) of Directive 2009/29/EC states that 'Member States may also adopt financial measures in favour of sectors or subsectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to compensate for those costs and where such financial measures are in accordance with state aid rules applicable and to be adopted in this area.' Article 10a(6) therefore does not establish the carbon leakage risk, but merely states that State aid may be an option if and where such a risk has been determined. In any case, Directive 2009/29/EC only addresses ETS-3, i.e. the period after 2013.
- (71) Similarly, Decision 2010/2/EU ⁽⁴⁶⁾ contains a list of sectors and subsectors that are deemed to be exposed to a significant risk of carbon leakage only as of 2013 when the third phase of the ETS enters into force. In view of its underlying assumptions, it does not establish the existence of a carbon leakage risk for 2009.
- (72) More importantly, the objective of Decision 2010/2/EU is to determine the list of sectors and subsectors which shall benefit from the allocation of EU-ETS allowances free of charge. This allocation of free allowances is provided for in Article 10a(12) of Directive 2009/29/EC. Decision 2010/2/EU is based on Article 10a(13) of Directive 2009/29/EC which in turn clearly refers to Article 10a(12). As the allocation of allowances free of charge is a remedy for tackling the *direct* CO₂ costs incurred by the industrial sectors concerned (e.g. through their own production activity), the decision cannot be relied on to determine which sectors and subsectors might need compensation for *indirect* CO₂ costs ⁽⁴⁷⁾.
- (73) The Commission takes the view, consistent with the ETS Guidelines, that an aid measure cannot be necessary and appropriate to prevent carbon leakage due to indirect CO₂ emission costs unless at least three conditions are fulfilled: First, it is necessary to show that the potential beneficiaries of the aid bear, within their electricity costs, a substantial share of indirect CO₂ costs passed on through electricity prices. Secondly, these indirect CO₂ costs must make up a substantial share of the beneficiaries' production costs. Thirdly, the beneficiaries must not be in the position to pass on these costs to their customers. Even if these conditions are met, it would be necessary to establish that production shifts or relocation would occur outside the EU/EEA, i.e. that production would move to countries with less stringent emission reduction requirements. Indeed, shifts of production within the EU-ETS would not constitute carbon leakage.
- (74) As regards the first condition, Germany has argued that CO₂ costs were priced in as opportunity costs by electricity suppliers and passed on to their customers already in 2009 despite the fact that most ETS allowances had been allocated for free to the electricity suppliers. This was because the allowances used in the generation of electricity, although granted for free, carried a 'price' in that they could in principle be sold. These opportunity costs were priced in and passed on to their customers.

⁽⁴⁵⁾ OJ C 111, 9.4.2011, p. 22, recital 64.

⁽⁴⁶⁾ See footnote 41.

⁽⁴⁷⁾ Otherwise, this would create a situation where sectors listed in Decision 2012/2/EU only because of their direct CO₂ emissions could be compensated also for their indirect CO₂ costs.

