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**Subject: State aid C 24/2009 (ex-N 446/2008) – Austria
The Austrian Green Electricity Act – Aid to the Producers of Green
Electricity and Aid to Large Electricity Consumers**

Sir / Madam

The Commission wishes to inform Austria that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to

- **raise no objections to the support measures for the production of green electricity on the ground that it is compatible with the EC Treaty;**
- **initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of a relevant measure for supporting large energy consumers.**

1. PROCEDURE

1. On 27 June 2008 the Austrian authorities pre-notified changes to the existing Green Electricity Act (GEA), which had been approved as compatible aid by the Commission in its current form in 2006 ("2006 Commission Decision")¹.
2. On 5 September 2008, by taking into account that the former Environmental Aid Guidelines² have been replaced by new Environmental Aid Guidelines³, Austria notified the whole law (not only the modifications). The Commission requested additional information by letter dated 28 October 2008. Following a reminder the Austrian authorities submitted additional information by letter dated 22 December 2008. Following a meeting with the Austrian authorities on 11 February 2009, the Commission requested further information by letter

¹ Case NN 162/A/2003 and N 317/A/2006, 'Support of electricity production from renewable sources under the Austrian Green Electricity Act (feed-in tariffs)', Commission decision of 4 July 2006

² OJ C 37 of 3.1.2001, p. 3

³ OJ C 82 of 1.4.2008, p. 1

dated 19 February 2009. By letter dated 17 March 2009 the Austrian authorities provided the requested information. Subsequently the Commission requested additional information by letter dated 8 May 2009. In the course of the procedure, Austria has informed the Commission in June that it considers amending certain aspects of the GEA. Austria submitted the additional information by letters dated 9 June 2009 and 19 June 2009. However, on 10 July 2009 Austria has withdrawn these proposals.

3. The Austrian authorities confirmed that the measure will not be put into effect prior to approval by the Commission⁴. Pending the Commission's decision on the notified Act, its former version authorising aid to the producers of green electricity would remain in force.
4. However, with regard to the existing and notified scheme, the Austrian authorities argue that due to changes in the ownership of the clearing body the whole system of aid to green electricity producers would not constitute State aid anymore. Alternatively, the Austrian authorities argue that, irrespective of the State aid character of the scheme as such, at least the support for the large consumers would not constitute State aid. This decision deals with support to the producers of green electricity as such as well as with the support to large electricity consumers in particular.
5. On 9 July 2008 the Commission has also received a complaint from the Bundesarbeitskammer concerning the notified new Electricity Act regarding inter alia the measure proposed by Austria in favour of large electricity consumers.

2. DESCRIPTION OF THE AID

2.1 Description of the aid to the producers of green electricity

2.1.1 Overview of the Green Electricity Act (GEA)

6. The GEA is designed to support the production of green electricity via a feed-in tariff, which is financed by the Austrian electricity consumers through a clearance mechanism (for details see Annex 1). Under the measure notified on 5 September 2008, a designated settlement centre, the OeMAG Abwicklungsstelle für Ökostrom (OeMAG), pays a feed-in tariff to the producers of green electricity and recovers its costs via two channels. Firstly, Austrian electricity consumers are obliged to pay a fixed lump sum to OeMAG (which varies according to the grid level on which they are connected to the network). Secondly, electricity distributors are obliged to purchase a certain amount of green electricity from OeMAG on the basis of a levy. The electricity distributors are then (in principle) free as to how they recover their costs from their electricity consumers⁵.
7. In contrast to the measure currently in place (approved by the 2006 Commission Decision), the GEA does in general not cover electricity produced in combined heat and power plants (CHP). However, the GEA provides support for CHP plants operated on the basis of spend lye ("Ablauge"), if they fulfil the requirements as laid down in the GEA. The support of CHP

⁴Para 32d Ökostromgesetz.

⁵The system is described further in a table in Annex I.

plants operated on the basis of fossil fuels is now included in the Austrian CHP Act⁶ which was approved by the Commission (N 461/2008)⁷ and hence is not part of this decision. According to Austria both Acts are still linked, since the funding mechanisms for the investment support and the CHP support tariff are still provided by the GEA. The following description is based on version of the Green Electricity Act as notified by Austria..

8. The GEA provides for different modes of support. Further to the system of feed-in tariffs the draft GEA includes support by investment grants. Accordingly, support for green electricity will be achieved both through feed-in tariffs and investment grants.
9. The GEA specifies its objectives as:
 - To raise the proportion of electricity produced in installations from renewable energy sources to such an extent as to achieve in 2010 the national target of 78.1% specified as reference value in Directive 2001/77/EC;
 - To make efficient use of the means of promoting renewable energy sources;
 - To focus on technology policies with a view to achieve market maturity for new technologies;
 - To ensure a secure investment climate for existing and future power plants;
 - To promote electricity produced from renewable energy sources in accordance with the principles set out in European Community Law, especially in Directive 2003/54/EC⁸ and Directive 2001/77/EC⁹;
 - To increase until 2015 the percentage of green electricity produced and supported in accordance with this law to a total amount of 15% as measured by the whole output to end consumers of the public electricity grid;
 - To increase between 2008 and 2015 the green electricity production by fostering the installation of hydro power plants (hereafter HPP) with a total capacity of 700 MW, wind power plants with a total capacity of 700 MW and biomass power plants with a total capacity of 100 MW, for the latter plants provided that the raw material delivery is secured.
10. Austria has notified the Green Electricity Act on the basis of the Environmental Aid Guidelines (EAG) of 1 April 2008 and will accordingly re-notify the scheme after these guidelines have expired end of the year 2014. It would start granting the aid only after the approval of the measures by the Commission. The duration of the investment aid for energy production by spent lye is limited until 2012 and for small and medium sized hydro power until 2014 and no further investment aid will be granted after that date. With respect to the feed-in tariffs, when in the year 2015 the feed-in volume for new installations becoming operational will be exhausted, new installations will have no legal right on a purchase contract for green electricity.

