



C/2024/1921

5.3.2024

POMOC PAŃSTWA – SZWECJA

Pomoc państwa SA.56908 (2023/C) (ex 2020/N) – Przedłużenie i zmiana programu pomocy na rzecz biogazu przeznaczonego do wykorzystania jako paliwo silnikowe w Szwecji

Pomoc państwa SA.56125 (2023/C) (ex 2020/N) – Przedłużenie i zmiana programu pomocy SA.49893 (2018/N) – Zwolnienie podatkowe dla biogazu i biopropanu, których źródłem nie jest żywność i które wykorzystuje się do produkcji ciepła

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(C/2024/1921)

Pismem z dnia 30 stycznia 2024 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Szwecję o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej (TFUE) dotyczącego części wyżej wspomnianej pomocy/wyżej wspomnianego środka.

Zainteresowane strony mogą zgłaszać uwagi na temat pomocy/środka pomocy, w odniesieniu do których Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres:

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Otrzymane uwagi zostaną przekazane Szwecji. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

Procedura

29 czerwca 2020 r. Komisja przyjęła dwie decyzje o braku sprzeciwu zatwierdzające przedłużenie na lata 2021–2030 programu zwolnień podatkowych dla biogazu i biopropanu przeznaczonego do wykorzystania jako paliwo silnikowe (SA.56908) oraz programu zwolnień podatkowych dla biogazu i biopropanu wykorzystywanego do produkcji ciepła (SA.56125) w Szwecji („decyzje z 2020 r.”).

Programy te zostały po raz pierwszy zatwierdzone decyzjami Komisji w sprawie pomocy państwa odpowiednio w 2003 i 2007 r. Następnie były one wielokrotnie przedłużane i zatwierdzone przez Komisję do dnia 31 grudnia 2020 r. jako pomoc zgodna z rynkiem wewnętrznym.

21 grudnia 2022 r. Sąd wyrokiem w sprawie T-626/20 – Landwärme/Komisja (ECLI:EU:T:2022:853) stwierdził nieważność decyzji z 2020 r. Sąd orzekł, że Komisja powinna była powziąć wątpliwości co do zgodności tych programów z rynkiem wewnętrznym i powinna była wszcząć formalne postępowanie wyjaśniające zgodnie z art. 108 ust. 2 TFUE.

Sąd uznał, że Komisja dysponowała informacjami przekazanymi jej przez Landwärme GmbH („Landwärme”), niemieckiego producenta biometanu, wskazującymi na możliwość istnienia nadmiernej rekompensaty wynikającej z kumulacji szwedzkich systemów zwolnień podatkowych z pomocą na produkcję energii z biogazu przyznaną przez inne państwa członkowskie, w szczególności przez Danię. Sąd uznał, że na podstawie informacji przekazanych jej przez Landwärme Komisja powinna była uwzględnić w swojej ocenie sporną kumulację w kontekście rosnącego przywozu do Szwecji biogazu z niektórych innych państw członkowskich, w szczególności z Danii. Sąd orzekł, że Komisja nie dokonała oceny takiej kumulacji i nie mogła w związku z tym wykluczyć istnienia nadmiernej rekompensaty. Sąd stwierdził, że świadczyło to o poważnych trudnościach, które Komisja powinna była zbadać w ramach formalnego postępowania wyjaśniającego.

W związku ze stwierdzeniem nieważności decyzji z 2020 r. wdrażanie programów należy uznać za niezgodne z prawem.

Opis pomocy, w odniesieniu do której Komisja wszczyna postępowanie

W ramach przedmiotowych programów Szwecja przyznaje zwolnienie z podatku akcyzowego od energii i od dwutlenku węgla na zakup zrównoważonego biogazu i biopropanu, których źródłem nie jest żywność i które wykorzystuje się jako paliwo silnikowe lub do produkcji ciepła. Zwolnienie podatkowe ma zastosowanie zarówno do krajowego, jak i do importowanego biogazu i biopropanu. Celem programów jest ochrona środowiska zapewniana przez zwiększone wykorzystanie tego rodzaju biogazu i biopropanu zamiast odpowiadających im paliw kopalnych.

Chociaż omawiane programy mają na celu zachęcanie do konsumpcji zrównoważonego biogazu i biopropanu, których źródłem nie jest żywność, pośrednio przynoszą one również korzyści ich producentom w postaci zwiększonego popytu na ich produkty.

Podstawą prawną programów jest szwedzka ustawa o podatku akcyzowym od energii (1994:1776). Szacunkowy budżet programów na lata 2021–2030 wynosi 5,15 mld SEK (około 477 mln EUR) w przypadku paliw silnikowych i 5,94 mld SEK (550 mln EUR) w przypadku paliw grzewczych.

Ocena środka

Komisja ponownie zbadała zgodność programów z rynkiem wewnętrznym w świetle warunków ustanowionych w Wytycznych w sprawie pomocy państwa na ochronę środowiska i cele związane z energią z 2014 r. (Dz.U. C 200 z 28.6.2014, s. 1) w odniesieniu do okresu od 1 stycznia 2021 r. do 26 stycznia 2022 r. oraz – w odniesieniu do okresu od 27 stycznia 2022 r. do 31 grudnia 2030 r. – w Wytycznych w sprawie pomocy państwa na ochronę klimatu i środowiska oraz cele związane z energią z 2022 r. (Dz.U. C 80 z 18.2.2022, s. 1). Komisja doszła w szczególności do wstępnego wniosku, że programy ułatwiają rozwój działalności gospodarczej, a mianowicie produkcji zrównoważonego biogazu i biopropanu, których źródłem nie jest żywność, mają efekt zachęty i są niezbędne do osiągnięcia europejskich celów środowiskowych.

Niemniej jednak, jak podkreślił Sąd i jak wskazują informacje przekazane Komisji w momencie przyjmowania decyzji z 2020 r., Komisja zauważa, że przywóz z innych państw, a w szczególności z Danii, najwyraźniej wzrósł w latach poprzedzających zgłoszenie przedłużenia programów. W związku z tym Komisja zastanawia się, jakie są czynniki decydujące o wzroście przywozu biogazu do Szwecji i czy taki wzrost można wytłumaczyć środkami wprowadzonymi przez Szwecję i tymi wprowadzonymi przez niektóre inne państwa członkowskie, w szczególności przez Danię. Komisja chce wyjaśnić, jaki wpływ na wzrost przywozu do Szwecji biogazu produkowanego w innych państwach członkowskich, w szczególności w Danii, ma połączenie pomocy przyznanej w Szwecji w ramach przedmiotowych programów i pomocy przyznanej przez inne państwa członkowskie producentom biogazu.

Komisja ma ponadto wątpliwości co do proporcjonalności tych programów ze względu na potencjalną kumulację pomocy przyznanej w ich ramach z pomocą przyznaną przez Danię producentom biogazu. Komisja chce wyjaśnić, czy domniemana kumulacja dotyczy tych samych kosztów kwalifikowalnych, a jeżeli tak, to czy prowadzi to do nadmiernej rekompensaty na rzecz producentów, którzy otrzymują pomoc na produkcję w Danii, a sprzedają biogaz w Szwecji. Komisja chce również pozyskać informacje od zainteresowanych stron, które uważają i mają konkretne dowody na to, że szwedzkie programy prowadziły do nadmiernej rekompensaty na rzecz producentów w przypadkach, gdy inne państwo członkowskie przyznawało pomoc na produkcję.

Podsumowując, Komisja chce wyjaśnić wątpliwe kwestie na podstawie obecnie dostępnych informacji i elementów opisanych powyżej i zwraca się do zainteresowanych stron o przedstawienie uwag na temat proporcjonalności pomocy ze względu na potencjalną kumulację pomocy przyznanej producentom biogazu w ramach przedmiotowych programów i pomocy na produkcję przyznanej przez Danię oraz – potencjalnie – inne państwa członkowskie, a także wskazanie, czy taka kumulacja prowadzi do nadmiernej rekompensaty na rzecz tych producentów w przypadku gdy sprzedają oni biogaz w Szwecji.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589 wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od beneficjentów.⁽¹⁾

⁽¹⁾ Rozporządzenie Rady (UE) 2015/1589 z dnia 13 lipca 2015 r. ustanawiające szczegółowe zasady stosowania art. 108 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. L 248 z 24.9.2015, str. 9, ELI: <http://data.europa.eu/eli/reg/2015/1589/oj>)

TEKST PISMA

The Commission wishes to inform Sweden that, following the judgment of the General Court of 21 December 2022 in case T-626/20 — *Landwärme v Commission*⁽¹⁾ ('the GC Judgment'), it has re-examined the information supplied by your authorities on the measures referred to above.

After re-examination of the notification, the Commission has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- (1) Following pre-notification contacts, Sweden notified to the Commission on 1 April 2020, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union ('TFEU'), the prolongation and modification of a tax exemption scheme for biogas used as motor fuel (the 'motor fuel scheme'), as well as the prolongation and modification of a tax exemption scheme on renewable fuels for heat generation (the 'heating fuel scheme') (together, the 'schemes').
- (2) The motor fuel scheme was first approved by the Commission in 2003⁽²⁾. It was then repeatedly prolonged and approved by the Commission as compatible aid. The latest prolongation approval decision in case SA.43302 (2015/N)⁽³⁾ was based on the Guidelines on State aid for environmental protection and energy 2014-2020 ('EEAG')⁽⁴⁾ and was valid until 31 December 2020.⁽⁵⁾
- (3) The heating fuel scheme was first approved by the Commission in 2007⁽⁶⁾. It was then repeatedly prolonged and approved by the Commission as compatible aid. The latest prolongation approval decision in case SA.49893 (2018/N)⁽⁷⁾ was based on the EEAG and was valid until 31 December 2020.⁽⁸⁾
- (4) On 18 October 2019 and 19 June 2020, the Commission received submissions from Landwärme GmbH ('Landwärme'), a German biomethane producer, concerning potential overcompensation of Danish biogas producers resulting from the cumulation of the Danish support to biogas producers⁽⁹⁾ and of the Swedish tax exemption for biogas.
- (5) On 29 June 2020, the Commission adopted Decision C(2020) 4487 final and Decision C(2020) 4489 final approving the modification and prolongation until 31 December 2030 of the motor fuel scheme (SA.56908 (2020/N)) and the heating fuel scheme (SA.56125 (2020/N)) ('the 2020 Decisions')⁽¹⁰⁾ ⁽¹¹⁾.

