Brussels, 25.11.2014
C(2014) 8822 final

PUBLIC VERSION
This document is made available for information purposes only.

Subject: State aid SA.38728 (2014/N) – Germany

Sir,

1. Procedure

(1) By an electronic notification validated and registered at the Commission on 8 May 2014, Germany notified a planned support scheme (“the EEG 2014”) for the promotion of the production of electricity from renewable energy sources (“RES electricity”) and from mining gas, as well as a planned reduction from renewable surcharges (“the EEG-surcharge”) for railway undertakings, that is granted under §63 N°2 EEG 2014 and §65 EEG 2014. The present decision assesses the measures related to railway undertakings.

(2) Already on 17 April 2014, the German authorities notified a planned support scheme for the promotion of the production of electricity from renewable energy sources and from mining gas, as well as a planned reduction from renewable surcharges for energy-intensive undertakings. The notification was complemented on 7 May 2014 as far as the reduction from renewable surcharges for energy-intensive undertakings was concerned. On 25 June 2014, Germany communicated an amended version of the EEG 2014. These measures are part of a separate procedure SA.38632 (2014/N - EEG 2014 – Reform of the Renewable Energy

Seiner Exzellenz Herrn Frank-Walter STEINMEIER
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin
2. DETAILED DESCRIPTION OF THE MEASURES CONCERRED

2.1. Objective of the EEG-2014 and main characteristics of the EEG 2014

(10) The EEG 2014 aims at ensuring that the share of renewables in the German electricity supply rises to 40-45 per cent by 2025 and to 55-60 per cent by 2035 whilst also achieving an affordable and secure supply of electricity for private households and industry.

(11) The EEG 2014 sets out a binding corridor for the deployment of certain renewable energies.

- Generation capacity from offshore wind energy is to reach 6.5 gigawatts of capacity by 2020 and 15 gigawatts by 2030.
- Generation capacity from onshore wind energy is to increase by up to 2,500 megawatts per year (net).
- Generation capacity from solar energy is to increase by up to 2,500 megawatts per year (gross value).
- With regard to bioenergy, the target is to increase it by 100 megawatts annually (gross value).
(12) In order to improve market integration of renewable technologies, direct selling is made compulsory for installations reaching a certain capacity. These installations are entitled to a premium set by the EEG 2014.

(13) However, in principle, by 2017 the support and the level of support should be determined by way of tenders. The tender concept will be first tested for solar energy (other than on buildings). The Government will have to report on the experience with the solar tenders at the latest by 30 June 2016 (§99 of the EEG 2014). Based on this report a new law would be adopted to extend tenders to other technologies.

(14) The costs of the support will be shared among all electricity consumers through the EEG-surcharge. The allocation will occur in a way that does not endanger the international competitiveness of electricity-intensive industries (reductions from the EEG-surcharge for energy-intensive undertakings and railways) and will take into account the polluter pays principle ("Verursacherprinzip", §2(4) EEG 2014).

(15) The EEG 2014 does not explicitly impose on electricity suppliers the obligation to pass on the EEG-surcharge to customers. However, the EEG 2014 also recognises that consumers are obliged to pay the EEG-surcharge in principle but that some of them enjoy a limited obligation (see in particular §74 (5) EEG 2014). The EEG 2014 further establishes how the supplier has to indicate the EEG-surcharge on the electricity bill and which percentage it is allowed to indicate as having been supported by the EEG-surcharge that the electricity supplier has paid.


