

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 April 2007

on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — Case No C 7/2005

(notified under document number C(2007) 1181)

(Only the Slovenian version is authentic)

(Text with EEA relevance)

(2007/580/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

(1) By letter registered as received by the Commission on 1 October 2003, Slovenia submitted the 'Programme for recovery of stranded costs in electricity generation

plants in the Republic of Slovenia' under the interim procedure referred to in Annex IV, paragraph 3, subparagraph 1(c) to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union. This notification was registered under State aid case number SI 7/03.

(2) In the course of the exchange of letters that followed, it appeared that two power plants mentioned in the background description of the notified measure benefited from another state support scheme. This other State aid scheme (hereinafter 'the scheme') was registered as received on 6 December 2004 by the Commission under State aid case number NN 80/04.

(3) Based on the information at its disposal, the Commission had doubts as to the compatibility of certain parts of the scheme with the common market. Thus, on 2 February 2005, it adopted a decision to open a formal investigation under Article 88(2) of the EC Treaty (hereinafter 'the decision to open proceedings') and called on Slovenia to submit its comments. The decision to open proceedings was published on 15 March 2005 in the *Official Journal of the European Union* ⁽²⁾. All interested parties were invited to submit their comments within one month of the date of publication.

⁽¹⁾ OJ C 46, 22.2.2005, p. 3.

⁽²⁾ OJ C 63, 15.3.2005, p. 2.

- (4) By letter dated 11 March 2005, registered as received on 14 March 2005, Slovenia submitted its comments with regard to the doubts raised in the decision to open proceedings. On 25 April 2005, 11 July 2005, 23 November 2005 and 22 June 2006 the Commission sent further questions to Slovenia, which were answered respectively by letters dated 14 June 2005, registered as received by the Commission on the same day, 20 September 2005, registered as received by the Commission on the same day, 31 January 2006, registered as received by the Commission on the same day and 7 July 2006, registered as received by the Commission on 14 July 2006.
- (iii) the Trbovlje Thermoelectric Power Station (hereinafter 'the Trbovlje plant'), for that part of its production that uses up to 15 % of the domestic primary energy necessary to cover the consumption of electricity in Slovenia.

(5) The Commission did not receive any comments from other interested parties.

(6) A technical meeting between the Commission and the Slovenian authorities was held on 25 October 2006 and as a result Slovenia provided the Commission with additional information by letter dated 23 November 2006, registered as received by the Commission on 24 November 2006.

2. DESCRIPTION OF THE SCHEME

(7) The scheme was introduced in 2001 in order to support the generation of electricity from renewable sources and combined heat and power generation in Slovenia and to secure a reliable supply of energy from indigenous sources.

(8) In order to benefit from the scheme, a generator must be designated as a 'qualified producer' by the Ministry of Environment, Spatial Planning and Energy ⁽¹⁾.

(9) The status of qualified producer can be attributed to three types of electricity generators:

(i) power stations generating electricity from renewable sources of energy, except hydro power plants of more than 10 MW capacity;

(ii) generators using combined heat and power production with an above-average efficiency, except

(10) In 2003, qualified producers had a share of approximately 11,2 % of the electricity generation market in Slovenia. After excluding the Trbovlje plant and the combined heat and power station at Ljubljana, this share drops to around 2,7 %.

(11) Qualified producers have the right to have their whole production purchased by the network operator to which they are connected, at a price that is fixed and adjusted every year by the State. This price is higher than the market price. Qualified producers can also choose to sell their electricity directly on the market, in which case they are entitled to receive from the State a premium payment equal to the difference between the revenues they would have received should they have chosen to sell their electricity to their network operator and the revenue they received from the market.

(12) Network operators recover the losses they incur from the purchase obligation through payments from a fund established by law. Monies from the fund are also used to pay the premiums to qualified producers which choose to sell their electricity on the market. The fund is fed by the proceeds of a parafiscal levy on the consumption of electricity which is imposed on all electricity consumers in Slovenia.

3. DOUBTS EXPRESSED IN THE DECISION TO OPEN PROCEEDINGS

(13) After the analysis of information at its disposal, the Commission came to the preliminary conclusion that the support was State aid within the meaning of Article 87(1) of the EC Treaty since it met the four cumulative criteria of the relevant definition.

(14) The Commission also doubted whether the scheme could be considered compatible with the common market.

⁽¹⁾ Ordinance relating to the conditions for obtaining the status of qualified producer of electricity (Official Gazette of Slovenia Nos 29/01 and 99/01).

(15) Firstly, the Commission analysed the aid in the light of the Community guidelines on State aid for environmental protection ⁽¹⁾ (hereinafter 'the environmental guidelines'). This analysis led to doubts as to the compatibility of the aid with the environmental guidelines, in particular as regards the definition of producers using renewable energy and efficient combined heat and power generation, and as regards the level of the aid as compared to the real excess costs borne by the producers.

(16) Secondly, it analysed the aid in the light of the Commission Communication relating to the methodology for analysing State aid linked to stranded costs ⁽²⁾ (hereinafter 'the methodology'). This analysis led to doubts as to the compatibility of the scheme with the methodology. In particular, the Commission was not in a position to conclude that the aid had been calculated in a way that was sufficiently precise to enable the power plant by power plant calculation that is necessary under this methodology.

(17) Thirdly, it analysed the aid as compensation for charges linked to services of general economic interest. This analysis led to doubts as to the compatibility of the aid since, for most of the beneficiaries, the Commission was not in a position to define a sufficiently precise service of general economic interest with which they would have been entrusted and, for the only beneficiary for which this service could have been precisely defined, it was not in a position to assess the proportionality of the compensation.

(18) The Commission also had doubts whether the aid, which is financed via a parafiscal levy imposed on electricity consumers, is compatible with Articles 25 and 90 of the EC Treaty.

