

Official Journal

of the European Union

L 235



English edition

Legislation

Volume 54

10 September 2011

Contents

II *Non-legislative acts*

DECISIONS

2011/526/EU:

- ★ **Commission Decision of 29 September 2010 on State aid C 32/09 (ex NN 50/09) implemented by Germany for the restructuring of Sparkasse KölnBonn (notified under document C(2010) 6470) ⁽¹⁾**..... 1

2011/527/EU:

- ★ **Commission Decision of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*) (notified under document C(2011) 275) ⁽¹⁾**..... 26

2011/528/EU:

- ★ **Commission Decision of 8 March 2011 on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria (notified under document C(2011) 1363) ⁽¹⁾**..... 42

Price: EUR 4

⁽¹⁾ Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 29 September 2010

on State aid C 32/09 (ex NN 50/09) implemented by Germany for the restructuring of Sparkasse KölnBonn

(notified under document C(2010) 6470)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/526/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on Member States and other interested parties to submit their comments pursuant to those provisions ⁽¹⁾,

Whereas:

(4) On 11 February 2010 Germany submitted a restructuring plan which was discussed in a series of meetings and teleconferences during the period from December 2009 to September 2010.

(5) Germany submitted further information and updates to the restructuring plan on 15 January, 10, 12 and 24 February, 10 and 26 March, 21 and 28 May, 8 and 11 June, 23 July, and 10 and 23 August 2010. The final version of the restructuring plan was submitted on 1 September 2010.

2. DESCRIPTION OF THE BENEFICIARY

1. PROCEDURE

(1) Germany notified the measures on 21 October 2009.

(2) By Decision of 4 November 2009 ⁽²⁾ ('the opening Decision'), the Commission reached the preliminary conclusion that the recapitalisation measures of Sparkasse KölnBonn ('the Bank') constituted State aid and raised doubts as to whether the measures provided to Sparkasse KölnBonn could be found compatible with the internal market pursuant to Article 107(3) TFEU. Further, the Commission required the submission of a restructuring plan by the German authorities.

(3) On 6 January 2010 the opening Decision was published in the *Official Journal of the European Union* and interested parties were requested to submit their comments.

(6) Sparkasse KölnBonn is a German savings bank. It was created in its current form in 2005 as a result of the merger of Stadtsparkasse Köln and Sparkasse Bonn, whose owners ('Träger', responsible public institutions, hereinafter 'owner') were, respectively, the cities of Cologne and Bonn. The city of Cologne indirectly holds a 70 % stake in the new bank, the city of Bonn 30 %. Subsequent to this merger the role of owner of Sparkasse KölnBonn is performed by the association Zweckverband Sparkasse KölnBonn ('Zweckverband'). The Zweckverband, which is incorporated under public law, is a special purpose association. The sole participants in the Zweckverband are the city of Cologne (70 %) and the city of Bonn (30 %).

(7) At the end of 2008 Sparkasse KölnBonn was the second largest savings bank in Germany with a balance sheet of EUR 31 billion. At this point, Sparkasse KölnBonn had an Aa2 rating from Moody's. This was changed to A1 on 15 March 2010.

⁽¹⁾ Commission Decision in Case C 32/09 (ex NN 50/09), *Restructuring of Sparkasse KölnBonn* (O) C 2, 6.1.2010, p. 13).

⁽²⁾ See footnote 1.

- (8) Sparkasse KölnBonn provides banking services for retail clients (*Privatkundengeschäft*) and corporate clients (*Firmenkundengeschäft*). The Bank is, with a regional focus, active in project finance and capital markets (*Kapitalmarktgeschäft*), as well as in other financial activities such as asset management.
- (9) The Bank is active only in the Cologne-Bonn region, where it held a market share of approximately [30-35] (*) % in private customer deposits, around [20-25] % in loans to private customers and [15-20] % in credits to corporate clients in 2008 (3).

3. THE AID MEASURES

- (10) The capital of Sparkasse KölnBonn was strengthened by a total of EUR 650 million
- (i) by the issuance of certificates of participation (*Genusssrechte*) at the end of 2008; and
- (ii) by a silent participation (*Stille Einlage*) at the beginning of 2009.

3.1. Certificates of participation (*Genusssrechte*)

- (11) In December 2008 Rheinische Sparkassen-Förderungsgesellschaft ('Förderungsgesellschaft') subscribed nominal participation certificates in Sparkasse KölnBonn amounting to EUR 300 million in two tranches of EUR 150 million.
- (12) Förderungsgesellschaft is a wholly-owned subsidiary of Rheinischer Sparkassen- und Giroverband (Rhine saving banks association — 'RSGV'). RSGV is the public-law association (*Körperschaft des öffentlichen Rechts*) of all savings banks and their public owners located in the Rhineland and represents the Sparkassen and their (public) owners. According to its statute the objective of Förderungsgesellschaft is the promotion of savings banks belonging to RSGV. Förderungsgesellschaft can contribute to the capital of saving banks for the sole purpose of developing further credit-granting activities and can be granted loans.
- (13) The coupon of the certificates is 8 %. The lifetime of the certificates is until 31 December 2013. From a regulatory point of view the certificates of participation are Tier-2 capital.
- (14) The certificates of participation participate in yearly losses proportionately to the total of loss-absorbing equity. A [...] carry forward of the payments on the

participation certificates is attached to them, i.e. foregone payments on the participation certificates must be paid up to [2-6] years after they were due. The same applies to payments to top up the nominal value of the participation certificates if it is depleted due to absorption of losses.

- (15) In order to finance the certificates, Förderungsgesellschaft subscribed two loans with [...]. These loans bear a fixed interest of [4-5] % over the lifetime of the certificates of participation. The loan is guaranteed to [...] by RSGV, which will receive from Förderungsgesellschaft a guarantee remuneration of [1,8-2,5] %.

3.2. Silent participation

- (16) The silent participation contracts were concluded on 2 January 2009 and on 27 February 2009 between Sparkasse KölnBonn and the Zweckverband setting up a '*Stille Gesellschaft*' for a total of EUR 350 million, paid out in two tranches, EUR 300 million on 2 January and EUR 50 million on 1 April 2009. The silent participation is a device by which the investor does not obtain any voting rights but receives a remuneration. The instrument is perpetual and acknowledged as Tier-1 core capital. The silent participation is held by the Zweckverband.
- (17) To finance the silent participation, the Zweckverband has contracted a loan of EUR 300 million for the first tranche. 50 % of the loan is provided by [...] and the remaining 50 % by [...]. The remuneration of the loan payable by the Zweckverband amounts to 12-month EURIBOR plus [0,7-1,1] %. The second tranche of EUR 50 million was refinanced using a loan from [...], remunerated at EURIBOR plus [0,7-1,1] %. Whilst there is no specific guarantee by either Cologne or Bonn, there exists an unlimited statutory liability of both cities for all liabilities of the Zweckverband pursuant to the statute of incorporation of the Zweckverband.
- (18) The remuneration paid by Sparkasse Köln Bonn for the silent participation is 12-month EURIBOR plus 7,25 %. That remuneration was set in line with a Fairness Opinion from Deutsche Bank. The payment of remuneration is subject to a balance sheet profit, and is foregone if Sparkasse KölnBonn reports no profit for the year. A payment is excluded if, at the time it is due, the capital ratio is below 9 % and in so far as the payment would lead to or increase a loss for the relevant accounting year. In case of deferral of the payment there is no carry-forward obligation to pay the foregone amount at a later point in time. Furthermore, the silent participation absorbs balance sheet losses in proportion to the total loss-absorbing capital.

(*) Subject to professional secrecy.

(3) Its market share in the total German banking sector is too small to be meaningful.

4. THE RESTRUCTURING PLAN

- (19) According to the restructuring plan, Sparkasse KölnBonn will focus on its statutory business model of a regional savings bank. The Bank will concentrate on providing typical retail banking services to its traditional customer segments, being private customers and SMEs, and withdraw from other activities such as proprietary trading or investments in structured products and divest non-core subsidiaries. Further, the Bank will significantly reduce its administrative expenses.

4.1. Description of the restructuring plan

- (20) Sparkasse KölnBonn will focus on the services to customers located in the Cologne-Bonn region in the segments for private customers, private banking, SMEs, and corporate and institutional clients. The Bank will focus on corporate clients with a yearly turnover below EUR 250 million.
- (21) Sparkasse KölnBonn will reduce its largest credit exposures by limiting the credit lines, requesting additional collateral or transferring risks to other credit institutions. In the corporate clients segment, Sparkasse KölnBonn has already achieved a EUR 551,5 million reduction and will further decrease the exposure by EUR [900-1 100] million by the end of 2013 from the original level of EUR 2,8 billion in 2008. In addition credit exposure in the amount of EUR [800-900] million granted to institutions not connected with the Cologne-Bonn region will be reduced by the end of 2013 using the same instruments (see Annex I, point 4).
- (22) Sparkasse KölnBonn has already decreased its proprietary trading portfolio from originally EUR 550 million to currently EUR [20-23] million, which will be further reduced to 0. The Bank will cease all proprietary trading activities in the future and considers giving up its status as trading book institute, thus accounting all remaining limited trading activities in the banking book. They will be qualitatively limited to certain products and have to respect a quantitative daily exposure limit (market risk < EUR [3-5] million, see Annex I, point 2).
- (23) One of the main sources of Sparkasse KölnBonn's losses in 2008 was its investments in so-called ABS and Strategic Assets Allocation ('SAA') portfolios. At the time of investment in ABS portfolio, Sparkasse KölnBonn acquired geographically diversified⁽⁴⁾ and

predominantly AAA-rated assets, including RMBSs⁽⁵⁾, CDO⁽⁶⁾s, CMBs⁽⁷⁾, ABSs⁽⁸⁾ and CLOs⁽⁹⁾. As per the end of 2007 the ABS portfolio amounted to EUR 1,05 billion in Sparkasse KölnBonn's accounts. SAA is an investment in special funds, through which Sparkasse KölnBonn held a diversified portfolio consisting among others of international equity shares, REIT⁽¹⁰⁾ and bonds including High Yield and Emerging Markets. As per the end of 2007 this portfolio was accounted for at EUR 2,2 billion in Sparkasse KölnBonn's books. Although Sparkasse KölnBonn aimed at widespread diversification of its ABS and SAA portfolios, they were significantly affected by the financial crisis. Both portfolios mainly contributed to the write-downs of EUR 249 million⁽¹¹⁾ that Sparkasse KölnBonn had to recognise on its investment portfolio in 2008, in addition to EUR 108 million already recorded in 2007.

- (24) In its restructuring plan Sparkasse KölnBonn classified the ABS and SAA investments as not in line with the risk profile and its strategic reorientation towards a traditional savings bank. As a result, the Bank decided to completely sell off or run down those commitments by 2014. Sparkasse KölnBonn reduced its SAA investment by half in March 2008 in order to limit its exposure to equities. Further divestments took place in 2009, resulting in the reduction of the SAA portfolio to EUR 468 million as per 30 September 2009. The impact of the remaining ABS exposure (nominally EUR 970 million as per 30 September 2009) on the Sparkasse KölnBonn's accounts will be absorbed by provisioning and hedging in 2010. Finally in [2012-2014] the whole remaining portfolio is to be sold.
- (25) Sparkasse KölnBonn has started implementing a comprehensive cost-cutting programme, including staff reduction, internal processes optimisation and closure of 22 out of 131 existing branches by mid-2011. As a result, its administrative expenses will be gradually reduced by [5-8] % by 2014⁽¹²⁾.
- (26) Germany commits that the Bank will respect restrictions on coupon payments (Annex I, point 7), advertisement (Annex I, point 9) and acquisition bans (Annex I, point 8) and a price leadership ban which stipulates that until the end of 2014 Sparkasse KölnBonn will not offer better rates for deposits and mortgages than the best out of its 10 largest competitors (for deposits in terms of market shares of competitors active in the relevant

⁽⁴⁾ As per the end of September 2009 64 % of the ABS portfolio volume was related to Germany and other European countries, a further 17 % to the USA.

⁽⁵⁾ Residential mortgage-backed securities.

⁽⁶⁾ Collateral debt obligation.

⁽⁷⁾ Commercial mortgage-backed securities.

⁽⁸⁾ Asset-backed securities.

⁽⁹⁾ Collateralised loan obligation.

⁽¹⁰⁾ Real estate investment trust.

⁽¹¹⁾ Thereof ABS portfolio: EUR 104,5 million write-down in 2008.

⁽¹²⁾ Taking into consideration price and salary increases.

market in the Cologne-Bonn region and for mortgages in terms of market share in new production in Germany, see Annex I, point 5).

an independent expert. The assets held by the subsidiaries to be sold to the City of Cologne are mainly related to real estate activities.

4.2. Restructuring of subsidiaries

(27) Sparkasse KölnBonn plans to reduce its holding of subsidiaries by one third. From the portfolio of subsidiaries, held at EUR 635 million in the Bank's accounts as per 31 December 2008, EUR [20-40] million were sold or liquidated by the end of 2009 and a further EUR [180-250] million are to be divested. By implementing this measure, Sparkasse KölnBonn follows two aims depending on the type of the subsidiary. First, the divestments of non-core subsidiaries⁽¹³⁾, which are active in regional development projects or communal and social housing, aim at reducing Sparkasse KölnBonn's risk exposure and vulnerability. Second, the sale of stakes in entities which are only indirectly related to Sparkasse KölnBonn's activities, aims at generating profits to finance the restructuring of Sparkasse KölnBonn (see Annex I, point 10). A complete list of subsidiaries to be divested is given in Annex I, points 10 and 13.

(28) Examples of divestments in the second group are stakes in companies such as RW Holding AG, S ProFinanz Versicherungsmakler GmbH, Schufa Holding AG and neue leben Pensionsverwaltung AG. Those sales have already been completed and have resulted in proceeds totalling approximately EUR [25-35] million.

(29) For some subsidiaries, which account for approximately EUR [70-100] million, Sparkasse KölnBonn expects little interest from private third-party purchasers. That low interest is mainly due to the character of those entities, as they are small, involved in social housing and regional development in cooperation with the City of Cologne, or their ownership structure, which is already dominated by the City of Cologne. Therefore, the Bank is considering selling those activities to [the City of Cologne or a company associated with the City of Cologne]. The transfer would take place at market value, assessed by

(30) In consequence of the implementation of the restructuring measures, the Bank will reduce its risk-weighted assets (RWA) by EUR [2-5] billion to EUR [15-20] billion (i.e. by [15-20] %) (without taking into account future growth in the core business over the restructuring period). If growth in the core business is taken into account, the reduction of RWA will amount to [10-15] % by 2014. Sparkasse KölnBonn's [...] will be reduced by EUR [4-6] billion to [20-30] billion (i.e. by [15-20] %) (without taking into account future growth in the core business over the restructuring period). When growth in the core business is accounted for, the restructuring measures will result in a total assets reduction of 5 %.

4.3. Ability to return to viability in base and stress case

(31) Germany has submitted a base and a stress scenario with the aim of demonstrating Sparkasse KölnBonn's ability to restore its long-term viability.

Base case

(32) In the base case the submitted financial projections are based on assumptions which are in line with projections for Germany published by acknowledged economic institutes. It is assumed that GDP growth will remain at the same moderate level for the whole restructuring period. The unemployment rate is expected to continue rising until 2011 and fall slowly thereafter. Finally, it is expected that the currently unfavourable, low-interest rates environment will improve in 2010 and then remain unchanged for the rest of the restructuring period.

⁽¹³⁾ An important source of Sparkasse KölnBonn's difficulties was its engagement in projects and subsidiaries unrelated to its core business. These activities have generated a major part of the losses in the past. In order to attract new industries to Cologne, in the past the Bank engaged in development of commercial and office spaces or granted rent guarantees to facilitate real estate developments. The Bank is renegotiating the guarantees and rent contracts with the aim to ceasing such arrangements and, where possible, is proceeding with the sale of the activities to third parties.

(33) As illustrated in Table 1 below, in the base case Sparkasse KölnBonn is expected to return to profitability in 2010 and continuously improve its results until 2014. In 2014 the Bank will achieve a return on equity (ROE) of [9-10] %. Chart 1 below illustrates the main financial performance indicators of Sparkasse KölnBonn for the years 2008-2014.

Table 1

Sparkasse KölnBonn's pre-tax profit 2010-2014 in base case

Scenario	2009	2010	2011	2012	2013	2014
Base case	-98,8	[5-10]	[80-100]	[125-150]	[150-175]	[20-225]

Chart 1

Sparkasse KölnBonn's main financial performance indicators for 2008-2014 — base case

Indicators		2008	2009	2010	2011	2012	2013	2014
	RWA ⁽¹⁾ (EUR bn)	20,2	19,1	[17,5-20]	[...]	[...]	[...]	[15-20]
	Tier-1 ratio ⁽²⁾	6,4 % (5,5 %)	6,9 % (6,1 %)	[7-8] % ([6-7] %)	[8-9] % ([7-8] %)	[8-9] % ([7-8] %)	[8-9] % ([7-8] %)	[8-10] % ([8-9] %)
	ROE	-13,5 %	-6,5 %	[0-3] %	[4-6] %	[7-9] %	[7-9] %	[9-10] %
	CIR	73,0 %	70,0 %	[65-75] %	[60-70] %	[55-65] %	[50-60] %	[50-60] %
	FTE	3 824	3 672	[3 500- 3 750]	[3 250- 3 500]	[3 000- 3 250]	[3 000- 3 250]	[2 750- 3 000]

⁽¹⁾ Figure for Sparkasse KölnBonn only.

⁽²⁾ Tier-1 capital ratio for Sparkasse KölnBonn, figure in brackets: Tier-1 ratio for the Group. CIR — cost income ratio, FTE — full-time equivalents (of full-time workers).