⁶ BGBl. I Nr. 111/2008 "Bundesgesetz, mit dem Bestimmungen auf dem Gebiet der Kraft-Wärme-Kopplung neu erlassen werden".

⁷ Letter of the Commission of 23 February 2009.

⁸ OJ L 173 of 15.7.2003, p. 37

⁹ OJ L 283 of 27.10.2001, p. 33

2.1.2 Operating Aid in the form of feed-in tariffs

11. The GEA obliges the Green Electricity Settlement Centre ("Ökostromabwicklungsstelle") (hereafter GESC) to purchase green electricity from eligible generators at a fixed feed-in tariff ("Einspeisevergütung"). For the time being, the OeMAG ("Abwicklungsstelle für Ökostrom AG") (hereafter OeMAG) has been appointed to carry out the task of the GESC. The OeMAG recuperates its costs in two different ways. Firstly, Austrian electricity consumers are obliged to pay a fixed lump sum ("Zählpunktpauschale") to the OeMAG, which varies according to the grid level to which the consumers are connected to. Secondly, electricity traders ("Stromhändler") are obliged to purchase a certain amount of green electricity from the OeMAG at fixed transfer prices ("Verrechnungspreise"). Subsequently, the electricity distributors are then free as to how they recuperate their costs from their electricity consumers.
12. However, producers of certain forms of green electricity are not eligible for the benefit from the feed in tariffs: According to Para 10a (1) GEA electricity produced with spend lye, animal meal ("Tiermehl"), sewage sludge as fuel and electricity generated by (HPP) with a maximum capacity of more than 10 MW as well as small hydro power plants (SHPP) according to Para 12a GEA and CHP according to Para 12 GEA are excluded from the purchase obligation. Furthermore there is no obligation to purchase electricity produced with solid bio mass, where the power plant does not provide state of the art measures to avoid fine dust ("Feinstaub").
13. Furthermore, small photovoltaic installations with a capacity of less than 5 kW peak are also excluded from the purchase obligation. These installations can be supported with investment grants according to the KLI.EN-FondsG ("Gesetz über die Errichtung des Klima- und Energiefonds"). However, the GESC is obliged to buy this electricity at the market price, published according to Para 20 GEA, reduced by the average expenses for balance energy ("Ausgleichsenergie") within the last calendar year for SHPP and miscellaneous green electricity installations excluding the expenses for wind energy plants. Larger photovoltaic installations with a capacity of more than 5 kW will receive support via the feed-in tariff. Furthermore, a support according to the KLI.EN-FondsG is possible, which may be considered when determining the tariff support. Operators having concluded a contract with the GESC prior to the entry into force of the present version of the GEA will still receive the respectively valid feed-in tariffs.
14. For already existing power plants the respectively concluded feed-in tariffs will remain valid. For new green electricity power plants new feed-in tariffs will be determined after the entry into force of the present version the GEA.
15. Additionally, the GEA provides for some bonuses under certain conditions. According to Para 11 (1) of the GEA a bonus of 2 cent/kWh could be granted, if green electricity is generated from biogas or liquid biomass in CHP plants and there has not been filed an application for a feed-in tariff contract prior to the entry into force of the present version of the GEA. However, this bonus is strictly for new plants and only to support those costs that arise directly from the electricity production. Costs that are related to the heat-extraction are

not supported via the GEA. There is another bonus that can be granted according to Para 11 (1). A feed-in tariff of 2 cent/kWh can be granted, if green electricity is generated from biogas which was refined to meet the quality of natural gas and then fed into the natural gas grid and there has not been filed an application for a feed-in tariff contract prior to the entry into force of the present version of the GEA. This technology bonus is to compensate for the higher expenses from the treatment and feeding-in of the biogas.

16. The GEA also provides for a raw material bonus for liquid biomass and biogas for 2009 and the following years. According to Para 11 (6)-(9) of the GEA a bonus of a maximum of 4 cent/kWh can be granted, if the operator has concluded a feed-in contract with the GESC prior to the entry into force of the notified draft GEA. Austria justifies this with the fact that existing plants would have older contract which would not account for increasing raw material costs. In contrast to that, new contracts shall take into account the raw material costs in the process of fixing the tariff.
17. In relation to the above mentioned raw material bonus stands the support mechanism pursuant to Para 11b of the GEA. Accordingly, it shall be possible for the GESC to purchase green electricity from a generator after the initial purchase obligation has expired, provided that the raw material depending plant is feeding-in into the public grid and has a fuel efficiency of at least 60%. This support mechanism shall compensate for the higher expenses for raw materials, but not for the costs related to the construction or depreciation of the plant. According to Austria, such a mechanism shall be necessary, since the generation of green electricity from raw materials after the expiry date of the purchase obligation would lead to production costs above the electricity market price. However, a closure of the then unprofitable plants would be detriment to the objective of supporting green electricity.
18. The OeMAG is constituted as a private undertaking and has the legal personality of a joint-stock company, which is audited by chartered accountants. It is monitored by the Austrian Federal Ministry of Economic Affairs and Labour as well as the Austrian Energie-Control GmbH. The decisive elements necessary for the implementation of the measure (e.g. modalities of distributing the electricity to the electricity traders, the purchase price for the green electricity to be paid to the producers, the price to be paid by the traders, the contribution by the final consumers) are determined in advance by the Austrian authorities. With regard to the purchase obligation, any litigation between the companies involved is settled in Civil Court and not by administrative procedures.
19. The Austrian energy regulator, Energie-Control GmbH, reports annually on the implementation of the scheme analysing to what extent the measure achieves its objectives and can make proposals for improvements or adaptations of the support mechanism. Energie-Control GmbH is a public body, which is responsible for the monitoring and regulation of the Austrian energy market.