4. COMMENTS FROM OTHER INTERESTED PARTIES

(19) Following the decision to open proceedings the Commission did not receive any comments from other interested parties.

⁽¹⁾ OJ C 37, 3.2.2001, p. 3.

⁽²⁾ Adopted by the Commission on 26.7.2001. Available on the Commission's Competition Directorate-General's website at the following address: http://ec.europa.eu/comm/competition/state_aid/legislation/stranded_costs_en.pdf
Communicated to Member States by letter ref. SG(2001) D/290869 of 6.8.2001.

5. INITIAL COMMENTS OF THE MEMBER STATE

(20) By letter dated 11 March 2005, registered as received on 14 March 2005, Slovenia submitted its comments with regard to the doubts raised in the decision to open proceedings. These comments referred only to the problem of the definition of State aid and the notion of a parafiscal levy.

5.1. Existence of State aid

(21) Slovenia pointed out that the Slovenian distribution companies are not 100 % State-owned. Slovenia states that, in fact, the ownership of the operators is divided between the State (approximately 80 %) and private investment funds and others (approximately 20 %). Moreover, for the purposes of the purchase obligation scheme, Slovenian legislation draws no distinction between State-owned and privately owned operators. The Energy Act ⁽³⁾ imposes no condition that the operator must be State-owned and allows operators to be privately or State-owned.

(22) In Slovenia's opinion, the fact that a particular entity involved in the purchase obligation scheme is State-owned does not mean that, on those grounds alone, this constitutes State aid. Reference was made to the judgment by the European Court of Justice of 13 March 2001 in Case C-379/98.

(23) Furthermore, Slovenia argues that the system of purchasing electricity from qualified producers, as laid down by Slovenian regulations, is very similar to other schemes examined by the Commission, e.g. in cases NN 27/2000 and NN 68/2000 ⁽⁴⁾, where the Commission concluded that no State aid was involved. According to Slovenia, in the decisions on those two cases, the Commission found that, since the obligation applied to both numerous private and some public network operators, the laws — or rather the cases in question — could not be deemed to involve state resources.

(24) In view of the above considerations and taking into account the system as it stands, Slovenia considered that, in so far as the funds do not by their nature come from state resources, the question of the ownership of the entities involved cannot on its own alter that nature.

⁽³⁾ Official Gazette of Slovenia Nos 79/1999, 51/2004.

⁽⁴⁾ OJ C 164, 10.7.2002, p. 3, for both cases.

(25) Furthermore, according to Slovenia, mandatory contributions received by a public undertaking do not constitute State aid where the undertaking in question does not have the right to dispose freely of those funds. In the case of the purchase obligation, the source of financing of the scheme is the fee for network use paid by all electricity users, part of which is collected by the network operators in separate accounts for a pre-determined purpose.

5.2. Parafiscal levy

(26) Slovenia pointed out that the purchase obligation scheme is financed from part of the fee for network use paid by all electricity users under identical conditions that are known in advance. The components of the fee for network use are determined by the Energy Agency (energy market regulator) and the Government. Differences in price are covered by a mechanism whereby the network operators buy electricity at a fixed price and sell it at the market price. Any loss they incur as a result is covered from part of the fee for network use. So operators under the purchase obligation receive funds not from the State, but from part of the fee for network use.

(27) The operators have to allocate these funds to a special account. The funds also serve as a source for paying the additional premium where qualified producers sell part of their electricity independently or through an intermediary.

(28) Slovenia claimed that the scheme incorporates neither a state fund nor any other sort of fund through which the resources are transited. The resources to fund the scheme cannot be perceived as stemming from a parafiscal levy as they do not stem from the State budget and are not attributable to the State.

6. FURTHER INFORMATION SUBMITTED BY SLOVENIA

(29) By further correspondence with the Commission, Slovenia submitted additional information and commitments on the scheme.

Renewables

(30) Slovenia provided new information detailing the environmental protection objectives of the scheme. First of all,

the scheme was designed to contribute to the general environmental policy objectives:

(i) more efficient energy use;

(ii) increasing the proportion of renewable energy sources in the primary energy balance of the Community from 8,8 % in 2001 to 12 % by 2010.

(31) The stated objectives include targets for co-generation and for renewable sources, both of which fall under the electricity purchase scheme. These objectives are consistent with the targets set for Slovenia *inter alia* by Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market⁽¹⁾. Directive 2001/77/EC sets indicative targets for individual Member States. For Slovenia, the objective is a share of electricity consumption coming from renewables of 32,6 % by 2010.

(32) The total number of power plants from which electricity is purchased under the scheme is 434, of which 430 are connected to the distribution network and four to the transmission network. More than 90 % of the power plants connected to the distribution network are hydro-electric plants, the remainder being biomass power plants, solar plants and CHP plants.

(33) The scheme has been in force since the Decree on the rules for determining prices and purchasing of electricity from qualified electricity producers⁽²⁾ entered into force on 4 April 2002.

(34) The electricity purchase agreements currently in force between qualified power plants and network or system operators have been concluded for a period of 10 years.

(35) Slovenia explained that, according to Article 4 of the 1999 Energy Act, renewable sources of energy are defined as provided for in Directive 2001/77/EC.

⁽¹⁾ OJ L 283, 27.10.2001, p. 33.

⁽²⁾ Official Gazette of Slovenia No 25/02.

- (36) The main aim of the scheme is to ensure appropriate economic conditions for the development and implementation of new qualified power plant projects. A cost analysis of individual qualified power plants (with regard to primary energy source and size) has been used to work out purchase prices for individual types of qualified power plants that would guarantee at least the minimum return required for making new investments. The amount of aid or premium is determined as the difference between the uniform annual purchase price and the average market price of electricity. If the market price increases, the premiums are reduced accordingly.
- (37) The table below compares production costs of the qualified producers per power plant technology and size categories with the premium offered by the scheme. The table assumes an average market price of 8 SIT/kWh. This value is for reference only since, if market prices increase, premiums are decreased accordingly.
- (38) In all cases, production costs are higher than both the average market price and the guaranteed uniform purchase price under the qualified producers' scheme.

