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Subject: State aid SA.33384 (2011/N) – Austria
Ökostromgesetz 2012 (Green Electricity Act 2012)

1. PROCEDURE

- (1) On 22 July 2011 Austria notified a draft law, the "*Ökostromgesetz 2012*" (*Green Electricity Act 2012*, "*2012 GEA*"), amending the 2002 Green Electricity Act¹ that contains an aid scheme for green electricity producers.
- (2) The 2002 Austrian Green Electricity Act entered into force on 1 January 2003. The aid scheme was approved by the Commission on 4 July 2006 (NN 162/A/2003 and N 317/A/2006²). An amendment notified under N 47/2008 was approved on 10 July 2008³.
- (3) On 5 September 2008, by taking into account that the former 2001 Environmental Aid Guidelines⁴ had been replaced by new 2008 Environmental

¹ BGBl I Nr. 149/2002.

² Letter to Austria of 4 July 2006, C(2006) 2955.

³ Letter to Austria of 10 July 2008 C(2008) 2749.

⁴ OJ C 37 of 3.1.2001, p. 3.

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Aid Guidelines⁵, Austria notified the whole act again together with some amendments (2008 GEA). The Commission partially approved the scheme on 22 July 2009 but opened the formal investigation procedure (C 24/2009)⁶ as far as the exemption mechanism for energy-intensive businesses contained in the amended act was concerned. On 8 March 2011, the Commission found this exemption mechanism to be incompatible with the internal market⁷.

- (4) Compared to the 2008 GEA, the notified draft act contains changes concerning the objectives of the aid scheme, the budget, the duration, forms of support and eligibility criteria. It also contains important changes to the financing mechanism of the aid scheme.
- (5) The Commission asked Austria to provide further information on the draft 2012 Green Electricity Act by letter of 1 September 2011, to which Austria replied on 4 October 2011. To a further request for information of the Commission Austria replied on 17 November 2011 and 9 December 2011. The Austrian authorities supplemented their replies by emails of 27 January 2012 and 30 January 2012.

2. DESCRIPTION OF THE AID

2.1. Forms of support, beneficiaries and objective of the aid scheme

- (6) The 2012 GEA aims at supporting the production of electricity from renewable energy sources through feed-in tariffs and investment grants. The 2012 GEA will enter into force after the Commission approval of the measure⁸. The Austrian authorities confirmed in this context that the aid granting body can only grant after the Commission has cleared the aid (stand still clause).
- (7) Beneficiaries are all producers of green electricity, be they small, medium-sized or large undertakings fulfilling the criteria of the scheme. Indeed, as set out under points 33, 34, 51 and 52 below support under the scheme is granted only for electricity produced from certain types of renewable energies and the form of support (feed-in tariffs or investment grants) varies according to the type of renewable energy used to produce electricity.
- (8) The 2012 GEA does in general not cover electricity produced in combined heat and power plants (CHP). However, the 2012 GEA provides support for CHP plants operated on the basis of biogas and liquid biomass and for CHP plants operated on the basis of spent lye. The support of CHP plants operated on the basis of fossil fuels is included in the Austrian CHP Act⁹ which was approved by the Commission (N 461/2008)¹⁰ and is not part of this decision.
- (9) The GEA specifies its objectives as:

⁵ OJ C 82 of 1.4.2008, p. 1.

⁶ OJ C 217 of 11.9.2009, p. 12.

⁷ OJ L 235 of 10.9.2011, p. 42.

⁸ With the exception of Articles 1, 23(4) and 56(4) which entered into force on 30 July 2011.

⁹ BGBl. I Nr. 111/2008 "Bundesgesetz, mit dem Bestimmungen auf dem Gebiet der Kraft-Wärme-Kopplung neu erlassen werden".

¹⁰ Letter of the Commission of 23 February 2009.

- Promoting electricity produced from renewable energy sources in accordance with EU law;
- Increasing the proportion of production of electricity from renewable sources in accordance with specific targets established for 2020;
- Ensuring the energy efficient production of electricity from renewable energy sources;
- Make efficient use of the means of promoting renewable energy sources;
- Focusing on technology policies with a view to achieve market maturity for new technologies;
- Ensuring a secure investment climate for existing and future power plants;
- Eliminating by 2015 (in terms of quantities) the reliance on electricity from nuclear sources.

2.2. Allocation of the support and financing

- (10) The feed-in tariffs and the investments grants are paid out respectively by the Green Electricity Settlement Centre ("Ökostromabwicklungsstelle") and the Settlement Center for Investment Grants ("Abwicklungsstelle für Investitionszuschüsse") to be designated by the Minister for Economy, Family and Youth. For the time being, the OeMAG ("Abwicklungsstelle für Ökostrom AG") (hereafter OeMAG) has been appointed to carry out these tasks.
- (11) The OeMAG is monitored by the Austrian Federal Ministry of Economic Affairs and Labour, the Austrian Energie-Control GmbH as well as the Court of Auditors. The OeMAG is also subject to various reporting obligations and has to grant access to any relevant information necessary for the Minister or Energie-Control GmbH's ("E-Control")¹¹ monitoring tasks. For the administration of the levies, the OeMAG has to open a special account which can at any moment be monitored by the Minister or E-Control. Also, E-Control has to approve the general conditions of OeMAG's operation and can require OeMAG to amend or replace the general conditions, which regulates its operations. Details on these control mechanisms are contained in particular in Articles 37, 42(3), 50, 51, 52 of the 2012 GEA.
- (12) The OeMAG will recover its costs via two types of charges: the "Ökostrompauschale" and the "Ökostromförderbeitrag" that are to be collected by network operators and then transferred to the OeMAG.
- (13) The Ökostrompauschale consists in a fixed lump sum to be paid by electricity consumers and which varies according to the grid level to which the consumers are connected to.

¹¹ Energie-Control GmbH is a public body, which is responsible for the monitoring and regulation of the Austrian energy market (Austrian energy regulator).

- (14) The Ökostromförderbeitrag also consists in a charge to be paid by Austrian electricity consumers connected to the grid. It will be determined on a yearly basis by the Minister for economy, family and youth and will vary depending on the required financing needs. The total amount to be financed through the Ökostromförderbeitrag corresponds to the estimated total annual aid amount needed to support the measures as planned in the 2012 GEA minus the expected revenues to be generated by the Ökostrompauschale. By establishing the charge, the Minister will have to ensure that the charge is in proportion to the network charges and is spread equally among end users connected to the same grid level¹².
- (15) Austria has illustrated how the Ökostromförderbeitrag is calculated as follows: If for a given year EUR 360 million are needed to finance the support under the 2012 GEA, and the total annual revenues from the Ökostrompauschale are estimated at EUR 107 million, the gap between the two amounts (EUR 253 million) will indicate how much funds have to be raised through the Ökostromförderbeitrag. It is then calculated how much each grid level contributes to the financing of the total network costs (i.e. total expected revenues generated by charges levied for the use of each grid level are calculated). In parallel, the ratio between the total needed Ökostromförderbeitrag and the total network charges (in the example, they are calculated as amounting to EUR 1.52 billion) is calculated. In the example, EUR 253 million make out 16.64% of EUR 1.52 billion. This ratio is then applied on the total expected revenues generated by network charges for each grid level, which yields the total expected revenue to be generated at each grid level with the Ökostromförderbeitrag.