Stress case and sensitivity analysis

- (34) In the stress case the macroeconomic assumptions are those of a continuation of the crisis until 2011 and slow recovery in 2012. The stress case assumes two additional years of unfavourable low interest rates compared with the base case.
- (35) In the stress case Sparkasse KölnBonn is expected to return to profitability in 2012 and continuously improve its results until 2014. In 2014 the Bank will achieve an ROE of [10-12,5] %. According to the stress case scenario, the capital ratios for Sparkasse KölnBonn and for the whole consolidated group will remain well above the minimum regulatory requirements throughout the restructuring period. Table 2 and Chart 2 below illustrate the main financial performance indicators of Sparkasse KölnBonn for the years 2008-2014 in the stress case.

Table 2

Sparkasse KölnBonn's pre-tax profit 2010-2014 in stress case

Scenario	2009	2010	2011	2012	2013	2014
Stress case	-98,8	-[125-150]	-[25-50]	[50-75]	[125-150]	[175-200]

Chart 2

Sparkasse KölnBonn's main financial performance indicators for 2008-2014 — stress case

Indicators		2008	2009	2010	2011	2012	2013	2014
	RWA ⁽¹⁾ (EUR bn)	20,2	19,1	[17-20]	[17-19]	[17-19]	[17-19]	[16-18]
	Tier-1 ratio ⁽²⁾	6,4 % (5,5 %)	6,9 % (6,1 %)	[6-7] % ([5-6])	[6-7] % ([6-7])	[6-7] % ([6-7])	[6-7] % ([6-7])	[7-8] % ([6-7])

Indicators		2008	2009	2010	2011	2012	2013	2014
	ROE	-13,5 %	-6,5 %	-[8-9] %	-[1-3] %	[3-5] %	[8-10] %	[10-12] %
	CIR	73,0 %	70,0 %	[70-75] %	[65-70] %	[60-65] %	[55-60] %	[50-55] %
	FTE	3 824	3 672	[3 500-3 750]	[3 250-3 500]	[3 000-3 250]	[3 000-3 250]	[2 750-3 000]

(¹) Figure for Sparkasse KölnBonn only.

(²) Tier-1 capital ratio for Sparkasse KölnBonn, figure in brackets: Tier-1 ratio for the Group. CIR — cost income ratio, FTE — full-time equivalents (of full-time workers).

- (36) Because the current low level of short-term interest rates constitutes the main constraint on the Bank's earnings, an additional sensitivity analysis of the interest rates has been conducted (scenario 1: upward shift of the interest curve by 100 bps, scenario 2: its downward shift by 50 bps). The analysis confirmed that further increasing interest rates would improve Sparkasse KölnBonn's profitability, whereas decreasing interest rates would reduce its profitability, i.e. a linear decrease of 50 bps of the short-term interest rates would lead to a reduction of EUR [20-25] million of profits per year. Overall the sensitivity analysis provided by Germany demonstrates that Sparkasse KölnBonn's vulnerability to major interest rate shocks is limited.

4.4. Corporate governance

- (37) Germany submitted information showing that the politically driven investments which contributed to Sparkasse KölnBonn's difficulties were decided in the period 1997-2004, prior to the merger of Stadtsparkasse Köln with Sparkasse Bonn in 2005 which created Sparkasse KölnBonn in its current form. Those investments were also decided under a different legal framework, defined mainly by the Savings Banks Act of North Rhine-Westphalia (¹⁴). Since then, improvements to the corporate governance of Sparkasse KölnBonn have been implemented.
- (38) Due to the change in the structure of the Bank's responsible public institution (Träger) after the merger of 2005, important decisions in the Zweckverband are taken by qualified majority of shareholder's votes, which is set at 85 % at least, a level exceeding the participation held by any single city.
- (39) The number and size of the institute's bodies have been reduced, including major reductions in the size of the Supervisory and Management Boards (¹⁵). The Parti-

pation Committee consisting of three members of the Management Board, which in the former Stadtsparkasse Köln was entitled to pre-decide on investment in subsidiaries, was dissolved. The Management Board took over responsibility for investment policy in respect of equity engagements, which are to be assessed according to economic criteria. Additionally, any new investment entered into by Sparkasse KölnBonn requires the approval of the Supervisory Board.

- (40) The changes in the Savings Banks Act obliged the Bank to establish risk and accounting committees and provide them with far-reaching control powers. The law also requires members of the Supervisory Board to possess qualifications necessary to assess and control operations of a savings bank. The Management Board bears sole and comprehensive responsibility for management of the Bank and is not bound by any instructions of the Supervisory Board or the shareholders.
- (41) In addition to the already implemented improvements to the corporate governance structure, Sparkasse KölnBonn will further strengthen its governance by increasing the number of independent (¹⁶) members of the Supervisory Board from two (at present) to four out of 18. The members of the Accounting Committee will be reduced from nine to seven and of the Risk Committee from nine to six respectively starting from 1 January 2011. The Participation and the Strategy Committees will be dissolved by the end of 2011 and the end of 2010 respectively. The former will naturally lose its importance once Sparkasse KölnBonn has divested the major part of its subsidiaries. The duties of the latter will be performed by the Management Board. Finally, the decision-making processes regarding acquisitions of companies will be amended and will involve unanimous decision-making in the Management Board and require investments that exceed EUR [2-5] million to have already been positively assessed by an independent expert, in the course of a due diligence or business valuation.

(¹⁴) Sparkassengesetz Nordrhein-Westfalen, <http://www.wlsgv.de/download/spkg28112008.pdf>, current version effective since 29 November 2008.

(¹⁵) From nine members in 2005 to five in 2010 in the case of the Management Board and from 27 to 18 in the case of the Supervisory Board.

(¹⁶) In this context 'independent' means that the member of the Supervisory Board does not belong to the City Council of the city which appointed him/her.

4.5. Hybrids

- (42) Sparkasse KölnBonn holds hybrid capital placed with third-party investors (private certificates of participation) in the amount of EUR 224 million. According to the information provided by Germany, the *Genussrechte* and the private certificates of participation rank *pari passu*. The silent participation is junior to both certificates. As shown in Table 3 below, since 2008 no coupon payments on hybrids have been made. In 2008 and 2009 the *Genussrechte* participated in the losses in the amount of EUR 57,4 million. The silent participation and the private certificates participated in the losses in 2009. Starting from 2010 the hybrid instruments will be topped up and from 2011 cancelled cumulative coupon payments will be caught up with by 2012. In 2013 all hybrids will be topped up, all cancelled coupon payments will be caught up with and a full coupon will be paid on each instrument. Given that the coupon payments are triggered either by a positive P&L or balance sheet result, Sparkasse KölnBonn does not have any discretion to suspend coupon payments if it operates profitably and any capital depletion has been replenished.

Table 3

Sparkasse KölnBonn's profit distribution in 2009-2014 (base case)

		2008	2009	2010	2011	2012	2013	2014
Profit before tax			-98,8	[5-10]	[80-100]	[125-150]	[150-175]	[200-225]
Profit distribution according to capital instruments								
State's certificates of	Loss absorption	40,6	16,8	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]
Private certificates of	Loss absorption	0	12,5	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]
Silent participation	Loss absorption	0	19,5	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]

- (43) Germany has provided the commitment that the Bank will not proceed with any coupon payments on the hybrid capital held by private investors, except for what it is contractually obliged to pay (see Annex I, point 7).

4.6. WestLB

- (44) Another source of Sparkasse KölnBonn's difficulties was its participation in WestLB. In the past Sparkasse KölnBonn incurred losses amounting to EUR [...] million, because as a member of the regional savings banks association it contributed to the reserve fund established by the savings bank association as a safety net for its members and the Landesbanks. In the context of the WestLB rescue in 2008 the fund had to intervene. The remaining risk exposure is linked to Sparkasse KölnBonn's indirect holding in WestLB and remaining indirect liability for WestLB's bad bank via RSGV.

- (45) Although Sparkasse KölnBonn has not invested directly in WestLB, it is exposed to the stake in it held by RSGV, in which Sparkasse KölnBonn holds a direct stake of about 19 %. According to information provided by Germany, the risk that any impairment of RSGV's book value for WestLB will have an impact on Sparkasse KölnBonn is very limited. First, WestLB has been valued by an independent party recently and its book value in RSGV accounts was reduced accordingly as per 31 December 2009 from the historic cost of EUR [...] billion to EUR [...] million as per 31 December 2009. Therefore the indirect stake of Sparkasse KölnBonn in WestLB amounts currently to approximately EUR [...] million. Further, as Sparkasse KölnBonn is exposed to WestLB only by its stake in RSGV, only the intrinsic value of the latter is relevant for Sparkasse KölnBonn. This is influenced not only by the value of WestLB, but also other subsidiaries and investments held by RSGV. Valuation of other RSGV subsidiaries conducted

at the end of 2009 disclosed significant latent reserves, which would suffice to cover even the potential worst case scenario write-down of WestLB to 0.

- (46) Sparkasse KölnBonn's obligation to contribute [to the ...] created to cover potential losses of the recently created WestLB bad bank amounts to EUR [...] million over 25 years. However, this commitment will not impact the capacity of the Bank to meet its regulatory requirements in the future because the contributions [to the ...] are to be made only out of future profits.

4.7. Partial early exit

- (47) Germany has provided a commitment that Sparkasse KölnBonn will repay part of the received capital earlier than provided for in the terms of the instruments (see Annex I, point 27). The repayment will take place starting in 2011 and involve two steps.
- (48) The first step consists of the sale of a EUR 150 million tranche [...] to the Zweckverband. The transaction, and in particular the level of the purchase price, will leave Förderungsgesellschaft no better off than if it kept the instrument⁽¹⁷⁾. The Zweckverband will then convert the *Genussrechte*, which are currently acknowledged as Tier-2 capital, into Tier-1 capital instruments. In particular, the new instrument would be subordinated, not be redeemed for at least 30 years and have non-cumulative coupon payments. That step will result in the improvement of Sparkasse KölnBonn's Tier-1 capital ratio by [0,8-1,0] %.

⁽¹⁷⁾ Germany proposes a solution with a so-called 'improvement clause', which would be valid for the same period as the cumulating feature of the original instrument. This way Förderungsgesellschaft would at first receive from the Zweckverband a payment based on the book value of the instrument (nominal value minus losses absorbed, which have not been topped up). Then, according to the 'improvement clause', Förderungsgesellschaft would receive from the Zweckverband similar cash flows to what it would have received had it kept the instrument, related to the period up to the sale of the instrument. Sparkasse KölnBonn refers to similar cash flows, because the suspended coupon payments, related to the period during which Förderungsgesellschaft held the instrument, would be paid to Förderungsgesellschaft only with a discount of up to 25 %. Germany considers such a reduction to be an appropriate instrument to compensate the Zweckverband for taking over the interest and funding risk and account for the advantage Förderungsgesellschaft achieves by receiving its capital sooner than contractually provided for. For example, if Förderungsgesellschaft sells the instrument worth nominally EUR 150 million, depleted by EUR 25 million losses, to the Zweckverband in 2011, it would be paid EUR 125 million initially. If in 2012 Sparkasse KölnBonn generates profits, which would trigger the obligation to top up the instrument's capital (if Förderungsgesellschaft had kept the instrument), the corresponding amount will be paid to Förderungsgesellschaft by Zweckverband. Should the 2012 profits suffice to pay any coupons suspended in 2009-2011, this would also result in a comparable payment being made to Förderungsgesellschaft by Zweckverband.

- (49) The increase in the Tier-1 capital ratio allows for the second step, which is the buy-back by Sparkasse KölnBonn of the remaining tranche of the *Genussrechte* held by Förderungsgesellschaft in 2011 worth nominally EUR 150 million. Overall both steps will result in a decrease in the Tier-2 capital ratio by [0,5-1,0] %. Additionally, RSGV or another member of the savings bank sector will buy at market price the stakes of Sparkasse KölnBonn in two savings-bank-related [...] ⁽¹⁸⁾ and [...]. The sale of the indirect stake in the two entities would result in a further [0,2-0,5] % decrease in the Bank's total assets. The sale of the two entities is closely linked to the repayment of the second tranche of the *Genussrechte* as RSGV will buy the two entities with the proceeds from the sale of the *Genussrechte*.

5. GROUNDS FOR INITIATING THE PROCEDURE ON THE RECAPITALISATION MEASURE

- (50) The Commission recalls that in this case it opened the formal investigation procedure on the recapitalisation measure regarding its compatibility with the internal market pursuant to Article 107(3) TFEU ⁽¹⁹⁾ as restructuring aid on 4 November 2009.
- (51) Further, the Commission expressed doubts as to whether adequate burden-sharing was ensured in any way and whether the distortion of competition was limited, as required by the State aid rules (paragraph 50 of the opening Decision).
- (52) Finally, given the uncertainty as to whether the difficulties of Sparkasse KölnBonn were due to investment decisions taken well before the crisis or rather to the crisis itself, the Commission did not conclude whether the recapitalisation measures would fall under Article 107(3)(b) TFEU or under Article 107(3)(c) TFEU. The Commission decided to proceed with an investigation of the facts in order to identify the proper legal basis to be applied and to take a position later in the process.

⁽¹⁸⁾ Sparkasse KölnBonn is bound to sell its participation to RSGV or other members of the savings banks sector due to the contractual arrangements regarding its indirect stake in these entities.

⁽¹⁹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

6. COMMENTS FROM INTERESTED PARTIES

- (53) The Commission notes that no comments from interested third parties have been received with regard to the opening Decision on the recapitalisation measure.

7. COMMENTS FROM GERMANY

- (54) Germany indicated that it had reviewed the Commission's Decision of 4 November 2009, in which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU. It informed the Commission that it upheld its opinion that the recapitalisation measures received by Sparkasse KölnBonn in the form of a silent participation and certificates of participation at the end of 2008 and the beginning of 2009 did not constitute State aid within the meaning of Article 107(1) TFEU. Germany considered the measures to be in conformity with the market economy investor principle in accordance with the reasoning provided prior to the opening Decision (see paragraphs 24-28 of the opening Decision).

- (55) Germany disagreed with the Commission's assessment that at the time the recapitalisation measures were executed, i.e. end 2008/beginning 2009, the market for hybrid instruments had completely dried up⁽²⁰⁾. More specifically, it disagreed with the Commission's conclusion that no market economy investor or owner would have engaged in such an investment at the time, even at a higher price (see paragraph 38 of the opening Decision). It argued that market developments did not affect Sparkasse KölnBonn, which was able to issue junior debt both in the last 4 months of 2008 (totalling EUR [10-15] million) and in the first quarter of 2009 (totalling EUR [35-40] million) in tranches of up to several hundred thousand euro.

- (56) Finally, Germany contested whether the recapitalisation of Sparkasse KölnBonn by Förderungsgesellschaft involved any state resources.

- (57) Germany expressed, however, its confidence, that were the Commission to confirm its preliminary assessment regarding the State aid character of Sparkasse KölnBonn's recapitalisation, the measures would be compatible with the internal market under Article 107(3)(b) TFEU.

- (58) Germany argued that the restructuring plan complied with all the conditions set forth in the Commission's Communication of 23 July 2009 on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules⁽²¹⁾ ('Restructuring Communication').

⁽²⁰⁾ With the exception of inter-group issuances or the State being the purchaser of the instruments.

⁽²¹⁾ OJ C 195, 19.8.2009, p. 9.

- (59) In Germany's opinion the restructuring plan ensures that Sparkasse KölnBonn's long-term viability is restored, Sparkasse KölnBonn provides a sufficient own contribution to the restructuring costs and distortions of competition are limited by substantial structural and behavioural measures.

- (60) The commitments provided by Germany are set out in Annexes I to III and form an integral part of this Decision. In order to ensure that the commitments will be implemented, a monitoring trustee will be appointed. The appointment procedure and the responsibilities of the monitoring trustee are set out in Annex II. Further, Germany has committed itself to a timeline for divestments (see Annex I, points 10 and 13). Should the committed timeline for divestiture not be met, a divestiture trustee will be appointed and will perform his duties in accordance with the conditions stipulated in Annex III.

8. ASSESSMENT

8.1. Existence and amount of the aid

- (61) The Commission must assess whether the measures concerned constitute State aid. Article 107(1) TFEU provides that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings is, in so far as it affects trade between Member States, incompatible with the internal market.

- (62) In the opening Decision (section 5.1) the Commission reached the preliminary conclusion that the recapitalisation measures of Sparkasse KölnBonn constituted State aid. The Commission cannot agree with Germany's reasoning according to which the measures did not constitute aid inasmuch as the conditions of both instruments were in line with what a market economy investor would have accepted. Even if the remuneration on both instruments was in line with the interest paid on comparable instruments until the beginning of 2008, it was too low in the case of Sparkasse KölnBonn given the high risk resulting from the lack of profitability of the Bank. At the time of the recapitalisation, the market for hybrid instruments had even completely dried up. Therefore, in the context of the case and in particular the situation of the market, the Commission could not accept the argument that a market economy investor would have made the investment at the time, not to mention investing on equivalent terms.

- (63) The investigation did not reveal any information which would have altered this assessment. Junior debt issuances by Sparkasse KölnBonn at the end of 2008 and in the first quarter of 2009 do not provide reliable evidence that the markets for hybrid instruments were active owing to the very limited amount of single tranches involved. Tranches of hybrid instruments worth several hundred thousand euro represent a considerably different

level of risk from an instrument worth nominally EUR 150 million and are therefore much easier to absorb by the private markets. Therefore, the Commission upholds its view that no market economy investor would have acquired a hybrid instruments issue of comparable size and characteristics as Sparkasse KölnBonn's recapitalisation measures at that time.

- (64) As regards the nature of the resources used to recapitalise Sparkasse KölnBonn by Förderungsgesellschaft, the Commission recalls that it has already established in its case practice that means provided by RSGV are resources directly or indirectly controlled by public authorities⁽²²⁾. The Commission considers that this also applies to Förderungsgesellschaft, which is a wholly-owned subsidiary of RSGV. Therefore, these resources are state resources within the meaning of Article 107(1) TFEU.
- (65) In the light of the above, the Commission confirms the provisional conclusion reached in the opening Decision that the recapitalisation measures in favour of Sparkasse KölnBonn constitute State aid within the meaning of Article 107(1) TFEU.
- (66) The Commission furthermore notes that the rescue aid measures have been converted into restructuring aid which continues to constitute an advantage for the Bank. The measures allowed the Bank to obtain financing in a situation where it was unable to raise capital on the market, especially in the financial and economic crisis. This gives an economic advantage to the Bank and strengthens its position compared with that of its competitors in Germany and other Member States that are not benefiting from the same support. The measures must therefore be regarded as liable to distort competition and affect trade between Member States.
- (67) The aid element in the capital injections amounts to EUR 650 million and represents 3,3 % in relation to the Bank's risk weighted assets (end of 2008).