Table 1

Comparison of production costs of qualified power plants with the purchase price under the scheme

Type of qualified power plant (QPP) by primary energy source	Power	Production costs	Difference	Premium	
	Size	[kW]	[SIT/kWh]	[SIT/kWh]	
Hydroelectric plants	up to 1 MW	100	15,53	7,53	6,75
	from 1 MW to 10 MW	3 000	14,33	6,33	6,23
Biomass plants	up to 1 MW	600	24,80	16,80	8,69
	over 1 MW	1 500	18,18	10,18	8,17
Wind plants	up to 1 MW	100	23,28	15,28	6,55
	over 1 MW	20 000	15,49	7,49	6,05
Geothermal plants		3 000	14,59	6,59	6,05
Solar plants	up to 36 kW	36	175,26	167,26	81,67
	over 36 kW	100	122,58	114,58	7,46
Other QPPs (biogas)		120	30,39	22,39	20,97
QPPs or thermal plants using municipal waste	up to 1 MW	100	13,97	5,97	4,74
	from 1 MW to 10 MW	3 000	12,08	4,08	3,87
CHP thermal plants for district heating	up to 1 MW	700	16,54	8,54	5,9
	from 1 MW to 10 MW	3 000	14,56	6,56	5,38
CHP industrial thermal plants	up to 1 MW	700	14,95	6,95	4,83

N.B. Assuming a market price of SIT 8/kWh.

- (39) On the basis of a cost analysis and an economic calculation for categories of qualified power plant units, as shown in the table below, it emerges that the net present value (NPV) of the purchase prices applied under the scheme does not exceed the NPV of all investment costs at any of the qualified power plants.

Table 2

Comparison of NPV of purchase prices with investment costs of individual qualified power plants

Type of qualified power plant (QPP) by primary energy source	Capacity	Projected annual sales	Specific investment costs	Investment	Annual premium	Premium — investment costs (NPV)	
	<i>Size</i>	[kW]	[MWh]	[SIT/kW]	[SIT million]	[SIT million/a]	[SIT million]
Hydroelectric plants	up to 1 MW	100	456	480 000	48	2,9	- 21,0
	from 1 MW to 10 MW	3 000	10 656	380 000	1 140	63,1	- 549,1
Biomass plants	up to 1 MW	600	2 725	990 000	594	22,5	- 369,3
	over 1 MW	1 500	6 813	660 000	990	52,9	- 492,1
Wind plants	up to 1 MW	100	187	341 000	34	1,2	- 22,2
	over 1 MW	20 000	40 800	253 000	5 060	234,5	- 2 802,2
Geothermal plants		3 000	20 736	715 000	2 145	119,2	- 1 029,1
Solar plants	up to 36 kW	36	34	1 430 000	52	2,7	- 26,2
	over 36 kW	100	116	1 210 000	121	0,8	- 105,4
Other QPPs (biogas)		120	628	913 000	110	12,5	- 1,0
QPPs or thermal plants using municipal waste	up to 1 MW	100	624	319 000	32	2,8	- 7,0
	from 1 MW to 10 MW	3 000	19 728	286 000	858	72,5	- 212,0
CHP thermal plants for district heating	up to 1 MW	700	2 496	198 000	139	16,1	- 16,0
	from 1 MW to 10 MW	3 000	10 698	165 000	495	63,0	- 19,3
CHP industrial thermal plants	up to 1 MW	700	3 135	187 000	131	2,5	- 5,0

N.B. Applying a discount rate of 8 %, a period of 15 years and a decrease in the purchase price or premium of 5 % after five years and 10 % after ten years, in accordance with the Decree on purchasing.

- (40) The premiums for individual qualified power plants also include the return on capital prescribed by Slovenian legislation — this amounts to a minimum discount rate of 8 % on investments from public funds. Non-adjustment of purchase prices and premiums has meant that the current return for all qualified power plants using renewable energy sources is lower than 8 %, as shown in the table below. For solar plants the premium allows no return on capital (negative return), particularly in the case of small and medium-sized plants.

Table 3

Return on capital for individual qualified power plants

Type of qualified power plant (QPP) by primary energy source		Power	Premium	Return on capital included in premium
	Size	[kW]	[SIT/kWh]	
Hydroelectric plants	up to 1 MW	100	6,75	6,95 %
	from 1 MW to 10 MW	3 000	6,23	7,90 %
Biomass plants	up to 1 MW	600	8,69	2,30 %
	over 1 MW	1 500	8,17	6,00 %
Wind plants	up to 1 MW	100	6,55	0,40 %
	over 1 MW	20 000	6,05	6,35 %
Geothermal plants		3 000	6,05	7,30 %
Solar plants	up to 36 kW	36	81,67	- 1,4 %
	over 36 kW	100	7,46	- 15,0 %
Other QPPs (biogas)		120	20,97	6,80 %
QPPs or thermal plants using municipal waste	up to 1 MW	100	4,74	4,40 %
	from 1 MW to 10 MW	3 000	3,87	7,30 %
CHP thermal plants for district heating	up to 1 MW	700	5,9	0,49 %
	from 1 MW to 10 MW	3 000	5,38	4,20 %
CHP industrial thermal plants	up to 1 MW	700	4,83	- 0,1 %

N.B.: Return on capital calculated on investments in QPPs (see Table 2) at the current value of premiums.

