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Subject: State aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users

Sir,

The Commission wishes to inform Germany that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the support to electricity produced from renewable energy sources and mining gas under the Renewable Energy Act and the reduced EEG-surcharge for energy-intensive users.

1. PROCEDURE

- (1) In December 2011, the German Association of Energy Consumers (*Bund der Energieverbraucher*) filed a complaint with the Commission arguing that the amended Renewable Energy Act¹ entering into force on 1 January 2012 ("EEG-Act 2012") and in particular the cap on the EEG-surcharge in favour of energy-intensive users ("EIU") constitutes unlawful and incompatible State aid.
- (2) In the course of 2012, the Commission received also letters from citizens complaining about the EEG-surcharge in general and the reduced surcharge in favour of EIU in particular. The complaint was forwarded to Germany together with a request for information. Germany submitted comments and information on 29 June 2012.

¹ Gesetz für den Vorrang Erneuerbarer Energien (Erneuerbare-Energien-Gesetz-EEG), as amended by the law „Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien“, Bundesgesetzblatt, Teil I, Nr. 42, Seite 1634, 4 August 2011.

- (3) Germany considers that no State resources are involved. It considers that the advantage is granted only through private means (network operators and electricity suppliers) like in *PreussenElektra*². It also underlines that the EEG-surcharge is not imposed by the law on final consumers as electricity suppliers are in fact free to pass the EEG-surcharge to final consumers or not.
- (4) Germany further considers that the EEG-Act 2012 does not entrust any entity with a specific task (managing the aid or the funds) but merely imposes various obligations on all network operators and electricity suppliers. In particular, it claims that the BAFA (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*, i.e. the entity deciding that an EIU fulfils the conditions of the capped EEG-surcharge) has no control over the money involved. Germany also states that the monitoring tasks of the energy network regulator BNetzA (*Bundesnetzagentur*) are merely related to consumer protection.
- (5) Germany states that irrespective of the qualification as aid within the meaning of Article 107(1) TFEU, the support granted to the producers of renewable energy is in any event compatible with the internal market as it complies with the relevant provisions of the Community Guidelines on State aid for environmental protection³ ("EAG"). It has submitted detailed information in this respect on 17 December 2012, 17 April 2013 and 28 June 2013.
- (6) Germany finally considers that irrespective of the qualification as aid within the meaning of Article 107(1) TFEU, the support granted to EIU is compatible with the internal market under Article 107(3)(b) TFEU or alternatively Article 107(3)(c) TFEU. It has submitted information in this respect on 25 September 2013.

2. DETAILED DESCRIPTION OF THE MEASURES CONCERNED

2.1. Overview

2.1.1. *Feed-in tariffs and market premium for electricity from renewable sources and from mining gas*

- (7) Network operators⁴ (in most cases the Distribution System Operator⁵, "DSO") are obliged to purchase electricity produced within their network area from renewable energy sources ("RES electricity"): hydropower, including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass, including biogas, biomethane, landfill gas and sewage treatment gas, as

² Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

³ Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p.1.

⁴ Network operators are defined in the EEG-Act as the operators of grid systems of all voltages for general electricity supply (§3(8) of the EEG-Act 2012).

⁵ A distribution system operator is a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity (see Article 2(6) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.08.2009.

well as the biodegradable fraction of municipal waste and industrial waste. They are furthermore obliged to purchase electricity produced from mining gas.

- (8) The purchase prices are fixed by law (feed-in tariffs). They differ for each type of RES and vary according to the capacity of the power plant. The EEG-Act 2012 also foresees certain bonuses. The tariffs decrease each year by a certain percentage for installations entering into operation in that specific year. The electricity that has benefited from feed-in tariffs will hereinafter be referred to as EEG electricity.
- (9) Instead of applying for feed-in tariffs, producers of RES electricity and electricity from mining gas also have the possibility to sell their electricity directly on the market ("direct marketing"). When they do so, they are however entitled to obtain a market premium from the network operator. This premium corresponds to the difference between the average market price and the feed-in tariffs. The choice between feed-in tariffs or market premium can be made on a monthly basis.

2.1.2. TSOs are obliged to purchase the EEG electricity from DSOs

- (10) DSOs have to immediately transfer the EEG electricity to their respective Transmission System Operators⁶ ("TSO") which in turn are under the obligation to compensate the DSOs in their network area at the feed-in tariffs. TSOs are furthermore obliged to compensate DSOs for the premium that they have paid to producers of RES electricity and electricity from mining gas in case of direct marketing.

2.1.3. Equalisation system between TSOs

- (11) The EEG-Act 2012 establishes further an equalisation mechanism whereby the financial burden resulting from the purchase obligation is spread between TSOs so that ultimately every TSO covers the costs of a quantity of electricity that corresponds to the average share of EEG electricity and electricity for which a market premium has been paid compared to the total electricity delivered to the final consumers in each area served by the individual TSO in the previous calendar year (§36 EEG-Act 2012).

2.1.4. Marketing of the EEG electricity on the spot market and establishment of the EEG-surcharge

- (12) TSOs are obliged to sell the EEG electricity on the spot market. They can do so alone or together.
- (13) If the price obtained on the spot market is not sufficient to cover the financial burden resulting from the purchase obligation at feed-in tariffs and the obligation to pay premiums, TSOs have the power to require from electricity suppliers⁷ to pay a share of this burden proportionate to the respective quantity of electricity delivered by the electricity suppliers to their final consumers. The share must be determined in such a

⁶ The transmission system operator is the system balancing grid operators of high-voltage and extra-high voltage grid systems which are used for the supraregional transmission of electricity to downstream grid systems (see §2(11) of the EEG-Act 2012).

⁷ An electricity supplier is defined as any natural or legal person that delivers electricity to final consumers (§2(2d) of the EEG-Act 2012).

way that each electricity supplier bears the same costs for each kilowatt-hour of electricity delivered by it to a final consumer. Monthly advance payments must be made for payment of this surcharge. The EEG-Act explicitly designates this charge that the TSO recovers from electricity supplies as constituting the "EEG-Umlage" ("EEG-surcharge") (see §37 (2) of the EEG-Act 2012).

- (14) The methodologies and elements that TSOs have to take into account when determining the EEG-surcharge have been further detailed in the *Ausgleichsmechanismusverordnung* (AusglMechV) and in the *Ausgleichsmechanismus-Ausführungsverordnung* (AusglMechAV).
- (15) In particular, §3 AusglMechV states the following:

“§ 3 EEG-Surcharge

(1) The transmission system operators calculate the EEG-Surcharge according to § 37 paragraph 2 of the Renewable Energy Act [i.e. the EEG-Act] in a transparent manner as:

1. the difference between the projected revenues referred to in paragraph 3, point 1 and 3 for the following Calendar year and the forecast expenditure referred to in paragraph 4 for the following calendar year and

2. the difference between the actual income referred to in paragraph 3 and the actual expenditure referred to in paragraph 4 at the time of calculation.

(2) The EEG-surcharge for the following calendar year has to be published before 15 October of each calendar year on the website of the transmission system operator in aggregated form and must be indicated in cent per kilowatt-hour delivered to consumers; § 43 paragraph 3 of the Renewable Energy Act shall apply accordingly.

(3) Revenues are:

1. Income from the day-ahead and intraday marketing pursuant to § 2

2. Income from the EEG-surcharge

2a. Income from payments according to § 35 paragraph 2 of the Renewable Energy Sources Act provided that the balancing exercise according to § 35 paragraph 3 of the Renewable Energy Act presents a positive balance for the transmission system operator

3. Income from interests referred to in paragraph 5,

4. Income from the settlement of balancing energy for the EEG balance group and

5. Income under § 35 or § 38 paragraph 4 of the Renewable Energy Act and paragraph 6

(4) Expenditures are:

1. Feed-in tariffs and compensation payments according to § 16 or § 35, paragraph 1 of the Renewable Energy Act,

1a. Payments of premiums pursuant to § § 33g or 33i or § 35 paragraph 1 of the Renewable Energy Act,

1b. Payments according to § 35 paragraph 1b of the Renewable Energy Act,

2. Repayments under paragraph 6,

3. Payments for interest referred to in paragraph 5,

4. costs necessary for the settlement of day-ahead transactions,

5. costs necessary for the settlement of balancing energy for the EEG balance group,

6. costs necessary for the preparation of day-ahead and intraday forecasts

7. costs necessary for the establishment and operation of an installation register, provided that the transmission system operator are required to operate such a register on the basis of a decree adopted pursuant to § 64e Number 2 of the Renewable Energy Act.

(5) Differences between revenue and expenditure are subject to an interest. The interest rate for one calendar month amounts to 0.3 percentage points above the monthly average of the euro interbank offered rate set for the procurement of one-month money of the first addresses in the countries participating in the European Monetary Union (EURIBOR) for a period of one month.

(6) If there are entitlements as a result of discrepancies between the monthly payments according to § 37 paragraph 2 sentence 3 of the Renewable Energy Act and the final settlement pursuant to § 48 paragraph 2 of the Renewable Energy Act, they have to be compensated until 30 September of the year following the feeding-in.

(7) When forecasting the revenues and expenditures referred to in paragraph 1, point 1 to calculate the EEG-surcharge, transmission system operators are allowed to take into account a liquidity reserve. It may not exceed 10% of the difference referred to in paragraph 1, point first.

- (16) As a result of these implementing provisions, the TSOs jointly determine each year the EEG-surcharge for year X+1. Basically, they determine the EEG-surcharge on the basis of the forecasted financial needs for the payment of feed-in tariffs and premiums, the forecasted revenues from the sale of the RES electricity on the spot market and the forecasted consumption of electricity. In addition, a series of revenues and costs linked to the management of the EEG-surcharge have to be taken into account for its calculation. For 2012 the EEG-surcharge amounted to 3.592 ct/kWh. For 2013 it amounts to 5.277 ct/kWh.

2.1.5. Reduction of the EEG-surcharge for electricity suppliers ("Grünstromprivileg")

- (17) The EEG-Act 2012 (§39) foresees that the EEG surcharge is decreased for electricity suppliers in a given calendar year by 2.0 cents per kilowatt hour, where the RES electricity they deliver to all of their final consumers fulfils certain conditions.

- (18) Basically, the reduction is granted when the supplier has bought RES electricity directly from national RES electricity producers under direct marketing arrangements within the meaning of §33b N°2 (i.e. direct marketing arrangements where the RES electricity producer does not apply for support under the EEG-Act) and this amount of electricity reaches the following thresholds:
- a) at least 50 % of the electricity the supplier delivers to all of their final consumers is RES electricity or electricity from mine gas within the meaning of §23 to 33; and
 - b) at least 20 % of the electricity is wind or solar electricity within the meaning of sections 29 to 33.
- (19) The reduction of 2ct/kWh will be applied on the entire electricity portfolio. This implies that if a supplier sources 50% of his electricity from conventional energy sources and half of his electricity from RES, he can offer to pay up to 4ct/kWh on top of the market price to buy RES electricity. The exact amount will depend on offer and demand:
- (20) Reference scenario: 100% electricity from conventional sources at market price (4.3 ct/kWh, i.e. 43€/MWh in 2012, see section 2.3 below) with EEG-surcharge: 43€/MWh + 53€/MWh = 96€/MWh
- (21) Comparison: Supplier under the “Grünstromprivileg“: 50% electricity from conventional sources with reduced EEG-surcharge (33€/MWh instead of 53€/MWh) and 50% RES electricity with reduced surcharge: $(43€/MWh + 33€/MWh) * 50\% + (RES\ electricity€/MWh + 33€/MWh) * 50\% = 96€/MWh$ with max RES electricity price that the supplier will offer 83€/MWh (i.e. 43€/MWh + top up of 40€/MWh).

2.1.6. Passing on final consumers and capped EEG-surcharge for energy-intensive undertakings

- (22) The EEG-Act does not impose on electricity suppliers the obligation to pass on the EEG-surcharge to customers. However, the EEG-Act establishes how the supplier has to indicate the EEG-surcharge on the electricity bill.
- (23) Also, §40 of the EEG-Act limits the amount of the surcharge that can be recovered from EIU: upon request, the BAFA will limit the EEG-surcharge which is passed on by the electricity suppliers to an end-user when the end-user is a manufacturing enterprise with high electricity consumption⁸.
- (24) §40 of the EEG-Act states that this limitation aims at reducing the electricity costs for these enterprises and thereby maintaining their international competitiveness, insofar as this is compatible with the goals of the EEG-Act and the limit imposed is still compatible with the interest of the electricity users as a whole.
- (25) §41 of the EEG-Act subjects the limitation of the EEG-surcharge to the following conditions:

⁸ The cap is also granted to railway undertakings. This cap is not examined in the framework of this decision. The Commission reserves the right to assess §42 EEG-Act 2012 in a separate procedure.

- a) the electricity purchased from a electricity supplier and used by the enterprises themselves was at least 1 GWh in the last financial year;
- b) the ratio of the electricity costs to be borne by the enterprise to its gross added value was at least 14% in the last financial year;
- c) the EEG-surcharge was passed on to the enterprise;
- d) the enterprise has gone through a certified energy audit (this latter condition does not apply to enterprises whose electricity consumption is less than 10 GWh).

(26) The general rule is that for an EIU, the EEG surcharge is gradually capped as follows:

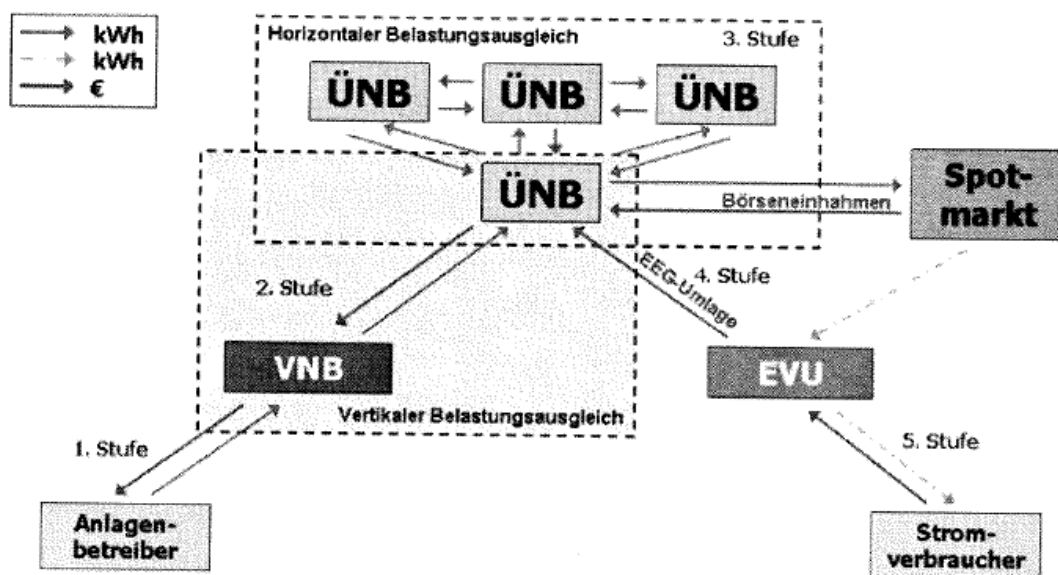
- consumption up to 1 GWh: no cap – full EEG-surcharge;
- consumption between 1 GWh and 10 GWh: 10 % of the EEG surcharge;
- consumption between 10 GWh and 100 GWh: 1 % of the EEG surcharge;
- consumption above 100 GWh: 0.05 cent/kWh.

