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**Subject: SA.37519 (2013/N) – Austria - Einzelfall, Altlast, N12, Kapellerfeld**

Sehr geehrter Herr Sebastian KURZ,

**1. PROCEDURE**

1. By letter dated 15 October 2013, registered on 17 October 2013, the Austrian authorities notified the Commission of their intention to grant the aid described below. Following a request on 11 December 2013 and a request on 14 April 2014 by the Commission, the Austrian authorities provided further information on 27 February 2014 and on 9 May 2014.

**2. DESCRIPTION OF THE MEASURE**

**2.1. Background and Objective**

2. The Austrian Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, Environment and Water Management) intends to grant aid for measures involving the remediation (removal of contaminated subsurface air) and protection (containment of the pollution) of a contaminated site in Gerasdorf, a municipality close to Vienna, (“*the Site*”), resulting in the prevention of further contamination and the restoration of the good quality of the groundwater.

Seiner Exzellenz Herrn Sebastian KURZ  
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3. The Site is located 500 m south of the township of Gerasdorf and 300 m North West of the township of Kapellerfeld, close to the Marchfeld Canal. The Site comprises of four old landfills located next to each other where approximately 1 350 000 m<sup>3</sup> of household waste, ash from waste incineration plants, small industrial waste, builders' rubble, spoil and chlorinated hydrocarbons were deposited, legally and illegally, on an area of approximately 190 000 m<sup>2</sup> between 1966 and 1988.
4. The decomposition of organic waste has produced a significant increase in landfill gases over most of the Site and, additionally, the groundwater downstream of the Site appears to be polluted with chlorinated hydrocarbons.
5. The Site was identified as a top-priority (Priority 1) contaminated site following an evaluation (hazard assessment) by the Austrian Environmental Agency in 1992.
6. The system Marchfeld Canal, which is adjacent to the Site, was built in the years 1986-2004 to secure water supply, enhance water quality, improve flood control and revitalise flowing waters<sup>1</sup>. A large groundwater resource is situated under the Marchfeld area which extends under the adjacent Site<sup>2</sup>. The groundwater volume amounts up to 1 billion m<sup>3</sup> and interacts with the Marchfeld Canal<sup>3</sup>. It constitutes the basis of the water supply for the municipalities and industries in this region<sup>4</sup>. The region Marchfeld is rich in grain and vegetables and thus, the water system is also important for the irrigation of the fields<sup>5</sup>. The contamination of the Site has a significant impact on the groundwater as well as on the Marchfeld Canal<sup>6</sup>. The official technical expert of the Federal Government of Niederösterreich<sup>7</sup> found that the groundwater downstream of the Site and the soil air are polluted with volatile halogenated hydrocarbons, benzene and toluene.
7. The effect of the envisaged decontamination measure is that the emission of contamination in the ground water will be effectively reduced and the current risk to the protected natural resource of groundwater and the adjacent Marchfeld Canal – also as a water supplier for the region – can be permanently eliminated.

### ***Historical background***

8. The Site covers several land plots, i.e. 2781/2, 2819/2, 2844/2, 2905/2, 2921/3, 2935/2, 2944/3, 2944/4, having three different owners.
9. The City of Vienna owns two of the former landfill sites located on the plots 2781/2 and 2819/2, and, respectively, on 2844/2. Together they cover a total area of 62 995 m<sup>2</sup>. Plot 2781/2 was purchased in 1967 from Konstantin Chmelar, owner since 1963. Plot 2819/2 was purchased in 1975 from Florian Ott, owner since 1964. Plot 2844/2 was purchased in 1976 from Josef Schmatelka, owner since 1965.

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<sup>1</sup> Information available online at <http://www.marchfeldkanal.at/mfkkurz/mfk11s03kurz.php>, retrieved on 28 March 2014.

<sup>2</sup> Expert Land Valuation Report by Ing. Rudolf Allerstorfer, dated 29 March 2012 page 6.

<sup>3</sup> Idem 1.

<sup>4</sup> Idem 1.

<sup>5</sup> Idem 1.

<sup>6</sup> Idem 2.

<sup>7</sup> Expert Report on the Contamination of 11 April 2003.