Combined heat and power generation

- (41) Slovenia explains that new CHP units are equipped mainly with gas turbines, which, during operation, attain an electrical efficiency of between 37 % and 40 % and an overall efficiency of over 80 %. New smaller turbines attain an electrical efficiency of over 30 % and again an overall efficiency of over 80 %. Given that the average electrical efficiency of conventional thermal power plants in Slovenia is around 31 %, this shows the large primary energy savings (between 15 % and 25 %) made by generating electricity in co-generation units and making beneficial use of heat.
- (42) The operating efficiency of qualified CHP plants are fixed such as to comply with the efficiency criteria of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC ⁽¹⁾.
- (43) Slovenia demonstrated that electricity production costs in qualified CHP plants is in all cases higher than the scheme purchase price, that the NPV of premiums is below investment costs and that the return on investment is below 4,20 % (see last three lines of all tables above). The calculations take into account gains from the use of heat.

⁽¹⁾ OJ L 52, 21.2.2004, p. 50.

Security of supply

- (44) Slovenia has put in place a service of general economic interest in the field of security of electricity supply. In accordance with Article 11(4) of Directive 2003/54/EC, this service of general economic interest is based on the generation of electricity using domestic sources of fossil fuel. For this purpose, 600 000 tonnes a year of Slovenian brown coal is used for electricity generation. Brown coal is the only source of fossil fuel available in Slovenia. Since brown coal is used to the best effect at one of the units of Trbovlje (TET2, which is located near a brown coal mine), it falls to Trbovlje to meet this commitment. It was decided that this amount of electricity may be purchased through the guaranteed purchase system.
- (45) The corresponding electricity is purchased at a price verified each year by the authorities, and corresponding to electricity production costs in Trbovlje. No profit element is included in the purchase price.
- (46) Slovenia provided the following table estimating the amount of support for the company in past years:

Table 4

Estimated amount of support

	7-12.2001	2002	2003	2004
Quantity (GWh)	254,3	562,2	563,4	563,0
Purchase price (SIT/kWh)	17,00	15,36	15,34	16,59
Cost of purchase (SIT thousand)	4 323 943	8 636 245	8 644 855	9 339 836
Sales price (SIT/kWh)	7,13	5,97	7,60	7,71
Cost of energy sold (SIT thousand)	1 813 111	3 357 073	4 281 840	4 340 040
Amount of aid (SIT thousand)	2 510 832	5 279 172	4 363 015	4 999 795
Level of aid (SIT/kWh)	9,87	9,39	7,74	8,88

- (47) The use of domestic brown coal is in principle also possible at the Šoštanj power plant, which has five units, two of which are more recent and equipped with flue-gas cleaning equipment and three of which are older and have no cleaning equipment. These units burn coal from a nearby colliery and, under certain conditions, could also burn brown coal. The two newer units are fully employed in burning lignite from the nearby colliery. Roughly speaking, the capacity of that colliery satisfies those two units. Burning brown coal would be possible only in the three older units, which are not used to full capacity and still have some operating reserves. However, this option raises the following difficulties:
- (i) transport by rail of brown coal to Šoštanj would cost around EUR 5/t; given the planned brown coal production in the national energy balance (600 000 t/year), this would amount to EUR 3 million a year.
 - (ii) burning the coal would increase SO₂ emissions by 30 000 t/year, as units 1, 2 and 3 at Šoštanj do not have flue-gas cleaning equipment and brown coal from Slovenia contains between 2,2 % and 2,5 % sulphur;
 - (iii) since units 1, 2 and 3 at Šoštanj have a considerably lower thermodynamic efficiency than Trbovlje, burning the same amount of brown coal for electricity generation in the three units at Šoštanj instead of at Trbovlje would increase CO₂ emissions by around 15 %.
- For the above reasons it can be seen that burning brown coal in the units at Šoštanj cannot be justified from an economic point of view.

(48) The only other possibility for burning brown coal is at the Ljubljana thermal power and heat plant (TE-TOL), which used domestic brown coal as its main energy source until 2000. Since the units at TE-TOL do not have in-built flue-gas cleaning equipment, they can no longer burn brown coal from Slovenia because it contains between 2,2 and 2,5 % sulphur. TE-TOL stopped burning domestic brown coal for that reason and now burns only imported Indonesian coal, which has a considerably lower sulphur content (< 0,5 %), so that the plant does not need flue-gas desulphurisation equipment. Fitting TE-TOL units with flue-gas cleaning equipment would be uneconomic.

(49) Slovenia undertook to ensure that no more than 15 % of the overall primary energy necessary to produce the energy consumed in Slovenia in any calendar year receives State support for security of supply.

Overlap

(50) The purchase obligation scheme provides for only part of the qualified producer's depreciation costs to be covered.

(51) The Rules on the allocation of funds for the promotion of the exploitation of renewable energy resources, efficient energy use and CHP ⁽¹⁾ allowed investment aid for power plants using renewable sources and CHP plants. However, investment aid for such plants has been abolished under the new Rules on the allocation of funds for the promotion of efficient use of energy and utilisation of energy resources ⁽²⁾. Exceptions have been made for power plants not connected to the public grid that do not benefit from the scheme, and for plants with a capacity of up to 10 MW that employ renewable sources of energy and use new or obsolete technology in which, because of the high cost price of generating electricity, the purchase price of electricity is not high enough to ensure the profitability of the investment. The type of technology eligible for the granting of incentives is determined in periodic calls for tenders.

(52) To prevent excessive aid overlap, Article 14 of the Decree on the rules for determining prices and purchasing of electricity from qualified electricity producers states

that, where a qualified producer has received any subsidy for the construction of a power plant, the guaranteed purchase price is reduced proportionately.

(53) Pursuant to that Article, a qualified electricity producer must, on signing an agreement for the purchase of electricity with the operator of the network to which it is connected, declare the amount of any subsidy it has received for the construction of power plants. The declared amount is used as a basis for calculating the reductions in the guaranteed purchase price. On the basis of the above provisions, the guaranteed purchase price for power plants (depending on the type of plant and the rated power) is reduced by 5 % for each 10 % of State aid received compared with the amount of investment in the power plant.