2.1.3 Investment Aid to the producers of green electricity

20. Investment grants will be granted to new small hydro power plants (hereafter SHPP), medium-sized HPP and CHP plants operated on the basis of spend i.e. provided that they fulfil the requirements as laid down in the GEA, whereas the feed-in tariff (the operating aid

as described in 2.1.2) will benefit already existing small HPP, wind energy, geothermal energy and energy from biogas, landfill gas, solid and liquid biomass.

21. The Investment grants are granted by the Settlement Centre for Investment Grants ("Abwicklungsstelle für die Gewährung von Investitionszuschüssen") after approval by the Federal Minister for economic affairs and labour. Austria has also tendered this task and appointed the OeMAG (OeMAG Abwicklungsstelle für Ökostrom AG) to fulfil this task.

Support to SHPP

22. So far SHPP (with a maximum capacity of up to 10 MW) have been supported via operating aid. The notified draft GEA (2. Ökostromgesetznovelle 2008), after authorisation by the Commission, intends to support newly constructed SHPP with investment grants. For SHPP constructed after the 1 January 2008 but prior to the authorisation of this amendment by the Commission, there will be the right to opt for either the support via the feed-in tariffs or the support via the investment grant. An accumulation of both support mechanisms will be impossible. Furthermore, SHPP which have been constructed prior to the 1 January 2008 will still receive the respectively valid feed-in tariff. Para 12a (2) GEA stipulates that the maximum aid intensity according to EC law must not be exceeded. For SHPP with a maximum capacity of 500 kW the GEA stipulates an aid intensity of 30%, but with a maximum of EUR 1.500 per kW. For SHPP with a maximum capacity of 2 MW the aid intensity will be limited to 20%, but with a maximum of EUR 1.000 per kW. For SHPP with a maximum capacity of 10 MW the aid intensity will be limited to 10%, but with a maximum of EUR 400 per kW. For SHPP with a maximum capacity between 500 kW and 2 MW as well as between 2 MW and 10 MW the appropriate aid intensity will be calculated by linear interpolation.
23. Upon application and provided that the requirements of Para 12a (4) GEA are fulfilled some simplifications can be granted for small SHPP with a maximum capacity of up to 500 MW with regard to the requirements for the verification of the amount of the maximum capacity constructed and the costs of it. Accordingly it shall be possible to grant an investment aid of EUR 1.500 per kW for small SHPP with a maximum capacity of up to 50 kW. For a maximum capacity between 50 kW and 100 kW the aid intensity must not exceed 30%, but with a maximum amount of EUR 1.500 per kW. Subject to additional requirements, an aid intensity of 30% shall be applied for small SHPP with a maximum capacity between 100 kW and 500 kW, but with a maximum amount of EUR 1.500 per kW. Simplified requirements may be applied to plants with a maximum capacity up to 2 MW by administrative decision..
24. According to the draftGEA, for the years 2009 to 2014 the total amount of aid is limited to EUR 12.5 Mio per year which is to be collected by a fixed lump sum ("Zählpunktpauschale").

Support to medium-sized HPP

25. Investment grants may be granted to medium-sized HPP provided that the construction starts between 1 July 2006 and 31 December 2013 and that the plant is operational until 31

December 2014. The aid intensity must not exceed 10% of the direct costs of the construction of the HPP (excluding the costs for the real estate), but with a maximum of EUR 400 per kW and EUR 6 Mio per plant. The total amount of aid to be granted is limited to EUR 50 Mio with a maximum of EUR 7.5 Mio per year which is to be financed by the fixed lump sum ("Zählpunktpauschale").

Support to CHP plants operated with spend lye as basic fuel

26. The draft GEA also provides investment grants for CHP plants which are operated on the basis of spend lye (residues of biogenous origin from the production of cellulose or paper) and which have to be constructed after the entry into force of the present GEA. Furthermore these plants have to serve for the production of process heat and have to achieve savings in the use of primary energy sources and in CO₂ emissions compared to the separate generation of electricity and heat. The CHP also have to meet the efficiency criteria of Para 7 (2) CHP Act¹⁰.
27. The aid granted must not exceed 30% of the direct costs of the construction of the CHP facility (excluding the costs for the real estate), but with a maximum of EUR 300 per kW for a CHP with a maximum capacity of 100 MW. For a CHP having a maximum capacity between 100 MW and 400 MW, the maximum amount per kW is EUR 180. Finally, for a CHP with a maximum capacity of 400 MW or more the maximum amount per kW is limited to EUR 120.
28. According to the draft GEA, in the years 2009 to 2012 the total amount of aid granted is limited to EUR 10 Mio whereof EUR 2.5 Mio per year are to be financed by the fixed lump sum ("Zählpunktpauschale").