10. In 1973 the City of Vienna received a landfilling permit under the Water Rights Act from 1959 for the plots 2781 and 2819 to landfill with refuse and slag from waste incineration plants as well as excavated material up to a maximum limit of 200 000 m<sup>3</sup>. Previously, the area was used for the extraction of gravel. The landfilling permit expired in March 1978. The sites have not been used since 1980.
11. The company EPS LAA 43 GmbH is the owner of the plot 2905/2 with an area of 69 867 m<sup>2</sup>. The plot was previously owned, since 1996, by Wiener Betriebs- und Baugesellschaft m.b.H., now renamed Wibeba Holding GmbH, from 1991 until 1996 by Kleeblatt Sicherheits-Deponie-Gesellschaft, from 1982 until 1991 by Wiener Betriebs- und Baugesellschaft m.b.H., from 1966 until 1982 by Adelheid Krcal and from 1957 until 1966 by Franz Krcal. EPS LAA 43 GmbH and Wiener Betriebs- und Baugesellschaft m.b.H. belong to the same group of companies, the PORR group. EPS LAA 43 GmbH became the owner of the property by way of a free of charge investment in-kind agreement concluded on November 2013.
12. In 1978 the City of Vienna received a landfilling permit under the Water Rights Act from 1959 for the plots 2844 and 2905 for the creation of a waste landfill site. The permit was restricted to domestic waste, small business waste of similar composition, slag, building rubble and excavated material. The landfilling permit is still valid today. Although plot 2905/2 was bought by Wiener Betriebs- und Baugesellschaft m.b.H. in 1982, the permit could not be transferred to this company as it had been issued specifically for the City of Vienna. The landfill on the plot 2905/2 was operated by Wiener Betriebs- und Baugesellschaft m.b.H. and from December 1982 until December 1983 by Rudolf Pribil. Until the 1950s, the plot 2905/2 was used for agricultural purposes and later as a gravel pit. Since the cessation of landfill operations in 1985 the plot has been disused.
13. Sabine Spindler-Spitzer owns the plots 2921/3, 2935/2, 2944/3 and 2944/4 with a total area of 57 241 m<sup>2</sup>. From 2000 until 2010 the owner was Günther Spindler and from the 1950s until 2000, Anton Spindler.
14. Before the plots were acquired by Anton Spindler they had been used as gravel pits and previously for agricultural purposes. In 1983 a permit under the Water Rights Act from 1959 for backfilling of the gravel pits on the plots was awarded to Anton Spindler. Since operations on the landfill site ceased in the 1980s, the plot has been disused.
15. During construction of the Marchfeld Canal in the 1980s, small areas in the south of each plot were ceded to the Errichtungsgesellschaft Marchfeldkanal (2781/1, 2819/1, 2844/1, 2905/1, 2921/2, 2935/1, 2944/1, 2944/2), with which plot divisions were connected.
16. Due to illegal substances found on the Site, from the 1980s onwards investigations on the soil air, sediments and groundwater were carried out. The presence of illegal substances was suspected, as early as 1984, due to exceeding or breaching the official land-filling authorisations. Elevated hydrogen chlorides levels were detected in the groundwater. The latest report, dated March 2013, by the official technical expert of the Federal Government of Niederösterreich found a high level of pollutant potential. According to this report the groundwater downstream and the soil air are polluted with volatile halogenated hydrocarbons, benzene and toluene.

## ***Legal background***

17. The Austrian Law on the promotion of the environmental protection<sup>8</sup> ("UFG") sets out the conditions under which subsidies can be obtained to decontaminate a site. §31 of this law provides that aid can be granted only for sites contaminated before 1 July 1989 and only if the polluter pays principle has been respected<sup>9</sup>.
18. The 'polluter pays principle' condition has been further detailed in the Austrian Guidelines for Remediation of Inherited Waste from 2008<sup>10</sup> ("Remediation Guidelines"). According to §2(9)<sup>11</sup> of the Remediation Guidelines, the party liable for the pollution is defined as being either the (legal or natural) person that has caused the pollution after 1959 or as the owners of land polluted after 1959 if they have tolerated the pollution and are required to decontaminate the site on the basis of administrative law.
19. As a result of those provisions, sites which have been contaminated since 1 July 1989 or newly contaminated sites are not eligible for aid. This ensures that, as a rule, the negative external effects of more recent contamination are borne by those responsible for the pollution, and that therefore undertakings can be expected to be more vigilant in avoiding such contamination.
20. Also, in line with the 'polluter pays' principle, for a contamination that occurred between 31 December 1959 and 1 July 1989, the polluter should pay and cannot receive aid if it is required to decontaminate the site under the law.
21. Therefore, for a contamination that occurred between 31 December 1959 and 1 July 1989, subsidies for the decontamination of the site can be granted only if no liable party can be identified or if it does not exist anymore.
22. The Act on the Remediation of Contaminated Sites<sup>12</sup> ("Remediation Act") does not contain itself any substantive remediation provisions, but refers in §17 to the Water Act<sup>13</sup> and the Waste Management Act<sup>14</sup>. The competent authority for contaminated sites is the Provincial Governor (*Landeshauptmann*). The Water Act and the Waste Management Act contain essentially similar provisions regarding liability for pollution, whereby both the provisions of §31 and §138 Water Act and §73 and §74 Waste Management Act provide, in each case, for a gradual liability procedure: first the liability of the operator is assessed and afterwards, on a secondary level, the liability of the landowners and of the landowners' successors in law.

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<sup>8</sup> Umweltförderungsgesetz, BGBl. Nr. 185/1993, last amended by BGBl. Nr. 146/2013.

<sup>9</sup> "§ 31. Eine Förderung im Rahmen der Altlastensanierung setzt voraus, dass: 1. die zu sichernde oder zu sanierende Altlast vor dem 1. Juli 1989 durch Ablagerungen oder durch das Betreiben von Anlagen entstanden ist; (...) 5. das Verursacherprinzip berücksichtigt wird".

<sup>10</sup> Förderungsrichtlinien 2008 für die Altlastensanierung oder –sicherung.

<sup>11</sup> "(9) Der für die Verschmutzung Verantwortliche im Sinne dieser Förderungsrichtlinien ist  
1. der Verursacher einer Kontamination nach 1959 oder  
2. der Liegenschaftseigentümer, der den diesbezüglichen Maßnahmen, die zur Kontamination nach 1959 geführt haben, zugestimmt oder diese geduldet hat und der nach den Verwaltungsvorschriften zur Sanierung oder Sicherung verpflichtet werden kann."

<sup>12</sup> Altlastensanierungsgesetz, BGBl. No. 299/1989 last amended by BGBl. I NO. 103/2013.

<sup>13</sup> Wasserrechtsgesetz, BGBl. Nr. 215/1959, last amended by BGBl. I Nr. 98/2013.

<sup>14</sup> Bundesgesetz über eine nachhaltige Abfallwirtschaft, BGBl. Nr. 102/2002, last amended by BGBl. Nr. 193/2013.