2.2. Reduced EEG-surcharge for railways (privileged undertakings)

(17) § 5 Nr. 28 of the EEG 2014 defines the term "railway" for the purpose of the EEG 2014. This definition contains the most important elements of the definition of a "railway undertaking" and "operator of infrastructure" as contained in Article 3 of the Community guidelines on State aid for railway undertakings (hereinafter "the Railway Guidelines"): the law considers as railway undertaking each company which aims at transporting people or freight, by means of railways, magnetic cable

---

1 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts, Vorblatt, B.
2 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur grundlegenden Reform des Erneuerbare-Energien-Gesetzes und zur Änderung weiterer Bestimmungen des Energiewirtschaftsrechts, Vorblatt, B
3 See recital (1).
4 "Ist eine Schienenbahn jedes Unternehmen, das zum Zweck des Personen- oder Güterverkehrs Fahrzeuge wie Eisenbahnen, Magnetschwebebahnen, Straßenbahnen oder nach ihrer Bau- und Betriebsweise ähnliche Bahnen auf Schienen oder die für den Betrieb dieser Fahrzeuge erforderlichen Infrastrukturanlagen betreibt."
railways, tramways or any similar train circulating on rails or having to use similar infrastructure.

(18) §63 in combination with §65 of the EEG 2014 limits the amount of the EEG-surcharge that can be recovered from railways: upon request, the BAFA⁶ will limit the EEG-surcharge which is passed on by the electricity suppliers to railway undertakings⁷.

(19) §63 of the EEG 2014 states that this limitation aims at reducing the electricity costs for railway undertakings and thereby maintaining their intermodal 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.

(20) §65 of the EEG 2014 subjects the limitation of the EEG-surcharge to the following condition: The electricity that is subject to the surcharge and that has been used by the railway undertaking itself directly for the operation of trains amounts to at least 2 GWh in the last financial year at the consumption point concerned, with the exclusion of the energy fed back by the railway undertaking itself.

The surcharge is capped for the full consumption to 20% of the full EEG-surcharge.

(21) The consumption point is defined as the sum of all consumption points for the operation of trains by the respective railway undertaking.

(22) The decision of the BAFA is binding also upon the Transmission System Operators⁸ (hereinafter "TSOs"). This means that where the BAFA has decided that a railway undertaking needs to pay only a reduced EEG-surcharge to its electricity supplier, the railway’s electricity supplier’s obligation to pay the EEG-surcharge to the TSOs is in turn reduced accordingly. This will be taken into account when TSOs establish the EEG-surcharge.

(23) According to § 65 in conjunction with § 64(4) of the EEG 2014, new entrants in the railway sector have to transmit past consumption data. Under certain circumstances (tenders in railway passenger transport sector) new entrants encounter the problem that they cannot demonstrate their electricity consumption due to the lack of past consumption data. The Commission indicated that this could be a potential market entry barrier. Therefore, Germany made on 24 October 2014 and 17 November 2014 the following commitments:

(a) The respective provisions of the EEG 2014 shall be amended in the law in such a way that new entrants can demonstrate their electricity consumption by using provisional forecast data. This is the only way to align the

---

⁶ Bundesamt für Wirtschaft und Ausfuhrkontrolle (= federal agency in charge of dealing with requests for limiting the surcharge)
⁷ The cap also applies to energy-intensive undertakings. This measure is not examined in the framework of this decision but has been the subject matter of a separate procedure (SA.38632). See above recital (2).
⁸ The TSOs are 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 2014).
provisions with EU competition rules in the future. This should come into effect with the next application period for the special equalisation scheme. This concerns only newly created railway undertakings, which cannot provide past consumption data and which participate in a public bidding process in railway passenger transportation. They will be entitled to transmit provisional consumption data on the basis of the specifications of the bidding process. The reduction of the EEG-surcharge will only be granted to the railway company which wins the tender. This applies solely to the railway sector and not to the industrial sector. Newly created companies operating freight and long distance passengers transport can apply for the EEG privilege on the basis of forecast data certified by an independent expert and subject to an ex-post control.

(b) Until then, Germany commits to introduce the possibility for newly created railway companies, which put an offer in an ongoing tender for railway passenger services, to apply retroactively until two weeks after the publication of this decision for the limitation of the EEG-surcharge on the basis of forecast data (for the limitations starting 1.1.2015). The reduction of the EEG-surcharge will only be granted to the railway company which wins the tender. This will be realized in an administrative way due to the fact that the application period 2014, which is laid down in the EEG law, is expired. New created companies operating freight and long distance passenger transport can apply for the EEG privilege on the basis of forecast data certified by an independent expert and subject to an ex-post control. “

2.3. Position of the German authorities

(24) The measures were notified for legal certainty as Germany considers that they do not constitute State aid. Nevertheless, Germany takes the view that, should they be considered as aid by the Commission, the measures would be compatible with the internal market, as it fulfils the requirements of Article 93 TFEU.