(54) The provisions of the Decree are based on the premise that the full guaranteed price for electricity from qualified producers covers the fixed costs and variable costs. The average ratio between fixed and variable costs is assumed to be 50:50.

(55) Slovenia has undertaken to refine the reduction rule in order to adapt it more precisely to the breakdown between fixed and variable costs depending on technologies.

Commitments of the Member State

(56) Slovenia undertook to prepare amendments to the regulations on electricity from renewable energy sources and CHP in order to change the current financing system of the scheme. These amendments will be introduced in order to make the support scheme compatible with Articles 25 and 90 of the EC Treaty:

- (i) the mode of collection of the support funds will be changed to lump-sum payments on connection, irrespective of the amount and source of the electricity consumed. When determining the amount of the lump sum payment, account will be taken of the power of the connection (fuse rating) and the voltage level at which a particular consumer and consumer group is connected;

⁽¹⁾ Official Gazette of Slovenia No 74/01.

⁽²⁾ Official Gazette of Slovenia No 49/03.

(ii) for the period from Slovenia's accession to the Union until the time when the new mode of collection of funds is put in place, Slovenia will ensure that importers of green electricity can apply for reimbursement of the levy financing the aid to renewables in the scheme, provided that they can prove that their imports are indeed of green origin. The conditions on documentation to prove the green origin of imported electricity are primarily based on the Community system of guarantees of origin. Where necessary, in order to prevent artificially high declarations against which the Community system of guarantees of origin does not afford sufficient protection, limits will be set on the amounts to be reimbursed per distributor. A similar system will be put in place for CHP electricity, based on the Community system of guarantees of origin for CHP.

7. ASSESSMENT

7.1. Existing Community Directives concerning electricity generation

- (57) Electricity generation is subject to the provisions of several Community Directives, including in particular Directives 2003/54/EC, 2001/77/EC and 2004/8/EC.
- (58) Article 3(2) of Directive 2003/54/EC provides as follows: 'Having full regard to the relevant provisions of the Treaty, in particular Article 86, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection.'
- (59) Article 11(4) of Directive 2003/54/EC reads: 'A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.'
- (60) Directive 2001/77/EC sets out national indicative targets for the consumption of electricity from renewable energy sources. Article 3 of that Directive provides as follows:

'1. Member States shall take appropriate steps to encourage greater consumption of electricity produced

from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.

2. Not later than 27 October 2002 and every five years thereafter, Member States shall adopt and publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources in terms of a percentage of electricity consumption for the next ten years. The report shall also outline the measures taken or planned, at national level, to achieve these national indicative targets. To set these targets until the year 2010, the Member States shall:

— take account of the reference values in the Annex,

— ensure that the targets are compatible with any national commitments accepted in the context of the climate change commitments accepted by the Community pursuant to the Kyoto Protocol to the United Nations Framework Convention on Climate Change.'

- (61) The Annex to Directive 2001/77/EC, as amended by the Act of Accession, stipulates a national target of 33,6 % for Slovenia.

7.2. Assessment of the support for green electricity and combined heat and power producers

7.2.1. Existence of aid within the meaning of Article 87(1) of the EC Treaty

- (62) For a measure to be State aid within the meaning of Article 87(1) of the EC Treaty, it must give a competitive advantage in a specific way, it must affect or threaten to affect competition and trade between Member States, and it must involve state resources.
- (63) It is clear that the scheme is specific, as it targets only certain power plants. It is also evident that it confers an advantage to those power plants, as the very purpose of the system is to allow such plants to sell their electricity at a price which is higher than the market price.

- (64) Electricity is exchanged between Member States. Directive 2003/54/EC completes the creation of an internal market in electricity that was initiated by Directive 96/92/EC. Slovenia's network is connected in particular with those of Austria and Italy. Slovenia exchanges electricity with its neighbours. For instance, in 2004 Slovenia imported 6 314 GWh of electricity and exported 7 094 GWh⁽¹⁾. The measure therefore has an impact on trade between Member States.
- (65) The Commission also notes that Slovenia did not question the fulfilment of any of the three criteria above.
- (66) On the fourth criterion, the involvement of state resources, the Commission does not concur with Slovenia's argument that the system is equivalent to the one examined by the Court of Justice in the *PreussenElektra* case.
- (67) The two systems differ in their financing mechanisms. In *PreussenElektra*, the feed-in tariff was financed directly from private electricity supply undertakings, which had to purchase electricity at a price above the market price from renewable electricity producers. In the present case, the costs created through the feed-in tariff are financed through a parafiscal levy.
- (68) In this respect, the Commission takes note of the fact that the scheme is financed via the proceeds of a levy which is imposed by the State. The proceeds of the levy are then transferred to an account managed by the public authorities, unlike in the *PreussenElektra* case. The public authorities allocate the resources in the account according to a distribution scheme determined by the law.
- (69) The constant practice of the Commission is to consider that the proceeds of such levies are state resources⁽²⁾. This practice is in line with the Court's case law, according to which the proceeds of levies imposed by the State, transferred to funds designated by the State and used for the purpose of advantaging certain companies, are deemed to be state resources. (See for instance the Court's decisions in Cases C-173/73⁽³⁾ and C 78/79⁽⁴⁾.)
- (70) In its judgment in *Pearle*⁽⁵⁾, the Court declared that the proceeds of a parafiscal levy imposed on its members by a publicly controlled board could not be viewed as state resources. The levy was decided by the professional board in the optics sector and imposed on all of its members. It was used for the purpose of financing advertising campaigns for the benefit of the sector, that is, of the contributors themselves.
- (71) The Court ruled that the measure did not constitute State aid because the decision to set up the levy was not attributable to the State and the proceeds of the levy were not state resources.
- (72) Unlike in the system studied by the Court, the responsibility of the State is very clear in the case under consideration here, since the State creates the levy itself by a law.
- (73) As regards the origin of the funds, the Commission notes that it is different from the origin of the funds involved in the aforementioned judgment, since the monies are collected not from contributions by the undertakings that benefit from the measure, but from all customers that purchase electricity, whether they be beneficiaries of the scheme or their competitors. Such a mechanism could not be achieved by an association of undertakings like the one that was considered in the Court's judgment. This reveals the very fiscal nature of the scheme, which is made possible only by the powers of the State.
- (74) The Commission considers that this difference is enough for it to conclude that State aid exists in the case in question.
- (75) The aid scheme was put in place before Slovenia's accession to the European Union. The primary legal basis for the scheme is the 1999 Energy Act. The definition of qualified producers benefiting from the scheme was set out in 2001 by the Ordinance relating to the conditions for obtaining the status of qualified producer of electricity⁽⁶⁾.