23. Under the Water Act <sup>15</sup>, the provisions for the prevention and removal of water contamination are linked to a strict polluter liability, regardless of fault. Any person whose works, actions or omissions could have an effect on bodies of water, hence, who is legally or factually entitled to control risk is obliged to take preventive measures or cover necessary and appropriate expenditure. §31(4) states that when the obligated party cannot be instructed to act or held liable, the landowner can be instructed to act or held liable for the reimbursement of the costs. This applies also to works, actions or omissions that took place or came into operation before 1 July 1990 with the exception that the landowner can be required to take action only where he has expressly permitted the works, actions or omissions causing the water contamination on his own land and he has gained an advantage therefrom in the form of compensation for the use of his property<sup>16</sup>. §138 Water Act empowers the authority to issue mandates to restore the lawful condition in the event of anyone implementing measures requiring authorisation under water law without such authorisation.
24. Under the Waste Management Act, primary liability for the pollution lies with the polluter. If the polluter cannot be held liable, the legislation provides for the subsidiary liability of the owners of the land. They are liable under §74(2) of the Waste Management Act if they have either approved or tolerated the depositing of the waste or have omitted to take reasonable preventive measures. With regard to depositing of waste which took place before 1 July 1990, property owners are only liable pursuant to §74(3) of the Waste Management Act if they have expressly permitted the waste to be deposited and have thereby benefited from it in the form of compensation for the use of the property. If that is the case, their liability is however limited to the part of the advantage that goes beyond the normal remuneration for the use of his land.

### *The liability issue*

25. The Austrian authorities assessed the liability for the contamination of the Site in accordance with the administrative legal framework as set out above.
26. The Water Act and the Waste Management Act, both contain provisions requiring a strict proof of causality for the assessment of the liability of any party. The burden of proof lies on the authorities alone.
27. Since in this case the waste was deposited between 1966 and 1988, the provisions of §31(6) Water Act and of §74(3) Waste Management Act would apply.
28. There must be a causal relationship between the concrete risk of waste contamination or imminent danger from waste and the activity of an individual person. The mere possibility of being responsible for detected contamination is not sufficient for a claim.
29. In the course of administrative proceedings under Section 138 of the Water Act, initiated by the competent authority in 1992, various limits of the landfilling authorizations were found to have been exceeded and the cause or origin of the breaches were investigated. The competent authority reached the conclusion that the classification of the discovered hydrocarbons was impossible due to the

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<sup>15</sup> §31(1) .

<sup>16</sup> §31(6) .

spatial proximity of the relevant landfill sites (partially overlapping) and the mobility of harmful substances and that, therefore, proof of causality could not be produced. As concluded by the Austrian authorities, no one can be held liable in the current case. No liability could be attributed to any of the owners of the Site either, as it could not be proven that any of them consented to or tolerated the dumping of illegal substances (hydrocarbons) and failed to take reasonable preventive measures.

30. In 1994 the official technical expert of the Federal Government of Niederösterreich carried out an analysis of the pollution within the procedure set out in §138 Water Act to identify the person responsible. The expert stated that the origin of the pollution could not be identified and that an imputability of the pollution to one of the plots comprising the Site was not possible.
31. In 2003, the Austrian Environmental Agency (*Umweltbundesamt*) found that there was chlorinated hydrocarbon contamination in the subsurface air in all approved landfill deposits, which indicated that some of the waste in the landfill contained solvents. The Agency assessed whether an entity responsible could be identified. They concluded that the adverse effect on groundwater quality cannot be clearly assigned to any sub-area of the Site.
32. Another official technical expertise of the Federal Government of the Federal State of Lower Austria (Niederösterreich) was performed in 2013<sup>17</sup>. The expert was explicitly asked by the authorities if an allocation of the contamination to one of the plots and, thus, to one operator could be determined. The expert assessed that during the investigation of the landfill site, no landfill material was found which could establish a relationship with the contamination. Harmful substances have been distributed throughout the groundwater in the area of the Site over decades. This may relate to the fact that there is a flattening of the groundwater level in the area of the Site, which is associated with the tectonics of the confining bed. The expert came to the conclusion that no source of contamination could be found. Furthermore, the groundwater damage cannot be assigned to one of the operators, since it is also extended across the flow direction of the groundwater and thereby over the plots of all operators.
33. Therefore, the Austrian authorities are not able to prove the liability of any of the landfill operators or of any of the plots' owners due to the fact that the causal link with the contamination cannot be established. The lack of assignability of the contamination to one or more specific facilities rules out using the principle of joint and several liability, as interpreted by Austrian case-law as regards the provisions of the Water Act and Waste Management Act. For joint and several liability to be possible causality has to be clearly established as regards the respective entities.
34. Based on the elements mentioned above, the administrative investigation was concluded with the finding that in this particular case liability cannot be established. No administrative decisions were issued as no liable parties could be established.

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<sup>17</sup> The assessment took place on 29 February 2012.

## 2.2. Legal Basis

35. The legal basis for the aid is to be found in the UFG, Remediation Act as well as in the Remediation Guidelines.
36. Austria has confirmed that the aid will be put into effect only after a positive decision from the Commission.

