



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

11 December 2014*

(State aid — Electricity — Aid for energy-intensive businesses — Austrian Green Electricity Act — Decision declaring the aid incompatible with the internal market — Concept of State aid — State resources — Imputability to the State — Selectivity — General regulation on exemption by category — Misuse of powers — Equal treatment)

In Case T-251/11,

Republic of Austria, represented by C. Pesendorfer and J. Bauer, acting as Agents, and by T. Rabl, lawyer,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by S. Behzadi-Spencer and S. Ossowski, and subsequently by S. Behzadi-Spencer and L. Christie, acting as Agents,

intervener,

v

European Commission, represented initially by V. Kreuzschitz and T. Maxian Rusche, and subsequently by T. Maxian Rusche and R. Sauer, acting as Agents,

defendant,

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

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich, President, J. Schwarcz (Rapporteur) and V. Tomljenović, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2014,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 Under 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 2009 L 140, p. 16; ‘the Renewable Energy Sources Directive’), the Member States of the European Union are required to achieve, between now and 2020, mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy. That directive fixes the target to be achieved, while the choice of means of achieving it is left to the discretion of Member States. In accordance with Annex I to that directive, entitled ‘National overall targets for the share of energy from renewable sources in gross final consumption of energy in 2020’, it was envisaged that the Republic of Austria would achieve the target of 34%.
- 2 By the *Ökostromgesetz*, as amended in 2008 (Austrian Green Electricity Act, BGBl. I, 114/2008, ‘the amended ÖSG’), the Republic of Austria decided to achieve its national target. In that regard, two basic measures were adopted. In the first place, the amended ÖSG provides that the production of green electricity is to be encouraged, by guaranteeing to purchase from each producer of green electricity its entire production of green electricity, at a fixed price. The electricity is purchased by a centre for the regulation of green electricity and the performance of the related tasks formed the subject-matter of a concession granted to a limited company governed by private law, namely the *Abwicklungsstelle für Ökostrom AG* (‘the ÖMAG’). In accordance with that Act, the guaranteed fixed price, which is higher than the market price of electricity, is fixed each year by regulation by the Austrian Federal Minister for the Economy and Employment (subsequently the Austrian Federal Minister for the Economy, the Family and Young Persons and then the Austrian Federal Minister for Science, Research and the Economy; ‘the competent Austrian federal minister’).
- 3 In the second place, the amended ÖSG provides for the costs thus incurred to be transferred to electricity consumers. First, each final consumer connected to the public grid is to pay an annual contribution, irrespective of consumption, which may vary between EUR 15 and EUR 15 000, depending on the level of his connection to the grid, as provided for in Article 22(1) and Article 22a(1) of the amended ÖSG. Second, electricity suppliers are required to buy from the ÖMAG all the green electricity in its possession, also at a fixed price set by regulation (‘the transfer price’). Those suppliers are authorised then to pass on to their customers, in the invoice price, the additional costs which they thereby incur. However, under Article 22c of the amended ÖSG, which has not yet entered into force, the Republic of Austria proposes to establish a scheme of specific compensation for energy-intensive businesses, limiting the amounts payable by them to a specific amount, calculated, for each undertaking benefiting from the scheme, according to the value of their net annual production (‘the compensatory amount’).
- 4 On 27 June 2008, the Republic of Austria informed the Commission of the European Communities, by a preliminary notification, that it intended to amend the Austrian Green Electricity Act, then in force, and which the Commission had approved, in the version then existing, by decision dated 4 July 2006 concerning its compatibility with the internal market (State aid, Cases NN 162a/2003 and N 317a/2006: ‘Förderung der Elektrizitätserzeugung aus erneuerbaren Energieträgern im Rahmen des österreichischen Ökostromgesetzes (Einspeisetarife)’).
- 5 On 4 September 2008, the Republic of Austria notified to the Commission the amended ÖSG in its entirety. Following various communications and meetings between the Commission and the Austrian authorities concerning that notification, from 28 October 2008, and also following a complaint dated 9 July 2009 and submitted to the Commission by the *Bundesarbeitskammer* (Austrian Federal

Chamber of Employment), concerning, in particular, the ‘exemption’ provided for in the amended ÖSG for energy-intensive businesses, the Commission on 22 July invited interested parties to submit their comments on the measure in question (OJ 2009 C 217, p. 12; ‘the formal invitation’).

- 6 As is apparent, in particular, from paragraph 78 of the formal invitation, the Commission considered that the amended ÖSG was compatible with Article 87(3)(c) of the EC Treaty, so far as the proposed measures in favour of green electricity producers were concerned. In that regard, while being of the view that the measures in question constituted State aid, the Commission considered that they were compatible with the Guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1; ‘the Guidelines’).
- 7 As regards the ‘aid’ for energy-intensive businesses, however, the Commission expressed doubts as to its compatibility with the rules on State aid (paragraph 78 of the formal invitation). It considered, in essence, that in the light of the procedures according to which the aid had been decided, it had the effect of conferring an unwarranted advantage on those undertakings. In the Commission’s view, the measure in question satisfied the criteria set out in Article 87(1) of the EC Treaty and should therefore be regarded as State aid, while there was no indication that it might be compatible with the rules governing the common market. It considered, in particular, that there was no reason to conclude that point 4 of the Guidelines was applicable or that the conditions on which that the aid in question might be deemed compatible were satisfied. In addition, it observed that the evaluation of the measure must take account of its negative effects on the environment, as it reduced the price of electricity for large energy consumers.
- 8 Subsequently, the Commission decided, in accordance with Article 4(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), to initiate the formal investigation procedure (paragraphs 83 to 85 of the formal invitation). That decision was accompanied by an invitation to the Republic of Austria to adopt a position and to communicate to the Commission all relevant information for the purpose of assessing the measure in question, and also to communicate a copy of the formal invitation to the potential beneficiaries of the measure in question. Finally, the Commission reminded the Republic of Austria of the suspensory effect of Article 88(3) of the EC Treaty and also referred to Article 14 of Regulation No 659/1999, pointing out that all the unlawful aid could be recovered from the beneficiaries.
- 9 By letter of 8 October 2009, the Republic of Austria submitted its comments on the decision to initiate the formal investigation procedure. The Austrian authorities were of the opinion that the measure at issue did not constitute State aid, owing in particular to the lack of selectivity and of the use of State resources. They also emphasised the inherent logic of the measure at issue, which, in their view, permitted objective differentiation between undertakings covered by the measure and those unable to benefit from it, emphasising that such differentiation did not constitute State aid. In particular, they maintained that the measure bore a significant number of similarities to the Erneuerbare-Energien-Gesetz (German law on green energy, BGBl. 2008, I 2074; ‘the EEG’).
- 10 The Bundesarbeitskammer, by letter of 7 October 2009, communicated to the Commission its comments on the measure in favour of energy-intensive businesses. By letter of 22 December 2009, the Republic of Austria responded to the Commission’s position, which had been communicated to it by letter of 23 November 2009, and on 22 April 2010 it provided further details of the measure at issue.
- 11 By letters of 21 June and, following a meeting with the Austrian authorities on 9 July, of 19 July 2010, the Commission requested the Republic of Austria to provide additional information, which it did on 13 September 2010.

- 12 By letter of 24 November 2010 to the Commission, the Republic of Austria stressed the importance of the amended ÖSG and asked that a decision be adopted in the case before the beginning of December 2010. Another meeting between the representatives of the Commission and those of the Republic of Austria took place on 9 December 2010.
- 13 By letter of 30 December 2010, the Republic of Austria reiterated the arguments it had put forward in favour of the measure in the course of the procedure, and asked the Commission to approve the exemption mechanism for energy-intensive businesses. The Commission replied to that letter on 25 January 2011.
- 14 On 8 March 2011, the Commission adopted Decision 2011/528/EU of 8 March 2011 on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ 2011 L 235, p. 42; ‘the contested decision’). It considered, in essence, that the mechanism at issue constituted a selective advantage, consisting of the partial exemption of energy-intensive businesses from a burden which they would normally have had to bear. In its view, such a mechanism would entail losses of State resources and would be imputable to the State. It also considered that the mechanism would be liable to distort competition and trading conditions to an extent contrary to the common interest. Thus, concluding that the measure at issue, in that it concerned the partial exemption in favour of energy-intensive businesses, constituted State aid which reduced the operating costs of those businesses and could not be justified by the nature and general scheme of the system, the Commission declared it incompatible with the internal market.
- 15 The operative part of the contested decision reads as follows:

‘Article 1

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

The aid may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Republic of Austria.’

Procedure and forms of order sought

- 16 By application lodged at the Court Registry on 18 May 2011, the Republic of Austria brought the present action. On 4 August 2011, the Commission lodged its defence. On 19 October 2011, the Republic of Austria submitted the reply and, on 5 December 2011, the Commission submitted the rejoinder. On 26 September 2011, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the forms of order sought by the applicant. By order of 11 November 2011, the President of the Second Chamber of the Court granted leave to intervene. On 3 February 2012, the United Kingdom submitted the statement in intervention. The Commission submitted its comments on that statement in intervention on 2 April 2012.

- 17 The composition of the Chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was therefore assigned. On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, put a number of written questions to the parties, to which they replied within the prescribed period.
- 18 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 27 February 2014.
- 19 The Republic of Austria claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 20 The Commission contends that the Court should:
- reject the first and second pleas in law as inadmissible;
 - in the alternative, reject the first and second pleas as unfounded;
 - reject the third and fourth pleas as unfounded;
 - order the Republic of Austria to pay the costs.
- 21 The United Kingdom submits that the Court should:
- find that the first plea is well founded and, on the assumption that it is admissible, annul the contested decision.

Law

- 22 In support of the action, the Republic of Austria raises four pleas in law. First, it maintains that the contested decision infringes Article 107(1) TFEU, as the Commission erred in law in concluding that the scheme provided for in Article 22c of the amended ÖSG constituted State aid. Second, that decision infringes the same provision, as the Commission erred in law in concluding that the abovementioned measure was selective. Third, the Commission misapplied Article 107(3) TFEU and misused its powers. Fourth, the Commission treated comparable situations unequally as regards their economic and competition effects.

Admissibility of the first and second pleas

- 23 The Commission claims that the Republic of Austria does not examine, in the context of the first and second pleas, the grounds on which the contested decision is based, nor has it identified the specific recitals in which the Commission is alleged to have erred in law. In the Commission's submission, the Republic of Austria has confined itself to stating the reasons why the scheme provided for in Article 22c of the amended ÖSG is not State aid, repeating, in essence, the claims made during the administrative procedure. Those pleas must therefore be rejected as inadmissible under Article 44(1) of the Rules of Procedure. In that regard, the Commission refers to the judgments of 15 December 1961 in *Fives Lille Cail and Others v High Authority* (19/60, 21/60, 2/61 and 3/61, ECR,

EU:C:1961:30, paragraphs 617 and 644) and of 31 March 1992 in *Commission v Denmark* (C-52/90, ECR, EU:C:1992:151, paragraph 17). Any expansion of the arguments in the reply would also be inadmissible.

- 24 In the rejoinder, the Commission further contends that the fact of reproducing, in the application, the complaint in full does not satisfy the requirements of Article 44(1) of the Rules of Procedure. In that regard, it refers to the order of 28 April 1993 in *De Hoe v Commission* (T-85/92, ECR, EU:T:1993:39, paragraph 23) and emphasises that, in practical terms, a complaint in the field of the law relating to the civil service is comparable to the administrative procedure in the law applicable to State aid.
- 25 In the Republic of Austria's contention, it is clear from the application that the complaint alleging infringement of the FEU Treaty is based on both infringement of Articles 107(1) and (3) TFEU (for the first, second and third pleas) and on breach of the principle of equal treatment (for the fourth plea). It would also be over-formalistic to require that the application or the summary of the pleas indicate the precise recitals to the decision against which the pleas are directed.
- 26 The Court recalls, in that regard, that, under Article 44(1) of the Rules of Procedure of the Court of First Instance, the application initiating proceedings must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information (judgment of 11 July 2007 in *Asklepios Kliniken v Commission*, T-167/04, ECR, EU:T:2007:215, paragraph 39).
- 27 It has consistently been held that, in order to ensure legal certainty and the proper administration of justice, it is necessary, if an action is to be admissible, for the essential matters of law and fact relied on to be stated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provision, must appear in the application (see judgment in *Asklepios Kliniken v Commission*, paragraph 26 above, EU:T:2007:215, paragraph 40 and the case-law cited).
- 28 As regards, more particularly, the two pleas which the Commission considers inadmissible, it should be observed, first of all, that it is apparent from the wording of the application that, in the context of the first plea, the Republic of Austria maintains, relying on sufficiently precise and comprehensible assertions relating both to the factual circumstances of the case and also to references to case-law and to legal opinion, that the resources employed in the context of the mechanism at issue did not originate with the State, nor was there any question of aid imputable to the State. Its argument enabled the Commission to prepare its defence and allows the Court to rule on the present application, if necessary, without any further information, in accordance with the principle in *Asklepios Kliniken v Commission*, paragraph 26 above (EU:T:2007:215). It must be stated, moreover, that, contrary to the Commission's assertions, the corresponding part of the grounds of the contested decision is readily identifiable.
- 29 Next, it is apparent from the wording of the application that, in the context of the second plea, the Republic of Austria takes issue with the Commission's assessment that the measure at issue, which exempts energy-intensive businesses from certain payments provided for in the amended ÖSG, was selective. It maintains that there was neither *de facto* nor *de lege* selectivity and submits, in that regard, sufficiently precise explanations of the nature and the logic of the system established by the amended ÖSG, raising, at the outside, the question whether Article 22c of that law is really to be analysed as an exception to the 'reference system'. It then puts forward sufficiently precise allegations to the effect that, even if that must be considered to be the case, the system would have to be considered to be justified by its logic and internal conception. It further relies, for the purpose of

disputing the existence of any selectivity, first, on the actual wording of the amended ÖSG and, second, on specific factors, in particular tables from which it is apparent that any undertaking, irrespective of its size or business sector, could take advantage of the rule laid down in that provision. Thus, the Republic of Austria manifestly attempted to respond to certain assertions made by the Commission in the contested decision, contrary to what the Commission claims before the Court. Accordingly, it must be held that, as regards the second plea, the Republic of Austria's argument, supported, moreover, by certain references to the case-law and by references to the Commission's previous practice in taking decisions, also enabled the Commission to prepare its defence and the Court to rule on the present application, if necessary, without any further information.

- 30 The conclusion set out at paragraphs 28 and 29 above is not undermined by the Commission's reference to the order in *De Hoe v Commission*, paragraph 24 above (EU:T:1993:39). First, that order relates to a different area of law from that concerned by the present case, name the law relating to the civil service, where, contrary to the Commission's assertions, the administrative complaint procedure cannot be assimilated to the procedure laid down for the assessment of the compatibility of State aid with the internal market. Second, as is apparent, in particular, from paragraph 23 thereof, that order concerns an assessment of a specific case, in which the entire content of the complaint had been incorporated in the body of the application, which bears no resemblance to a mere reference to an annex. Such a general reference to other documents is different from the present case, where the Republic of Austria developed sufficiently precise and comprehensible assertions in the application (see paragraphs 28 and 29 above).
- 31 In the light of the foregoing, the Commission's assertions concerning the inadmissibility of the first two pleas must be rejected as unfounded.