- (75) In its Impact Assessment Report on the ETS Guidelines, the Commission came to the same conclusion that electricity producers were able to pass on most of their CO₂ costs in the second ETS trading period (2008-2012), although this pass-on was estimated to be below 100 % ⁽⁴⁸⁾.
- (76) On the second condition, Germany has not provided specific information on the proportion of indirect CO₂ costs within the beneficiaries' total production costs.
- (77) Germany has submitted general information on the proportion of electricity costs in total costs: For copper production, energy or electricity costs ranged from 13 to above 40 % of production costs. For zinc production, they made up nearly 50 %, for aluminium, 46 %. The Commission notes that the definition of total costs has not been consistent across the different beneficiaries, which means that the figures cannot be compared with each other. Germany has also submitted figures on the indirect CO₂ cost component of four of the beneficiaries (in EUR per MWh): they range from EUR [...] per MWh (for a copper producer) to EUR [...] per MWh (for a zinc producer), with aluminium production varying between EUR [...] and [...] per MWh. No information was submitted on the other beneficiaries.
- (78) From the interested parties who are also beneficiaries, [...] stated that indirect CO₂ costs in 2009 amounted to EUR [...] per MWh, representing as much as [...] % of its total production costs. [...] indicated that electricity costs make up approx. [...] % of its turnover.
- (79) This information — which is unspecific — does not allow the Commission to ensure that the second condition has been fulfilled.
- (80) In addition, as already mentioned in recital 75, it appears that CO₂ costs are not entirely passed on in electricity prices. The extent to which CO₂ costs are passed on depends greatly on the type of contract and on the time the contract was concluded. The information provided by [...] for instance tends to demonstrate that in the period concerned (July to December 2009) the part of CO₂ costs in electricity was significantly less than the 1-year-forward price of allowances for 2009.
- (81) In order to prove that a carbon leakage risk existed in 2009, Germany and interested parties have pointed to the data gathered by the Commission in the preparation of the ETS Guidelines. But this information cannot be relied on to establish the existence of a carbon leakage risk for German industries in 2009. First, the Commission based its analysis in the Impact Assessment Report on data aggregated at European level. This data therefore only has limited significance when examining a potential risk of carbon leakage for industries at Member State level.
- (82) More importantly, the findings in the Impact Assessment Report all relate to ETS-3 and are not applicable to 2009. Indeed, the different risk scenarios described in the Impact Assessment Report were based on the assumption of a tightening of the cap and a transition to auctioning in ETS-3; they were therefore not reflecting the factual situation in 2009 ⁽⁴⁹⁾.
- (83) Therefore, the Commission has not been presented with conclusive evidence on the actual share of indirect CO₂ costs within production costs.
- (84) On the third condition, that is to say the ability of the beneficiaries to pass on their indirect CO₂ costs to their customers, Germany and several interested parties have stated that the beneficiaries have no influence on the metal price. As the production of non-ferrous metals constitutes a world market, the prices are set at the London Metal Exchange (LME). Producers are therefore said to have no means to raise prices without losing market share.
- (85) The information submitted tends to confirm that the third condition is met, namely that producers could not pass on substantial cost increases due to the fact that competition is worldwide and mainly driven by price.

⁽⁴⁸⁾ Impact Assessment report accompanying the Guidelines on certain State aid measures in the context of Greenhouse Gas Emission Allowance Trading Scheme, 22.5.2012, SWD(2012) 130 final, http://ec.europa.eu/competition/sectors/energy/impact_assessment_main%20report_en.pdf, p. 16.

⁽⁴⁹⁾ For the period before the tightening of the cap, the Commission actually noted that the 'carbon leakage literature [did] not find empirical proof of carbon leakage', see Impact Assessment Report, footnote 48, p. 13.

- (86) Overall, the Commission finds that the information submitted by Germany and interested parties does not provide conclusive evidence that for the potential beneficiaries, indirect CO₂ costs constituted a share of production costs of such a level that there was a risk of carbon leakage. Therefore, it has not been demonstrated that the scheme would be necessary and appropriate to achieve the objective of common interest of preventing carbon leakage.