## 2.3. The Project

37. The effect of the measure is the immediate cessation and prevention of contaminant release in the groundwater and the significant decrease in pollutants, i.e. chlorinated hydrocarbons, at the source by extracting the subsurface air. Thus, the emission of contamination in the groundwater will be effectively and permanently reduced. The current risk to the protected natural resource of groundwater can be permanently eliminated. An improvement of the quality of the groundwater will be achieved. This will lead to soil and water protection, and consequently the protection of human health.
38. The Austrian authorities argue that the remediation of the Site is urgently necessary due to the impact the contamination has on the groundwater.
39. The costs of the remediation are estimated to amount to EUR 27 million. These costs comprise the costs for the planning and execution of the measure including inter alia the construction of the retention walls, the filter windows and the facilities for the suction of the gases, the removal of soil and the construction of the profiling of the landfill surface, as well as the supervision of these works and the monitoring of the desired results.
40. As part of the application for the aid, PORR AG commissioned a study evaluating the possible options to achieve the environmental benefits described above which included various technical solutions as well as the full decontamination of the Site. The solution at hand was the solution which offered best value for money in achieving the required environmental protection.
41. The costs of remediation work are listed below:

### Costs of the eligible measures:

Preliminary work: approx. EUR 0.8 million

Implementation and realisation of construction measures (erection of cut-off wall, filter windows, surface and hydrological layers, soil vapour extraction): approx. EUR 23.2 million

Auxiliary services (e.g. planning services, building supervision, chemical analysis etc.): approx. EUR 0.7 million

Ongoing remediation costs (evidence collection, maintenance, initial costs of replacement, etc.): approx. EUR 0.8 million

**TOTAL: approx. EUR 25.5 million**

### Contaminated site levy<sup>18</sup> for eligible measures:

**EUR 1.5 million**

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<sup>18</sup> Tax on waste..

42. The Site will be secured by a combination of actions: enclosing it in a cut-off wall with integrated flow-through activated charcoal filter elements, extracting the subsurface air and methane oxidation and hydrological balance layers.
43. PORR AG, the project implementation entity, bears 5 % of the eligible project costs itself, which will afterwards be shared between the different owners of the Site.

#### **2.4. Beneficiary**

44. The Austrian authorities submit that the beneficiary is PORR AG, a limited company (large enterprise) based in Vienna dealing in the field of civil engineering. It submitted an aid application to the relevant authorities on 17 April 2012.
45. Austria provided powers of attorney issued by the City of Vienna, EPS LAA 43 GmbH, Wiener Betriebs- und Baugesellschaft m.b.H and by Ms Sabine Spindler-Spitzer authorizing PORR AG to deal with the Site. By the powers of attorney, PORR AG is authorised to carry out all necessary measures for the remediation and securing of the Site, to make any applications necessary, to receive funds and supervise all the information in the related files. PORR AG was chosen by the owners of the land to undertake these formalities due to its experience with project management and handling aid financing.
46. Austria puts forward that PORR AG is acting on image grounds and in order to obtain legal certainty by registering the contaminated site in the Austrian Register of Contaminated Waste Sites (*Altlastenverordnung*) and, thus, clarifying the legal status of the Site as a plot of land that no longer poses a significant threat to human health and to the environment.
47. The Remediation Guidelines provide that compliance with the Austrian Federal Public Procurement Act is a significant prerequisite for funding operations. PORR AG will not carry out the remediation works itself. The works will be tendered out in accordance with the relevant public procurement requirements to find appropriate construction firms and waste-disposal firms for the construction works. The construction works are classified as a building contract within the upper threshold limits and are consequently subject to an EU-wide tender. The open competition generated in this manner will ensure that the prices correspond to market prices.
48. Compliance with public procurement rules is verified by the national processing office, Kommunalkredit Public Consulting GmbH, which is the service provider for the implementation of the aid.

#### **2.5. Impact of the Project on the value of the land**

49. As regards the increase in value of the land, the Austrian authorities provided a study<sup>19</sup> showing that no such increase will occur. The value of the land before and after the measure is zero. The value was determined by way of a comparison with comparable sites in the proximity which have been sold in the recent years while taking into account the specificities of the Site. The Site consists of grassland-wasteland which is rated 1/3 of the price of farmland. The given dedication and

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<sup>19</sup> Expert valuation report from 29 March 2012 drafted by the certified sworn expert Ing. Rudolf Allerstorfer.

the formation of the terrain constitute a further constraint. The value of the land without the contamination would amount to EUR 95 051.50. However, under the given circumstances of the contamination the possible circle of purchasers tend to zero. Therefore, the value of the land before the remediation is zero. After the measure most of the contamination stays in the soil, i.e. the land is not decontaminated but the contamination is only contained. Thus, the pollution is not entirely removed and therefore, also after the completion of the project, the value of the Site remains zero.

## **2.6. Budget**

50. According to the Austrian authorities the overall maximum aid amount for the measure is fixed at EUR 25.7 million, while the total costs will amount to approximately EUR 27 million. The aid is paid out as a direct grant.
51. The actual aid amount that will be paid out is based on actual incurred costs. All costs have to be documented by invoices or justificatory documents and a description of services according to the Remediation Guidelines.
52. The aid is paid out ex post and PORR AG has to pre-finance the measure completely. Payments are only carried out step by step according to the progress of executed works. Additionally, a 5% deduction of the eligible expenses is withheld from payment until completion of the works. This guarantees that PORR AG will not receive a higher amount than the actual costs it incurs.

## **2.7. Aid intensity**

53. The Austrian system of aid provides for varying aid intensities for projects of this kind, depending on the extent of contamination. The aid in question is aid for a site contaminated between the end of 1959 and 1 July 1989. Due to the extent of the damage, the highest level of aid can be granted for remediation of the Site in respect of construction measures (95%) and the contaminated site levy (100%).