(27) If an EIU has a consumption above 100 GWh and if costs of electricity represent more than 20 % of gross added value, the different grades described in paragraph (26) do not apply, and the EEG surcharge will be limited to 0.05 ct/kWh for the EIU’s whole electricity consumption.

(28) The decision of the BAFA is binding also upon the TSO. This means that where the BAFA has decided that an EIU only needs to pay a reduced EEG-surcharge to its electricity supplier, the EIU’s electricity supplier’s obligation to pay the EEG-surcharge to the TSO is in turn reduced accordingly. This will be taken into account when TSO establish the EEG-surcharge.

Schematic view of the entire system

ÜNB = TSO; VNB = DSO; EVU = electricity suppliers; Anlagenbetreiber = operator of an power plant; Stromverbraucher = electricity consumer



2.1.7. Transparency, EEG-account and monitoring by the State

- (29) RES electricity producers, DSOs and TSOs and electricity suppliers are obliged to make available to each other the data required for the correct implementation of the EEG-system. The EEG-Act establishes in some detail what type of information must be transmitted systematically to other operators and at what time of the year. DSOs, TSOs and electricity suppliers can require that the data be audited by an accountant.
- (30) The EEG-Act has established a dispute settlement body entrusted by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with the task of clarifying questions and resolving disputes between electricity producers, network operators and electricity suppliers (Clearingstelle).
- (31) In addition, DSOs and TSOs are obliged, according to the EEG-Act and implementing decrees to publish a certain number of data on their websites (amount of RES electricity purchased and at what price).
- (32) TSOs have to keep all transactions linked to the EEG separate from the rest of their activities. They are obliged to keep separate bookkeeping for all financial flows related to the EEG, and the expenses and revenues linked to the EEG must be made on a separate account (§5 AusglMechAV).
- (33) Finally, TSOs are under the obligation to publish, on a common website designated as "EEG-account", monthly aggregated revenues resulting from the sale of EEG electricity on the spot market and from the EEG-surcharge and aggregated costs (compensation to DSOs and other costs related to the management of the system). They are also under the obligation to publish in advance the forecasted EEG-surcharge.
- (34) The law has established the obligation for installations to be registered with a public body. The registration will be a condition to be entitled to receive feed-in tariffs. The register has not yet been established but there is already a separate obligation in place for solar installations and (liquid) biomass installations to be registered in order to benefit from feed-in tariffs. The BNetzA manages the solar installation register and the Bundesanstalt für Landwirtschaft und Ernährung manages the liquid biomass installations register.
- (35) Network operators have to transmit to the BNetzA the details which they receive from the installation operators (installation location, production capacity, etc.), the network level at which installations are connected, aggregated and individual tariffs paid to installations, the final invoices sent to electricity suppliers and the data required to verify the accuracy of the figures thus provided. Electricity suppliers are obliged to communicate to the BNetzA the amount of electricity supplied to their customers and their final accounts. The BNetzA has also certain audit powers towards owners of RES electricity installations so as to monitor how DSOs and TSOs have complied with their obligations.

- (36) TSOs further have to transmit to the BNetzA detailed data relating to the establishment of the EEG-surcharge. In particular, they have to provide data related to the different revenues and expenditures entries that enter into the calculation of the EEG-surcharge, §7(2) AusglMechV.
- (37) Those benefiting from a capped EEG-surcharge must, upon request, provide the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety with information about all the facts which are necessary in order to assess whether the objectives under §40(1) will be met.
- (38) The BNetzA has been entrusted with various monitoring tasks. It has *inter alia* to monitor that:
- TSOs sell on the spot market the electricity for which feed-in tariffs are paid in accordance with applicable rules (AusglMechV),
 - TSOs properly determine, set and publish the EEG surcharge,
 - TSOs and properly charge electricity suppliers for the EEG-surcharge,
 - That feed-in tariffs and premiums are properly charged by DSOs to TSOs,
 - That the EEG-surcharge is reduced only for electricity suppliers fulfilling the conditions of §39.
- (39) As to the determination of the EEG-surcharge, the BNetzA has numerous monitoring powers and tasks related to the different cost and revenue items that TSOs are allowed to include in the calculation of the EEG-surcharge. First, the BNetzA has the power to establish, in agreement with the Ministry for Environment the rules for the determination of items that are regarded as income or expenses in for the establishment of the EEG-surcharge and the applicable interest rate. On that basis, the BNetzA has further detailed in the AusglMechAV what types of costs could be taken into account. Second, the BNetzA is to be provided with all the relevant elements and documents pertaining to the determination of the EEG-surcharge. Third, the BNetzA can also request additional information, including account abstracts (§5(3) AusgleichAV). Finally, for certain cost items, the TSOs are under the obligation to demonstrate their accuracy and necessity before they can be taken into account for the calculation of the EEG-surcharge (see for instance §6(2) AusglMechAV).
- (40) The BNetzA has the power to give instructions to TSOs and establish standard forms related to the data that TSOs have to transmit to it.
- (41) Also the BNetzA has the power to establish, in agreement with the Ministry for Environment requirements related to the marketing of the EEG electricity by the TSOs on the spot market and to establish the incentives for the best possible marketing of the electricity. This was done with the AusglMechAV.
- (42) The BNetzA has enforcement powers. It can for instance issue orders when TSOs do not establish the EEG-surcharge in accordance with the rules (see §38(5); §61(2)). It would also seem that they can set the level of the EEG-surcharge. Indeed, §6 (3)

AusglMechAV⁹ indicates that the difference between the EEG surcharge in the collected amounts and the EEG-surcharge in the level authorised by the BNetzA in accordance with enforceable decision of the BNetzA pursuant to § 61, first paragraph, point (3) and (4) of the EEG-Act 2012 also constitutes or revenue or expense within the meaning of § 3(3) and (4) of the AusglMechV. The BNetzA can also impose fines (see §62 (1)(2) EEG-Act 2012).

- (43) The BNetzA itself is subject to certain reporting obligations and has to communicate certain data to the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and to the Federal Ministry of Economics and Technology for statistical and evaluation purposes.

2.2. The feed-in tariffs, production costs, review mechanism

- (44) Feed-in tariffs are established for periods of 20 years as of the first year of operation of the concerned installation. The 20 years period correspond to the economic lifetime of the installation as well as to its depreciation period. Feed-in tariffs vary according to the technology used and the size of the installation and other parameters, so as to take into account the elements that can impact the production costs.

2.2.1. Feed-in tariffs

- (45) For installations entering into operation in 2012, feed-in tariffs are established as follows:

Hydropower (§23)

Year of entering into operation	bis 500 kW ct/kWh	bis 2 MW ct/kWh	bis 5 MW ct/kWh	bis 10 MW ct/kWh	bis 20 MW ct/kWh	bis 50 MW ct/kWh	ab 50 MW ct/kWh
2012	12.70	8.30	6.30	5.50	5.30	4.20	3.40

Automatic reduction per year, beginning as of 01.01.2013: 1%

Landfill gas (§24)

	bis 500 kW _{el} in ct/kWh	bis 5 MW _{el} in ct/kWh
2012	8.60	5.89

Automatic reduction per year, beginning as of 01.01.2013: 1.5 %

⁹ „Als Einnahmen und Ausgaben im Sinne von § 3 Absatz 3 und 4 der Ausgleichsmechanismusverordnung gelten auch Differenzbeträge zwischen der EEG-Umlage in der vereinnahmten Höhe und der nach Maßgabe einer vollziehbaren Entscheidung der Bundesnetzagentur nach § 61 Absatz 1 Nummer 3 und 4 des Erneuerbare-Energien-Gesetzes zulässigen Höhe“.

Sewage gas (§25)

	bis 500 kW _{el} in ct/kWh	bis 5 MW _{el} in ct/kWh
2012	6.79	5.89

Automatic reduction per year, beginning as of 01.01.2013: 1,5%

Biogas and biomass (§27-27c)

Vergütung					
Biogasanlagen (ohne Bioabfall) und Festbrennstoffanlagen				Bioabfallvergärun gs-anlagen (§ 27a)	Kleine Gülle- Anlagen (§ 27b)
Bemessungsleistu ng	Grundvergütu ng	Einsatzstoff- vergütungsklas se I ¹⁰	Einsatzstoff- vergütungsklas se II		
[kW _{el}]	[ct/kWh]				
≤ 75	14.3	6	8	16	25
≤150					
≤500	12.3				
≤ 750	11	5	8 / 6	14	
≤ 5.000	11	4			
≤ 20.000	6	-			

Automatic reduction per year, beginning as of 01.01.2013: 1.5 % for biogas and 2 % for biomass.

- (46) The EEG-Act provides for a bonus that is intended to cover the costs implied by the upgrading of the gas to natural gas quality. As those costs depend on the size of the installations, three categories have been established:

Bonus for sewage gas, landfill gas and biogas when they are upgraded to natural gas quality (§27c (2))	
max. Nennleistung von 700 Nm ³ /Stunde	3.0 ct/kWh

¹⁰ Based on feedstock market observations, Germany has divided the types of biomass into three categories: waste and residues that can in general be obtained at low prices do not give rise to any bonus. They are listed in Annex I to the Biomass regulation. Annex II of the Biomass Regulation lists the type of feedstock of class I for which a bonus can be obtained. Annex III of the Biomass Regulation lists the type of feedstock that is the most expensive given that it implies high production costs. This feedstock also entails more benefits for the environment. They give to a higher feedstock bonus under the EEG.

max. Nennleistung von 1000 Nm ³ /Stunde	2.0 ct/kWh
max. Nennleistung von 1400 Nm ³ /Stunde	1.0 ct/kWh

Mine gas (§26)

	bis 1 MW _{el} in ct/kWh	bis 5 MW _{el} in ct/kWh	über 5 MW _{el} in ct/kWh
2012	6.84	4.93	3.98

Automatic reduction per year, beginning as of 01.01.2013: 1,5%

Geothermal energy (§28)

Basis tariff: 25,00 ct/kWh

Bonus for petrothermal technics: 5,00ct/kWh

Automatic reduction per year, beginning as of 01.01.2018: 5%

Wind energy onshore (§29 and 30):

Jahr der Inbetriebnahme	Grundvergütung in ct/kWh	Anfangsvergütung in ct/kWh ¹¹
2012	4.87	8.93

Wind energy offshore (§31):

Jahr der Inbetriebnahme	Grundvergütung in ct/kWh	Erhöhte Anfangsvergütung in ct/kWh ¹²	Anfangsvergütung im Stauchungsmodell ¹³
2012	3.5	15.0	19.0

Solar energy (§32):

	Anlagen nach § 32 Abs. 2 EEG (Dachanlagen)				Anlagen nach § 32 Abs. 1 EEG
	bis 10 kWp	bis 40 kWp	bis 1 MWp	bis 10 MWp	bis 10 MWp
Inbetriebnahme	19.50	18.50	16.50	13.50	13.50

¹¹ This compensation is paid only at the beginning of the support period. It is in principle a 5 year period but can be longer depending on the technical parameters of the installation.

¹² This compensation is paid only at the beginning of the support period. It is in principle a 12 year period but can be longer when the installation is further away than 12 miles and deeper than 20 meters.

¹³ Market observations have shown that off-shore wind installation imply very important up-front investment costs.

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Automatic reduction from 01.05.2012 until 31/01/2012: 1 % every month

Automatic reduction between 01.11.2012 and 31.101.2013: 2.5 % every month

Automatic reduction between 01.02.2013 and 30.04.2013: 2.2 % every month

Automatic reduction between 01.05.2013 and 31.07.2013: 1.8 % every month

- (47) The feed-in tariffs are established so that an installation belonging to a specific category of technology and size will be able to cover its production costs under average conditions.

2.2.2. Production costs

- (48) Germany has indicated that before the appropriate level of the feed-in tariffs is determined, studies and surveys take place so as to determine production costs for certain classes of technology and installations that are considered as representative based on the practice observed on the market. The determination of the production costs is made on the basis of data gathered from installation operators, installation producers, installing companies, public sources and past experience¹⁴.
- (49) The production costs taken into account include investment costs, a normal rate of return, operating costs and revenues where relevant.
- (50) Concerning the normal return on investment, Germany has indicated that the following rates of return were taken into account for the establishment of the Feed-in tariffs in the EEG-Act 2012: They were determined on the basis of market observations¹⁵.

On-shore wind energy:	7.125%	$(25\%*12\%) + (75\%*5.5\%)$
Off-shore wind energy	9.45%	$(25\%*14\%) + (75\%*7\%)$
Biomass (solid)	7.6%	$(20\%*6\%) + (80\%*8\%)$
Biogas	6.16%	$(20\%*10\%) + (80\%*5.2\%)$
Solar (Freiflächen)	5%	$(30\%*7.3\%) + (70\%*4\%)$

¹⁴ The studies commissioned by the Ministry for Environment for establishment of the feed-in tariffs in the EEG Act 2012 are available under: <http://www.erneuerbare-energien.de/die-themen/gesetz-verordnungen/erneuerbare-energien-gesetz/eeg-erfahrungsbericht-2011/>.