Table 1: Numerical example provided by Austria as to the calculation of the Ökostromförderbeitrag and as to the percentage that each grid level contributes to the financing of green electricity.

Kostenaufteilung je NE							
	Netzentgelte (Bemessungsgrundlage)					Gesamtbasis für die Berechnung des Ökostromförderbeitrags	Kostenaufteilung gesamt in % je NE
	Leistungspreis (nicht gemessen)	Leistungspreis (gemessen)	NNE-Leistung	Netzverlust-entgelt	NNE-Arbeit		
NE 1-3	0	0	13.009.128	4.839.741	30.354.631	48.203.500	3,17%
NE 4	0	0	12.399.257	4.583.842	28.931.601	45.914.700	3,02%
NE 5	0	0	57.617.955	17.264.110	134.441.895	209.323.960	13,77%
NE 6	0	0	41.606.163	15.604.218	97.081.047	154.291.428	10,15%
NE 7	45.408.666	48.933.487	25.787.595	148.402.749	793.451.279	1.061.983.776	69,88%
Summen	45.408.666	48.933.487	150.420.098	190.694.660	1.084.260.452	1.519.717.364	100,00%

¹² The definition of grid level is based on technical and physical values and is measured on the basis of the connected load. There are 7 grid levels in Austria. Based on connected load, they represent the following entities: Level 1-3 – industry; Level 4 – industry; Level 5 – large businesses, industry; Level 6 – businesses, industry; Level 7 – households, businesses, agriculture, industry.

Aufteilung der Unterdeckung auf Netzebenen (durch Förderbeitrag abzudecken)	Ökostromförderbeitrag in % der Netzkosten	Ökostrom-pauschale	Kostenbasis (Summe Förderbeitrag und Pauschale)	Kostenaufteilung gesamt in % je NE
-8.019.980	16,64%	3.339.467	11.359.447	3,16%
-7.639.175	16,64%	5.841.850	13.481.025	3,75%
-34.826.807	16,64%	25.574.536	60.401.343	16,81%
-25.670.629	16,64%	8.547.514	34.218.143	9,52%
-176.690.257	16,64%	63.251.275	239.941.532	66,76%
-252.846.849	16,64%	106.554.642	359.401.490	100,00%

Source: the Austrian authorities

- (16) Austria has further explained that the individual Ökostromförderbeitrag will then be established as follows: On the basis of existing data concerning power flows on each grid level and the network charges, an average Ökostromförderbeitrag can be determined. The specific additional charge resulting from the Ökostromförderbeitrag for an individual metering point corresponds then simply to the relative deviation of the individual point compared to the average network charges to be paid on each grid level. Example: If it is observed that at the metering point X the network charges due are 10% higher than average network charges, then also the Ökostromförderbeitrag will be 10% higher than the average Ökostromförderbeitrag to be paid for the grid level concerned.

2.3. Modification of the support scheme

2.3.1. Objectives and budget

- (17) Compared to the 2008 GEA, the objectives have slightly changed. They have been extended to 2020 and new higher targets have been set. The objective to suppress the reliance on nuclear power is new.
- (18) In order to achieve the new targets, an increase of a yearly additional¹³ budget to 50 millions EUR is foreseen. This additional budget will serve only for new entrants (i.e. new purchase contracts and new investments). This budget is to be reduced yearly by 1 million EUR.
- (19) The additional budget is spread over the different technologies according to the following key: EUR 8 million for photovoltaic; EUR 10 million for biomass and biogas; minimum EUR 11.5 million for wind power; minimum EUR 1.5 million for small-sized hydropower plants; 19 million EUR to be shared between wind, hydropower and photovoltaic – this latter part will be yearly reduced by EUR 1 million.

2.3.2. Supported projects and aid amount

- (20) Apart from changes in the eligibility criteria the main changes are the possibility for small hydro power plants with a maximum capacity of 2 MW to apply for feed-in tariffs instead of investment aid (under the 2008 GEA, they were only

¹³ The Austrian authorities estimate that the total yearly budget will amount EUR 550 million.

eligible for investment aid) and the CHP bonus of 1 cent/kWh for modernised CHP plants producing green electricity from biogas or biomass.

2.3.3. Calculation of feed-in tariffs

- (21) Another novelty is the possibility for the Minister to establish feed-in tariffs for several years in a row, with an automatic yearly decrease instead of calculating and establishing feed-in tariffs every year and the automatic prolongation of previous tariffs (with automatic) as long as new tariffs have not been defined.

2.3.4. Financing of the aid to the producers of green electricity

- (22) Compared to the previous financing mechanism, the funding of the support mechanism by means of a fixed transfer price to be paid by the electricity traders on the (mandatory) purchase of green electricity to OeMAG has been deleted. It has been replaced by the Ökostromförderbeitrag.
- (23) Moreover, the exemption for energy-intensive undertakings at stake in Commission decision of 8 March 2011 in case C 24/2009 has been abolished as well. Under the 2012 GEA, they will be subject to the Ökostromförderbeitrag as all other consumers.
- (24) As far as the "Ökostrompauschale" is concerned, it is very similar to the previous "Zählpunktpauschale". The amounts still depend on the grid level. They have been modified: Levels 1-4 will pay EUR 35 000 instead of 15 000; Level 5 will pay EUR 5 200 instead of 3 300; Level 6 will pay EUR 320 instead of 300 and Level 7 will pay EUR 11 instead of 15.

2.4. Operating Aid in the form of feed-in tariffs

2.4.1. Presentation and scope

- (25) The 2012 GEA obliges OeMAG to purchase green electricity from eligible generators at a guaranteed feed-in tariff ("Kontrahierungspflicht zu festgelegten Einspeisetarifen").
- (26) For certain types of green electricity different types of "bonuses" can be paid on top of the "normal" feed-in tariff.
- (27) The feed-in tariffs as well as the bonuses are established by the Minister for economy, family and youth in agreement with the Minister for agriculture and forestry, environment and water and for employment, social affairs and consumer protection.
- (28) The purchase obligation against feed-in tariffs lasts for 15 years for electricity produced with biomass or biogas and 13 years for other types of green electricity. The purchase obligation is formalised in a purchase contract concluded between the green electricity producer and the OeMAG.
- (29) The feed-in tariffs applicable when the purchase contract with OeMAG is concluded remain applicable for the whole duration of the contract.