⁽¹⁾ ECLI:EU:T:2022:853

⁽²⁾ Commission decision of 11 November 2003 in case N 480/02 — Sweden — Excise duty reduction in favour of carbon dioxide neutral fuel (OJ C 33, 6.2.2004, p. 8).

⁽³⁾ Commission decision of 14 December 2015 in case SA.43302 (2015/N) — Sweden — Tax exemptions for biogas used as motor fuel (OJ C 241, 1.7.2016, p. 6).

⁽⁴⁾ OJ C 200, 28.6.2014, p. 1-55.

⁽⁵⁾ The Commission approved an increase in the budget of the motor fuel scheme in its decision of 14 December 2020 in case SA.59125 (2020/N) — Sweden — Budget extension for scheme SA.43302 (2015/N) — Tax exemptions for biogas used as motor fuel (OJ C 41, 5.2.2021, p. 12).

⁽⁶⁾ Commission decision of 22 June 2007 in case N 866/06 — Sweden — Tax exemption; Certain renewables in heat generation (OJ C 220, 20.9.2007, p. 2).

⁽⁷⁾ Commission decision of 19 July 2018 in case SA.49893 (2018/N) — Sweden — Prolongation of the scheme SA.35586 (2012/N) — Tax exemptions; Certain renewables in heat generation (OJ C 127, 5.4.2019, p. 1).

⁽⁸⁾ The Commission approved an increase in the budget of the heating fuel scheme for 2019 and 2020 in its decision of 14 December 2020 in case SA.59126 (2020/N) — Sweden — Budget increase for scheme SA.49893 (2018/N) — Tax exemptions for certain renewables in heat generation (OJ C 41, 5.2.2021, p. 12).

⁽⁹⁾ Commission decision of 14 November 2013 in case SA.35485 (2012/N) — Denmark — Aid for all forms of biogas use — A (OJ C 292, 4.9.2015, p. 1); Commission decision of 16 December 2015 in case SA.36659 (2013/N) — Denmark — Aid for all forms of biogas use — B (OJ C 241, 1.7.2016, p. 1).

⁽¹⁰⁾ Commission decision of 29 June 2020 in case SA.56908 (2020/N) Prolongation and modification of biogas scheme for motor fuel in Sweden (OJ C 260, 7.8.2020, p. 4) and Commission decision of 29 June 2020 in case SA.56125 (2020/N) Tax exemption for non-food-based biogas and bio-propane in heat generation (OJ C 260, 24.7.2020, p. 2)

⁽¹¹⁾ The Commission approved the extension of the scope of beneficiaries to undertakings that were not in difficulty on 31 December 2019 but became in difficulty between 1 January 2020 and 30 June 2021 in its decision of 29 June 2021 in case SA.62941 (2021/N) — Sweden — Modification of the tax exemptions for biofuels and biogas in Sweden — SA.55695, SA.56125 and SA.56908 (OJ C 46, 28.1.2022, p. 2).

- (6) On 13 October 2020, Landwärme lodged a complaint with the Commission against the Kingdom of Sweden, alleging that the cumulation of the aid granted in Sweden under the schemes with other aid, granted by other Member States to biogas producers, led to overcompensation.
- (7) On 21 December 2022, following Landwärme's action for annulment, the General Court annulled the 2020 Decisions on procedural grounds without ruling on the substance of the cases ⁽¹²⁾.
- (8) Landwärme brought forward that it had submitted information to the Commission on 18 October 2019 and 19 June 2020, which mainly concerned the aid scheme supporting biogas in Denmark. Landwärme had notably provided a study showing different forms of biogas support, production support as well as incentives to raise demand such as tax reductions. It argued that these different support schemes could coexist simultaneously in different Member States, and that such cumulation of aid granted by different Member States could result in overcompensation of biogas producers in other Member States if they were to sell biogas in Sweden. Landwärme explicitly referred to the aid granted by Denmark and Sweden ⁽¹³⁾.
- (9) The General Court recognised that the beneficiaries of the Swedish scheme are the purchasers of biogas in Sweden. Whereas the tax reductions would not impact on the production cost of biogas, they would indirectly benefit also biogas producers exporting to Sweden, as, due to the tax exemptions, they could sell biogas at a final price that can compete with that of natural gas ⁽¹⁴⁾.
- (10) The General Court considered that in its assessment and based on the information from Landwärme, the Commission should have taken into account the contested cumulation against the background of rising biogas imports into Sweden from certain Member States ⁽¹⁵⁾. The General Court held that in the annulled decisions, the Commission had however assessed the cumulation from different schemes at national level only. The General Court considered it an indication for the presence of serious difficulties, if the Commission's assessment as regards the contested cumulation, and hence on the question of the absence of overcompensation, is incomplete. This was deemed to be tied to the assessment of the proportionality of the aid ⁽¹⁶⁾.
- (11) The General Court considered that biogas, of which the additional production cost compared to natural gas would have been covered, would not be comparable to biogas for which this was not yet the case ⁽¹⁷⁾. Also, if there was overcompensation, this could be an objective ground for tax differentiation between biogas that has received production aid and biogas that has not ⁽¹⁸⁾. The General Court concluded that neither the principle of non-discrimination nor Article 110 TFEU would preclude the consideration of the contested cumulation in the assessment of overcompensation, implying that its omission from the analysis indicated the existence of serious difficulties ⁽¹⁹⁾.
- (12) The General Court concluded that the assessment of the compatibility of the scheme with the internal market under Article 107(3)(c) TFEU, with regard to the principle of non-discrimination and Article 110 TFEU, presented serious difficulties in connection with potential overcompensation that might result from the contested cumulation. The General Court concluded that the Commission should have examined those difficulties in the context of the formal investigation procedure, in its assessment of the overcompensation, instead of adopting the contested decisions at the end of the preliminary examination procedure ⁽²⁰⁾.
- (13) In order to comply with the Judgment, the Commission re-examines the schemes in the present decision. Additional information was received from Sweden on 11 May 2023 and 14 June 2023 and 19 December 2023.
- (14) Sweden exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958 ⁽²¹⁾ and to have this Decision adopted and notified in English.

2. DETAILED DESCRIPTION OF THE SCHEMES

2.1. Legal basis, form of aid and objective

2.1.1. Legal basis and form of aid

- (15) The legal basis of the schemes is the Swedish Act (1994:1776) on Excise Duties on Energy. The Swedish excise duty consists of two parts: an energy tax and a carbon dioxide (CO₂) tax.

⁽¹²⁾ Judgment of the General Court of 21 December 2022, *Landwärme GmbH v European Commission*, T-626/20, EU:T:2022:853.

⁽¹³⁾ EU:T:2022:853, para. 31 and 71-75.

⁽¹⁴⁾ EU:T:2022:853, para. 25.

⁽¹⁵⁾ EU:T:2022:853, para. 97-98.

⁽¹⁶⁾ EU:T:2022:853, para. 99.

⁽¹⁷⁾ EU:T:2022:853, para. 105.

⁽¹⁸⁾ EU:T:2022:853, para. 122.

⁽¹⁹⁾ EU:T:2022:853, para. 110, 112 and 126.

⁽²⁰⁾ EU:T:2022:853, para. 127.

⁽²¹⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17.6.10.1958, p. 385).

- (16) The aid, as approved by the Commission in the decisions SA.43302 and SA.49893, was granted in the form of a total exemption from the energy and CO₂ taxes in favour of
- (a) food and non-food-based biogas used as motor fuel, and
 - (b) food and non-food-based biogas and other biofuels used for heating (collectively defined as the 'tax exemptions').

2.1.2. *Notified modifications to the schemes as approved in the decisions SA.43302 and SA.49893*

- (17) Sweden notified i) the prolongation of the schemes until 31 December 2030 (only with respect to biogas for the heating fuel scheme), ii) the exclusion of food-based biogas; and iii) the inclusion of non-food-based bio-propane, in addition to non-food-based biogas. Sweden amended the existing legislation to introduce these changes. The new provisions entered into force on 1 January 2021.
- (18) Biogas is methane produced from biomass and bio-propane is propane or butane produced from biomass. This means that if not tax exempted, biogas would be taxed at the rate of fossil methane, that is natural gas, while bio-propane would be taxed at the rate of fossil propane, which is normally referred to as LPG (liquefied petroleum gas).
- (19) The heating fuel scheme as modified only includes non-food-based biogas and bio-propane and is no longer open to other biofuels. The former tax exemption for taxable bioliquids, such as non-synthetic methanol, animal and vegetable fats and oils was abolished in the Swedish legislation as from 1 January 2021.
- (20) Sweden submitted that the scope of the amended schemes includes all technologies for the production of gas from sustainable biomass that are currently in competition.
- (21) In addition, Sweden has confirmed that it will regularly follow the market developments and, if needed, it will review the eligibility rules to ensure that any limitations on eligibility can still be justified when new technologies or approaches are developed or more data becomes available.
- (22) To be eligible for the tax exemptions, the biogas and bio-propane must comply with the sustainability and greenhouse gas saving criteria as set out in the Swedish Act (2010:598) on sustainability criteria for biofuels, bioliquids and biomass fuels. This act implements the Renewable Energy Directive ('RED I')⁽²²⁾, as amended by the Indirect Land Use Change Directive⁽²³⁾ and was updated on 1 July 2021 to include the changes in the revised Renewable Energy Directive ('RED II')⁽²⁴⁾. Only non-food-based biogas and bio-propane complying with the applicable criteria are eligible for the tax exemptions. Unsustainable biogas and bio-propane (as well as food-based⁽²⁵⁾ biogas and bio-propane) are taxed at the rate of natural gas and LPG respectively.
- (23) Sweden does not apply a quota system, blending obligation or any other system with similar effects for biogas and bio-propane used as motor fuel or used for heating, and has indicated that it does not intend to apply any such measure for the duration of the schemes.
- (24) The Swedish authorities also confirmed that, in case of blending of biogas and bio-propane with other types of gas/fuel, the tax exemptions are applicable only to the renewable part of such mixtures.

2.1.3. *Objective*

- (25) The primary objective of the schemes is environmental protection through the increased use of sustainable non-food-based biogas and bio-propane as motor and heating fuel. Sweden explains that, as the use of fossil fuels generates higher levels of greenhouse gas emissions, replacing natural gas with biogas and LPG with bio-propane will have the effect of reducing these emissions. Although Sweden exceeded its national renewables target for 2020, the Swedish authorities explained that a further reduction of such emissions would be instrumental to achieve the 2030 EU renewables target as well as the national target to reduce by 2030 the greenhouse gas emissions from domestic transport by at least 70 % compared to 2010. In addition, the schemes should contribute to the efforts of Sweden and the EU as a whole to deliver on the Paris agreement.