2.1.4 Financing of the aid to the producers of green electricity

29. The funding of the support mechanism is based on two pillars: a fixed transfer price is to be paid by the electricity traders on the (mandatory) purchase of green electricity and a fixed lump sum is to be paid by the Austrian electricity consumers depending on the grid level to which they are connected to. Currently this lump sum varies from EUR 15 000 p. a. for a connection to grid levels 1 to 4, EUR 3 300 p. a. for grid level 5, EUR 300 p. a. for grid level 6 and EUR 15 p. a. for grid level 7 and is to be paid to the OeMAG. According to Para 22b GEA the transfer price is fixed by the federal Ministry for Economics and Labour.

2.2 Description of the potential aid to large electricity consumers

30. The notified law includes changes foreseeing a new provision that intends to exempt companies in energy intensive industries from the obligation to purchase green electricity, if expenses for green electricity are larger than 0,5 % of their respective production value. The respective provision of the GEA states that "*(c)ontracts between electricity distributors and [large electricity] consumers have to include a mandatory provision that ...distributors do not supply green electricity to these customers ... and do not pass on the additional costs for*

¹⁰ The Commission considers this to be a clerical mistake and assumes the text refers to efficiency criteria of Para 8 (2) CHP Act, since Para 7 (2) CHP Act does not contain an efficiency criteria.

*green electricity. Any provisions to the contrary are invalid*¹¹. Austria argues that irrespective of the State aid character of the scheme as such at least the support for the large consumers would not constitute State aid.

31. According to these provisions, large energy consumers would be partially exempted from the obligation to buy green electricity, which price is considerably above the market price for "grey" electricity. In comparison to all other electricity consumers they would receive an advantage resulting in lower operational cost. The benefit may increase proportionally with the amount of electricity consumed by the enterprises.

3. ASSESSMENT OF THE MEASURES

32. The Commission has examined the aid scheme in accordance with Article 87 et seq. EC Treaty and Article 61 et seq. EEA Agreement¹².
33. Given that the aid to support production of green electricity and the exemption for large electricity producers from an obligation to purchase green electricity for a fixed price constitute, in principle, two separate measures, the Commission has assessed separately (i) the aid for green electricity producers as such and (ii) the aid for large electricity consumers.

3.1 Aid to the producers of green electricity

34. For the reasons below, the Commission finds that the aid for the producers of green electricity notified according to Article 88 (3) of the EC Treaty constitutes State aid pursuant Article 87 (1) EC Treaty and is compatible with Article 87 (3) (c) of the EC Treaty.

3.1.1 Existence of State Aid to the Producers of Green Electricity

35. According to Article 87 (1) of the EC Treaty, *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market”*. It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.
36. The GEA confers an advantage to the producers of green electricity since it guarantees them a minimum electricity price which is regularly higher than the market price. Furthermore the measure is selective because it favours only producers of green electricity. Moreover, at least

¹¹ Para 22c (5) Ökostromgesetz ("Verträge zwischen Stromhändlern und Endverbrauchern haben zwingend vorzusehen ..., dass diesen Endverbrauchern [energieintensive Betriebe] kein Ökostrom, der den Stromhändlern von der Ökostromabwicklungsstelle zugewiesen wird geliefert wird und keine Überwälzung von Ökostromaufwendungen erfolgt. Entgegenstehende Vertragsbestimmungen sind nichtig.")

¹² The following assessment is based on both the EC Treaty and the EEA Agreement, but for reasons of simplification, in the following assessment it will only be referred to the EC Treaty provisions.

some of those producers are engaged in sectors where trade between Member States takes place. Finally, the Commission has to assess whether the measure is financed directly or indirectly through State resources and whether it is imputable to the State.

The measures in the context of PreussenElektra

37. The Austrian authorities submitted that in comparison to the scheme approved by the Commission in 2006, the support of green electricity producers is not anymore imputable to the State because OeMAG now passed from public to private ownership. It is further argued that in view of the private ownership of OeMAG the monies channelled through this body can no longer be attributed to the State. By consequence the Austrian authorities claim that the system does not (anymore) involve State aid. In this respect they also invoke similarities to the German system as assessed in the PreussenElektra Judgement¹³ which according to the ECJ does not involve State aid.
38. In the PreussenElektra system, the German law directly regulated the relationship between green electricity producers and electricity distributors/traders by obliging the private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices set by law that were higher than the real economic value of that type of electricity. The electricity distributors were then free as to how they recover their additional cost for the green electricity from their end consumers. To achieve an equal participation in buying green electricity, the energy companies had to balance the amounts between themselves. This results in purchased amounts of green electricity corresponding to the companies' market shares. As a whole, the system in PreussenElektra was based on regulating the relationship between private parties ("gesetzliches Schuldverhältnis"), so that no government entities need to be involved in the functioning of the system.
39. The Austrian authorities argue that their scheme is identical in its economic effects with that in PreussenElektra case. In particular, the Austrian authorities claim that in both systems (i) support for producers of green electricity is financed via a feed-in tariff finally paid by the end consumer, (ii) different amounts of green electricity purchased by the energy companies are balanced according to their market share and (iii) large electricity consumers are partially exempted from the obligation to finance green electricity (see chapter 3.2 below).
40. It should be noted, that the 2006 Commission Decision concerning the support mechanism under GEA currently in place in Austria did explicitly not build its assessment on the question of ownership of OeMAG but on the fact that OeMAG is designated by the State to administer the transfer of money to the green electricity producers through the granting of a license. Also, the system under PreussenElektra seems to differ significantly from the notified Austrian scheme to the extent that, according to the information currently available, OeMAG is and should remain subject to strict monitoring and financial support from the State.
41. Moreover, the private ownership of OeMAG does not make the Austrian system comparable to PreussenElektra. In particular, the private nature of OeMAG does not provide a sufficient