## **2.8. Duration**

54. It is assumed that construction measures will take place in 2014 and 2015, followed by a period of operation of five years.
55. According to the Austrian authorities the aid will be put into effect immediately after approval by the Commission. The duration of the payment of the aid will be approximately seven years. According to progress of the Project, the aid will be granted in monthly instalments over the duration of the Project.

## **2.9. Cumulation**

56. The Austrian authorities submit that the aid cannot be cumulated with aid received from other local, regional, national or EU schemes to cover the same eligible costs. The possible cumulation of aid is checked by the processing office Kommunalkredit Public Consulting GmbH.

### 3. ASSESSMENT

57. The Commission has examined the proposed measure in accordance with Article 107 et seq. of the TFEU.

#### 3.1. Existence of aid

58. A measure constitutes State aid under Article 107(1) TFEU if it fulfils four conditions. Firstly, the measure is funded by the State or through State resources. Secondly, the measure confers an advantage to the recipients. Thirdly, the measure favours selected undertakings or economic activities. And fourthly, the measure has the potential to affect the trade between Member States and to distort competition in the internal market.

59. As regards the owners of the land, Sabine Spindler-Spitzer is a private person with no economic activities and the City of Vienna is a public administrative body. Both are not undertakings and thus, do not benefit from an aid under Article 107(1) TFEU.

60. EPS LAA 43 GmbH and PORR AG are private undertakings. The beneficiary of the grant is PORR AG as it has received powers of disposal over the Site from the owners. The actual construction and operating of the decontamination works will be accomplished by different private firms identified by way of a non-discriminatory tendering process in accordance with the provisions of the Austrian Federal Public Procurement Law (*'Bundesvergabegesetz'*).

61. The aid stems from State resources since it will be financed by the federal budget of Austria. The aid is selective since it is only granted to the beneficiary. The aid confers an advantage to PORR AG because it obtains additional funds which would not have been obtained under normal market conditions. The aid has the potential to affect the trade between Member States and to distort competition as there is trade between Member States in the remediation works market and in the civil engineering market where the beneficiary is active.

62. The aid granted to the beneficiary PORR AG thus constitutes State aid pursuant to Article 107 (1) TFEU.

63. The Expert Land Valuation Report (see recital 49) provides that the value of the contaminated site is currently zero and will remain zero even after the Project as the Site remains a contaminated Site filled with waste. Nevertheless, the report compares the current situation of the land with the situation after the Project is completed and not with the situation after a full decontamination of the land plot. As the envisaged remediation works represent only a part of the decontamination process, the Site will, in practice require less money to be decontaminated. This could lead to the owners of the land receiving a theoretical advantage via a theoretical increase in the value of the land as it will afterwards require less funds to be completely decontaminated. In other words, the land owners now own an asset which requires a certain amount to be functional and, after the completion of the containment measures, they will own an asset which requires a lower amount to become functional. As established above only one of the land owners, EPS LAA 43 GmbH, could theoretically benefit from State aid as the others are a natural person and the City of Vienna.

64. Moreover, the Expert Land Valuation Report mentions that if the Site would not be contaminated it would have a market value of EUR 95 051.50<sup>20</sup> as it consists mostly of grassland, out of which approximately one third could be attributed to EPS LAA 43 GmbH. As the pollution containment works are estimated to amount to approx. 27 million euros and full – theoretical – decontamination works are estimated to amount to approx. 79 million euros, any advantage to EPS LAA 43 GmbH, given the theoretical market value of the land, would be very small. Nevertheless, such an advantage cannot be excluded and, hence, aid at the level of EPS LAA 43 GmbH cannot be totally excluded.

### **3.2. Legality of the Aid**

65. By notifying the measure before its implementation, the Austrian authorities have fulfilled their obligation according to Article 108 (3) TFEU. Any disbursements will only be made after a positive decision by the Commission.

### **3.3. Compatibility of the Aid at the level of PORR AG with Article 107(3)(c) TFEU**

#### **3.3.1. Detailed Assessment of Aid for the Remediation of Contaminated Sites**

66. The objective of the aid is environmental protection since the measure aims at the protection of the quality of groundwater. More specifically, the measure constitutes aid for the remediation of contaminated sites pursuant to points 132 et seq. (Chapter 3.1.10) of the Community Guidelines on State aid for environmental protection<sup>21</sup> ("the Environmental Aid Guidelines"). Accordingly the measure will be assessed on the basis of the provisions for aid for the remediation of contaminated sites pursuant to points 132 et seq. of the Environmental Aid Guidelines.
67. Furthermore it should be noted that the measure is subject to a detailed assessment pursuant to points 160 et seq. (Chapter 5) of the Environmental Aid Guidelines because the aid amounts to EUR 25.70 million and is paid to one beneficiary only. It thus constitutes investment aid exceeding the threshold of EUR 7.5 million above which a detailed assessment is required according to point 160 (b) (i) of the Environmental Aid Guidelines. According to the Environmental Aid Guidelines a detailed assessment is to be conducted on the basis of the positive and negative elements of the aid in question. As regards positive effects the environmental aid must address a clearly identified market failure, be an appropriate instrument, have an incentive effect and be proportionate. The negative impact of the aid on competition and trade needs to be limited. Compliance of aid with Environmental Aid Guidelines has to be verified on the basis of a balancing test of positive and negative elements<sup>22</sup>.

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<sup>20</sup> Date of the valuation report: 29.03.2012.

<sup>21</sup> OJ C 82, 1.4.2008, p. 1.