Substance

Preliminary presentation of certain main points of the measure at issue and of the position adopted by the Commission in the contested decision

- 32 As is apparent from paragraphs 1 to 3 above, the Republic of Austria intended, by means of the amended ÖSG, to achieve its mandatory national objective concerning the proportion of energy produced from renewable resources in the overall final consumption of energy, as provided for in the Renewable Energy Sources Directive. In the contested decision, the Commission objected only to the exemption provided for in Article 2c in favour of energy-intensive businesses, which alone forms the subject-matter of the present action. None the less, the Court considers that that provision must be analysed in its context, that is to say, against the background of the overall structure provided for by the amended ÖSG.
- 33 In that regard, it is appropriate, before examining the various pleas put forward by the Republic of Austria, to describe certain additional relevant points of the overall structure provided for in the amended ÖSG. First, although, in accordance with the third part of that Act, the Republic of Austria is to award one or more undertakings a concession to perform the tasks incumbent of the centre for the regulation of green electricity, at the date of the contested decision ÖMAG, a limited company governed by private law, was the only undertaking to benefit from such a nation-wide concession granted by the Austrian authorities. Furthermore, as is apparent from recital 15 to the contested decision, the Commission had no evidence to suggest that the publicly-controlled shareholders, which held 49.6% of the shares in ÖMAG, could exercise control or at least joint control over that undertaking, while the privately-controlled shareholders held 50.4% of the shares. However, there is some disagreement between the parties, both during the administrative procedure and before the Court, as to the significance to be placed on the fact that ÖMAG is subject to a certain amount of *ex posteriori* control by the State or administrative entities.

- 34 Second, as stated by way of introduction at paragraphs 2 and 3 above, another fundamental element of the mechanism at issue, and more particularly of the exemption provided for in Article 22c of the amended ÖSG, is that the actual procedures for the implementation, such as the means of the distribution of electricity or the price to be paid by suppliers and, consequently, the contribution of final consumers, are fixed in advance by the Austrian authorities by statute or by order.
- 35 Third, under Article 15(1)(3) of the amended ÖSG, the total quantity of green electricity produced, which suppliers of electricity are required to buy from ÖMAG, is divided up in such a way that the green electricity quota is the same for all suppliers pro rata to the total quantity of electrical energy which they own. It is common ground that those electricity suppliers are, in principle, permitted to pass on the additional costs which they thereby incur to final consumers, by re-invoicing them with a higher electricity cost. However, that arrangement, established as a principle, does not apply to energy-intensive businesses which fulfil the conditions set out in Article 22c of the amended ÖSG.
- 36 Fourth, as regards the exemption of energy-intensive businesses which fulfil the conditions set out in Article 22c of the amended ÖSG, two principal aspects must be underlined.
- 37 The first aspect is that any undertaking which satisfies the conditions laid down in the Austrian legislation is entitled, on request, to be granted an exemption by the Austrian energy regulator, which, moreover, has no discretion in that respect. Once the exemption in question had been granted, the amended ÖSG prohibits suppliers from charging those energy-intensive businesses the additional costs linked with green electricity. Article 22c(5) of that Act states, in particular, that contracts between electricity suppliers and large electricity consumers are required to provide that, from the time when the latter benefit from the exemption at issue, the suppliers are not to supply them with green electricity provided by the centre for the regulation of green electricity and are not to charge them additional costs for green electricity. Any provision to the contrary is to be deemed null and void.
- 38 The second aspect is that any energy-intensive business which has been granted an exemption from the purchase obligation is required, under Article 22c(2) of the amended ÖSG, to pay directly to ÖMAG, and not to the electricity suppliers, a ‘compensatory amount’ corresponding to 0.5% of the net value of production during the previous calendar year.
- 39 Fifth, owing to the particular importance of that consideration in the logic followed by the Commission in the contested decision, it should be observed that, at recital 58 to the contested decision, the Commission stated that the mechanism at issue entailed, beyond a certain level, a ‘cap’ on the contribution of energy-intensive businesses to ÖMAG’s revenues. In the Commission’s view, under the provisions of the amended ÖSG, those businesses were therefore exempt from a charge which they would have had to bear under normal market conditions. It follows, according to the Commission, that the undertakings able to benefit from that exemption mechanism enjoyed an advantage.
- 40 In order to arrive at the conclusion referred to at paragraph 39 above, the Commission, after referring at recital 55 to the contested decision to the case-law on the advantages resulting from an exemption or partial exemption from a regulatory charge, assessed, at recital 56 to that decision, the measure at issue and considered that it was intended to raise revenue from electricity consumers in order to finance the production of green electricity. In the Commission’s view, energy-intensive businesses were in the same factual and legal situation as all other electricity users, as they all consumed electricity which they obtained from electricity suppliers, which in turn were required to purchase a certain amount of green electricity at the clearing price. The Commission went on to state that, in the absence of the mechanism at issue, energy-intensive businesses would pay electricity suppliers the additional costs of green electricity shown on their electricity bill. The Commission pointed out that electricity suppliers passed on to their customers who were unable to enjoy the exemption at issue the additional costs resulting from their obligation to purchase green electricity from ÖMAG.

First plea, alleging infringement of Article 107(1) TFEU owing to the Commission's error of law in concluding that the scheme provided for in Article 22c of the amended ÖSG constituted State aid.

- 41 The present plea is divided into two parts. The first part consists of the assertion that the funds applied in order to finance the scheme provided for in Article 22c of the amended ÖSG were not State resources. The second plea consists in the assertion that, in any event, those funds were not imputable to the State.

– First part of the first plea

- 42 The Republic of Austria denies that the compensation scheme for energy-intensive businesses provided for in Article 22a of the amended ÖSG is financed by resources of State origin. It maintains that the facts of the present case are comparable with those giving rise to the judgment of 13 March 2001 in *PreussenElektra* (C-379/98, ECR, EU:C:2001:160). It emphasises, in particular, that in that case the decisive factor was that the payment of funds had been made exclusively between private undertakings, those funds never leaving the private sector and never being under the control of the State. It was for those reasons that the Court held that the fact that a given movement of funds is based on statute and confers advantages on certain undertakings is not sufficient to confer on those resources the character of State resources.
- 43 In that regard, the Republic of Austria further maintains that, in both the German system and the Austrian system of aid for green electricity, operators approved by the State, with no public authority prerogatives, act as points for receiving, paying for and re-selling green electricity, while neither of the two aid systems makes provision for losses to be covered by budgetary resources. The resale, purchase and payment obligations are determined by statute. Thus, in the Republic of Austria's submission, in both systems the State does not take part in the payment, but only lays down rules of general application, imposing no burden on a public budget. In that regard, the applicant refers to the judgments of 17 March 1993 in *Sloman Neptun* (C-72/91 and C-73/91, ECR, EU:C:1993:97) and of 15 July 2004 in *Pearle and Others* (C-345/02, ECR, EU:C:2004:448, paragraph 36 et seq.).
- 44 The United Kingdom supports the Republic of Austria's argument that the measure at issue did not involve the grant of aid 'through State resources'. On the one hand, it maintains that it is well established that aid may be regarded as being granted through State resources where, instead of being granted directly by the State, it is collected and paid by an institution entrusted with the distribution and administration of the aid (judgment of 22 March 1977 in *Steinike & Weinlig*, 78/76, ECR, EU:C:1977:52, paragraphs 21 and 22). On the other hand, it claims that the Court of Justice has confirmed that a measure was not regarded as aid granted through State resources simply because the payment to the beneficiary had been mandated by the State. Thus, if the State directed a third party to make a payment from its own resources to the beneficiary, that payment would not constitute State aid within the meaning of Article 107(1) TFEU. In that regard, the Republic of Austria refers to the judgments in *PreussenElektra*, paragraph 42 above, EU:C:2001:160, paragraphs 59 and 61, and of 17 July 2008 in *Essent Netwerk Noord and Others*, C-206/06, ECR, EU:C:2008:413, paragraphs 40, 47, 66, 69, 70, 72 and 74).
- 45 The United Kingdom observes, in particular, that although the Court considered in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), that the resources used could be classified as State resources, it had relied on three factual elements. First, the sums at issue in that case originated in a surcharge imposed by statute on consumers of electricity. The surcharge was a tax measure and therefore a State resource from the outset. Second, the body responsible for managing the funds collected had been entrusted with operating an economic service of general interest, independently of its entitlement to retain part of the proceedings. Third, the body in question was not entitled to use the proceeds from the surcharge for purposes other than those provided for by the law and was strictly monitored in its task. The Court also emphasised that the funds at issue remained under

public control and were therefore available to the national authorities until they were finally distributed. In the United Kingdom's submission, the entire amended ÖSG does not fulfil those conditions, in particular the first and third.

- 46 The Court observes that the Commission stated, at recital 61 to the contested decision, in essence, that mechanism at issue reduced ÖMAG's revenues, since the electricity suppliers were not obliged to purchase green electricity for those energy-intensive businesses that had been granted an exemption, and the direct payment which they made to ÖMAG was lower than what ÖMAG would have received had the energy-intensive businesses not been exempted.
- 47 Next, at recital 62 to the contested decision, the Commission stated that, accordingly, it needed to establish whether the resources controlled by ÖMAG on the basis of the amended ÖSG constituted State resources. If they did, the measure at issue would lead to a reduction in State revenue and would therefore be financed from State funds.
- 48 In that regard, first, after analysing the judgments in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), and *Essent Network Noord and Others*, paragraph 44 above (EU:C:2008:413), in order to determine the implications for the assessment of the present case, the Commission assessed, at recital 68 to the contested decision, whether the Austrian scheme at issue envisaged the existence of a tax. It concluded that that was indeed the case, in so far as the amended ÖSG obliged electricity suppliers to purchase a certain quantity of electricity at the clearance price, higher than the market price and set annually by the competent Austrian Federal Minister, while that Act merely indicated default values. The difference between the market price for electricity and the clearing price, which was thus set by an act of public authority, constituted, according to the Commission, a 'charge on electricity'. The Commission also stated that, unlike in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), the funds at issue were not paid in this case to other market players engaged in ordinary commercial business, but were paid to a body which the State had specifically entrusted with collecting and distributing those funds, solely for purposes in the public interest. At recitals 69 to 71 to the contested decision, the Commission added that ÖMAG held a concession to perform tasks of the centre for the regulation of green energy and it was thus made responsible for managing an economic service of general interest, namely collecting the charge in question from all electricity suppliers.
- 49 Second, the Commission pointed out, at recital 72 et seq. to the contested decision, that the funds at issue were intended for a purpose designated by law, which was strictly controlled. It stated that, under Article 23 of the ÖSG, ÖMAG was required to administer the revenues in question in a dedicated bank account, used only for the purchase of green electricity, and to allow the competent Austrian Federal Ministry to have access to the account at any time and the Austrian Court of Auditors to examine all the documents relating to the account.
- 50 In the light of all of those factors, the Commission concluded, at recital 74 to the contested decision, that '[i]n line with the ... cases [giving rise to the judgments in *Essent Network Noord and Others*, EU:C:2008:413, and *Steinike & Weinlig*, EU:C:1977:52, paragraph 44 above], the funds collected and administered by ÖMAG constitute[d] State resources'.
- 51 Third, at recital 75 et seq. to the contested decision, the Commission rejected the assertion that there were analogies between the present case and *PreussenElektra*, paragraph 42 above (EU:C:2001:160). It stated, in essence, that it was pointless to assess the German legislation, whether in its earlier or present version, and that, in any event, the Austrian legislation differed substantially from the German legislation. That was particularly so, according to the Commission, since the German regime, which was assessed by the Court of Justice in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), constituted solely a system of supply obligation existing between private operators operating on the market, whereas the Austrian system, which could be characterised as constituting a measure entailing

taxation on electricity, provided for the presence of an intermediate body, designated and controlled by the State. According to the Commission, the Austrian system could also allow direct payments from the State to ÖMAG (recital 76 to the contested decision).

- 52 Fourth, the Commission further stated that it was irrelevant that ÖMAG was a private body, since it had been designated to collect and administer a charge, the funds at issue thus being State funds (recitals 79 and 80 to the contested decision). Last, it considered irrelevant the fact that the total amount paid to ÖMAG by electricity suppliers was not affected by the mechanism in question, since only the distribution of that amount between the various categories of consumers changed. The Commission asserted, in that regard, that the decisive factor was whether an advantage received by an undertaking would lead to losses of State revenues, which was indeed the case of the Austrian system at issue. The Commission considered that it was obvious that the State would ultimately have to find other sources of revenue to make good the shortfall (recitals 81 to 85 to the contested decision).
- 53 In that regard, it should be borne in mind that, according to consistent case-law, the classification of 'aid' within the meaning of Article 107(1) TFEU requires that all the conditions referred to in that provision be fulfilled (see, to that effect, judgment in *Essent Netwerk Noord and Others*, paragraph 44 above, EU:C:2008:413, paragraph 63 and the case-law cited). First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, to that effect, judgment in *Essent Netwerk Noord and Others*, paragraph 44 above, EU:C:2008:413, paragraph 64 and the case-law cited).
- 54 As regards the first condition, it should, in the first place, be observed that, according to settled case-law, only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 107(1) TFEU. It follows from the very wording of that provision and from the procedural rules laid down in Article 108 TFEU that the advantages granted from resources other than State resources do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted by the State, but also aid granted by public or private bodies designated or established by the State (see, to that effect, judgments in *Steinike & Weinlig*, paragraph 44 above, EU:C:1977:52, paragraph 21, and *Sloman Neptun*, paragraph 43 above, EU:C:1993:97, paragraph 19 and the case-law cited). Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (judgment of 16 May 2002 in *France v Commission*, C-482/99, ECR, EU:C:2002:294, paragraph 23).
- 55 In the second place, it should be borne in mind that it is not necessary to establish in every case that there has been a transfer of State resources in order for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 107(1) TFEU (see judgment in *France v Commission*, paragraph 54 above, EU:C:2002:294, paragraph 36 and the case-law cited).
- 56 In the third place, it should be emphasised that it has already been established in the case-law of the Court of Justice that Article 107(1) TFEU covers all the financial means by which authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see judgment in *France v Commission*, paragraph 54 above, EU:C:2002:294, paragraph 37 and the case-law cited).
- 57 In the present case, the Republic of Austria and the United Kingdom claim that the State funds are not involved at any time in the context of the measure at issue. They seek support, in particular, in the judgment in *PreussenElektra*, paragraph 42 above (EU:C:2001:160). The Commission, on the other

hand, relies on the cases giving rise to the judgments in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), and *Steinike & Weinlig*, paragraph 44 above (EU:C:1977:52), paragraph 21. Furthermore, it must be held that, although in the contested decision the Commission analyses the three abovementioned judgments in detail, it seeks, on the other hand, during the proceedings before the Court, to ascribe greater value to the judgment in *Steinike & Weinlig*, paragraph 44 above (EU:C:1977:52), as a 'leading' judgment, while considering that the judgments in *PreussenElektra*, paragraph 42 above (EU:C:2001:160) and *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413) are purely 'ad hoc' decisions from which generally applicable conditions to be followed in order for a measure to be regarded as directly or indirectly using State resources cannot be inferred.