3. ASSESSMENT OF THE MEASURES

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

(25) 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

3.1.1.1. Selective advantage for the producers of EEG electricity

(26) The notified EEG-system procures advantages for the producers of EEG electricity, as, through the feed-in tariffs, market premiums and flexibility premiums, it is guaranteed that they will obtain a price for their electricity that is higher than the market price. They are thus advantaged by the EEG-system. While the average market price was between 30 and 35 €/MWh between January and April 2014 on the Epex Spot the reference values under the EEG range from 35€/MWh to 240 €/MWh.
In 2013, around EUR 19 billion were paid out to EEG electricity operators under the predecessor of the EEG 2014, while TSOs could sell the purchased EEG electricity on the wholesale market only for around EUR 2 billion. The top up compared to market prices thus amounted to EUR 17 billion. For 2014, the difference between payments made under the EEG 2014 and its predecessor scheme and market price is estimated at around EUR 19 billion.

The measure is selective because it only favours producers of EEG electricity.

The electricity market has been liberalised and electricity producers are engaged in trade between Member States so that the advantage granted to the producers of EEG electricity is likely to distort competition and affect trade between Member States. The EEG electricity is generally sold on the spot market where it enters in competition with all sources of electricity. The German spot market is interconnected with other markets.

3.1.1.2. Selective advantage for railway undertakings

The notified EEG-system contains advantages for railway undertakings. Measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid.

The Court has also ruled that in the case of exemptions from charges, in order to demonstrate that an advantage is selective, the Commission has to prove that the measure at stake creates differences between undertakings which, with regard to the objective of the measure in question, are in a comparable factual and legal situation. However, the concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question.

Railway undertakings are advantaged compared to other undertakings in the transport sector (such as airlines or undertakings operating vehicles) because they may request that the EEG-surcharge charged to them is capped. Hence, where the BAFA adopts a capping decision based on the EEG 2014 electricity suppliers are prevented from recovering the entire EEG-surcharge from railway undertakings. In this case, TSOs are equally prevented from recovering the full EEG-surcharge from electricity suppliers which supply to railway undertakings. Consequently, only a reduced EEG-surcharge can be imposed on electricity consumed by these privileged companies. The limitation of the EEG-surcharge is meant to provide electrified rail with an advantage in intermodal transport competition (§63 EEG 2014). This privilege of a limited EEG-surcharge for railway undertakings is not attributable to the nature or the general logic of the system, but it is based on an external objective, i.e. the environmental aim to privilege rail transport.

This advantage is selective because only railway undertakings can benefit from it.

---

10 Case C-159/01 Netherlands v Commission [2004] ECR I-4461, paragraph 42; Case C-279/08 P, NOx emission trading scheme, paragraph 62.
3.1.2. Imputability

The financing of support for EEG electricity and the possibility to cap the EEG-surcharge for railway undertakings are imputable to the State, as they are established by law and implementing decrees. In addition, it is the State, through the BAFA, that grants the entitlements to a capped EEG-surcharge for railway undertakings and through the Bundesnetzagentur, that monitors its correct implementation.

3.1.3. Existence of State resources

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. The concept of "intervention through State resources" is intended to cover not only advantages which are granted directly by the State but also "those granted through a public or private body appointed or established by that State to administer the aid". 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 sector.

Germany has notified the EEG 2014 for legal certainty and considers that neither the RES support nor the capping of the EEA-surcharges does involve the use of State resources as it would be financed through private means only.

However, 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 money from the State budget or from a public entity for the advantage granted to one or more undertakings to be capable of being regarded as State aid within the meaning of Article 107(1) TFEU.