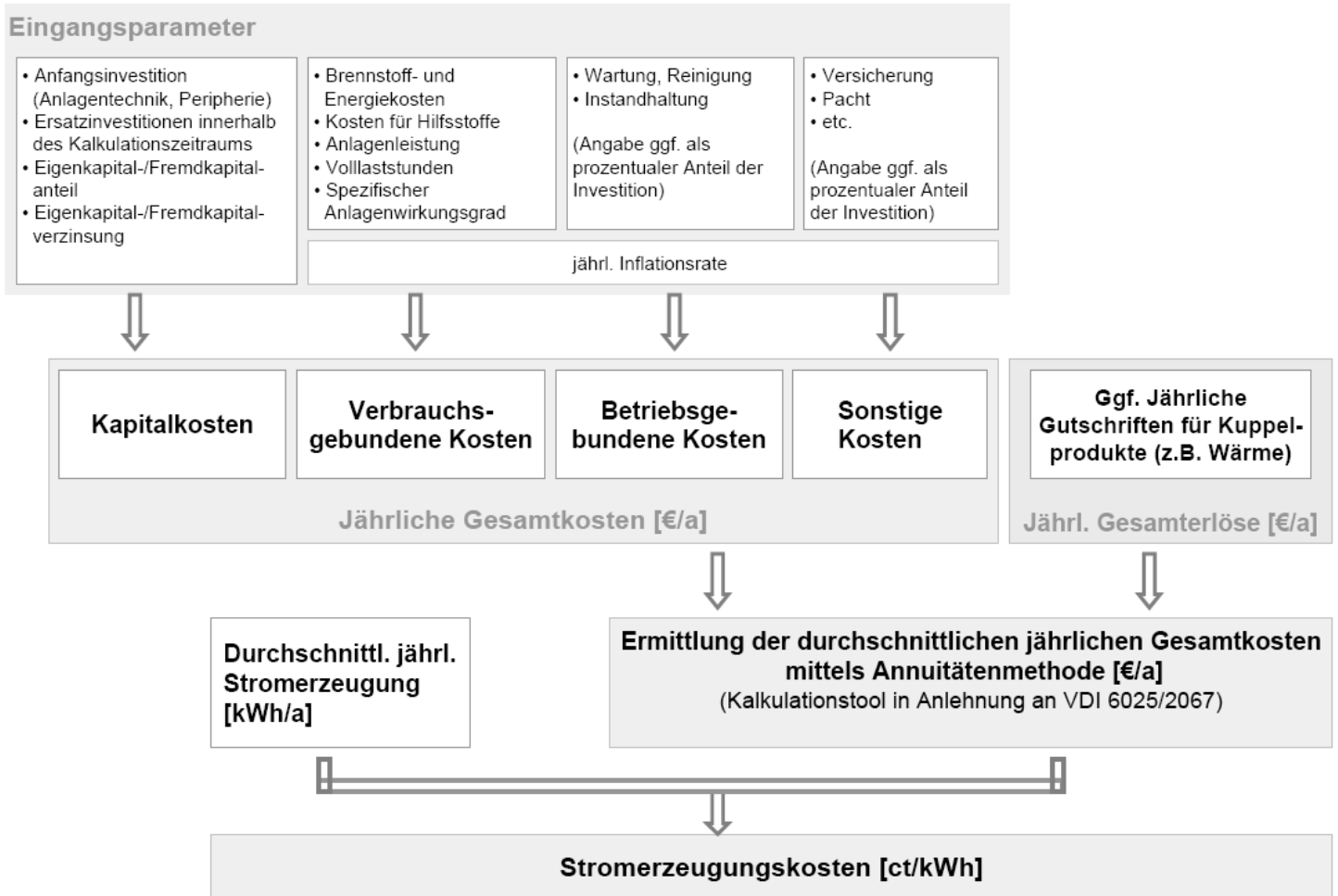
¹⁵ Details about the establishment of the rate of return can be found in each "Vorhaben zum Erfahrungsbericht 2011". They are available under: <http://www.bmu.de/service/publikationen/downloads/details/artikel/begleitende-vorhaben-zum-eeg-erfahrungsbericht-2011/>

Solar (roof installations)	5%	$(10\%*14\%) + (90\%*4\%)$
Water	7.2%	$(20\%*6\%) + (80\%*12\%)$
Geothermal	9.3%	$(41\%*13.1\%) + (59\%*6\%)$
Sewage gas, landfill gas and mine gas	6.95%	$(30\%*11.5\%) + (70\%*5\%)$

- (51) Operating costs 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;
- (52) As to revenues, Germany has indicated that in the case of installations that for a certain type of energy source usually make use of CHP plants, the revenues generated by the sale of heat are deducted from the production costs. This will typically be the case for biogas and biomass installations.
- (53) The production costs are established for each year of the entire 20 year period, taking into account inflation (2%). By application of the annuity factor (calculated in accordance with VDI standard 6025/2067) the total costs for the entire period are converted into average annual costs. By dividing them by the average annual electricity production, the average electricity production costs per ct/kWh are determined.
- (54) This methodology can be schematized as follows and is done on the basis of VDI standard 6025/2067:

Wirtschaftlichkeitsanalyse

Ermittlung der Stromerzeugungskosten mittels Annuitätenmethode



(55) Germany has provided production costs calculation for the following installations starting operation in 2012:

Wind:

	Wind Onshore	wind offshore		
Nennleistung	3.5MW		3.6 MW	5 MW
Standortqualität:	100% ¹⁶	Wassertiefe	20m	26m

¹⁶ The quality of the site has an impact on the duration of the start up tariff. The quality of the site is measured by reference to a reference site (100% sites). 80% sites have a wind exposure of lesser quality while 120% sites have a better wind exposure than 100% sites. Production costs will vary accordingly. Production costs

		Küstenentfernung	12nm	38nm
		Volllaststunden	3850 h/a	3850h/a
Spezifischer Energieertrag (kWh/a/m ² Rotorfläche)	1040		1541	1544
Mittlere Stromerzeugungskosten (ct/kWh)	8.51		11.5	13.5
Vergütung (EEG 2012)				
Zeitraum der Anfangsvergütung (Jahre)	16		12	14
Zeitraum der Basisvergütung	4		8	6
Höhe der Anfangsvergütung	8.93		15	15
Systemdienstleistungsbonus ¹⁷	0.48			
Höhe der Basisvergütung	4.87		3.5	3.5
Durchschnittsvergütung (ct/kWh)	8.5		10.4	11.55

Water

Lebensdauer der Anlage baulicher Teil (70%)	60
Lebensdauer der Anlage maschineller Teil (30%)	30
Nennleistung	3.5MW
Bemessungsleistung	2MW
Volllaststunden	5000 h/a
Mittlere Stromerzeugungskosten	9,00 -11,10 ct/kWh

are higher for 80% sites than 100 or 120% sites. This is the reason why the start-up period during which an increased tariff can be obtained is longer for an 80% site than for a 100% site. 100 % are considered to constitute the typical type of site where new windmills will be constructed (see p. 94 – 95 of Vorhaben IIe zu der Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011 gemäss §65 EEG).

¹⁷ This bonus is paid for new installations for the duration of the increased initial tariff when the installation has entered into operation before 31.01.2015. It serves to cover costs resulting from the installation of certain specific device that help providing network services.

Durchschnittsvergütung	9,4 ct/kWh
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Solar:

Nennleistung	10 MW	5kW
Technologie	Aufständigung, optimale Südausrichtung und Winkelung ohne Nachführung	Dachmontage
Spezifischer Jahresertrag	950 kWh/kw	900 kWh/kW
mittlere Stromerzeugungskosten	14,55 ct/kWh	21.75 ct/kWh
Vergütung (gemäß Gesetz zur Änderung des Rechtsrahmens für Strom aus solarer Strahlungsenergie und weiteren Änderungen im Recht der erneuerbaren Energien)	13,5 ct/kWh (zum 01.04.2012)	19.5 ct/kWh

Biomass:

Nennleistung	4 MWel
Technologie	Dampfkraftprozess mit KWK
Wirkungsgrad elektrisch	20%
Wirkungsgrad thermisch	67%
Volllaststunden	6 000 h/a
Wärmeauskopplung	80%
Brennstoffart	Waldrestholz
Brennstoffkosten	49 €/t
Anlegbare Wärmevergütung	3.0 ct/kWhth
mittlere Stromerzeugungskosten	15.8 ct/kWh
Grundvergütung	11.24 ct/kWh
Rohstoffabhängige Vergütung	2.5 ct/kWh für den Anteil an Waldrestholz

Vergütung insgesamt	12.49 ct/kWh
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Biogas:

Nennleistung	190 kWel
Technologie	Nassfermentation, Verbrennung inkl. Vor-Ort-Verstromung, KWK
Wirkungsgrad elektrisch	38%
Wirkungsgrad thermisch	44%
Volllaststunden	7 700 h/a
Wärmeauskopplung	80%
Brennstoffart	Mischsubstrat (65% Mais- u. Getreideganzpflanzensilagen, 35% Gülle)
Brennstoffkosten	35,00 €/t FM (Einkaufspreis für nachwachsende Rohstoffe) 0€/t für Gülle
Anlegbare Wärmevergütung	3.0 ct/kWh th
mittlere Stromerzeugungskosten	22.0 ct/kWh
Grundvergütung	13.88 ct/kWh
Rohstoffabhängige Vergütung	6.16 ct/kWh ¹⁸
Vergütung insgesamt	21.88 ct/kWh

Geothermal energy:

Nennleistung 4,0 MW	
Volllaststunden 8.000 h/a	
Mittlere Stromerzeugungskosten	17,6 - 27,9 ct/kWh

¹⁸ Der Massenanteil von 65% nachwachsender Rohstoffe (Getreide- Ganzpflanzensilage) führt zu einem Anteil von rund 92% am Energieoutput der Anlage, wodurch die Vergütung nach Einsatzstoffklasse I 5,51 ct/kWh (92% * 6 ct/kWh) beträgt. Der Anteil der Gülle (Rindergülle) von 35 Masseprozent führt zu einem Anteil von rund 8% am Energieoutput der Anlage und damit zu einer Einsatzstoffvergütung von 0,65 ct/kWh (8% * 8 ct/kWh).

Grundvergütung	25,00 ct/kWh
Zusatzvergütung (Bonus bei Nutzung petrothermaler Techniken)	5,00 ct/kWh

Sewage gas, landfill gas, mine gas

	Klärgas	Deponiegas ¹⁹	Grubengas
Nennleistung	100 kWel	250 kWel	400 kWel
Technologie	Standard Gasmotor BHKW		
Volllaststunden	8.000 h/a	6.000 h/a	6.000 h/a
Stromerzeugungskosten von - bis	10,5 ct/kWh –	8,5 ct/kWh –	6,5 ct/kWh –
	13 ct/kWh	11,0 ct/kWh	9,0 ct/kWh
Grundvergütung	6,79 ct/kWh	8,6 ct/kWh	6,84 ct/kWh

2.3. Market price

- (56) For the market price, the German authorities refer to the base load price observed on the power exchange EPEX. In 2012, the average price for base load power at EPEX Spot per quarter was as follows:

Average Price for Base load Power at EPEX Spot per Quarter	
Quarter	Average Price (EUR/MWh)
Q1 2013	42.27
Q4 2012	41.37
Q3 2012	43.52
Q2 2012	40.39
Q1 2012	45.10

¹⁹ The production costs do not include the costs linked to the capture of the gas, given that the gases need to be captured anyway according to laws applicable to the management of landfills. Landfill operators then have the possibility either to flare them or to try to produce electricity, which however entails additional costs compared to flaring.

2.4. Direct marketing, market premium and flexibility premium

- (57) Since 1 January 2012, the EEG-Act is supporting the development of RES electricity also through another instrument, the so-called direct marketing. Installation operators may claim a market premium from the network operator for RES electricity or for electricity generated from mining gas which they directly sell in accordance with section 33b (1) EEG Act-2012. For biogas installations above 750 kW, the market premium is the only type of support they can obtain under the EEG-Act 2012. They are not eligible anymore for feed-in tariffs. The instrument of direct marketing aims at incentivizing a market oriented production of RES electricity and at improving the integration of RES electricity in the electricity market as it implies that producers of RES electricity predict, like all other domestic and foreign conventional power plants, their production and sale forecasts and communicate them to the network operator. It also implies that they bear the costs of deviations of the actually produced amounts from forecasts (compensatory payments or provision of balancing energy).
- (58) The market premium is paid only for electricity which has actually been fed into the network and has been purchased by a third party. It is calculated each calendar month according to the following formula: $MP = EV - RW$ where "MP" corresponds to the amount of the market premium in ct/kWh, "EV" to the feed-in tariffs to which the operator would have been entitled if he had chosen and "RW" to the market value of electricity that serves as reference for the specific energy source concerned ("reference market value"). The MP cannot be lower than zero.
- (59) The reference market value is calculated differently depending on whether the electricity production can be steered (hydropower, landfill gas, sewage treatment gas, mine gas, biomass and geothermal energy) or is intermittent (wind, solar).
- (60) For steerable energy sources, the reference market value is calculated in accordance with the following formula: $RW_{Steerable} = MW_{EPEX} - PM_{Steerable}$, where " MW_{EPEX} " corresponds to the actual monthly average of hour contracts on the spot market of the EPEX Spot SE energy exchange in Leipzig in ct/kWh. $PM_{steerable}$ corresponds to the management premium established for steerable sources.
- (61) For intermittent energy sources (onshore and offshore wind, solar), the reference market value corresponds to $RW_{intermittent} = MW_{intermittent} - PM_{intermittent}$. $PM_{intermittent}$ corresponds to the management premium established for steerable sources. " $MW_{intermittent}$ " is calculated as follows:
- For each hour in a given calendar month, the average value of hour contracts on the spot market of the EPEX Spot SE energy exchange in Leipzig is multiplied by the quantity of electricity concerned (offshore, onshore or solar) actually generated in that hour.
 - The results for all hours in that calendar month shall be aggregated.
 - This total is divided by the quantity of electricity concerned (offshore, onshore or solar) generated in the entire calendar month.
- (62) The management premium aims at compensating additional costs resulting from the direct marketing. Such costs are not borne by the producers who benefit from the feed-in tariffs since they do not have to sell their electricity on the market by contrast to

producers choosing the direct marketing instrument. The management premium consists of two components: the costs linked to the trading (stock exchange admission, transaction costs, costs for staff and services, IT infrastructure, etc) and the costs of compensations for forecast errors (i.e. the costs of procuring balancing energy). In this respect, a distinction is made between steerable and intermittent renewable energy sources. In the case of steerable energy sources, costs incurred for mismatch between forecasts and actual production are more limited; also, trading costs are slightly lower than for intermittent RES electricity. The management premium is decreasing over time to take into account cost savings induced by the learning effect.

(63) As a result, $PM_{\text{intermittent}}$ is established as follows²⁰:

	Kosten für Prognose- fehlerausgleich	Kosten für Handels- abwicklung	Managementprämie (in Klammern für nicht fernsteuerbare Anlagen)
2012	9 €/MWh	3 €/MWh	12 €/MWh
2013	5,5 €/MWh	2 €/MWh	7,5 €/MWh (nicht fernsteuerbar: 6,5 €/MWh)
2014	5 €/MWh	1,5 €/MWh	6 €/MWh (nicht fernsteuerbar: 4,5 €/MWh)
2015	4 €/MWh	1 €/MWh	5 €/MWh (nicht fernsteuerbar: 3 €/MWh)

(64) $PM_{\text{steerable}}$ amounts to 0.30 ct/kWh in 2012; 0.275 ct/kWh in 2013, 0.25 ct/kWh in 2014, 0.225 ct/kWh from the year 2015 onwards.

(65) Germany has provided an example of calculation of a biogas plant with a rated power of 2500 kW (2800 kW of installed electrical power and 7821 full hours). The biogas is produced from feedstock of tariff class I (for example, corn-cob-mix). In 2012, the feed-in tariff would be EUR 158.8 / MWh for such plant. On this basis, the market premium is calculated as follows:

2012	EV	MW	PM	RW = MW - PM	MP = EV - RW
	EUR/MWh				
Januar	158.8	39.89	3	36.89	121.91
Februar		54.92	3	51.92	106.88

²⁰ $PM_{\text{intermittent}}$ has been adapted in 2013 on the basis of updated cost estimations.

März	41.15	3	38.15	120.65
April	43.57	3	40.57	118.23
Mai	38.85	3	35.85	122.95
Juni	38.81	3	35.81	122.99
Juli	41.02	3	38.02	120.78
August	44.9	3	41.9	116.9
September	44.67	3	41.67	117.13
Oktober	43.92	3	40.92	117.88
November	44.79	3	41.79	117.01
Dezember	35.51	3	32.51	126.29

- (66) In addition to the market premium, producers of electricity from biogas are also entitled to a flexibility premium when they have invested in a flexible installation. Provided the necessary equipment is installed, the production of electricity from biogas can to a certain extent be adapted to the needs of the demand-side. In general, biogas installations are operated so as to maximize production, which results in a constant output. A flexible installation allows that for a same amount of electricity produced over the year, the major part of the electricity is produced during peak demand hours. Germany would like to promote this type of technology given that it can make a valuable contribution to system and market integration of renewable energies.
- (67) While the flexibility allows producers to steer production of electricity so as to produce it in particular when demand and thus market prices are high, the additional revenues that can be achieved on the market when the electricity is produced during peak demand times are however not sufficient to cover the additional costs resulting from installing the flexibility equipment. The flexibility premium serves to cover this part of the additional costs over a 10-year period that cannot be recouped thanks to higher market prices.
- (68) The flexibility premium is calculated individually for each installation and depends on the technical parameters of the installations. In order to incentivize a flexible and demand-driven production, the more the installation is flexible, the higher the premium. The premium will be highest when installation can allow for a 12-hour shift in production (from low peak demand to high peak demand).
- (69) In order to establish the calculation methodology of the flexibility premium, the Federal Environment Ministry commissioned a study²¹ into the additional costs resulting from

²¹ *Flexible Stromproduktion aus Biogas und Biomethan*, 29. April 2011, available under: http://www.iwes.fraunhofer.de/de/publikationen/uebersicht/2011/flexible_stromproduktionausbiogasundbio

investing in and running a flexible biogas fired power plant. The costs were compared to the traditional biogas fired power plants that generate only base load electricity.