⁽²²⁾ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140 5.6.2009, p. 16).

⁽²³⁾ Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources (OJ L 239, 15.9.2015, p. 1).

⁽²⁴⁾ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82-209). The Commission notes that RED II was revised in 2023 and that the revised Directive EU/2023/2413 ('RED III') entered into force on 20 November 2023 (Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (OJ L, 2023/2413, 31.10.2023, p. 1)).

⁽²⁵⁾ Based on Article 2(40) of RED II, "food and feed crops" means starch-rich crops, sugar crops or oil crops produced on agricultural land as a main crop excluding residues, waste or ligno-cellulosic material and intermediate crops, such as catch crops and cover crops, provided that the use of such intermediate crops does not trigger demand for additional land'.

- (26) As regards the motor fuel scheme, the Swedish authorities added that the transport sector accounts for approximately one third of the total CO₂ emissions in Sweden. The Swedish authorities explained that an increased use of biogas and the introduction of bio-propane as motor fuel would be instrumental to reach Sweden's long term climate goals (e.g. Sweden aims to have zero net emissions of greenhouse gases into the atmosphere by 2045 and to achieve negative emissions thereafter) and the ambition of a fossil fuel free vehicle fleet. One way of decreasing the use of fossil fuels in Sweden is through increased substitution of fossil fuels by renewable gases such as biogas and bio-propane, which is the objective of the scheme.
- (27) Based on energy statistics and forecasts of the Swedish Energy Agency ('SEA'), the Swedish authorities showed at the time of notification that the use of biogas has slightly increased since 2013 but that it still remains low, i.e. below 2 % out of the total energy used in the transport sector, and is not expected to increase in a great extent in the next couple of years. The Swedish authorities explained that the cost of producing biogas is too high for these fuels to be able to compete with their equivalent fossil fuels. Certain investments in the production of biogas have already been made, but a significant demand for biogas is necessary to maintain and enable investments in the vehicles and the infrastructure required.

2.2. Beneficiaries and taxpayers

- (28) The direct beneficiaries under the two schemes are as follows.
- (29) Under the motor fuel scheme, the direct beneficiaries of the tax exemptions are the undertakings that are liable to pay energy and CO₂ taxes on gas and file a tax return (the 'taxpayers'). They are fuel suppliers and importers of biogas (and bio-propane). Among them may also be biogas (and bio-propane) producers, to the extent they are fuel suppliers or final consumers. In short, the tax is due where the motor fuel leaves the last fuel warehouse before it is sold to final consumers. The taxpayers are exempted from the energy and CO₂ taxes on gas and then are expected to pass on the tax exemption benefit when selling the biogas (or bio-propane) to final consumers (e.g., a transport company or private person fuelling a vehicle at a gas station).
- (30) Under the heating fuel scheme, the direct beneficiaries of the tax exemptions are the end users (e.g., companies active in the heating, district heating or manufacturing sectors). In this case, the end user may deduct the tax in its own tax declaration (if it is a taxpayer of the energy and CO₂ taxes), but it is also common that the end user acquires the gas inclusive of tax and applies for a refund.
- (31) Both schemes aim at reducing the final price of biogas and bio-propane for end-consumers. The schemes also lower the costs of consumption for producers that produce biogas (and bio-propane) for their own use.
- (32) While the direct beneficiaries of the schemes are the undertakings that claim the tax exemptions to the tax agency (either directly for the taxpayers or as a refund for the end users in the heating fuel scheme), the schemes indirectly benefit producers of sustainable biogas and bio-propane. They indirectly benefit from the schemes through an increased demand for their products (sustainable biogas or bio-propane) from final consumers.
- (33) The schemes are open both to biogas and bio-propane produced in Sweden and imported biogas and bio-propane.
- (34) The Swedish authorities have explained that the Swedish market is not a homogeneous market with the same characteristics. On the Swedish west coast, there is a gas grid which is connected to Denmark and hence to some other European countries. However, this European network covers only a very small part of the total land mass in Sweden. In other parts of Sweden, for instance in Stockholm, there are local networks. However, in most regions there are no gas networks at all. In those areas gas is distributed by trucks to supply stations. The Swedish authorities have further explained that a majority of the producers in Sweden are small producers who produce biogas for their own consumption (e.g. farmers using manure from their farm) or for just one or two customers (e.g. a local waste company using municipal waste and producing biogas for the district heating or a local bus company). These 'local markets' are to a negligible extent affected by the import of biogas, natural gas, or biogas production elsewhere in Sweden.
- (35) To benefit from the tax exemptions, the direct beneficiary (taxpayer in the motor fuel scheme or end user in the heating fuel scheme) must provide a decision from the SEA demonstrating that the biogas and bio-propane that would benefit from the tax exemption are sustainable and non-food-based. Sweden has put in place a system of control whereby the direct beneficiaries receive a decision from the SEA confirming that the criteria of sustainability are met and that the biogas or bio-propane stems from non-food-based sources.
- (36) The Swedish Tax Agency administrates the payment of the tax from the taxpayers and ensures, by checking *ex post* the monthly tax declaration and by doing regular audits, that the taxpayers are following the legal provisions concerning the applicable tax rates, the exemptions and other conditions laid down in the Swedish Act on Excise Duties on Energy. In case of a request for a refund, the Swedish Tax Agency conducts similar control and audit measures.

- (37) The Swedish authorities have confirmed that the aid is granted automatically in accordance with objective and non-discriminatory criteria, is open to any undertaking that fulfils the eligibility criteria and that there is no room for any discretionary measures from the Swedish Tax Agency.
- (38) Sweden has confirmed that no aid would be granted after the plants are fully depreciated according to normal accounting rules.

2.3. Aid level and monitoring of overcompensation

- (39) The tax exemptions are granted to compensate for the difference between the higher costs of sustainable non-food-based biogas and bio-propane and the costs of natural gas and LPG respectively.
- (40) The schemes are subject to regular monitoring by the Swedish authorities. Sweden has committed to submit to the Commission annual monitoring reports and to adapt the aid levels, if necessary, to avoid any overcompensation in the future.

2.3.1. Motor fuel scheme

- (41) The monitoring reports are based on detailed information collected by the SEA from the taxpayers, both in respect of domestically produced and of imported biogas. The SEA gathers data through a reporting obligation for taxpayers benefiting from the scheme, i.e. fuel suppliers, importers and producers (to the extent that the latter are taxpayers). Required information includes data on volumes and costs for production, imports or direct purchase of biogas. Producers provide data on their production costs and other reporting entities provide data on the purchase price of the biogas. For importers, this price corresponds to the actual purchase price including customs and shipping.
- (42) The cost of biogas is determined by calculating a volume-weighted average between declared production, import and purchase costs. The cost of biogas is then compared to the cost of its fossil equivalent ⁽²⁶⁾ (including taxes), adjusted for the content of energy ⁽²⁷⁾.
- (43) The Swedish authorities explained that other possible aid schemes that reduce the production costs or import and purchase prices would be reflected in the calculation. If the taxpayer is a producer, the aid granted at production level will be included in the capital costs reported. If the taxpayer is a fuel supplier or importer, the aid granted at production level is likely to be reflected in the purchase or import prices reported.
- (44) Sweden has submitted the results of the monitoring reports for biogas used as motor fuel for the years 2018 ⁽²⁸⁾ and 2019, based on the methodology described in recitals (41) to (43). Table 1 shows that the cost of biogas without taxes is significantly higher than the cost of natural gas with taxes.

Table 1

Cost of sustainable biogas in Sweden for the years 2018 and 2019

	Biogas 2019		Biogas 2018	
	SEK/m ³	EUR ⁽²⁹⁾ /m ³	SEK/m ³	EUR ⁽³⁰⁾ /m ³
(A) Raw materials ⁽³¹⁾	7.10	0.66	4.96	0.46
(B) Labour costs	1.02	0.09	0.61	0.06
(C) Capital costs	1.35	0.12	0.77	0.07
(D) Processing costs ⁽³²⁾	2.69	0.25	2.95	0.27
(E) Transport costs	1.25	0.12	0.73	0.07
(F) Sales of by-products ⁽³³⁾	—	—	—	—

⁽²⁶⁾ For the cost of natural gas, the SEA bases itself on an annual average of the industrial customer prices (Source: Statistics Sweden).

⁽²⁷⁾ In order to compare the price of the renewable fuel with its fossil counterpart an adjustment for the different energy content needs to be made. Natural gas has a higher energy content than biogas (11.05 kWh/L and 9.7 kWh/L respectively, based on SEA estimates).

⁽²⁸⁾ For 2018, 16 companies have provided data on biogas.

⁽²⁹⁾ Calculated with official exchange rate of 1 October 2019: 10.8043 SEK/EUR (OJ C 331, 2.10.2019, p. 5).

⁽³⁰⁾ Calculated with official exchange rate of 1 October 2019: 10.8043 SEK/EUR (OJ C 331, 2.10.2019, p. 5).

⁽³¹⁾ Row (A) shows the costs of raw materials for reporting entities that are producers, and the import or purchase prices at which they bought the biogas for reporting entities that are fuel suppliers or importers.

⁽³²⁾ For business secret, the profit margin is included in row (D) Processing costs.

⁽³³⁾ Sweden currently do not have a system for issuing Guarantees of Origin for biogas.

	Biogas 2019		Biogas 2018	
	SEK/m ³	EUR ⁽³⁴⁾ /m ³	SEK/m ³	EUR ⁽³⁵⁾ /m ³
G) Total cost (without taxes) (A + B + C + D + -E — F)	13.42	1.24	10.02	0.93
(H) Price adjusted for energy content ⁽³⁶⁾	15.28	1.41	11.42	1.06
(I) Reference price of natural gas (including taxes) ⁽³⁷⁾	6.73	0.62	7.30	0.68
(J) difference between the reference price of natural gas and price for biogas (H — I)	+ 8.55	+ 0.79	+ 4.12	+ 0.38

Source: the Swedish authorities. Based on the monitoring reports for 2019 and 2018 compiled by the SEA.