Incentive effect

- (87) State aid has an incentive effect if the aid changes the recipients' behaviour towards reaching the objective of common interest. In its opening decision, the Commission, *inter alia*, doubted that any aid granted under the notified scheme would incentivise the beneficiaries to maintain production capacity in Germany. Regardless of whether a carbon leakage risk was real and present in 2009, the time span of the aid, which essentially only covered the second half of 2009, was considered too short to influence investment decisions of a relevant magnitude ⁽⁵⁰⁾.
- (88) Germany argues that the scheme was conceived to bridge the gap between 2009 when the crisis hit hardest and 2013 when it will be possible to set up a long-term support scheme based on the ETS Guidelines. Moreover, Germany and interested parties have claimed that the mere announcement of the notified scheme in 2009 has had the effect of maintaining production capacity ⁽⁵¹⁾. One beneficiary, [...], has submitted internal documents to show that the announcement made by the German Government did avert the closure of their plant in Germany.
- (89) The Commission finds the information submitted on the incentive effect of the aid to be contradictory. On the one hand, non-ferrous metal production is a cyclical business, which may result in an important increase of production during an upturn and thus in overcapacity when demand falls ⁽⁵²⁾. On the other hand, the issue of carbon leakage motivating the aid measure is linked to environmental policies and is an issue that exists irrespective of overcapacity problems. As interested parties have argued, in order to prevent carbon leakage, businesses need to have long-term security, that is to say stable long-term conditions, because only this would prompt them to undertake investments with a view to maintaining production capacity in Europe for the next ten to 20 years.
- (90) It is already questionable whether operating aid, as argued by some of the interested parties, is really the appropriate instrument to encourage meaningful investment by market operators (as compared for instance to targeted investment aid). But even if this was the case, the aid measure has not been designed to address the long-term business conditions of the non-ferrous metal producers. Its only effect is to strengthen the beneficiaries' position during the overcapacity period while other competitors have to cope with the overcapacity issue with their own means. The comments from interested parties on the positive impact of the aid in fact seem to confirm that the measure acted more against the cyclical downturn, rather than addressing the potentially structural issue of environmental policies entailing higher electricity costs and leading to carbon leakage.
- (91) Given that the scheme was meant to operate only in the second half of 2009 while both the market situation of non-ferrous metal producers and the Union allowance forward prices have been highly fluctuating before and after that period, the Commission therefore considers it unlikely that such a short-termed support is liable to decisively influence the beneficiaries' medium- and long-term strategies of maintaining and possibly increasing capacities within the Union. Moreover, the Commission considers that it was foreseeable for the potential beneficiaries, first, that any approval of the scheme by the Commission would take time and, secondly, that a framework for support would be in place anyway in ETS-3. This, and the fact that none of the beneficiaries has so far actually shut down and relocated, leads the Commission to the conclusion that the continued operation of non-ferrous metal producing plants has been determined by other factors than by the prospect of the notified scheme. In the internal documents provided by [...], it appears that in fact, long-term support (starting in 2009 and going beyond 2013) was a decisive factor.

⁽⁵⁰⁾ OJ C 111, 9.4.2011, p. 22, recital 69.

⁽⁵¹⁾ The German Government had announced that the scheme would be set up once it had been approved by the European Commission.

⁽⁵²⁾ ECORYS, Competitiveness of the EU Non-Ferrous Metals Industries, 5 April 2011, http://ec.europa.eu/enterprise/sectors/metals-minerals/files/fn97624_nfm_final_report_5_april_en.pdf, p. 31.

- (92) In conclusion, the Commission finds that the incentive effect of the aid granted under the scheme has not been demonstrated.