- (70) The additional costs result from the capital cost of additional electricity generation capacity (e.g. an additional CHP block), heat or gas reservoirs as well as the peripheral installations (enlarged connection to the grid and if necessary enlarged gas connection, system control) and other costs like licensing, insurance, personnel, repair and maintenance as well as possibly an additional increased fee for the connection to the gas network (capacity component).
- (71) The additional costs were examined for different sizes of installations and also for different levels of flexibility. From those additional costs, additional revenues that can be expected for such installations and that result from the possibility to sell electricity when demand is particularly high were deducted. Finally, given that direct marketing involves higher risks than the feed-in tariff, capital costs were estimated by taking into account a rate of return of 8%.
- (72) On the basis of those elements, the flexibility premium ("FP") was established as:

$$FP = \frac{P_{Zusatz} \times KK \times 100 \frac{Cent}{Euro}}{P_{Bem} \times 8760h}$$

- (73) KK is currently established at 130€/MW. P_{Bem} is the rated output and P_{Zusatz} is the additional installed capacity provided to generate electricity on a demand-basis in kilowatts and in the respective calendar year.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid within the meaning of Article 107 (1) of the TFEU

- (74) Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the internal market.

3.1.1. *Existence of a selective advantage and impact on competition and trade*

- (75) The current EEG-system contains advantages at two different levels:

a) **Advantage for the producers of RES electricity and electricity from mining gas:**

(76) Producers of RES electricity and electricity from mining gas are advantaged because, through the feed-in tariffs and premiums, they obtain more than what they would obtain on the market. Indeed the feed-in tariffs and premium guarantee the producers of RES electricity that they will obtain a price for their electricity that is generally higher than the market price. The same is true for direct marketing of RES electricity that gives an entitlement to a reduced EEG-surcharge under §39 of the EEG-Act, as this provision enables the producers of RES electricity and electricity from mine gas to obtain a price for their electricity that is higher than market price. They are thus advantaged by the EEG-system. In 2012, around EUR 19.5 billion were paid out in terms of feed-in tariffs and premiums while TSOs could sell the purchased renewable energy on the wholesale market only for around EUR 3 billion. The top up compared to market prices thus amounted to EUR 16.5 billion. The measure is selective because it favours only producers of RES electricity and electricity from mining gas. Moreover, the electricity market has been liberalised and electricity producers are engaged in trade between Member States takes place.

b) Advantage to EIU in the manufacturing sector:

(77) EIUs in the manufacturing sector are advantaged because the EEG-surcharge that can be required from them is capped. §§40-41 EEG-Act 2012 relieve them from a burden that they would normally have to bear. Indeed, it prevents TSOs and electricity suppliers from recovering the additional costs for the support of RES electricity and electricity from mining gas from energy-intensive undertakings.

(78) According to estimates made by the BNetzA for the year 2011, as a result of the cap, the EIUs concerned only pay 0.3% of the EEG-surcharge while they account for 18% of energy transmitted through the grid. The total advantage for EIU resulting from the cap is calculated at amounting to EUR 2.5 billion in 2011 when the number of undertakings eligible for a reduced EEG-surcharge was still smaller²².

(79) The measure is selective because only energy-intensive undertakings can benefit from it. In addition only undertakings from the manufacturing sector qualify for it.

(80) Finally, the potential beneficiaries are producers of energy-intensive goods (e.g. ferrous and non-ferrous metal producers, paper industries, chemical industry, cement producers²³) and are active in sectors in which trade between Member States takes place. The measure is therefore liable to distort competition and affect trade.

3.1.3. Imputability

(81) Both the advantages for producers of RES electricity and the capped EEG-surcharge for EIU and the feed-in tariffs are imputable to the State, as they are established by law and

²² http://www.erneuerbare-energien.de/fileadmin/e-import/files/pdfs/allgemein/application/pdf/eeg_hintergrundpapier_besar_bf.pdf. See p. 6 in particular. This figure also includes railways, which are not examined under this decision.

²³ See Vorhaben IV – Instrumentelle und rechtliche Weiterentwicklung im EEG – Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011, p 226-227.

implementing decrees. In addition, the BAFA grants the entitlements to a capped EEG-surcharge for EIU.

3.1.4. Existence of State resources

- (82) For advantages to be capable of being categorised as aid within the meaning of Article 107 TFEU, they must be granted directly or indirectly through State resources. This means that both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State are included in the concept of State resources within the meaning of Article 107(1) TFEU²⁴. In this sense, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector²⁵.
- (83) As a consequence, and contrary to what Germany seems to imply, the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved. It results from the case-law of the Court that it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 107(1) TFEU²⁶.
- (84) Also, the originally private nature of the resources does not prevent them from being regarded as State resources within the meaning of Article 107(1) TFEU²⁷. Hence, the mere fact that a subsidy scheme benefiting certain economic operators in a given sector is wholly or partially financed by contributions imposed by the public authority and levied on certain undertakings is not sufficient to take away from that scheme its status of aid granted by the State within the meaning of Article 107(1) TFEU²⁸. Equally, the fact that the resources would at no moment be the property of the State does not prevent that the resources might constitute State resources, if they are under the control of the State²⁹.
- (85) In this connection, the Court has stated in *Steinike*, a case that concerned a fund set up for the promotion of products of the German agricultural, forestry and food industry and financed *inter alia* by contributions from undertakings in the agricultural, forestry and food sector that³⁰:

²⁴ Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58.

²⁵ Case C-677/11 *Doux Elevage*, not yet published, paragraph 34, Case T-139/09 *France v Commission*, not yet published, paragraph 36.

²⁶ *Doux Elevage*, cited above in footnote 25, paragraph 34, *France v Commission*, cited in footnote 25, paragraph 36; joined cases C-399/10 P et C-401/10 P *Bouygues Telecom v Commission*, not yet published, paragraph 100.

²⁷ Case T-358/94 *Air France v Commission* [1996] ECR I-2109, paragraphs 63 to 65.

²⁸ Case T-139/09 *France v Commission*, not yet published, paragraph 61.

²⁹ Case T-358/94 *Compagnie nationale Air France v Commission* paragraphs 65 to 67; Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 37; Case C-677/11 *Doux Elevage SNC*, paragraph 35.

³⁰ Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21.

"The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid".

- (86) The same line was followed in the *Italy v Commission* Court case. It concerned contributions paid by employers to funds providing for unemployment and family allowances; Italy had argued that no State resources were involved because the contributions were not paid by the community as a whole. The Court ruled that³¹:

"As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 92, even if they are administered by institutions distinct from the public authorities."

- (87) Also, the Court indicated in its 1985 *France v Commission* case that³²:

"(...) the mere fact that a system of subsidies which benefits certain traders in a specific sector is financed by a parafiscal charge levied on every supply of national goods in that sector is not sufficient to divest the system of its character as aid granted by a Member State".

- (88) This line of reasoning was also applied in *Essent*³³. In that case, the Court had to assess a system which provided that the operators of the Dutch electricity network collect a surcharge from private electricity clients and pass on the proceeds of that charge to SEP, a joint subsidiary of the four electricity generators, in order to compensate the latter for so-called "stranded costs". The Court found that the Dutch system involved State resources³⁴.

- (89) In this case, the Court first observed that the surcharge constituted a State resource:

"45 That price surcharge on electricity which is transmitted was imposed by Article 9 of the OEPS. In this respect, it is of little importance that that provision facilitates the implementation of an agreement which had been previously concluded by various economic operators, since it is that legislation which provides that electricity consumers are required to pay that surcharge. The surcharge is a unilaterally imposed charge."

³¹ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16.

³² Case 259/85 *France v Commission*, paragraph 23.

³³ Case C-206/06 *Essent* [2008] ECR I-5497.

³⁴ Case C-206/06 *Essent* [2008] ECR I-5497, point 66.

46 Likewise, for the purposes of the application of Articles 25 EC and 90 EC, it is of little account that the financial charge is not levied by the State (Case 132/82 *Commission v Belgium* [1983] ECR 1649, paragraph 8). The fact that the price surcharge is levied by the net operators is, therefore, irrelevant.

47 It is apparent from those considerations that the surcharge in question is a charge which is imposed on electricity, whether imported or domestic, according to an objective criterion which is the number of kWh transmitted. [...]

66 Article 9 of the OEPS provides for the payment to the designated company, namely SEP, of NLG 400 million and for the payment of the excess of the charge received to the Minister, who must set that amount aside for the purpose of defraying the costs referred to in Article 7 of the OEPS – which will not, however, enter into force – namely the non-market-compatible costs associated with urban heating and the Demkolec coal gas plant. In that regard, it must be borne in mind that those amounts have their origin in the price surcharge imposed by the State on purchasers of electricity under Article 9 of the OEPS, a surcharge with regard to which it has been established, in paragraph 47 of this judgment, that it constitutes a charge. Those amounts thus have their origin in a State resource.”

- (90) This surcharge had to be transmitted by network operators to SEP which had to collect the proceeds and use them up to a certain amount defined in the law in order to cover stranded costs.
- (91) In this connection, the Court observed that SEP had been appointed by the law to manage a State resource³⁵:

*"Likewise, the measure in question differs from that referred to in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, in which the Court held, at paragraph 59, that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity. In the latter case, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources.*

- (92) Hence on the basis of this case-law it can be concluded that subsidies financed through parafiscal charges or contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation imply a transfer of State resources, even if not administered by the public authorities. As the General Court recalled in *France v Commission*³⁶, the relevant criterion in order to assess whether the resources

³⁵ Case C-206/06 *Essent* [2008] ECR I-5497, point 74

³⁶ Case T-139/09, not yet published, point 63 and 64.

are public, whatever their initial origin, is that of the degree of intervention of the public authority in the definition of the measures in question and their methods of financing.

- (93) The Court excluded the transfer of State resources in only very specific circumstances: For instance in *PreussenElektra*, the Court found that the *Stromeinspeisungsgesetz* (Electricity feed-in Act), in its version of 1998, did not involve a public or private body established or appointed to administer the aid³⁷. This conclusion was based on the observation that the *Stromeinspeisungsgesetz* put in place a mechanism that was limited at directly obliging electricity supply undertakings and upstream electricity network operators to purchase renewable electricity at a fixed price, without any body administering the stream of payments.³⁸ The situation under the *Stromeinspeisungsgesetz* was characterized by a multitude of bilateral relationships between renewable electricity generators and electricity suppliers. There was no surcharge established by the State to compensate the electricity suppliers for the financial burden resulting from the supply obligation, and therefore, nobody had been appointed to administer such a surcharge and the corresponding financial flows.
- (94) Also the Court³⁹ considered that a decision by which a national authority extends to all traders in a certain sector an agreement which introduces the levying of a contribution in an inter-trade organisation recognised by that national authority, thus rendering that contribution compulsory, in order to make it possible to implement certain promotional and public relations activities, does not constitute State aid. The Court noted in this respect that the measure was not financed from State resources since it was not the State but the inter-trade organisation that decided how to use the resources stemming from the levy. Those resources were entirely dedicated to pursuing objectives determined by that organisation. Hence the resources were not constantly under public control and were not available to State authorities.
- (95) In the light of those principles, the Commission has examined whether the financing of the feed-in tariffs and the reduced EEG-surcharge, as resulting from the EEG-Act 2012, involves State resources.
- (96) As will be shown more in detail below, the Commission observes that the State has established a special surcharge, called EEG-surcharge in order to finance the difference between the revenues stemming from the sale of EEG electricity and the feed-in tariffs and premiums. In other words, the EEG surcharge serves to finance the support of RES electricity under the EEG-Act. In addition, the Commission observes that the State has entrusted the TSOs with the task to centralise and administer all financial flows related to the feed-in tariffs and the EEG-surcharge. Also, the State has established very detailed rules governing the determination of the EEG-surcharge and its use and destination. Finally, the Commission notes that there are extensive control mechanisms in place that allow the State to monitor the financial flows.

³⁷ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, point 58 and 59.

³⁸ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, point 56. See also Case C-206/06 *Essent* [2008] ECR I-5497, point 74, where the Court notes that in *PreussenElektra*, the undertakings had not been appointed by the State to manage a State resource.

³⁹ Case C-677/11, *Doux Elevage*, not yet published; C-345/02, *Pearle and Others* [2004] ECR I-07139.

3.1.4.1. The so-called "Bundesweiter Ausgleichmechanismus" and the EEG-surcharge

- (97) In a first step, the State has provided that DSOs have to transfer the entire EEG electricity to the TSOs. The DSOs are then paid the feed-in tariffs for this electricity (§34, §35 (1)). TSOs also have to compensate DSOs for premiums that DSOs have paid in accordance with §33 g to 33i EEG-Act 2012 (§35(1a)). As a result, the purchase obligation is entirely transferred to the four TSOs.
- (98) The TSOs, however, do not have to bear the financial burden resulting from the purchase obligation. Indeed, the State has devised a special surcharge, which is explicitly designated in the EEG-Act 2012 as the "*EEG-surcharge*".
- (99) The purpose of this surcharge is defined in the law: it serves to finance the difference between the revenues resulting from the sale of the EEG electricity by the TSOs and the costs they bear resulting from the purchase obligation pursuant to §§ 16-to 33 and pursuant to §33g and §33i, § 34 and §35 (1) and (1a). In other words, this surcharge serves to finance the economic advantage that renewable electricity producers can obtain under the EEG-Act 2012 (i.e. a price above the market price). This was explicitly confirmed by Germany that has indicated that "*die in der EEG-Umlage berücksichtigten Gelder werden direkt für den vergüteten Strom aus den EEG-Anlagen verwendet*"⁴⁰.
- (100) This surcharge has to be paid by electricity suppliers for each kWh that they supply to final consumers. Electricity suppliers then can pass it on to final consumers.
- (101) The EEG-Act 2012 and the implementing provisions mentioned under paragraphs 13-14 of this decision define in detail the methodology how the surcharge has to be calculated. The Commission observes that as a result of those provisions, TSOs are not free to establish the level of the surcharge.
- (102) Given that the EEG-surcharge in year x is calculated based on forecasts, the law has also established a correction mechanism, whereby deficits or surpluses are corrected the following year. This ensures that TSOs do not have to bear any financial burden for the purchase obligation but it ensures as well that they cannot raise funds through the surcharge that would serve other purposes than the support of renewables as decided by the State.
- (103) On this basis, the Commission concludes that contrary to what was the situation in the *PreussenElektra* case, the undertakings on which the purchase obligation rests has been provided by the State with a surcharge that provides them with the required financial resources to finance the support to RES electricity.