- (45) The Swedish authorities expect that the cost of sustainable biogas without taxes will remain higher than the cost of natural gas with taxes in the future.
- (46) Sweden has explained that the rate of return for biogas in 2019 was around 10 %. This rate is expected to remain stable for the duration of the scheme.
- (47) The Swedish authorities have provided estimated costs only for biogas, given that bio-propane used as motor fuel did not yet exist in Sweden at the time of the initial notification on 1 April 2020.
- (48) For bio-propane, Sweden estimates that the costs of bio-propane to be used as motor fuel are significantly higher than those of LPG. The Swedish authorities have committed that, as the market for bio-propane grows, a calculation will be made in the yearly monitoring report following a similar method as for biogas. The SEA will monitor the costs of bio-propane, compare such costs with the costs of LPG and adjust the level of aid, if necessary, to avoid overcompensation. If Sweden finds that the tax exemption goes beyond what is necessary for covering the difference between the costs of bio-propane and LPG, it will adjust the level of aid instead of granting a full tax exemption.

2.3.2. Heating fuel scheme

- (49) The cost of biogas used in the monitoring reports on the heating fuel scheme is taken from the SEA's monitoring report on biogas used as motor fuel. Since biogas being consumed in heating or CHP (Combined heat and power) plants does not need to be as pure, the cost of upgrades is however deducted. The costs of emission allowances are also added to the calculation.
- (50) Sweden has submitted the results of the monitoring reports for biogas used as heating fuel for the years 2018 and 2019.

Table 2.

Cost calculation for biogas used for heating purposes in heat plants according to monitoring reports for 2019 and 2018

	Biogas 2019		Biogas 2018	
	SEK/MWh	EUR ⁽³⁴⁾ / MWh	SEK/MWh	EUR/ MWh ⁽³⁵⁾
A) Product price	1 106	102.4	729	67.5
B) Energy tax	—	—	—	—
C) Carbon tax	—	—	—	—

⁽³⁴⁾ Calculated with official exchange rate of 1 October 2019: 10.8043 SEK/EUR (OJ C 331, 2.10.2019, p. 5).

⁽³⁵⁾ Calculated with official exchange rate of 1 October 2019: 10.8043 SEK/EUR (OJ C 331, 2.10.2019, p. 5).

⁽³⁶⁾ The total net costs for biogas for 2019 amounted to 13.42 SEK/m³. Adjusted for energy content (in K) that is (11.05/9.7) = 15.28 SEK/m³.

⁽³⁷⁾ The reference price of natural gas includes the natural gas price, based on an average of the industrial customer prices for the year monitored produced by Statistics Sweden, the network charges and the CO₂ tax. The applicable tax rate for natural gas as motor fuel was 2.516 SEK/m³ in 2019 and 2.465 SEK/m³ in 2018 (source: Swedish Ministry of Finance). Natural gas used as motor fuel is not subject to the energy tax.

	Biogas 2019		Biogas 2018	
	SEK/MWh	EUR ⁽¹⁾ / MWh	SEK/MWh	EUR/ MWh ⁽¹⁾
D) Cost for emission allowances (EU ETS ⁽²⁾)	67 ⁽²⁾	6.2	59 ⁽²⁾	5.5
E) Net total (A+B+C+D)	1 173	108.6	788	72.9
F) Reference price of natural gas ⁽³⁾	703	65.1	761	70.4
G) Difference between the reference price of natural gas and production costs for biogas (E-F)	+470	+43.5	+ 17	+ 1.6

⁽¹⁾ Source: Based on the monitoring report for 2019 and 2018 compiled by the Swedish Energy Agency. Calculated with the exchange rate 10.8043 SEK/EUR according to the Official Journal 2019/C 331/05.

⁽²⁾ Since it is not possible for a plant connected to the natural gas grid to avoid the cost of emission allowances for biogas, this cost is included from 2018 and forward.

⁽³⁾ Includes the price of natural gas (which corresponds to the average annual price of natural gas for industrial customers in Sweden without taxes — Eurostat), taxes (Energy tax and CO₂ tax) and costs for emission allowances (EU ETS).

(Source — the Swedish authorities)

Table 3.

Cost calculation for biogas used for heating purposes in CHP plants according to monitoring reports for 2019 and 2018

	Biogas 2019		Biogas 2018	
	SEK/MWh	EUR ⁽¹⁾ /MWh	SEK/MWh	EUR ⁽¹⁾ /MWh
A) Product price	1 106	102.4	729	67.5
B) Energy tax	—	—	—	—
C) Carbon tax	—	—	—	—
D) Cost for emission allowances (EU ETS ⁽²⁾)	67 ⁽²⁾	6.2	59 ⁽²⁾	5.5
E) Net total (A+B+C+D)	1 173	108.6	788	72.9
F) Reference price of natural gas ⁽³⁾	560	51.8	521	48.2
G) Difference between the reference price of natural gas and production costs for biogas [(F-E)]	+613	+56,7	+267	+24.7

⁽¹⁾ Source: Based on the monitoring report for 2019 and 2018 compiled by the Swedish Energy Agency. Calculated with the exchange rate 10.8043 SEK/EUR according to the Official Journal 2019/C 331/05.

⁽²⁾ Since it is not possible for a plant connected to the natural gas grid to avoid the cost of emission allowances for biogas, this cost is included from 2018 and forward.

⁽³⁾ Includes the price of natural gas (which corresponds to the annual average price of natural gas for industrial customers in Sweden without taxes — Eurostat), taxes (Energy tax and CO₂ tax) and costs for emission allowances (EU ETS).

(Source — the Swedish authorities)

- (51) Table 2 and Table 3 show that the difference between the total levelised costs of energy ('LCOE') for biogas and the market price of natural gas is positive, after taking into account the tax exemption, both for biogas used for heating purposes in heat plants and biogas used in CHP plants. Biogas used for heating purposes is more expensive than natural gas despite the tax exemptions.
- (52) As far as the CO₂ tax is concerned, the Swedish authorities explained that on 1 August 2019, the carbon tax on natural gas was raised from 11 percent of general level to 91 percent in CHP plants falling under EU ETS. The lower energy tax has been raised from 30 percent to 100 percent. The tax levels and thus the price for natural gas used for heating in CHP are thereby the same as in heating plants. The tax change has not led to overcompensation (as shown in table 3 above).
- (53) The Swedish authorities expect that the cost of sustainable biogas used for heating purposes without taxes will remain higher than the cost of natural gas with taxes in the future.
- (54) Similarly to the motor fuel scheme (see recital (47)), because of the scarce presence of bio-propane on the Swedish market⁽³⁸⁾, the national authorities have no sufficient data on its costs. Based on information provided by two Swedish bio-propane producers, the Swedish authorities, however, estimate that the cost of bio-propane is nearly the double of that of fossil propane. The Swedish authorities have committed to include bio-propane in the annual monitoring reports as of the entry into force of the scheme, compare its production costs with the ones of fossil propane and adjust the aid, if necessary, to avoid overcompensation.

2.4. Budget and duration

- (55) Sweden requested a 10-year extension of the schemes, from 1 January 2021 until 31 December 2030.
- (56) Following the annulment of the 2020 Decisions, the Swedish Tax Agency published a statement on 7 March 2023 stating that the agency can no longer grant exemption from tax for biogas or bio-propane.
- (57) The tax exemptions are financed from the State budget in the form of foregone tax revenues.
- (58) The Swedish authorities estimate the budget for the whole duration of the motor fuel scheme at approximately SEK 5.15 billion (EUR 477 million⁽³⁹⁾), with an annual budget of approximately SEK 0.47 billion (EUR 43 million). For the heating fuel scheme, the Swedish authorities estimate the total budget of the scheme between 1 January 2021 and 31 December 2030 at approximately SEK 5.94 billion (EUR 550 million).

2.5. Cumulation

- (59) In general, the tax exemptions can be cumulated with aid, and notably aid to the production of sustainable biogas and bio-propane.
- (60) In Sweden, investment aid that promotes sustainable biogas and bio-propane may be granted by several Swedish authorities under State aid schemes for research and innovation or environmental purposes under the General Block Exemption Regulation ('GBER')⁽⁴⁰⁾.
- (61) The Swedish authorities explained that investment aid amounts that had been granted to producers of biogas and bio-propane are included in the compensation monitoring through capital costs, and thereby taken into account for the assessment of overcompensation.
- (62) Furthermore, the Swedish authorities explained that any aid granted to a producer, in Sweden or in another Member State, is taken into account either directly, when the reporting entity is a producer, or indirectly, when the reporting entity is a fuel supplier or importer, in the monitoring of overcompensation (see recital (43)).

2.6. Transparency and other provisions

- (63) The Swedish authorities committed to comply with the transparency provisions under Section 3.2.7 of the EEAG and Section 3.2.1.4 of the 2022 Guidelines on State aid for climate, environmental protection and energy ('CEEAG')⁽⁴¹⁾ and publish all required information on a website⁽⁴²⁾.

⁽³⁸⁾ The Swedish authorities estimate that approximately 10 000 tonnes of bio-propane is currently being sold yearly on the Swedish market (less than 10 % of all propane on the market).

⁽³⁹⁾ Calculated with official exchange rate of 1 October 2019: 10,8043 SEK/EUR (OJ C 331, 2.10.2019).

⁽⁴⁰⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187 26.6.2014, p. 1).

⁽⁴¹⁾ OJ C 80, 18.2.2022, p. 1.

⁽⁴²⁾ <https://www.tillvaxtanalys.se/statsstod.html> and <https://www.riksdagen.se/sv/Dokument-Lagar/>.

- (64) The Swedish authorities explained that to be eligible for the tax exemptions under the schemes, the aid recipient may not be subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market, or be a company in difficulty, as defined by the Rescue and Restructuring Guidelines⁽⁴³⁾.