8.2. Compatibility of the aid with the internal market

8.2.1. Legal basis for the compatibility assessment

- (68) In its opening Decision of 4 November 2009, the Commission did not conclude what would be the

proper legal basis for the analysis of the recapitalisation measures. Based on the information available at that time, the decisions to invest in regional development projects taken in the period considerably before the financial crisis seemed to be the major source of Sparkasse KölnBonn's difficulties. As the crisis appeared only to have exacerbated existing problems of the Bank, the application of Article 107(3)(c) TFEU was not excluded. On the other hand, the implementation date of the recapitalisation measures at the peak of the financial crisis and the Commission's financial crisis banking case practice suggested the application of Article 107(3)(b) TFEU.

- (69) Further, even if previous decisions made reference to the Guidelines on State aid for rescuing and restructuring firms in difficulty⁽²³⁾ ('Restructuring Guidelines'), the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2010 will be assessed as restructuring aid to banks pursuant to the Restructuring Communication instead of the Restructuring Guidelines.
- (70) Given the continuing sensitivity of the banking sector in Germany the Commission concludes that the potential dissolution of one of the biggest saving banks in Germany due to the [...] would have had systemic implications and therefore threatened financial stability in Germany.
- (71) Therefore, Article 107(3)(b) TFEU is the appropriate legal basis for assessing whether the aid received by Sparkasse KölnBonn is compatible with the internal market as restructuring aid in order to preserve financial stability.

8.2.2. Compatibility of the restructuring aid with the internal market

- (72) According to the Restructuring Communication, first, the restructuring plan has to demonstrate that the restructuring process which a beneficiary of State aid is undergoing is suitable to restore its long-term viability. Second, the aid amount must be limited to the minimum necessary and both the beneficiary and its capital holders should contribute to the restructuring as much as possible with their own resources. Third, measures need to be in place to limit distortion of competition created by artificially supporting the market power of the beneficiary and to ensure a competitive banking sector. Finally, monitoring and procedural issues need to be addressed.

⁽²²⁾ See point 29 of the Commission Decision of 30 April 2008 in Case NN 25/2008, *WestLB risk shield*; Commission Decision of 1 October 2008 in Case C 43/08, *WestLB risk shield* (OJ C 322, 17.12.2008, p. 16), Commission Decision of 12 May 2009 in Case C 43/08, *WestLB risk shield*. In the context of the current court case regarding WestLB risk shield, Germany has not challenged the Commission's assessment of the support provided by savings banks associations RSGV and WLSGV to WestLB as being based on state resources within the meaning of Article 107(1) TFEU.

⁽²³⁾ OJ C 244, 1.10.2004, p. 2. Reference was made explicitly in point 42 of the Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('Banking Communication').

(i) Restoration of long-term viability

(73) In line with points 9 to 11 of the Restructuring Communication, Germany submitted a comprehensive and detailed restructuring plan which provides complete information on the business model. The plan also identifies the causes of the difficulties faced by the Bank.

(74) As regards its business model, Sparkasse KölnBonn intends to refocus on the traditional regional savings bank business activities. It will provide a full range of retail banking products to its core customer segments in the Cologne-Bonn region: retail, SMEs as well as smaller corporate customers and institutional clients located in the region. As a consequence, Sparkasse KölnBonn will concentrate on its statutory activities and capitalise on its core competence, while withdrawing from those areas which have been at the origin of its financial difficulties. In particular, Sparkasse KölnBonn ceases proprietary trading, all non-core subsidiaries and investments in SAA and ABS portfolios. The Commission considers that the new business model of the Bank is viable and sustainable in the long term.

(75) Sparkasse KölnBonn's difficulties were mainly attributable to three activities: (i) regional development projects, (ii) investments in ABS and SAA portfolios and (iii) the Bank's investment in WestLB.

(76) Already in 2008 Sparkasse KölnBonn initiated the sale or liquidation of non-core subsidiaries related to regional development. The full cessation of these activities constitutes a necessary and appropriate measure to remove the Commission's concerns as the divestments set an ultimate limit to any future losses or risk exposure resulting from the subsidiaries. Additionally, the measure frees up capital as well as management capacities, which can be re-employed in the core business of the Bank. Furthermore the divestments will also reduce the Bank's balance sheet by approximately EUR [180-230] million ([0-2] %) ⁽²⁴⁾.

(77) As the activities of the subsidiaries to be sold to the City of Cologne are mainly real estate development and real estate-related services, the Commission does not consider that the application of the Communication on the treatment of impaired assets in the Community banking sector ⁽²⁵⁾ ('Impaired Assets Communication') is necessary or appropriate in this case. The book values of these subsidiaries have been significantly written down in the past years in order to bring them in line with their market values. Therefore significant further losses for the Bank due to the sale of the subsidiaries are not expected.

Furthermore, the commitment of Germany that the Bank will sell at market value, which will be determined by an independent expert, ensures that no additional State aid is involved in the transactions.

(78) Another source of the Bank's problems was the ABS and SAA portfolios. Those investments have already been significantly reduced. Sparkasse KölnBonn will withdraw completely from those portfolios by the end of 2014. As those investments are outside the scope of the new business model of the Bank, the withdrawal from those portfolios is a necessary step in the implementation of Sparkasse KölnBonn's strategy. The current book values of the remaining assets in the ABS and SAA portfolios are overall in line with their market value. Therefore the remaining risk exposure stemming from those portfolios is limited and does not affect the viability of the Bank.

(79) Finally, the Bank's remaining exposure to WestLB, which in the past resulted in Sparkasse KölnBonn's losses of EUR [...] million, is limited in size and compensated by reserves in the investment portfolio of RSGV. Further, the contribution of the Bank [to the ...] is to be made only out of future net profits. Therefore, the obligation of Sparkasse KölnBonn to contribute [to the ...] will not endanger Sparkasse KölnBonn's long-term viability. Additionally, the Commission views positively the fact that the Bank's contributions can take place only once the State's capital has been remunerated in line with the recapitalisation terms.

(80) The Commission notes that the Bank has already addressed and will further address the weaknesses of its corporate governance. The change in the shareholders structure and the qualifying majority voting introduced in the light of the merger of Stadtparkasse Köln with Sparkasse Bonn in 2005 ensures that the political interests of the owners do not overrule the economic interests of the Bank. Further, the changes in the structure and size of Sparkasse KölnBonn's bodies as well as in the decision-making process lead to improved accountability of the top management. Fewer divided responsibilities, as well as a higher proportion of personnel who are not politically driven and who are [external ...] experts in the Bank's bodies, will increase the transparency and efficiency of the decision-making process. Together with the change in the shareholder structure, those measures address the sources of Sparkasse KölnBonn's difficulties as they minimise the risk that Sparkasse KölnBonn will engage in politically-driven projects conflicting with the economic interests of the Bank. Further, the independence of the Bank's management seems to be sufficiently anchored in the existing law. The fact that Sparkasse KölnBonn provided evidence that since 2004 the Bank has not engaged in new politically-driven projects shows that the implemented measures are effective. Overall, the new corporate governance code is in line with what

⁽²⁴⁾ The balance sheet reduction of the divestments only reflects the book value of the entities.

⁽²⁵⁾ OJ C 72, 26.3.2009, p. 1.

was achieved in comparable cases⁽²⁶⁾. Therefore, the implemented and committed changes of the corporate governance of Sparkasse KölnBonn can be considered adequate and sufficient to contribute to the restoration of the Bank's long-term viability.

- (81) The Commission considers that Sparkasse KölnBonn's restructuring plan meets the requirements set out in points 9 and 12-15 of the Restructuring Communication, namely that the restructuring plan should also demonstrate how the Bank will restore its long-term viability without State aid as soon as possible. In particular, the Bank should be able to generate an appropriate return on equity, while covering all the costs of its normal operations and complying with the relevant regulatory requirements.
- (82) First, Sparkasse KölnBonn has provided financial projections for the period 2008-2014, giving information on the revenues, costs, impairments, profits and capital position of the Bank. The Commission finds that the base case projections provided are based on reasonable underlying macroeconomic assumptions. The Bank expects to generate profits again in 2010 and continuously improve its yearly results over the whole restructuring period. Further, in 2014 ROE will reach a level of [9-10] %, which appears to be an adequate level of remuneration for a retail bank in normal market conditions. Furthermore, starting from 2013 Sparkasse KölnBonn will fully remunerate the aid measures. The Bank's capital ratios remain well above the minimum regulatory requirements with the Tier-1 ratio improving from 6,1 % in 2009 to [8-9] % in 2014.
- (83) Second, Sparkasse KölnBonn demonstrated that it is able to withstand a stress scenario. The assumptions of the stress scenario have been assessed as reasonable. As the stress scenario demonstrates that Sparkasse KölnBonn will exceed its regulatory capital requirements, the Bank can be regarded as meeting the requirements of paragraph 13 of the Restructuring Communication. Further, the sensitivity analysis shows that the Bank is capable of withstanding a significant change in interest rates in the future.
- (84) Finally, Sparkasse KölnBonn presented a partial early exit strategy. The partial repayment of the state capital should be possible without depleting the capital base of the institution, as Sparkasse KölnBonn's Tier-1 capital ratio is projected to reach [6-7] % in 2010 and will exceed this level afterwards in the base case scenario and also remain well above the regulatory minimum in a stress case scenario in the restructuring plan. The partial early exit does not involve additional aid either to Sparkasse KölnBonn or to other entities which are part of the transaction. First, due to the design of the purchase price to be paid for the first EUR 150 million tranche of the *Genussrechte*, which closely simulates the cash flow

Förderungsgesellschaft would receive had it kept the instrument, Förderungsgesellschaft would be left no better off. Second, the transaction takes place between two public entities. Further, as the instrument to be converted into Tier-1 capital already qualifies as aid and Sparkasse KölnBonn will pay the same remuneration to the Zweckverband after the conversion, the Commission does not see any additional aid involved in the conversion. Finally, the buy-back by Sparkasse KölnBonn of the second EUR 150 million tranche will also closely simulate the cash flow Förderungsgesellschaft would have received had it kept the instrument.

- (85) Consequently, the Commission considers that the restructuring plan submitted by Sparkasse KölnBonn fulfils the requirements of the Restructuring Communication with regard to the restoration of the long-term viability and thereby allays the doubts expressed in the opening Decision.

(ii) Own contribution/burden-sharing

- (86) As stated in the Restructuring Communication, banks and their stakeholders need to contribute to the restructuring as much as possible in order to ensure that aid is limited to the minimum necessary. This implies that banks use their own resources to finance the restructuring, for instance by selling assets, while the stakeholders should absorb the losses of the bank where possible. The measures committed to by Sparkasse KölnBonn ensure that own resources are used and that private investors holding hybrid capital of the Bank contribute to the restructuring.
- (87) The restructuring plan does not contain any elements that suggest that the aid exceeds the means required to cover those costs which are triggered by the restoration of viability. The aid received is required to ensure that Sparkasse KölnBonn will have reasonable capital buffers in the base case and will be able to comply with regulatory capital requirements in a stress scenario.
- (88) In respect of the contribution to restructuring costs through internal resources generated by Sparkasse KölnBonn, the Commission notes that the Bank is implementing cost-cutting measures. The cost-cutting measures will result in a reduction of annual costs by EUR [25-35] million by the end of the restructuring period, which represents about [5-8] % of the total costs in 2009.
- (89) Further, the divestments of profitable non-core subsidiaries will generate proceeds which can be used to finance the restructuring costs.
- (90) The Bank has no discretion to suspend or delay the payment of a coupon on the hybrid instruments if it generates a profit in a given year. However, the holders of hybrid instruments also bear to the extent possible the

⁽²⁶⁾ Commission Decision of 15 December 2009 in case C 17/09, *Restructuring of LBBW* (OJ L 188, 21.7.2010, p. 1).

losses incurred by Sparkasse KölnBonn, as both coupon payment and principal of the hybrid capital were suspended or participated in the absorption of Sparkasse KölnBonn's losses. Therefore, the Commission considers that the maximum possible burden-sharing from its private hybrid investors is ensured and therefore the requirements of the Restructuring Communication for the contribution to the restructuring costs by the private investors are met.

- (91) Point 24 of the Restructuring Communication states that an adequate remuneration of the state capital is also a means of achieving burden-sharing. In this respect the Commission considers the level of remuneration set in the terms of recapitalisation measures is appropriate in association with the other burden-sharing measures described above. The projected profits will allow the Bank to remunerate the state capital and pay suspended coupons in line with the terms of the recapitalisation starting from 2011 for *Genussrechte* and from 2013 for silent participation, after the nominal capital of the instruments has been topped up. It should be noted that the interest on the *Genussrechte* held by the State is cumulative for [2-6] years and the capital depleted due to loss absorption is to be topped up in the case of both recapitalisation instruments. Therefore, according to the financial projections in the base case the unpaid interest on the *Genussrechte* and depleted principal of both instruments will subsequently be recovered by the State.

- (92) In the light of the above, the Commission considers that the restructuring plan submitted by Germany provides for a sufficient own contribution to the restructuring and therefore allays the doubts expressed in the opening Decision.

(iii) Measures limiting the distortion of competition

- (93) The Restructuring Communication requires that the restructuring plan proposes measures limiting distortions of competition and ensuring a competitive banking sector. Moreover, they should also address moral hazard issues and ensure that State aid is not used to fund anti-competitive behaviour.

- (94) The package of measures sufficiently addresses the issue of moral hazard. Sparkasse KölnBonn is committed to implementing a comprehensive sale of profitable non-core businesses. These include the stake in [...], [...], RW Holding AG, S ProFinanz Versicherungsmakler GmbH, Schufa Holding AG and Neue Leben Pensionsverwaltung AG, which are significant [...] of Sparkasse KölnBonn.

- (95) The German authorities have provided a detailed timeline for planned divestments and committed to the appointment of a monitoring trustee in order to ensure that the commitments will be carried out in a timely

manner. A divestiture trustee would be appointed for the divestments if the committed timeline is not met.

- (96) The restructuring of the Bank includes a reduction of Sparkasse KölnBonn's presence in certain customer segments. Those measures will allow competitors to access parts of the Bank's large corporate and institutional clients. Since it affects mainly large entities, which generally have access to the capital markets, the Commission considers the risk of negative impact on the real economy of this measure to be negligible.

- (97) Further, as a consequence of the implementation of the restructuring measures, Sparkasse KölnBonn will reduce its total assets by [15-20] % in terms of RWA ([15-20] % in terms of total assets) on a pro forma basis and by [10-15] % including future growth (5 % in terms of total assets). The reduction will be mainly driven by the withdrawal from the SAA and ABS investments, the cessation of proprietary trading ([6-8] % in RWA terms, [6-8] % in terms of total assets) and the reduction of large credit exposures and credit lines to institutional clients (RWA: [5-7] %, total assets: [5-7] %).

- (98) In view of the amount of aid in the present case (3,3 % of RWA), these measures can be considered to be sufficient and proportionate in terms of the reduction of the Bank's size and scope of activities. Sparkasse KölnBonn is active only in the Cologne-Bonn region, where it has a significant ([18-23] % — [30-35] % depending on the product), but not dominant market position. Moreover, the Bank does not act as a price leader in its core business segments. For this reason, additional measures aiming at further reducing the Bank's market share in its core retail market do not appear to be appropriate in the case of Sparkasse KölnBonn. First, the Commission notes that the core activity was not the source of the Bank's difficulties. Further, Germany provided sufficient evidence showing that such measures would be difficult and disproportionately costly to implement, thereby negatively affecting the underlying earning ability of the Bank, and would constitute a threat to the long-term viability of Sparkasse KölnBonn. Furthermore such measures would adversely affect Sparkasse KölnBonn's core business segments, SMEs and private customers, which, however, were not the source of the Bank's difficulties. Finally, given the limited alternative sources of financing for those customer groups and Commission's case practice, which is aimed at maintaining lending to the real economy, the Commission finds that further constraints to Sparkasse KölnBonn's scope of activities would impact its core business and would therefore be harmful both to the Bank and to the markets it serves.

- (99) The Commission also notes the behavioural commitments provided by Sparkasse KölnBonn and Germany. Those commitments include a price leadership ban and an advertisement ban on the state support, thus preventing Sparkasse KölnBonn from using the aid to fund anti-competitive market conduct. In line with

point 40 of the Restructuring Communication, the acquisition ban furthermore ensures that the State aid will not be used to take over competitors.

- (100) On the basis of the above, the Commission considers that the scale and nature of the measures proposed by Sparkasse KölnBonn are sufficient and adequate to address any distortions of competition. Therefore, the restructuring plan of Sparkasse KölnBonn fulfils the requirements of the Restructuring Communication in terms of viability, burden-sharing and measures to mitigate the distortion of competition and hence allays the doubts expressed in the opening Decision.

8.2.3. Monitoring

- (101) Pursuant to section 5 of the Restructuring Communication, regular reports are required to allow the Commission to verify that the restructuring plan is being implemented properly. Germany will appoint a monitoring trustee who will provide semi-annual monitoring reports. The first report is due in February 2011. The Commission, therefore, finds that proper monitoring of the implementation of the restructuring plan is ensured.

Conclusion on the restructuring plan

- (102) The Commission finds that the restructuring plan set out in chapter 4 of this Decision is compatible with Article 107(3)(b) TFEU.