3.1.4.2. TSOs have been designated to administer the EEG-surcharge

- (104) The TSOs constitute the central point of the entire mechanism designed to finance the support to the producers of RES electricity. Given the numerous tasks entrusted to them

⁴⁰ Mitteilung der Bundesrepublik Deutschland, 29.06.2012, p; 16

by the EEG-Act 2012 and its implementing regulations, the Commission can only conclude that TSOs have been appointed by the State to administer the EEG-surcharge.

(105) They have to :

- purchase EEG electricity produced in their area either directly from the producer when he is directly connected to the transmission line or from DSOs at feed-in tariffs, or pay the market premium. As a result the EEG electricity is centralised at the level of each of the four TSOs, as well as the financial burden of the support provided for by the EEG-Act 2012.
- equalise between themselves the amount of EEG electricity so that each of them purchases the same proportion of EEG electricity.
- sell the EEG electricity on the spot market according to rules defined in the law. They can sell it jointly.
- jointly calculate the EEG-surcharge, which has to be the same for each kWh consumed in Germany, as the difference between revenues from the sale of EEG electricity and expenditures linked to the purchase of EEG electricity.
- jointly publish the EEG-surcharge in a specific format on a joint website.
- publish also aggregate information on the supported renewable electricity.
- compare the forecasted EEG-surcharge with what it should really have been in a given year and adapt the surcharge for the following year.
- publish forecasts for several years in advance.
- collect the EEG-surcharge from electricity suppliers.
- (each) keep all financial flows (expenditures and revenues) linked to the EEG in separate accounts.

(106) They are entitled to take into account costs linked to the management of the EEG-surcharge and sale of the EEG electricity and incorporate those costs into the calculation of the EEG-surcharge.

(107) As a result, the four German TSOs centralise each for their area all the EEG electricity and all the costs resulting from the acquisition of EEG electricity and the payment of market premiums, and the costs resulting from the administration of the EEG-surcharge. Also, they centralise each for their area the proceeds of the EEG-surcharge. In fact each of them is a body designated by the State to administer the financial flows relating to the EEG. In this connection, the Commission notes that they have to keep all revenues and expenses related to the EEG (payment of feed-in tariffs and market premiums) and revenues (sale of EEG electricity, EEG-surcharge) on separate accounts.

(108) In addition, TSOs have to coordinate a certain number of tasks: uniform determination and application of the EEG-surcharge; joint website where all financial flows related to the EEG-surcharge have to be published; joint forecast of EEG in following years.

(109) On the basis of these elements, the Commission considers at this stage that the TSOs are administering the EEG-surcharge and that they have been entrusted with specific task and all related operations by the State.

3.1.4.3. TSO are strictly monitored in their administration of the EEG-surcharge

(110) The Commission notes in addition that the State is monitoring the TSOs in their administration of the EEG-surcharge.

(111) As mentioned under paragraph 38 of this decision, the BNetzA monitors that:

- TSOs sell on the spot market the electricity for which feed-in tariffs are paid in accordance with applicable rules;
- TSOs properly determine, set and publish the EEG surcharge;
- TSOs properly charge electricity suppliers for the EEG-surcharge;
- feed-in tariffs and premiums are properly charged to TSOs;
- the EEG-surcharge is reduced only for electricity suppliers fulfilling the conditions of §39.

(112) Network operators have to transmit to the BNetzA the details which they receive from the installation operators (installation location, production capacity, etc.), the network level at which installations are connected, aggregated and individual tariffs paid to installations, the final invoices sent to electricity suppliers and the data required to verify the accuracy of the figures thus provided.

(113) Finally, the BNetzA can also adopt decisions and fines or set the level of the EEG-surcharge.

3.1.4.4. Germany's position

(114) Germany considers that the advantage is financed through private means because the surcharge does not transit through a State controlled entity. However, also a private body can be appointed with the administration of a State resource⁴¹.

(115) Germany contends that contrary to what was the case in *Essent* or in case SA.26036⁴², no entity has been designated or appointed with the administration of the surcharge. It argues that no entity has been entrusted with centralising the financial flows. It argues that the law has merely imposed various obligations on different actors.

(116) Germany seems to consider that it is not possible to entrust several entities with the administration of the funds. It is not clear on what legal ground it would be required that

⁴¹ Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21

⁴² Commission decision of 8 March 2011, Austria, Aid to energy intensive businesses, Green Electricity Act (Ökostromgesetznovelle 2008).

only one entity is designated to administer a charge in the entire country in order for a surcharge to qualify as State resource.

- (117) The Commission notes in that respect that even in the *Essent* case, SEP was not the only entity involved in the administration of the levy: in fact, the levy was first collected by the DSOs before being transferred to SEP. In addition, as the case-law confirms more than one undertaking in a given sector can be entrusted with a service of general economic interest and their name does not need to be mentioned in the entrustment act⁴³.
- (118) In the present case, the Commission cannot agree with Germany that the State has not entrusted or designated any entity with the administration of the fund and that there would be no entity that is centralising money flows. On the contrary, while the TSOs might not be the only entities involved in the support mechanism of the EEG, they play a central role in it and have been entrusted with specific tasks that correspond to the administration of the EEG-surcharge. Each of the four TSO centralises for its respective area all expenditures and all revenues related to the support of RES electricity. In addition, they have to coordinate certain tasks, including the calculation of the uniform EEG-surcharge. The Commission notes further that the TSOs cannot delegate their tasks to third parties. §64c (5) EEG-Act 2012 makes clear that a delegation is possible only once the Government has authorised them to do so and in accordance with the conditions that the Government will establish for this delegation. This is a further element that confirms that TSO's have been entrusted by the State with the management of the financial flows related to the RES electricity support.
- (119) Germany also puts forward that TSOs - which are private undertakings - determine the level of the surcharge and that the State is not involved in establishing the surcharge. It further underlines that contrary to what was the case in *Essent*, any surplus resulting from the EEG-surcharge is used to reduce the surcharge in the following year, but is not transferred to the State budget and that the surcharge is directly used for the RES electricity while in the *Essent* case there was no correlation between the levy and a service or a good.
- (120) However, at this stage and based in particular on the elements described under section 3.1.4.1 of this decision, the Commission cannot agree with Germany that the EEG-surcharge would not be established by the State but by TSOs. The State has established a very detailed methodology of how to EEG-surcharge has to be calculated. The TSOs have the task to calculate the EEG-surcharge, but are not free to determine its level. The level of the surcharge will result automatically from the methodology established by the EEG-Act and its implementing provisions. Also, the TSOs are strictly monitored in that task by the BNetzA.
- (121) Also, the TSOs are not free to use the proceeds of the surcharge as pleases them. They can only use the proceeds from the EEG-surcharge for the purposes provided by the law, namely to finance the support for RES electricity and electricity from mining gas (§3 AusglMechV). This is reinforced by the obligation for TSOs to keep the

⁴³ See for instance on the entrustment of hospitals with SGEI tasks, T-137/10, *CBI v. Commission*, paragraph 119.

management of the EEG financial flows separate from their other activities and to keep them on separate accounts. In addition, the TSOs may not dispose of surpluses as they like, since the law prescribes specifically that surpluses constitute revenues that enter into account for the establishment of the surcharge of the following year and thus serve to finance the support of RES electricity and electricity from mining gas in the following year.

- (122) The Commission notes in this respect that the fact that the State decided that the surpluses would serve to reduce the surcharge in the following year rather than being paid to the State budget does not prevent at this stage the conclusion that State resources are involved.
- (123) In *Essent*, the levy was imposed for one year only and in order to compensate SEP for stranded costs up to an amount of NLG 400 000 000; it then seems normal that the State indicates that the money in excess of that amount has to be transferred to the State budget. In the present case, the support is conceived to be continued every year and is (in the year x) based on forecasts it seems only natural that the State would require that 1) a corrective mechanism is foreseen and 2) that corrections take the form of a reduced surcharge for the year x+1. The mechanism by which surpluses are taken into account for the support in year x+1 is actually a very common system for support schemes organised with the intervention of funds.
- (124) In the Commission's view, the decisive element is that the State has determined the destination and purpose of the surcharge and has also established what use was to be made of any surcharge in excess of what was needed to compensate TSO for the financial burden resulting from the RES support. By doing so, the State has retained control over the surcharge. This is the more so in this case since even the interests generated by any surpluses constitutes revenues within the meaning of §3(3) AusglMechV and serve to determine the EEG-surcharge.
- (125) The Commission further notes that, contrary to what was the case in *Doux Elevage*, the EEG-surcharge does not correspond to an initiative of the TSOs but constitutes a mechanism that the State has put in place in order to finance its support policy for the development of RES electricity and electricity from mining gas. Also, the support policy for RES electricity does not result from an initiative of the TSOs but corresponds to the policy of the State.
- (126) Also Germany points out that electricity suppliers are not obliged to pass on the surcharge to the final consumer.
- (127) In this connection, the Commission notes first that it does not alter the circumstance that the State has established the EEG-surcharge and that the EEG-Act and its implementing provisions enable the State to "*direct and influence the administration of the funds*"⁴⁴.
- (128) In addition, as has been clarified by the Court, even voluntary payments can constitute State resources⁴⁵.

⁴⁴ *Doux Elevage*, cited above, paragraph 38.

- (129) In any event, the Commission notes that the EEG-surcharge is mandatory for all electricity suppliers. They have to pay the surcharge to their respective TSO for each kWh of electricity that they have supplied to final consumers (subject to the reduced EEG-surcharge in accordance with §41 EEG-Act 2012). This obligation results from the law.
- (130) In this connection, a surcharge that is imposed on undertakings rather than on consumers also constitutes a State resource⁴⁶.
- (131) For the sake of completeness, the Commission notes that the whole system has been conceived by the State as a surcharge that will necessarily be passed on to final consumers. This results from the structure of the surcharge (calculated on each kWh supplied to final consumers), from the fact that final consumers also have to pay the surcharge even when they are not supplied by an electricity supplier but by another third party, from the fact that the State felt it necessary to cap the surcharge that would be passed on to certain undertakings (see §40 EEG-Act 2012), from the existence of provisions imposing how the EEG-surcharge can be indicated on the electricity bill. Finally, the very fact that Germany extended the monitoring powers of the BNetzA for consumer protection also confirms that the whole system is conceived as a surcharge paid by the final consumer.
- (132) Germany has also pointed out that the monitoring mechanisms in place are mere consumer protection provisions and do not allow the State to control the financial flows.
- (133) The Commission notes first that even if the purpose of the monitoring mechanisms would merely be consumer protection, this does not alter the fact that the State is closely and specifically monitoring the financial flows related to the EEG-surcharge.
- (134) The Commission notes in addition, that the monitoring powers of the BNetzA are extensive and correspond at least to the monitoring powers that the State had in respect of the levy at stake in the *Essent* case. Also, contrary to what Germany seems to imply, the BNetzA has enforcement powers: It can issue orders and impose fines. It can in fact even set the level of the EEG-surcharge (see § 6(3) AusglMechAV referring to the level of the EEG-surcharge established by the BNetzA on the basis of §61(1) nr. 3 and 4 EEG-Act 2012).
- (135) Finally, Germany has contended that contrary to what was the case in the *Essent* case, where the levy did not correspond to any service, the EEG-surcharge compensates for a good.
- (136) In this connection, the Commission notes that in the *Essent* case, there was ultimately also a service that had been provided, namely the services and goods procured through the stranded investments that the levy aimed to compensate. In addition, the Commission notes that while the EEG-surcharge aims at financing the support for RES electricity, it does not correspond to a price for a good. Indeed, as the TSOs sell the

⁴⁵ Case T-139/09, not yet published, paragraphs 63 and 64.

⁴⁶ Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, Case 173/73 *Italy v Commission* [1974] ECR 709. Case T-139/09, *France v Commission*, not yet published.

EEG-electricity on the spot market, the surcharge paid by electricity suppliers does not correspond to the price for RES electricity that they would buy from the TSOs. In that sense, the EEG-surcharge corresponds to a surcharge in the same way as the levy at stake in the *Essent* file.

3.1.4.5. Preliminary conclusion

- (137) For all the reasons set out above, the Commission comes to the conclusion that on the basis of the information available it cannot be considered that the support for RES electricity would be financed from private means and that the State would exercise no control over the financial means involved. On the contrary, the Commission observes that the State can control, direct and influence the administration of the funds at stake: the State intervenes at both the level of the advantage (feed-in tariffs) and its financing (the entire system of the EEG-surcharge). The State has defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also provided the financial resources to cover the costs of the support to RES electricity and electricity from mining gas. Contrary to what was the case in *Doux Elevage*, the EEG-Surcharge stems from the State and is not a private initiative of the TSOs. The State has defined the purpose and destination of the surcharge: it serves to finance a support policy developed by the State and not an action that would have been decided by the TSOs. The TSOs are not free to establish the surcharge as they want and are strictly monitored in the way the surcharge is calculated, levied and managed. Also, the way they sell the EEG electricity is monitored by the State. The provisions governing the establishment of the EEG surcharge ensure that the surcharge provides a sufficient financial cover to pay for the support for RES electricity and electricity from mining gas as well as for the costs implied by the management of the system. It does not allow for more. The TSOs cannot use the EEG-surcharge to finance any other type of activity, and financial flows are to be kept on separate accounts.
- (138) The Commission therefore concludes on the basis of the information currently available that the TSOs have been designated by the State with the task to administer the EEG-surcharge and that the revenues from the EEG-surcharge constitute a State resource.

3.1.5. *The reduced EEG-surcharge for EIU also involves State resources*

- (139) Based on the information available at this stage, the Commission comes to the preliminary conclusion that the EEG-surcharge constitutes a State resource. Hence, a reduced EEG-surcharge or capped surcharged implies a renouncement to State resources.
- (140) In this connection, the Commission notes that according to the information at hand, the German State remains involved on the level of the cap. Firstly, the potential beneficiaries from the cap submit an application to BAFA, which is a State entity and which verifies the request, and finally grants the cap to EIU.
- (141) This decision is then opposable to electricity suppliers who are not allowed to charge EIU the full EEG-surcharge but only the EEG-surcharge up to the cap (§43). This decision is also opposable to the TSOs §43 (1) so that according to §43(3) the surcharge that the TSOs can claim from electricity suppliers will be limited in accordance with the decision by the BAFA.

(142) With regard to the transfer of resources it thus appears that the cap for EIU results in a decreased amount collected by EEG-surcharge for the TSOs. The cap therefore implies a renouncement to State resources.

(143) In a second step, the cap and the corresponding decrease in EEG resources for the TSOs is set off at a later stage by a mechanism that compensates the foregone revenues by increasing the amounts raised by the EEG-surcharge from the remaining (non-capped) consumers. As Germany notes, the cap for EIU results in the level of the surcharge being higher for the other electricity consumers. The loss of revenues induced by the cap is thus ultimately financed from the EEG-surcharge, which - as established above - has at this stage to be considered as a State resource.

3.1.6. The reduced EEG-surcharge for suppliers having bought min 50% of renewable electricity (§39 of the EEG-Act)

(144) Based on the information available at this stage, the Commission comes to the preliminary conclusion that the EEG-surcharge constitutes a State resource. Hence, a reduced EEG-surcharge implies a renouncement to State resources.

(145) In this connection, the Commission notes that according to the information at hand, the German State remains involved on the level of the cap. The BNetzA must specifically ensure that only suppliers fulfilling all conditions of §39 of the EEG-Act benefit from the reduction of 2ct/kWh.