2.7. Submissions received from Landwärme

- (65) As mentioned in the GC judgement⁽⁴⁴⁾, Landwärme provided to the Commission, before the adoption of the 2020 Decisions, information concerning the potential effects of the combination of the tax exemption schemes in Sweden with support to biogas production granted by other Member States and in particular by Denmark.
- (66) On 18 October 2019, Landwärme sent a letter to the Commission concerning the Danish State aid scheme for biomethane injected into the grid (case SA.35485). In the annex to its letter, Landwärme produced a study on the biomethane market in Europe and the Danish State aid scheme for biomethane. The report underlined that the geographic market for biogas was now transnational and included at least Denmark, Sweden, Germany and the United Kingdom. This study also explained that biogas could be supported both by subsidies for its production and by incentives for demand, such as tax exemptions. The study specified that cumulation could occur and give rise to a 'double subsidy' or an 'overcompensation' when production aid and tax exemptions came from different Member States. This study also indicated that overlaps between aid schemes adopted by different Member States could lead to overcompensation and create a distortion of competition. The example provided on this subject related specifically to the combination of the Danish State aid scheme for biomethane with the Swedish tax exemptions schemes.
- (67) On 19 June 2020, Landwärme sent another letter to the Commission concerning the Danish State aid scheme for biomethane injected into the grid. In its letter, Landwärme made reference to the decisions by which the Commission had approved the Swedish tax exemptions schemes in cases SA.43302 and SA.49893 and mentioned the link between the Danish aid and the tax exemptions granted by Sweden. The study annexed to that letter contained elements similar to those appearing in the study mentioned in recital (66) above.
- (68) In its submissions, Landwärme also provided data showing that the exports of German biomethane to Sweden declined significantly between 2016 and 2018.
- (69) In October 2020, Landwärme introduced a complaint to the Commission against the Kingdom of Sweden and appealed the 2020 Decisions at the same time.
- (70) As noted by the General Court⁽⁴⁵⁾, Landwärme explained that it exported biomethane to Sweden in 2013 and 2014 but that, since then, it was no longer able to export biomethane to Sweden as it could not offer its biomethane at the price of the Danish biomethane. In parallel, the imports in Sweden of biogas from other Member States, and in particular Denmark, significantly increased between 2015 and 2019⁽⁴⁶⁾.
- (71) As noted by the General Court⁽⁴⁷⁾, Landwärme explained that the contested schemes would intensify the market pressure resulting from production aid granted by Member States other than Sweden. The contested schemes would distort competition by themselves as, in order to benefit from the contested tax exemptions, biogas producers receiving aid in other Member States would increase their exports to Sweden and put pressure on prices as they can offer their biogas at significantly lower prices than non-subsidised biogas producers.
- (72) In this context, Landwärme claimed that, despite the information it had provided to the Commission, the Commission did not address in its 2020 Decisions the question whether the cumulation of the tax exemption schemes in Sweden with aid granted by other Member States to biogas producers resulted in overcompensation in favour of these producers when they sold biogas in Sweden⁽⁴⁸⁾.
- (73) In its complaint of October 2020, Landwärme raised similar concerns to those summarised in the GC judgement. Landwärme explained that, as the Swedish tax exemption scheme does not exclude the possibility to claim a tax relief for imported biomethane after having received subsidy in another Member States, it allows a double subsidy and leads to overcompensation.
- (74) Because of this possibility to claim a tax exemption in Sweden despite having received production aid in another country, biogas producers that receive production aid in another Member State can offer their biogas at significantly lower prices on the Swedish market. Biogas producers that do not receive production aid are therefore not able to compete and are foreclosed from the Swedish market. Consequently, only subsidised biogas can benefit from the tax exemption scheme in Sweden and this cumulation results in overcompensation.

⁽⁴³⁾ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

⁽⁴⁴⁾ EU:T:2022:853, para. 71-73.

⁽⁴⁵⁾ EU:T:2022:853, para. 26.

⁽⁴⁶⁾ EU:T:2022:853, para. 96.

⁽⁴⁷⁾ EU:T:2022:853, para. 40.

⁽⁴⁸⁾ EU:T:2022:853, para. 31.

- (75) To avoid this situation, Landwärme considers that Sweden could exclude imported biomethane which has been subsidised in its country of origin from the scheme.
- (76) Landwärme presented data to support its claim, focusing on the Danish production aid and the cross-border trade between Denmark and Sweden.
- (77) First, Landwärme submitted that exports of German biomethane to Sweden dropped between 2016 and 2018, as German producers did not receive a production subsidy in Germany. Landwärme further submitted that it exported biomethane to Sweden in 2013 and 2014, but no more in 2015. Since then, it was no longer able to export biomethane to Sweden as it could not compete with subsidised biomethane.
- (78) Second, Landwärme provided information on the proportions of biogas imported and produced domestically in Sweden between 2015 and 2019. The data suggests that the biogas market in Sweden has grown over time. The amount of domestically produced Swedish biogas has remained constant, while the amount from Denmark has continuously increased between 2015 and 2019. The data suggests that the amount from other countries has grown as well. The estimated level of imports from Denmark to Sweden seems to be based on biogas certificates (guarantees of origin).
- (79) Finally, Landwärme submitted that because of the double subsidies, there is overcompensation with regard to imports of subsidised biomethane from Denmark. Landwärme argued that the Danish production aid fully compensated the production cost gap (i.e. the difference between the biogas production costs and the gas price per unit). Landwärme further argued that the aided producers would potentially gain further income above the production cost gap due to the Swedish tax break.
- (80) Landwärme considers that the tax exemption schemes intensify the distorting effect of the Danish production aid. By allowing a cumulation of the schemes and support granted by other Member States, Sweden grants a level of aid which exceeds the production costs for biogas, leading to a foreclosure of the Swedish market.

2.8. Position of Sweden

- (81) Sweden explains that the monitoring reports collect data on production costs and import price of eligible biogas. These are affected if the biogas has received other aid. Since a Danish production aid can be expected to affect the price of the gas produced, the Swedish authorities consider that it can be argued that the Danish production aid is also taken into account in the SEA's monitoring exercise.
- (82) The Swedish Government submits that it has difficulty in seeing how State aid in the form of a general tax reduction with equal conditions for all should be designed, and applied in practice, to take account of other countries' national production aid.
- (83) The rationale of the Swedish aid schemes in question is to encourage both individuals and undertakings to choose biogas and bio-propane by lowering the price through a lower tax level. The scheme therefore leads to an increase in the use of biogas and bio-propane for heating and transport and at the same time to a reduction in the use of fossil fuels and emissions of greenhouse gases.
- (84) According to the Swedish authorities, State aid rules must enable Member States to use the exemptions or reduced levels of taxation envisaged in the Energy Taxation Directive⁽⁴⁹⁾ ('ETD'). It is particularly important considering that such tax exemptions are applicable regardless of the origin of the biogas and thus promotes a well-functioning internal market — which is the underlying purpose of the ETD.
- (85) Moreover, in order for an aid scheme in the form of tax exemption to be a suitable form of State aid, fit for purpose, it is important that the aid schemes are as simple as possible to apply and cost-effective. Intricate rules and multiple applicable tax levels reflecting varying levels of production aid in other Member States are counterintuitive in terms of a tax aid scheme.
- (86) While it is important that tax exemptions must not create unintended consequences or distortions in the market through for example overcompensation it is equally important that the safeguards are pragmatic and appropriate to achieve the intended objective.

⁽⁴⁹⁾ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

- (87) The Swedish authorities have provided data on the origin of the raw materials for biogas used as motor fuels. This data is collected in accordance with the Sustainability Criteria Act (lag (2010:598) om hållbarhetskriterier för biodrivmedel och flytande biobränslen) and also the Fuel Quality Act (Drivmedelslag (2011:319)). The data shows that the share of energy produced with raw materials from Denmark amounted to 26 % in 2018 and 19 % in 2019, the main part coming from Sweden (69 % and 71 % respectively). Sweden explains that since the transportation of raw material for biogas is more expensive and often more complicated than the transportation of biogas, a reasonable assumption is that biogas is produced in the same country as the country of origin of the raw material.

2.9. Biogas support in Denmark

- (88) The Commission approved support schemes for biogas in Denmark in cases SA.35485⁽⁵⁰⁾ and SA.36659⁽⁵¹⁾.
- (89) Case SA.35485 (2012/N) concerns:
- (a) A scheme where aid is granted for biogas used to generate electricity in combined heat and power plants in the form of a supplement for each unit of biogas used.
 - (b) A scheme where aid is granted for the upgrading of biogas so that it can be injected into the gas grids, in the form of a premium on top of the market price for natural gas for each unit of upgraded gas produced.
- (90) Case SA.36659 (2013/N) concerns:
- (a) A scheme where aid is granted for biogas used for industrial process purposes in the form of a supplement for each unit of biogas used.
 - (b) A scheme where aid is granted for biogas used for heating in the form of a supplement for each unit of biogas used.
 - (c) A scheme where aid is granted for biogas used in transport in the form of a supplement for each unit of biogas used.
- (91) All the schemes support the consumption of biogas in Denmark except for one, mentioned in recital (89)(b), which supports the production of upgraded biogas (biomethane). The aid scheme for upgraded biogas injected into the gas grid approved under decision SA.35485 (2012/N) is the only one of the schemes mentioned in recitals (89) and (90) where it is possible to sell subsidised biogas to other countries, as the other schemes only support the use of biogas for different purposes in Denmark.
- (92) Under that scheme, Denmark grants aid to biomethane producers in the form of a premium on top of the market price for natural gas for each unit of upgraded biogas (biomethane) produced. Danish producers are entitled to receive Guarantees of origin (GOs) for biomethane injected into the gas grid. Their total revenues therefore include income from the sale of gas and GOs (inside or outside Denmark), as well as the aid (Premium).
- (93) The decision in case SA.35485 states that Denmark will monitor trends in the economics of the operation of the plants concerned so as to ensure that there is no overcompensation (see recital (7)). In the context of a monitoring exercise carried out by the Commission on the scheme SA.35485, the Danish authorities provided additional explanations on the overcompensation assessment for biogas support schemes they carry out annually.
- (94) In its annual overcompensation calculation, Denmark checks with aggregate figures and on a rolling three-year period, whether the net costs for producing biomethane is negative.
- (95) The calculation is based on the annual financial statements of the beneficiaries and takes into account all costs and revenues, notably income related to sales of gas and GOs, as well as the Danish aid.
- (96) If the test reveals overcompensation, the aid level will be reviewed and adapted by the national authorities.

3. PRELIMINARY ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (97) Article 107(1) TFEU provides that 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.

⁽⁵⁰⁾ Commission decision of 14 November 2013 in case SA.35485 (2012/N) — Denmark, Aid for all forms of biogas use — A (OJ C 292, 4.9.2015, p. 3).

⁽⁵¹⁾ Commission decision of 16 December 2015 in case SA.36659 (2013/N) — Denmark, Aid for all forms of biogas use — B (OJ C 241, 1.7.2016, p. 2).

(98) In order to conclude if State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability to the State, selective advantage, potential distortion of competition and effect on intra-EU trade) are met for the measure under assessment.

3.1.1. *Imputability and State resources*

(99) The tax exemptions are established in the Swedish Act (1994:1776) on Excise duties (see recital (15)) and they reduce the State's tax income. They are therefore imputable to the State and financed through State resources.

3.1.2. *Selective advantage and beneficiaries*

(100) The direct beneficiaries of the schemes are the taxpayers in the motor fuel scheme and the end users in the heating fuel scheme (see recitals (29) and (30)). They are the ones that do not pay the tax that would normally be paid to the tax agency or the ones that ask the tax agency for a refund of the tax they have paid on sustainable non-food-based biogas and bio-propane.