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. 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. There are extensive control mechanisms in place that allow the

---

11 Case 76/78 Steinike & Weinlig v Germany [1977] ECR 595, paragraph 21; Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 58; Case C-677/11 Dous Elevage and Cooperative agricole UKL-ARREE., not yet published, paragraph 26; Case C-262/12, Vent de Colère, not yet published, paragraph 20; Sloman Neptune, paragraph 19.
12 Case C-677/11 Dous Elevage, not yet published, paragraph 34, Case T-139/09 France v Commission, not yet published, paragraph 36, Case C-262/12, Vent de Colère, not yet published, paragraph 19.
13 Dous Elevage, cited above in footnote 13, paragraph 34, France v Commission, cited in footnote 13, paragraph 36; joined cases C-399/10 P et C-401/10 P Bouygues Telecom v Commission, not yet published, paragraph 100; Case C-262/12, Vent de Colère, not yet published, paragraph 19; Case C-275/13 Elcogás SA v Administración del Estado, Iberdrola SA, Order of 22.10.2014, not yet published, paragraphs 24-26, 30 and 32.
State to monitor the financial flows. Finally, the Commission notes that the mechanism put in place by Germany ensures that the additional costs arising from the obligation for the network operators to purchase renewable electricity at a price higher than the market price or to pay a premium to generators of renewable electricity on top of the market price are offset in full.

(39) The Commission observes that the State controls, directs and influences the administration of the funds at stake: the State (both legislation and the public administration) intervenes at both the level of the advantage (by providing for the feed-in tariffs and market and flexibility premiums) and its financing (by setting up 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, and it organises the financing through a mechanism which allows for the recovery of the costs (at least the difference to the price for selling the electricity) from end customers, to the extent they are not capped. The EEG-Surcharge has been designed and decided by the State and is not a private initiative of the TSOs.

(40) The Commission therefore concludes that the TSOs have been designated by the State with the task to administer the EEG-surcharge, the revenues from which constitute a State resource. Hence, a reduced EEG-surcharge or capped surcharge implies a renouncement to State resources. The mechanism such as set up by the State ensures that an amount equivalent to the capped surcharges will be financed through an increased EEG-surcharge on other customers, which do not benefit from a capped surcharge.

3.1.4. Distortion of competition and effect on trade between Member States

(41) The Commission considers that the capped surcharge for railway undertakings will distort competition and have an effect on intra-EU trade. Potential beneficiaries belong to the railway sector, which is open to competition between undertakings from different Member States. The measure is therefore liable to distort competition and affect trade between Member States.

3.1.5. Conclusion on the existence of aid

(42) The Commission concludes that the EEG 2014 entails State aid in favour of producers of EEG electricity and that the reduced EEG-surcharge entails aid for railway undertakings. Therefore the Commission needs to examine their compatibility.

3.2. Lawfulness of the aid

(43) The support scheme for renewable energy under the EEG 2014 as well as the reduced surcharge for railway undertakings was notified to the Commission on 8 May 2014. It has so far not been implemented. Thus, Germany has complied with its obligations under Article 108 TFEU. The EEG 2014 entered into force on 1 August 2014 with the exception of the provisions concerning railway undertakings.
3.3. Compatibility

(44) Regarding the assessment of the compatibility of the operating aid to the production of renewable electricity, the Commission refers to its positive decision adopted on 23 July 2014 regarding the reform of the Renewable Energy Law\textsuperscript{14}, which concludes that the aid scheme for RES electricity is compatible with the Guidelines on environmental and energy aid for 2014-2020\textsuperscript{15}.

(45) As regards the operating aid to railway undertakings, the Commission has assessed the notified aid scheme on the basis of the Railway Guidelines, and in particular section 6 (Aid for coordination of transport) and its sub-section 6.3 (Criteria for aid for rail infrastructure use, reducing external costs and interoperability)\textsuperscript{16}. Article 93 TFEU states that "Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service".

3.3.1. Eligible costs

(46) The transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result, there may be disparities between the different modes of transport, which it may be appropriate to correct by way of public support for those modes of transport which give rise to the lowest external costs.