(146) With regard to the transfer of resources the reduction of 2 ct/kWh results in a decreased amount collected by EEG-surcharge for the TSOs. The reduction therefore implies a renouncement to State resources.

(147) In a second step, the EEG-surcharge reduction and the corresponding decrease in EEG resources for the TSOs is set off at a later stage by a mechanism that compensates the foregone revenues by increasing the amounts raised by the EEG-surcharge for the remaining (non-capped) consumption. The mechanism of §39 of the EEG-Act results in the level of the surcharge being higher for the other electricity consumers⁴⁷. The loss of revenues induced by the reduction is thus ultimately financed from the EEG-surcharge, which - as established above - has at this stage to be considered as a State resource.

3.1.7. Preliminary conclusion on the existence of aid

(148) Based on the elements mentioned above and the information available at this stage, the Commission concludes that the EEG-Act 2012 entails State aid in favour of producers of RES electricity and electricity from mining gas and that the reduced EEG-surcharge entails aid for EIU.

⁴⁷ See also in this respect Vorhaben IV, – Instrumentelle und rechtliche Weiterentwicklung im EEG – Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011.

3.2. Lawfulness of the aid

- (149) On 22 May 2002⁴⁸, the Commission adopted a decision in which it considered that the German renewable support system did not involve State aid. Subject matter of this decision is the "*Gesetz über den Vorrang erneuerbarer Energien (Erneuerbare-Energien-Gesetz)*" that entered into force on 1 April 2000. This corresponds to a former version of the EEG-Act.
- (150) However, since the adoption of this decision, the EEG-act has been amended. The EEG-Act 2012 now contains an important number of features that were not present in the 2000 scheme. This concerns in particular all the provisions related to the establishment of the EEG-surcharge, the distinction between final consumers who have to pay the EEG-surcharge and "privileged" consumers who benefit from a capped surcharge, the tasks of the BNetzA and all the monitoring provisions. Also, while in 2000 the support system was conceived as a system based upon successive purchase obligations of RES electricity, in the EEG-Act 2012, the EEG-surcharge is not linked to any purchase of renewable electricity. There is no (mandatory) purchase of renewable electricity anymore beyond the TSOs.
- (151) The Commission finds those alterations to be substantial. Also, those alterations are not detachable from the rest of the scheme. As a consequence, the aid measures granted under the EEG-Act 2012 constitute new aid as of 1 January 2012. Given that the amendments introduced by the EEG-Act 2012 were not notified to the Commission, the aid has to be considered as unlawful new aid as of 1 January 2012.

3.3. Compatibility

3.3.1. Feed-in tariffs for producers of RES electricity

- (152) The Commission has assessed the compatibility of the notified scheme according to Article 107(3)(c) TFEU and in the light of the EAG.
- (153) Given that the feed-in tariffs constitute operating aid for the production of electricity from renewable energy sources, based on the difference between renewable and conventional electricity production costs, the compatibility conditions laid down in point 109 (Option 1 for operating aid to renewable energy sources) of the EAG apply.
- (154) Firstly, the Commission notes that with the exception of mine gas, the supported energy sources comply with the definition of renewable energy sources and biomass as laid down in point 70(5) and 70(6) of the EAG.
- (155) In accordance with point 109 a) of the EAG, 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.
- (156) As required by point 109 b) of the EAG the German authorities submitted a detailed calculation method for determining the production costs and illustrated it by several

⁴⁸ NN27/2000 – Germany -Act on granting priority to renewable energy sources (Renewable Energy Law), OJ C 164, 10.07.2002, p. 5

calculation examples for different categories of wind, solar, geothermal, water, biomass and biogas installations (see section 2.2.2 of this decision).

- (157) Furthermore, the German authorities described in detail the elements included in production costs calculations, which are in accordance with points 109 a) and b). In this respect, they have demonstrated that the aid is only granted until the plant is fully depreciated (aid is granted for the period of maximum 20 years, which corresponds to normal depreciation period). As to cumulation with investment aid, the German authorities have indicated that since the support under the EEG was predating other types of support and was well known to local authorities, it was taken into account and deducted from any application for investment aid. As regards the return on capital the Commission considers that on the basis of the elements described under paragraph 50 above the return on capital applied in production costs calculations as normal.
- (158) As regards specifically the absence of overcompensation, the Commission observes first that the information provided by the German authorities and the elements described in the studies, show that production costs of installations are above market price of electricity, including for installations working under favourable conditions.
- (159) For the purpose of establishing the absence of overcompensation, the production costs were compared directly with the respective level of the feed-in tariffs without taking into account the actual market price since the notified measure provides to the beneficiaries the total income for their electricity at the level of the guaranteed price.
- (160) Based on the comparison summarized under section 2.2.2 of this decision, the Commission concludes that the aid granted under the notified measure does not lead to overcompensation as the production costs exceed the feed-in tariffs.
- (161) With respect to the absence of overcompensation in time, the German authorities confirmed that the production costs will be monitored on a regular basis (annual report and "Erfahrungsbericht" every 4 year).
- (162) The German authorities also confirmed that the support levels for new beneficiaries are adapted in case a risk of overcompensation is identified. This has for instance happened with the Law of 17 August 2012 adapting the feed-in tariffs for solar energy. In addition, the Government can adapt various bonuses, tariffs, premiums or certain tariff parameters, when necessary (see §64f of the EEG-Act).
- (163) Therefore, the Commission considers that the methodology used by the German authorities to determine the amount of aid is equivalent to or not more favourable than the methodology presented in point 109(a) of the EAG.
- (164) Also, in the light of the above mentioned considerations, including the mechanisms in place to adapt the notified measure in time in order to avoid overcompensation the Commission finds that the notified measure is in line with the condition of absence of overcompensation. This conclusion is valid for both the tariffs set as of 1 January 2012 and for tariffs set under previous EEG-Act versions but that continue to apply as foreseen by §66 of the EEG-Act. Indeed, the methodology applied to establish feed-in tariffs and verify the absence of overcompensation was already the same before 2012.

3.3.2. *Market premium*

(165) The Commission observes that the market premium is calculated as the difference between the reference market price and feed-in tariffs. The Commission notes that the methodology chosen ensures that the aid is granted only for the difference between the costs of producing electricity from renewable energy sources and the market price of the energy given the following elements:

- The market premium is calculated by reference to the theoretically applicable feed-in tariffs. As seen above, the feed-in tariffs are established on the basis of production costs.

- The reference market value is calculated based on the average monthly observed market prices in the case of steerable RES electricity and on the basis of average hourly observed market prices in the case of intermittent RES.

- From the reference market value are deducted marketing costs (management premium) which are additional costs falling upon producers selling directly their electricity on the market and which are not accounted for in feed-in tariffs. The management premium has been calculated differently for steerable and intermittent RES electricity since intermittent RES electricity will lead to higher management costs.

(166) The German authorities submitted a detailed calculation of the market premium, as required by paragraph 109(b) EAG.

(167) With regard to the overcompensation in time, the Commission notes that the German authorities regularly re-examine production costs assumptions that are at the basis of the feed-in tariffs and the management premium and adapt them when needed.

(168) Therefore, the Commission considers that the methodology used by the German authorities to determine the market premium is equivalent to or not more favourable than the methodology presented in point 109(a) of the EAG.

3.3.3. *Flexibility premium*

(169) As mentioned under paragraph 66, this premium aims at promoting the production of renewable electricity from biogas on the basis of a specific technology that allows for a demand-responsive production. Germany would like to promote the use of this technology in order to improve the system and market integration of the production of RES electricity.

(170) The study commissioned by the German Government shows that while this technology also allows for higher revenues given that production is higher at times of higher demand, the additional revenues do not cover the entire additional costs resulting from investing in and using this technology.

(171) In accordance with paragraph 109 of the EAG, Germany has shown that the premium has been calculated in such a way that it covers the difference between the additional

costs of producing on the basis of that technology and the market price that can be expected when producing on the basis of that technology. Also, the premium is not granted beyond the depreciation period of the additional investment.

- (172) The calculations were made based on a rate of return of 8%, which is higher than the normal rate of return for biogas installations but also take into account the higher risk involved with a demand-side steered production of the electricity. The Commission considers this rate as normal given the circumstances.
- (173) With regard to the overcompensation, the Commission notes that the flexibility premium was calculated not on the basis of the average market price but by reference to market price at peak demand periods, which should prevent overcompensation. Furthermore, the German authorities regularly re-examine production costs assumptions that are at the basis of the feed-in tariffs and premiums and adapt them when needed. Indeed, the EEG-Act foresees that the flexibility premium is calculated on the basis of a KK of 130€/KW as long as it is not adapted by the Government. In that connection, Germany has indicated that it will examine the functioning of the flexibility premium closely, also in order to gain more experience and further refine the calculation of the premium if necessary.

3.3.4. The reduced EEG-surcharge for suppliers having bought min. 50% of renewable electricity (§39 of the EEG-Act)

- (174) Given the fact that §39 of the EEG-Act concerns operating aid for electricity produced from renewable energy sources and considering its market based set up, the compatibility conditions laid down in point 110 (Option 2 for operating aid to renewable energy sources) of the EAG apply. Indeed, the design of the reduced EEG-surcharge provides producers of RES electricity with an indirect guarantee of a certain demand for their energy at a price above the market price for conventional power. The exact price, however, is not fixed in advance and depends on supply and demand.
- (175) The compatibility conditions as laid down by point 110 of the EAG for market mechanism are the following:
- a) Support is essential to ensure the viability of the renewable energy sources concerned;
 - b) Support does not in the aggregate result in overcompensation;
 - c) Support does not dissuade renewable energy producers from becoming more competitive;
 - d) The Commission authorises the aid system for the period not exceeding 10 years.

- (176) As regards the first condition concerning the necessity of support for the viability of renewable energy sources concerned, the Commission notes that the production costs as summarised in the tables listed under section 2.2.2. above exceed the market price of electricity. In this respect it is referred to the table included in paragraph (56) of this decision showing that the average market price of electricity was 4.3 ct/kWh in 2012,

compared to the production costs summarized in section 2.2.2, ranging between 8.5 ct/kWh and 27.9 ct/kWh.

- (177) The Commission thus concludes that the support to be granted under §39 of the EEG-Act complies with the above mentioned condition of necessity for viability.
- (178) In order to assess whether there is no overcompensation in the aggregate, the Commission needs to verify that the revenues of the generators do not exceed the costs of production and a reasonable benefit in the aggregate of the scheme i.e. over time and over technologies.
- (179) Firstly, the Commission refers to the tables listed under section 2.2.2 of this decision containing production costs for the production of RES electricity ranging from 8.5 ct/kWh to 27.9 ct/kWh, to the average market price of electricity that was 4.3 ct/kWh in 2012, to the evolution of the market price (expected to vary between 4 and 6 ct/kWh until 2015⁴⁹), to the maximum top up that suppliers will agree to provide in the light of the conditions established under §39 of the EEG-Act 2012 (4ct/kWh). On this basis, RES producers could obtain a price between 8 and 10 ct/kWh depending on the market price and competition. Essentially wind power, waterpower and sewage gas have production costs in that range. Electricity from sewage gas has production costs that are very close to the range and might also compete in the light of rather low feed-in tariffs.
- (180) Secondly, the Commission notes that according to studies undertaken on the functioning of the Grünstromprivileg suppliers will only be in a position to offer a lower top up than 4ct/kWh. The maximum top up of 4ct/kWh rests on the assumption that 50% of the electricity portfolio is RES electricity and the other 50% is electricity from conventional power plants. However, in order to ensure reaching the 50% threshold and given uncertainties linked to production of certain RES electricity, suppliers will adopt a security margin of 5% additional RES electricity in their portfolio⁵⁰. As a result, 3.6 ct/kWh would remain as possible top up. In addition, the condition to have 20% of intermittent RES electricity (wind and solar) also implies additional costs for suppliers in terms of balancing variations in the supply, which will further reduce the top up that they will be able to offer.
- (181) Thirdly, the Commission notes that as is the case for direct marketing within the meaning of §33(b)(1) EEG-Act 2012, RES producers will have additional costs arising from the direct marketing.
- (182) With respect to the absence of overcompensation in time, the Commission notes that as already explained under paragraphs 167 and 168 the German authorities monitor production costs and revenues and adapt the support levels (the reduced surcharge) in case a risk for overcompensation of is identified.

⁴⁹ Vorhaben IV, – Instrumentelle und rechtliche Weiterentwicklung im EEG – Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011, p. 51

⁵⁰ Vorhaben IV, – Instrumentelle und rechtliche Weiterentwicklung im EEG – Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011, p. 46.

- (183) In the light of the above mentioned considerations, the Commission finds that §39 of the EEG-Act is in line with the condition of absence of overcompensation in the aggregate.
- (184) As for the compliance with the third compatibility condition requiring that the support scheme does not dissuade the beneficiaries from becoming more competitive, the Commission observes that §39 of the EEG-Act first obliges the RES producers to better integrate into the electricity market. Also the mechanism is designed in such a way that RES producers have to compete with each other to obtain the contract. The Commission thus considers the third compatibility condition as complied with.

3.3.5. Incentive effect

- (185) As regards the incentive effect, the calculations of the German authorities show that the production costs of RES electricity are higher than the market price for electricity. In this respect it is referred to the table included in paragraph 56 of this decision showing that the average market price of electricity was 4.3 ct/kWh in 2012, compared to the production costs summarized in section 2.2.2, ranging between 8.5 ct/kWh and 27.9 ct/kWh.
- (186) As the operating aid reduces the difference between the market price and the production costs for RES electricity, undertakings may operate a plant which they otherwise could not operate economically. The Commission considers that due to the operating aid the aid recipient will change its behaviour so that the level of environmental protection is increased. On this basis and taking into account the information provided by Germany, the Commission considers that the aid will only be granted in cases where it is necessary and will provide an incentive effect (chapter 3.2 of the EAG).

3.3.6. Conclusion of the assessment under the EAG

- (187) On the basis of the foregoing, the Commission concludes that the aid measures to producers of electricity from renewable energy sources comply with the criteria of Sections 3.1.6.2 and 3.2 of the EAG.

3.3.7. Aid to producers of electricity from mining gas

- (188) Mining gas is a mixture of gases that occurs naturally in coal production sites and contains a high proportion of methane. Mining gas has a high global warming potential when released into the atmosphere. Therefore, supporting mining gas utilization contributes to the efforts to reduce the release of greenhouse gases. Besides climate protection effects, using mine gas to produce energy leads to primary energy savings, as this gas would otherwise simply be released into the atmosphere. These positive effects for the environment were already recognized by the Commission in the State aids SA.24642(N 708/2007) – DE – State aid for the closure of hard coal mines and SA.33766 – notification of aid to coal for 2011.