(101) The schemes, however, also indirectly benefit producers of sustainable non-food-based biogas and bio-propane through an increased demand for their products (see recital (32)).

(102) The advantage is selective as it only concerns sustainable non-food-based biogas and bio-propane, which serve as substitute for natural gas and LPG.

3.1.3. *Effect on trade and impact on competition*

(103) Since biogas and bio-propane for transport and for heating are traded among Member States and serve as a substitute for fossil fuels, the tax exemptions are likely to affect trade between Member States and may distort competition.

(104) In particular, the South-western part of Sweden is connected to the European gas network via Denmark. Sweden therefore trades gas and biogas with neighbouring countries, and in particular with Denmark. There is also a regional gas network in Stockholm, fuelled with locally injected biogas and shipped LNG/LBG. The Commission, however, notes that for the rest, the Swedish biogas market is to a large extent off-grid with several local and regional grids or stand-alone biogas plants and filling stations (see recital (34)).

3.1.4. *Conclusion on the presence of State aid*

(105) Based on the above (see recitals (99) to (104)) and as held in previous decisions⁽⁵²⁾, the Commission concludes that the schemes constitute State aid within the meaning of Article 107(1) TFEU.

3.2. **Lawfulness of the aid**

(106) Although the schemes were notified by the Swedish authorities before being put into effect, the 2020 Decisions authorising the schemes were annulled by the General Court. The schemes must therefore be regarded as unlawful⁽⁵³⁾.

3.3. **Compatibility with the internal market**

3.3.1. *Legal basis for assessment*

(107) Article 107(3)(c) TFEU provides that the Commission may declare compatible 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. Therefore, compatible aid under that provision of the Treaty must contribute to the development of certain economic activity (or area)⁽⁵⁴⁾. Furthermore, the aid should not distort competition in a way contrary to the common interest.

⁽⁵²⁾ See for example recital (21) in Commission decision in case SA.43302 (2015/N) (OJ C 241, 01.07.2016, p. 6).

⁽⁵³⁾ See Article 108(3) TFEU and Judgment of 12 February 2008, *CELF*, C-199/06, EU:C:2008:79, paragraphs 61 to 64.

⁽⁵⁴⁾ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 20 and 24.

- (108) In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid ⁽⁵⁵⁾, the Commission has assessed the compatibility of the measure with the internal market, in accordance with the rules applicable at the time when the aid was granted.
- (109) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred ⁽⁵⁶⁾.
- (110) In the case of a tax advantage, the date on which the tax is due can be considered the granting moment of the aid, as the Court noted in its *France Telecom* judgment ⁽⁵⁷⁾. For the tax advantage in question, the granting moment is therefore the date when the tax declaration is due as this is the moment when the taxation benefit takes place (the taxpayer pays less taxes due to the application of the aid scheme). As mentioned in recital (36), the tax declaration is due by taxpayers every month.
- (111) Since the schemes pursue an environmental and energy objective, the EEAG are therefore applicable, in accordance with point 13 thereof, for the period from 1 January 2021 until 26 January 2022. For the period from 27 January 2022 onward, the supported activities fall within the scope of the CEEAG. More specifically, they fall under the category of aid for the reduction and removal of greenhouse gas emissions, including through support for renewable energy and energy efficiency (see point 16(a) CEAAG).
- (112) The Commission will therefore assess the compatibility of the schemes with the internal market, from 1 January 2021 until 26 January 2022, on the basis of the conditions established in Sections 3.2 and 3.3 EEAG and from 27 January 2022, on the basis of the conditions established in Sections 3 and 4.1 CEEAG. As the point on cumulation and the assessment as regards potential overcompensation is common to both guidelines, the Commission will assess this point separately at the end.
- (113) In the light of the General Court's conclusions (see recitals (7) to (12)) that the Commission should have had doubts as to the compatibility with the internal market of certain aspects of the scheme and in light of the information provided by the Landwärme to the Commission (see section 2.7), the Commission has decided to initiate the formal investigation procedure.

3.3.2. Preliminary assessment under the EEAG

3.3.2.1. Positive condition: the aid must facilitate the development of an economic activity

3.3.2.1.1. Development of an economic activity

- (114) Under Article 107(3)(c) TFEU, in order to be capable of being considered compatible with the internal market, the measure must contribute to the development of certain economic activity (or area) ⁽⁵⁸⁾.
- (115) The Commission notes that the schemes support, via tax exemptions, the consumption of sustainable biogas and bio-propane used as motor or heating fuels and thereby indirectly also the production of sustainable biogas and bio-propane (see recital (32)). The economic activity supported by the schemes is therefore sustainable biogas and bio-propane production.
- (116) The objective of the schemes is to contribute to meeting the targets mentioned in recital (25).
- (117) Therefore, the Commission reaches the preliminary conclusion that the schemes facilitate the development of economic activities, as required by Article 107(3)(c) TFEU.

3.3.2.1.2. Incentive effect

- (118) An aid measure has an incentive effect if it incentivises the beneficiary to change its behaviour towards the development of a certain economic activity pursued by the aid measure and if the change in behaviour would not occur without the aid ⁽⁵⁹⁾. This is the case, in particular, where the costs of the renewable energy exceed the market price of the form of energy concerned and the aid can help reduce these environmental extra costs.

⁽⁵⁵⁾ Commission notice on determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

⁽⁵⁶⁾ Judgment of 3 July 1986, *Council v Parliament*, 34/86, EU:C:1986:291, paragraph 47; Judgment of 12 November 1998, *Spain v Commission*, C-415/96, EU:C:1998:533, paragraph 31; and Judgment of 3 October 2000, *Industrie des poudres sphériques v Council*, C-458/98 P, EU:C:2000:531, paragraph 82.

⁽⁵⁷⁾ Judgment of the Court of Justice of 8 December 2011, *France Télécom SA v European Commission*, Case C 81/10 P, EU:C:2011:811, paragraphs 82-83.

⁽⁵⁸⁾ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 20 and 24.

⁽⁵⁹⁾ See, in that sense, points 49 and 120 of the EEAG, as well as judgment of 22 September 2020, *Republic of Austria v Commission*, C-594/18 P, EU:C:2020:742.

- (119) As shown in Tables 1, 2 and 3, for taxpayers, the unit cost of biogas for motor or heat purposes is higher than the market price per unit of natural gas. Sweden explains that this is also the case for bio-propane. As mentioned in recitals (48) and (54), Sweden committed to include bio-propane in the annual monitoring reports and to compare its cost with the price of fossil propane and adjust the level of aid, if necessary, in order to avoid overcompensation. Furthermore, Sweden will adapt its annual monitoring reports for taking into account ETS exemptions for the biogas fraction used in heating and CHP plants in accordance with the monitoring and reporting requirements when adopted pursuant to Directive 2003/87/EC.
- (120) Since the tax exemptions will encourage the use of sustainable biogas and bio-propane, they will also incentivise the production of these types of renewable fuels. The Commission therefore takes the preliminary view that aid will have an incentive effect according to point (49) of the EEAG.

3.3.2.1.3. Compliance with other provisions of Union law

- (121) State aid that contravenes provisions or general principles of Union law cannot be declared compatible⁽⁶⁰⁾.
- (122) As mentioned in recital (22), Sweden will ensure that any aid under the schemes is granted only to biogas and bio-propane meeting the applicable EU sustainability and greenhouse gas emission criteria, as set out in RED I and RED II.
- (123) In compliance with point (113) of the EEAG, Sweden has also confirmed that no aid will be granted under the schemes to food-based biofuels (see recital (17)).
- (124) As the schemes concern excise duty exemptions for energy products, the Commission also assessed its compliance with Council Directive 2003/96/EC ('the Energy Taxation Directive')⁽⁶¹⁾.
- (125) Article 16(1) of the Energy Taxation Directive allows Member States to apply an exemption or a reduced rate of taxation to biofuels. Article 16(2) limits the exemption or reduction in taxation to the part of the product that actually derives from biomass, which is the case under the schemes (recital (24)), as the tax exemption only applies to the part of biogas and bio-propane.
- (126) Furthermore, the schemes also comply with Article 16(3) of the Energy Taxation Directive which states that the exemption or reduction in taxation applied by Member States shall be adjusted to take account of changes in raw material prices to avoid over-compensating for the extra costs involved in the manufacture of the products. The Commission notes that Sweden monitors annually the prices of the relevant products and, if needed, adjusts the aid levels to avoid the risk of overcompensation in the future (see recital (40)).
- (127) As stated in recital (33), the exemption of excise duty is applicable regardless of the origin of the biogas or bio-propane and therefore is in line with the free movement rules. The fiscal regime applicable for excise duties to energy imported by other Member States must be made in compliance with Directive 2008/118/CE concerning the general arrangements for excise duty and repealing Directive 92/12/EEC⁽⁶²⁾.
- (128) Therefore, the Commission reaches the preliminary conclusion that the schemes do not infringe relevant provisions of Union law.

3.3.2.2. Negative condition: the aid measure must not unduly affect trading conditions to an extent contrary to the common interest

3.3.2.2.1. The market affected by the aid

- (129) The market affected by the aid is the market of sustainable biogas and bio-propane in Sweden and in the EU.

3.3.2.2.2. The positive effects of the aid measure

- (130) As indicated in section 3.3.2.1.1, the measure contributes to the development of certain economic activity, i.e. the production of sustainable biogas and bio-propane. The promotion of the development of renewable energy is one of the aims of the Union's policy on energy. The measure is also in full consistency with the Union's renewables and emissions targets (see recital (25)).

⁽⁶⁰⁾ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

⁽⁶¹⁾ Directive 2003/96/EC on restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

⁽⁶²⁾ And from 13 February 2023 with Directive 2020/262/EU replacing Directive 2008/118/CE (Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast) (OJ L 058 27.2.2020, p. 4)).