(47) The Railway Guidelines state that, "as regards aid for reducing external costs, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes". Member States are allowed to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail.

(48) To assess the eligible costs for the measure at stake, Germany provided the Commission with two studies:

(a) The first study, realized in 2007\textsuperscript{17}, estimates the annual external costs of transport in Germany in 2005. It only takes into consideration direct external costs (accident, noise, air pollution, climate costs, nature and countryside, downstream and feeder processes, additional costs in urban areas) and not indirect costs. In 2005, of an annual total of external costs of transport in Germany (passengers and freight) of EUR 80,4 bn, railway transport counted for 3,1 % (EUR 2,5 bn), road transport for 96% (EUR

\textsuperscript{14} Procedure SA.38632 (2014/N) - EEG 2014 – not yet published.
\textsuperscript{15} OJ C 200 of 28 June 2014, p. 1.
\textsuperscript{16} See footnote 6.
77 bn), domestic aviation for 0.6% (EUR 0.5 bn) and inland water transport for 0.5% (EUR 0.4 bn)\(^\text{18}\).

Table S-2\(^\text{19}\) of the same study compares average external costs of the various transport modes for passenger and freight transport in Germany in 2005: costs for passenger rail transport (EUR 21.2 per 1 000 Pkm\(^\text{20}\)) are around three times less than costs for passenger road transport (EUR 64.5 per 1 000 Pkm) and the difference is even higher for freight transport, as costs for freight rail transport (EUR 9.5 per 1 000 Tkm\(^\text{21}\)) are around four times less than costs for freight road transport (EUR 38.9 per 1 000 Tkm).

(b) The second study, realized in 2011\(^\text{22}\), provides total external costs per inhabitant and year for EU-27 by country and transport mode (passenger and freight) and refers to data from 2008. It concludes that, in Germany in 2008, ca. 93.6% of external costs derived from road transport, whereas 2.5% derived from railway transport. According to Germany, this study confirms the results provided by the first study.

The second study also provides data on average external costs for Germany in 2008 by country and transport mode (excluding congestion): average costs for passenger rail transport amount to EUR 21.5 per 1 000 Pkm whereas the same data for road transport is EUR 87 per 1 000 Pkm. Average costs for freight rail transport amount EUR 9.3 per 1 000 Tkm whereas the same data for road transport is EUR 52.9 per 1 000 Tkm.

(49) Germany concludes that, as the main competitor of railway transport, either for passenger or for freight transport, is road transport, external costs for rail transport have to be compared to external costs for road transport.

Transparency of the analysis

(50) The Railway Guidelines also state that Member States have to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport. The methodology used and calculations performed must be made publicly available\(^\text{23}\).

(51) Both mentioned studies are public and can be accessed via the internet. Their realization is based on data on external costs which are methodically founded. Both studies explicitly justify the methodology and calculations used. Therefore the Commission is of the opinion that this comparative cost analysis provided by Germany is reliable and fully transparent.

Validity of the data provided

---

\(^{18}\) See Table S-1 at page 5 of the study - Tabelle S-1 Gesamtkosten 2005.

\(^{19}\) See Table S-2 at page 7 of the study - Durchschnittskosten 2005 in € pro 1'000 Pkm bzw. 1'000 Tkm.

\(^{20}\) Passenger-kilometer.

\(^{21}\) Ton-kilometer.


\(^{23}\) See recital (105) of the Railway Guidelines.
Germany argues that the calculation of external costs in the transport sector implies complex calculations and long term data investigations. This results in a significant delay between the period studied and the establishment of the final results, as the elaboration of data is a complex process. Indeed, in the two studies mentioned at recital (48), two to three years have passed between the period studied and the final results.

In addition, Germany argues that data on external costs in the transport sector do not change significantly throughout the years, which explains why some "recent" studies refer to data from the period 2000-2010. This is also the case with the two studies mentioned at recital (48), for which the results are similar, although a three years period has passed in-between both studies.