- 58 It should be stated, as regards the judgments in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), and *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), that they cannot be analysed as meaning that the findings made in the more recent judgment render the solutions reached in the older judgment void. On the contrary, they should be read as reacting to factually different circumstances (see also, to that effect, judgment of 19 December 2013 in *Vent De Colère and Others*, C-262/12, ECR, EU:C:2013:851, paragraphs 34 and 35).
- 59 As regards the judgment in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), it should be observed that, in order to preclude the classification of State aid within the meaning of Article 87(1) EC (now Article 107(1) TFEU), the Court of Justice relied, in essence, on the fact that the German legislation at issue in the case, which first, required private electricity supply undertakings to purchase electricity produced from renewable energy sources at minimum prices higher than its economic value and, second, allocated the ensuing financial burden between the electricity supply undertakings and private electricity grid operators situated upstream, did not present elements from which it might be inferred that there had been a direct or indirect transfer of State resources. In such circumstances, the Court of Justice held that the fact that the legislation conferred an undeniable advantage on producers of electricity obtained from renewable sources and that such an advantage was the consequence of the intervention of the public authorities was not sufficient for the measure at issue to be classified as aid. In addition, it considered that one of the essential factors was the fact that the persons liable to pay the additional charges imposed by the German law in question were private entities (see the operative part of the judgment, and also paragraphs 55 and 56). It also follows from the analysis of the factual background to that case that, unlike the Austrian measure forming the subject-matter of these proceedings, the mechanism provided for by German law did not provide for the intervention of intermediaries, entrusted with the collection or administration of the sums constituting aid, and, accordingly, did not provide for entities comparable, in their structure or their role, to ÖMAG. Thus, unlike in the present case, the advantage analysed by the Court of Justice in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), consisting both in the guarantee, in favour of the beneficiary undertakings, of the possibility of re-selling all the energy produced from renewable resources, and in the fact that the selling price exceeded the market price, was granted at the very time of the conclusion of the contracts of supply and payment of the consideration.
- 60 On the other hand, as regards the case giving rise to the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), which concerned a measure consisting in national legislation which allowed a surcharge on the price of transporting electricity to be collected in favour of a company designated by law ('SEP'), required to pay what were known as 'stranded' costs, it should be borne in mind that the Court of Justice concluded that this entailed the use of State resources within the meaning of Article 87(1) EC. In that regard, as is apparent from paragraph 65 et seq. of that judgment, the Court of Justice relied, first, on the finding that the amounts in question, paid to SEP, had their origin in a surcharge imposed by the State on purchasers of electricity under the statute, and that it had been established that that surcharge constituted a tax. The Court of Justice therefore considered that those amounts therefore had their origin in a State resource.

- 61 Second, as is apparent from paragraphs 67 to 69 of the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), the Court of Justice emphasised that the tax in question was paid to the net operators or licence holders, who were required to pay it to SEP, which retained a sum provided for by the statute (Netherlands florins (NGL) 400 million) and to pay the excess to the competent minister in the Netherlands. The Court of Justice also stated that SEP, whose entire capital was held by the electricity generating undertakings, had at the time been given the task by statute of operating an economic service of general interest. Furthermore, SEP was not entitled to use the proceeds from the tax for purposes other than those provided for by the statute and was also strictly monitored in that task, since under the statute it was required to have the detailed account of the sums received and transferred certified by an auditor.
- 62 Third, as is apparent from paragraph 70 of the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), the Court of Justice stated that '[i]t [was] of little account that that designated company was at one and the same time the centralising body for the tax received, the manager of the monies collected and the recipient of part of those monies; t]he mechanisms provided for by the Law and, more specifically, the detailed accounts certified by an auditor, [made] it possible to distinguish those different roles and to monitor the use of the monies; i]t follow[ed] that as long as that designated company [had] not appropriate[d] to itself the amount of NGL 400 million, at the time when it [had been] freely able to do so, that amount remained under public control and therefore available to the national authorities, which [was] sufficient for it to be categorised as State resources'.
- 63 At paragraph 71 of the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), the Court of Justice further explained the objective of the law in question, which appeared to be that of enabling the electricity generating undertakings, through their subsidiary SEP, to recover certain non-market-compatible costs which they had incurred in the past.
- 64 For those reasons, the Court of Justice also concluded, at paragraphs 72 and 73 of the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), that that case could be distinguished from the measure at issue in *Pearle and Others*, paragraph 43 above (EU:C:2004:448). It emphasised that, in the latter case, the monies used for an advertising campaign had been collected by a professional body from its members who benefited from the campaign, by means of compulsory levies earmarked for the organisation of that campaign. According to the Court of Justice, the monies were neither revenue for the State nor monies which remained under State control. The Court of Justice also emphasised the fact that the advertising campaign had been organised by a private association of opticians, had had a purely commercial purpose and had had nothing to do with a policy determined by the authorities, unlike the situation in the main proceedings in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), where the payment of the financial amount in question to the designated company had been the subject of a decision by the national legislature.
- 65 Finally, at paragraph 74 of the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413), the Court of Justice expressly distinguished the measure under examination from the measure at issue in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), pointing out that, in the latter case, there had been no direct or indirect transfer of State resources to undertakings producing electricity from renewable sources, but just an obligation to obtain supplies of such electricity at minimum prices. The Court of Justice emphasised that, in the latter case, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.
- 66 Contrary to the assertions of the Republic of Austria and the United Kingdom, the amended ÖSG has aspects which cause it to closely resemble the measure forming the subject-matter of the case giving rise to the judgment in *Essent Netwerk Noord and Others*, paragraph 44 above (EU:C:2008:413).

- 67 In the first place, it should be observed that, like the situation of SEP in the case giving rise to the judgment in *Essent Network Noord and Others*, paragraph 44 above (EU:C:2008:413), ÖMAG is entrusted, in the present case, by the amended ÖSG with administering the system of aid to the production of electricity from renewable sources. On that point, the Commission correctly refers to the fact that ÖMAG was set up in 2006 with the express purpose of seeking a concession to carry out the tasks of the centre for the regulation of green electricity, in accordance with Articles 14 to 14e of that Act. As the Commission maintains, the system provided for in that Act may be defined as constituting a State concession, as the monies in question are paid for purposes exclusively in the public interest, defined by the Austrian legislature. Those monies, consisting in the surcharges paid to ÖMAG by electricity suppliers for green electricity, the price of which is higher than that of electricity purchased on the market, do not go directly from the paying undertakings to the electricity suppliers, that is to say, to other operators on the market who carry out ordinary commercial activities, but require the intervention of an intermediary, responsible for collecting and administering those monies. Unlike the circumstances of the case giving rise to the judgment in *PreussenElektra*, paragraph 42 above (EU:C:2001:160), there is thus no question of a mere obligation to purchase, established by law, where the advantage granted is automatically granted at the time of the conclusion of the contracts of supply and on payment of the consideration.
- 68 In the second place, it must be stated that, as in the case giving rise to the judgment in *Essent Network Noord and Others*, paragraph 44 above (EU:C:2008:413), the present case concerns resources intended to fund the measure at issue which are obtained through charges imposed on private subjects by the amended ÖSG, which provides for a mandatory additional price linked with the purchase of green electricity. By analogy with paragraphs 43 to 47 of the judgment in *Essent Network Noord and Others*, paragraph 44 above (EU:C:2008:413), it must be considered that that additional price or surcharge can be assimilated to a parafiscal levy on electricity in Austria, which is set by a public authority, for purposes in the public interest and according to an objective criterion, according to the number of kilowatt/hours (kWh) of electricity transported. As the Commission emphasises at recital 68 to the contested decision, both the volume of green electricity to be purchased and the price are provided for by law, as Article 22b of the amended ÖSG states that the level of the clearing price is to be set annually by the competent Austrian Federal Minister. In addition, it has not been maintained by the Republic of Austria or by the United Kingdom, and there is nothing in the file to indicate, that the initiative to impose the charge, by means of the measure at issue, was taken by entities liable to pay it, or that ÖMAG acted solely as an instrument in a scenario which they themselves envisaged or that they themselves would have decided on the use of the financial resources. Accordingly, and by analogy to paragraph 66 of the judgment in *Essent Network Noord and Others*, paragraph 44 above (EU:C:2008:413), the amounts at issue may be classified as funds having their origin in a State resource, capable of being assimilated to a parafiscal levy. As regards the particular question of the existence of an advantage resulting from the aid in the form of exemptions from payment of a parafiscal levy, and also of the selectivity of such an advantage (see, to that effect, judgment of 7 March 2012 in *British Aggregates v Commission*, T-210/02 RENV, ECR, EU:T:2012:110, paragraphs 46 to 49 and the case-law cited), it will be assessed in the context of the examination of the Republic of Austria's second plea (see paragraph 94 et seq. below).
- 69 In the third place, although it is common ground that ÖMAG is a limited company governed by private law, and not a public body, and that the ÖMAG shareholders under public control hold less than half the shares and are unable to exercise control or even joint control of ÖMAG (see paragraph 33 and 45 above), that cannot be deemed sufficient, in the circumstances of the present case, to preclude the finding that State resources were present in the context of the measure at issue.
- 70 As observed at paragraphs 67 and 68 above, ÖMAG is responsible for administering the system of aid for the production of electricity from renewable sources and is closely supervised in that task, as the Commission points out in the contested decision and in its written submissions to the Court, and is therefore unable to use the monies collected in the context of the measure at issue, which are compulsorily paid to it by the undertakings referred to in the measure at issue, for purposes other

than those provided for by the Austrian legislature. In such circumstances, while it is true that ÖMAG is a body which is presented in the form of a limited company governed by private law, it must be held that, in the context of the concession to carry out the tasks entrusted to the centre for the regulation of green electricity, the action of that body is not that of an economic entity acting freely on the market for the purpose of making a profit, but an action defined by the Austrian legislature, which circumscribed it so far as the performance of the concession in question is concerned.

- 71 In that regard, it should be added that ÖMAG is under an obligation to administer the funds obtained in application of the measure at issue in a specific account, subject to control by the State authorities, as is apparent from, in particular, Articles 15, 21 and 23 of the amended ÖSG. That, when analysed together with the powers and specific obligations conferred on ÖMAG, constitutes a further indication that the funds in question are not funds corresponding to normal resources belonging to the private sector, which would be at the entire disposal of the undertaking administering them, but special resources, the use of which for strictly defined purposes was provided for in advance by the Austrian legislature (see, by analogy, judgment of 27 January 1998 in *Ladbroke Racing v Commission*, T-67/94, ECR, EU:T:1998:7, in particular paragraph 105 et seq.).
- 72 More specifically, as regards the control of ÖMAG by State bodies, referred to at paragraphs 70 and 71 above, it is carried out at multiple levels. First, control is carried out by the competent Austrian Federal Minister, who, pursuant to Article 21, *in fine*, of the amended ÖSG, must, in the context of his supervisory functions, control ÖMAG's expenditure and decide, by means of an opinion, to recognise that expenditure, and also, pursuant to Article 23 of that Act, read with Article 15(2) thereof, be granted access at any time to all the documents relating to ÖMAG's specific accounts and to the resources at issue. Furthermore, as follows from Article 24 of that Act, the competent Austrian Federal Minister must also be informed immediately of any developments contrary to the achievement of certain objectives provided for by the Act in question, by the Austrian energy regulator, which is responsible for regularly monitoring the achievement of those objectives.
- 73 Second, pursuant to Article 23 of the amended ÖSG, the competent Austrian regulatory authority for electricity is presented with a detailed report by ÖMAG each year.
- 74 Third, pursuant to Article 15(5) of the amended ÖSG, and as the Commission correctly observed at recital 72 to the contested decision, notwithstanding the ownership structure of ÖMAG, the Austrian Court of Auditors must also carry out *ex post* audits of that entity.
- 75 The existence of such strict control of the compliance of ÖMAG's activities with the legislative framework provided for, even when carried out retroactively, although not decisive per se, forms part of the general scheme of the overall structure provided for in the amended ÖSG and thus corroborates the conclusion, drawn from the competences exercised by that entity and adopted by reference to its obligations, that ÖMAG does not act freely and on its own behalf, but as an administrator, in the execution of a concession, of aid granted through State funds. In that regard, the Republic of Austria's assertion at the hearing that control by the Austrian Court of Auditors has no impact on the way in which ÖMAG uses those funds is ineffective. Even if it is accepted that the abovementioned control has no direct effect on ÖMAG's day-to-day administration of the funds in question, the fact remains that it is indeed an additional factor designed to ensure that ÖMAG's activities do indeed remain circumscribed in the context provided for in the amended ÖSG.
- 76 In those circumstances, it should be stated that the Commission was correct to assert, at recitals 61 and 62 to the contested decision, read with recitals 82 to 86 to that decision, that the advantage provided for in Article 22c of the amended ÖSG in favour of energy-intensive businesses constitutes, in this instance, an additional burden for the State, in so far as any reduction in the amount of the tax to which they are subject may be considered to have led to losses in revenue for the State, which, however, are subsequently recovered from other undertakings, offsetting the losses thus incurred. In return for the 'capping' of the contribution of the energy-intensive businesses, an electricity supplier

is, in accordance with Article 15(1a) of the amended ÖSG, exempted from purchasing green electricity from ÖMAG for the volume of electricity which it sells to a final consumer which is exempt from the obligation to purchase green electricity.

- 77 Those findings are not undermined by the other assertions of the Republic of Austria and the United Kingdom.
- 78 First of all, the assertion that the State does not envisage covering any losses by means of budget resources, and the assertion that any risks of insolvency that might possibly result from the fact that ÖMAG acts in breach of the provisions of the amended ÖSG would be borne by ÖMAG and not by the State, are ineffective.
- 79 It should be observed that only the situation resulting from an application of the measure at issue, as notified, is relevant in the present case, not any activity on ÖMAG's part that would not be consistent with the prescribed legislative framework. The parties are agreed that, in acting in strict compliance and in the limits of the measure at issue, ÖMAG had, in principle, no need to be supported by the State, since, in accordance with Article 21 et seq. of the amended ÖSG, in particular the clearance price, together with the annual contribution payable by each end consumer connected to the public grid, were also to cover ÖMAG's costs. As the Republic of Austria stated in answer to a question put by the Court in the context of the measures of organisation of procedure, that included any failure by ÖMAG to make a profit during a preceding year, owing, for example, to a cap on the contribution of certain energy-intensive businesses. Accordingly, as the Republic of Austria correctly states, either ÖMAG has not at any time failed to make a profit, or, at most, such a failure to make a profit was only temporary, being offset the following year. In addition, as the Commission maintains in its answer to the questions put by the Court in the context of the measures of organisation of procedure, by reference to Article 22c of the amended ÖSG and in relation to ÖMAG's activity for 2006, annexed to the defence, adjustments of the clearance price were authorised even during the year. In that regard, reference should also be made to the explanations provided by the Republic of Austria in its answers to the questions put by the Court concerning the fact that the competent Austrian Federal Minister was even authorised, pursuant to Article 22c of the amended ÖSG, to change the compensatory amount that should be paid to ÖMAG, after weighing up various relevant economic data. In those circumstances, it must further be stated that it is contradictory for the Republic of Austria to have maintained, at the hearing, that ÖMAG must bear the risks associated with its activities, particularly in the case of the problems of insolvency or lack of liquidity.
- 80 In any event, it follows from an analysis of the amended ÖSG that, in principle, the measure at issue provides for uninterrupted access by ÖMAG to the funding necessary to carry the tasks in the general interest allocated to it in the context of the concession to carry out the tasks of the centre for the regulation of green electricity, thus minimising any risks associated with illiquidity, or indeed insolvency, to be borne in that context. That merely reinforces the conclusion, set out at paragraphs 70, 71 and 75 above, that ÖMAG did not act as a typical undertaking on the market, bearing all the normal risks and hazards, including the financial risks, but as a special entity whose role was strictly defined by the legislation at issue. In the light of the foregoing, there is no need also to evaluate the relevance of the Commission's assertion, in answer to the questions put by the Court in the context of the measures of organisation of procedure, that Article 23(2)(5) of the amended ÖSG provided for the possibility of 'other allocations', without further detail, and without the legal basis for such allocations, even outside the amended ÖSG, being specified by the Republic of Austria during the administrative procedure, or the relevance of the Commission's reference in the same context to the fact that it might be foreseeable that ÖMAG would hold the Republic of Austria liable in the event that the competent Austrian Federal Minister should not set the clearance price in such a way that all of ÖMAG's additional costs, which were reimbursable within the meaning of that Act, would be covered. The Republic of Austria does not dispute that, in principle, if the legal framework is

observed, it provides a mechanism whereby the surcharges imposed on ÖMAG owing to the obligation for electricity suppliers in Austria to purchase green electricity at a price higher than the market price will be compensated in full.