3.3.2.2.3. The negative effects of the aid measure on the internal market: the aid measure minimizes the distortions on competition and trade

3.3.2.2.3.1. Need for State intervention

- (131) According to subsection 3.2.2 of the EEAG, the Member State needs to demonstrate that there is a need for the State intervention and in particular that the aid is necessary to remedy a market failure that otherwise would remain unaddressed. In the case of the production of renewable energy, the Commission presumes that a residual market failure remains, which can be addressed through aid for renewable energy, for the reasons set out in point (115) of the EEAG.
- (132) Without State intervention, biogas and bio-propane would have the same tax rates as their fossil counterparts, natural gas and LPG respectively. As shown in tables 1 to 3, without State intervention, biogas and bio-propane used as motor or heating fuels would be more expensive than their fossil equivalent. The Commission considers that they would therefore not be sold to the extent needed to contribute to the environmental goals which constitutes the objective of the schemes. On this basis, the Commission reaches the preliminary conclusion that the aid is necessary.
- (133) In addition, as stated in recital (23), Sweden has confirmed that the biogas and bio-propane supported under the schemes would not be subject to a quota system, blending obligations or other systems with similar effect. Point (114) of the EEAG is therefore complied with.

3.3.2.2.3.2. Appropriateness

- (134) According to point (40) of the EEAG, the proposed measure must be an appropriate instrument to address the policy objective concerned. According to point (116) of the EEAG, the Commission presumes the appropriateness and limited distortive effects of aid granted by Member States to achieve their climate change and sustainability targets, provided that all other compatibility conditions are met.
- (135) The Commission notes that tax exemptions encourage the consumption of sustainable biogas and bio-propane and thereby foster their production. The objective of the schemes is to contribute to meeting the national and EU targets mentioned in recital (25).
- (136) The Commission considers that aid in the form of a tax reduction is in principle an appropriate instrument to incentivise the consumption of renewable energy, provided all other compatibility conditions are met.

3.3.2.2.3.3. Proportionality excluding cumulation

- (137) According to point (131) of the EEAG, operating aid granted to energy from renewable sources other than electricity needs to meet the following cumulative conditions:
- (a) The aid per unit of energy does not exceed the difference between the total levelised costs of producing energy ('LCOE') from the particular technology in question and the market price of the form of energy concerned (no overcompensation).
 - (b) The LCOE may include a normal return on capital. Investment aid is deducted from the total investment amount in calculating the LCOE.
 - (c) The production costs are updated regularly, at least every year.
 - (d) Aid is only granted until the plant has been fully depreciated according to normal accounting rules in order to avoid that operating aid based on LCOE exceeds the depreciation of the investment.
- (138) On the condition in point 131(c) EEAG, the Commission notes that the schemes are subject to regular monitoring by the Swedish authorities. Sweden has confirmed that it will continue to monitor the market for motor and heating fuels and that monitoring reports will be compiled and sent to the Commission regularly. These reports will include updated cost calculations for biogas (and calculations for bio-propane if such a market develops). Sweden has also committed that in case the costs evolved to risk an overcompensation, the aid levels would be adapted accordingly. The Commission considers that the condition in point 131(c) EEAG is therefore met.
- (139) As mentioned in recital (38), Sweden has confirmed that no aid would be granted after the plants are fully depreciated according to normal accounting rules. The Commission considers that the condition in point 131(d) EEAG is therefore met.

- (140) On the condition in point 131(a) EEAG, Sweden has explained that its monitoring reports for 2018 and 2019 show that there has been no overcompensation for biogas, and forecasts show that it should not occur in the future. The results of the two last monitoring reports compiled by the SEA (provided in Tables 1, 2 and 3) indicate that there is still a price difference between natural gas and biogas to the detriment of biogas, regardless of the tax exemption granted.
- (141) As far as the point 131(b) is concerned, the Swedish authorities submitted that the rate of return for biogas in 2019 was around 10 %, which has been considered as a reasonable rate of return for the industry. Sweden committed to monitor yearly the return on investment and adjust the aid level if necessary.
- (142) Therefore, and before assessing cumulation (see section 3.3.4), the Commission reaches the preliminary conclusion that the schemes are proportionate.

3.3.2.2.4. Weighing up the positive effects of the aid with the negative effect on the internal market

- (143) The negative effects of the measure on competition and trade must be sufficiently limited, so that the overall balance of the measure is positive. The Court of Justice has clarified that in order to assess whether a measure adversely affects trading conditions to an extent contrary to the common interest, the Commission must weigh up the positive effect of the planned aid for the development of the activities that aid is intended to support and the negative effects that the aid may have on the internal market⁽⁶³⁾.
- (144) On the positive side of the balance, the Commission notes that the measure will support the consumption of sustainable biogas and bio-propane and thereby facilitate the development of sustainable biogas and bio-propane production. Moreover, the aid should induce positive indirect effects in terms of environmental gains.
- (145) In this regard, the Commission notes that promotion of the development of renewable energy is one of the aims of the Union's policy on energy pursuant to Article 194 TFEU. Moreover, point (30) of the EEAG recognises that an increased level of environmental protection may be attained through a shift to a low carbon economy with a significant share of variable energy from renewable sources.
- (146) Therefore, the Commission welcomes the fact that, as explained in recital (25), the schemes support the EU and national targets (increased use of renewable energy sources and reduction of greenhouse gas emissions).
- (147) As explained in recital (27), the cost of producing biogas is too high for these fuels to be able to compete with their equivalent fossil fuels without aid.
- (148) On the negative side of the balance, the Commission notes that the schemes provide an indirect advantage to sustainable biogas and bio-propane producers, to the exclusion of other fuels producers.
- (149) Point (116) of the EEAG establishes a presumption that aid to energy from renewable sources has limited distortive effects provided all other compatibility conditions are met.
- (150) In view of the doubts raised in section 3.3.4, at this stage, the Commission cannot conclude on the absence of undue negative effects on competition and trade between Member States.

3.3.2.3. Transparency

- (151) Member States are required under Section 3.2.7 of the EEAG to publish certain information related to the beneficiaries of aid. Sweden will continue complying with these provisions and to publish the relevant information on a website (see recital (63)).

3.3.2.4. Firms in difficulty or subject to an outstanding recovery order

- (152) As seen in recital (64), the Swedish authorities will continue ensuring that no aid will be granted to firms in difficulty or to those which are subject to an outstanding recovery order following a previous Commission decision declaring an aid measure illegal and incompatible with the internal market, in compliance with points (16) and (17) of the EEAG.

3.3.3. Preliminary assessment under the CEEAG

- (153) Following the adoption of the CEEAG, the Commission will assess the compatibility of the schemes on the basis of the CEEAG for the period from 27 January 2022. The supported activities fall under the category of aid for the reduction and removal of greenhouse gas emissions, including through support for renewable energy and energy efficiency (see point 16(a) CEEAG).

⁽⁶³⁾ Judgement of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 101.

(154) The Commission will assess the schemes under the general compatibility provisions in Section 3 CEEAG, as well as the specific compatibility criteria for aid for the reduction and removal of greenhouse gas emissions including through support for renewable energy and energy efficiency in Section 4.1 CEEAG.

3.3.3.1. Positive condition: the aid must facilitate the development of an economic activity

3.3.3.1.1. Identification of the economic activity which is being facilitated by the measure, its positive effects for society at large and, where applicable, its relevance for specific policies of the Union

(155) In line with points 23 to 25 CEEAG, Member States must identify the economic activities that will be facilitated as a result of the aid and describe if and how the aid will contribute to the achievement of Union policies and targets.

(156) The Commission notes that the schemes support, via tax exemptions, the consumption of biogas and bio-propane used as motor or heating fuels and thereby indirectly also the production of biogas and bio-propane, therefore contributing to the development of this economic activity (see recital (32)). As explain in recital (25), Sweden considers that by promoting the use of sustainable renewable fuels, the schemes contribute to meeting the EU and national targets mentioned.

(157) In compliance with point 80 CEEAG, Sweden has confirmed that the supported fuels will be compliant with the sustainability and greenhouse gases emissions saving criteria in RED II (see recital (17)).

(158) The Commission therefore considers that the schemes comply with the requirements of Section 3.1 and of point 80 CEEAG.

3.3.3.1.2. Incentive effect

(159) State aid can only be considered to facilitate an economic activity if it has an incentive effect. An incentive effect occurs when the aid induces the beneficiary to change its behaviour towards the development of an economic activity pursued by the aid, and if this change in behaviour would not otherwise occur without the aid ⁽⁶⁴⁾.

(160) In order to demonstrate the presence of an incentive effect, point 28 CEEAG requires the factual scenario and the likely counterfactual scenario in the absence of aid to be identified. Furthermore, point 28 CEEAG requires the incentive effect to be demonstrated through a quantification referred to in Section 3.2.1.3 CEEAG. Section 3.2.1.3 CEEAG refers to the net extra cost ('funding gap') necessary to meet the objective of the aid measure, compared to the counterfactual scenario in the absence of aid. In the absence of a competitive bidding process, point 51 CEEAG explains that to determine the funding gap in such cases, the Member State must submit a quantification, for the factual scenario and a credible counterfactual scenario, of all main costs and revenues, the estimated weighted average cost of capital ('WACC') of the beneficiaries to discount future cash flows, as well as the net present value ('NPV') for the factual and counterfactual scenarios, over the lifetime of the project. However, point 54 CEEAG explains that in certain circumstances, it may be difficult to fully identify the benefits and costs to the beneficiary and hence to quantify the NPV in the factual and counterfactual scenarios. Alternative approaches for those cases may be applied, as detailed in Chapter 4 for specific types of aid. In this respect, point 110 CEEAG states that where a tax or a parafiscal levy reduction reduces recurrent operating costs, the aid amount must not exceed the difference between the costs of the environmentally-friendly project or activity and of the less environmentally-friendly counterfactual scenario.

(161) In the schemes, the Commission notes that the factual scenario is the consumption of sustainable biogas or bio-propane and the counterfactual scenario is the consumption of the equivalent fossil fuel.

(162) In this context, the Commission considers that, in line with point 110 CEEAG, the relevant applicable quantification for the schemes consists in the difference between the costs of the environmentally-friendly activity and of the less environmentally-friendly counterfactual scenario, i.e. the costs of biogas (or bio-propane) and the costs of the equivalent fossil fuel.

(163) As demonstrated in Tables 1, 2 and 3, the costs of sustainable biogas for motor or heat purposes are higher than the costs of the natural gas. The aid contributes to reducing those extra costs. The Commission therefore considers that the tax exemptions will encourage the use of sustainable biogas (and bio-propane ⁽⁶⁵⁾) and, as a consequence, will also indirectly incentivise the production of these types of renewable fuels.

⁽⁶⁴⁾ See in that sense Section 3.1.2 CEEAG and Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 20 and 24.

⁽⁶⁵⁾ For bio-propane, Sweden committed to provide monitoring report and adjust the level of aid is necessary to avoid overcompensation.