The Commission notes that the difference between external costs from rail transport and external costs from road transport is so high, that, even if the most recent data would differ significantly from those underlying the studies (which appears unlikely given the developments in the past), the possibility for the eligible costs to exceed the compatibility criteria set out by the Railway Guidelines would be extremely low.

Finally, the Commission has itself carried out an assessment in which it analysed the average external costs for railway and for road transport in Germany on the basis of the following cost elements: accidents, noise, pollutants, climate costs, infrastructure and congestion. This internal study estimates that total costs for Germany for rail amount to EUR 7.3 per 1 000 Tkm, whereas the same data for road transport result in an amount of EUR 30.6 per 1 000 Tkm. As the difference between the external costs of railway and road transport is similar to the one presented in the two studies provided by Germany, the Commission considers that the data presented by Germany are valid and that the resulting conclusions can be taken into consideration for the compatibility assessment. The Commission's own assessment therefore confirms the finding of the studies presented by Germany.

3.3.2. Necessity and proportionality of the aid

The Railway Guidelines state that for aid for reducing external costs, the Commission considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below 30 % of the total cost of rail transport, up to 50 % of the eligible costs.

The Railway Guidelines state that, for aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit corresponds to the highest cost differential among the various options. As stated at recital (49), the Commission agrees on comparing costs

---

24 Internal study "Freight marginal average external costs of transport per country"
25 For any aid above these thresholds, Member States must demonstrate the need and proportionality of the measures in question.
26 See recital (109) of the Railway Guidelines.
generated by the rail sector to costs generated by road, as road transport represents the highest cost differential with rail.

(58) The Commission notes that, in the present case, the intensity of the aid stays below 30% of the total cost of rail transport as energy costs in railway transport constitute just a small part of the total costs generated by rail: energy costs for passenger transport amount roughly to 10% of total costs\(^\text{27}\) and to 16% for freight transport\(^\text{28}\). The reduced EEG surcharge corresponds to a part of the energy costs. Hence, even a full exemption of the EEG-surcharge would not lead to an aid intensity of more than 30% of the total cost of rail transport (as also suggested by Germany).

(59) The Commission also finds that the aid intensity is not above 50% of the eligible costs: the difference between external costs for rail and road transport amounts to around EUR 74.5 bn according to the aforementioned study\(^\text{29}\). The exact amount of the reduction of the EEG-surcharge is difficult to estimate, as it is linked to the effective electricity consumption, itself linked to the economic activity of the railway sector and to the specific business development of the eligible railway undertakings. The exact number of the eligible railway undertakings is still unknown. However, Germany has indicated that in the past the total EEG exoneration for the railway sector amounted to between EUR 88 Mio. in 2010 and EUR 253 Mio. in 2013. Therefore the difference of external costs largely exceeds the amount of the reduced EEG-surcharge.

(60) In the light of these findings, the Commission concludes that, in terms of its level, the aid is necessary and proportional.

3.3.3. Absence of discrimination

(61) However, the necessity and proportionality of the aid also needs to be assessed as regards the eligibility criteria, in order to avoid distortions of competition within the railway sector. The EEG 2014 foresees that the reduced EEG-surcharge will only apply to railway undertakings reaching 2 GWh of consumption yearly. Railway undertakings above this threshold shall benefit for the whole amount of their consumption of the reduced surcharge, whereas railway undertakings below this threshold shall pay 100% of the surcharge. The Commission had to examine to what extent the existence of this threshold introduces discrimination between small and large railway undertakings.

(62) Germany states that railway undertakings which remain below the threshold of 2 GWh are active in a very specific sector and do not compete with railway undertakings with a consumption level above the threshold. According to Germany, the electricity consumption below 2 GWh yearly typically concerns local railway companies with a very specific transport business, like museum or touristic railways, for which there is no competition. In addition, Germany argues that the


\(^{29}\) See recital (48) (a).
fixing of the threshold is linked to administrative considerations, in particular with a view to the cost of treating application files for the reduced surcharge.