- (30) Feed-in tariffs (for new purchase contracts) are in principle established every year. However, when appropriate, tariffs can also be established for several years in a row. In that case, should past experience show a decreasing trend in terms of costs because, for instance, of technological progress, the decreasing tendency in production costs will have to be reflected in the decreasing tariffs when these are determined for several years forward¹⁴.
- (31) Also, the 2012 GEA now establishes a system whereby until new tariffs enter into force, the tariffs applicable in the previous year remain applicable but with an automatic reduction of 8% for photovoltaic installations, of 1% for wind powered installations and 1% for installations based on the other eligible technologies¹⁵.
- (32) Finally, tariffs can be amended in the course of a year (Article 19 2012 GEA).
- (33) The categories of green electricity producers eligible for feed-in tariffs are wind power plants, photovoltaic power plants, power plants fired on the basis of biomass and biogas, geothermic power plants, hydropower plants and hybrid plants (for the green electricity part of their production).
- (34) However, producers of certain forms of green electricity are not eligible for the benefit of the feed-in tariffs (but some of them are eligible for investment aid). Those are according to Article 12 (1) and (2) GEA 2012: electricity produced with spent lye, animal meal ("Tiermehl"), sewage sludge, electricity generated by hydro power plants with a maximum capacity of more than 2 MW and photovoltaic installations with a capacity of less than 5 kW peak.
- (35) Furthermore there is no obligation to purchase electricity produced with biomass or biogas, if the power plant does not provide state of the art measures, is not run in accordance with certain sustainability requirement, does not have a 5 year purchase-plan for biomass or biogas or does not achieve a certain efficiency level.

2.4.2. *Establishment of the feed-in tariffs*

- (36) The feed-in tariffs must be determined so as to provide incentives for a continuous increase in the green electricity production. In case of electricity generated from raw material, the increase in production of green electricity is to be encouraged only insofar as there is demonstrably a secured raw material supply (Article 20 GEA).
- (37) Austria has explained that feed-in tariffs are to be established in accordance with the following criteria:

¹⁴ For instance it will be possible to establish in advance (decreasing) tariffs for 2013, 2014 and 2015. The tariffs will apply respectively to new contracts concluded in 2013, 2014 and 2015.

¹⁵ Austria indicated that this automatic reduction was established on the basis of trends observed for the various technologies concerned and was inspired by a similar system in Germany.

- Tariffs must comply with the requirements of EU law. This implies that the tariffs and the respective bonuses (described in more detail in 2.4.3, 2.4.5 and 2.4.6. below) cannot lead to overcompensation and have to be calculated so as to compensate the difference between the production costs for green electricity and the market price for electricity.
- For establishing of the market price for electricity, the Austrian authorities consider as relevant the electricity prices negotiated on the EEX trading market (European Energy Exchange AG, based in Leipzig). - Tariffs must be established for each different primary energy source, taking into account differences in production costs. They may differ according to output (Engpasseistung), other special technical specifications and performance targets.
- The relevant production costs are established by reference to the average production costs of cost-efficient and rationally managed installation built in accordance with state of the art standards. Each year an expert is consulted in order to determine the average production costs of rationally managed facilities that reflect the state of the art.
- Tariffs must take into account any aid already received.
- They must avoid that raw materials that would normally be aimed at uses in the food and feed industry are diverted for the production of energy.

(38) Austria has further indicated that for the calculation of the production costs, the following is taken into account:

- (a) investment costs converted to the annual level on the basis of the annuity method¹⁶;
- (b) operating costs (which are separated into three categories: a) variable costs depending on the use of the installation, like fuel costs, variable maintenance costs; b) running costs necessary for the operating of the installations, like labour costs, fixed maintenance costs; c) other costs like insurances;
- (c) revenues (if any). In the case of CHP plants for example, the revenues generated by the sale of heat will be deducted from the production costs.

(39) Austria has indicated that on the basis of the above described method, the feed-in tariffs had been established as follows for 2011:

¹⁶ The investment costs are converted into annual amounts on the basis of the admitted duration of the feed-in tariff contract (13 or 15 years) and by applying an appropriate return on investment currently established at 6% (4% basis + 2% inflation).

Table 2: Overview of 2011 production costs and FIT levels (in cent/kWh)

	Stromerzeugungskosten	Einspeisetarife für Neuanlagen 2011
Windenergie	8,7 - 9,9	9,5 - 9,7
Biomasse fest		
bis 2 MW	13,5 - 17,2	12,97 (11,5) - 14,98
2 bis 5 MW	12,8 - 13,9	12,26 (11,5)
5 bis 10 MW	11,6 - 12,5	12,06 (11,5)
über 10 MW	10,4 - 12,2	10,00
zB Rinde, Sägespäne	minus 25 %	minus 25 %
zB Spanplattenabfälle	minus 40 %	minus 40 %
Biomasse flüssig	5,4 - 8,3	5,8
Biogas		
bis 250 kW	16,7 - 26,8	18,5
250 kW bis 500 kW	14,6 - 25,2 (interpoliert)	16,5
über 500 kW	12,5 - 23,5	13,0
Zumischung von Reststoffen	bis zu minus 20 % / 30 %	minus 20 %
Photovoltaik		
	30 - 40	27,65 - 38
	25 - 35	20,63 - 33

Source: the Austrian authorities

Table 3a: Overview of increased production costs and the respective bonuses in cents/kWh (described below in 2.4.3, 2.4.5 and 2.4.6)

	Real additional costs	Legal bonus in cent/kWh				
		2012	2011	2010	2009	2008
raw material bonus	caused by increasing raw material costs 4 to 9 Cent/kWh	n.a (max 4)*	n.a (approximately 2)*	n.a. (2)*	(3)*	4
technology bonus for refining biogas	min. 3 Cent/kWh	2	2	2	2	-
KWK bonus	2.8 Cent/kWh	2	2	2	2	-
KWK bonus for refurbished facilities	min. 1 Cent/kWh	1	-	-	-	-

Source: the Austrian authorities; * possible for existing plants only, for details see point 40 below

Table 3b: Overview of production costs of installations eligible for bonuses and FIT levels, including the respective bonuses in cents/kWh (described below in 2.4.3, 2.4.5 and 2.4.6)

	Electricity production costs for new	FIT levels + bonus for existing Biogas/liquid	FIT levels + bonuses for new
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	installations	biomass installations before 2009	installations 2011
	minimum costs - higher costs without additional technologies/with additional technologies	without /with maximum bonus (4 raw material + 1 for CHP)	without /with maximum bonus (2 CHP)
Liquid biomass	5.4 – 8.3 / 18.3	5.99 – 13.00 / 10.99 – 18.00	5.8/7.8
Biogas	minimum costs - higher costs without additional technologies/with additional technologies	without /with maximum bonus (4 raw material + 1 CHP)	without /with maximum bonus (2 CHP + 2 refining)
Up to 250 kW	16.7 – 26.8 / 36.8	15.14 – 17.0 / 20.14 – 22.0	18.5 / 22.5
250 kW to 500 kW	14.6 – 25.2 / 35.2 (interpoliert)	13.99 – 14.5 / 18.99 – 19.5	16.5 / 20.5
above 500 kW	12.5 – 23.5 / 33.5	10.3 – 12.6 / 15.3 – 17.6	13.0 / 17.0
Addition of residues	Up to minus 20 % / 30 %	minus 25% to minus 30%	minus 20 %

Source: the Austrian authorities

2.4.3. Raw material bonus

- (40) Article 22 of the 2012 GEA provides for a raw material bonus of maximum 4 cent/kWh for liquid biomass and biogas. It can be granted if the operator has concluded a feed-in contract with the OeMAG prior to 20 October 2009 and if it is demonstrated that the power plant cannot be operated break-even because of the increase in raw material (operating) costs compared to the costs of 2006.
- (41) Austria has explained that before that date raw material costs were lower than today. Hence, feed-in tariffs applying to contracts concluded before that date are too low to cover the production costs. The bonus aims at taking the increase in raw material costs into account. By contrast, new tariffs applying to contracts concluded after that date take into account the increased raw material (operating) costs. The bonus thus does not apply to them.