9. CONCLUSION

- (103) The Commission concludes that the restructuring measures are apt to enable Sparkasse KölnBonn to

restore its long-term viability, sufficient in respect to burden-sharing and appropriate and proportional to offset the market-distorting effects of the aid measures in question. It therefore considers that the submitted restructuring plan fulfils the criteria of the Restructuring Communication and the restructuring measures can therefore be considered compatible with the internal market pursuant to Article 107(3)(b) TFEU. The capital injection measures can therefore be approved in accordance with the restructuring plan,

HAS ADOPTED THIS DECISION:

Article 1

The restructuring aid provided to Sparkasse KölnBonn by its public shareholders constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

The aid is compatible with the internal market, subject to implementation of the restructuring plan and fulfilment of the commitments set out in Annexes I, II and III.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 September 2010.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

European Commission — Financial Crisis Taskforce
DG Competition
Rue Joseph II/Jozef II-sstraat 70
1000 Brussels
Belgium

Case C 32/09 — Sparkasse KölnBonn

COMMITMENTS TOWARDS THE EUROPEAN COMMISSION

Pursuant to Article 7(3) of Council Regulation (EC) No 659/99 ⁽¹⁾, as amended, Germany hereby provides the following commitments concerning Sparkasse KölnBonn in order to enable the European Commission ('the Commission') to find the recapitalisation of Sparkasse KölnBonn compatible with the internal market by decision under Article 107(3)(b) of the Treaty on the Functioning of the European Union.

The commitments are to take effect on the date of the decision's adoption.

This text is to be interpreted within the general framework of EU law and with reference to Regulation (EC) No 659/99, and also taking into consideration the Decision to which the commitments are attached.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

ANNEX I

Section A — Commitments

1. **Corporate governance:** The Federal Government and Sparkasse KölnBonn undertake that Sparkasse KölnBonn will make the following amendments to its corporate governance:

- (a) The number of external members of the Supervisory Board is to be increased from the current two members to four as of 1 January 2011. The total number of Supervisory Board members is to be restricted to 18.
- (b) The Supervisory Board of Sparkasse KölnBonn is to appoint only the following committees in future and to reduce their members to the number stipulated no later than on 1 January 2011.
 - Accounting committee (seven members)
 - Risk committee (six members)
 - Main committee (three members)
- (c) The Strategy committee and the Investment committee are to be abolished no later than on 31 December 2010 and 31 December 2011 respectively.
- (d) All members of the Supervisory Board are to possess the abilities stipulated in the first sentence of §36(3) of the German Banking Act.
- (e) With effect from 1 January 2011 the Management Board of Sparkasse KölnBonn is to tighten the guidelines for investment decisions as follows: The Management Board will be able to take investment decisions only if there is unanimity and — in the case of investments over a nominal value of EUR [2-5] million — following a due diligence check involving an auditor, if necessary.

2. **Proprietary trading:** Sparkasse KölnBonn is to cease trading for its own account. This means that Sparkasse KölnBonn is only to carry out transactions that either

- (a) are necessary to receive, transmit and carry out its clients' orders to buy and sell; or
- (b) help the savings bank perform liquidity or risk management.

Under no circumstances is Sparkasse KölnBonn to create positions on its own account, unless they arise because Sparkasse KölnBonn, for example, does not carry out certain customer orders straight away. Positions of this kind and the liquidity/risk management positions are allowed only if they do not jeopardise the Bank's viability and/or liquidity. Sparkasse KölnBonn is therefore to limit the market risk of its trading portfolio to EUR [3-5] million (Value at Risk at a confidence level of 99 %).

3. **Lending to the economy:** Through its lending and investment activities, conducted under normal market conditions that meet supervisory and banking industry requirements, Sparkasse KölnBonn is to meet the borrowing needs of the business sector, particularly of SMEs.

4. **Reduction of large and cash credit exposures**

As part of its reorientation, Sparkasse KölnBonn is to gradually reduce its large credit exposures in the area of corporate banking in order to reduce the associated risks. The measures include, among other things, limiting the credit lines, requesting additional collateral or transferring risks to other credit institutions.

By the end of 2013 Sparkasse KölnBonn is to reduce its large credit exposures by EUR [900-1 100] million, of which EUR [400-550] million should already be achieved by the end of 2010. Cash credits granted to institutional clients, who are not connected to the Cologne-Bonn region, are to be reduced by EUR [800-900] million by the end of 2013.

5. **Price leadership ban:** Until 31 December 2014 Sparkasse KölnBonn is not, without the prior authorization of the Commission, to offer more favourable prices on the relevant markets for deposit-taking [...] and for long-term mortgage loans [...] than its best-priced competitor among the top 10 market players in terms of market share ⁽¹⁾ in the relevant market.

⁽¹⁾ [...].

6. As soon as Sparkasse KölnBonn becomes aware that it is offering more favourable prices than its best-priced competitor, it will immediately adjust its prices accordingly.
7. **Dividend and coupon ban:** Germany undertakes, with regard to coupon payments and call options on capital instruments, that
- (a) Sparkasse KölnBonn or any other of its entities is not to use the capital or reserves of Sparkasse KölnBonn to pay any coupons on capital instruments, unless (a) there is a legal obligation to do so, or (b) where the payment of the relevant coupon will be covered by the current profits of Sparkasse KölnBonn. In the case of doubts as to the existence of a legal obligation or sufficient current profit for the purpose of this commitment, Sparkasse KölnBonn is to submit the proposed coupon payment to the Commission for approval;
- (b) No entity of Sparkasse KölnBonn is to exercise a call option in respect of these hybrid capital instruments if Sparkasse KölnBonn's total regulatory capital would be reduced as a result.
- During the implementation of the restructuring plan, until 31 December 2014 at the latest, Sparkasse KölnBonn is to pay coupon on and avoid loss absorption by the subordinated capital only if it is obliged to do so, and provided it does not require the release of reserves and of the special items pursuant to §340 f and g of the Commercial Code.
8. **Acquisition ban:** Upon the Decision coming into effect, Sparkasse KölnBonn is not to acquire more than 20 % of the shares in other financial institutions during a period of 3 years. Other participation transactions that are not related to Sparkasse KölnBonn's original customer business in its business model may still be carried out, provided they do not jeopardise the Sparkasse's viability and have been approved by the European Commission. In addition, Sparkasse KölnBonn is to refrain from acquiring participations that are not necessary for its core business, or that entail excessive risks.
9. **No reference to state support in advertising:** Sparkasse KölnBonn is not to use the European Commission's authorisation of the measures, which the European Commission has assessed as constituting State aid, or other competitive advantages resulting therefrom, for advertising purposes.

Section B — The business to be divested

10. Sparkasse KölnBonn is to sell the following participations (referred to together as the business to be divested), in so far as they have not already been sold, by no later than the dates indicated and at the best possible prices. This should enable the essential, valuable elements of the current business to be retained until they are put up for sale.

Participation	To be sold by no later than
Golfclub Gut Lärchenhof GmbH	Already sold in 2009
TA Triumph Adler AG	Already sold in 2009
RW Holding AG	Already sold in 2009
S ProFinanz Versicherungsmakler GmbH	Already sold in 2009
Schufa Holding AG	Already sold in 2009
Sparkassen Servicegesellschaft für Zahlungssysteme und elektronische Vertriebskanäle mbH & Co KG	Assets sold/Liquidation by the end of 2010
[...]	[...]
Campus Grundstückentwicklungs GmbH	Assets already sold/liquidation in 2011
[...]	[...]
[...]	[...]
[...]	[...]
neue leben Pensionsverwaltung AG	End of 2010
[...]	[...]
[...] ⁽²⁾	[...]
[...] ⁽³⁾	[...]

⁽²⁾ [...].

⁽³⁾ [...].

11. In order to avoid undue distortions of competition, Sparkasse KölnBonn undertakes to sell, or procure the sale of the above-mentioned businesses to be divested as going concerns under the terms of sale approved by the Commission in accordance with the procedure described in paragraph 26. Sparkasse KölnBonn undertakes to enter into a final, binding purchase agreement for the sale of the business to be divested within the first divestiture period ⁽⁴⁾. If Sparkasse KölnBonn has not entered into such an agreement by the end of the first divestiture period,
- (a) the deadline will be extended by a further [...] if Sparkasse KölnBonn can prove that [...]. Sparkasse KölnBonn undertakes to enter into a final, binding purchase agreement [...] within the extended divestiture period for the sale of the business to be divested;
 - (b) if Sparkasse KölnBonn has not entered into such an agreement by the end of the extended divestiture period, it is to grant the divestiture trustee an exclusive mandate to sell the business to be divested within the trustee divestiture period ⁽⁵⁾. The procedure for the nomination of the divestiture trustee, and his duties are set out in Annex III.
12. The commitment to divest will be considered fulfilled if Sparkasse KölnBonn enters into a final, binding purchase agreement by the end of the period under paragraph 10 or of the extended period under paragraph 11 with a buyer that fulfils the conditions in paragraphs 25 and 26, and if the transfer of the business to be divested is effected no later than 6 months after the conclusion of the purchase agreement.
13. Sparkasse KölnBonn is to sell the following participations by no later than 31 March 2011 to the city of Cologne, a company connected with the city of Cologne or a third party:
- [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
 - [...]
14. The individual transactions with the city of Cologne are to be carried out under normal market conditions. For this purpose, the current market value of the sales object at the time of transfer is to be determined by an independent expert. The monitoring trustee is to monitor the individual transactions.
- In the context of the transaction it is also permitted to transfer the assets and business activities of a company, instead of the company in question, if this serves the intended business purpose.
15. An auditing company is to verify the valuation of the assets and the contractually agreed general business data on behalf of the purchaser.
16. Before the transaction takes place, the monitoring trustee is to be informed of its details.
17. In order to maintain the structural effect of the commitments, Sparkasse KölnBonn may not, for a period of [...] after they become effective, acquire direct or indirect influence over the whole or part of the business to be divested, unless the Commission has previously found that the structure of the market has changed to such an extent that protecting the business to be divested from such influence is no longer necessary in order to render the restructuring measures compatible with the internal market.
18. In the future Sparkasse KölnBonn is to grant no more than [30-60] % of the financing to its subsidiaries that are to be divested. An exception is made for existing loans until the due date under the loan agreement.

⁽⁴⁾ Period from the Decision's entry into force until the dates stated in paragraph 10.

⁽⁵⁾ [...].

19. The profits from the sale of Sparkasse KölnBonn's participations are to be used entirely to fund the restructuring plan.

Section C — Divestment-related commitments

Preservation of the viability, marketability and competitiveness of the business to be divested

20. From the date on which the commitments become effective until transfer, Sparkasse KölnBonn is to preserve, in accordance with good business practice, the economic viability, marketability and competitiveness of the business to be divested and is to minimise as far as possible any risk that may reduce its competitive potential. Sparkasse KölnBonn undertakes, in particular
- (a) not to carry out any activity that might have an adverse impact on the value, management or competitiveness of the business to be divested, or that might alter the nature and scope of its activity, its industrial or commercial strategy or its investment policy;
 - (b) to make available sufficient resources for the development of the business to be divested, on the basis of and by implementing the existing business plans;
 - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all key personnel to remain with the business to be divested.

Hold-separate obligations of Sparkasse KölnBonn towards the business to be divested

21. Sparkasse KölnBonn undertakes, from the date on which the commitments become effective until transfer, to keep the business to be divested separate from the businesses it is retaining and to ensure that the managers of the subsidiaries who are operating the business to be divested have no involvement in the management of any business retained and vice versa.
22. Until the transfer, Sparkasse KölnBonn is to assist the monitoring trustee in ensuring that the business to be divested is managed as a distinct and saleable entity.

Non-solicitation clause

23. Sparkasse KölnBonn undertakes, subject to the customary limitations, not to solicit the key personnel transferred with the business to be divested for a period of 12 months after closure, and will ensure that the affiliated undertakings do not solicit them either.

Due diligence

24. In order to enable potential purchasers to carry out a reasonable due diligence check of the business to be divested, Sparkasse KölnBonn undertakes, subject to the customary confidentiality assurances and depending on the stage of the divestiture process, to:
- (a) provide potential purchasers with sufficient information on the business to be divested;
 - (b) give potential purchasers sufficient information on and reasonable access to the personnel.

Section D — The purchaser

25. In order to ensure the immediate restoration of effective competition,
- (a) the purchaser must be independent of and unconnected to Sparkasse KölnBonn. This does not apply, however, to the sale of [...], [...] and the participations listed in paragraph 13 to the responsible municipalities, their affiliated companies, and members of the Sparkassen financial group;
 - (b) the purchaser must have the financial resources, proven expertise and incentive to maintain and develop the business to be divested as a viable and active competitive force in competition with Sparkasse KölnBonn and other competitors;
 - (c) in the light of the information available to the Commission, the purchaser must not give rise to prima facie competition concerns, nor to a risk that the fulfilment of the commitments will be delayed, and can, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.
26. As soon as Sparkasse KölnBonn reaches an agreement with a purchaser, it is to submit a fully documented and reasoned proposal, including a copy of the final agreement, to the Commission and the monitoring trustee. Sparkasse KölnBonn must be able to demonstrate to the Commission that the purchaser meets the relevant requirements and that the business to be divested is being sold in a manner consistent with the commitments. The Commission is to verify that the purchaser meets the relevant requirements and that the business to be divested is being sold in a manner consistent with the commitments.

Section E — Other commitments

27. **Early partial repayment and partial conversion of the certificates of participation:** The Federal Government and Sparkasse KölnBonn hereby commit to the following successive and integrated measures for improving Sparkasse KölnBonn's core capital ratio:
- (a) Zweckverband Sparkasse KölnBonn (Sparkasse KölnBonn special-purpose association) will purchase by 31 December 2011, to be effective as of 1 January 2011, a first tranche of EUR 150 million in certificates of participation of the Rheinische Sparkassen-Förderungsgesellschaft and convert them into an instrument recognised as regulatory core capital (tier 1 capital).
 - (b) By 31 December 2011 Sparkasse KölnBonn will repurchase a second tranche of EUR 150 million in certificates of participation of the Rheinische Sparkassen-Förderungsgesellschaft, provided that this is compatible with Sparkasse KölnBonn's risk-bearing capacity and has been approved by the Federal Financial Supervisory Agency.
28. Germany undertakes that the conditions of the partial conversion and partial repurchase of the certificates of participation will be formulated in such a way that further State aid is ruled out.
29. **Reduction of the total assets:**
- In addition to the measures already carried out to reduce the total assets, Sparkasse KölnBonn undertakes to reduce other assets (large-scale lending activities, short-term lending, investments) by EUR [2,5-4] billion by the end of 2014. On the other hand, however, Sparkasse KölnBonn is to develop its core business activities (in particular, regional retail and corporate lending) while ensuring that the net total assets do not exceed EUR [25-30] billion at the end of 2014. In line with this, the Sparkasse KölnBonn's risk weighted assets are not to exceed EUR [16-19] billion at the end of 2014.
30. The complete and correct implementation of all the conditions contained in this document is to be fully monitored on an ongoing basis and checked in detail by an adequately qualified and independent monitoring trustee. The appointment and duties of the monitoring trustee are laid down in Annex II.

.....
Duly authorised for and on behalf of

[Indicate the name of the MS]

ANNEX II

APPOINTMENT AND DUTIES OF THE MONITORING TRUSTEE**I. The Monitoring Trustee**

1. The Federal Republic of Germany shall appoint a Monitoring Trustee.
2. The Monitoring Trustee shall be one or several natural or legal person(s) independent of Sparkasse KölnBonn who will be approved by the Commission and appointed by the Federal Republic of Germany, and will have the duty to monitor whether Sparkasse KölnBonn complies with its obligations towards the Commission and implements the restructuring plan.
3. The Monitoring Trustee must be independent of Sparkasse KölnBonn and must possess the necessary qualifications to carry out its mandate, for example as an investment bank, consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall be remunerated by Sparkasse KölnBonn, which shall not impede the independent and effective fulfilment of its mandate.

II. Appointment of the Monitoring Trustee*Proposal by the Federal Republic of Germany*

4. No later than 4 weeks after the date of delivery of the Decision, the Federal Republic of Germany shall submit for the Commission's approval the names of two or more persons as Monitoring Trustees and shall indicate which of those is its first choice. The proposal must contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 3 and shall include:
 - (a) the full terms of the proposed mandate together with all the provisions necessary to enable the Monitoring Trustee to carry out its duties in accordance with these commitments;
 - (b) the outline of a work plan describing how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

5. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. The Monitoring Trustee shall be appointed within 1 week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Federal Republic of Germany

6. If all the proposed Monitoring Trustees are rejected, the Federal Republic of Germany shall, within 1 week of being informed of the rejection, submit the names of at least two other persons or institutions, in accordance with the conditions and according to the procedure in paragraphs 1 and 5.

Monitoring Trustee nominated by the Commission

7. If all further proposed Monitoring Trustees are also rejected by the Commission, the Commission shall nominate a Monitoring Trustee(s), whom the Federal Republic of Germany shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

III. The duties of the Monitoring Trustee

8. It is to be the duty of the Monitoring Trustee to ensure compliance with the conditions and obligations attached to the Decision and guarantee implementation of the restructuring plan.