(63) This opinion of Germany is supported by submissions from CER and Mofair30, which both state that railway undertakings with energy consumption levels below the threshold could only be found in particular cases, whose business model is restricted to specific operations, like for example heritage and tourist railway companies, test drives, seasonal special excursions, vehicle transfer, etc. Both associations state that these operations would not concern business activities that are carried out in competition with other, regular railway activities. There would therefore be no impact, be it on intramodal competition or on intermodal competition.

(64) Mofair also suggested that it might be possible that small freight transport companies and newcomers on the market might not reach the 2 GWh threshold. This might especially be the case for freight companies which provide short term transport activities for less than one year without business continuation. At the same time, Mofair acknowledges the lack of practical experience in this matter, as the precedent version of the law fixed a very different threshold (10 GWh).

(65) The Commission recognizes the need to apply a minimum threshold for such a measure, as the necessity of a minimum of electricity consumption ensures the right proportion between the benefit of a reduced surcharge and the considerable costs (both for the administration as well as the applicant) linked to an application for reduction. The Commission considers at the same time that its impact should be strictly limited to specific cases of small railway undertakings active on specific routes on which no competition can be considered with other railway undertakings qualifying for the reduced EEG-surcharge. In order to understand the practical implication of the threshold of 2 GWh, the Commission consulted two German railway associations, "Netzwerk Europäischer Eisenbahnen e.V. & mofair e.V." (Mofair) and "Community of European Railway and Infrastructure Companies" (CER). According to these two railway associations, undertakings operating below the threshold are only special railway undertakings such as museum trains, heritage and historical trains, tourist railways, test drives, seasonal special excursions or vehicle transfers. CER states that on the basis of averaged data, an average railway undertaking (for example in the freight transport service) will already exceed 2 GWh per year with only one train ride per day. The use of one locomotive eight hours per day will represent a higher consumption than 2GWh per year. According to CER, operations of this kind do not concern business activities of undertakings which stand in a competitive relation to other regular railway activities. CER therefore cannot see any impact either on intramodal competition or on intermodal competition. The association Mofair stated that, in the absence of experience with

30 The "Netzwerk Europäischer Eisenbahnen e.V. & mofair e.V." (Mofair) represents private, independent railway undertakings (almost exclusively from Germany) that are operating in regional passenger transport (see: http://www.netzwerk-bahnen.de/mitglieder.html); its stated objective is to develop the conditions for fair competition in the railway sector and in this context ensure non-discriminatory regulation. The "Community of European Railway and Infrastructure Companies" (CER) represents 75 railway undertakings (both incumbents and new entrants), their national associations and infrastructure companies operating in the EU. According to internet site, CER members represent about 61% of the rail network length, more than 84% of the rail freight business and about 99% of rail passenger operations in EU, EFTA and EU accession countries.
such a low threshold (so far it had been 10 GWh), it is impossible to foresee every situation and constellation of small railway undertakings, but that it cannot be ruled out that very small and new freight railway undertakings might not reach the threshold because of a limited freight contract if there was no subsequent contract thereafter. Given the absence of any experience of Mofair's members with the new threshold, which it acknowledges, as well as the lack of any specific underpinning data, the described potential scenario appears however rather speculative. Based on this information, which does not contradict Germany's claim, the Commission concludes that any risk of discrimination as a consequence of applying the threshold of 2 GWh is unlikely and that on balance the threshold can be justified.