2.4.4. Follow-up feed-in tariff contract for biomass, including biogas

- (42) Pursuant to Article 17 of the 2012 GEA, the OeMAG may, after expiry of the initial purchase obligation, purchase green electricity produced from solid or liquid biomass or biogas if (i) the electricity is supplied into the public grid, (ii) the plant has a fuel efficiency of at least 60%, (iii) the producers has a purchase-plan for the concerned raw material for at least the following 5 years, (iv) (for solid biomass plants) the producer has adopted measures to avoid the emissions of fine particles and (v) (for liquid biomass) the plant is operated in accordance with sustainability requirements applying to liquid bio-fuels.
- (43) The Minister may establish follow up feed-in tariffs for the conclusion of these additional purchase contracts. The follow-up tariffs are based on running costs only. Follow-up feed-in tariffs can only be granted up to 20 years after the installation started to be operated.

- (44) According to Austria, the generation of green electricity from biomass (including biogas) after the expiry date of the purchase obligation would lead to production costs above the electricity market price. As a result, without additional support, producers would probably close the installation directly after the end of the depreciation period, which is in Austria's view detrimental to the objective of supporting green electricity.

2.4.5. *Technology bonus for the refining of biogas*

- (45) According to Article 21 of the GEA 2012 a bonus of 2 cent/kWh may be granted for green electricity generated from biogas which was refined to meet the quality of natural gas and then fed into the natural gas network¹⁷, if the power plant uses at least 50% of refined biogas and achieves the efficiency level indicated in Article 8(2) of the Austrian CHP Act. This technology bonus focuses on power plants using biogas produced in facilities located elsewhere and that has subsequently been upgraded and fed into the natural gas network. Austria would like to promote this "decoupled" production of electricity from biogas given that it broadens the technical possibilities to produce electricity from biogas.
- (46) This technology bonus can be granted for a maximum duration of 15 years after the biogas power plant was put into function. The purpose of the bonus is to compensate for higher prices of biogas resulting from its refining to natural gas quality and from the feeding-in of the gas into the natural gas network. Those costs are not included in the "normal" feed-in tariffs for electricity produced from biogas.

2.4.6. *KWK bonus for CHP plants using liquid biomass or biogas*

2.4.6.1. 2 cent/kWh for (new) CHP facilities

- (47) Article 21 (2) provides for a bonus of 2 cent/kWh for CHP facilities operated on the basis of biogas or liquid biomass ("KWK-Bonus"). The bonus can only be granted if the CHP plant achieves the efficiency level indicated in Article 8(2) of the Austrian CHP Act and if an application for a feed-in tariff contract was done after the entry into force of the GEA 2008. The efficiency criteria of Article 8(2) of the Austrian CHP Act is stricter than the criteria set out in Annex III to Directive 2004/8/EC¹⁸.

¹⁷ Through feeding the refined biogas in the natural gas network, it makes it possible to produce electricity from biogas without requiring that the production of electricity takes place at the same location as the production of the biogas.

¹⁸ Article 8(2) of the Austrian CHP Act provides that a major saving in the use of primary energy sources as compared to modern calorific power stations without cogeneration heat is achieved, if within the period under review the following ratio is attained by a plant: $2/3 * W/B + E/B \geq 0.6$.

W = quantity of heat (kWh) supplied to the public district heating system or economically used as process heat

B = total fuel used in kWh

E = electric energy (kWh) supplied to the public electricity grid or metered at the generators clamp

The efficiency criterion shall be calculated on a monthly basis per plant or per operator. Attention shall be paid to achieving an optimal total in terms of reducing green house gas emissions.

- (48) Austria has explained that an optimal use of renewable energy sources such as biomass or biogas occurs when the production of electricity is combined with the production of heat¹⁹. However, the mechanism established by the 2012 GEA for the calculation of feed-in tariffs focuses on the production costs for electricity and takes as a reference a cost-efficient and rationally conducted installation. Also the revenues generated by heat sales are much lower than revenues generated by the sale of electricity²⁰. As a consequence, operators of CHP plants fuelled by biomass or biogas will try to maximize their electricity production at the expense of the overall energy efficiency level of the CHP plant. In order to encourage CHP plant operators to maximize their overall energy efficiency, Austria has established a bonus of 2 cent/kWh el. This bonus has been calculated in order to compensate for the loss of revenues linked to a reduced production of electricity implied by a production process maximizing the overall energy efficiency. It has also taken into account the additional revenue stemming from an increased production of heat.

2.4.6.2. 1 cent/kWh for refurbished CHP facilities

- (49) CHP plants producing electricity from biogas or liquid biomass having concluded a feed-in tariff contract before the entry into force of the 2008 GEA can receive a bonus of 1 cent/kWh if they have been refurbished and the costs of the plant refurbishing accounts for at least 12.5% of the costs implied by the renewal of the entire plant and if they achieve the required efficiency level indicated in Article 8(2) of the Austrian CHP Act. The efficiency criteria of Article 8(2) of the Austrian CHP Act is stricter than the criteria set out in Annex III to Directive 2004/8/EC²¹.
- (50) Based on the same observations as described under point (48) of this decision, the purpose of this latter bonus is to provide incentives for undertakings to modernise and increase the efficiency of their CHP power plant. The bonus, however, will be granted (only) for the rest of the remaining duration of the feed-in tariff contract.

¹⁹ Austria has indicated that a biomass fueled power plant can only hardly achieve an energy efficiency level of 40%. This is corroborated by the reference value set in Commission Decision 2007/74/EC for agricultural biomass at 25%. The remaining 60% (or more) are then lost in the form of heat. Energy efficiency can be increased if the power plant is equipped with heat recovery systems.

²⁰ Austria indicated that in 2009 for instance, prices varied between 0.7 cent/kWh th and 4.7 cent/kWh th for heat while feed-in tariffs for electricity produced from biomass and biogas ranged between 13.84 cent/kWh el and 14.05 cent/kWh el.

²¹ Article 8(2) of the Austrian CHP Act provides that a major saving in the use of primary energy sources as compared to modern caloric power stations without cogeneration heat is achieved, if within the period under review the following ratio is attained by a plant: of $\frac{2}{3} * \frac{W}{B} + \frac{E}{B} \geq 0.6$.