- 81 Next, the Republic of Austria's assertions that, first, the measure at issue did not provide for direct 'budgetary' payments from the State to ÖMAG; second, the funds in question never left the private sector; third, those funds were not 'available to the State'; fourth, ÖMAG 'did not have public authority prerogatives and any proceedings against it followed, in accordance with the measure at issue, the normal civil judicial procedure and not the administrative procedure; and, last, that ÖMAG was 'neutral and independent' vis-à-vis the various market players are also ineffective.
- 82 It has already been stated, first, that the funds at issue had to be classified from the outset as State funds, owing in particular to the mandatory nature of the payments for purposes in the public interest, and, second, that ÖMAG acted, as regards the concession for the performance of the tasks incumbent on the centre for the regulation of green electricity, within a framework clearly defined by the Austrian legislature, pursuing those same aims, and, moreover, being strictly controlled by the competent Austrian bodies. In that regard, the Court of Justice recently confirmed that funds financed through compulsory contributions imposed by the legislation of the Member State, administered and apportioned in accordance with that legislation, could be regarded as State resources within the meaning of Article 107(1) TFEU even if they were administered by entities separate from the public authorities (see, to that effect, judgment in *Vent De colère*, paragraph 58 above, EU:C:2013:851, paragraph 25 and the case-law cited, and also, by analogy, paragraph 26). According to the Court of Justice, a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that was financed by final consumers of electricity on the national territory, such as that provided for in the French legislation being analysed, constituted an intervention through State resources.
- 83 In the light of all of the foregoing, it must be held that the Commission did not err in considering that the measure at issue entailed the use of State resources.
- 84 The first part of the first plea must therefore be rejected.

– Second part of the first plea

- 85 The Republic of Austria claims that the measure at issue is not, in this instance, aid attributable to the State. In that regard, it refers to the judgments in *France v Commission* (paragraph 54 above, EU:C:2002:294, paragraph 55 et seq.) and also in *PreussenElektra* (paragraph 42 above, EU:C:2001:160, paragraph 20), and maintains that a set of indicia must be taken into account, such as the integration of the body which adopts the measure in the structures of the public administration, the nature of its activities and the exercise of those activities on the market, the legal status of the body, the extent to which the management of the body is supervised by the public authorities, and others. In the applicant's submission, first, the person who, having been granted a concession, carries out the tasks of the centre for the regulation of green electricity established by the amended ÖSG is a private undertaking. It refers *a contrario* to the judgment of 12 December 1996 in *Air France v Commission*, (T-358/94, ECR, EU:T:1996:194, paragraph 38). Second, no body of the abovementioned legal person must be approved or appointed by the State, which, moreover, is not represented on its bodies. Third, neither the form of the abovementioned legal person nor its shareholding is governed by law. Fourth, the State has no right to approve of its activities. Fifth, the abovementioned legal person is not governed by a regulation subject to the approval of the State, nor is it subject to State authorisations or to specific penalties. Sixth, any disputes between the abovementioned legal person and electricity suppliers must be brought before the ordinary courts.

- 86 In that regard, it should be borne in mind that, according to consistent case-law, as regards the condition that the measure must be attributable to the State, it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of that measure (see, to that effect, judgment in *Vent De colère*, paragraph 58 above, EU:C:2013:851, paragraph 17 and the case-law cited).
- 87 In the present case, it must be held that the mechanism of aid for green energy, and the mechanism of the exemption for energy-intensive businesses, was established by law, in fact the amended ÖSG, and must therefore be regarded as being attributable to the State. In such circumstances, contrary to the Republic of Austria's contention, there is no need to examine in greater detail whether ÖMAG was integrated in the structures of the public administration, the nature of its activities and the exercise of those activities on the market, the legal status of the body or the extent to which its administration was controlled by the public authorities. In any event, it has already been found, in the context of the examination of the first part of the first plea, that ÖMAG was integrated in a structure regulated by the Austrian legislature, providing not only for the nature of its activities and the way in which they were actually to be exercised, but also supervision in the form of *ex post* control by the competent State bodies and, in addition, predetermining in detail ÖMAG's scope for manoeuvre in the performance of its concession, so that that entity cannot be regarded as a private operator acting freely, with the aim of making a profit, on a market operating competitively.
- 88 It follows that the second part of the first plea must also be rejected, as, accordingly, must the first plea in its entirety.

Second plea, alleging infringement of Article 107(1) TFEU owing to the error of law made by the Commission when it concluded that the measure at issue was selective

- 89 The Republic of Austria submits that the criterion of selectivity distinguishes general economic policy measures from State aid. State aid is characterised where a national measure is such as to favour certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation (judgment of 29 April 2004 in *GIL Insurance and Others*, C-308/01, ECR, EU:C:2004:252, paragraph 68). According to the Republic of Austria, examination of the selectivity of a measure that is liable to constitute State aid is carried out in a number of stages. It is necessary, first of all, to identify a reference system, then to establish a discrepancy by reference to that system and, last, to consider whether that discrepancy may be justified by the nature and logic of the system.
- 90 Thus, in the first place, it is appropriate, according to the Republic of Austria, to ask whether Article 22c of the amended ÖSG may actually be regarded as an 'exception' to the 'reference system'. It relies in its argument, in particular, on the judgment of 10 April 2008 in *Netherlands v Commission* (T-233/04, ECR, EU:T:2008:102).
- 91 In the second place, according to the Republic of Austria, even if the Court should consider that the system established by Article 22c of the amended ÖSG leads to a discrepancy by comparison with the reference system, that discrepancy would be justified by the logic and internal concept of the system. The system is intended to share, in a balanced manner, the burden of funding green electricity between the groups of consumers, taking account of the logic flowing from Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51; 'the energy taxation directive'). The Republic of Austria refers, in particular, to earlier comparable procedures before the Commission (N 271/2006, 'Tax Relief for Supply of surplus Heating' in Denmark and N 820/2006, 'Tax exemptions for certain energy intensive processes' in Germany).

- 92 In the third place, the Republic of Austria maintains that Article 22c of the amended ÖSG is not selective ‘in law’, since the compensation system is applicable to all undertakings, irrespective of their size or business sector. Nor is there any ‘de facto’ selectivity. The Republic of Austria submits that, in the absence of selectivity, the measure at issue does not constitute State aid (it refers to the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECR, EU:C:2001:598, paragraph 36).
- 93 It should be observed, by way of preliminary point, that although certain of the Republic of Austria’s arguments may be understood as relating to the question of the very existence of an advantage owing to the application of the exemption provided for in Article 22c of the amended ÖSG, the main basis of its second plea relates, in essence, to the lack of selectivity of such an advantage. In any event, the Court deems it appropriate to examine those two questions together.
- 94 As regards, in the first place, the existence of an advantage, it has consistently been held that the concept of aid was more general than that of subsidy because it embraced not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigated the charges which were normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, were similar in character and had the same effect. In addition, so far as taxation is concerned, the Court of Justice stated that a measure by which the public authorities granted a tax exemption to certain businesses which placed its beneficiaries in a more favourable financial situation than other taxpayers constituted State aid within the meaning of Article 107(1) of the TFEU. Likewise, a measure which grants certain undertakings a reduction in a tax or defers payment of the tax normally due may constitute State aid (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 68 above, EU:T:2012:110, paragraph 46 and the case-law cited).
- 95 In the second place, as regards the selective nature of the advantage, it is appropriate to consider whether, in the context of a given statutory scheme, a State measure is such as to favour ‘certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU by comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure concerned (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 68 above, EU:T:2012:110, paragraph 47 and the case-law cited).
- 96 According to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective, where that differentiation arises from the nature or the overall structure of the system of which they form part (see, to that effect, judgment of 22 December 2008 in *British Aggregates v Commission*, C-487/06 P, ECR, EU:C:2008:757, paragraph 83 and the case-law cited). The Court of Justice has made clear that the Member State concerned could show that a measure resulted directly from the basic or guiding principles of its tax system and that, in that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which were extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which were necessary for the achievement of such objectives. Tax exemptions which are the result of an objective that is unrelated to the tax scheme of which they form part cannot circumvent the requirements under Article 107(1) TFEU (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 68 above, EU:T:2012:110, paragraph 48 and the case-law cited).
- 97 Furthermore, according to the case-law, for the purpose of assessing the selective nature of the advantage conferred by a tax measure, the determination of the reference framework has a particular importance, since the very existence of an advantage can be established only by comparison with ‘normal’ taxation. Thus, in order to classify a domestic tax measure as ‘selective’, it is necessary to begin by identifying and examining the common or ‘normal’ regime applicable in the Member State concerned. It is by comparison with that common or ‘normal’ tax regime that it is necessary, second, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime in so far as the measure

differentiates between economic operators who, in light of the objective assigned to the tax system of that Member State, are in a comparable factual and legal situation (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 68 above, EU:T:2012:110, paragraph 49 and the case-law cited).

- 98 It should also be observed that the Court of Justice has repeatedly held that the objective pursued by State measures was not sufficient to exclude those measures outright from classification as ‘aid’ for the purposes of Article 107 TFEU (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 96 above, EU:C:2008:757, paragraph 84 and the case-law cited). Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 96 above, EU:C:2008:757, paragraph 85 and the case-law cited). Thus, Article 107(1) TFEU defines State interventions independently of the techniques which the Member States of the European Union use in order to implement them (see, to that effect, judgment in *British Aggregates v Commission*, paragraph 96 above, EU:C:2008:757, paragraph 89 and the case-law cited).
- 99 Last, it is also settled case-law that the fact that the number of undertakings able to benefit from a measure is very large or that those undertakings belong to different business sectors is not sufficient to call the selective character of that measure into question and, accordingly, to preclude its classification as State aid (see judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 92 above, EU:C:2001:598, paragraph 48 and the case-law cited). Where the measure in question is governed by objective criteria of horizontal application, that fact too does not call into question its selective character, since it can serve only to show that the aid at issue falls within an aid scheme and is not individual aid (see, to that effect, judgment of 13 February 2003 in *Spain v Commission*, C-409/00, ECR, EU:C:2003:92, paragraph 49).
- 100 In the present case, it is appropriate, after referring to the relevant part of the contested decision, to identify the criteria determining the ‘normal’ regime provided for by the amended ÖSG.
- 101 In that regard, as is apparent from the part of the contested decision dealing with the ‘Advantage’, and also from the part analysing ‘State resources and imputability’, the Commission treats the entire amended ÖSG, as notified, as a tax regime, in the context of which the advantage would result, in essence, from complete or partial exemption from a regulatory tax (see, to that effect, in particular, recitals 55, 64 and 68 to 70 to the contested decision).
- 102 Next, in the part dealing with the selectivity of the advantage, that is to say, at recitals 88 to 103 to the contested decision, the Commission asserts, in essence, that the measure at issue, in so far as it relates to the advantage provided for in Article 22c of the amended ÖSG, is selective because, although that measure is open to any undertaking whose costs increase by more than 0.5% of its net production value as a result of its contribution to the support of green electricity, is *de facto* reserved for only a certain category of undertakings, namely energy-intensive businesses, which are active primarily in the production of goods. The measure in question thereby prevents certain other undertakings in Austria from benefiting from it.
- 103 In particular, as regards the fact that the advantage resulting from the measure at issue is focused on certain undertakings, the Commission states the following, at recital 101 to the contested decision:

‘In its investigation the Commission found that the notified scheme focused primarily on a very few undertakings, most of which were engaged in the production of goods. On 9 September 2010 [the Republic of Austria] submitted data gathered on the basis of the scheme as it currently applied, that is to say with aid intensities below the notification thresholds. Of the approximately 300 000 undertakings in [the Republic of Austria], according to this information, the number that applied for benefits under the scheme was only about 2000, or less than 1% of all Austrian undertakings. As the scheme was applied, approximately 66% of the benefits went to undertakings in the “production of goods” [the

Commission refers to the fact that in this economic sector there is a certain concentration on subsectors such as the production of wood, paper, food, glass, ceramics, metals and chemicals]. The Commission observes that if [the Republic of Austria] were to increase the aid intensities above the *de minimis* thresholds under which the scheme is provisionally operating, the measure would most probably focus even more on undertakings active in the production of goods. This is demonstrated by the fact that, on the basis of the information provided by [the Republic of Austria], only 12 undertakings would benefit from aid intensities higher than under the version of the scheme currently applying, and that of these only two operate in the transport sector, while 10 are engaged in the production of goods [the Commission refers to a letter from the Republic of Austria of 9 September 2010 in response to the Commission's questions of 19 July 2010, page 17 and Table 5, also on page 17]’.

- 104 At recital 102 to the contested decision, the Commission concludes that the notified scheme will provide little or no benefit to certain sectors of the Austrian economy, while it will benefit mainly undertakings active in one of the branches of the production of goods.
- 105 In that regard, it is appropriate, first of all, to examine the Republic of Austria's claims that, in essence, Article 22c of the amended ÖSG cannot be regarded as an 'exception' by comparison with the 'reference system' consisting of the rest of that Act or, in any event, is justified by the nature of the system.
- 106 However, the Court agrees with the Commission that there is no unity of object and purpose between the general system provided for in the amended ÖSG analysed as a whole and the special provision in Article 22c of that Act, which would enable that provision to be regarded as constituting an integral part of the general scheme and not as a special exemption in the context of such a scheme.
- 107 As the Court recalled at paragraph 32 above, the Republic of Austria intended, by means of the amended ÖSG, to achieve its mandatory national objective concerning the proportion of energy produced from renewable resources in the overall final consumption of energy, as provided for in the Renewable Energy Sources Directive. To that end, a mechanism was put in place in order to dispose of all green energy produced in Austria, consisting in the obligation, established in Articles 19 to 22b of the amended ÖSG, for all electricity suppliers to purchase all green electricity from ÖMAG all at a clearing price higher than the market price. As a consequence of that obligation, all those suppliers, in order to pass on the resulting additional costs corresponding to the difference between the clearing price and the market price of electricity, then require all non-exempt undertakings consuming electricity in Austria to pay a supplement on electricity prices, namely the 'green electricity surcharge' (see also recital 107 to the contested decision).
- 108 It must be stated that the general scheme provided for in the amended ÖSG, which, moreover, is not as such the subject-matter of the present proceedings, since the Commission did not consider that the aid to producers of green electricity was incompatible with the internal market (see paragraphs 6, 14 and 15 above), differs, as regards its intrinsic ecological objective, from that put forward by the Republic of Austria in order to justify the exemption provided for in Article 22c of the amended ÖSG.
- 109 As regards the latter aspect, the Republic of Austria has maintained on several occasions, both during the administrative procedure and before the Court, that the measure placing a cap on the contribution of energy-intensive businesses was intended to 'make the charges which [the system of aid for green electricity] entail[ed] bearable from an ... economic and industrial viewpoint' and to protect the undertakings particularly affected by the system put in place. More particularly, the Republic of Austria submitted that energy-intensive businesses were particularly exposed to international competition and that the green electricity surcharge placed them at a competitive disadvantage by comparison with non-member States or with other Member State of the European Union which did not impose financial contributions on electricity consumers in order to fund green electricity or which

had also placed a cap on the contribution of energy-intensive businesses. It referred, moreover, to the schemes existing in Germany, Switzerland and France. Accordingly, in the Republic of Austria's submission, although the general scheme provided for in the amended ÖSG entailed a competitive disadvantage which affected all Austrian undertakings, some undertakings were more affected than others. It is in order to react to that situation that the capping of contributions provided for in Article 22c of the amended ÖSG seeks to reduce the 'disproportionate' competitive disadvantage borne by energy-intensive businesses. Ultimately, according to the Republic of Austria, the amended ÖSG does not represent a competitive advantage for those businesses, but merely offsets or reduces an existing competitive disadvantage (see also recitals 106 and 107 in fine to the contested decision). In the light of the foregoing, it must be considered that the exemption at issue sought an objective different from that of the amended ÖSG as such, notwithstanding the fact that the 'compensatory amount' provided for in that exemption in favour of energy-intensive businesses and intended to co-finance the aid for green electricity might have certain indirect positive effects on the environment.