¹³ Judgement of the Court of 13 March 2001 in Preussenelektra/Schleswig (C-379/98)

basis to consider that the financial resources channelled through it are of private nature and are not imputable to the State. This point of view is not only supported by the 2006 Commission Decision concerning the support mechanism under GEA currently in place in Austria but also by the more recent Essent Judgement of the ECJ¹⁴ where revenues channelled through a body similar to OeMAG are considered to be imputable to the State. The Austrian scheme as notified initially thus seems to differ from PreussenElektra in three significant ways.

Established by law and licensed by the State

42. Firstly, the Commission already stated in its 2006 decision on NN 162/A/2003 and N 317/A/2006 that OeMAGs activity is imputable to the State independent of its ownership, because it is established by law and licensed by the State. The decision states that OeMAG *'...could, independent of its ownership also be described as a clearing mechanism, similar to a fund. It is established by the law and designated by the State to administer the transfer of money to the green electricity producers. The financial contributions transferred to the Settlement Centre are imposed by legislation and thus by the State, and the money is used to favour specific enterprises'*¹⁵.
43. In its assessment of the notified changes of the GEA the Commission has taken into account the Essent Judgment of the European Court of Justice¹⁶. This court ruling deals with a Dutch law regulating the recovery of stranded costs they incurred before the liberalisation of the market. The Dutch law provided for the stranded costs to be recovered through extra payments by the electricity distributors. To this end the Dutch law designates a company (SEP) to collect additional charges from the distributors and channel them through to the electricity generators. The Essent judgment concludes that *'... the amounts paid to SEP constitute intervention by the State through State resources'*¹⁷. The judgment argues that *'(a)s for SEP, whose capital is held in its entirety by the electricity generating undertakings, it was at that time an undertaking which had been given the task by statute ...'*¹⁸. The judgment further points out that PreussenElektra would not be comparable because in the German scheme *'...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'*¹⁹. The same reasoning seems to apply for the difference between PreussenElektra and the Austrian scheme, in which OeMAG is appointed by the State. The Austrian scheme thus does not seem to be comparable to the scheme analysed in the PreussenElektra Judgement.

State control and monitoring

44. Secondly, OeMAG is subject to strict State control. The Austrian State regulates both the way that green electricity producers sell their electricity to OeMAG (i.e. on the basis of the purchase obligation imposed on OeMAG) as well as the way OeMAG attributes and sells the

¹⁴ Judgement of the Court of 17 July 2008 in Essent Network Noord BV (C-206/06).

¹⁵ NN162/A/2003, para 52.

¹⁶ Case C-379/98, PreussenElektra/Schlesweg, judgement of 13.3.2001, [2001] ECR I-2099.

¹⁷ Para 75 of the Essent Judgment

¹⁸ Para 68 of the Essent Judgment.

¹⁹ Para 74 of the Essent Judgment

electricity to the electricity distributors (i.e. on the basis of the purchase obligation imposed on the electricity distributors). OeMAG has no discretionary power as to the implementation of the decisive elements of the measure such as modalities of distributing the electricity to the electricity traders, the purchase price for the green electricity to be paid to the producers as well as the price to be paid by the traders and the contribution by the final consumers. These aspects are determined in advance by the Austrian authorities apart from the decisions of OeMAG concerning the distribution of electricity due to technical needs to balance wind power. Its cost calculations are verified by the Ministry of Economy and Labour. Any change of the ownership has to be authorised by the government. The 100 % government owned Austrian energy regulator, Energie-Control, determines the general conditions of OeMAG's operation. Furthermore, Energie-Control is authorised for instructing OeMAG to amend or replace the general conditions, which fully regulates its operations. Also, OeMAG is not free as to how to deal with the revenues designated for the producers of green electricity.

45. Similar to the Austrian OeMAG the Essent Judgement notes with regard to the Dutch SEP that '*...the designated company is not entitled to use the proceeds from the charge for purposes other than those provided for by the Law. Furthermore, it is strictly monitored in carrying out its task, since [the Dutch law] requires it to have the detailed account of the sums received and transferred certified by an auditor*'²⁰. The same applies to OeMAG which is not free as to how it deals with the proceeds from the sale of green electricity but has to reattribute these proceeds to the green electricity producers according to the rules laid down in the GEA. From this follows again that the Austrian scheme seems comparable to the Dutch scheme and differs considerably from the system in the framework of PreussenElektra. In addition, OeMAG is subject to a multitude of reporting and monitoring requirements (e.g. para 15 (2) GEA) including scrutiny by the National Court of Auditors, which go far beyond the requirements imposed on distributors under the German scheme.

Financial support from the State

46. Thirdly, the notification provides for a so-called fixed lump sum, which the electricity consumers are obliged to pay to OeMAG according to the grid level on which they receive their electricity. The significance of this lump sum lies within the fact that it constitutes a levy which is comparable to the levy assessed in the Essent judgment and OeMAG plays in the notified Austrian scheme the role of an intermediary designated by the State to administer the transfer of money to the producers of green electricity. Therefore, the Austrian scheme involves State resources.
47. Moreover, the Commission further considers that the funds from the feed-in tariffs channelled through OeMAG are controlled by the State, because the State regulates both the way that the green electricity is purchased by OeMAG and the way it is sold on to the distributors. The entirely regulated use of the money channelled through OeMAG is also considered to amount to State resources.