- (189) In the context of that procedure, Germany had indicated that the use of mine gas for the production of heat and electricity reduced methane emissions from coalmining into the atmosphere by 76% between 2000 and 2009 (880.000 t CO₂ in 2009)⁵¹.
- (190) The exploitation of mine gas is not viable without public incentives. Germany therefore encourages the utilization of mining gas through feed-in tariffs under the EEG-Act.
- (191) The aid for mine gas does not fall under the provisions of the EAG. It is not a renewable energy source within the meaning of point 70(9) 2008 EAG, and while it helps reducing consumption of primary energy and helps preserving natural resources, it does not fall under the definition of energy savings within the meaning of point 70(2) 2008 EAG. The Commission has therefore examined the aid for the production of mine gas under Article 107(c) TFEU.
- (192) Article 107(3)(c) TFEU states that "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*" may be considered to be compatible with the common market. In this regard, the Commission shall assess whether the aid measure a) aims at a well-defined objective of common interest, b) is an appropriate instrument to deliver the objective of common interest, c) presents an incentive effect (i.e., changes the behaviour of the beneficiary), d) is proportional (i.e., does not overcompensate the beneficiary), e) distorts competition and affects intra-EU trade at a limited extent, so that the overall balance is positive.

3.3.7.1. Well-defined objective of common interest,

- (193) The Commission concludes that based on the elements highlighted under paragraphs (188)-(189) above, it can be concluded that the scheme at hand aims at a well-defined objective of common interest, namely environmental protection, and more in particular, CO₂ emission savings and resources savings.

3.3.7.2. Appropriate instrument

- (194) The aid granted for the envisaged measures is an appropriate instrument to achieve the savings of primary energy sources and the increase in environmental protection through CO₂ emissions reductions. In addition, it seems that there are no indications that the current economic and legal context in Germany provides for a less distortive instrument to achieve these goals. It can thus be concluded that the envisaged aid constitutes an appropriate instrument to achieve the environmental benefits linked with the use of mine gas as energy source.

3.3.7.3. Necessity and incentive effect

- (195) State aid provides an incentive effect if the aid changes the recipient's behaviour towards achieving the objective of common interest.

⁵¹ ZSW, IfnE, IFEU und IWR 2011: Vorbereitung und Begleitung der Erstellung des Erfahrungsberichtes 2011 gemäß § 65 EEG. Im Auftrag des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit. Vorhaben I. Spartenübergreifende und integrierende Themen sowie Stromerzeugung aus Klär-, Deponie- und Grubengas. Endbericht, S. 22.

(196) As the production costs calculation show, the production costs are higher than the market price of electricity. Without the aid, the producers would thus not use the mining gas energetically, but just let it escape into the atmosphere.

3.3.7.4. Proportionality

(197) The German authorities have provide calculations and robust studies showing that the aid is proportionate in the sense that it is limited to the difference between market price and production costs and does not lead to overcompensation (see also calculation shown under section 2.2.2).

(198) In addition, the support is granted only for gas that results from mining activities in order to ensure that there is no specific drilling taking place for the sole purpose of finding mining gas.

3.3.7.5. Distorts competition and affects intra-EU trade at a limited extent, so that the overall balance is positive

(199) The Commission notes that the distortion of compensation is rather limited in this case: first, the aid only compensates additional costs. Second, the aid concerns only a limited number of installations. Also, it is not expected that it will develop much more in the future since experts believe that the maximum mine gas potential has almost be reached⁵². In that connection, the German authorities have provided figures showing that the production of electricity from mine gas follows a downward trend since 2008

(200) On that basis, the Commission concludes that the overall balance of the aid is positive.

3.3.8. Aid to energy-intensive users

(201) Taking into account the conclusion that the capped EEG-surcharge for EIU constitutes State aid, the Commission assessed the possible compatibility of such a measure with State aid rules.

(202) The capped surcharge relieves the beneficiaries from a part of the EEG-surcharge which they would normally have had to bear in their day-to-day operation as part of their electricity costs; it thus reduces operating costs for the companies concerned.

(203) According to settled case-law, it is for the Member State to put forward any grounds of compatibility and to demonstrate that the conditions thereof are met⁵³.

(204) Germany has indicated that the reduced EEG-surcharge for EIU enables Germany to combine two objectives:

⁵² Vorhaben I ("Spartenübergreifende und integrierende Themen sowie Stromerzeugung aus Klär- Deponie- und Grubengas"), S. 22-23

⁵³ Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others v Commission* [1999] ECR II-3663, paragraph 140.

1. Having an ambitious RES policy financed from the consumers of electricity, including energy-intensive consumers. Germany underlines in this connection, that EIU are not totally exempted but pay part of the surcharge (EUR 1.6 billion in total).
2. Ensuring sustainable growth by maintaining the international competitiveness of the manufacturing industry and avoiding that they relocate out of Germany to countries having less ambitious environmental policies. Such relocation would possibly lead to carbon leakage and would also put into question the financing of the support to RES, as a significant part of contributors would have disappeared.

(205) Germany derives from that balancing of the two objectives that the reduced EEG-surcharge contributes to :

a) the implementation of a project of common European interest (namely the promotion of RES and maintaining the competitiveness of the European industry) within the meaning of Article 107 (3)(b) TFEU. Germany refers to the 2020 Strategy to support its view. (See Section 3.3.9 below).

b) achieve an objective of common interest (environmental protection and competitive economy) in the meaning of Article 107(3)(c) TFEU. In addition, it helps preserving employment. (See Section 3.3.10 below).

3.3.9. Aid promoting the execution of an important project of common European interest

(206) The Commission has indicated in point 147 of the EAG under which conditions it would consider that aid may be considered compatible with the common market according to Article 107(3)(b) TFEU to promote the execution of important projects of common European interest which are an environmental priority.

(207) Those conditions are the following:

a) the aid proposal concerns a project which is specific and clearly defined in respect of the terms of its implementation including its participants, its objectives and effects and the means to achieve the objectives. The Commission may also consider a group of projects as together constituting a project;

b) the project must be in the common European interest: it must contribute in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection, such as by being of great importance for the environmental strategy of the European Union. The advantage achieved by the objective of the project must not be limited to the Member State or the Member States implementing it, but must extend to the Community as a whole. The project must present a substantive contribution to the Community objectives. The fact that the project is carried out by undertakings in different Member States is not sufficient;

c) the aid is necessary and presents an incentive for the execution of the project, which must involve a high level of risk;

d) the project is of great importance with regard to its volume: it must be substantial in size and produce substantial environmental effects.

- (208) Furthermore, in order to allow the Commission to properly assess such projects, the common European interest must be demonstrated in practical terms: for example, it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental objectives of the Community (point 148 EAG).
- (209) The Commission will consider notified projects more favourably if they include a significant own contribution of the beneficiary to the project.
- (210) The Commission notes that Germany has not provided information elements that would demonstrate that all those conditions are fulfilled.
- (211) In addition, the Commission notes that while the reduced EEG-surcharge serves a certain policy of the State it does not seem to relate to a project and a fortiori not a project which would be "*specific and clearly defined in respect of the terms of its implementation*".
- (212) Even, if it could be considered that the link between the reduced EEG-surcharge and its alleged contribution to the promotion of RES (by making the financing of RES more sustainable) would be sufficient to consider that the reduced EEG-surcharge can be viewed as "*promoting the execution of a project*", namely achieving the RES target of 80% of renewable energy by 2050, it is questionable whether the project could qualify as a project of common European interest. While the German renewable policy also aims at reaching the RES targets set in Article 3 read in conjunction with Annex I to Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources⁵⁴ ("RES Directive"), it, however, remains a policy or project that is national in scope. It envisages the promotion of the production of renewable energy in Germany only. In addition, it is questionable whether the reduced EEG-surcharge can be considered as "*presenting an incentive for the execution of the project*" when it serves to secure an allegedly more sustainable basis for financing the RES support without actually incentivising the production of renewable energy as such.
- (213) On the basis of the forgoing, the Commission doubts that the reduced EEG-surcharge can be considered as aid to promote the execution of an important project of common European interest.

3.3.10. *Aid to facilitate the development of certain activities or of certain economic sectors within the meaning of Article 107(3)(c) TFEU*

- (214) It is established Commission practice⁵⁵ that measures may be declared compatible directly under Article 107(3)(c) TFEU if they are necessary and proportionate and if the

⁵⁴ OJ L 140 of 5.6.2009, p. 16.

⁵⁵ Community framework for state aid for research and development and innovation OJ C 323, 30.12.2006, p. 1, point 1.3; Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1, point 1.3.

positive effects for the common objective outbalance the negative effects on competition and trade. In this regard, the Commission considers it appropriate to assess the following questions:

(215) In this regard, the Commission considers it appropriate to assess the following three questions:

- a) Is the aid measure aimed at a well-defined objective of common interest⁵⁶?
- b) Is the aid well designed to deliver the objective of common interest? In particular:
 - i. Is the aid measure an appropriate and necessary instrument, i.e. are there other, better-placed instruments⁵⁷?
 - ii. Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - iii. Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- c) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

3.3.10.1. Objective of Common Interest

(216) The aid measure has to aim at a well-defined objective of common interest..

Germany's observations

(217) Germany submits that the EEG-surcharge must be viewed in the context of the support to renewable energy production. The EEG aims at achieving – in the interest of climate change and environmental protection – a sustainable development of the energy supply and to strive towards an increase of the share of RES in energy consumption of 80% in 2050. The EEG-surcharge is an essential part of the support to renewable energy production as it generates the financial means that are needed and guarantees a uniform distribution of the burden. The reduction of the EEG-surcharge limits the burden for certain undertakings so as to preserve their international competitiveness and prevent their relocation outside the EU.

(218) According to Germany, the reduced EEG-surcharge contributes to the objectives of the EEG and thus environmental protection and climate change in three respects:

⁵⁶ Judgement of the court of 14 January 2009, Kronoply v. Commission (T-162/06, Rec. p. II-1; especially points 65, 66, 74, 75)

⁵⁷ Judgement of the Court of 7 June 2001, Agrana Zucker und Stärke / Commission (T-187/99, Rec. p. II-1587) (cf. point 74); Judgement of the Court of 14 May 2002, Graphischer Maschinenbau / Commission (T-126/99, Rec. p. II-2427) (cf. points 41-43); Judgement of the Court of 15 April 2008, Nuova Agricast (C-390/06, Rec. p. I-2577) (cf. points 68-69).

— The special compensation scheme does not lead to a complete exemption of the EIU. It is a reduction only. Up to a consumption of 1GWh/year they pay the full surcharge and receive reductions only on their consumption above that amount. The contribution is always positive. In total, EIU still contribute to 1,6 billion € (out of 20,4 billion €). EIU thus pay their share in the promotion of RES electricity.

— Germany is pursuing an ambitious renewable energy policy in the electricity sector, resulting in high additional burdens on the electricity consumers. The limitation of the EEG surcharge contributes to the preservation of the international competitiveness of EIU. The aim is to prevent that because of this high burden, EIU would relocate to States with a lower electricity costs. This relocation would mean that the concerned EIU do not contribute anymore to the climate change and environmental protection aims of the EEG. In addition, those companies would probably relocate outside the EU in States having less ambitious climate change goals. This would increase global greenhouse gas emissions (carbon leakage) and undermine the very reason why RES are promoted.

— EIU having a consumption of more than 10 GWh are entitled to the reduced EEG-surcharge only if they demonstrate that they have a certified energy management in accordance with ISO 50001 or EMAS and must carry out annual audits.

(219) Germany concludes that the reduced EEG-surcharge allows achieving a balance between climate change policy and sustainable growth and further stresses that EIU in Germany employ an important number of employees. Relocation of those companies, that would inevitably result from paying the full EEG-surcharge would cause job losses

(220) Germany also refers to Chapter 4 of the EAG, where exemptions from environmental charges are allowed as demonstrating that the Commission did in principle accept the argument that exemptions are sometimes necessary to enable MS to afford ambitious environmental policies. It further refers to the Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 ('*ETS Guidelines*')⁵⁸ and to the Commission Consultation Paper of 11 March 2013 on Environmental and Energy Aid Guidelines 2014-2020⁵⁹ (the "*EAG Consultation Paper*") where the Commission indicated that it would examine in more details the compatibility with the internal market of exemptions for energy intensive users from financing RES support schemes.

Assessment

(221) The Commission first notes that neither the ETS Guidelines, nor Chapter 4 of the EAG apply to the case at hand. The ETS Guidelines set out the conditions under which

⁵⁸ OJ C 158, 5.6.2012, p. 4.

⁵⁹ Available under

http://ec.europa.eu/competition/state_aid/legislation/environmental_aid_issues_paper_en.pdf.

Member States may for certain sectors subject to carbon leakage compensate ETS costs passed on in electricity prices. The EEG-surcharge does not correspond to indirect ETS costs within the meaning of the ETS Guidelines. Chapter 4 EAG deals with the exemption from or the reduction of environmental taxes. However, the EEG-surcharge does not constitute an environmental tax, which is not contested by Germany.

- (222) In fact, there are currently no specific state aid rules that would recognize that exemptions or reductions from charges that serve to finance RES support could be considered as necessary to achieve an objective of common interest. However, in their Consultation Paper of 11 March 2013 on Environmental and Energy Aid Guidelines 2014-2020, the Commission services have indicated that this issue should be examined in more details: "(69) *However, in addition to exemptions from the energy tax, several Member States are considering exemptions (for energy intensive users) from financing the RES support schemes. In principle, all energy consumers should bear the financial burden of supporting RES which ensure an equal treatment. However, a reflection is warranted whether such costs may justify aid to maintain competitiveness of undertakings. This has to be carefully examined in order not to incentivize subsidy races between Member States. (70) Moreover, the primary objective should be to make RES support as efficient as possible to avoid an excessive financial burden on any consumer and to introduce all measures that allow integration of RES into the energy market*".
- (223) In that connection, it is also worth mentioning the Europe 2020 strategy and the Industrial Policy Communication Update of the Commission. The Europe 2020 Strategy focuses on creating the conditions for a smart, sustainable and inclusive growth. To this end, a number of headline targets have been set, including targets for climate change and energy sustainability: (i) a 20 % reduction in EU greenhouse gas emissions; (ii) raising the EU energy consumption produced from renewable resources to 20 %; (iii) a 20 % improvement in the EU's energy efficiency. In order to support achieving those targets, the Europe 2020 strategy put forward the "Resource efficient Europe" as one of seven flagship initiatives. This flagship initiative aims to create a framework for policies which helps to, inter alia, boost economic performance while reducing resource use, identify and create new opportunities for economic growth and greater innovation and boost the EU's competitiveness, and fight against climate change. With the Industrial Policy Communication Update "A stronger European Industry for growth and Economic Recovery", the Commission points out the necessity to "reverse the declining role of industry in Europe from its current level of around 16 % of GDP to as much as 20 % by 2020".
- (224) High energy prices and costs can have a negative impact on the EU's competitiveness vis-à-vis its global economic counterparts. In that connection, the European Council stated in May 2013 that the impact of high energy prices and costs must be addressed, and called on the Commission to present an analysis of the composition and drivers of energy prices and costs in Member States, with a particular focus, inter alia, on the impact on energy intensive industries, and looking more widely at the EU's competitiveness vis-à-vis its global economic counterparts. These issues will be addressed in the context of the discussion scheduled for the February 2014 European Council on industrial competitiveness and policy.

- (225) Should the additional charges on the electricity price that result from the financing of RES support result in companies which face international competition to relocate outside the EU in countries having lower greenhouse gas reduction standards, this could put into question the environmental objective of reducing greenhouse gas emissions globally, which is at the heart of promoting RES, and risks in addition reducing the financial base to such an extent that RES financing overall is at risk, as well as the climate change goals that the financial support helps to achieve.
- (226) While this issue will be examined also in the course of the revision of the EAG, the Commission invites third parties to present their views whether the reduced EEG-surcharge can be viewed as contributing to an objective of common interest (environmental protection) by enabling Germany to secure financing means for its support to the production of renewable energy and the reaching of the EU targets of reduction in greenhouse gas emissions.