(66) The Commission considers that Germany's commitments of 24 October 2014 and 17 November 2014 are capable of avoiding any risk of discrimination for new entrants (i.e. newly created railway undertakings in the sense of Germany's commitments31) to the railway sector in the case of tenders in the regional passenger transport. Germany has committed to amend the respective provisions of the EEG 2014 in the law in such a way that new entrants can demonstrate their electricity consumption by using provisional forecast data. New entrants will have the possibility to compete with established railway undertakings in tenders in railway passenger transportation, as they are granted the exceptional right to use provisional forecast data of their electricity consumption in order to receive EEG-surcharge reduction applicable to the offer they make in the tender. According to Germany the new entrants will be able to use provisional forecast data of consumption in case they want to participate in a tender for regional passenger transportation. In this case the new entrants can use the provisional data of the electricity consumption that corresponds to the expected electricity amount as published by the tender. Due to this exceptional possibility to use provisional forecast data, the Commission considers that new entrants and established undertakings are treated equally in tenders concerning the possibility to apply for a reduced EEG-surcharge. In addition, new entrants operating freight and long distance passenger transport will be able to apply for a surcharge reduction on the basis of forecast data certified by an independent expert and subject to an ex-post control. Moreover, Germany has committed that until the amendment of the law, new entrants will receive the possibility to apply retroactively until two weeks after the publication of this decision for a surcharge reduction (starting on 1 January 2015) on the basis of forecast data in case they put an offer in an ongoing tender for railway passenger transport. Likewise, until the amendment of the law, new entrants operating freight and long distance passenger transport will be able to apply for a surcharge reduction on the basis of forecast data certified by an independent expert and subject to an ex-post control. These commitments are appropriate to put new entrants in the same situation as established undertakings and avoid different treatment of railway companies in the railway market. The Commission concludes therefore that there is no risk of discrimination for new entrants to the railway sector.

Incentive effect

(67) The Railway Guidelines stipulate at recital (110) that: "At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have

31 See recital 23
the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road”. Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

(68) Germany states that such a requirement is fulfilled as the EEG-surcharge mechanism is clearly reflected in the transport price set by railway undertakings: without a reduced EEG-surcharge, the final price of railway transport would be higher. The reduced EEG-surcharge will contribute to a shift of passengers and freight towards rail transport instead of road transport. Germany has claimed that there is a realistic prospect that this shift of passengers and freight will lead to a sustainable transfer of traffic. The Commission considers that, taking into consideration that the EEG-surcharge is capped to 20% of the full EEG-surcharge and that electricity costs are a considerable cost component for railway undertakings, Germany's claim that the reduced EEG-surcharge will be reflected in the final prices of railway transport appears credible. The lower train prices will lead to a higher demand of train transport both by passengers and freight shippers. Hence, the Commission concludes that the requirements of recital (110) of the Railway Guidelines are fulfilled.

3.3.4. Conclusion

(69) The aid measure at stake fulfils the criteria of the Railway Guidelines (as well as general principles of non-discrimination) and can therefore be considered compatible with the internal market under Article 93 TFEU, as aid for reducing external costs that is necessary and proportionate and is not contrary to the common interest.

4. COMMITMENT FROM GERMANY ON THE DURATION

(70) The Railway Guidelines state at recital (97) that, in view of the rapid development of the transport sector and hence the need for coordinating it, any aid notified to the Commission on the basis of Article 93 TFEU has to be limited to a maximum of five years, in order to allow the Commission to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal.

(71) Hence, the Commission authorises the aid scheme only for a period of five years, after which Germany should re-notify the measures. Germany therefore commits, in the case it intends to continue the measures foreseen in the EEG 2014 for railway undertakings, to re-notify the measures for any period going beyond the five-year period from the date of this letter, in order to apply for a new assessment of their compatibility.

5. AUTHENTIC LANGUAGE

(72) Germany has waived its right to have the decision adopted in German. The authentic language will therefore be English.
6. **CONCLUSION**

(73) The Commission has accordingly decided not to raise objections to the aid measures on the grounds that they are compatible with the internal market pursuant to Article 93 TFEU.

(74) The present decision is valid for five years in respect of the reduced EEG-surcharge for railway undertakings.

(75) The Commission reminds the German authorities that, in accordance with article 108 (3) TFEU, any plans to refinance, alter or change this aid have to be notified to the Commission pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU).

(76) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://ec.europa.eu/competition/elojade/isef/index.cfm.

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

European Commission  
Directorate-General for Competition  
Directorate for State Aid  
State Aid Greffe  
B-1049 Brussels  
Belgium  
Email: stateaidgreffe@ec.europa.eu  
Fax No: (0032) 2-296.12.42

Yours faithfully,  
For the Commission

Margrethe VESTAGER  
Member of the Commission

---