W = quantity of heat (kWh) supplied to the public district heating system or economically used as process heat

B = total fuel used in kWh

E = electric energy (kWh) supplied to the public electricity grid or metered at the generators clamp

The efficiency criterion shall be calculated on a monthly basis per plant or per operator. Attention shall be paid to achieving an optimal total in terms of reducing green house gas emissions.

2.5. Investment aid to the producers of green electricity

- (51) The 2012 GEA also provides for investment grants for the construction of new CHP plants fired on the basis of spent lye and for the construction or modernisation ("Revitalisierung") of small and medium-sized hydro power plants.
- (52) Small-sized hydro power plants are defined as plants with a maximum capacity of 10 MW. Medium-sized hydro power plants are defined as plants with a maximum capacity above 10 MW but not going beyond 20 MW.
- (53) The Investment grants are granted by the OeMAG after approval by the Minister for economic affairs and labour. Applications are handled in chronological order.
- (54) The aid application has to be submitted before the works start and has to include investment costs and a profitability calculation. For the profitability calculation, the 2012 GEA imposes a return on invested capital of 6%.
- (55) Eligible costs are defined in "Förderungsrichtlinien für Investitionszuschüsse"²² (Guidelines for Investment grants) adopted on the basis of Article 30 2012 GEA. Those Guidelines set out the principle that eligible investment costs are limited to the extra investment costs borne by the beneficiary compared with a conventional facility having the same output capacity. Operating costs and benefits related to the extra investment and arising during the first five years of the life of the investment have to be taken into account for the calculation.
- (56) Those Guidelines further establish that eligible investments may take the form of investments in tangible and intangible assets.

2.5.1. Investment support to new or revitalised small-sized hydro power plants ("SHPP") and medium-sized hydro power plants ("MHPP")

- (57) For SHPP with a maximum capacity of 500 kW the 2012 GEA stipulates an aid intensity of 30% of the investment costs directly related to the construction or the revitalisation (excluding the costs for the real estate), 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 MHPP, 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.
- (58) The investment costs as well as the necessity of the grant are to be established by an independent expert.

²² The 24.3.2011 version is available under http://www.oem-ag.at/static/cms/sites/oem-ag.at/media/downloads/Investitionsfoerderung/2011_03_24_Richtlinienaenderung_clean.pdf.

- (59) For SHPP the 2012 GEA limits the total amount of aid to EUR 16 Mio per year. A one off additional amount of EUR 20 Mio to be financed through the Ökostrompauschale will be earmarked SHPP for the year following the entry into force of the 2012 GEA. For MHPP the 2012 GEA limits the total amount of aid to EUR 50 Mio of which the OeMAG has to use up to EUR 7.5 Mio per year until 2014.

2.5.2. Investment support to CHP plants operated with spend lye

- (60) The 2012 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 2012 GEA. To be eligible the plants must serve for the production of process heat and achieve savings in the use of primary energy sources and in CO₂ emissions compared to the separate generation of electricity and heat. The CHP must meet the efficiency criteria of Article 8(2) of the Austrian CHP Act. Also the harmonised efficiency reference values established in Article 4 of Directive 2004/8/EC have to be satisfied.
- (61) Austria has explained that in general spend lye is used to produce heat without combined production of electricity due to important additional investment costs necessary to co-generate electricity and heat. Through the investment aid, Austria thus intends to grant an incentive for the combined production of heat and electricity on the basis of spend lye in order to further reduce CO₂ emissions.
- (62) 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.
- (63) Until 2012 the total amount of aid is limited to EUR 2.5 Mio per year.
- (64) For the purposes of the profitability calculation, the revenues generated by the heat are to be taken into account and the depreciation period is 15 years.

3. ASSESSMENT

3.1. Existence of State aid to the producers of green electricity

- (65) It follows from Article 107 (1) of the TFEU that in order to be qualified as State aid, a measure must meet the following cumulative conditions: 1) the measure has to be granted out of State resources and be imputable to the State, 2) it has to confer a selective economic advantage to undertakings or a sector, 3) the advantage has to distort or threaten to distort competition, 4) the measure has to affect trade between Member States.

3.1.1. *Selective advantage to undertakings, impact on competition and trade between Member States*

- (66) The 2012 GEA confers an advantage to the producers of green electricity since it provides them with an investment subsidy or guarantees them a minimum electricity price which is regularly higher than the market price. Furthermore the measure is selective because it favours only certain producers of green electricity. Moreover, producers of green electricity are active on electricity markets where trade between Member States takes place.

3.1.2. *The measures is imputable to the State and is financed out of State resources*

- (67) The measures contained in the 2012 GEA are imputable to the State given that the measures will be adopted by law.
- (68) In the *Essent*²³ case, 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 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).
- (69) In this judgment the Court underlined that the measure in question differed from that considered in *PreussenElektra*²⁴, 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 (para 74 of the judgment).
- (70) The Commission finds that in accordance with the *Essent* case-law, the advantages granted to green electricity producers through feed-in tariffs and investment aid are financed from State resources for the following reasons:
- (a) The feed-in tariffs and the investment aid is financed through two types of (sur)charges (Ökostrompauschale and the Ökostromförderbeitrag) imposed by law on consumers of electricity.
 - (b) The OeMAG has been entrusted by the State with the task to administer the transfer of money to the green electricity producers. It has both the task of collecting the charges and of transferring them to green electricity producers through feed-in tariffs contracts and investment grants.

²³ Case C-206/06, *Essent Netwerk Noord BV*, judgement of 17.7.2008, [2008] ECR I-5497.

²⁴ Case C-379/98, *PreussenElektra/Schlesweg*, judgement of 13.3.2001, [2001] ECR I-2099.

- (c) OeMAG is not free in the way it allocates the funds to green electricity producers: the law establishes the level of feed-in tariffs, bonuses and grants but also indicate which proportion of the funds have to be allocated per type of technology. Moreover, the OeMAG is subject to a multitude of reporting and monitoring requirements (see point (10) of this decision) including scrutiny by the ministry, E-Control and the National Court of Auditors.

3.2. No selective advantage for energy-intensive undertakings

3.2.1. No exemption mechanism or specific regime applying to energy intensive undertakings

- (71) As described under points (14) to (16) of this decision the Ökostromförderbeitrag corresponds ultimately to a percentage applied on network charges. This percentage is set yearly at such a level as to ensure that the gap between the subsidies needed to finance the support to green electricity under the 2012 GEA and the estimated revenues from the Ökostrompauschale is filled.
- (72) The percentage is the same across Austria and is the same for households and undertakings. It does not vary depending on their size or energy consumption.
- (73) Contrary to what was the case under the 2008 GEA and gave rise to the negative Commission decision of 8 March 2011 in case C 24/2009²⁵, the 2012 GEA does not contain anymore an exemption mechanism for energy-intensive businesses. Under the 2012 GEA energy-intensive undertakings will be subject to the Ökostromförderbeitrag as any other electricity consumer. In particular, the Ökostromförderbeitrag they have to pay will be calculated according to the same formula as for other consumers and will not be subject to a specific calculation method²⁶.
- (74) On the basis of those elements, the Commission concludes that the financing mechanism does not appear to contain any selective advantage for energy-intensive undertakings.