- 110 Thus, the reference framework constituting normal taxation, against which the existence of any selective advantages in favour of certain operators must be determined in accordance with the principle in *British Aggregates v Commission* (paragraph 68 above, EU:T:2012:110, and in particular paragraph 49 thereof), consists of the amended ÖSG as such, which established a system of aid for the production of green electricity, imposing obligations applicable to all electricity suppliers and undertakings consuming electricity in Austria, and in relation to which Article 22c of the amended ÖSG constitutes an exception.
- 111 As regards that exception, it is appropriate, in the first place, to reject the Republic of Austria's general assertions that the exception does not constitute an advantage, but only reduces a 'competitive disadvantage' borne by Austrian undertakings and, more specifically still, Austrian energy-intensive businesses.
- 112 First, since it is common ground that the amended ÖSG constitutes a regulation producing effects of such a kind as to create a charge which is normally included in the budget of an undertaking consuming electricity in Austria, it should be stated that the fact that the Republic of Austria waived a part of the surcharges connected with the purchase of green electricity, by placing a cap on the contribution of Austrian energy-intensive businesses to the regime, must be regarded as relieving them of a burden that would normally be included in their budget. Accordingly, that arrangement does indeed confer an advantage on them, by comparison with the other undertakings consuming electricity in Austria (see, to that effect, judgment of 3 March 2005 in *Heiser*, C-172/03, ECR, EU:C:2005:130, paragraph 38).
- 113 Furthermore, in that regard, it should be observed that, although the Republic of Austria stated, in answer to the questions put by the Court in the context of the measures of organisation of procedure, that the cap referred to at paragraph 112 above or, in other words, the compensatory amount paid by energy-intensive businesses, could vary in so far as the competent Austrian Federal Minister was authorised, on certain conditions, to increase the compensatory amount above 0.5% of their net production value for the preceding year, it did not claim that such an amendment would reduce the advantage conferred on those undertakings, in such a way as to eliminate it entirely, in particular by setting at zero or a very small figure the difference between that compensatory amount and the payments for which those undertakings would be liable under the amended ÖSG in the absence of any exemption such as that provided for in Article 22c of that Act. Nor is it irrelevant in that context that, as is apparent both from that provision and from the Republic of Austria's answers to the questions put by the Court, the exemption in favour of energy-intensive businesses may even have negative consequences for groups of contributors to the promotion of green energy who are energy consumers unable to benefit from that exemption, because of the greater financial burden that they would have to bear. That further increases the effect of the advantage conferred on energy-intensive businesses.

- 114 Second, it should be stated that, even on the assumption that the cap placed on the contribution had the object of offsetting the disadvantage to which the Republic of Austria refers in its explanations, such a measure could not in any event be justified by the fact that it is intended to correct distortions of competition existing on the Community market for electricity.
- 115 In that regard, it is sufficient to recall that, according to settled case-law, the fact that a Member State of the European Union 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 (see judgment in *Heiser*, paragraph 112 above, EU:C:2005:130, paragraph 54 and the case-law cited).
- 116 Likewise, it is appropriate to reject as unproven the Republic of Austria's assertion that the exemption at issue was indispensable for the purposes of creating a balanced regime for the various participating undertakings, with obligations that were 'bearable' by them, in particular as regards their economic and industrial weight. The Republic of Austria has not adduced sufficiently cogent evidence to show that the general application, to all undertakings consuming electricity, of an equivalent rate of the green electricity surcharge, in proportion to the volumes consumed, should be deemed either inequitable or impossible for the entities concerned to bear. In that regard, although it is apparent from certain of the letters which the Republic of Austria sent to the Commission during the administrative procedure, such as the letters of 8 October and 22 December 2009 and also those of 22 April, 13 September or 30 December 2010, that it considered that the aims pursued by the amended ÖSG could be achieved only if the costs were divided in such a way as to be bearable in social and economic terms and in the light of its industrial policy, it must be stated that these are declaratory assertions which cannot in themselves render a legislative structure, which places a significant proportion of undertakings active in Austria at a disadvantage, compatible with EU law. That would also be the case if certain of the Republic of Austria's assertions were to be taken to refer to the possibility of facilitating the adoption of the amended ÖSG in the context of the domestic legislative procedure owing to the existence of the exemption provided for in Article 22c, at issue in the present case.
- 117 Thus, there can be no question of a situation such as that referred to at paragraph 48 of the judgment in *British Aggregates v Commission*, paragraph 68 above (EU:T:2012:110), where a measure which, although conferring an advantage on its beneficiary, is justified by the nature or general scheme of the tax system of which it is part does not satisfy the condition of selectivity. In particular, it is not shown that the exemption measure at issue would be the direct result of the founding or guiding principles of the Austrian tax system or that it would be indispensable for the purpose of ensuring fairness. In that regard, it has consistently been held that it is for the Member State which has introduced a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (see, to that effect, judgment of 8 September 2011 in *Commission v Netherlands*, C-279/08 P, ECR, EU:C:2011:551, in particular paragraph 62 and the case-law cited). Nor, in that context, can the Court deem sufficient the various general claims put forward by the Republic of Austria at the hearing, which, by reference to the administrative file and the procedural documents, assert that the exemption at issue was part of a legislative package, necessary for the purposes of the legislative reform taking place in Austria in 2008.
- 118 Last, it should again be emphasised that, in accordance with the judgment in *British Aggregates v Commission*, paragraph 96 above (EU:C:2008:757, paragraph 86), it would be to disregard Article 107(1) TFEU to hold that Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they decide to subject to an environmental levy, with the result that the fact that such a levy does not apply to all similar activities which have a comparable impact on the environment would not mean that such activities which are not subject to the levy benefit from a selective advantage.

- 119 In the second place, it is appropriate to reject as unfounded the Republic of Austria's assertions, supported by certain factual elements, put forward to demonstrate the lack of *de facto* selectivity of the measure at issue. First of all, as observed at paragraph 99 above, the fact that the number of undertakings able to benefit from a measure is very large or that those undertakings belong to different business sectors is not sufficient to call the selective character of that measure into question and, accordingly, to preclude its classification as State aid. Nor, likewise, can the fact that the measure at issue is governed by 'objective' criteria of horizontal application be decisive in that regard.
- 120 Next, it must be stated that the factual elements submitted by the Republic of Austria during the administrative procedure before the Commission and subsequently before the Court merely confirm the selective character of the measure at issue. Although it is possible to agree with the Republic of Austria that, in principle, any undertaking, without exception, irrespective of its size and business sector, may, hypothetically, become an energy-intensive business within the meaning of Article 22c of the amended ÖSG, it is apparent from the data submitted in the form of tables that in reality only a very small proportion of undertakings active in Austria seem to be actually able to take advantage of the exemption at issue, although they belong to different business sectors.
- 121 Thus, the Court finds that, although it is clear from the tables submitted by the Republic of Austria that more than 19 sectors were involved, it is also possible to infer from those tables that the great majority of energy-intensive businesses are concentrated in certain sectors, such as manufacturing, sales and repair of motor vehicles, hotels and restaurants or the water, purification and waste treatment sector. Next, even in the context of the manufacturing sector, it is possible to define certain sub-sectors in which those energy-intensive businesses are more particularly concentrated.
- 122 In the light of all of the foregoing, the Commission was correct to consider that the measure at issue was selective, in that it differentiated between undertakings which, in the light of the objective pursued, were in a comparable factual and legal situation, although that differentiation was not the result of the nature and structure of the system of charges at issue. Only Austrian energy-intensive businesses benefit from an advantage consisting in being able to limit their charges in connection with the purchase of green electricity to 0.5% of the net value of their production, while the other Austrian undertakings consuming electricity are unable to do so.
- 123 Nor can that finding be undermined by the Republic of Austria's various references to the Commission's previous practice in taking decisions.
- 124 In that regard, it should be observed, first, that by those assertions the Republic of Austria refers in essence to the principle of equal treatment. It has consistently been held that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 18 January 2012 in *Djebel — SGPS v Commission*, T-422/07, ECR, EU:T:2012:11, paragraph 202).
- 125 In addition, it should be borne in mind, more generally, that the concept of State aid meets an objective situation which is assessed on the date on which the Commission adopts its decision. Thus, the reasons why the Commission had made a different assessment of the situation in a previous decision can have no impact on the assessment of the legality of the contested decision (see, to that effect, judgment of 20 May 2010 in *Todaro Nunziatina & C.*, C-138/09, ECR, EU:C:2010:291, paragraph 21, and *Djebel — SGPS v Commission*, paragraph 124 above, EU:T:2012:11, paragraph 199). It should also be observed that the Commission cannot be deprived of the possibility of setting stricter conditions of compatibility if the development of the internal market and the objective of undistorted competition in that market so require (see judgment in *Djebel*, paragraph 124 above, EU:T:2012:11, paragraph 200 and the case-law cited).

- 126 In the present case, it must be stated, first of all, that the two Commission decisions cited by the Republic of Austria, namely the decision relating to the Danish system, at issue in Case N 271/2006, adopted on 20 December 2006, and the decision relating to the German system, at issue in Case N 820/2006, adopted on 7 February 2007, had been adopted before the Court of Justice delivered its judgment in *British Aggregates v Commission*, paragraph 96 above (EU:C:2008:757), providing significant elements of interpretation in the field of taxation connected with the environmental sector. Thus, the two Commission decisions referred to above cannot affect the validity of the contested decision, since it applies the elements of interpretation adopted by the Court of Justice on the points at issue.
- 127 In those circumstances, it is purely for the sake of completeness that the Court observes that the Danish and German systems were not comparable, on any relevant point, with the situation at issue in the present case.
- 128 More particularly, as regards the Danish system forming the subject-matter of the Commission decision in Case N 271/2006, it should be observed that it was intended, as the Commission makes clear at recital 109 to the contested decision, to neutralise an advantage which resulted, for energy-intensive businesses in Denmark, from the fact that they paid less taxes on energy sources, in order to ensure the coherence of the tax system. Thus, by taxing the surplus heat generated by industrial undertakings, Denmark intended to ensure that those undertakings could not offer the heat produced at a lower price than that offered by high-efficiency energy generation plants. Furthermore, in the reply, the Republic of Austria did not submit any argument to counter the Commission's position that an additional difference consisted in the fact that the Danish system, unlike the present case, concerned, without exception, all industrial undertakings producing and selling a certain type of energy, namely energy connected with the use of the surplus heat generated. The Commission emphasised in particular, in that regard, that it was possible for all the undertakings to choose either to pay a set tax or to pay a tax percentage, depending on the selling price.
- 129 As regards the German system, forming the subject-matter of the Commission decision in Case N 820/2006, it should be observed that the Republic of Austria has not reacted to the Commission's assertion that the 'fiscal reduction' at issue in that case, concerning dual use energy products used other than for heating or fuel purposes, and also for mineralogical processes, concerned a tax derogation directly based on Article 2(4) of the Energy Tax Directive, which excluded the abovementioned energy products from the scope of that directive (see, to that effect, recital 109 to the contested decision). In addition, the Commission correctly stated that the reference framework, namely the transposition of the abovementioned directive, pursued the objective of taxing energy products used for heating or fuel purposes. The Commission was also correct to submit, as representing a difference by comparison with the present case, that it was by following recital 22 to that directive that it had made the exemptions in question, which were justified by the inherent logic and the very nature of the tax system at issue.
- 130 Accordingly, and in any event, neither case N 271/2006 nor case N 820/2006 of the Commission can be held to be comparable to the present case. The Commission cannot therefore be criticised for not having treated those cases in the same way.
- 131 In the light of all of the foregoing, the second plea must be rejected as unfounded.

Third plea, alleging incorrect application of Article 107(3) TFEU and misuse of powers

- ¹³² In the Republic of Austria's submission, even if the measure at issue were to be regarded as State aid, it would still be necessary to determine whether it is not compatible with EU law as a discretionary exception under Article 107(3) TFEU. In that context, it is appropriate, in particular, to assess whether the measure falls within the scope of one or more guidelines or notices issued by the Commission.
- First part of the third plea
- ¹³³ The Republic of Austria maintains that, if the measure at issue must be regarded as being State aid, it would fall within the scope of the Guidelines, in conjunction with Article 107(3) TFEU.
- ¹³⁴ The Republic of Austria claims that that is the consequence of the application of point 151 et seq. of the Guidelines, in so far as Article 22c of the amended ÖSG satisfies the condition of 'indirect' improvement of environmental protection. First, the compensatory amount provided for, representing at least 0.5% of the net value of production during the preceding calendar year, even ensures a direct contribution to the promotion of green electricity. Second, as for the limitation of charges within the meaning of that provision, it merely places a cap on the competitive disadvantages caused by the amended ÖSG, which are disproportionate for certain undertakings. In addition, that provision is a necessary element of a set of measures and cannot be considered in isolation.
- ¹³⁵ The Republic of Austria submits that it is then necessary to assess whether Article 22c of the amended ÖSG must be analysed by analogy with section 4 of the Guidelines, and in particular with points 152 and 153. The two essential conditions in that respect, namely, first, that the provisions applicable in the present case are broadly comparable with those which, in the Republic of Austria's submission, should be applied by analogy and, second, that there is an omission incompatible with EU law, are fulfilled. As regards the comparability of the provisions at issue, the Republic of Austria maintains, in particular, that the mechanism at issue must be considered to be analogous to the budgetary systems, in particular since the Commission found that 'State resources' were used in the context of the mechanism with it and had previously advised the Republic of Austria, as an alternative solution, to apply a tax or a charge on energy in order to finance green electricity, with, if necessary, a reduction of that tax or charge granted to energy-intensive businesses, which would be accepted under Article 17 of the Energy Tax Directive.
- ¹³⁶ The Republic of Austria maintains that the Commission exceeds the limits of its discretionary power when it applies stricter criteria to a system of off-budget funding than to a system of funding by taxation that pursues the same objectives and produces the same economic and competitive effects, as it thus interferes in the choice of funding systems and contradicts the intentions stated in its notice of 31 January 2011. In the Republic of Austria's submission, whether or not there is a minimum rate set by EU law, the effect of the clearing price, which is concerned by Article 22c of the amended ÖSG, is comparable with the system of taxes on energy. Both systems provide for a levy depending on consumption and thus have the same effects from the viewpoint of the burden which they place on the consumption of electricity. They have comparable objectives, consisting in establishing a minimum rate applied throughout Europe to the same products, and comparable competitive and economic effects.
- ¹³⁷ As a preliminary point, it should be observed that it follows from the contested decision that, after finding that the measure at issue constituted State aid, within the meaning of Article 107(1) TFEU, because it had the effect of reducing State resources and thereby conferring a selective advantage on energy-intensive businesses and that, consequently, the measure had the potential to affect trade

between Member States and to distort competition in the internal market (recital 113), the Commission went on to examine the compatibility of the measure at issue with the internal market, in accordance with Article 107(3) TFEU (recital 115 et seq.).