3.3.10.2. Appropriateness, necessity and incentive effect

Germany's comments

(227) In order to substantiate the necessity of the aid, Germany puts forward the following elements:

- There are no other means to achieve the same combination of objectives.
- Eligible EIU have electricity costs that make out a high share of production costs. The condition to apply for exemption is that electricity costs are above 14% of gross value added. The current EEG surcharge is 5.277 ct/kWh. Being exposed to the full amount of the surcharge would imply a near doubling of electricity costs.
- Without the reduction, EIU would likely move away from Germany, primarily to states outside the EU. This would be a loss of taxes and jobs to Germany, and would also lead to an increase in surcharge paid by firms that do not benefit currently from EEG surcharge exemptions.
- Germany has submitted information in order to show that the EIU concerned would face international competition and would not be able to pass on the surcharge to their customers without losing important market shares. The data provided is focused on export data. In addition, Germany submits that even undertakings with no exports face international competition through imports. Detailed data has been submitted only for the aluminium sector. In this connection, Germany has provided data showing that investments have shrunken in the EU and production relocation has already taken place.
- Germany has also compared electricity prices and EEG surcharge of German firms with other Member States and some third countries. On the basis of the data submitted, Germany claims that with the EEG-Surcharge, electricity costs in Germany are higher than the EU average (but lower than electricity costs in Cyprus, Malta, Italy, Lithuania, Slovakia and Hungary). Germany adds that electricity prices are, even with the EEG exemptions, higher than in several Member States. Germany explains in this connection that because of different ways of financing RES support in Member

States and, different targets and important differences in the installed RES capacity, the resulting burden in Member States is different. This is in particular to the detriment of the German industry. The reduction of the EEG-surcharge also serves to counterbalance that disadvantage.

Assessment

- (228) Germany submits that the reduced EEG-surcharge is the only instrument that allows it to follow an ambitious RES policy financed from electricity users, including EIU, without jeopardizing the existence of EIU or inducing their relocation outside the EU. Such relocation would on the one hand lead to a substantial reduction in financial means for the support of RES and on the other hand, as those companies would relocate to countries having less stringent CO₂ emission standards, it would risk increasing CO₂ emissions globally thereby also undermining the purpose of the RES policy (climate change). Germany indicated that it did not see how else it could achieve the same result.
- (229) The EEG-surcharge seems to have enabled Germany to finance an ambitious RES policy. Provided the risk of relocation is established, the reduced EEG-surcharge might arguably be viewed as necessary to secure a large and stable financing basis for the support to RES and to prevent that the financing of RES by imposing too high a financial burden on certain undertakings risks undermining the climate change goal that is at the heart of RES policy. The Commission seeks the view of third parties in this respect.
- (230) In order to demonstrate the necessity of the aid, Germany has submitted comparisons of electricity costs between Germany, certain third countries but also various other Member States. In this connection, Germany seems to argue that the EEG-surcharge would be necessary to reduce the disparity between German electricity costs and electricity costs in other Member States.
- (231) However, the Commission doubts that, as results from case-law and decision practice⁶⁰, aid aiming at reducing cost differences between Member States and improving the competitiveness of undertakings toward undertakings from other Member States or at preventing relocation in other Member States can be viewed as being in the common interest. Aid that aims at reducing cost disparities with other Member States distorts competition, as the aid measure would protect German industry over other EU/EEA competitors, thus potentially leading to a race of subsidies.
- (232) In order to demonstrate the necessity of the aid, Germany further submits that without the reduced EEG-surcharge, EIU would relocate to third countries. Germany also refers in this respect to a carbon leakage risk.

⁶⁰ Commission Decision C 36/A/2006 on State aid implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche, 20.11.2007, paragraph 145: "*the Italian argument that such a State aid would be justified by the existence of other (equally distortive) State aids in the EU is to be dismissed altogether. Such an approach would lead to subsidy races and would run counter to the very objective of State aid control*"; Commission Decision C 24/2009 on State aid measure No C24/2009 (ex N 446/2008) for energy-intensive businesses under the Green Electricity Act in Austria, paragraph 154; Case C-86/89 *Italy v. Commission*, ECR [1990], p. I-3905, paragraph 18-19; Case 173/73 *Italy v Commission* ECR [1974], p. 710, paragraph 36 and following; See also judgment of the ECJ in *Italian Republic v Commission*, Case C-372/97 [2004], ECR I-03679, paragraph 67.

- (233) Under the ETS Guidelines, the Commission has identified a certain number of sectors that are at risk of relocation in case they would not be partially shielded from indirect CO₂ costs in electricity. This list established sectors that were exposed to a significant cost burden from indirect emissions in their production costs that they could not pass on without losing competitiveness and therefore are at risk of relocation. While Germany seems to refer to a similar risk of relocation should EIU have to bear the full EEG-surcharge, Germany does not seem to have identified the list of beneficiaries on the basis of the same criteria that could demonstrate a significant burden that cannot be passed on. The sectoral range of beneficiaries of the reduced EEG-surcharge also seems to be significantly larger than the list of sectors that were identified as being at risk of relocation under the ETS Guidelines.
- (234) In order to establish the risk of relocation, Germany refers essentially to the portion that exports make out in the turnover of EIU. While this element may be a useful indication, it does however not establish the risk of relocation, in particular since it does not show the cost increase in production costs and the fact that the companies concerned cannot pass on their costs to customers. Actually, Germany provided more market information for aluminium and steel that could indicate a risk of relocation, subject to more detailed information. Overall however, the Commission notes that the data provided does not clearly show to what extent the EIU concerned are exposed to a risk of relocation to third countries.
- (235) On this basis, the Commission considers that at this juncture the necessity of the aid has not been sufficiently demonstrated.
- (236) The Commission invites Germany to submit for each of the sectors that benefit from the reduced EEG-surcharge the following information:
- general market description (main market participants, functioning of the market, price drivers)
 - figures per sector indicating what portion of their gross added value the RES-surcharge would represent if paid in full
 - trade intensities with third countries (outside the EU) and any other indicators able to demonstrate the (in)ability of firms to pass on cost increases to customers, e.g. product price elasticity of the sector concerned in the relevant geographic market, price elasticity of trade flows, as well as estimates of lost sales and/or reduced profits for the companies in the sector/category concerned that would result from a full EEG-surcharge.
- (237) Germany believes the aid to be proportionate since EIU still pay part of the EEG-surcharge on each kWh and most of them are under the obligation to let their energy consumption being certified and audited. This certification and audit system on its turn incentives the undertakings concerned to reduce their energy consumption on the basis of the audit recommendations. Germany also underlines that while EIU do not pay at least 20% of the EEG-surcharge (as is required for authorising reductions from environmental charges), they nevertheless pay at least 0,05 ct/kWh, which corresponds to the minimum energy tax on electricity used in business set by Directive 2003/96.
- (238) While the Commission welcomes the fact that companies have to pay a surcharge for each kWh they consume, which would at least not induce them to energy inefficiency

and ensures that they contribute to RES support for each kWh they consume, the Commission notes that the surcharge does not correspond to an energy tax within the meaning of Directive 2003/96/EC. The fact that EIU would at the minimum pay 0,05 ct/kWh, corresponding to the minimum tax provided for by the Directive 2003/96/EC does not demonstrate that the surcharge is proportional.

- (239) For the aid to be proportional, it must be demonstrated that the same change in behaviour cannot be obtained with less aid. Germany has, however, not demonstrated that the same objective could not be achieved with less aid.
- (240) Also, it is unclear why certain EIU are benefitting from an extra reduction and why the "normal" reduction would not lead to the same result.
- (241) The Commission therefore seeks the view of third parties as to the proportionality of the aid and request Germany to further demonstrate that the same results could not be obtained with less aid.
- (242) If the aid aims at improving the competitiveness of German EIU towards EIU in other Member States, the Commission doubts that it would not distort competition in the internal market. The Commission notes in this regard that on the basis of Directive 2009/28/EC each Member State has been attributed a national overall target. Those targets were agreed between Member States. Each Member State is free to determine how this objective will be achieved and which financial means will be used to achieve the target. Aid that would be aimed at reducing alleged differences in electricity costs resulting from different targets would disturb an equilibrium that was agreed at the level of the Council and Parliament.
- (243) In addition, even if a Member States pursues higher targets than the targets established in Directive 2009/28/EC resulting in higher electricity costs, the Commission doubts that the aid granted with the aim of reducing costs differences with other Member States would not induce distortions of competition. As results from case-law and decision practice⁶¹, such aid aimed at improving the competitiveness of undertakings toward undertakings from other Member States would protect German industry over other EU/EEA competitors, thus potentially leading to a race of subsidies.
- (244) The Commission seeks third parties views on the impact that the reduced EEG-surcharge might have on competition, in other Member States.

⁶¹ Commission Decision C 36/A/2006 on State aid implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche, 20.11.2007, paragraph 145: "*the Italian argument that such a State aid would be justified by the existence of other (equally distortive) State aids in the EU is to be dismissed altogether. Such an approach would lead to subsidy races and would run counter to the very objective of State aid control*"; Commission Decision C 24/2009 on State aid measure No C24/2009 (ex N 446/2008) for energy-intensive businesses under the Green Electricity Act in Austria, paragraph 154; Case C-86/89 *Italy v. Commission*, ECR [1990], p. I-3905, paragraph 18-19; Case 173/73 *Italy v Commission* ECR [1974], p. 710, paragraph 36 and following; See also judgment of the ECJ in *Italian Republic v Commission*, Case C-372/97 [2004], ECR I-03679, paragraph 67.

3.3.11. Doubts related to the compatibility with Articles 30 and 110 TFEU

- (245) As regards the compatibility of the financing mechanism of the EEG-Act 2012 with Article 30 and 110 TFEU, it is settled case-law, first, that in its present state of development, Union law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 110 TFEU, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Union law, however, only if it pursues objectives which are themselves compatible with the requirements of Union law, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.⁶²
- (246) A discriminatory treatment against imports from other Member States presupposes that similar situations are treated differently, so that one needs to determine if imports are in a similar situation to the national production. The Commission has, in long-standing decision practice⁶³ and in line with the case-law of the Court⁶⁴, considered that the financing of national support schemes for RES by means of a parafiscal levy on electricity consumption may discriminate against imported RES.
- (247) The Commission observes that EEG-Act 2012 may *prima facie* in particular have a discriminatory effect in that §39 EEG-Act 2012 provides for a reduced rate of the EEG surcharge in case of so-called direct marketing that seems to be available only when the supplier has purchased 50% of his electricity portfolio from national RES electricity producers and seems therefore to constitute a discriminatory charge within the meaning of Article 110 TFEU.
- (248) Therefore, the Commission seeks the views of third parties whether the EEG-Act 2012 constitutes a discrimination prohibited by Articles 30 or 110 TFEU with regards to imported electricity, which would have been eligible for support, if it had been produced in Germany. Where the levy is raised on imports that would not have benefitted from support under the EEG had they been produced in Germany, the Commission considers the levy to comply with Article 110 for lack of similarity between the national production and the imports (for instance RES electricity produced from facilities that have been in operation for more than 20 years).

⁶² Case C-213/96 *Outokumpu* [1998] I-1777, paragraph 95.

⁶³ State aid decision N 34/90; State aid decision N 416/1999, State aid decision N 490/2000, State aid decision N 550/2000, State aid decisions N 317/A/2006 and NN 162/A/2003, State aid decisions N 707 and 708/2002, State aid decision N 789/2002, State aid decision N 6/A/2001, Commission decision 2007/580/EC, Commission decision 2009/476/EC, State aid N 437/2009.

⁶⁴ Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2886, paragraphs 44 to 47; Case C-206/06 *Essent* [2008] ECR I-0000, paragraphs 58 and 59.

- (249) With regard to §39 of the EEG-Act 2012 Germany notes that the provision has been kept in the EEG-Act 2012 for historical reasons. Germany points out that the Commission approved this provision in its decision of 2002⁶⁵.
- (250) The Commission notes that when the Commission examined the support scheme in 2002, it found that the system did not constitute State aid. Therefore, the question of compatibility with Articles 30 and 110 was not examined.
- (251) Germany has also argued that an analysis of §39 of the EEG-Act 2012 under Article 30/110 TFEU would put into question the right to decide, in accordance with Articles 3, 5 to 11 of the RES Directive, to which extent it supports energy from renewable sources which is produced in a different Member State.
- (252) The Commission underlines that the respect of Article 30/110 TFEU is unrelated to the decision of Member States to which extent they open their national support schemes to renewable electricity produced in other Member States. Article 30/110 TFEU only prohibits the financing of a support scheme for national production by means of a discriminatory charge levied on imported products. They do not oblige the Member State to extend the benefit of the support scheme to imported products. The present decision, like previous decisions on national support schemes for renewable energy,⁶⁶ does not put into question the fact that support under the EEG is limited to national production. However, when drafting their support schemes, Member States may not introduce discriminatory charges within the meaning of Article 30/110 TFEU.
- (253) Germany further submits that requiring that §39 of the EEG-act also applies to imported RES electricity would provide imports an undue advantage, in particular when the imported RES electricity has already benefited from support or is stemming from already depreciated facilities.
- (254) As regards, imported RES electricity stemming from already depreciated facilities, as the Commission has noted above under recital 248, it believes that there is no issue of discriminatory charge as §39 of the EEG-Act does not apply either to German RES electricity produced in facilities that are already depreciated (in operation for more than 20 years) as those facilities are not eligible for the application of the reduced EEG-surcharge under §39 EEG-Act 2012.

⁶⁵ See Footnote 48.

⁶⁶ See for instance state aid SA.33384 (2011/N) – Austria, Ökostromgesetz 2012, C (2012) 565 final.

- (255) As to imported RES electricity that has received support in its country of origin, it would appear to compete on an equal footing with German domestic RES electricity benefitting from §39 of the EEG-Act 2012. In that sense, RES electricity that has received domestic support would, according to Germany, not be in a similar situation with the EEG-supported electricity produced in Germany. On the other hand it might be argued that this would depend on the level of support received in the country of origin.
- (256) The Commission invites third parties to present their views whether there is discrimination with regards to RES electricity, which has received support comparable to the support under the EEG-Act 2012 in its country of production, and subsequently been exported to Germany.
- (257) In view of the above, the Commission doubts at this stage that the EEG-Act 2012 insofar as it concerns imports that could have been eligible for EEG support if produced in Germany, is compatible with Article 30 or 110 TFEU. In its final decision, the Commission will also assess the particular situation of imports that have benefitted from support in their country of origin.

4. CONCLUSION

The Commission has at this stage doubts as to the compatibility of the support mechanism for RES electricity and electricity from mining gas insofar as the financing mechanism concerns imports that could have been eligible for EEG support if produced in Germany, and of the reduced EEG-surcharge for energy-intensive users with the Treaty. In accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to open the formal investigation procedure, thereby inviting Germany to submit its comments. The opening of the formal investigation does not prejudice the outcome of the formal investigation procedure.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Germany to submit its comments and to provide all information which may help to assess the measure, within one month of the date of receipt of this letter.

It requests the German authorities to forward a copy of this letter to the potential recipients of the aid immediately.

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

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

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

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-president