<sup>22</sup> The detailed assessment is conducted on the basis of the assessment of positive and negative elements specified in sections 5.2.1 and 5.2.2 of the Environmental Guidelines, which will be used in addition to the criteria set out in Chapter 3 (in particular chapter 3.1.10 on aid for the remediation of contaminated sites). It is a proportionate assessment, depending on the distortion potential of the case. The fact that the aid induces an undertaking to pursue environmental protection, which it would not otherwise have pursued, constitutes the main positive element to be taken into consideration when assessing the compatibility of the aid (see point 166 of the Environmental Aid Guidelines).

## Existence of a Market Failure

68. According to point 167 of the Environmental Aid Guidelines, the Commission will verify "...whether the State aid is targeted at [a] market failure by having a substantial impact on environmental protection". In this context, particular attention must be paid to the expected contribution of the measure to environmental protection.
69. As regards the market failure, according to points 53 and 132 of the Environmental Aid Guidelines, aid for the remediation of contaminated sites addresses a market failure linked to negative externalities by creating individual incentives to meet environmental targets where it is not possible to identify the polluter and make it pay for repairing the environmental damage it has caused.
70. According to point 132 of the Environmental Aid Guidelines, in the absence of any Community rules on this matter, "the polluter" refers to the person liable under the Law applicable in each Member State.
71. Based on the section "Legal background" described above, the Commission concludes that no polluter can be identified as liable or be made to pay under Austrian law.
72. As explained under Section 2.1 of this Decision, the analysis of the liability issue under Austrian law leads to the conclusion that it is not possible to hold any party liable for the pollution.
73. The Commission notes in addition that Austria initiated steps to take administrative measures against the potentially liable parties, but that these steps ended with the conclusion that no party could be held liable for the pollution and the decontamination of the Site.
74. In addition, the Austrian authorities confirmed that no further polluting substances were deposited on the site after 1989.
75. The Commission therefore concludes that the aid will not remedy any pollution for which a polluter could be held liable under Austrian law. The *polluter pays principle* has therefore been respected.
76. The information provided by the Austrian authorities shows that the current economic and legal framework cannot provide the necessary incentives to bring the beneficiary to remediate contaminations for which he is not legally liable. It should also be noted that there are currently no EU standards that would force the beneficiary to carry out such a measure.
77. The beneficiary PORR AG, which is not liable for the site contamination, would not have carried out the remediation on its own as the increase in value of the land would not have been sufficient to justify the implementation of such an extensive remediation project (total costs approx. EUR 27 million). In addition, the aid for the remediation of the contaminated site has no impact on the production process or business of the beneficiary.
78. As regards the substantial impact on environmental protection, according to point 132 of the Environmental Aid Guidelines, aid for the remediation of contaminated sites is compatible with Article 107 (3) (c) TFEU if it leads to an *improvement of environmental protection* in the sense that it mitigates or

remediates damages to the quality of the soil or of surface water or of ground water.

79. The Project consists in the safeguarding of the Site by building a retention wall with integrated run through activated carbon filter windows, the soil vapour extraction and the building of a methane oxidation and water balance layer. The cut-off wall with filter windows will immediately block discharges of hazardous substances from the Site. Currently, approximately 33 kg of chlorinated hydrocarbons per year are discharged unchecked from the Site into the groundwater. These hazardous substances will in future be absorbed by the activated charcoal. The subsurface air extraction will eliminate large quantities of volatile pollutants from the water-saturated underground area within the Site. Approximately 210 kg of chlorinated hydrocarbons per year are discharged in this way. Additionally, injecting oxygen as the subsurface air is extracted will reduce greenhouse gases. This measure will, thus, lead to a direct prevention of contaminant release in the groundwater and a considerable removal of hazardous substances. Consequently, the emissions of contamination in the groundwater will be reduced effectively and permanently.
80. The Austrian authorities confirmed and provided studies showing that by removing or containing the above-mentioned pollutants, the environmental risk they cause will be permanently eliminated and environmental protection will be improved.
81. The aid to the beneficiary for the remediation of the Site therefore leads to an improvement of environmental protection. The studies provided by Austria show a significant contamination of the Site and of the groundwater and, furthermore, that the contamination poses a considerable threat to the environment in general and to the groundwater in particular. The Austrian authorities explained that the aid will be used to remove contaminated soil air on the site. This should mitigate the threat to the environment in general. According to the Austrian authorities, remediation of contaminated sites will result in a qualitative improvement of the body of groundwater. Therefore it can be concluded that the measure will have a substantial impact on environmental protection.

### **Appropriate Instrument**

82. The measure must be appropriate within the meaning of points 169 et seq. of the Environmental Aid Guidelines. An instrument is appropriate if there are no other less distortive instruments to achieve the same results. In the current situation the landfill operators and the owners of the plots cannot be held liable. Thus there seem to be no other policy options than State aid to ensure the decontamination of the site and the protection of the groundwater. This approach is also in line with the polluter pays principle. In the current legal framework the granting of the aid is therefore the appropriate instrument to achieve the desired level of environmental protection given that less distortive instruments not involving aid are not available or may not achieve the same results.

### **Incentive Effect and Necessity**

83. According to point 171 of the Environmental Aid Guidelines, State aid "*...must result in the recipient changing its behaviour to increase the level of environmental protection*". In that respect the Member State has to demonstrate

that in the absence of the aid the beneficiary would not have engaged in the environmentally friendly measure.