Proportionality

- (93) A State aid measure is proportional if aid to the beneficiaries is kept at the minimum sufficient for achieving the objective of common interest. This means that the beneficiaries cannot receive more aid than would be necessary to cover the financial burden which is intended to be alleviated in view of the objective of common interest.
- (94) Germany claims that its methodology ensures that the beneficiaries are not overcompensated and that in fact, compensation is only partial. First, Germany intends to apply a retention amounting to the indirect CO₂ costs which correspond to 1 GWh of electricity consumption, meaning that a beneficiary would only be compensated for those indirect CO₂ costs exceeding the retention. Secondly, it stresses that the aid amount would be reduced by a safety deduction of 10 %. Thirdly, it contends that by setting different aid amounts for the three different metals, it is ensured that compensation is kept to a minimum.
- (95) In general, interested parties agree with Germany's viewpoint⁽⁵³⁾, with some of them even advocating full compensation of indirect CO₂ costs.
- (96) However, the methodology appears to be flawed in several ways. First, this concerns the accuracy of determining the indirect CO₂ costs. Germany takes the EUA forward price for 2009 (EUR 24 per tonne of CO₂) as a starting point and assumes, based on the average CO₂ emissions of a marginal power plant in Germany (0,8 tonnes of CO₂ per MWh⁽⁵⁴⁾), that the part of indirect CO₂ costs within electricity costs is equivalent to EUR 19 per MWh. However, Germany has recognised that the actual proportion of CO₂ costs within a beneficiary's electricity costs will vary according to its supply arrangements, given that the undertakings concerned had typically entered long-term contracts at a given time and on the basis of given electricity and EUA prices. This was also confirmed by the information provided by interested parties. Some interested parties indicated that companies that were procuring their electricity through long-term contracts were indeed shielded from indirect CO₂ prices in electricity. Moreover, the information provided by [...] shows that not the entire CO₂ costs were passed on in electricity prices. The assumption that indirect CO₂ costs would be equivalent to EUR 19 per MWh does not reflect this circumstance and does not effectively preclude overcompensation. The Commission therefore notes that Germany has not demonstrated that the 10 % deduction would be sufficient to prevent overcompensation as they did not convincingly demonstrate to what extent CO₂ costs were passed on in electricity prices. In particular, they did not demonstrate how the 10 % were determined. In addition, the information received from interested parties shows that the 10 % deduction is insufficient to prevent overcompensation.
- (97) Secondly, in order to take into account the different situations of the aluminium, zinc and copper production, Germany has, on unclear grounds, decided that, after applying a safety deduction of 10 %, aluminium should be entitled to the highest compensation (EUR 17 per MWh), while zinc and copper would receive less aid (EUR 16 and 9 per MWh respectively). While it may be true that the production of primary aluminium has been more affected by the economic crisis than, for example, copper production, Germany has submitted insufficient information to understand how the different aid amounts have been determined. At the same time, some of this information clearly shows that the biggest beneficiary would have been overcompensated⁽⁵⁵⁾. The absence of a clear explanation of the aid amounts for zinc and copper also puts into question their effectiveness in preventing carbon leakage for these sectors.
- (98) Based on these considerations, the Commission therefore concludes that the scheme does not ensure that compensation would be limited to the minimum necessary.

⁽⁵³⁾ For instance, one interested party, a trade association, has submitted that since copper production is less energy-intensive than aluminium production, it was appropriate to grant only half the compensation (EUR 9 per MWh) that is awarded to aluminium (EUR 17 per MWh).

⁽⁵⁴⁾ This appears to be a rounded figure based on a more accurate value submitted by Germany during the notification procedure: 0,75 tonnes of CO₂ per MWh.

⁽⁵⁵⁾ According to [...], an aluminium producer, its indirect CO₂ costs in 2009 amounted to EUR [...] per MWh, which is significantly below the aid amount of EUR 17 per MWh the scheme applies to aluminium production.