²⁰ Para 69 of the Essent Judgment.

48. Finally, it should be noted that contrary to the system in the context of PreussenElektra, the Austrian scheme provides even for direct financial involvement of the State, since both the operating cost and differences from the trade of green electricity are financed from state resources. In particular, the Austrian scheme provides for a mechanism by which the government pays for possible losses of OeMAG in case there is a gap between the costs of purchasing green electricity and the benefits from selling it to distributors/traders²¹. In this respect OeMAG has to provide the necessary figures to the Federal Minister for Economy and Labour who then decides about the reimbursement. The Commission takes note that this mechanism even involves directly State resources.

Conclusion

49. Taking into account the 2006 Commission's Decision on the original scheme as well as the Essent Judgement, the Commission believes that according to the information currently available the Austrian system as notified differs considerably from the case in the context of PreussenElektra. The payments channelled through OeMAG constitute State resources and are imputable to the state and thus involve State aid in the meaning of Article 87 (1) of the EC Treaty.

3.1.2. Compatibility of the Aid with Article 87 (3) (c) of the EC Treaty

50. By notifying the measure before its implementation, the Austrian authorities have fulfilled their obligation according to Article 88(3) of the EC Treaty. Any disbursements will only be made after the authorisation of the notified measure by the Commission.

51. The Commission has examined the proposed measure in accordance with Article 87 et seq. EC Treaty and Article 61 et seq. EEA Agreement²² and has decided, in the light of its policy on environmental protection, to raise no objections to the support measures for the production of green electricity on the ground that the aid is compatible with the EC Treaty.

52. The Commission assessed the compliance of the support to the green electricity producers with Article 87(3)(c) EC Treaty, particularly on the basis of the Community Guidelines on State Aid for Environmental Protection (EAG) of 2 April 2008.²³

Compatibility of the operating Aid for the producers of green electricity in the form of feed-in tariffs

53. The operating aid as proposed in the Green Electricity Act (GEA) appears to be compatible aid according to Article 87(3)(c) EC Treaty. The Commission considers that according to the information provided, the measure meets the provisions of chapter 3.1.6. EAG on aid for

²¹ Para 21 Ökostromgesetz.

²² The following assessment is based on both the EC Treaty and the EEA Agreement, but for reasons of simplification, in the following assessment it will only be referred to the EC Treaty provisions.

²³ OJ of 1.4.2008, C 82, p. 1. With a reference to point 50 of the EAG, the Commission notes that the development of hydropower plants should be in accordance with the principles set out in European Community Law, especially in the Water Framework Directive (2000/60/EC - WFD) and the Habitats Directive (92/43/EEC). The present decision does not prejudice any conclusion of the Commission as to compliance with these Directives.

renewable energy sources (in particular 3.1.6.2, operating aid) and chapter 3.2 on the incentive effect and the necessity of the aid.

54. According to point 109 EAG, Member States may grant operating aid to compensate for the difference between the cost of producing energy from renewable sources, including depreciation of extra investments for environmental protection and the market price of the form of energy concerned. Operating aid may then be granted until the plant has been fully depreciated according to normal accounting rules. Austria has undertaken to respect point 109 of the EAG. The Commission has verified the information provided including also the calculation method used for determining the costs and the examples submitted by Austria.
55. With regard to operating aid to photovoltaic installations with a capacity of more than 5 kW operating aid and investment support Kli.En-FondsG are possible. However, according to Para 10a GEA, the investment support will be considered when determining the operating aid. From this it follows, that these provisions are in line with point 109(b) EAG.
56. With regard to the bonuses which can be granted under Para 11(1) GEA Austria undertakes to exclude any over-compensation of the additional cost by the proposed bonuses, which it would reduce if necessary.
57. With regard to Para 11b GEA, which foresees a purchase obligation for the GESC (Green Electricity Settlement Centre) after the initial purchase obligation has expired, Austria has undertaken to respect point 109 (c) EAG. Austria provided sufficient information demonstrating that the aggregate costs borne by the undertaking after the plant depreciation are still higher than the market prices of the energy.
58. The Commission therefore finds that the Austrian authorities have illustrated that the support granted under the measure at stake will not exceed the extra production costs of the renewable energy sources supported by the measure.
59. As the operating aid reduces the difference between the market price and the production costs for green electricity, undertakings may operate a plant which they otherwise could not operate economically. The Commission considers that due to the operating aid the aid recipient will change its behaviour so that the level of environmental protection is increased. Taking into account the information provided by Austria, the Commission considers that the aid will only be granted in cases where it is necessary and will provide an incentive effect (chapter 3.2 EAG).
60. According to the information provided and the undertakings of Austria, the Commission considers the provisions on the operating aid as being in line with the EAG and the aid therefore as being compatible with Article 87 (3)(c) EC Treaty.
61. With regard to the aid for the producers of green electricity the Commission reminds the Austrian authorities that according to point 49 of the guidelines State aid may be an appropriate instrument only for those uses of renewable energy sources where the environmental benefit and sustainability is evident. The Directive on the Promotion of the

Use of Energy from Renewable Sources²⁴ states in Art. 17 that bioliquids will be eligible for financial support only if they fulfil the listed sustainability criteria as referred to in footnote 17 of the Environmental Aid Guidelines.