7.2.2. Legality of the aid

⁽¹⁾ Source: International Energy Agency. http://www.iea.org/Textbase/stats/electricitydata.asp?COUNTRY_CODE=SI

⁽²⁾ See for instance Case N 161/04 — Portugal (OJ C 250, 8.10.2005, p. 9).

⁽³⁾ Judgment of 2.7.1974 in case C 173/73, *Italy v Commission*.

⁽⁴⁾ Judgment of 22.3.1997 in case C-78/79, *Steinike v Federal Republic of Germany*.

⁽⁵⁾ Judgment of Court of Justice of 15.7.2004 in case C-345/02.

⁽⁶⁾ Official Gazette of Slovenia, Nos 29/01 and 99/01.

- (76) The State's financial exposure due to the scheme was not fixed at the time of accession. The scheme does not have a limited or predefined number of beneficiaries. Any power plant that meets the technical requirements laid out in the aforementioned Ordinance can receive the aid. This includes in particular any new qualified power plant connected to the network after the accession of Slovenia. Even for each individual aid measure granted under the scheme, the State's exposure cannot be known in advance, because it depends on the difference between purchase price fixed by the State for the plant and the average market price, which fluctuates in an unforeseeable manner. Slovenia has underlined that the actual burden of the scheme for the State can only be known *ex post* at the end of each year in which the scheme is applied.
- (77) In view of the above, the Commission considers that the scheme is still applicable after Slovenia's accession to the European Union.
- (78) The Commission notes that the above line of reasoning was already laid out in the decision to open proceedings and that Slovenia did not contest it in its comments.
- (79) The Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (hereinafter 'Act of Accession') lists the categories of aid which, upon accession, are regarded as existing aid within the meaning of Article 88(1) of the EC Treaty:
- aid measures put into effect before 10 December 1994. The scheme was put into effect in 2001 and therefore does not fall within this category;
 - aid measures listed in the Appendix to Annex IV to the Act of Accession. The scheme is not part of this list and therefore does not fall within this category;
 - aid measures which, after a specific procedure usually known as 'the interim procedure', have not been objected to by the Commission.

All aid still applicable after the date of accession and which does not fulfil the conditions set out above is

considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty.

- (80) The scheme falls into none of the three categories listed above. Therefore, it must be regarded as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty. This aid was not notified to the Commission and hence constitutes unlawful aid within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾.

7.2.3. *Compatibility of the aid with the EC Treaty*

- (81) The Commission notes that the scheme consists of three parts as it provides aid for three different groups of beneficiaries. In the case of the first two groups, namely green electricity producers and efficient cogeneration plants, Slovenia's objective is environmental protection. The aid provided for the third group of beneficiaries, namely the Trbovlje power plant, is earmarked for maintaining a certain level of security of electricity supply.
- (82) Taking into account the different objectives of the measures, the different parts of the scheme will be assessed separately.

Compatibility with the environmental guidelines of the aid to green electricity producers

- (83) The Commission assessed the compliance of the support mechanism for green electricity producers' plants in the light of the environmental guidelines, particularly points 58 *et seq.* thereof, and finds as follows.
- (84) The Commission notes that the definition of renewable sources of energy in the scheme is in line with the definition of Directive 2001/77/EC. Therefore, the scheme is in compliance with point 6, eighth subparagraph, of the environmental guidelines and points 58 *et seq.* can be applied.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