Distortions of competition and trade and balancing test

- (99) In order to be compatible aid, the distortion of competition and trade resulting from the State aid should be limited, so that the overall balance with regard to the objective of common interest is positive.
- (100) Germany argues that the scheme does not result in a significant distortion of competition and that the overall balance is therefore positive. Firstly, Germany invokes the objectives of the scheme to support a fundamental pillar of European industry as well as to prevent carbon leakage and the loss of industrial know-how. Secondly, Germany describes the scheme as a compensation for an ETS-induced disadvantage to restore fair competition rather than distort competition.
- (101) Interested parties have argued that there was, if at all, only a small risk of competition distortions within the internal market since the scheme was designed to alleviate a handicap for Union producers in their competition with non-Union producers. Moreover, they argued that intra-sector competition would not be harmed either, since the non-ferrous metal sector had already undertaken many efforts to reduce its CO₂ emissions and to become more energy-efficient. Finally, they claim that electricity prices within the EU/EEA are the same, or at least converging, which means that it would make no sense for German producers to relocate their plants to other EU/EEA Member States.
- (102) The Commission considers, however, that the argument that the scheme would not lead to serious distortions of competition, but rather have an overall positive balance cannot be accepted. In that respect, it must be recalled that the Commission has wide discretion in matters falling under Article 107(3) TFEU.
- (103) First, the form of the aid belongs to the most distortive types of aid: As the Court of First Instance held in its *Siemens* judgment, ‘operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of [Article 107(3) TFEU], as ‘the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any [objective of common interest]’⁽⁵⁶⁾.
- (104) Similarly, in Case C-86/89 *Italy v Commission*, the Court of Justice found that ‘the aid in question, which was granted without any specific conditions and solely according to the quantities used, should be regarded as an operating aid to the undertakings concerned and that, as such, it affected trading conditions to an extent contrary to the common interest’⁽⁵⁷⁾.
- (105) The Commission has also followed this approach, in particular as far as subsidies to cover electricity costs for the aluminium sector are concerned⁽⁵⁸⁾.
- (106) All the concerns expressed in those past cases are also present here: the aid consists in a grant that is paid to the producers concerned in order to reduce their electricity costs. As interested parties have confirmed, this is one of the main production costs in the sectors concerned by the aid scheme and is one of the main production factors on which producers compete.
- (107) In addition, the aid is granted for each MWh consumed and has thus a direct impact on the competitiveness of the eligible companies for each unit they produce beyond the consumption of the first GWh. Furthermore, the aid is not linked to any efficiency benchmark. Finally, the aid is not even linked to the beneficiaries’ actual CO₂ costs included in electricity. It might actually reduce their incentives to produce in a more energy-efficient way.

⁽⁵⁶⁾ Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 48.

⁽⁵⁷⁾ Case C-86/89 *Italy v Commission* [1990] ECR I-3891, paragraph 18. See also Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 50.

⁽⁵⁸⁾ See Commission Decision 86/60/EEC of 14 December 1985 on the aid which the Land of Rheinland-Pfalz of the Federal Republic of Germany has provided to an undertaking producing primary aluminium, situated in Ludwigshafen (OJ L 72, 15.3.1986, p. 30); Commission Decision 2010/460/EC of 19 November 2009 on State aid measures C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06) implemented by Italy for Alcoa Trasformazioni (OJ L 227, 28.8.2010, p. 62); Commission Decision 2012/339/EU of 13 July 2011 on the State aid No SA.26117 — C 2/10 (ex NN 62/09) implemented by Greece in favour of Aluminium of Greece SA (OJ L 166, 27.6.2012, p. 83). See also Case SA.33624 (ex 2011/CP) on preferential electricity tariffs for ALRO Slatina S.A. (OJ C 268, 5.9.2012, p. 21).