- 138 In that regard, the Commission stated, at recital 116 to the contested decision, that in State aid cases falling under Article 107(3) TFEU it had wide discretion. In that regard, it further referred to the judgments of 21 March 1990 in *Belgium v Commission* (C-142/87, ECR, EU:C:1990:125, paragraph 56) and of 11 July 1996 in *SFEI and Others* (C-39/94, ECR, EU:C:1996:285, paragraph 36). It asserted that, in the exercise of its discretion, it had issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market under that provision of the FEU Treaty. It observed that the Court of Justice had consistently held that the Commission was bound by the guidelines and notices that it had issued in the area of supervision of State aid where they did not depart from the rules in the Treaty and were accepted by the Member States. In that regard, the Commission referred to the judgments of 24 March 1993 in *CIFRS and Others v Commission* (C-313/90, ECR, EU:C:1993:111, paragraph 36), of 15 October 1996 in *IJssel-Vliet* (C-311/94, ECR, EU:C:1996:383, paragraph 43) and of 26 September 2002 in *Spain v Commission* (C-351/98, ECR, EU:C:2002:530, paragraph 53).
- 139 In the present case, the Commission considered, first, whether the aid at issue was covered by the Guidelines and in particular section 4 thereof; second, whether the aid was covered by Commission Regulation (EC) No 800/2008 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 2008 L 214, p. 3); and, third, whether the aid could not be considered compatible with the internal market on the basis of Article 107(3) TFEU.
- 140 In the first place, as regards the Guidelines, the Commission first of all concluded that the mechanism at issue did not fall within their scope.
- 141 In essence, the Commission considered that, although it followed from point 151 of the Guidelines that their scope also covered measures which contributed at least ‘indirectly’ to an improvement of the level of environmental protection, none of the arguments put forward by the Republic of Austria showed that that was the position in this case.
- 142 First, the Commission considered that the Republic of Austria’s argument that the exemption at issue was a necessary precondition for ensuring political support for increasing the clearing price to a higher level, which was necessary in order to finance the further increase in the production of energy from renewable sources, was unfounded. It observed that there was no ‘necessary’ link between the clearing price and an increase in the level of production of electricity from renewable sources. In that regard, the Commission emphasised, in particular, that the Republic of Austria was free to choose how it wished to finance the increased production of electricity from renewable sources, for example by means of tax revenues (see recitals 122 and 123 to the contested decision).
- 143 Second, the Commission considered that the Republic of Austria’s argument that the exemption at issue led to higher prices for electricity consumption, thereby giving an incentive to be more energy-efficient, was also unfounded. According to the Commission, the mechanism at issue functioned as a cap, with the consequence that the average price of electricity paid by energy-intensive businesses decreased for each additional kWh consumed above the threshold (recital 124 to the contested decision).
- 144 In the second place, the Commission considered, at recital 126 et seq. to the contested decision, that even if the exemption measure at issue did fall within the scope of the Guidelines — quod non —, it could not be declared compatible with the internal market, since it did not satisfy the conditions laid down in section 4 of those Guidelines.

- 145 First, the Commission stated that the Guidelines distinguished, for the purposes of the assessment of an aid, between harmonised and non-harmonised taxes. The ‘parafiscal levy’ represented by the clearing price was not an environmental tax that had been ‘harmonised’ at EU level (recital 127 to the contested decision). Thus, the mechanism at issue would in the Commission’s view have to be assessed under the rules on ‘non-harmonised’ taxes laid down in section 4 of the Guidelines.
- 146 Second, the Commission asserted that, in that context, it was for the Member State concerned to provide precise information on the respective sectors or categories of beneficiaries covered by the exemptions or reductions, and also on the situation of the main beneficiaries in each sector concerned and how the taxation might contribute to environmental protection (recital 129 to the contested decision). In the Commission’s view, that information should enable it to assess whether the reductions or exemptions at issue were necessary and proportional, within the meaning of the definition of those terms provided in the Guidelines. The Commission asserted, at recital 130 to the contested decision, that in spite of being repeatedly asked to do so, the Republic of Austria had not provided it with that information. It referred, in particular, to its letters of 21 June and 19 July 2010. The Commission was therefore unable to assess whether the aid was necessary and proportional or how it might contribute to the protection of the environment.
- 147 In the third place, according to the Commission, as the mechanism at issue did not contribute to the protection of the environment, either directly or indirectly, it therefore examined whether the mechanism might none the less be authorised by analogy with section 4 of the Guidelines (recitals 131 to 142 to the contested decision).
- 148 In that regard, the Commission recalled that section 4 of the Guidelines provided, for the reduction of environmental taxes, two types of examination. First, as regards reductions of ‘harmonised’ taxes in the context of the Energy Tax Directive, it asserted that the reductions might be declared compatible with the internal market without further analysis, provided that the minimum Community tax level set out in that directive was respected. Second, as regards the analysis of reductions of ‘non-harmonised’ environmental taxes and of ‘harmonised’ energy taxes leading to a level of taxation lower than the minimum level set in that directive, it stated that more specific rules had been laid down in section 4 (recital 132 to the contested decision).
- 149 The Commission added, in answer to the Republic of Austria’s argument that it could approve the mechanism at issue on the basis that the beneficiaries paid at least the minimum levels of Austrian energy taxes, that there were no precedents in which the rules for the assessment of harmonised energy taxes under section 4 of the Guidelines had been applied to parafiscal levies by analogy.
- 150 Next, after referring to the case-law of the Court of Justice on the application of legal rules by analogy, the Commission stated, first, that the systems at issue were not comparable (recitals 135 and 136 to the contested decision) and, second, that there was no omission incompatible with EU law (recitals 137 to 141 to the contested decision).
- 151 As regards the first aspect, the Commission asserted, in essence, that the measure at issue differed from the regime laid down for environmental taxes in that, although no provision of EU law established specific provisions for parafiscal levies, the regime provided for the levying of environmental taxes, in particular as regards the minimum levels of taxation set out in the Energy Tax Directive and as regards the exemptions under section 4 of the Guidelines and Article 25 of Regulation No 800/2008.
- 152 As regards the second aspect, the Commission asserted, in essence, that no omission incompatible with EU law existed, since all the measures which did not fall within the scope of the Guidelines could be assessed under Article 107(3) TFEU. Furthermore, in the Commission’s view, the absence of rules on exemptions from parafiscal levies could not in any event be remedied by analogy to the rules that govern reductions of energy taxes under EU law. The approach consisting in considering that the

minimum level of taxation laid down for harmonised taxes would also be applicable for parafiscal levies entailed the use of that reference criterion outside its intended framework. The minimum rates were clearly not set with the aim of defining the overall burden that energy-intensive businesses ought to bear as a result of environmental regulatory measures, such as in particular those arising out of financing mechanisms for feed-in tariffs (recitals 138 and 139 to the contested decision).

153 Accordingly, in the Commission's view, it was not possible to establish analogies between the mechanism at issue and the rules relating to the examination of reductions of environmental levies, which had been harmonised.

154 First of all, it should be observed that the Commission maintained, in the rejoinder, that the Republic of Austria had disputed, in the application, only the failure to apply by analogy the exemptions laid down in the Guidelines. In that regard, it must be stated that, although the Republic of Austria's general assertion, relating to the fact that the measure at issue falls within the scope of the Guidelines and, 'accordingly, is compatible with the common market', may be understood as being a request for the direct application of the Guidelines, conversely, the Republic of Austria's specific claims concerning the application of points 152 and 153 of the Guidelines are drafted in such a way that in reality they seek only the application by analogy of the exemptions laid down in the Guidelines. In the circumstances of the present case, however, without there even being any need to rule on the admissibility of the Republic of Austria's argument in that it relates to the direct application of the Guidelines, which was submitted in the reply, that argument must be rejected on the following grounds, which are valid as regards both their direct application and their application by analogy.

155 In that regard, it should be observed that, although, in its assessment of whether the measure at issue was imputable to the State, whether State resources had been implemented and whether the advantage conferred by the measure was selective, the Commission had rightly taken into account, first of all, the amended ÖSG in its entirety and, next, as an exemption from the normal reference framework, Article 22c of that Act (see the first and second pleas, and in particular paragraph 97 et seq. above), on the contrary, in its assessment of the applicability of the Guidelines, the Commission examined only the exemption laid down in Article 22c. However, it must be stated that it is indeed by reference to the entire structure put in place by the amended ÖSG for aid to the production of green electricity that the applicability of the Guidelines should have been assessed (see, in that regard, paragraphs 156 to 165 below) and subsequently, only in the event of an affirmative, that it was necessary to assess whether the exemption at issue, established by that provision, satisfied the conditions laid down therein for the purposes of being held to be compatible with the internal market. However, in view of the developments set out at paragraph 166 et seq. below, it must be stated that the abovementioned error on the Commission's part, concerning the scope of the Guidelines, has no impact on the legality of the contested decision.

156 First, it should be observed that the scope of the Guidelines is defined, in points 58 and 59, as follows:

'These Guidelines apply to State aid for environmental protection. They will be applied in accordance with other Community policies on State aid, other provisions of the Treaty establishing the European Community and the Treaty on European Union and legislation adopted pursuant to those Treaties.

These Guidelines apply to aid [[t]hese Guidelines do not discuss the concept of State aid, which derives from Article 87(1) of the EC Treaty and from the case-law of the Court of Justice of the European Communities] to support environmental protection in all sectors governed by the EC Treaty. They also apply to those sectors which are subject to specific Community rules on State aid (steel processing, shipbuilding, motor vehicles, synthetic fibres, transport, coal agriculture and fisheries) unless such specific rules provide otherwise.'

157 Second, under point 70(1) of the Guidelines, cited at recital 121 to the contested decision, ‘environmental protection’ is to mean ‘any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary’s own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy’.

158 Third, under point 70(2) of the Guidelines, ‘energy-saving measure’ is to mean ‘any action which enables undertakings to reduce the amount of energy used in particular in their production cycle’.

159 Fourth, point 151 of the Guidelines, in section 4, entitled ‘Aid in the form of reductions of or exemptions from environmental taxes’, reads as follows:

‘Aid in the form of reductions of or exemptions from environmental taxes will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reductions and exemptions do not undermine the general objective pursued’.

160 In the light of paragraphs 155 to 158 above, the measure at issue must be held to fall within the scope of the Guidelines, which apply, in particular, to State aid measures such as the amended ÖSG, which, taken as a whole, was clearly intended to meet an environmental protection objective within the meaning of the definition set out in those Guidelines. By the amended ÖSG, the Republic of Austria intended to achieve its mandatory national objective concerning the proportion of energy produced from renewable sources in the final overall consumption of energy, as provided for in the Renewable Energy Sources Directive (see, in particular, paragraph 32 above). It is apparent, moreover, on reading recitals 4 and 171 to the contested decision, read in conjunction with the formal notice, that the Commission deemed that the amended ÖSG, taken as a whole, was an aid measure established for the benefit of the environment, having, moreover, approved the part of that measure which provided for the financing of green electricity producers, on the ground that they were compatible with the Guidelines (see paragraph 6 above).

161 It is in that context that the Court must analyse the exemption laid down in Article 22c of the amended ÖSG, which, although it had been intended primarily to place a cap on the contribution of energy-intensive businesses in such a way as to render the charges entailed by the system of aid for green electricity economically and industrially bearable and to protect undertakings particularly affected by the system put in place (see paragraph 109 above, and also recital 124 to the contested decision), could also contribute, albeit indirectly and only to a certain extent, to improving the level of environmental protection, without undermining the general objective pursued by the amended ÖSG.

162 The latter finding is the consequence, first, of the fact that the mechanism at issue provided for a ‘compensatory amount’, which, while operating as a cap on the contribution of energy-intensive businesses, was none the less clearly intended to assist in the promotion of the production of green electricity by contributing to its financing. As is apparent from Article 22c of the amended ÖSG, it is provided that that ‘compensatory amount’, payment of which is imposed by the Austrian energy regulator on energy-intensive businesses eligible for the exemption, to be paid directly to the Centre for the Regulation of Green energy. It is therefore indeed a relevant element in the context of the general scheme designed to support the production of renewable electricity, in order to improve the level of environmental protection. In addition, such a finding is confirmed by the Commission’s answers to the questions put by the Court, when it asserted, first, that ‘the compensatory amount provided for ... had the consequence that ÖMAG received, in addition to the unaltered revenue from the clearing prices, other revenue based on the compensatory amounts, that it would not receive unless Article 22c of the amended ÖSG entered into force’ and, second, that, ‘in accordance with [Article 22c]

of the amended ÖSG, that additional resource should allow the clearing price to be reduced over the following years, or to be increased to a lesser degree, unlike the situation that would have existed in the absence of the revenue coming from the compensatory amount’.

- 163 Furthermore, contrary to the impression which the Commission gives in its explanations, put forward at recital 123 to the contested decision, that the mechanism at issue was not ‘necessary’ in order to increase production of renewable energy, as the Republic of Austria was, in the Commission’s view, free to choose how it wished to finance such increased production, it should be observed that, under the Guidelines, it was not necessary to show that a specific measure was ‘necessary’, or indeed the only possible means of achieving the aim pursued, but only that the general conditions, referred to at paragraphs 156 to 159 above, and the specific conditions, which will be described at paragraph 165 et seq. below, were satisfied. The same finding applies, by analogy, to the question whether the exemption at issue constituted a ‘precondition’ for ensuring political support for an increase in the clearing price in Austria and the question whether there was a ‘necessary link’ between the clearing price and the increase in production of energy from renewable sources (see, to that effect, recitals 122 and 123 to the contested decision).
- 164 Second, the Court does not agree with the Commission that the very existence of Article 22c of the amended ÖSG and the resulting cap on the contributions of energy-intensive businesses would necessarily have had the consequence of generally undermining the general objective pursued by the amended ÖSG. The Commission’s assertion at recital 124 to the contested decision that, rather than encouraging energy efficiency, the mechanism at issue would actually reduce it because the average electricity price paid by energy-intensive businesses would decrease for each additional kWh used above the threshold does not in itself invalidate the finding that the measure at issue had at least a certain indirect positive effect on environmental protection, owing to the destination of the ‘compensatory amount’.
- 165 In those circumstances, the applicability of the Guidelines cannot be directly precluded on the basis of the finding that the measure at issue did not fall within their scope and did not meet the requirements laid down in points 58 and 59 thereof, read in conjunction with point 70, or merely on the basis of the direct application of point 151.
- 166 Next, the Court must assess whether the Commission was correct to conclude, at recital 126 et seq. to the contested decision, that, even on the assumption that the measure at issue did in fact fall within the scope of the Guidelines, the exemption at issue, provided for in Article 22c of the amended ÖSG, was not covered by section 4 of the Guidelines and on that basis was not in any event compatible with the internal market.
- 167 In that regard, first of all, it should be observed that the Commission was correct to assert that it followed from point 152 thereof that the Guidelines provided for two different situations, depending in particular on whether the taxes in question had been harmonised and whether the minimum level of Community taxation was respected (see paragraph 148 above).
- 168 In that regard, even if it should be considered that the regime provided for by the amended ÖSG might as a whole be assimilated to a tax scheme, and Article 22c of that Act to a provision for a reduction or an exemption within the framework of that scheme, as the Republic of Austria maintains, referring, in particular, to the Commission’s assessment in the part of the contested decision concerning the advantage, and also in the part concerning the presence of State financing in the measure at issue (see, in particular, recitals 55, 58 and 64(a) to the contested decision, read in conjunction with recitals 68, 69 and 82 thereto), there could not in any event be any question of assimilation to a tax ‘harmonised’ at EU level.