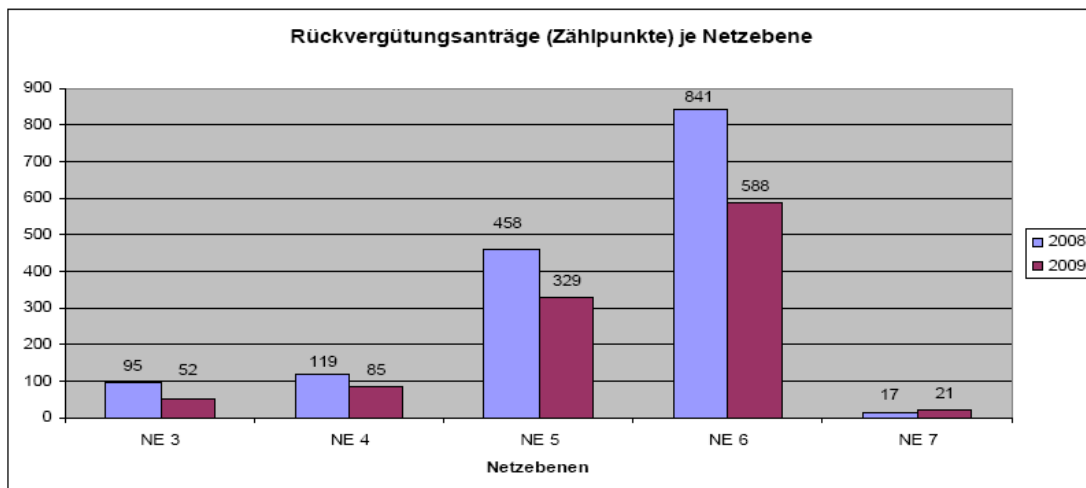
²⁵ OJ L 235 of 10.9.2011, p. 42.

²⁶ Under the 2008 GEA, the aid scheme was financed on the one hand through a lump sum and on the other through the obligation imposed on electricity suppliers to buy from OeMAG a certain amount of green electricity at fixed transfer prices. Electricity suppliers were then free as to how to recover those costs from their customers. However, they were not allowed to recover their costs from energy-intensive undertakings. Energy-intensive undertakings had to pay a compensatory amount to the OeMAG which was, however, lower than what they would in general have had to pay to their electricity suppliers. In its decision of 8 March 2011 the Commission found this exemption mechanism for energy-intensive undertakings to constitute a selective advantage financed by State resources and amounting to State aid. The Commission did not consider this aid to be compatible with the internal market.

3.2.2. No factual selectivity

- (75) Given the background of the 2012 GEA, the Commission also examined whether the new financing mechanism would de facto provide a selective advantage to energy-intensive undertakings.
- (76) As indicated under points (15) and (16) of this decision, the Ökostromförderbeitrag, being a percentage applied to the network charges, it will vary in accordance with network charges. In Austria network charges vary according to a number of various parameters. They vary among others depending on the grid level to which a consumer is connected²⁷, the area where the network is located, the power rate (kW), the consumption (kWh), the season (winter or summer), the time of the day (peak hours or not).
- (77) Based on past exemption applications submitted by energy-intensive undertakings, Austria provided information to the Commission showing that energy-intensive undertakings are located on all grid levels, including on grid level 7. Austria has explained that this was due to the fact that the level to which an undertaking is connected does not depend on its energy consumption but rather on its geographical location, technical suitability and required power rate.
- (78) On the basis of the table below, it appears that energy-intensive undertakings are not massively located on grid levels 1-3. It seems on the contrary that the overwhelming majority of energy-intensive undertakings are concentrated on grid levels 5 and 6 which are not the lesser contributors to the financing of the green electricity since those grid levels contribute to 25% of the financing needs for the support to green electricity (see table in point 15 of the decision).

Figure 1: Overview of payment points at different grid levels



- (79) The Commission therefore considers that the new financing mechanism does not provide a selective advantage to energy-intensive undertakings and concludes that the financing mechanism set up by the 2012 GEA does not contain State aid in favour of energy-intensive undertakings.

²⁷ Described in footnote 12 above.

3.3. Lawfulness of the aid

- (80) By notifying the measure before its implementation, the Austrian authorities have fulfilled their obligation according to Article 108(3) of the TFEU.

3.4. Compatibility of the Aid with Article 107 (3) (c) of the TFEU

- (81) The Commission has assessed the compatibility of the notified scheme in accordance with Article 107 et seq. TFEU and Article 61 et seq. EEA Agreement²⁸ and in the light of the Community Guidelines on State Aid for Environmental Protection (EAG) of 2 April 2008.²⁹

- (82) Given that the notified scheme concerns aid for renewable energy sources but also rewards high efficiency co-generation, it has been assessed on the basis of sections 3.1.6.2 and 3.1.6.1 (operating and investment aid for renewable energy sources) and 3.1.7.2. and 3.7.2.1 of the EAG (operating and investment aid for high efficiency cogeneration).

3.4.1. *Operating aid for the producers of green electricity*

- (83) Austria has confirmed that the aid is only granted to renewable energy sources as defined in point 70(5) of the EAG.
- (84) The Commission considers that according to the information provided and as set out below, the measure meets the provisions of 3.1.6.2 EAG and 3.1.7.2. EAG.

3.4.1.1. Feed-in tariffs and raw material bonus

- (85) As required by point 109b) EAG the Austrian authorities submitted a detailed calculation method for determining the production costs and illustrated it by several calculation examples for different categories of green electricity production installations.
- (86) Furthermore, the Austrian authorities described in detail the elements included in production costs calculation, which are in accordance with points 109a) and b): the calculation shows that the aid is granted in order to compensate for the difference between the costs of producing energy from renewable energy sources and the market price of the energy concerned; the aid is only granted until the plant is fully depreciated (aid is granted for a period of 13 or 15 years, while the normal depreciation period is 15 years); the aid also covers a return on capital of 6% which, according to the Commission, corresponds to a normal return on capital.
- (87) As far as cumulation is concerned, Austria has confirmed that when other types of aid exist, they are taken into account in order to calculate the feed-in tariffs and avoid that the feed-in tariffs would lead to over-compensation. This is

²⁸ The following assessment is based on both the TFEU and the EEA Agreement, but for reasons of simplification, in the following assessment it will only be referred to the TFEU provisions.

²⁹ OJ of 1.4.2008, C 82, p. 1. With reference to point 50 of the Environmental aid guidelines, the Commission reminds the Austrian authorities that the development of hydropower installations should be in accordance with the principles set out in the Water Framework Directive (2000/60/EC).

further ensured through Article 20 2012 GEA that states that feed-in tariffs must be established in accordance with EU law.