Compatibility of the investment Aid for the producers of green electricity and certain CHP plants

62. The Commission considers the investment aid as proposed in the GEA as compatible aid according to Article 87 (3)(c) EC Treaty. In particular, the measure appears to be in line with the provisions of chapter 3.1.6 EAG on aid for renewable energy sources (in particular chapter 3.1.6.1, investment aid) and chapter 3.2 EAG on the incentive effect and the necessity of the aid.
63. The aid intensity has to meet the conditions as laid down in chapter 3.1.6.1 EAG providing a maximum aid intensity of 60% of the eligible costs for large enterprises with additional 10% for medium-sized enterprises and 20% for small enterprises. Investment aid can be granted for new small hydro power plants (SHPP), medium-sized hydro power plants (HPP) and combined heat and power plants (CHP) operated on the basis of spend lye. Depending on their respective maximum capacity SHPP may receive investment aid up to 30%, medium-sized HPP may receive up to 10% and CHP operated on the basis of spend lye may receive up to 30% of the eligible cost. Austria assured that the maximum aid stipulated in the EAG of 2 April 2008 will not be exceeded.
64. On the basis of the information provided, with regard to the calculation of eligible cost Austria has undertaken to respect point 105 and 106 EAG. Additionally, Austria assures that the eligible costs are calculated as laid down in points 81 to 83 EAG. Information confirming this has been provided by Austria.
65. With regard to the incentive effect (chapter 3.2 of the EAG) Austria has undertaken to respect the provisions of the EAG. The Commission has taken into account that as long as the investment costs of aforementioned power plants are substantially higher than the investment costs for the conventional generation of electricity, there is without the aid an insufficient incentive to build such power plants. The investment aid granted in the framework of the GEA act would allow the undertakings to construct such plants under more economic conditions.
66. On the basis of the information provided, the Commission therefore considers the provisions on investment aid as being in line with the EAG and the aid as being compatible with Article 87 (3)(c) EC Treaty.

²⁴ OJ L140, 5.6.2009, p. 16

3.2 Aid to large electricity consumers

3.2.1. Existence of state Aid to the large electricity consumers

Overview

67. The measure confers an advantage to large electricity consumers. It would prevent electricity distributors from recovering the additional costs for green electricity from large electricity consumers. According to earlier estimations of Austria, the benefits of the exemption may attain a considerable level for the enterprises. Furthermore the measure is selective because only large electricity consumers profit from the exemption. Although in principle all enterprises could benefit from the exemption, only specific industrial sectors, to which only few Austrian producers belong, would qualify for it²⁵. Finally, the potential beneficiaries are producers of energy intensive goods (e.g. aluminium, cement, steel) and are active in sectors in which trade between Member States takes place. The measure is therefore liable to distort competition and effect trade. For the assessment it is decisive is whether the measure is financed directly or indirectly through State resources and whether it is imputable to the State. Austria claims that the changes with regard to the exemption of large electricity consumers from the obligation to purchase green electricity do not involve State aid. In this regard the Austrian authorities point out that electricity distributors are free as to how they recover the additional costs for the purchase of green electricity and that prices are freely negotiated between distributors and consumers. In order to balance the losses caused by the exemption for some customers, distributors would simply charge their other (non-exempted) customers more. Therefore the re-balancing of the costs for green electricity would take place below the level of OeMAG. Austria submits that neither OeMAG nor the State itself would interfere in the relationship between the electricity distributors and the customers. Contrary to the assessment of aid for green electricity producers (which was subject to the decision on NN 162/A/2003 and N 317/A/2006) the proposed changes would only concern private parties. In this regard at least the support for large electricity consumers would be comparable to PreussenElektra.

No isolated assessment of the distributor-customer level

68. However, on the basis of the information currently available the Commission holds that the exemption of large electricity consumers from the obligation to purchase green electricity cannot be assessed in isolation from the rest of the system. On the contrary, an 'exemption' is by definition always an integral part of 'the rule'. Therefore, as far as State aid measures are concerned, an exemption from a State aid scheme remains an integral part of the scheme itself and has to be assessed accordingly. Furthermore, the State or State controlled bodies are still strongly involved because they decide if and to what extent large electricity consumers are exempted from the obligation to purchase green electricity. Therefore, the proposed changes cannot be assessed independently from the rest of the aid scheme.

²⁵ Austria estimates that between 27 and 42 companies could be eligible for the exemption. However, these estimates are based on figures from an expertise from 2005.

State involvement on the distributor-customer level

69. Furthermore it should be noted that according to the information at hand, the Austrian State remains involved on the distributor-customer level. Firstly, the potential beneficiaries from the exemption submit an application to the government owned Energie-Control GmbH, which verifies the request, and finally grants the exemptions to large electricity consumers²⁶.
70. Secondly, the government controlled OeMAG grants derogations to electricity distributors concerning their obligation to purchase green electricity as far as they can prove that their customers have been exempted²⁷. If distributors demonstrate to OeMAG that they supply electricity to customers subject to the exemption, OeMAG has to reduce their quotas when establishing the quotas of green electricity attributed to the distributors. In a next step, by taking into account the green electricity not attributed to the certain distributors benefiting from reduced quotas, the quotas of green electricity for the remaining distributors will be increased. If quotas cannot be adjusted due to market rules, OeMAG is authorised to exploit the surplus of energy as good as possible.
71. Thirdly, the Federal Minister for Economy and Labour decides on a compensation fee that those large electricity consumers, which have obtained an exemption, have to pay directly to OeMAG²⁸. Finally it should be stressed again that in the notified measure the State seems to finance both the operating cost of OeMAG as well as deficits, which might result i.a. from the exemptions (see above).²⁹ For these reasons the Commission takes the view at this stage that the advantage granted to large electricity consumers is imputable to the state.
72. With regard to the transfer of resources it appears that (i) the exemption of large electricity consumers results in (ii) a decrease of green electricity attributed to their electricity distributors and accordingly in (iii) a decreased amount collected by the levy for OeMAG. In a second step the resource transfer from the large electricity consumers via the distributors to OeMAG is allegedly set off at a later stage by a mechanism that compensates the forgiven resources by increasing the amounts raised by the levy from the remaining (non exempted) consumers. Therefore despite this compensation mechanism, the Commission doubts that that the temporary loss in funding can be fully set-off without the use of state resources. Further, if not all green electricity can be attributed OeMAG would apparently try to market the surplus itself – allegedly for the price of grey electricity – and would receive