- 169 In the first place, there is nothing in the Energy Tax Directive from which the Court might infer that the EU legislature, when adopting that directive, intended, either directly or indirectly, to regulate in any way, by seeking to reinforce, delimit or limit them, off-budget systems, structured in the same way as the system at issue in the present case, that is to say, pursuing specific objectives of allocation or, in other words, having a specific direct and predetermined purpose. It must therefore be considered that the Commission did not err in stating that, although the aim of the amended ÖSG was to pass on the surcharges to which the promotion of renewable energy sources gave rise on to final electricity consumers, outside the scope of the budget, the objective of the Energy Tax Directive was, on the other hand, the harmonisation of the general taxation of the designated products, including electricity, to the advantage of the general budget and without any specific allocation (see also, by analogy, judgment of 27 February 2014 in *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, in particular paragraphs 23 and 27 to 32 and the case-law cited). As already stated, it follows from the amended ÖSG that it was intended, in itself, to ensure the financing of electricity produced from renewable sources, while the proceeds of the parafiscal levy at issue, consisting in green electricity surcharges and depending on the volumes of that electricity subject to the parafiscal levy consumed, had necessarily to be used in a specific manner in order to support the development of those energy sources, with the consequence that there was a direct link between the use of those revenues and the purpose of the off-budget structure in question.
- 170 In particular, it should be further observed, first, that the Energy Tax Directive refers to ‘fiscal’ tax regimes, which refers to the connection with the budget, and not to ad hoc schemes, with specific purposes, as referred to at paragraph 169 above. Second, that directive provides, in particular, as the Commission correctly maintains (see paragraph 151 above), what were to be the minimum amounts of taxation in the field of energy, and also the exemptions that might be adopted in that context. Unlike the regime provided for in the amended ÖSG, that directive did not place any cap on the additional contributions established for the purposes of supporting renewable energy, but rather reduced rates of taxation, applicable, however, in principle, in proportion to the volumes of electricity actually supplied, in particular in such a way as to ensure, so far as possible, equal treatment. Furthermore, as the Commission asserts at recital 139 to the contested decision, if the provisions of that directive, relating to harmonised taxes, were to be applied by analogy to rules structured as ‘financial surcharges’ intended as aid for renewable energy, it would be possible to comply with the harmonised minimum levels of taxation provided for therein by paying only the amounts of those ‘surcharges’, even if they were capped for certain undertakings, notwithstanding any distortions of competition to which that would give rise. However, it is not apparent from the directive in question that that was a possibility envisaged, or indeed intended, by the EU legislature.
- 171 Furthermore, it should be added that, as the Republic of Austria confirmed at the hearing, in answer to a question put by the Court, the Energy Tax Directive had been transposed into Austrian law by the *Energieabgabenvergütungsgesetz* (Law on the repayment of energy taxes), that is to say, by a legislative act other than the amended ÖSG. That constitutes an additional indicium that the legislation harmonising energy taxation at EU level had already been transposed into Austrian law even before the adoption of the amended ÖSG, which must therefore be regarded as constituting a set of additional rules not provided for at European level. That, moreover, follows indirectly from the Republic of Austria’s assertions before the Court, namely that in Austria it is necessary to pay ‘twice a minimum rate’ provided for by that directive, first for normal consumption of electricity and second, and in addition, in the context of the cap on the contribution of energy-intensive businesses to the financing of green electricity. Likewise, at the hearing, the Commission correctly maintained that what was at issue in the present case was a tax levied by the Republic of Austria on its own initiative and not in order to satisfy an obligation under EU law concerning a minimum tax on energy and providing for exemptions in that regard.
- 172 In those circumstances, the Court must also reject the Republic of Austria’s assertions that the system provided for by the amended ÖSG is consistent with the Energy Tax Directive, since, as in the case of the energy tax within the meaning of that directive, the amount of the levy depends on consumption.

That is specifically not the case for the undertakings benefiting from the exemption provided for in Article 22c of the amended ÖSG, which, beyond the maximum level provided for, are able to purchase electricity without any surcharge (see, to that effect, recital 124 to the contested decision). Nor, to that extent, can it be considered that the competitive and economic effects of the notified scheme are comparable with those resulting from a system implementing that directive. On the contrary, the difference between the price per kWh paid by energy-intensive businesses, which are able to take advantage of the exemption at issue, and by the other undertakings not coming within that category increases in proportion to the total consumption of kWh by the energy-intensive businesses.

- 173 In the second place, as regards the Renewable Energy Sources Directive, the Commission was also correct to state, in particular at recital 127 to the contested decision, and also in its written submissions to the Court, that that directive set obligatory targets for Member States only for the proportion of energy produced from renewable sources in the overall final consumption of energy, but left it to them to decide how to achieve those targets. Nor, therefore, can the Republic of Austria rely on that directive either to support its assertion that the measure at issue, in particular Article 22c of the amended ÖSG, reflected harmonisation at European level of taxation in the field of renewable energy.
- 174 Nor, in the third place, can the considerations set out at paragraph 168 et seq. be undermined by the Republic of Austria's references to certain advice that it obtained from the Commission during a number of meetings and also in the Commission's letter of 21 June 2010 in preparation for a meeting to take place on 9 July 2010, in particular as regards the possibility of having recourse, as an alternative solution to the amended ÖSG, to a tax or levy on energy to finance green electricity with, if necessary, a reduction of that tax or charge being granted to energy-intensive businesses, which would be permissible under Article 17 of the Energy Tax Directive.
- 175 In that regard, it is sufficient to observe that, by such a proposal, the Commission had not expressed a positive view on the comparability of the measure at issue with the tax systems governed by the Energy Tax Directive. On the contrary, the Commission had expressly asserted, in its letter of 21 June 2010 to which the Republic of Austria refers, that it did not appear to it that the purchase obligation, provided for in the amended ÖSG, was an energy tax within the meaning of that directive. It had also subsequently requested the Republic of Austria to express its view on the feasibility of an 'alternative' tax system, as it had just proposed, and asked the Republic of Austria to indicate what form this might take. Thus, that letter cannot be interpreted either as establishing an analogy between the notified Austrian system and the 'harmonised' tax systems provided for by the directive, or even as a definitive expression of the Commission's opinion that an alternative Austrian tax system would necessarily be compatible with that directive. Furthermore, as is apparent, in particular, from point 1.7 of its letter of 13 September 2010 to the Commission, the Republic of Austria did not deem it necessary to alter the structure of the aid, being of the view that, in the version notified, it satisfied the criteria to be exempted and deemed compatible with the internal market.
- 176 Nor, in the fourth place, does it avail the Republic of Austria to refer to the Commission notice of 31 January 2011, from which it is apparent that, given the increasing budgetary problems of the Member States of the European Union, the financing of renewable energies should, above all, be 'off budget'.
- 177 It should be made clear that the Commission does not refer in its notice of 31 January 2011 to a particular model of an 'off budget' structure that it would prefer and, *a fortiori*, that notice contains no example of a model for the financing of renewable electricity including an exemption that could be assimilated to the exemption provided for in Article 22c of the amended ÖSG. In any event, that notice cannot be either interpreted, owing to its position in the hierarchy of rules and its actual content, as 'harmonising' EU law in the matter of 'off budget' systems of aid for the financing of electricity produced from renewable sources or deemed to fill an 'omission' in that respect, in particular by

reference to the Energy Tax Directive. Accordingly, that notice is not decisive for the assessment of the compatibility of the measure at issue with the internal market. In addition, it should be borne in mind that in the present case the Commission did not consider that the 'off budget' structure of aid for producers provided for in the amended ÖSG was, as such, incompatible with the internal market: it decided only that it was the system of exemptions, referred to in Article 22c of that Act, that was incompatible with the internal market.

- 178 In the light of all of the foregoing, the only question to arise is whether the structure at issue can be deemed to be analogous to a structure coming under 'non-harmonised' taxation, forming the subject-matter of point 154 et seq. of the Guidelines. The first of those points refers, in particular, to reductions of or exemptions from taxes not covered by the Community legislation or below the Community level of taxation. It is in that sense, moreover, that the Republic of Austria maintained at the hearing that it was not disputed that the exemption provided for in Article 22c of the amended ÖSG was not a harmonised tax but that the amended ÖSG introduced a system of parafiscal levies.
- 179 In that regard, as is apparent from points 154 to 159 of the Guidelines, the Commission relies on the information supplied by the Member States of the European Union in order to assess the tax schemes which include elements of State aid in the form of reductions of or exemptions from taxes such as those referred to above, for the purpose of analysing, in particular, the 'necessity' and 'proportionality' of the aid and its effects at the level of the economic sectors concerned.
- 180 In the present case, it should be observed that, in spite of being asked to do so in the context of the measures or organisation of procedure, the Republic of Austria did not produce before the Court precise references or other specific elements to counter the conclusion which the Commission drew at recitals 129, 130 and 167 to the contested decision that, in the absence of information supplied by the Republic of Austria following requests to that effect from the Commission during the administrative procedure, it was not possible for the Commission to consider whether the exemption at issue was 'necessary' and 'proportional' or how it would contribute to environmental protection. In addition, at the hearing, after referring to recital 129 to the contested decision, the Commission emphasised, among the decisive elements of which it had not been aware, in particular the amount of the production costs for each category of recipient of the aid, the information concerning the fact that the surcharges were not passed on to consumers and, consequently, the effects on any reduction of sales. Subsequently, the Commission correctly observed that it was for the Member State concerned to submit evidence in order to prove that the aid in question should be exempted. It is not the Commission's task, in such circumstances, to gather further evidence to prove the need and proportionality of the aid at issue. In order to establish that the Commission made a manifest error of assessment in examining the facts such as to justify the annulment of the contested decision, the evidence adduced by the Republic of Austria must be sufficient to render the factual assessments used in the decision at issue implausible (see judgment of 6 October 2009 in *FAB v Commission*, T-8/06, EU:T:2009:386, paragraph 78 and the case-law cited). As is apparent from the foregoing, the Republic of Austria did not show that the Commission had failed to take relevant elements into account for the purpose of substantiating its conclusion that it was unable to find that the aid at issue was necessary and proportional within the meaning of points 158 and 159 of the Guidelines.
- 181 In addition, the Republic of Austria's assertion at the hearing that the Commission had taken a very hard line during the administrative procedure by always requiring additional information that the Republic of Austria was unable to supply and that, moreover, could not properly be demanded of a Member State of the European Union, when the conditions for the application of an exception provided for by EU law were satisfied, may be understood, in essence, as alleging a breach by the Commission of the principle of sound administration (see, in relation to State aid, judgments of 11 December 1973 in *Lorenz*, 120/73, ECR, EU:C:1973:152, paragraphs 4 and 5, and of 24 November 1987 in *RSV v Commission*, 223/85, ECR, EU:C:1987:502, paragraphs 12 to 17). However, in so far as that assertion was made for the first time at the hearing, and cannot be regarded as expanding on a plea submitted beforehand, directly or by implication, in the application initiating the proceedings and

as being closely linked with that plea, and since it has not been maintained that that assertion was based on new elements of fact or of law, it must be rejected as inadmissible (see, to that effect, judgment in *Djebel — SGPS v Commission*, paragraph 124 above, EU:T:2012:11, paragraphs 142 and 143 and the case-law cited).

182 Furthermore, the Republic of Austria's reference at the hearing to documents submitted by the Bundesarbeitskammer, which show how the various measures affect undertakings in different sectors, cannot be regarded as sufficient to satisfy the requirements of points 158 and 159 of the Guidelines. First, apart from the fact that the Republic of Austria did not submit those documents to the Court, in order to clarify the factual arguments put forward, it should be borne in mind that the Bundesarbeitskammer was a complainant before the Commission (see paragraph 5 above) and that its claims were not designed to establish that the measure at issue was aid that could be exempted by the Commission as being compatible with the Guidelines (see, in particular, recitals 47 to 51 to the contested decision). Second, as is apparent from the assertions which the Republic of Austria put forward at the hearing, although a number of documents were supplied to the Commission, the question still arose as to the degree of detail required of the information to be supplied. While the Republic of Austria maintained at the hearing that the Commission's requests to that effect were 'disproportionate', those assertions are inadmissible (see paragraph 181 above). It is also appropriate to refer to paragraph 180 above, where it was noted that, still at the stage of the reply to the measures of organisation of procedure adopted by the Court, and even though the Court had made a specific request to that effect, the Republic of Austria did not maintain that it had sent the Commission the information necessary for an analysis of the measure at issue in the light of points 158 and 159 of the Guidelines, nor did it allege any lack of proportionality in the Commission's requests to that effect.

183 In those circumstances, the Commission cannot be considered to have made an error of assessment in concluding that the exemption at issue also failed to satisfy the conditions laid down in points 154 to 159 of the Guidelines.

184 Last, without there even being any need to rule on whether the Republic of Austria's argument that the Commission distorts competition by verifying only the Austrian system of promoting electricity obtained from renewable sources, when equivalent 'off budget' systems exist in other Member States of the European Union, which was put forward for the first time in the reply, is out of time (see, by analogy, judgment in *Djebel — SGPS v Commission*, paragraph 124 above, EU:T:2012:11, paragraphs 142 to 144 and the case-law cited), it is sufficient to state, as the Commission contends, that that assertion is ineffective for the purpose of assessing the legality of the structure put in place by the Republic of Austria and notified in the present case. Furthermore, it should be observed that the Republic of Austria had other procedural means of encouraging the Commission to take action against other Member States of the European Union with comparable structures, if it had intended to do so.

185 In those circumstances, it should also be stated that none of the Republic of Austria's claims permits the conclusion that the Commission misused its powers in refusing to apply the Guidelines by analogy. It should be borne in mind in that regard, in particular, that the Commission undertook an analysis, as a subsidiary matter, in the light of the Guidelines (recital 127 et seq. to the contested decision), aimed more specifically at the non-harmonised levies. Second, the Republic of Austria has not adduced, before the Court, any evidence relating directly to that alleged 'misuse of powers'.

186 Accordingly, the Court must also reject the Republic of Austria's assertion that the economic and competitive effects of the notified measure were comparable to the tax systems governed by the Energy Tax Directive, and also the assertion that the Commission exceeded the limits of its discretion when it applied stricter criteria to an 'off budget' financing system than to a system of financing by taxes, thus interfering with the choice of systems of finance.

187 It follows that the first part of the present plea must be rejected.

– Second part of the third plea

- 188 The Republic of Austria maintains that, apart from the application by analogy of the Guidelines, the application of Article 25 of Regulation No 800/2008 could be envisaged. It maintains, with reference to the German, English and French versions of that regulation, that it is formulated in broader terms than the Guidelines, since, unlike point 152 of the Guidelines, which states that reductions of environmental taxes assume that the taxes in question are ‘harmonised’ energy taxes, Article 25 of that regulation implies only that the reductions are to be exempt from the notification requirement when they satisfy the conditions laid down in the Energy Tax Directive. The Republic of Austria also claims that it follows from the document entitled ‘Joint paper on the revision of the Community guidelines on State aid for environmental protection and Energy Tax Directive’ of 7 December 2006 that the Member States of the European Union need to be flexible in order to be able to make judicious distinctions, including, in the scheme of environmental taxes, exemptions and differentiated rates. Thus, the compensation scheme ought to have been authorised under that regulation as well.
- 189 In the reply, the Republic of Austria maintains, in particular, that Article 25 of Regulation No 800/2008 is a provision adopted later than the Guidelines and that its wording is clearly broader than that of point 152 of the Guidelines, which provides that reductions of environmental taxes assume the entire harmonisation of energy taxes. If, as the Commission claims, that article were applicable only to the Energy Tax Directive, it would be superfluous, since the possibility of allowing a tax reduction is the direct consequence of that directive.
- 190 In the Republic of Austria’s submission, it is not sufficient to refer to the fact that the Austrian system of the promotion of green electricity is not an energy tax within the meaning of the Energy Tax Directive. Since the effect of the system is similar to that of Article 17(1)(a) of that directive, it comes, according to the Republic of Austria, under Article 25 of Regulation No 800/2008. The Republic of Austria also emphasises that the definition of the beneficiaries and of the conditions that must be satisfied in order to benefit from Article 22c of the amended ÖSG reproduces the requirements of that directive.
- 191 In addition, the Republic of Austria submits that, although Regulation No 800/2008 lays down, in Article 25, specific rules on the reduction of environmental taxes, such rules do not exist in relation to reductions in the context of comparable ‘off budget’ financing, pursuing exactly the same objectives as the environmental taxes or energy taxes and having the same economic and competitive effects. The unequal treatment, which is unjustified and incompatible with EU law, is all the more obvious because the Commission considers that this case concerns State resources in the form of a parafiscal levy. The Republic of Austria asserts that such a parafiscal levy does not substantially differ from the mechanisms of budgetary financing. Article 22c of the amended ÖSG satisfies the conditions of direct and, in any event, indirect improvement of environmental protection, in particular since it expressly provides that a compensatory amount representing at least 0.5% of the net value of production of the preceding calendar year must be paid to the office for green electricity. Last, it maintains that the Commission’s broad discretion allowed it to apply that regulation directly or by analogy in order to ensure that two comparable situations would not be treated differently.
- 192 It should be borne in mind, first of all, that recital 46 in the preamble to Regulation No 800/2008 reads as follows:

‘In view of the sufficient experience gathered in the application of the Community guidelines on State aid for environmental protection, investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards, ... environmental aid for investment in energy saving, environmental aid for investment in high efficiency cogeneration, environmental aid for investments

to promote renewable energy sources including investment aid relating to sustainable biofuels, aid for environmental studies and certain aid in the form of reductions in environmental taxes should be exempt from the notification requirement.’