Duties and obligations of the Monitoring Trustee

9. The Monitoring Trustee shall
 - (i) propose to the Commission within 4 weeks of appointment a detailed work plan describing how it plans to monitor compliance with the commitments towards the Commission and implementation of the restructuring plan;
 - (ii) oversee the ongoing management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness;

- (iii) monitor compliance with all obligations towards the Commission and implementation of the restructuring plan;
 - (iv) propose measures, which the Monitoring Trustee considers necessary to ensure compliance by the Federal Republic of Germany with all commitments towards the Commission, in particular the preservation of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
 - (v) submit to the Commission, Sparkasse KölnBonn and the Federal Republic of Germany within 30 days after the end of each half year the draft of a written report in German or English. The report shall cover the Monitoring Trustee's fulfilment of its obligations under the Mandate, compliance with all conditions and obligations and the implementation of the restructuring plan. All recipients of the draft report shall be able to submit their observations within 5 working days. Within 5 working days of receipt of the comments, the Monitoring Trustee shall prepare a final report and submit it to the Commission, taking into account, if possible and at his sole discretion, the comments submitted. The Trustee will also send a copy of the final report to the Federal Republic of Germany and to Sparkasse KölnBonn. Should the draft report or the final report contain any information that must not be disclosed to Sparkasse KölnBonn or the Federal Republic of Germany, Sparkasse KölnBonn or the Federal Republic of Germany shall only be provided with a non-confidential version of the draft report or the final report. The Monitoring Trustee shall submit no version of the report to the Federal Republic of Germany and/or Sparkasse KölnBonn before submitting it to the Commission.
10. The Commission can give the Monitoring Trustee instructions or directions in order to ensure that the commitments towards the Commission are met and the restructuring plan implemented.
11. For the duration of the mandate, the cities of Cologne and Bonn and Sparkasse KölnBonn shall undertake to give instructions to the Monitoring Trustee only following the approval of the Commission.
12. The Federal Republic of Germany shall provide for all such cooperation, support and information which the Monitoring Trustee may reasonably require in order to perform its tasks. The Monitoring Trustee shall have unlimited access to the books, records, documents, managers and other staff members, to files, locations and technical information of Sparkasse KölnBonn or the Divestment Business, which are necessary in order to perform its tasks in accordance with the obligations.
-

ANNEX III

**APPOINTMENT AND DUTIES OF THE DIVESTITURE TRUSTEE
THE DIVESTITURE TRUSTEE****I. The Divestiture Trustee**

1. The Federal Republic of Germany shall appoint a Divestiture Trustee.
2. The Divestiture Trustee shall be one or several natural or legal person(s) independent of Sparkasse KölnBonn who will be approved by the Commission and appointed by the Federal Republic of Germany, and will have the duty to divest the Divestment Business in accordance with the obligations towards the Commission.
3. The Divestiture Trustee must be independent of Sparkasse KölnBonn and must possess the necessary qualifications to carry out its mandate, for example as an investment bank, consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall receive normal market remuneration from Sparkasse KölnBonn that does not impede the independent and effective fulfilment of its mandate.

II. Appointment of the Divestiture Trustee*Proposal by the Federal Republic of Germany*

4. If Sparkasse KölnBonn has not entered into a binding sale and purchase agreement 1 month before the end of the extended Divestiture Period, the Federal Republic of Germany will submit for the Commission's approval two or more persons as Divestiture Trustees and shall indicate which of those is its first choice. The proposal must contain sufficient information for the Commission to verify that the proposed Divestiture Trustee meets the conditions laid down under paragraph 3, and must in particular include:
 - (a) the full terms of the proposed mandate together with all the provisions necessary to enable the Divestiture Trustee to fulfil its duties in accordance with these commitments;
 - (b) the outline of a work plan describing how the Divestiture Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

5. The Commission shall have the discretion to approve or reject the proposed Divestiture Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Divestiture Trustee to fulfil its obligations. The Divestiture Trustee shall be appointed within 1 week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Federal Republic of Germany

6. If all the proposed Divestiture Trustees are rejected, the Federal Republic of Germany shall, within 1 week of being informed of the rejection, submit the names of at least two other persons or institutions, in accordance with the conditions and according to the procedure in paragraphs 1 and 5.

Divestiture Trustee nominated by the Commission

7. If all further proposed Divestiture Trustees are also rejected by the Commission, the Commission shall nominate a Divestiture Trustee(s), whom the Federal Republic of Germany shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

III. The duties of the Divestiture Trustee

8. It shall be the duty of the Divestiture Trustee to fulfil the conditions and obligations laid down in the Decision regarding the business to be divested. The Divestiture Trustee shall prepare and carry out the purchase so that a sale and purchase agreement is signed [...]. The Divestiture Trustee shall be authorised to carry out the sale of the Divestment Business on behalf of Sparkasse KölnBonn, without being subject to instructions, [...].
9. The Divestiture Trustee shall
 - (i) propose to the Commission within 4 weeks of appointment a detailed plan of work describing how it plans to fulfil the conditions and obligations in the Decision regarding the business to be divested; it shall in particular present a concept for the divestiture and an assessment as to which divestiture strategy is the most promising;

- (ii) shall sell the divestment business to a buyer [...], in so far as the Commission has not raised any objections regarding the buyer or the final binding sale and purchase agreement within 4 weeks of these being made known. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale. The Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale;
 - (iii) take on the other duties which are conferred on the Divestiture Trustee in the Decision;
 - (iv) propose such measures as it considers necessary to ensure compliance by the Federal Republic of Germany with all commitments towards the Commission, in particular the preservation of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
 - (v) submit to the Commission comprehensive monthly reports in English or in German on the development of the divestment procedure. These reports shall be submitted no later than 15 days after the end of each month. At the same time Sparkasse KölnBonn or the Federal Republic of Germany shall receive non-confidential versions of the report.
10. To prepare and carry out the divestiture, the Divestiture Trustee shall in particular provide the following services:
- (i) examining different options for the divestiture; a detailed proposal taking account of the framework conditions for the structuring and concluding of the sale procedure;
 - (ii) compiling the necessary marketing documents on the participation of Sparkasse KölnBonn concerned (in particular the sales memorandum, teasers, and other presentations which are necessary or beneficial for a sale process). These are to be given to interested parties by way of initial information on the pending sale;
 - (iii) in close agreement with the Sparkasse: preparing the content and logistical coordination of the due diligence process;
 - (iv) identifying potential purchasers and contacting the decision-making bodies of these interested parties. For legally binding reasons with regard to the interests of secrecy and in line with the requirement for a non-discriminatory sale, a potential purchaser will, at the request of the Sparkasse, be denied access to the due diligence information (the burden of proof lying with the Sparkasse), whereby this right must be exercised within 3 working days following receipt of the list of potential purchasers;
 - (v) collecting and examining sales offers made by interested parties; support with the evaluation of these offers;
 - (vi) conducting sales negotiations with selected interested parties and preparing the conclusion of the contract.
11. The Divestiture Trustee will be given all the necessary powers of attorney with which the Sparkasse or the subsidiaries it controls will authorise the Divestiture Trustee to complete and carry out the divestiture. The powers of attorney include the power to issue sub-delegated powers in order to carry out and complete the divestiture correctly.
12. The powers of attorney in question shall be maintained until the divestiture is fully completed. The powers of attorney and all sub-delegated powers shall come to an end at the end of the Divestiture Trustee's mandate.
13. The Divestiture Trustee is authorised to commission further advisers to support it in the sale process. As soon as consultancy costs exceed the overall sum of EUR [...], the agreement of Sparkasse KölnBonn is required. If Sparkasse KölnBonn refuses to give its agreement, the Commission instead may, after consulting Sparkasse KölnBonn, approve the commissioning of advisers. Only the Divestiture Trustee can give the advisers instructions or directions.
14. The Divestiture Trustee has to involve the European Commission in each exchange with the Sparkasse, the Träger (responsible public institution) or Germany or to inform these immediately about the exchange.
15. The Träger and Sparkasse KölnBonn shall undertake to support the Divestiture Trustee, to cooperate with it and to provide it with all the information it requires or requests in order to carry out and duly fulfil this mandate. To this end, the Divestiture Trustee shall have access, within legally permissible limits and during normal working hours, to all documents, books and the management or other staff of Sparkasse KölnBonn.
16. Where considered necessary by the Sparkasse and the Träger for the proper execution of the divestiture, they shall allow the Divestiture Trustee access on request to any information or documents available only to them. This applies in particular to each version of the restructuring plan agreed with the European Commission.
17. The Sparkasse shall undertake to exempt the Divestiture Trustee from all claims for damages from third parties, which arise during or in connection with the execution of the mandate. This shall exclude damages based on a breach of obligation on the part of the Divestiture Trustee. Should the Divestiture Trustee be informed of claims which might lead to payment obligations on the part of the Träger or Sparkasse KölnBonn, the Divestiture Trustee shall immediately notify this.

18. The Divestiture Trustee shall be obliged to provide services always with the due care of a prudent businessman. Should there nevertheless be a breach of duty, the Divestiture Trustee shall only be liable towards the Sparkasse, the Träger or Germany to provide compensation for damages if the Divestiture Trustee or its bodies, employees or assistants have intentionally or through gross negligence brought about the reason for the liability in so far as the key contractual obligations are not affected. The Divestiture Trustee shall also be liable for breaching such obligations through simple negligence but only in the amount of typical and foreseeable damages. Liability for loss of anticipated profits shall be excluded.
 19. The Commission may give the Divestiture Trustee instructions or directions in order to guarantee that the conditions and obligations in relation to the Divestment Business are fulfilled.
 20. The cities of Cologne and Bonn and Sparkasse KölnBonn shall undertake not to give the Divestiture Trustee instructions for the duration of the mandate.
-

COMMISSION DECISION

of 26 January 2011

on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*)

(notified under document C(2011) 275)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/527/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾,

Whereas:

submitted further information on 2 July 2010. The Commission did not receive any comments from interested parties.

2. DESCRIPTION OF THE MEASURE

2.1. Background

1. PROCEDURE

- (1) By letters dated 5 August 2009 and 30 September 2009 the Commission asked Germany for information about §8c Corporate Income Tax Act (*Körperschaftsteuergesetz*, hereinafter: KStG). The German authorities replied to these requests by letters dated 20 August 2009 and 5 November 2009. By decision of 24 February 2010, the Commission opened the formal investigation procedure in respect of the aid laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).
- (2) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit comments.
- (3) The German authorities submitted their reply by letter dated 9 April 2010.
- (4) Two meetings with the German authorities were held in Brussels on 9 April 2010 and 3 June 2010. Germany

- (5) Corporate taxation in Germany is based mainly on the Income Tax Act (*Einkommensteuergesetz*, hereinafter: EStG) and the KStG. §10d(2) EStG allows losses incurred in a tax year to be carried forward, i.e. according to the ability-to-pay principle, taxable income in future tax years may be reduced by setting off the losses up to a maximum of EUR 1 million each year. Under §8(1) KStG, this possibility to carry forward losses also applies to entities subject to corporate income tax.
- (6) The possibility of carry-forward of losses resulted in trade in empty-shell companies (*Mantelgesellschaften*), which had long ceased any economic activity but still retained losses that had been carried forward.
- (7) To counteract the trade in empty-shell companies, in 1997 the German legislator restricted the possibility of carrying forward losses by introducing in §8(4) KStG the shell acquisition rule (*Mantelkaufregelung*). The rule restricted loss carry-forward to those corporate entities that were legally and economically identical to the entity that incurred the losses. The rule does not contain a definition of 'economically identical', but gives one negative and two positive examples:
 - (a) a corporate entity is not economically identical if more than half of its shares are transferred and if the entity then continues its economic activity or starts it again with predominantly new assets;
 - (b) a corporate entity is economically identical, however, if the injection of new assets is solely for the purpose of restructuring the loss-making entity and if the activity which gave rise to the unrelieved loss carry-forward continues on a comparable scale for the following five years;

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood where appropriate as references to Articles 87 and 88, respectively, of the EC Treaty.

⁽²⁾ OJ C 90, 8.4.2010, p. 8.

⁽³⁾ See footnote 2.

- (c) a corporate entity is also economically identical if, rather than injecting new assets, the acquiring entity covers the losses that have accrued at the loss-making entity.
- (8) The last two examples were commonly referred to as the ‘*Sanierungsklausel*’ (clause allowing for restructuring of companies in difficulty).
- (9) §8(4) KStG was repealed with effect from 1 January 2008 by the Business Taxation Reform Act 2008 (*Unternehmensteuerreformgesetz*).
- (10) The same act introduced the new §8c(1) KStG, which imposes much tighter restrictions than §8(4) KStG on loss carry-forward in the case of changes in the shareholding of a corporate entity. Under the new rule:
- (a) unused losses are forfeited entirely if more than 50 % of the share capital, membership rights, ownership rights or voting rights is transferred to an acquirer;
- (b) if, within a period of five years, more than 25 % but not more than 50 % of the share capital, membership rights, ownership rights or voting rights is transferred, unused losses are forfeited on a pro rata basis.
- (11) Initially the new rule did not provide any exception for companies in the process of restructuring and at the same time subject to a significant change in ownership.
- (12) According to the explanatory memorandum adopted by the German Parliament with the Business Taxation Reform Act 2008, the purpose of replacing §8(4) KStG by the new §8c(1) KStG was to simplify the rules (the explanatory memorandum states that the practical application of §8(4) KStG had raised many difficult legal questions) and to better target abuse⁽⁴⁾. The legislator was aware that the change meant that, in the case of a restructuring of an undertaking in difficulty which implied a change in ownership, carry-forward of losses would no longer be possible. This was regarded as acceptable, however, since the tax authorities could waive tax debts in such a situation based on considerations of equity, even without explicit legislative provision⁽⁵⁾.

2.2. The measure

- (13) In June 2009 an amendment to §8c KStG introduced §8c(1a) KStG, under which loss carry-forward is still possible where a company in difficulty is acquired for the purpose of restructuring. This amendment formed part of the Citizens’ Relief Act — Health Insurance Fund (*Bürgerentlastungsgesetz Krankenversicherung*)⁽⁶⁾. The new provision is again referred to as *Sanierungsklausel* or new *Sanierungsklausel* in order to distinguish it from its predecessor §8(4) KStG. It creates an exception to the limitation of tax loss carry-forward introduced with effect from 1 January 2008 by §8c(1) KStG.
- (14) Under §8c(1a) KStG, a corporate entity can carry forward losses despite a change in its shareholding that is caught by §8c(1) KStG provided the following requirements are met:
- (a) the acquisition serves the purpose of restructuring the corporate entity⁽⁷⁾;
- (b) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition⁽⁸⁾;
- (c) the company’s fundamental business structures are preserved, which requires:
- the corporate entity to honour an agreement between management and works council (*Betriebsvereinbarung*) on the preservation of jobs, or
- preservation of 80 % of the jobs (in terms of the average annual wage bill) for the first five years following the acquisition, or

⁽⁶⁾ Gesetz zur verbesserten steuerlichen Berücksichtigung von Vorsorgeaufwendungen (*Bürgerentlastungsgesetz Krankenversicherung*), 16 June 2009, BGBl. I No 43, p. 1959.

⁽⁷⁾ Restructuring (*Sanierung*) is a measure to avoid or overcome insolvency (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*). Accordingly, eligibility is limited to companies that are, or are likely to be, insolvent or over-indebted when the change in shareholding takes place.

⁽⁸⁾ The terms ‘insolvency’, ‘risk of insolvency’ and ‘over-indebtedness’ are defined in German insolvency legislation (*Insolvenzordnung*, hereinafter: InsO). In particular, Insolvency (§ 17 InsO): the debtor is deemed unable to meet due payment obligations. As a rule, a debtor is presumed to be insolvent if it has ceased payments. Risk of insolvency (§ 18 InsO): the debtor is deemed to be at risk of insolvency if it is unlikely to be able to meet its existing payment obligations on the due date. Over-indebtedness (§ 19 InsO): the debtor is over-indebted where its assets no longer cover its existing liabilities; unless it is highly likely, given the circumstances, that the company will continue to exist.

⁽⁴⁾ Bundestagsdrucksache 16/4841, p. 74.

⁽⁵⁾ Bundestagsdrucksache 16/4841, p. 76, referring to a circular from the Federal Ministry of Finance dated 27 March 2003; BStBl I, p. 240.

- injections of significant business assets or write-off of debts which still have an economic value within 12 months; business assets are significant if they represent at least 25 % of the assets of the previous financial year; any transfer back to the acquiring entity within the first three years are deducted;

(d) the company does not change sector of activity during the five years following the acquisition;

(e) the company had not ceased operation at the time of the acquisition.

(15) §8c(1a) KStG entered into force on 10 July 2009 and applies retroactively from 1 January 2008.

(16) Initially, §8c(1a) KStG was introduced only for a limited time, until 31 December 2009. However, on 22 December 2009, as part of the Economic Growth Acceleration Act 2009 (*Wachstumsbeschleunigungsgesetz*)⁽⁹⁾, the German Parliament adopted a provision that deleted the corresponding sunset clause from the KStG.

(17) It should be noted that the losses carried forward can be offset only against the profits of the company that is being restructured. The acquiring company cannot offset the losses against its own profits.

(18) This holds true even if the acquiring company consolidates its tax liabilities at group level since §15, first sentence, number 1 KStG prohibits loss carry-forward if a controlled subsidiary company (*Organgesellschaft*) forms part of an integrated group (*Organschaft*)⁽¹⁰⁾.

(19) However, under German corporate tax law such losses are not forfeited; they are merely 'frozen' at the level of the entity and may be used only once the company is no longer consolidated. There is no time limit for the carry-forward of these 'frozen' losses.

(20) The acquiring company benefits indirectly from §8c(1a) KStG because, once the restructuring process has been successfully completed, the tax burden of the restructured entity is reduced. Furthermore, the acquiring company

may of course merge part or all of its activities into the acquired company and hence use the losses carried forward.

2.3. Comparison between §8c(1a) KStG and §8(4) KStG

(21) The new rule in §8c(1a) KStG differs from the preceding rule, the repealed §8(4) KStG, in one important aspect which is crucial for the assessment for State aid purposes.

(22) Under §8c(1) KStG, a company forfeits its loss carry-forward where more than half of the shares are transferred, unless the *Sanierungsklausel* is applicable. Thus, the general rule is the forfeiture of loss carry-forwards on significant changes in ownership. The existing *Sanierungsklausel* therefore is the exception to the general rule.

(23) Under the earlier §8(4) KStG, the general rule was continuation of loss carry-forwards in the case of significant changes in ownership, provided that the company was economically identical. This exception was intended to prevent abuse, for example in the form of trading in shell companies.

3. THE OPENING DECISION

(24) By letter dated 24 February 2010 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of this measure.

(25) In the opening decision, the Commission took the view that §8c(1a) KStG differentiates between financially sound loss-making companies and companies that are (potentially) insolvent or over-indebted, by benefiting only the latter. §8c(1a) KStG thus seemed to depart from the system of reference, according to which both types of companies would not be eligible for loss carry-forward. The Commission therefore reached the preliminary conclusion that the measure is selective and constitutes State aid, since the preconditions of Article 107(1) TFEU appeared to be fulfilled. Finally, the Commission expressed its doubts about the compatibility of the measure with Article 107(3)(b) TFEU, as interpreted by the Temporary Framework⁽¹¹⁾, and with Article 107(3)(c), as interpreted by the Rescue and Restructuring Guidelines⁽¹²⁾ and the Regional Aid Guidelines⁽¹³⁾.