- (88) The production costs are monitored on a yearly basis and tariffs are adapted for installations newly entering the scheme when it is observed that production costs have decreased.
- (89) As for the mechanism whereby tariffs are established several years in advance, the Commission notes that according to the 2012 GEA, when tariffs are established for several years in advance, past data has to be taken into account. Thus, if a decreasing trend in terms of costs is observed and can further be forecasted, it will be necessary to establish decreasing tariffs for the following years.
- (90) In addition, in any event, tariffs can be amended in the course of a year (Article 19 2012 GEA).
- (91) The Commission therefore considers that even with multiannual establishment of feed-in tariffs, the way tariffs are established and the criteria to be taken into account should ensure that no overcompensation will take place.
- (92) The Commission further considers that the provision stating that until new tariffs enter into force, the tariffs applicable in the previous year remain applicable but with an automatic reduction is also suitable to avoid overcompensation. Austria has explained that that was in fact the purpose of the mechanism: avoiding overcompensation in situations where no new tariffs are established because of delays in the decision-making process.
- (93) As regards the absence of overcompensation of the support including bonuses that are added to feed-in tariffs (described in points 2.4.3, 2.4.5 and 2.4.6 above), the Austrian authorities demonstrated compliance with this condition by comparison of the increased production costs in the respective installations with the bonus as well as for some installations with the feed-in tariff together with the bonus as presented in Table 3a and 3b above.

3.4.1.2. Follow-up feed-in tariff for raw material (biomass, including biogas, installations)

- (94) Austria has submitted detailed calculation showing that even after full depreciation of the power plant (15 years), the production costs remain higher than market prices³⁰. The aid granted in the form of follow-up tariffs for biomass, including biogas, thus complies with point 109c) EAG.

3.4.1.3. Bonus for plants using refined biogas

- (95) The Austrian authorities described in detail the elements included in the production costs calculation. In particular they provided cost calculations for the

³⁰ In the examples submitted, Austria obtained production costs of 9.62/9.72 cent/kWh for electricity produced in a (solid) biomass/biogas fired CHP plant while the market price for electricity was set at 5.676 cent/kWh in the 4th quarter of 2011.

refining and the feeding-in of biogas produced by facilities with a total output capacity of 50, 250 and 500 Nm³/h. On the basis of those calculations, Austria showed that for a biogas fired power plant having an annual efficiency rate of 50%³¹, the additional costs would at least be 3 cent/kWh el. It can thus be concluded that a bonus of 2 cent/kWh el (when considered on its own as well as together with the feed-in tariffs) does not lead to overcompensation.

- (96) The Commission further notes that the bonus is limited to the depreciation period of the plant, which corresponds normally to 15 years for this type of installations.
- (97) The Commission therefore considers that the aid will be granted in order to compensate for the difference between the costs of producing energy from refined biogas and the market price of the energy concerned and is in accordance with points 109a) and b) of EAG.

3.4.1.4. KWK Bonus for CHP plants using liquid biomass and biogas

- (98) As explained under point 48 of the decision, this bonus does not focus on compensating costs resulting from the use of renewable energy sources in order to produce electricity but rather aims at increasing the energy efficiency of CHP plants and is designed to compensate costs linked to the use of the CHP technology. The KWK bonus has thus been examined under section 3.1.7 of the EAG.
- (99) Austria has shown that operating aid in the form of the KWK bonus will be granted to high-efficiency cogeneration plants only, as required by point 113 of the EAG and defined in point 70(11) of the EAG. In particular, Austria has provided calculations based on the harmonised efficiency reference values established by Commission Decision 2007/74/EC of 21 December 2006 showing that the high efficiency criteria of Article 8(2) of the Austrian CHP Act was stricter than the criteria set out in Annex III to Directive 2004/8/EC.
- (100) Austria has confirmed that the bonus was limited to undertakings distributing electric power and heat to the public and has demonstrated that the bonus was designed so as to compensate for production costs (of electricity) that are higher than the market price (in fact higher than the feed-in tariffs that can be obtained for that type of electricity) and that the bonus should not lead to any overcompensation.
- (101) Austria has provided in accordance with point 119 read in conjunction with point 109 (b) of the EAG the methods for calculating the amount of the KWK bonus and has on that basis also shown that in accordance with point 119(a) of the EAG both revenues generated from the production and sale of electric power

³¹ On the basis of the harmonised efficiency reference value for the production of electricity on the basis of natural gas (set for the period 2006-2011 at 52.5%), the additional costs would at least be 2.8 cent/kWh el, which is still higher than 2 cent/kWh el (Annex I of Commission Decision 2007/74/EC establishing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2004/8/EC of the European Parliament and of the Council, OJ L 32, 6.2.2007, p. 183).

and heat had been taken into account in order to establish the bonus³² and, taken on its own as well as together with the feed-in tariffs, does not lead to overcompensation.

- (102) Also, Austria has confirmed that the bonus cannot be granted longer than the basis feed-in tariffs themselves which are, in the case of facilities fired on the basis of biogas or biomass limited to 15 years, corresponding to their depreciation period.
- (103) Finally, Austria has indicated that no investment aid was granted in view of the costs taken into account for the granting of the KWK bonus.

3.4.2. *Investment aid*

3.4.2.1. Support to new and revitalised SHPP and MHPP

- (104) Austria has confirmed that where the application of the maximum aid intensities and amounts described under point 57 of this decision would lead to aid intensities beyond those mentioned in points 102 and 103 of the EAG³³, the aid amount granted under the 2012 GEA would be reduced accordingly. Indeed the aid scheme explicitly states that the maximum aid intensities set out in the EAG are to be complied with (Article 24(5) of 2012 GEA).
- (105) The Commission also observes that the calculation of eligible costs made under the notified aid scheme and the Guidelines on Investment Grants (see point (55) of this decision), is in line with points 105 and 106 of the EAG.
- (106) In this connection, the Commission further notes that Austria has provided examples showing how it will implement the scheme in practice. Eligible costs are calculated in a first step in accordance to the general rule of the scheme (which takes the entire investment costs as a starting point) and the aid intensities of the scheme are applied to them in order to determine the possible aid amount.
- (107) In a second step, eligible costs are determined in accordance to points 105 and 106 of the EAG. In other words, Austria then determines the extra investment costs compared to a conventional power plant (in this case a gas fired power plant) net of any related operating benefits and costs during the first 5 years of the investment. The relevant percentage is then applied in order to determine the maximum aid intensity allowed.

³² The Austrian authorities gave the example of a new high efficient biomass cogeneration installation eligible for the KWK bonus of 2 cent/kWh, where the support level of approximately 10.5 cent/kWh was calculated the following way: 14 cent/kWh (average fee-in tariff) plus 2 cent/kWh (KWK bonus) minus 5.5 cent/kWh market price of sold energy, i.e. the revenues from sale of energy are deducted from support.

³³ I.e. 60% of eligible investment costs (large enterprises); 70% (medium-sized enterprises) or 80% (small-sized enterprises).

- (108) Both aid amounts are then compared and if 30% of the investment costs directly related to the construction of a SHPP is higher than 80%, 70% or 60% of eligible costs calculated in accordance with points 105 and 106 of the EAG, the aid amount will be reduced to the latter limit.