- (108) Moreover, the Commission does not agree that the aid scheme would not disrupt competition in the Union. The Commission notes that, first, remedies had already been in place, for instance the allocation of EU ETS allowances free of charge ⁽⁵⁹⁾. Although this mechanism did not specifically target the indirect costs resulting from the ETS, it has alleviated the burden borne by the Union industry. Secondly, there is a very high risk that the measure would harm competition as it is granted *ad hoc* outside any harmonised framework and targets only the national level and therefore only benefits the undertakings established in that particular Member State.
- (109) In that vein, the argument made by Germany and by some of the interested parties that the scheme could not hurt intra-Union competition since it was essentially designed to restore fair competition with outside-Union competitors misses the point: Support granted only to German producers in order to improve their competitiveness towards non-Union competitors at the same time risks also making them better off in comparison with their Union competitors ⁽⁶⁰⁾. This is further demonstrated by the fact that the scheme would require beneficiaries to pay back the aid in case of plant closure or relocation *outside Germany* (and not only outside the Union or the EEA).
- (110) Similarly, the allegation that German non-ferrous metal producers would not relocate to other EU/EEA Member States anyway due to comparable levels of electricity prices is not convincing. Distortions of competition in the internal market are not only measured by the relocation of plants from one to the other Member State. Distortions of competition already arise when production capacity can be maintained in one Member State because of State aid, as this has repercussions on the profitability of production capacity in other Member States. Germany is the main EU location of some of the non-ferrous metals producers concerned, but it is not the only one ⁽⁶¹⁾, so that the aid is likely to distort competition conditions between producers across the EU and the EEA. In fact, Germany had stressed in the earlier notification of the scheme that German producers were allegedly disadvantaged also in comparison with competitors in other Member States.
- (111) In addition, the Commission sees the risk that a scheme like the one at hand would trigger a subsidy race between Member States, a situation in which competition on the internal market would be significantly distorted according to the availability of budgetary resources in the various Member States. This risk is particularly important in the present case given the absence in 2009 of a harmonised framework setting the conditions by which all Member States have to abide.
- (112) Consequently, even where an objective of common interest has been recognised, such as the environmental objective of preventing carbon leakage, it is crucial that the distortive effects of any aid are kept to a minimum and that a level playing field is preserved for all market players in the internal market.
- (113) Indeed, one of the specific objectives pursued with the adoption of the ETS Guidelines (alongside the prevention of carbon leakage and the preservation of the efficiency of the ETS) was to minimise distortions on the internal market ⁽⁶²⁾. Such distortions cannot only arise within economic sectors, but also between sectors: If a Member State decides to grant support to some sectors, but not to others, the unsupported sectors may have to bear a heavier burden in view of the Member State's emission targets. However, as was established in recital 48, the German scheme does not fall within the scope of application of the ETS Guidelines. The Guidelines only apply to the third ETS trading period.
- (114) The Commission notes furthermore that while the aid scheme is liable to adversely affect trading conditions to a significant extent, the positive effects of the aid scheme are unclear. In particular, Germany has not convincingly established, for the reasons set out in recitals 63 *et seq.*, that the notified scheme was appropriate and necessary.

⁽⁵⁹⁾ According to Article 10 of Directive 2003/87/EC, for the second ETS trading period, 'Member States shall allocate at least 90 % of the allowances free of charge'.

⁽⁶⁰⁾ Cf. Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 50.

⁽⁶¹⁾ In 2009, the four leading aluminium-producing EU Member States were Germany, Spain, France and Italy. For primary aluminium, in 2009, the biggest producers were France, Spain, the Netherlands and Germany (Germany, however, having been the main producer between 2000 and 2008). Copper production in 2009 was dominated by Germany and Poland, followed by Spain, Belgium-Luxembourg and the Scandinavian countries. The biggest zinc-producing countries are Spain, Finland and the Netherlands. See ECORYS, *Competitiveness of the EU Non-Ferrous Metals Industries*, 5 April 2011, http://ec.europa.eu/enterprise/sectors/metals-minerals/files/fn97624_nfm_final_report_5_april_en.pdf, p. 43 *et seq.*

⁽⁶²⁾ See Impact Assessment Report, footnote 48, p. 22.

- (115) The Commission therefore considers that the overall balance of the notified scheme is not positive, since the scheme is liable to cause severe distortions of competition on the internal market of non-ferrous metals while the positive effects of the scheme are not convincingly established.

Conclusion on the prevention of carbon leakage

- (116) The Commission therefore considers that the scheme does not constitute a necessary and appropriate means to prevent carbon leakage in a balanced manner and, at any rate, is liable to adversely affect trading conditions to an extent contrary to the common interest. It cannot be found compatible with the internal market on that ground.
- (117) Even if Germany had modified the scheme in order to address the Commission's concerns on proportionality by amending or changing the method for calculating the aid, as it had offered to do, this would not alter the Commission's assessment regarding the lack of necessity and appropriateness of the measure and regarding the distortions of intra-Union competition. Indeed, the carbon leakage risk for 2009 has not been established, and the scheme's effect on competition would still be negative.