- (85) As stated in point 59, 1st subparagraph, of the environmental guidelines, Member States may compensate for the difference between the production cost of renewable energy and the market price of the form of power concerned. Thus, such compensation can relate only to the extra production costs for environmentally friendly electricity production as compared to the production costs for energy based on conventional energy sources. Any support must however only cover plant depreciation and, if Member States can show that this is indispensable, a fair return on capital.
- (86) Slovenia calculated the compensation in form of fixed tariffs (feed-in tariffs) for the energy supported, as described above. The law sets out objective methods of calculating the levels of aid. According to the information mentioned above, the support will not exceed the depreciation plus a fair return on capital. The aid will be granted only over a period of 10 years, as that is the duration of the agreements signed between the network operators and green electricity producers. This period is below the typical 15-year depreciation period for such plants. The Commission notes positively that in all cases the cost production price of a qualified power plant is higher than both the average market price and the guaranteed purchase price. Thus, the difference between the market price and production costs of green electricity is higher than the premium for all power plants.
- (87) Furthermore, point 59, 2nd subparagraph, of the environmental guidelines stipulates that, in determining the amount of operating aid, account should be taken of any investment aid granted to the firm in question in respect of the new plant. Following the decision to open proceedings, Slovenia informed the Commission that only a limited number of renewable electricity producers benefited from investment aid in addition to the operating aid in question. Slovenia implemented legislation obliging beneficiaries of investment aid to declare the amount of aid granted before feeding their electricity to the network at fixed prices.
- (88) When investment aid has been granted, the feed-in price is reduced. The reduction is proportionate to half of the investment aid granted. Although that fixed proportion may in theory result in the possibility of overcompensation for technologies with small operating costs, Slovenia has demonstrated that, in practice, in the very rare cases where investment aid has been combined with the aid scheme in the past, no overcompensation has taken place. This is due to the fact that for the time being Slovenia does not have renewable power plants with low operating costs, such as wind plants.
- (89) For the future application of the scheme, Slovenia has undertaken to adapt where necessary the proportionate reduction in such a way that no overcompensation takes place in compliance with point 59, 2nd subparagraph, of the environmental guidelines.
- (90) So, in the Commission's view, Slovenia has demonstrated that the support granted under the measure will not exceed the extra production costs of the renewable energy sources supported by the measure. Accordingly, the measure is compatible with points 58 *et seq.* of the environmental aid guidelines.
- Compatibility with the environmental guidelines of the aid to combined heat and power producers*
- (91) The Commission assessed the compliance of the support mechanism for efficient cogeneration plants with the environmental guidelines, particularly points 66 and 67 thereof, and finds as follows.
- (92) First of all, the Commission notes that, in compliance with point 66 of the environmental guidelines, the operating efficiency of the CHP units benefiting from the scheme exceeds the reference values set out in Directive 2004/8/EC. Slovenia will update the reference values in accordance with the Directive. The combined heat and power plants covered by the scheme therefore fulfil the eligibility requirements set out in point 31 of the environmental guidelines.
- (93) As is evident from the information submitted by Slovenia, the average cost of producing electricity in CHP plants is in all cases higher than the guaranteed purchase price⁽¹⁾. The calculations also take into account revenue from the production and sale of heat. The Commission therefore takes the view that the amount of aid is calculated in accordance with point 66 of the environmental guidelines.
- (94) Slovenia informed the Commission that the aid for CHP plants is granted under the same rules as for the green electricity producers. As these rules were proved to be compatible with the environmental guidelines, the Commission finds that, consequently, the scheme component providing aid for the CHP plants is compatible with point 66 of the environmental guidelines.

⁽¹⁾ See last three lines of the tables above.

Compliance with Articles 25 and 90 EC of the financing mechanism of the aid to green and combined heat and power producers.

- (95) The Commission notes that the imposing of a levy on both domestically produced and imported green electricity to the benefit of domestically produced green electricity may have led in the past to discrimination against imported green electricity. However, Slovenia has undertaken to introduce the possibility of reimbursing the levy on imported green electricity. The Commission notes that the reimbursement will be based primarily on the Community system of guarantees of origin. By applying additional requirements, the Member State will protect the system against artificially high import declarations. In assessing the proportionality of the requirements, the Commission considered the risk of artificial declarations and the small size of the Slovenian market in which such artificial declarations could have a significant impact on the system of support. The Commission therefore considers that Slovenia has undertaken to establish an appropriate instrument to remedy any discrimination which may have occurred in the past.
- (96) The Commission notes that Slovenia has undertaken to implement the new financing mechanism based on a connection fee which will be independent from the actual consumption of domestically produced or imported green electricity. This new mechanism will not discriminate against imported green electricity.

Conclusion on aid to green electricity and combined heat and power producers

- (97) In view of the above, the aid to both green electricity plants and combined heat and power plants fulfils the criteria of the environmental guidelines. Since this is sufficient to declare the aid compatible with the common market, the Commission sees no need to analyse whether the aid could be declared compatible in the light of other provisions, even though it considered those provisions in its decision to open proceedings.

7.3. Assessment of the support to the Trbovlje power plant

- (98) Slovenia considers the support to the Trbovlje power plant as compensation for the costs of a service of general economic interest in the field of security of electricity supply.
- (99) Compensation for the costs of a service of general economic interest may benefit from an exception to

the principle of the prohibition of State aid. In certain cases, such compensation may not even be State aid within the meaning of Article 87(1) of the EC Treaty. In its judgment in Case C-280/00 ⁽¹⁾ (hereinafter 'the *Altmark* judgment'), the Court of Justice set four conditions for state support aimed at compensating for costs of a service of general economic interest not to be State aid within the meaning of Article 87(1) of the EC Treaty.

- (100) The Commission analysed the support to Trbovlje in the light of these four conditions.
- (101) **First condition:** 'the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined'.
- (102) The Commission notes that Slovenian law entrusts the Trbovlje plant with a security of supply obligation, making a direct reference to Directive 2003/54/EC, and in particular its Articles 3(2) and 11(4), cited above.
- (103) The Commission has already found in several decisions that Article 11(4) of Directive 2003/54/EC, read in conjunction with Article 3(2) of the same Directive, could be interpreted as providing the basis for public service obligations in the field of security of supply (?). The Article mentions a maximum of 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned. Slovenia undertook to restrict the scope of the support to the Trbovlje plant so that this limit is respected, even taking into account support granted for the same purpose outside the scheme under review in this decision. The obligation is also limited in time to 2009.
- (104) The Commission therefore considers that the first condition is fulfilled.
- (105) **Second condition:** 'parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner'.

⁽¹⁾ Judgment of the Court of Justice dated 24.7.2003 in case C-280/2000, *Altmark trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

⁽²⁾ See Commission Decisions in Cases N 34/99 (OJ C 5, 8.1.2002, p. 2), NN 49/99 (OJ C 268, 22.9.2001, p. 7), and N 6/A/2001 (OJ C 77, 28.3.2002, p. 26).