⁽⁹⁾ Gesetz zur Beschleunigung des Wirtschaftswachstums (*Wachstumsbeschleunigungsgesetz*), 22 December 2009 (BGBl I, p. 3950), Article 2(3)(b).

⁽¹⁰⁾ Losses at sub-group level, cf § 15 No 1 KStG.

⁽¹¹⁾ Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

⁽¹²⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

⁽¹³⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

(26) The decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁴⁾. The Commission invited Germany and interested parties to submit comments.

(27) After the opening of the formal investigation procedure, the German Federal Ministry for Finance instructed the tax authorities responsible for tax collection to cease applying §8c(1a) KStG until the Commission had adopted a final decision in the case and to inform the entities concerned that in the event of a negative final decision by the Commission, State aid would have to be recovered ⁽¹⁵⁾.

4. COMMENTS BY GERMANY

(28) Germany takes the view that §8c(1a) KStG does not constitute State aid, for three reasons:

(a) it complies with the private market creditor principle (see 4.1);

(b) it is not selective (see 4.2);

(c) it is justified by the nature and the overall structure of the German tax system (see 4.3).

(29) Germany further argues that the new *Sanierungsklausel* in §8c(1a) KStG corresponds in essence to the old *Sanierungsklausel* in §8(4) KStG, which had never been criticised by the Commission (see 4.4) and that a number of other Member States had similar tax rules in place (see 4.5).

4.1. Compliance with the private market creditor principle

(30) This argument was put forward by the German authorities for the first time in their letter dated 2 July 2010. Germany claims that the private creditor principle may be also invoked with respect to tax debts or quasi-tax debts ⁽¹⁶⁾. The relationship of the German State towards its taxpayers is argued to be comparable with the relationship between a private creditor and a debtor, which are linked by a long-term contract, such as a rent contract or an employment contract. In the view of the

German authorities, a private creditor party to a long-term contract would forego part of their future claims, if that enabled another undertaking to take over the debtor, thus ensuring the continuation of the long-term contract.

4.2. Absence of selectivity

(31) Germany takes the view that §8c(1a) KStG is a general measure, since it may be used by all undertakings, regardless of their region, sector and size. Germany points out that any undertaking could potentially find itself in financial difficulties outside its control and be a candidate for application of the rule.

(32) The German authorities note that the Commission itself had taken the view, in its 1998 Notice on business taxation, that, 'provided that they apply without distinction to all firms and to the production of all goods', tax measures of a purely technical nature, such as rules on loss carry-overs, were not selective, and that 'the fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid' ⁽¹⁷⁾.

(33) Germany takes the view that these considerations were of particular importance for tax incentives for research and development, but also for environmental protection, training and employment. In the view of the German authorities, tax rules that favour undertakings making particular efforts in these areas are not selective, since they are open to all undertakings, even if de facto they are of greater benefit to undertakings active in certain sectors than others. In Germany's view, the same reasoning should also apply to tax rules that favour undertakings in difficulty which are acquired in order to be restructured.

(34) Germany argues that the Court and the General Court had accepted that a measure benefiting exclusively undertakings in difficulty may, in principle, constitute a general measure, which is not selective. In this context Germany cites in the first instance *DMT*, where the Court held with regard to a Belgian payment facility for undertakings in difficulties that ⁽¹⁸⁾:

'The French Government argues that payment facilities in relation to social security contributions do not constitute State aid if they are granted in identical circumstances to any undertaking experiencing financial difficulties. That would seem to be the case under the regime established by the Belgian legislation. The Commission, however, claims that the ONSS has a discretionary power in regard to the grant of payment facilities.

⁽¹⁴⁾ See footnote 2.

⁽¹⁵⁾ Circular from the Federal Ministry of Finance dated 30 April 2010 addressed to the tax authorities of the *Länder* (responsible for tax collection): http://www.bundesfinanzministerium.de/DE/BMF_Startseite/Aktuelles/BMF_Schreiben/Veroffentlichungen_zu_Steuerarten/koerperschaftsteuer_umwandlungsteuerrecht/009.html

⁽¹⁶⁾ Germany cites the following cases: Case C-276/02 *Spain v Commission* [2004] ECR I-8091, paragraphs 15 and 26, and Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913, paragraphs 22 and 25.

⁽¹⁷⁾ Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), recitals 13 and 14.

⁽¹⁸⁾ *Déménagements-Manutention Transport SA (DMT)*, cited above, recitals 26 to 28.

It follows from the wording of Article 92(1) of the Treaty that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (see, to that effect, Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 23 and 24).

It is for the national court in the main proceedings to determine whether the ONSS's power to grant payment facilities is discretionary or not and, if it is not, to establish whether the payment facilities granted by the ONSS are general in nature or whether they favour certain undertakings.'

- (35) Germany also cites *HAMSA*, where the Spanish authorities had argued that a measure is not selective because it applies to all undertakings in difficulty. On that point, the General Court held that ⁽¹⁹⁾:

'In the present case, the argument relied on by the applicant and the Kingdom of Spain to the effect that the Spanish law of 26 July 1922 concerning suspension of payments institutes a general procedure, applicable to all companies in difficulty, cannot be accepted. Whilst it is true that the law does not have authority to apply selectively in favour of certain categories of undertakings or sectors of activity, it must be remembered that the debt remissions criticised by the Commission do not flow automatically from the application of the law, but from the discretionary decisions made by the public bodies in question. It is, moreover, settled case-law that where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27).'

- (36) The German authorities argue that, unlike the measures in *DMT* and *HAMSA*, §8c(1a) KStG does not provide for discretionary decisions by public bodies, but that its application flows automatically from the law. Therefore, applying the *a contrario* argument, §8c(1a) KStG is not selective.
- (37) Germany also takes the view that §8c(1a) KStG forms part of the body of rules under German insolvency law. In particular, the eligibility of an undertaking is based on the notions of insolvency, risk of insolvency and over-

indebtedness, which are defined in the InsO and which provide grounds for the opening of insolvency procedures.

- (38) On the question of selectivity, Germany concludes that the Commission's view would mean that any tax reduction constituted State aid, even if it were generally applicable, and that such a position was in breach of the TFEU.

4.3. Justification by the nature or overall structure of the tax system

- (39) Germany asserts that the exemption created by §8c(1a) KStG is justified by the nature and overall structure of the German corporate tax system. It claims that there is an objective difference between undertakings in difficulty which are in need of restructuring and other undertakings, and that this objective difference justifies different treatment of undertakings in difficulty which are acquired in view of restructuring. The German authorities base their argument on three considerations.

- (40) Firstly, whereas financially sound undertakings have a choice between seeking finance on the capital markets and looking for an undertaking to acquire them, undertakings in difficulty only have the latter option, as they will not be able to raise debt on the capital market or obtain a bank loan. As a result, undertakings in difficulty will systematically forfeit the possibility of carrying forward their losses, whereas healthy undertakings always have the choice between debt financing and looking for a buyer.

- (41) Secondly, the *ratio legis* of §8c(1) KStG, i.e. preventing trade in empty-shell companies with accumulated losses, does not require the exclusion of loss carry-forward in situations where the acquisition is for the purpose of restructuring rather than simply tax optimisation. Without the restriction of §8c(1a) KStG to acquisitions of undertakings in financial difficulty in view of restructuring, i.e. if other acquisitions were also included, the *ratio legis* could no longer be maintained.

- (42) Thirdly, the purpose of §8c(1) KStG is to ensure that the sale price of stakes in undertakings is based solely on the economic value of the undertaking and that the value of accumulated losses for tax optimisation does not affect the sale price. In the case of the acquisition of an undertaking in difficulty in view of restructuring, however, the possible value of accumulated losses plays no particular role. To substantiate this argument, Germany points out that accountants do not attach any value, in commercial group accounts, to potential carried-forward losses of an ailing undertaking.

⁽¹⁹⁾ Case T-152/99 *Hijos de Andrés Molina SA (HAMSA)* [2002] ECR II-3049, paragraph 157.

- (43) For these three reasons taken together, Germany considers that, even if §8c(1a) KStG were *prima facie* selective, it is in any event justified by the nature and overall structure of the German corporate tax system.

4.4. Link between new and old *Sanierungsklausel*

- (44) Germany observes that, with effect from 1 January 2008, §8c KStG replaced a similar rule that was repealed at the same time, namely §8(4) KStG. Both rules pursue the same objective, i.e. the prevention of trade in empty-shell companies with accumulated losses.
- (45) Germany notes that the Commission had never expressed any concerns with regard to §8(4) KStG, and that it therefore appears that this rule did not constitute State aid.
- (46) Germany therefore regards the Commission's position in this regard as incoherent.

4.5. Similar rules in other tax systems

- (47) Germany has pointed out that many other Member States have comparable rules to §8c(1a) KStG. Examples are Austria, Belgium, Finland, Italy, Luxembourg and the Netherlands. It notes that the Commission has not taken any action under the State aid rules against these Member States, despite the great similarities between the systems.
- (48) In relation to paragraph 34 of the opening decision, which sets out the action the Commission has taken with respect to the French system, Germany stresses that the German system differs from the French system, which is limited to certain sectors of the economy and provides a complete exemption from corporate income tax.

5. ASSESSMENT OF THE MEASURE

- (49) Article 107(1) TFEU lays down that any aid granted by a Member State through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade among Member States, is incompatible with the internal market.

5.1. State resources and imputability

- (50) A measure must be financed through State resources, and the use of State resources must be imputable to the State. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. By allowing companies to reduce their corporate tax

burden through loss carry-forward, Germany is foregoing revenue, which constitutes State aid. Germany has informed the Commission that implementation of the measure could lead to a tax revenue shortfall of EUR 900 million every year. Since the measure implies a loss of State resources, it is therefore granted through State resources. The aid is granted by a law, and is therefore imputable to the State.

5.2. Selective advantage

- (51) In addition, the measure must confer a selective advantage on the beneficiary. It is settled case-law that the concept of aid covers not only positive benefits, but also action which, in various forms, mitigates the charges which are normally included in the budget of an undertaking ⁽²⁰⁾.
- (52) Pursuant to §8c(1) KStG, certain changes in the ownership structure of an undertaking mean the partial or complete forfeiture of the possibility of carrying forward past losses for tax purposes.
- (53) §8c(1a) KStG creates an exception to that rule where the change in ownership concerns an undertaking in difficulty and takes place for the purpose of restructuring.
- (54) §8c(1a) KStG could therefore grant a selective advantage to companies fulfilling those conditions, since it enables them to set off past losses against future profits for the purpose of calculating their taxable income.
- (55) As explained in recital 28, Germany argues that §8c(1a) KStG does not constitute such a selective advantage, for three reasons:
- (a) §8c(1a) KStG complies with the private market creditor principle (5.2.1);
- (b) §8c(1a) KStG is not *prima facie* selective (5.2.2);
- (c) §8c(1a) KStG is justified by the nature and the overall structure of the German tax system (5.2.3).
- (56) Germany also points out the similarities between §8c(1a) KStG and its predecessor, §8(4) KStG (see 5.2.4) and that other Member States have similar rules (see 5.2.5).

⁽²⁰⁾ Joined Cases C-182/03 and C-217/03 *Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission* [2006] ECR I-5479, paragraphs 86-87.

5.2.1. Possible application of the private market creditor principle

(57) Germany argues that §8c(1a) KStG complies with the private market creditor principle, because it corresponds to the behaviour of a private market creditor engaged in a long-term contract with a debtor.

(58) The Commission considers that this claim is ill-founded, for several reasons. According to the case-law of the Court and the General Court, the private market creditor principle is applicable only if the State acts like an economic operator, but not when it exercises its prerogatives as a public authority⁽²¹⁾. In this case, the State exercises its monopoly of taxation in its capacity as a public authority.

(59) The Commission takes the view that the case-law cited by Germany does not alter this assessment. §8c(1a) KStG concerns the establishment of a tax debt, whereas the facts that gave rise to the judgments of the Court in *Spain v Commission*⁽²²⁾ and *DMT*⁽²³⁾ concerned situations where the administration had the possibility to waive existing tax debts. Therefore, the private market creditor principle is not applicable in this case.

(60) Secondly, even if it were applicable, which the Commission disputes, the Commission notes that the tax advantage is granted automatically, without a prior assessment of the total losses (which determine the maximum amount of the future tax reductions), the prospects of the beneficiary returning to viability, or whether the debtor has strategic importance. A private market creditor would not provide, in their general terms and conditions, such an automatic waiver of future debts, without knowing in advance the possible amount of the waiver, the debtor's financial prospects and its strategic importance.

(61) Thirdly, the Commission notes that, contrary to a long-term contractual relationship, §8c(1a) KStG does not concern a waiver for existing debts, but a reduction of possible future debts, which might arise once the debtor's financial health has been restored. In other words, when the State allows the loss carry-forward, there are no outstanding debts.

(62) Fourthly, the Commission observes that usually, in the event of insolvency, the debtor's business is taken over by another company. Since the State has a monopoly on taxation, it will be able to collect taxes from the other company. Therefore, a debtor that exits the market will be replaced by another debtor. Contrary to a private market creditor, the concept of an existing customer's loyalty has no bearing on the decision of the State.

(63) The Commission concludes that the private market creditor principle is not applicable in this case because the State has acted using its prerogatives in the public policy remit, and not as an economic operator. Even if the private market creditor principle were applicable in this case, the Commission has shown that a private creditor in a long-term contractual relationship, placed in the same position as the State, would not have adopted a measure comparable to §8c(1a) KStG.

5.2.2. *Prima facie* selectivity

(64) According to the case-law of the ECJ concerning the selectivity of a tax measure, Article 107(1) TFEU requires assessment of whether, under a particular statutory scheme, 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 scheme, are in a comparable factual and legal situation⁽²⁴⁾.

(65) Consequently, when assessing the selectivity of a tax provision, the Commission must first determine the general or 'usual' rules applicable to the field of taxation concerned under the existing tax system ('system of reference'). It must then determine whether the measure is an exception to the system of reference by differentiating between economic operators who, in the light of the objective pursued by the tax system of the Member State concerned, are in a comparable factual and legal situation.

5.2.2.1. System of reference

(66) The Commission is of the opinion that the system of reference is the German corporate income tax system in its present form, and in particular the rules on tax loss carry-forward for companies subject to change in their shareholding, which are laid down in §8c(1) KStG. As described above in recital 10, under this rule

⁽²¹⁾ Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraphs 84-85; Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraphs 133-134.

⁽²²⁾ Cited above.

⁽²³⁾ Cited above.

⁽²⁴⁾ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; see also Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

unused losses are forfeited entirely if more than 50 % of the ownership rights are transferred to an acquirer; they are forfeited pro rata if, within a period of five years, more than 25 % but less than 50 % of the ownership rights is transferred. The Commission therefore concludes that forfeiture of losses is the general rule, i.e. the system of reference, in the case of a change of ownership of a company.

- (67) The Commission notes that it had already used §8c(1) KStG as a system of reference in a previous case⁽²⁵⁾. There, the Commission declared incompatible with the internal market an exception to §8c(1) KStG allowing companies acquired by venture capital companies to carry forward losses despite the change in ownership. The reasoning developed in that decision also applies to this case.

5.2.2.2. Differentiation between companies in a comparable factual and legal situation in the light of the objective of the tax system

- (68) By way of departure from the reference scenario, §8c(1a) KStG enables companies that are, or are at risk of being, insolvent or over-indebted at the time of their acquisition for the purpose of restructuring to carry forward their losses, provided that certain conditions are met (see recital 14).
- (69) Germany argues that the objective of §8c(1a) KStG is to remove a tax obstacle to the restructuring of undertakings in difficulty. In the light of the objective of the tax system, only undertakings in difficulty are in a comparable factual and legal situation. Since §8c(1a) KStG applies to all undertakings in difficulty, it is not selective.
- (70) Germany takes the view that the judgments in *DMT*⁽²⁶⁾ and *HAMSA*⁽²⁷⁾ support this position. Germany contends that the Court and the General Court concluded that the measures in these cases were selective because they required discretionary decisions by the public authorities. It follows *a contrario* from these judgments that a measure applicable to all undertakings in difficulty, and which does not leave any discretion to the public authorities, is not selective.

- (71) The Commission would point out first that the objective of the tax system must be established at the level of the system of reference rather than at the level of the exception⁽²⁸⁾. The objective of the corporate income tax system is to generate revenue for the budget. The question arises whether this objective is taken into account where companies unduly reduce their tax base by using loss carry-forwards from shell companies. §8c(1) KStG is intended to prevent companies which change ownership from carrying forward their losses. This is clear from the explanatory memorandum to the law which introduced §8c(1) KStG and repealed §8(4) KStG⁽²⁹⁾. Therefore, all companies which change ownership are, in the light of the objective of the tax system, in a comparable factual and legal situation.

- (72) The Commission points out that only companies in difficulty are eligible for the exception provided for by §8c(1a) KStG. However, companies which are not insolvent or over-indebted, or at risk thereof at the time of acquisition, might also be loss-making, but are not eligible for loss carry-forward.

- (73) The Commission therefore concludes that §8c(1a) KStG differentiates between loss-making companies that are otherwise healthy and those that are insolvent or over-indebted, or at risk thereof, by benefiting the latter. §8c(1a) KStG thus differentiates between companies that are, with regard to the objective of the tax system, in a comparable factual and legal situation.

- (74) Secondly, the Commission stresses that, contrary to the German view, the case-law of the Court and the General Court has never regarded a measure applicable to all undertakings in difficulty and which does not leave any discretion to the public authorities as, by definition, not selective.

- (75) With regard to *DMT*, it should be noted that, in response to the observation by the French government, which corresponds to the view held by Germany in this case, the Court concludes in recital 28 that even if the national authorities enjoyed no discretion, it was still for the national court to determine whether the national measure in question was general in nature or selective. Thus, the Court recognises implicitly that a national measures open to all undertakings in difficulty, and which does not leave any discretion to the public authorities, may still be selective.