84. Point 53 of the Environmental Aid Guidelines indicates that this is normally the case if the cost of remediation is higher than the resulting increase in value of the land. The information provided by the Austrian authorities show that the costs of the measure outweigh the possible benefits from the measure in terms of increase in value of the land. According to the Austrian authorities the costs of the remediation work for the contamination total EUR 27 million. According to the expertise provided by the Austrian authorities the land has currently a value of zero. After the remediation of the Site the value of the land will be still zero. Thus, there is no increase in value of the land and therefore, no sufficient incentives are given to undertake the remediation of the site for the estimated cost of EUR 27 million. Based on this information it can be concluded that the beneficiary would not engage in the measure without the aid.
85. The Austrian authorities described in detail the expected increase in environmental protection pursuant to point 172 (b) (i) of the Environmental Aid Guidelines. In particular, the documents provided contain a detailed report on the contamination of the site and on possible decontamination measures that show that the envisaged measure is capable of enhancing the quality of the groundwater.
86. Moreover, since there are no productivity advantages linked to the measure, it can be concluded that the level of risk of the investment is high in the sense of point 172 (f) of the Environmental Aid Guidelines.
87. Finally, the level of profitability of the measure is negative within the meaning of point 172 (g) of the Environmental Aid Guidelines because the costs of the measure exceed the increase in value of the Site. Moreover, there is a concrete risk of the investment turning out to be more expensive than budgeted, as a result of which it would be even less profitable.
88. It can thus be concluded that the measure is necessary and provides for a sufficient incentive effect.

### **Proportionality**

89. With regard to the proportionality of the aid, the standard assessment in Chapter 3.1.10 of the Environmental Aid Guidelines focuses on the eligible extra investment costs necessary to carry out the remediation of the contaminated site. In a second step, the aid amount established on this basis needs to be re-assessed as required by the detailed assessment in of Chapter 5 of the Environmental Aid Guidelines.

#### ***Proportionality of the Aid under Chapter 3.1.10***

90. According to point 133 of the Environmental Aid Guidelines the aid for the remediation of contaminated sites may cover up to 100% of the eligible costs. According to point 134 of the Environmental Aid Guidelines the eligible costs are equal to the costs of the remediation work less the increase in the value of the land. The costs of the remediation work include all expenditures incurred by an undertaking in remediating its site.

91. The estimated costs of the remediation work for the contamination total approximately EUR 27million (exact amount EUR 26.97 million)<sup>23</sup>. This includes the actual remediation costs, as well as the contaminated site contribution to the contaminate site levy since the latter also is an expenditure incurred by an undertaking in remediating its site.
92. The Austrian authorities calculate the aid by financing 95% of construction measures and 100% of the contaminated site levy. The beneficiary will therefore benefit from approximately EUR 1.5 million (100% of the contaminated site contribution), EUR 24.2 million (95% of the actual costs of the remediation). The total amount of the aid is EUR 25.7 million (aid for contaminated site contribution and remediation).
93. The aid will thus remain below the eligible costs of approximately EUR 27 million. The contribution of the beneficiary will be EUR 1.3 million or 4.81 % of the eligible costs. The aid intensity amounts thus to 95.19 % of the eligible costs. In any case, the aid intensity will not exceed 100% of the eligible costs. The Commission therefore considers that the aid is calculated in line with point 133 of the Environmental Aid Guidelines.

#### ***Proportionality of the Aid under Chapter 5***

94. The measure must be proportionate within the meaning of points 174 of the Environmental Aid Guidelines. A State aid measure is proportional in the sense of point 174 (a) of the Environmental Aid Guidelines if the eligible costs are limited to the extra costs necessary to achieve the level of environmental protection. The Austrian authorities demonstrated that the aid covers not more than the costs necessary to remediate the part of the contamination for which the beneficiary is not responsible. A study of the options relating to the Project was carried out during the preparation of the aid application. The optimum options for the Site were examined with the help of a modified cost-effectiveness analysis based on ecological and socioeconomic criteria. This ensures that the Project represents the best value for money to achieve the desired level of environmental protection. The underlying costs were estimated in a cost catalogue and analysed item by item setting out the specific costs and quantity, in order to make the calculation as transparent as possible. Austria puts forward that all the items in the cost catalogue are necessary to achieve the level of environmental protection. On the basis of the information provided by the Austrian authorities it can be concluded that the selection process of the companies to perform the works is non-discriminatory, transparent and open and fulfils the conditions set out in point 174 (b) of the Environmental Aid Guidelines. The aid is paid out to the beneficiary ex-post on the basis of costs incurred and works performed and, thus, PORR AG will not be receiving more than the actual cost of the remediation works. Furthermore, the calculations provided by the Austrian authorities demonstrate that the aid amount does not exceed the lack of profitability of the measure as postulated by point 174 (c) of the Environmental Aid Guidelines, because the aid only concerns the remediation of contaminations for which the beneficiaries are not liable and does not exceed 100% of the eligible costs as required by point 133 of the Environmental Aid Guidelines. The measure can

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<sup>23</sup> Catalogue of measures with cost estimates in EUR (incl. VAT) – Annex 5 to the notification.

therefore be considered as being proportionate within the meaning of Chapter 5 of the Environmental Aid Guidelines.

### ***Analysis of the Distortion of Competition and Effect on Trade***

95. Furthermore the Commission assessed the foreseeable negative effects of the aid on competition between undertakings in the product markets (remediation works) affected. In that respect it can be noted that it seems unlikely that the beneficiary will be able to increase or maintain sales as a result of the aid. In particular, the remediation of the contaminated site has no influence on the production unit costs as described in point 177 (a) of the Environmental Aid Guidelines, neither does it lead to more environmentally friendly production processes within the meaning of point 177 (b) of the Environmental Aid Guidelines or to new products as described in point 177 (c) of the Environmental Aid Guidelines. On the contrary the aid is technologically neutral to the extent that it does not promote any kind of technology used by the beneficiary in its production process.