- (106) In the case under consideration the support takes the form of a fixed purchase price. Every year, the Government issues a published decision fixing the amount of electricity covered by the purchase obligation, and the purchase price for this electricity. The price-fixing follows a transparent methodology with a list of eligible costs, which cover only the plant's generation costs.
- (107) The Commission therefore considers that the second condition is fulfilled.
- (108) **Third condition:** 'the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations'.
- (109) The purchase price is established with a view to covering no more than the cost of generating the expected amount of electricity. It does not include any profit element.
- (110) The Commission therefore considers that the third condition is fulfilled.
- (111) **Fourth condition:** 'where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations'.
- (112) The Trbovlje plant was not chosen on the basis of a public procurement procedure. However, the Commission notes that Slovenia has demonstrated that, in the case in question, the choice of Trbovlje was the one that led to providing the service of general economic interest at the least cost to the community, having regard to the specific factual and legal constraints prevailing in this case. In the present case the public service obligation consists in ensuring national security of supply up to 2009 by using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15 % of the overall primary energy necessary to produce the electricity consumed in Slovenia.
- (113) In the current situation, no more than two power plants in Slovenia could in any event have fulfilled the public service obligation in question in their current state. These are the Šoštanj plant and the Trbovlje plant.
- (114) Other plants would require the construction of expensive flue-gas cleaning equipment to be able to use it, which would make this option uneconomic. The two units of the Šoštanj plant that can use domestic fuel are already used to their maximum capacity using domestic lignite. It would not be economical to increase their maximum domestic fuel-burning capacity, as this would require an extension of the plant or the upgrading of some of its units with flue-gas cleaning equipment. The output of these two units is taken into account by the Slovenian authorities when calculating the 15 % limit referred to in paragraph 112. Therefore, only the Trbovlje plant was in a position to meet the public service obligation in this case. The support to Trbovlje covers only the share of the 15 % which cannot be covered by the Šoštanj plant.
- (115) Slovenia has therefore used the most economically efficient way to achieve the public service obligation which consists in producing electricity with domestic fuel. Considering also that the compensation for the public service obligation does not include any profit element, the Commission concludes that the public service obligation is fulfilled at the least cost for the community. A public tendering procedure would not have delivered a cheaper solution. Indeed, in the short term (up to 2009) upgrading existing plants or building new, more efficient ones (supposing this would be possible) would have required high investment costs and any bidder would have demanded compensation including at least a reasonable profit by way of return on the invested capital. The result would therefore have been an increase in the amount of compensation to be granted to the operator entrusted with the SGEI obligation.
- (116) Furthermore, the Commission notes that there is no indication that the Trbovlje plant is not operated as a well-run typical undertaking or is run in a particularly inefficient way. The Commission notes that the company already restructured its activities at the time of the economic transition in Slovenia, in particular by closing down its older and less efficient units, which were outdated, and reducing its staff. It is also noted that in any event the remuneration for the public service obligation does not include any profits.

- (117) Finally, the Commission notes that the Trbovlje plant will not be in a position to use the effect of the new round of the Emission Trading System (ETS) for 2008-2012 to generate additional revenue or profit as a result of its specific public service obligation compared to what any otherwise comparable undertaking would be able to realise. Indeed, the State imposes on Trbovlje a public service obligation to generate electricity. Unlike plants that freely sell their electricity on the market, Trbovlje will therefore not have the alternative of ceasing to generate electricity and selling on the CO₂ market the necessary allowances it received for free without having to buy an equivalent number of allowances in order to fulfil its surrender obligations. This is without prejudice to the plant improving efficiency in line with the incentive structure created by the ETS and thereby freeing spare allowances which it could sell while respecting its public service obligation to generate a certain amount of electricity.
- (118) The above reasoning is based on the premise that, at present, lignite is the most economical source of domestic fuel for the generation of electricity in Slovenia. The Commission considers that, at present, and for the short-term future, this is the case.
- (119) However, the Commission also notes that certain electricity generation technologies using renewable sources of domestic fuel already now have generation costs that are not very far above lignite generation costs. This is the case for large biomass plants, for which, according to Slovenia, the generation costs are on average 18,18 SIT/MWh, which is slightly more than 10 % above the costs of Trbovlje.
- (120) The Commission therefore notes that the reasoning in the present Decision is based on the particular factual background of the present case and in particular the fact that the obligation imposed on the Trbovlje plant will end in 2009. In the longer run, when the costs of renewables have decreased and their total capacity has increased, the situation may be different.
- (121) Furthermore, the Commission takes into account that this particular public service obligation has been entrusted on the basis of a Community instrument — Directive 2003/54/EC. The special nature of this public service obligation — ensuring national security of supply — may be construed as limiting its scope, by definition, to the national boundaries within which the provider was to be entrusted.

- (122) The Commission therefore considers that the method used by Slovenia to fix the amount of compensation granted to the Trbovlje plant ensures that the SGEI is provided with the least cost to the community up to 2009. In the specific legal and factual circumstances of the case, the compensation does not appear to exceed what a typical, well run undertaking would have requested in order to carry it out. Therefore the Commission considers that the fourth condition is fulfilled, bearing in mind that the public service obligation ends at the end 2009. This limitation in time will also leave scope for Slovenia to consider whether, as of 2010, it will switch to 'clean coal' technologies for the use of lignite or convert to biomass or other less polluting fuel, in line with the European Union's energy policy ⁽¹⁾.
- (123) In view of the above, the Commission concludes that the support to the Trbovlje power plant in the above specific circumstances fulfils the four conditions of the Altmark judgment and does not constitute aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to qualified electricity producers using renewable sources of primary energy as defined in the Slovenian Energy Act is compatible with Article 87(3)(c) of the EC Treaty.

Article 2

The aid granted to qualified electricity producers using combined heat and power plants as defined in the Slovenian Energy Act is compatible with Article 87(3)(c) of the EC Treaty.

Article 3

The support granted to the Trbovlje power plant as defined in the Slovenian Energy Act does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 4

The present Decision is addressed to the Republic of Slovenia.

Done at Brussels, 24 April 2007.

For the Commission

Neelie KROES

Member of the Commission

⁽¹⁾ See Energy package of January 2007, and in particular COM(2006) 843 final.