²⁶ Para 22c (2) Ökostromgesetz provides that even exempted large electricity consumers have to pay a minimum contribution (calculated as 0,5% of the net production value) for the support for green electricity producers (see attached chart). According to the Austrian authorities this provision should give some flexibility to the State as to the extent to which large electricity consumers are exempted.

²⁷ Para 15a (1a) Ökostromgesetz: "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."

²⁸ Para 22c (2) Ökostromgesetz.

²⁹ According to the latest submissions, Austria considers to abolish this provision in the draft Green Electricity Act.

compensatory funding for the incurred losses from the state. For these reasons the Commission cannot exclude the involvement of state resources in the system.

Conclusion

73. The changes to the existing scheme approved by the Commission in 2006 thus do not seem to merely concern the (private) relationship between end consumers and electricity distributors/traders. On the contrary the proposed system of exemptions for large electricity consumers seems to increase the involvement of OeMAG, E-Control and the State in general in the relationship between end consumers and electricity distributors/traders. Based on the information provided by Austria to this date, the Commission considers that the measure benefitting large electricity consumers constitutes State aid. in the meaning of Article 87 (1) of the EC Treaty.

3.2.2. Compatibility of the Aid with Article 87(3)(c) of the EC Treaty

74. Taking into account the conclusion that the exemption for large electricity consumers constitutes State aid, the Commission assessed the possible compatibility of such a measure with State aid rules.

75. Although the scheme as such was notified as aid for renewable energies the Austrian authorities submitted that the exemption could be approved under Chapter 4 EAG. Point 151 EAG sets out that aid in the form of exemptions from environmental taxes will be considered compatible with the common market provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax exemptions do not undermine the general objective pursued. In this regard the Commission considers that Chapter 4 EAG does not apply directly since the obligation to purchase green electricity is not considered as being an environmental tax within the meaning of points 151 et seq. EAG. Since Chapter 4 already constitutes an exemption from the system of the EAG and has to be interpreted restrictively, it cannot be applied by analogy to levies under the EAG. In view of the Commission, based on the available information, there is no indication that the conditions for compatible aid as stipulated in chapter 4 of the EAG may be fulfilled.

76. Based on the information currently available it can be concluded that the partial exemption of large electricity consumers from contributing to the financing of green electricity seems to constitute State aid, which raises doubts as to its compatibility with State aid rules since it seems to amount to operating aid for the companies concerned. Furthermore, the assessment of the aid needs to take into account the negative environmental effects of the aid, which reduces the price for energy to be paid by large electricity consumers.

77. The Commission has therefore at this stage doubts as to the compatibility of the proposed measure and in accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to open the formal investigation procedure, thereby inviting Austria to submit its comments.

4. DECISION

78. In view of the above the Commission comes to the conclusion that the notified measure regarding aid to the producers of green electricity is compatible with Article 87(3)(c) of the EC Treaty. However, with regard to the aid to large energy consumers the Commission raises doubts as to the compatibility with State aid rules.

4.1 State aid to the producers of green electricity

79. In light of the foregoing, the Commission concludes that the notified measure for the benefit of the producers of green electricity is compatible with Article 87(3)(c) of the EC Treaty.

80. The Commission has concluded not to raise objections to the measure as described and assessed above as it complies with the Community guidelines on State aid for environmental protection and is therefore considered to be compatible with the common market in application of Article 87(3)(c) EC Treaty.

81. The Commission reminds the Austrian authorities that, in accordance with Article 88 (3) of the EC Treaty, any plans to refinance, alter or further change this act have to be notified to the Commission pursuant to provisions of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 [now 88] of the EC Treaty³⁰.

82. The Commission requests Austria to submit an annual report on the implementation of the aid enabling the Commission to verify that all conditions stipulated above were fulfilled when implementing the measure. Any change in the conditions under which the aid is granted must be notified in advance.

4.2 State aid to large electricity consumers

83. The Commission has at this stage doubts as to the compatibility of the notified measure for the benefit of large energy consumers and in accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to open the formal investigation procedure, thereby inviting Austria to submit its comments.

84. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests Austria to submit its comments and to provide all information which may help to assess the measure, within one month of the date of receipt of this letter. It requests the Austrian authorities to forward a copy of this letter to the potential recipients of the aid immediately.

85. The Commission wishes to remind Austria that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

³⁰ OJ L140 30.4. 2004 p.1

4.3 Publication and Confidential Information

86. The Commission warns Austria that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax No: + 32-2-296 12 42

Yours faithfully
For the Commission

Neelie KROES
Member of the Commission