### ***Dynamic Incentives/Crowding Out***

96. According to point 178 of the Environmental Aid Guidelines, State aid for environmental protection may be used strategically to promote innovative environmentally friendly technologies with the aim of giving domestic producers a ‘first mover’ advantage. Consequently, the aid may distort the dynamic incentives and crowd out investments in the specific technology in other Member States and lead to a concentration of this technology in one Member State. However, the Commission notes that the measure in question does not promote any kind of technology, but is confined to the remediation of a contaminated site. Furthermore the support is strictly limited to measures concerning the remediation of damages for which the beneficiary is not responsible and does not exceed the amounts necessary to do so. Consequently, the measure is not capable of conferring any monetary advantage to the beneficiary that could – in one way or another – be used to cross-subsidise investments in his production process. The Commission therefore concludes that the aid will not distort dynamic incentives or lead to the crowding out of specific technologies.

### ***Maintaining Inefficient Firms Afloat***

97. According to point 180 of the Environmental Aid Guidelines, State aid for environmental protection may be justified as a transitional mechanism to move towards a full allocation of environmentally negative externalities, but should not be used to grant unnecessary support to undertakings which are unable to adapt to more environmentally friendly standards and technologies because of their low levels of efficiency. However, as described above, the aid is strictly limited to the remediation of damages for which the beneficiary is not responsible and does not exceed the amounts necessary to do so. Consequently, the measure is not capable of conferring any monetary advantage to the beneficiary that could – in one way or another – be used to cross-subsidise any operational inefficiencies of the beneficiary. The Commission therefore concludes that the aid will not help to maintain an inefficient firm afloat.

### ***Market Power/ Exclusionary Behaviour***

98. With regard to point 181 of the Environmental Aid Guidelines, aid for environmental protection given to a beneficiary may be used to strengthen or maintain its market power in the given product market. It is, however, unlikely that the aid may have an impact on the position of the beneficiary on this market and enable it to exclude competitors from the market as it will not undertake any of the works itself, but tender them out. The aid is strictly limited to the remediation of damages for which the beneficiary is not responsible and does not exceed the amounts necessary to do so. Based on the data submitted by Austria The Commission therefore concludes that the aid is not capable of helping the beneficiary to strengthen or maintain its market power in the product markets in which he is active.

### ***Effects on Trade and Location***

99. According to point 183 of the Environmental Aid Guidelines State, aid for environmental protection may result in some territories benefiting from more favourable production conditions, notably because of comparatively lower production costs as a result of the aid or because of higher production standards achieved through the aid. This may result in companies re-locating to the aided territories, or to displacement of trade flows towards the aided area. However, as explained above, the aid does not exceed the amounts necessary to decontaminate the Site. The aid has therefore no effect on the production conditions of the beneficiary and does not provide an incentive for foreign companies to relocate to Austria. The measure is therefore unlikely to be capable of having an effect on trade or location.

### ***Balancing***

100. It follows from the above that the negative effects of the aid on competition between undertakings in the product markets affected will be very limited. In particular, the aid is unlikely to positively affect the competitive situation of the beneficiary since it does not relate to the production of certain goods or the development of certain technologies. Furthermore, the financial advantage is effectively limited to the remediation of the Site and cannot be used to cross-subsidise the operational activities of the beneficiary. At the same time the aid will have considerable positive effects on the level of environmental protection in the region. In particular, it will mitigate the threat of groundwater contamination, especially as regards the system Marchfeld Canal. The Commission therefore concludes that the positive effects of the aid outbalance possible negative effects on competition and trade.

### **3.4. Compatibility of the aid at the level of EPS LAA 43 GmbH**

101. It should be noted that EPS LAA 43 GmbH, in the same manner as the other owners of the plots comprising the Site, could not be held liable by the Austrian authorities for the contamination and therefore cannot be made responsible for the decontamination works of the Site.

102. As shown above in recital 64, any advantage to EPS LAA 43 GmbH due to the aid measure would be very low, if any, as it would be, at most, equal to their

share in the increase in value of the land after the decontamination works. It would fall under the Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid<sup>24</sup>.

### **3.5. Cumulation**

103. Austria confirmed that the aid granted under the notified measure will not be combined with other aid. According to the Austrian authorities this has been verified by Kommunalkredit Public Consulting GmbH. Furthermore, the Austrian authorities submitted that according to the general terms and conditions of the grant contract the beneficiary is obliged to inform the Kommunalkredit Public Consulting GmbH of any past, existing or planned applications for support.

### **3.5. Assessment Conclusion**

104. It can be concluded that the aid is compatible with Article 107 (3) (c) TFEU because it is in line with the provisions for aid for the remediation of contaminated sites and the requirements for aid subject to a detailed assessment as outlined by the Environmental Aid Guidelines and could also be found compatible under the relevant provisions of the Guidelines on State aid for environmental protection and energy 2014-2020 adopted by the Commission on the 9 April 2014 and scheduled to enter into force on 1 July 2014, in particular with Section 3.2. thereof.

105. The Austrian authorities undertake to submit annual reports on the implementation of the notified environmental measure to the Commission.

## **4. Conclusion**

106. The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107 (3) (c) of the Treaty on the Functioning of the European Union.

107. 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: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
Directorate for State Aid  
State Aid Greffe  
B-1049 Brussels

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<sup>24</sup> OJ L 352, 24.12.2013, p 1.

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For the Commission

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Vice-President