193 Next, it should be observed that Article 25 of Regulation No 800/2008, entitled ‘Aid in the form of reductions in environmental taxes’, reads as follows:

‘1. Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of [the Energy Tax Directive] shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by [the Energy Tax Directive].

3. Tax reductions shall be granted for maximum periods of 10 years. After such 10 year period, Member States shall re-evaluate the appropriateness of the aid measures concerned.’

194 It should also be observed that Article 26 of the Energy Tax Directive reads as follows:

‘1. Member States shall inform the Commission of measures taken pursuant to Articles 5, 14(2), 15 and 17.

2. Measures such as tax exemptions, tax reductions, tax differentiation and tax refunds within the meaning of this Directive might constitute State aid and in those cases have to be notified to the Commission pursuant to Article 88(3) of the Treaty.

Information provided to the Commission on the basis of this Directive does not free Member States from the notification obligation pursuant to Article 88(3) of the Treaty.

3. The obligation to inform the Commission pursuant to paragraph 1 of measures taken pursuant to Article 5 does not free Member States from any notification obligations pursuant to Directive 83/189/EEC.’

195 At recitals 143 to 148 to the contested decision, the Commission asserted, in essence, that in the present case there was no scope for applying Article 25 of Regulation No 800/2008 by analogy. First, the applicable systems were not in its view comparable, in particular because that article applied only to environmental taxes harmonised under the Energy Tax Directive. Classification as an ‘energy tax’ was thus a condition for the application of that article. That interpretation was supported by the fact that it followed from the rationale of the system of that regulation that it could not have a scope wider than the Guidelines to which it refers. Article 25 therefore applies only to energy taxes harmonised by the Energy Tax Directive.

196 The Commission asserted that the contributions paid under the amended ÖSG were not environmental taxes and that the provisions on energy tax therefore did not apply to them. Accordingly, the rules governing energy taxes are not similar to the rules governing the Austrian feed-in tariffs.

197 In the second place, the Commission emphasised that the rules applicable in the present case did not contain an omission which was incompatible with EU law and which could be remedied by analogy. In its view, tax reductions or similar measures which were not covered by Regulation No 800/2008 were

not automatically incompatible with EU law, but merely had to be notified under Article 108 TFEU and then analysed either by reference to the Guidelines or, if they were not applicable, on the basis of Article 107(3)(c) TFEU.

- 198 The Commission concluded that it could not draw an analogy between the notified system and the harmonised energy taxes referred to in Article 25 of Regulation No 800/2008 and could not therefore approve the mechanism at issue on the basis of such an analogy (recital 147 to the contested decision).
- 199 It should be observed, first of all, that the Commission maintains that the Republic of Austria's claim that Article 25 of Regulation No 800/2008 was directly applicable was inadmissible on the ground that it was submitted out of time, as that claim was submitted for the first time only in the reply. In that regard, it must be held that it follows from the application, and in particular from paragraph 64, read with paragraphs 63 and 59, that the Republic of Austria sought to establish that that provision was applicable by analogy, by reference to Article 22c of the amended ÖSG. In the circumstances of the present case, without there even being any need to examine further the admissibility of the Republic of Austria's claim that Article 25 of that regulation was 'directly' applicable, in particular as an expansion of the arguments alleging that the notified aid was compatible with that provision on the ground of an analogy, that claim must be rejected for the same reasons.
- 200 In that regard, it should be stated that, as was held at paragraphs 168 to 178 above, even if the amended ÖSG must be analysed as being similar to a fiscal measure and Article 22c thereof as being an exemption in the context of that measure, the fact none the less remains that it could at most be a tax that must be treated by analogy to fiscal regimes that have not been harmonised at European level. The amended ÖSG was not adopted in the specific context of the transposition of the Energy Tax Directive and was not, as such, envisaged by that directive.
- 201 Next, as regards, specifically, the possible application of Regulation No 800/2008, whether directly or by analogy, it should be stated that that regulation establishes, in particular, in the context of tax exemptions in environmental matters, specific circumstances in which an exemption does not have to be notified to the Commission (see recital 46 to and Article 25 of that regulation).
- 202 Contrary to the Republic of Austria's contention, it is not possible, when interpreting Article 25 of Regulation No 800/2008, to separate the criterion of 'fulfilling the conditions of [the Energy Tax Directive]' from the criterion according to which the taxes in question must be environmental taxes such as those provided for in that directive, that is to say, taxes harmonised at European level. In fact, the objective of that regulation consists in exempting from the notification obligation certain categories of tax exemptions, such as had been governed by that directive, taken in its entirety. Nor, in that context, can it be deemed to be merely a superfluous document by comparison with the Guidelines, since, in particular, in certain specific cases it provides that there is no need to make prior notification of an environmental aid scheme.
- 203 In those circumstances, owing to the difference between the situations referred to and, consequently, the fact that the situation provided for in Article 25 of Regulation No 800/2008 is not comparable with the situation of the notified measure (see also paragraph 172 above), that provision cannot be applied in the present case, either directly or by analogy. In the latter respect, it should be further stated that, as the Commission maintains, the fact that a specific tax regime or a comparable regime does not fall within the scope of that regulation does not have the automatic consequence that there is a legal 'lacuna' or an omission incompatible with the principles governing EU law. A regime such as that referred to above comes in that case either under the Guidelines and, where appropriate, in particular under their provisions on 'non harmonised' taxes, or directly under an analysis of the compatibility of aid with the internal market within the meaning of Article 107(3) TFEU.

204 In the light of the foregoing, there is no need to go further into the actual conditions for the application of Article 25(2) and (3) of Regulation No 800/2008. It is purely for the sake of completeness, therefore, that the Court further observes that the Republic of Austria has not claimed, and there is no indication in the notified system, that under that system the duration of the exemption provided for in Article 22c of the amended ÖSG would be limited to a maximum period of 10 years.

205 Furthermore, it should be observed that the findings relating to the non-applicability of Regulation No 800/2008 in the present case cannot be undermined by the claims which the Republic of Austria bases on the reference to the 'Joint paper on the revision of the Community guidelines on State aid for environmental protection and Energy Tax Directive' (see paragraph 188 above). As the Commission maintains, this is only a preparatory document, signed, moreover, by only some Member States of the European Union, in particular by the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, which cannot thus take precedence in the interpretation of the final version of the regulation in question as adopted by the Commission, a version which took into account the precise wording of the provisions of that regulation to which the Republic of Austria's claims refer and the context in which that regulation is placed. In addition, that interpretation takes account of the history of the adoption of Article 25 of that regulation, in relation to the Guidelines, and in particular of the fact that that provision was intended to take advantage of the experience gathered by the Commission through its application of the Guidelines (see, in particular, paragraph 192 above). In such a context, in particular, the Commission was correct to emphasise at the hearing that that regulation must be interpreted narrowly, since it addressed only situations in relation to which the Commission had much experience and in relation to which it could thus adopt a general exemption.

206 Last, in the context of the present part of the third plea too, it should be stated that the Republic of Austria's claims do not allow the conclusion that the Commission misused its power by refusing to apply, either directly or by analogy, Regulation No 800/2008, and in particular Article 25 thereof. It should also be borne in mind that, at recitals 143 to 148 to the contested decision, the Commission undertook a specific analysis of the claims which the Republic of Austria had put forward during the administrative procedure with respect to that regulation and considered, without erring in law, that the abovementioned provision referred to energy taxes as governed by the Energy Tax Directive.

207 The second part of the third plea must therefore be rejected.

208 In so far as, first, in spite of the title of its plea, referring to 'incorrect application of Article 107(3) TFEU and misuse of powers', the Republic of Austria has put forward no other specific arguments which the Court would now find it appropriate to analyse and which would relate directly to the application of that article, that is to say, in particular, in the absence of any allegations on the part of the Republic of Austria seeking to take issue with the Commission's reasoning at recital 149 et seq. to the contested decision, in which it evaluated the compatibility of the measure at issue with direct reference to that provision, asking, in particular, whether the aid at issue had an objective of common interest, whether it had an incentive effect, and whether it was necessary and proportional and, second, in so far as, in any event, the Commission's assertions set out at recitals 165 to 167 to the contested decision could not be called into question, the third plea must be rejected in its entirety.

Fourth plea, alleging unequal treatment by the Commission of situations that were comparable as regards their economic and competitive effects

209 The Republic of Austria claims that during the investigation procedure it referred on several occasions, and in particular in its written observations of 8 October 2009, to the analogy with the German system, in particular on the points of financing by an 'invoice price' (re-invoicing of the additional green electricity costs) and the cap on the contribution of energy-intensive businesses. Since 2004 the German law on renewable energy has also provided for a comparable cap. Consequently, owing to the

close connection between the German and Austrian electricity markets since they were liberalised, and given the similarity of the two systems, the Republic of Austria maintains that they are close as regards their economic and competitive effects.

- 210 In those circumstances, the Republic of Austria maintains that the Commission could not refuse to evaluate any analogies between the Austrian and German systems and merely state that it had not yet evaluated the latter system. Likewise, in its submission, the reason why the Commission adopted a different decision in procedure N 271/2006 (concerning the ‘Tax Relief for Supply of surplus Heating’ in Denmark), although the system in that case was comparable to the system at issue in the present case as regards their economic and competitive effects, is not clear. Therefore, as comparable situations were treated unequally, there has been a breach of the principle of equal treatment (by reference to judgment of 30 April 1998 in *Vlaamse Gewest v Commission*, T-214/95, ECR, EU:T:1998:77, paragraph 89).
- 211 In the reply, in answer to the Commission’s argument that it had not analysed the EEG, which had not been notified to it, the Republic of Austria submits that the classification of a system as State aid cannot be subject to such notification, as the Commission is under a duty to examine State aid that might be unlawful. Likewise, it disputes the Commission’s argument that the judgment in *Vlaamse Gewest v Commission*, paragraph 210 above (EU:T:1998:77) is not relevant in the present case and claims that account must be taken of the fact that it follows from that judgment that the Commission had undertaken to observe the guidance laid down in the Guidelines. The same ought to apply with respect to Regulation No 800/2008. Accordingly, if a situation comes under the Guidelines or that regulation, they should be applied and the Commission should authorise the notified measure without hiding behind formalistic arguments.
- 212 Last, the Republic of Austria maintains that the Commission’s arguments relating to the judgment in *Vlaamse Gewest v Commission*, paragraph 210 above (EU:T:1998:77), are incomprehensible, in particular the arguments that that judgment does not in any way mean that the Commission is required to treat comparable situations in the same way. In the Republic of Austria’s submission, although the Commission refuses, for formalistic reasons, to apply by analogy the Guidelines or Regulation No 800/2008, it now asserts that situations which are comparable as regards their competitive effects ‘may be subject to the regime of EU law’ in some cases and not in others. The Republic of Austria refers, in particular, to examples from the Commission showing that situations which are comparable as regards their competitive effects may be caused with or without the grant of State aid.
- 213 As a preliminary point, it should be stated that certain of the Republic of Austria’s claims concerning equal treatment had been included in the context of the second plea and had been dealt with in that context (see paragraph 124 et seq. above).
- 214 As was observed at paragraph 124 above, with reference to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.
- 215 In the context of the assessment of Article 107(1) TFEU, it was also observed that the concept of State aid meets an objective situation which falls to be assessed on the date on which the Commission adopts its decision. Thus, the reasons why the Commission had made a different assessment of the situation in a previous decision cannot therefore have any effect on the assessment of the legality of the contested decision (see paragraph 125 above).
- 216 Next, it should be observed that, according to settled case-law, it is only in the context of Article 107(3)(c) TFEU that the validity of a Commission decision finding that new aid does not satisfy the conditions for the application of that derogation must be examined, not by reference to an earlier practice of the Commission in taking decisions, on the assumption that such a practice is

established (judgment of 8 July 2010 in *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-396/08, EU:T:2010:297, paragraph 54). That principle is applicable, by analogy, as regards the assessment of aid schemes.

- 217 Furthermore, it has already been held that the Commission cannot be deprived of the opportunity to lay down stricter conditions for compatibility if developments in the internal market and the objective of ensuring undistorted competition on that market so require (see, to that effect, judgment in *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, paragraph 210 above, EU:T:2010:297, paragraph 53 and the case-law cited).
- 218 Moreover, as observed at paragraph 126 et seq. above, the Commission decisions to which the Republic of Austria refers in the present case are not relevant to the outcome of the present dispute, first, owing to developments in the case-law and, second, because they are not directly comparable with the situation at issue in the present case. Accordingly, its claims in respect of Commission Decisions N 271/2006 or even N 820/2006 cannot be held to be well founded. The same applies, for reasons analysed in the context of the first and second pleas, to any analogies with the ‘former’ German system governing the promotion of electricity from renewable sources, which gave rise to the judgment in *PreussenElektra*, paragraph 42 above (EU:C:2001:160).
- 219 As regards the reference to the EEG (see, in particular, paragraph 211 et seq. above), first, the Commission was correct to maintain that, in so far as the abovementioned German system was not notified and, accordingly, neither analysed by the Commission nor, *a fortiori*, analysed in such a way that a decision on its compatibility with the common market was adopted, it cannot prevail over the analysis of the lawfulness of the Austrian system carried out in the light of the particular circumstances provided for in the amended ÖSG. Second, the Commission was also right to submit, before the Court, that the Republic of Austria had other procedural means of providing the Commission with an incentive, if necessary, to evaluate other regimes in other Member States.
- 220 Last, it should be held that, as the Commission contends, the Republic of Austria has not shown in any of its four pleas that the Commission, by its actions, had in any way ‘misused its discretionary power’.
- 221 Consequently, the fourth plea must be rejected and the action must be dismissed in its entirety.

Costs

- 222 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Furthermore, under Article 87(4) of the Rules of Procedure, the Member States and institutions which intervened in the proceedings are to bear their own costs.
- 223 Since the Republic of Austria has been unsuccessful, it must be ordered to pay the costs, in accordance with form of order sought by the Commission.
- 224 The United Kingdom must bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Order the Republic of Austria to pay the costs;**
- 3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

Dittrich

Schwarcz

Tomljenović

Delivered in open court in Luxembourg on 11 December 2014.

[Signatures]

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