3.4.2.2. Support to new CHP plants operated with spent lye

- (109) Austria has shown that investment aid to new CHP plants operated with spent lye will be granted to high-efficiency cogeneration plants only, as required by point 112 of the EAG and defined in point 70(11) of the EAG. Austria has also shown that the new cogeneration unit will overall make primary energy savings compared to separate production as defined by Directive 2004/8/EC and Decision 2007/74/EC.
- (110) Austria has confirmed that where the application of the maximum aid intensities and amounts described under paragraph 62 of this decision would lead to aid intensities beyond those mentioned in points 114 and 115 of the EAG³⁴, the aid amount granted under the 2012 GEA would be reduced accordingly. Indeed the aid scheme explicitly states that the maximum aid intensities set out in the EAG are to be complied with (Article 24 (5) 2012 GEA).
- (111) In this connection, the Commission notes that Austria has provided examples showing how it will implement the scheme in practice. The possible aid amount is in a first step calculated in accordance to the general rule of the scheme (i.e. 30% of the direct costs of the construction of the CHP facility).
- (112) In a second step, eligible costs are determined in accordance to points 117 and 118 of the EAG, i.e. Austria determines the extra investment costs to construct a high-efficiency cogeneration plant based on spent lye compared to the reference scenario net of any related operating benefits and costs during the first 5 years of the investment. The relevant percentage is then applied in order to determine the maximum aid intensity allowed.
- (113) Both aid amounts resulting from calculation methods described above in points 111 and 112, are then compared and if 30% of the investment costs directly related to the construction of the CHP plant is higher than, respectively 80%, 70% or 60% of eligible costs³⁵ calculated in accordance with points 117 and 118 of the EAG, the aid amount will be reduced to the latter limit.
- (114) As a reference scenario, Austria has taken electricity produced in a gas fired power plant having the same maximum output capacity as the CHP plant to be supported combined with the production of heat in a plant operated with spent lye and having the same annual output capacity. As an alternative reference scenario the Austrian authorities refer to the purchase of electricity from the grid combined with the production of heat in a plant operated with spent lye and having the same annual output capacity as the supported plant. The Commission

³⁴ I.e. 60% of eligible investment costs (large enterprises); 70% (medium-sized enterprises) or 80% (small-sized enterprises).

³⁵ Depending on the size of the beneficiary.

considers these installations as being relevant reference scenarios given that the purpose of the investment aid is to incentivise undertakings already having a spent lye plant to operate it as a CHP plant.

3.4.3. Common part of the assessment

- (115) The Commission notes that the Austrian authorities undertook to re-notify the measure under assessment in 10 years following the date of Commission approval.
- (116) They also confirmed that should the thresholds mentioned under point 160b of the EAG be reached, they would notify the aid individually to the Commission as required by section 5.1 of the EAG.
- (117) Also the Austrian authorities confirmed the respect of annual reporting and monitoring provisions of the EAG as laid down in sections 7.1 and 7.3.
- (118) As regards cumulation, the Austrian authorities indicated that under the scheme cumulation between feed-in tariffs and investment aid is excluded. However feed-in tariffs and investment aid under the scheme might be cumulated with aid under other schemes.
- (119) In order to avoid overcompensation, the scheme contains a provision requiring that the granting authorities ensure that the granted investment aid does not exceed the maximum aid intensities allowed under EU law (Article 24 of 2012 GEA). In addition, the 2012 GEA also states that other aid has to be deducted from eligible costs if the cumulation of aid would either undermine the purpose of the investment aid under the 2012 GEA or be contrary to EU law (in this case would go beyond maximum aid intensities).
- (120) As far as tariffs and bonuses are concerned, Austria has confirmed that when other types of aid exist, they have to be taken into account in order to calculate the feed-in tariffs and the bonuses and avoid that the feed-in tariffs would lead to over-compensation. This is further ensured through Article 20 2012 GEA that states that feed-in tariffs must be established in accordance with EU law. For instance, for photovoltaic above 5 kW, the investment aid that can be obtained from the KLIEN-Fund has to be deducted so as to avoid that maximum aid intensities/amounts are exceeded.
- (121) The Commission is therefore satisfied that where cumulation is possible, the aid amount will not exceed allowed aid intensities.

3.4.3.1. Incentive effect

- (122) Austria has pointed out that aid can only be granted under the 2012 GEA if the aid complies with relevant provisions of EU law. This implies among others that the aid must have an incentive effect in accordance with section 3.2 EAG.
- (123) Concerning feed-in tariffs and bonuses, Austria has further indicated that they had to be established at a level ensuring an incentive effect (Article 20(2)(1) of 2012 GEA) and that, in addition, they had to be established by reference to

production costs of state of the art facilities and were reviewed on a yearly basis which further ensures that the aid remains proportionate.

- (124) The Commission notes in addition that the calculations provided by the Austrian authorities show that the production costs of electricity from renewable energy sources eligible under the scheme and the production costs in high efficient co-generation installations are higher than the expected electricity market price. Hence without the notified aid, there would be an insufficient incentive to undertake or carry on generation of electricity from renewable energy sources or in high efficiency co-generation installations as such activity would be unlikely to be economically viable.
- (125) As for investment aid, Austria has confirmed that no aid can be granted under the scheme for works that have already started before the aid application.
- (126) Moreover, Austria has indicated that an individual examination of the incentive effect and the necessity of the aid takes place before the aid can be granted (including for SME's).
- (127) Part of this individual examination is the profitability test (Article 24 of 2012 GEA). For this profitability test a return on capital of 6% is to be taken into account as well as the benefits associated with the investment. Austria has provided detailed methodology and examples of how this profitability test would be analysed.
- (128) Austria has also provided credible counterfactual situations for the investments described under section 2.5 of this decision that can be supported under the scheme. They show that in the absence of aid the more environmentally friendly alternative would not have been retained.
- (129) Furthermore, the Commission finds that the calculation of eligible costs that Austria intends to apply is in line with the provisions of the EAG. In particular they are limited to the extra investment costs needed to reach a higher level of environment protection and are calculated net of operating benefits and costs.
- (130) Finally, the Commission notes that Austria has confirmed that it will submit in accordance with section 7.1 of the EAG, together with the annual reports, an explanation of how the incentive effect has been respected.
- (131) Taking into account the information provided by Austria, including the confirmation that the aid will only be granted in cases where it is necessary, the Commission is satisfied that the notified aid scheme complies with section 3.2 of the EAG.

4. DECISION

1. The Commission has accordingly decided not to raise objections to the notified measure, because the aid can be found compatible with the Internal market in accordance with Article 107 (3) (c) TFEU and Article 61 (3) (c) of the EEA Agreement, since it complies with the Environmental Aid Guidelines.
2. The Commission reminds the Austrian authorities that, in accordance with Article 108 (3) TFEU, plans to refinance, alter or change this aid have to be notified to the

Commission pursuant to provisions of the Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU) (OJ L 140, 30.4.2004, p.1).

3. If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

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European Commission
Directorate-General for Competition
Directorate for State Aid
State Aid Greffe
B-1049 Brussels
Fax No: (0032) 2-296.12.42

For the Commission

Joaquín ALMUNIA
Vice-President