⁽²⁵⁾ Case C 2/2009 *MoRaKG*, Conditions for capital investments (OJ L 6, 9.1.2010, p. 32).

⁽²⁶⁾ Cited above.

⁽²⁷⁾ Cited above.

⁽²⁸⁾ Case T-55/99 *CETM* [2000] ECR II-3207, paragraph 53.

⁽²⁹⁾ See Bundestagdrucksache 16/4841, p. 75 et seq. and description above.

- (76) With regard to HAMSA, the Commission observes that the *obiter dictum* in paragraph 157 refers to the general Spanish insolvency legislation. The measure at issue in HAMSA, however, was not a measure under insolvency law, but a debt waiver granted by the Spanish authorities on a voluntary basis, without there being any legal obligation, and which was much higher than the debt waivers agreed by private investors. The case is therefore not relevant to the assessment of the measure in question.
- (77) Advocate General Fennelly, in his opinion in *Ecotrade*, confirms that rules which are applicable to all undertakings in difficulty may be selective and constitute State aid ⁽³⁰⁾.
- (78) Therefore, contrary to the position of Germany, the Commission's analysis of the measure in question is in line with the case-law of the Court and the General Court.
- (79) The Commission therefore considers §8c (1a) KStG to be *prima facie* selective.
- 5.2.3. *Justification on the basis of the nature or the general scheme of the tax system of which it is part*
- (80) According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part, does not fulfil that condition of selectivity ⁽³¹⁾.
- (81) Therefore, where, as in the present case, the Commission comes to the conclusion that the measure in question *prima facie* appears to be selective, it must assess whether the differentiation is justified by the nature or general scheme of the tax system of which it forms part.
- (82) The Commission notes that it is settled case-law of the Court that it is for the Member State to provide such justification ⁽³²⁾.
- (83) The Court has further clarified that a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary to achieve such objectives. Only the second mechanisms qualify for a justification by the nature or the general scheme of the tax system of which it is part.
- (84) The Commission considers that it is necessary in this case to distinguish between the objective of §8c(1) KStG and the objective of §8c(1a) KStG.
- (85) As Germany recognises in its submissions, the objective of §8c(1) KStG is to prevent abuse of the loss carry-forward allowed by the German tax system in the form of purchases of empty shell companies.
- (86) The Commission notes in this respect that §8c(1) KStG has a much broader scope than its predecessor, §8(4) KStG. Whereas the latter ruled out the carrying forward of losses only when two cumulative conditions were met, namely acquisition by another corporate entity and new economic activity, the new provision does not contain the second condition. Acquisition by another corporate entity is therefore enough to forfeit the possibility of loss carry-forward. The legislator was aware of this difference in scope since the explicit purpose of the change in legislation was to finance a reduction in the corporate income tax rate from 25 % to 15 % ⁽³³⁾.
- (87) §8c(1a) KStG, on the contrary, is not intended to prevent abuse. That is clear from the explanatory memorandum with the introduction of the new *Sanierungsklausel* published by the German Parliament. The explanatory memorandum states that §8c(1a) KStG was introduced to tackle the global financial and economic crisis ⁽³⁴⁾. During the crisis, the restrictions on loss carry-forward were perceived to be a particular obstacle to the restructuring of companies.
- (88) The Commission notes that Germany, in its comments on the opening decision, stresses the fact that §8c(1a) KStG does not constitute an anti-abuse measure, but was introduced to support ailing companies during the financial and economic crisis.
- (89) The Commission concludes that the objective pursued by this specific tax measure is extrinsic to the tax system. According to the case-law of the Court, the pursuit of such an extrinsic objective cannot be relied upon to justify a measure by the nature and overall structure of the tax system ⁽³⁵⁾. It can be analysed only in the compatibility assessment.

⁽³⁰⁾ Case C-200/97, opinion delivered on 16 July 1998, paragraphs 26-32.

⁽³¹⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 33; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 33; *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited above, paragraph 42; *GIL Insurance*, cited above, paragraph 72; *Heiser*, cited above, paragraph 43; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 52.

⁽³²⁾ *Portugal v Commission*, cited above, paragraph 81.

⁽³³⁾ Bundestagdrucksache 16/4841, p. 30 et seq.

⁽³⁴⁾ Bundestagdrucksache 16/13429, p. 50, and Bundestagdrucksache 16/12674, p. 10.

⁽³⁵⁾ *Portugal v Commission*, cited above, paragraph 82, which refers to 'cohesion' and 'regional development' as extrinsic objectives.

(90) The three arguments presented by Germany cannot alter this assessment.

(91) With regards to Germany's argument that a company in difficulty has no choice for but to obtain finance through an investor, whereas a healthy company, which is temporarily loss-making, has the choice between obtaining finance on the capital market and acquisition by an investor with subsequent refinancing, the Commission is of the opinion that the way a company finances its business is irrelevant in the light of the objective of the tax system. A corporate tax system is based on the taxation of profits and the declaration of losses. As could be observed during the financial and economic crisis, financially sound companies also reported losses temporarily. But these financially sound companies are not eligible for the loss carry-forward in application of the *Sanierungsklausel* and are thus at disadvantage compared with ailing loss-making companies in the event of a change of ownership and subsequent refinancing by the new shareholders. Furthermore, the Commission also notes that during the financial and economic crisis healthy companies, which temporarily recorded losses, had great difficulties accessing the capital markets. Therefore, even the factual assumptions underlying the first argument are inaccurate. The Commission therefore rejects Germany's first argument.

(92) With regard to Germany's second argument, that the exception provided in §8c(1a) KStG to the general prohibition on loss carry-forward in the event of a change of ownership laid down by §8c(1) KStG was justified by the *ratio legis* of §8c(1) KStG, because there was no risk of abuse in the case of the restructuring of a company in difficulty, the Commission observes that this argument does not justify the restriction of §8c(1a) KStG to companies in difficulty. The Commission points out that there is no risk of abuse either when a financially sound company is acquired. The risk of abuse exists only in relation to empty-shell companies. As pointed out above, the *ratio legis* of §8c(1) KStG goes further than combating abuse. Its objective is also to increase the German corporate tax base and to offset the reduction in the corporate income tax rate from 25 % to 15 %. This explains why §8c(1) KStG also includes a number of acquisitions of interests where there is no risk of abuse. The Commission therefore rejects Germany's argument that the exception introduced by §8c(1a) KStG corresponds to the *ratio legis* of §8c(1) KStG.

(93) With regard to Germany's third argument, that losses of ailing companies are usually not attributed any value by auditors when calculating deferred tax for consolidated financial statements, and therefore the possibility of carrying forward losses has no impact on the sale price

of the ailing company, the Commission notes first that this is based on accounting criteria and is therefore irrelevant for tax considerations. Secondly, the Commission notes that this argument contradicts Germany's statement that the inability to carry forward losses constitutes an obstacle to restructuring. This is true only if the acquiring company attributes a certain monetary value to the possibility of carrying forward losses. Therefore, the Commission also rejects Germany's third argument.

(94) Moreover, Germany claims that other Member States also provide tax relief for the restructuring of companies, such as the French aid scheme for the takeover of firms in difficulty. The Commission cannot accept Germany's argument, which is based on a comparison. Firstly, in order to justify a measure, the Member States may refer only to principles inherent to their tax system, as the system of reference by which to assess whether an undertaking obtains an advantage with the meaning of the State aid rules. The fact that comparable tax measures might exist in the other Member States is of no consequence since any such measures could themselves be caught by the provisions in the Treaty. Secondly, the conditions imposed on measures under the French scheme differ from §8c(1a) KStG. The French scheme provides for a tax exemption for newly created companies which take over a firm in difficulty. After the scheme was declared incompatible within the common market by the Commission in 2004,⁽³⁶⁾ France changed it to comply with the State aid rules. The benefits provided are now partly *de minimis*. The other part of the aid is compatible as regional aid or SME aid.⁽³⁷⁾

(95) The Commission therefore concludes from the above that the measure in question does not derive directly from the basic principles of the tax system and is not justified by the nature and general scheme of the tax system.

5.2.4. The link between the old and new *Sanierungsklausel*

(96) Germany argues that §8c(1a) KStG essentially corresponds to the old §8(4) KStG and that the Commission had never considered §8(4) KStG to be State aid.

⁽³⁶⁾ Case C 57/02 *Tax exemption for the takeover of firms in difficulty* (OJ L 108, 16.4.2004, p. 38).

⁽³⁷⁾ Case N 553/04 *Tax exemption for the takeover of firms in difficulty* (OJ C 242, 1.10.2005, p. 5).

(97) The Commission points out that Germany never notified §8(4) KStG. The Commission has therefore not yet taken a view on whether it involved State aid.

(98) This procedure concerns only §8c(1a) KStG, since the opening of the formal investigation procedure was limited to this provision. Germany cannot rely on the argument that the Commission has never formally objected to §8(4) KStG in order to justify §8c(1a) KStG because the German authorities have never notified §8(4) KStG.

(99) The Commission reserves the right to analyse §8(4) KStG under the State aid rules, should it transpire that this provision may have provided undertakings with a selective advantage.

5.2.5. Similar tax schemes in other Member States

(100) The fact that other Member States have similar or identical tax schemes in operation, which they have not notified to the Commission, has no bearing on the analysis of the question whether a given measure constitutes State aid.

(101) The Commission will analyse the information submitted by Germany pursuant to Article 10 of the Procedural Regulation⁽³⁸⁾.

5.2.6. Conclusion on the existence of a selective advantage

(102) The Commission therefore concludes that §8c(1a) KStG provides a selective advantage to the companies to which it applies.

5.3. Effect on intra-Union trade

(103) The measure must be liable to affect intra-Union trade and distort or threaten to distort competition. §8c(1a) KStG is not sector-specific, i.e. all sectors can benefit from it. Virtually all sectors of the German economy are active on markets open to competition and intra-Union trade. Hence, the measure is liable to affect intra-Union trade and to distort or threaten to distort competition.

⁽³⁸⁾ 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 L 83, 27.3.1999, p. 1).

(104) The Commission observes that, according to the information provided by Germany, all undertakings eligible for the measure are eligible for insolvency proceedings under German insolvency law (see recital 14 and footnote 7). Therefore, all potential beneficiaries of the measure are undertakings in difficulty within the meaning of point 10(c) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter: the Rescue and Restructuring Guidelines). As a consequence, none of the beneficiaries is eligible for *de minimis* aid pursuant to Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid⁽³⁹⁾, as Article 1(h) of that Regulation excludes undertakings in difficulty from its scope.

5.4. Conclusion

(105) Therefore, as all the requirements laid down in Article 107(1) TFEU are met, the Commission takes the view that the scheme on the tax carry-forward of losses in the case of restructuring of companies in difficulty constitutes State aid within the meaning of that article.

6. ASSESSMENT OF THE COMPATIBILITY OF THE MEASURE

(106) The Commission may declare State aid compatible with the internal market pursuant to Article 107(3) TFEU. According to the settled case-law of the Court, the burden of proof for demonstrating that a measure is compatible lies with the Member State⁽⁴⁰⁾. The Commission notes in this respect that Germany, despite the explicit invitation by the Commission in the opening decision, has not submitted any information regarding the matter to the Commission. For that reason alone, the Commission cannot declare the aid measure compatible with the internal market.

(107) The Commission has nevertheless examined whether the measure could be declared compatible with the internal market. The Commission has wide discretion in aid cases falling under Article 107(3) TFEU⁽⁴¹⁾. Exercising this discretion, it has issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market under Article 107(3) TFEU. It is settled case-law that the Commission is bound by the guidelines and notices that it issues in the area of

⁽³⁹⁾ OJ L 379, 28.12.2006, p. 5.

⁽⁴⁰⁾ Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen (T-132/96) and Volkswagen AG and Volkswagen (T-143/96) v Commission* [1999] ECR II-3663, paragraph 140; Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 81.

⁽⁴¹⁾ Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 56, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36.

supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States ⁽⁴²⁾.

- (108) It is therefore necessary to assess first whether the notified aid falls under the scope of one or more guidelines or notices, and can be declared compatible with the internal market because it fulfils the conditions for compatibility set out therein.

6.1. Possible compatibility on the basis of the Temporary Framework ⁽⁴³⁾

- (109) Since §8c(1a) KStG was introduced in order to tackle the problems resulting from the financial and economic crisis, the Commission examined whether it could be declared compatible under Article 107(3)(b) TFEU, as interpreted by the Temporary Framework.

- (110) In the light of the current financial and economic crisis and its impact on the overall economy of the Member States, the Commission considers that certain categories of State aid are justified, for a limited period, to remedy this crisis and they can be declared compatible with the internal market under Article 107(3)(b) TFEU. The Temporary Framework sets out the conditions under which the Commission will declare such aid schemes compatible.

- (111) However, §8c(1a) KStG does not fall under any of the measures set out in the Temporary Framework because it concerns tax breaks for companies in difficulty. However, the Temporary Framework does not provide for State aid in the form of tax breaks.

- (112) The Commission therefore takes the view that §8c(1a) KStG does not meet the requirements for being declared compatible under Article 107(3)(b) TFEU, as interpreted by the Temporary Framework.

⁽⁴²⁾ Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 36; Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 43; and Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 53.

⁽⁴³⁾ Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1). With effect from 1 January 2011, this Communication has been replaced by a new version (OJ C 6, 11.1.2011, p. 5). However, pursuant to Chapter 5 of the new version, this new version applies for unlawful aid only to aid granted after 1 January 2011. As Germany has suspended the application of the measure, no aid has been granted after that date.

- (113) The Commission notes, however, that a limited amount of aid to certain beneficiaries may be declared compatible with the internal market pursuant to section 4.2 of the Temporary Framework provided that it meets all the conditions of a German aid scheme which the Commission has approved on this legal basis. In order to be eligible for this type of aid, the beneficiary must demonstrate in particular that it was not an undertaking in difficulty on 1 July 2008 within the meaning of the Rescue and Restructuring Guidelines (for large undertakings) or within the meaning of Article 1(7) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation — GBER) ⁽⁴⁴⁾ (for SME) and that the gross grant equivalent of the aid is not higher than EUR 500 000. Furthermore, the other conditions in section 4.2.2 of the Temporary Framework and of the decision authorising the German aid scheme must be met.

6.2. Possible compatibility on the basis of the Rescue and Restructuring Guidelines ⁽⁴⁵⁾

- (114) Since §8c(1a) KStG concerns tax advantages for ailing companies, the Commission examined its compatibility under the Rescue and Restructuring Guidelines. Under these Guidelines, only companies in difficulty are eligible for aid. Whereas an insolvent or over-indebted company can be considered as being in difficulty within the meaning of the Guidelines, paragraph 13 of the Rescue and Restructuring Guidelines provides that a firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid. One of the requirements of §8c(1a) KStG is a change in shareholding. After such a change, the target company might belong to a group. In this case, it would normally be for the group to assist the target company in difficulty, which would then not be eligible for aid under the Rescue and Restructuring Guidelines.

- (115) In addition, even for the beneficiaries eligible for aid under the Rescue and Restructuring Guidelines, other requirements of these Guidelines are not met.

- (116) Under paragraph 25(a) of the Rescue and Restructuring Guidelines, rescue aid can only take the form of loans or loan guarantees. Hence, the tax advantage in question cannot be considered to be rescue aid.

⁽⁴⁴⁾ OJ L 214, 9.8.2008, p. 3.

⁽⁴⁵⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(117) In the case of restructuring aid, the Rescue and Restructuring Guidelines require the submission of a realistic restructuring plan to restore the viability of the company. The aid must be limited to the minimum necessary. In this context, the beneficiary has to make a contribution to the restructuring costs. Finally, to avoid undue distortions of competition, the Rescue and Restructuring Guidelines provide for compensatory measures.

(118) Not all of these conditions are fulfilled by §8c(1a) KStG. While the explanatory memorandum indicates that the target company has to provide a reorganisation plan with a positive business outlook, there is no indication that such a plan would meet the requirements of the Rescue and Restructuring Guidelines, nor that the amount of the aid is limited to the minimum necessary. The amount of aid depends on the losses that a company incurred in the past. Moreover, §8c(1a) KStG does not provide for a contribution by the beneficiary or compensatory measures.

(119) Finally, rescue and restructuring aid to large enterprises must be notified individually. It cannot be granted as part of a scheme. §8c(1a) KStG does not distinguish between large companies and SMEs.

(120) Even for SMEs, where rescue and restructuring aid can in principle take the form of a scheme, the Commission notes that the particular requirements for such a scheme set out in paragraph 82 of the Rescue and Restructuring Guidelines are not met, for the same reasons set out above in recital 117.

(121) Therefore, the Commission takes the view that §8c(1a) KStG is not compatible with the internal market as restructuring aid.

6.3. Possible compatibility on the basis of the Regional Aid Guidelines⁽⁴⁶⁾

(122) §8c(1a) KStG must also be examined in the light of the Regional Aid Guidelines.

(123) Potential beneficiaries of regional aid must be located in a German region eligible for regional aid. Under §8c(1a) KStG, this is not necessarily the case, because the provision applies to companies located throughout Germany.

(124) Furthermore, the Regional Aid Guidelines exclude from their scope undertakings in difficulty within the meaning of the Rescue and Restructuring Guidelines (see paragraph 9). Therefore, even aid for undertakings located in eligible regions cannot be declared compatible on the basis of the Regional Aid Guidelines.

(125) The Commission therefore takes the view that the measure is not compatible with the internal market as regional aid.

6.4. Possible compatibility on the basis of the Environmental Aid Guidelines⁽⁴⁷⁾

(126) Finally, §8c(1a) KStG must be examined in the light of the Environmental Aid Guidelines.

(127) The primary objective of the Environmental Aid Guidelines is to ensure that State aid measures will result in a higher level of environmental protection than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking account of the polluter pays principle (hereafter 'PPP') established by Article 191 TFEU.

(128) This objective is not fulfilled by §8c(1a) KStG. The explanatory memorandum does not refer to any objective within the meaning of the Environmental Aid Guidelines.