6.3.3.2. Prevention of loss of employment

- (118) Germany has also stressed the need to prevent the loss of employment in Germany which would occur, both in the non-ferrous metal industry and in downstream industries, if the non-ferrous metal producers were to reduce capacity or even to relocate their plants to third countries.
- (119) In its opening decision, the Commission voiced doubts as to whether the mere prevention of relocation with a view to securing employment could be seen as an objective of common interest. In any event, the Commission doubted the contention made by Germany that the non-ferrous metal industry had been subjected to an exogenous shock and that this event had to be considered a market failure which in turn would lead to job losses. The Commission also had doubts whether operating aid to prevent the relocation of companies was the least distortive instrument to save jobs, as measures to improve the situation on the job market usually focus on sustainable measures such as improving the education and training of employees, or facilitating access to capital for new investments ⁽⁶³⁾.
- (120) Interested parties have argued that the threat to a continued non-ferrous metal production in Europe, resulting from both the financial and economic crisis in 2008 and from indirect CO₂ costs, was real.
- (121) The Commission recalls that there is no precedent in its decisional practice or in the case-law of the Courts of the Union where the alleged risk of relocation outside the Union as such had been accepted as a justification for the granting of State aid ⁽⁶⁴⁾. Given that Germany has not provided any convincing justification, the Commission does not consider it necessary to depart from its decision-making practice.
- (122) Even if such an objective was to be recognised, the Commission does not consider the other conditions of compatibility to be fulfilled. Indeed, a measure is compatible with the internal market only if it is demonstrated that it has a clear incentive effect on the beneficiaries to change their behaviour in line with the desired outcome.
- (123) However, as was already described in recitals 87 *et seq.*, in view of the short period for which aid was to be granted (less than six months) and of the alleged structural problems of the industry, the Commission considers that it has not been demonstrated how the aid measure would impact the behaviour of its beneficiaries.
- (124) Moreover, any State aid needs to be limited to the minimum amount necessary to achieve the objective of common interest. This means that in the case at hand, the notified scheme should ensure that aid is limited to the amount necessary to prevent job losses.

⁽⁶³⁾ OJ C 111, 9.4.2011, p. 22, recitals 77 *et seq.*

⁽⁶⁴⁾ Commission Decision 2008/408/EC of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche (OJ L 144, 4.6.2008, p. 37), paragraph 145. See also Decision 2010/460/EC, recital 244.

- (125) The notified scheme was found to be disproportionate in the prevention of carbon leakage since it did not include sufficient safeguards against overcompensation (see recitals 93 *et seq.*). This finding also applies here, given that the prevention of carbon leakage and the prevention of job losses have, as a common denominator, the preservation of production capacity. If there is overcompensation in view of the first objective (because the aid is disproportionate in preserving production capacity), there will also be overcompensation in view of the second objective.
- (126) In any event, the reasons why the overall balance of the scheme is negative with respect to the prevention of carbon leakage, set out in recitals 99 *et seq.*, also apply here: operating aid to cover running costs an undertaking would normally have to bear is highly distortive and cannot, in principle, be justified, regardless of what particular objective of common interest is being pursued (that is to say, the prevention of job losses instead of the prevention of carbon leakage). The fact that the aid would have been granted *ad hoc* and outside the scope of any harmonised framework reinforces this analysis. The scheme, if approved, could have led to job losses in other Member States, thereby triggering a subsidy race in the Union.

7. CONCLUSION

- (127) Based on these considerations, the Commission therefore concludes that the notified scheme cannot be found compatible with the internal market.
- (128) Since the aid has not been paid out, there is no need to order its recovery,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany is planning to implement under the notified Administrative Regulation on the Support for the Production of Non-Ferrous Metals from 6 August 2009 is incompatible with the internal market.

The aid may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17 July 2013.

For the Commission
Joaquín ALMUNIA
Vice-President