(129) As paragraph 20 of the Rescue and Restructuring Guidelines states, a firm in difficulty, given that its very existence is in danger, cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Since all potential beneficiaries of §8c(1a) KStG are companies in difficulty within the meaning of paragraph 10(c) of the Rescue and Restructuring Guidelines, the Commission is of the opinion that §8c(1a) KStG is not compatible as environmental aid.

6.5. Possible compatibility on the basis of Article 107(3) TFEU

(130) The Commission notes that the notified measure falls within the scope of both the Temporary Framework and the Rescue and Restructuring Guidelines. Therefore, when exercising its discretion under Article 107(3)(b) and (c) TFEU, it is bound by these two texts, for the reasons set out above in recital 109 et seq.

⁽⁴⁶⁾ Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

⁽⁴⁷⁾ Community guidelines on state aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

- (131) However, if the Commission is presented with compelling arguments for so doing, it can exercise its discretion again provided that it acts within the limits set out by the TFEU and the general principles of law, in particular the principle of equal treatment, as interpreted by the case-law of the Court ⁽⁴⁸⁾. In this context, according to the Court's case-law, the Commission may declare State aid compatible with the internal market if the aid is to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU) or pursues an objective of common interest (Article 107(3)(c) TFEU) ⁽⁴⁹⁾, is necessary to reach this objective ⁽⁵⁰⁾, and does not adversely affect trading conditions to an extent contrary to the common interest.
- (132) In this case, Germany has not presented any arguments that the aid is compatible with the internal market directly under Article 107(3)(b) or (c) TFEU.
- (133) The Commission notes that, due to the design of the aid measure, the amount of aid depends on the losses which the beneficiary has recorded in the past. Therefore, there is no link between the amount of aid received by an undertaking and the objective pursued by the aid scheme, i.e. the removal of barriers to restructuring and support for undertakings in difficulty during the economic and financial crisis. The Commission therefore concludes that the aid scheme is not limited to what is necessary to achieve its objective. As a consequence, it distorts competition in the internal market to an extent contrary to the common interest.
- (134) The Commission therefore concludes that the measure cannot be declared compatible based directly on Article 107(3)(b) or (c) TFEU.
- 7. RECOVERY**
- (135) Since the aid scheme has not been notified, it is unlawful aid.
- (136) By virtue of the Commission's established decision-making practice under Article 107 of the Treaty must be recovered from the beneficiaries. This practice has been confirmed by Article 14 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 ⁽⁵¹⁾: 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (137) Given that the measure in question constitutes unlawful and incompatible aid, it must be recovered in order to re-establish the situation that existed on the market before the aid was granted. Recovery is, therefore, to be effected from the date when the advantage accrued to the beneficiary, i.e. when the aid was made available to the beneficiary, and is to bear recovery interest until effective recovery.
- (138) The Commission is of the opinion that the annual date for payment of corporate tax must be considered as the relevant date for determining the date when the aid was made available to the beneficiary.
- (139) Germany must take all necessary measures to recover the aid from the beneficiaries. In order to establish the number of cases in which recovery must be effected, Germany must draw up a list of enterprises which have benefited from the measure in question since 1 January 2008. In this context the Commission notes that Germany ceased application of the measure on 30 April 2010. The German Federal Ministry of Finance ordered the tax authorities responsible for tax collection to cease applying the *Sanierungsklausel* until the Commission adopted a final decision in the case ⁽⁵²⁾.
- (140) The State aid to be recovered is to be calculated on the basis of the tax declarations of the companies concerned, i.e. the beneficiaries of §8c(1a) KStG. The aid amount is to be calculated as the difference between the tax which would have to be paid without the application of §8c(1a) KStG and the tax that was actually paid after application of §8c(1a) KStG.
- (141) This is without prejudice to the possibility that, where the total amount of aid thus granted does not exceed a gross grant equivalent of EUR 500 000, and where all other conditions set out in section 4.2.2 of the Temporary Framework and of a Commission decision authorising a German aid scheme on that legal basis are met, in particular with regard to the company not being in difficulty on 1 July 2008, the aid may be deemed compatible on the basis of Article 107(3)(b) TFEU, as interpreted by the Temporary Framework, and the authorised German aid scheme. Where the total amount exceeds EUR 500 000, the excess must be recovered.

⁽⁴⁸⁾ See in particular Case C-313/90 *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) v Commission* [1993] ECR I-1125.

⁽⁴⁹⁾ Case T-162/06 *Kronoply v Commission* [2009] ECR II-1; especially paragraphs 65, 66, 74, 75.

⁽⁵⁰⁾ Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

⁽⁵¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁵²⁾ See footnote 15.

- (142) The Commission draws the attention of Germany to the fact that the aid cannot be deemed compatible under *de minimis* rules ⁽⁵³⁾, or under a block-exempted ⁽⁵⁴⁾ aid scheme, or under any aid scheme approved on the basis of the Regional Aid Guidelines or the Research, Development, and Innovation Guidelines ⁽⁵⁵⁾, because all these texts exclude the granting of State aid to undertakings in difficulty ⁽⁵⁶⁾. For all other approved aid schemes, Germany must verify whether the decision approving the aid scheme excludes undertakings in difficulty from the scope. If not, the aid could be deemed compatible under these schemes, provided that Germany demonstrates that all the conditions of the relevant schemes were fulfilled when the aid was granted.

8. CONCLUSIONS

- (143) On the basis of the foregoing, the Commission concludes that the scheme for the carry-forward of tax losses (§8c(1a) KStG, '*Sanierungsklausel*') constitutes State aid within the meaning of Article 107(1) TFEU which has been unlawfully implemented in breach of Article 108(3) TFEU. The scheme is incompatible with the internal market.
- (144) The Commission is of the opinion that Germany must take all necessary measures to recover the aid from the beneficiaries of the *Sanierungsklausel*,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted on the basis of §8c(1a) of the Corporate Income Tax Act (*Körperschaftsteuergesetz*), unlawfully put into effect by Germany in breach of Article 108(3) TFEU, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 is compatible with the internal market under Article 107(3)(b), as interpreted by the Temporary Framework, provided that the aid amount does not exceed EUR 500 000, the beneficiary was not an undertaking in difficulty on 1 July 2008 and all the other conditions set out in section 4.2.2 of the Temporary Framework are met.

⁽⁵³⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

⁽⁵⁴⁾ See footnote 44.

⁽⁵⁵⁾ Community Framework for state aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

⁽⁵⁶⁾ See Article 1(6)(c) GBER; point 9 Regional Aid Guidelines; chapter 2.1 at the end, Research and Development and Innovation Guidelines.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by any aid scheme approved by the Commission on a legal basis other than the General Block Exemption Regulation, the Regional Aid Guidelines, the Research, Development and Innovation Guidelines, and which does not exclude undertakings in difficulty as potential beneficiaries, is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

- Germany shall withdraw the scheme referred to in Article 1.
- Germany shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.
- The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their actual recovery.
- The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁵⁷⁾.
- Germany shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of notification of this Decision.

Article 5

- Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
- Germany shall ensure that this Decision is implemented within four months of the date of notification of this Decision.

Article 6

- Within two months of notification of this Decision, Germany shall submit the following information to the Commission:

- The list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

⁽⁵⁷⁾ OJ L 140, 30.4.2004, p. 1.

(b) The total amount (principal and interest) to be recovered from each beneficiary;

(c) A detailed description of the measures already taken or planned to comply with this Decision;

(d) Documentary evidence that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the recovery of the aid granted under the scheme referred to in Article 1 has been completed. Upon request by the Commission, Germany shall immediately submit information on the measures already taken or planned

to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 26 January 2011.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION

of 8 March 2011

on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria

(notified under document C(2011) 1363)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/528/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

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

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

⁽¹⁾ OJ C 217, 11.9.2009, p. 12.

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

⁽³⁾ OJ C 82, 1.4.2008, p. 1.

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

⁽⁵⁾ See footnote 1.

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

2. DETAILED DESCRIPTION OF THE MEASURE

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

2.1. The exemption mechanism for energy-intensive businesses

- (13) Section 3 of the Act states that Austria is to grant a concession to one or more undertakings to perform the tasks of a green electricity settlement centre (*Ökostromabwicklungsstelle*, a 'settlement centre'). In particular, concessionaires are to buy green electricity from producers at a fixed price, and to sell that electricity to electricity suppliers at a fixed price. Electricity suppliers are obliged to purchase a percentage of their overall supply from a settlement centre: the percentage required corresponds to the average share of green electricity in the overall electricity mix in Austria.
- (14) Currently, Austria has granted a single countrywide concession to a single settlement centre, *Abwicklungsstelle für Ökostrom AG* (*OeMAG*). *OeMAG* is an ordinary public limited company, governed by private rather than public law, and is audited by a chartered accountant. It is monitored by the Austrian Federal Ministry of Economic Affairs and Labour and by *E-Control GmbH*, the Austrian energy regulator. The essential components in the implementation of the measure for the benefit of energy-intensive businesses (such as the arrangements for allocating electricity to electricity traders, the price to be paid by traders, or the contribution to be made by final consumers) are laid down in advance by the authorities, by statute or executive order. Any dispute between the undertakings involved is to be settled in the ordinary courts of law rather than by administrative proceedings.
- (15) *OeMAG* is a public limited company owned by transmission system operators, banks and industrial undertakings: a 24,4 % stake is held by *Verbund-APG*, and the rest is held by *VKW Netz AG*, *TIWAG Netz AG*, *CISMO GmbH*, *Oesterreichische Kontrollbank AG*, *Investkredit Bank AG*, and *Smart Technologies*, with 12,6 % each. *Verbund-APG* is a wholly owned subsidiary of *Verbund AG* (*Österreichische Elektrizitätswirtschafts-Aktiengesellschaft*, *Verbundgesellschaft*); a 51 % stake in *Verbund AG* is held by the Republic of Austria. *VKW Netz AG* is owned by *Illwerke AG*, 95,5 % of the shares in which are held by the Province of *Vorarlberg*. *TIWAG-*

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

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

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

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

- (17) If the exemption is granted, electricity suppliers are legally banned from charging the additional costs of green electricity to these large electricity consumers.
- (18) Section 22c(5) of the Act states that contracts between electricity distributors and large electricity consumers must provide that the distributor is not to supply green electricity to the customer and is not to pass on the additional costs of green electricity. Any contractual provision to the contrary is null and void ⁽⁶⁾.
- (19) If an energy-intensive business is exempted from the purchase obligation, it has to make a compensatory payment to *OeMAG* equal to 0,5 % of its net production value in the preceding calendar year (Section 22c(2) of the Act).

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

2.2. Summary of the opening decision

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

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

3. OBSERVATIONS PUT FORWARD BY AUSTRIA

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

3.1. State resources and imputability

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

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

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

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

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

⁽¹⁰⁾ OJ C 106, 8.5.2009, p. 8.

⁽¹¹⁾ OJ L 214, 9.8.2008, p. 3.

⁽¹²⁾ OJ L 283, 31.10.2003, p. 51.

⁽¹³⁾ Case C-379/98 [2001] ECR I-2099.

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

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

3.2. Selectivity

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

⁽¹⁴⁾ Case C-206/06 [2008] ECR I-5497.

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

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

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

⁽¹⁸⁾ Case C-345/02 [2004] ECR I-7139.

⁽¹⁹⁾ Case C-143/99 [2001] ECR I-8365.

⁽²⁰⁾ *Adria-Wien Pipeline*, paragraph 16.

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

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

3.3. Compatibility

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

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

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

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

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

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

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

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

⁽²²⁾ Directive 2003/96/EC.

⁽²³⁾ Regulation (EC) No 800/2008.

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

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

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

4. OBSERVATIONS RECEIVED FROM THIRD PARTIES

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

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

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

⁽²⁵⁾ Published by Germany, Denmark, the Netherlands, Finland, Sweden and Austria.

⁽²⁶⁾ See footnote 2.

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

5. ASSESSMENT

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

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

5.1. Presence of State aid

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

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

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

5.1.1. Advantage

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

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

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

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

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

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

5.1.2. State resources and imputability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁽³²⁾ See footnote 14.

⁽³³⁾ *Essent*, paragraph 74.

⁽³⁴⁾ To this effect see also *Essent*, paragraph 74.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

5.1.3. Selectivity of the measure

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

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

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

The 0,5 % threshold

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

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

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

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

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

⁽⁴⁰⁾ *Adria-Wien Pipeline*, paragraphs 34–35.

⁽⁴¹⁾ *Adria-Wien Pipeline*, paragraph 36.

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

⁽⁴³⁾ *Adria-Wien Pipeline*, paragraph 48.

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

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

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

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

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

⁽⁴⁶⁾ Decision 2005/565/EC, recital 46.

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

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

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

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

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

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

Focus on the production of goods

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

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

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

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

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

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

Conclusion

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

Measures justified by the nature and general scheme of the system

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

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

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

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

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

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

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

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

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

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

⁽⁵⁷⁾ See footnote 56.

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

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

⁽⁶⁰⁾ See footnote 58.

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

Conclusion

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

5.1.4. Distortion of competition and impact on trade

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

5.1.5. Conclusion

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

5.2. Lawfulness of the aid

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

5.3. Compatibility of the aid

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

⁽⁶¹⁾ See footnote 54.

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

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

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

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

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

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

5.3.1. The Environmental Aid Guidelines

- (120) The Environmental Aid Guidelines define their scope of application as follows⁽⁷⁰⁾:

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

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

⁽⁶⁶⁾ See footnote 3.

⁽⁶⁷⁾ Regulation (EC) No 800/2008.

⁽⁶⁸⁾ See footnote 3.

⁽⁶⁹⁾ Regulation (EC) No 800/2008.

⁽⁷⁰⁾ See footnote 3.

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

⁽⁷¹⁾ OJ L 140, 5.6.2009, p. 16.

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

⁽⁷³⁾ Point 156 of the Guidelines.

⁽⁷⁴⁾ Point 158 of the Guidelines.

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

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

5.3.2. Analogy with Chapter 4 of the Guidelines

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

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

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

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

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

Similarity of the rules

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

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

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

Omission (*lacuna*) incompatible with EU law

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

⁽⁷⁵⁾ Point 159 of the Guidelines.

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (149) The Commission notes that Austria has not claimed that the exemption mechanism can be declared compatible directly on the basis of Article 107(3)(c) TFEU. It is for the Member State to put forward any grounds of compatibility⁽⁸⁰⁾ and to demonstrate that the conditions thereof are met, and for this reason alone Austria is prevented from relying on this ground of compatibility.
- (150) The Commission has nevertheless considered whether it could declare the exemption mechanism compatible on this legal basis.
- (151) Article 107(3)(c) TFEU states that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered to be compatible with the internal market. According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest⁽⁸¹⁾, is necessary for the attainment of this objective⁽⁸²⁾, and does not adversely affect trading conditions to an extent contrary to the common interest.
- (152) Accordingly, it is established Commission practice that measures may be declared compatible directly under Article 107(3)(c) TFEU if they are necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade⁽⁸³⁾. The Commission considers it appropriate here to ask the following questions:

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

⁽⁸⁰⁾ See footnote 63.

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

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

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

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

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

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

Objective of common interest

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

Appropriate policy instrument

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

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

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

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

Necessity, incentive effect and proportionality

- (165) In the event that it were to be accepted that operating aid in the form of reductions of parafiscal levies was an appropriate policy instrument, the operating aid involved would have to be tested for necessity and proportionality in the same way as reductions of non-harmonised environmental taxes under Chapter 4 of the Environmental Aid Guidelines⁽⁸⁶⁾, because the assessment of non-harmonised environmental taxes under Chapter 4 reflects the general principles of the detailed economic analysis under Article 107(3)(c) TFEU

Distortion of competition and impact on trade

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

⁽⁸⁷⁾ See footnote 73.

⁽⁸⁸⁾ See footnote 74.

⁽⁸⁹⁾ See footnote 75.

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

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

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

Conclusion

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

5.4. Conclusion

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

The aid may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels, 8 March 2011.

For the Commission

Joaquín ALMUNIA

Vice-President

2011 SUBSCRIPTION PRICES (excluding VAT, including normal transport charges)

EU Official Journal, L + C series, paper edition only	22 official EU languages	EUR 1 100 per year
EU Official Journal, L + C series, paper + annual DVD	22 official EU languages	EUR 1 200 per year
EU Official Journal, L series, paper edition only	22 official EU languages	EUR 770 per year
EU Official Journal, L + C series, monthly DVD (cumulative)	22 official EU languages	EUR 400 per year
Supplement to the Official Journal (S series), tendering procedures for public contracts, DVD, one edition per week	multilingual: 23 official EU languages	EUR 300 per year
EU Official Journal, C series — recruitment competitions	Language(s) according to competition(s)	EUR 50 per year

Subscriptions to the *Official Journal of the European Union*, which is published in the official languages of the European Union, are available for 22 language versions. The Official Journal comprises two series, L (Legislation) and C (Information and Notices).

A separate subscription must be taken out for each language version.

In accordance with Council Regulation (EC) No 920/2005, published in Official Journal L 156 of 18 June 2005, the institutions of the European Union are temporarily not bound by the obligation to draft all acts in Irish and publish them in that language. Irish editions of the Official Journal are therefore sold separately.

Subscriptions to the Supplement to the Official Journal (S Series — tendering procedures for public contracts) cover all 23 official language versions on a single multilingual DVD.

On request, subscribers to the *Official Journal of the European Union* can receive the various Annexes to the Official Journal. Subscribers are informed of the publication of Annexes by notices inserted in the *Official Journal of the European Union*.

Sales and subscriptions

Subscriptions to various priced periodicals, such as the subscription to the *Official Journal of the European Union*, are available from our sales agents. The list of sales agents is available at:

http://publications.europa.eu/others/agents/index_en.htm

EUR-Lex (<http://eur-lex.europa.eu>) offers direct access to European Union legislation free of charge. The *Official Journal of the European Union* can be consulted on this website, as can the Treaties, legislation, case-law and preparatory acts.

For further information on the European Union, see: <http://europa.eu>



Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

EN