- (164) On this basis, the Commission considers that the requirements in points 26 to 28 CEEAG are fulfilled.
- (165) Point 29 CEEAG stipulates that aid does not normally present an incentive effect in cases where works on the project started prior to the aid application. However, point 31 CEEAG explains that in certain exceptional cases, aid can have an incentive effect even for projects which started before the aid application. In particular, aid is considered to have an incentive effect if the aid is granted automatically in accordance with objective and non-discriminatory criteria and without further exercise of discretion by the Member State, and if the measure has been adopted and is in force before work on the aided project or activity has started, except in the case of fiscal successor schemes, where the activity was already covered by the previous schemes in the form of tax advantages.
- (166) As stated in recital (37), the aid is granted automatically in accordance with objective and non-discriminatory criteria and without further exercise of discretion by the Member State. In addition, the schemes are the successor of existing fiscal schemes so that the activity was already covered by the previous schemes. Therefore, the requirements in point 31 CEEAG are fulfilled.
- (167) Therefore, the Commission reaches the preliminary conclusion that the aid under the schemes has an incentive effect.

3.3.3.1.3. No breach of any relevant provision of Union law

- (168) State aid cannot be declared compatible with the internal market if the supported activity, the aid measure, or the conditions attached to it entail a violation of relevant Union law ⁽⁶⁶⁾.
- (169) In the present case, the Commission has assessed, in particular, whether the schemes contravene any relevant Union legislation in the energy sector. The Commission notes that aid under the schemes will be granted in compliance with RED II, as the supported products will have to comply with the sustainability and greenhouse gas emissions reductions criteria laid down therein (see recital (22)).
- (170) As the measure concerns excise duty reductions and exemptions for energy products, the Commission has also to assess its compliance with the Energy Taxation Directive.
- (171) Article 16(1) of the Energy Taxation Directive allows Member States to apply an exemption or a reduced rate of taxation on biofuels. Article 16(2) limits the exemption or reduction in taxation to the part of the product that actually derives from biomass, which is the case under the scheme (see recital (24)).
- (172) Furthermore, the measure also complies with Article 16(3) of the Energy Taxation Directive which states that the exemption or reduction in taxation applied by Member States shall be adjusted to take account of changes in raw material prices to avoid over-compensating for the extra costs involved in the manufacture of the products. The Commission notes that Sweden monitors annually the prices of the relevant products and, if needed, adjusts the aid levels to avoid the risk of overcompensation in the future (see recital (40)).
- (173) Therefore, the Commission considers that schemes do not violate any relevant provision of Union law, and that the requirements of point 33 CEEAG are fulfilled.

3.3.3.1.4. Conclusion

- (174) The Commission therefore reaches the preliminary conclusion that the schemes fulfil the first (positive) condition of the compatibility assessment i.e. that the aid facilitates the development of an economic activity pursuant to the requirements set out in Section 3.1 CEEAG.

3.3.3.2. Negative condition: the aid cannot unduly affect trading conditions to an extent contrary to the common interest

3.3.3.2.1. Necessity of the aid

- (175) Point 89 CEEAG states that the Member State must identify the policy measures already in place to reduce greenhouse gas emissions. In order to demonstrate the necessity of aid, points 38 and 90 CEEAG explain that the Member State must show that the project would not be carried out without the aid, taking into account the counterfactual situation, as well as relevant costs and revenues including those linked to measures identified in point 89 CEEAG. To ensure that aid remains necessary for each eligible category of beneficiary, Member States must update their analysis of relevant costs and revenues at least every three years for schemes that run longer than that, as set out in point 92 CEEAG.
- (176) Sweden has confirmed that the biogas and bio-propane supported under the schemes are not subject to a quota system, blending obligations or other systems with similar effect (see recital (16)).

⁽⁶⁶⁾ Point 33 CEEAG, and Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

- (177) Without State intervention, biogas and bio-propane would be subject to the same tax rates as their fossil counterparts, natural gas and LPG respectively. As shown in tables 1 to 3, without State intervention, biogas and bio-propane used as motor or heating fuels would be more expensive than their fossil equivalent. The Commission considers that they would therefore not be sold to the extent needed to contribute to the environmental goals which constitutes the objective of the schemes.
- (178) For the duration of the schemes' prolongation, Sweden has confirmed that it will yearly update its analysis of costs and send an annual monitoring report to the Commission with updated cost calculations. In line with its previous commitments, Sweden has confirmed that in case of overcompensation, the aid levels would be adapted to avoid any overcompensation in the future (see recital (40)).
- (179) On this basis, the Commission reaches the preliminary conclusion that the aid is necessary.

3.3.3.2.2. Appropriateness

- (180) Point 93 CEEAG states that the Commission presumes the appropriateness of aid for achieving decarbonisation goals provided all other compatibility conditions are met. It further sets out that, given the scale and urgency of the decarbonisation challenge, a variety of instruments may be used.
- (181) The Commission notes that tax exemptions encourage the consumption of sustainable biogas and bio-propane and thereby foster their production.
- (182) The Commission considers that aid in the form of a tax reduction is in principle an appropriate instrument to incentivise the consumption of renewable energy, provided all other compatibility conditions are met.

3.3.3.2.3. Eligibility

- (183) Point 95 CEEAG explains that decarbonisation measures targeting specific activities that compete with other unsubsidised activities can be expected to lead to greater distortions of competition, compared to measures open to all competing activities. As such, Member States should give reasons for measures which do not include all technologies and projects that are in competition. Furthermore, Member States must regularly review eligibility rules and any rules related thereto to ensure that reasons provided to justify a more limited eligibility continue to apply for the lifetime of each scheme, as set out in point 97 CEEAG.
- (184) The Commission notes that the schemes are open to non-food-based biogas and bio-propane used as motor or heating fuel that comply with the sustainability and greenhouse gases emission reduction criteria of RED II (see recital (22)).
- (185) The Commission also notes that the schemes include all technologies that are currently in competition (see recital (20)).
- (186) As mentioned in recital (21), the Swedish authorities have confirmed that they will regularly follow the market development and if needed review eligibility rules and any rules related thereto to ensure that any limitations on eligibility can still be justified when new technologies or approaches are developed or more data becomes available.
- (187) The Commission therefore considers that the requirements of section 4.1.3.3 CEEAG on eligibility are complied with.

3.3.3.2.4. Proportionality excluding cumulation

- (188) According to point 47 CEEAG, State aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed for carrying out the aided project or activity. Point 103 CEEAG states that aid for reducing greenhouse gas emissions should, in general, be granted through a competitive bidding process. However, point 109 CEEAG explains that for support schemes targeting decarbonisation in the form of reductions in taxes or parafiscal levies, the application of a competitive bidding process is not obligatory. Such aid must be granted, in principle, in the same way for all eligible undertakings operating in the same sector of economic activity that are in the same or similar factual situation in respect of the aims or objectives of the aid measure. The notifying Member State must put in place an annual monitoring mechanism to verify that the aid is still necessary. Point 109 CEEAG specifies that reductions of taxes or levies which reflect the essential costs of providing energy or related services are excluded from the scope of section 4.1 CEEAG.
- (189) According to point 110 CEEAG, where a tax or a parafiscal levy reduction reduces recurrent operating costs, the aid amount must not exceed the difference between the costs of the environmentally-friendly project or activity and of the less environmentally-friendly counterfactual scenario. Where the more environmentally friendly project or activity may result in potential cost savings or additional revenues, these must be taken into account when determining the proportionality of aid.

- (190) Sweden has confirmed that the aid, framed as a general tax reduction, is open to any undertaking which fulfils the eligibility criteria (see recital (37)).
- (191) The Commission notes that the schemes do not cover reductions of taxes reflecting essential costs of providing energy or related services, but of taxes that come on top of the costs of producing or purchasing biogas/bio-propane.
- (192) Sweden explained the tax exemptions are granted to compensate for the difference between the higher costs of sustainable non-food-based biogas and bio-propane and the costs of natural gas and LPG respectively (see recital (39)). The scheme is subject to regular monitoring by the Swedish authorities. Sweden has committed to submit to the Commission annual monitoring reports and to adapt the aid levels, if necessary, to avoid any overcompensation in the future (see recital (40)). The monitoring reports are based on detailed information collected by the SEA from the taxpayers, both in respect of domestically produced and of imported biogas (see recital (41)).
- (193) As shown in recitals (44) and (51), the Swedish authorities explained that the tax reductions do not exceed the difference between the cost of sustainable biogas and bio-propane and the cost of natural gas.
- (194) The Commission notes that all main costs are taken into account in the calculation. Moreover, revenues from the sales of by-products are included in the calculation. Sweden has however indicated that there is no system of guarantees of origin in place in Sweden for biogas (see Tables 1, 2 and 3).
- (195) Finally, point 111 CEEAG states that, when designing aid schemes, Member States must take into account the information on support already received from the mass balance system documentation under Article 30 of RED II.
- (196) The Commission notes that the mass balance system documentation under Article 30 of RED II only applies to biofuels, bioliquids and biomass fuels used in the transport sector. The Commission further notes that this system was not yet available when Sweden designed and notified the schemes, and therefore Sweden was not in a position to take into account information from the mass balance system documentation. Therefore, the Commission takes the preliminary view that the requirements of point 111 CEEAG are without impact on its assessment of the schemes.
- (197) Therefore and before assessing cumulation (see section 3.3.4), the Commission reaches the preliminary conclusion that the schemes are proportionate.

3.3.3.3. Transparency

- (198) The Commission notes that Sweden will ensure compliance with the transparency requirements laid down in points 58 to 61 CEEAG. The relevant data of the notified measure will be published on the Swedish State aid transparency website (see recital (63)).

3.3.3.4. Avoidance of undue negative effects on competition and trade

- (199) Point 70 CEEAG explains that the Commission will approve measures under these guidelines for a maximum period of 10 years. As stated in recital (55), the schemes will run under the CEEAG for nine years, i.e. from 2022 to 2030.
- (200) Point 116 CEEAG explains that the aid must not merely displace the emissions from one sector to another and must deliver overall greenhouse gas emissions reductions. Furthermore, points 127 to 129 CEEAG require Member States to explain how they intend to avoid the risk of aid eventually stimulating or prolonging the consumption of fossil-based fuels and energy.
- (201) The Commission notes that the overall objective of the schemes is to replace fossil fuels with sustainable biomass fuels. The use of sustainable biogas and bio-propane instead of natural gas or LPG, will deliver overall greenhouse gases emissions reductions.
- (202) Point 121 CEEAG explains that aid which covers costs mostly linked to operation rather than investment should only be used where the Member State demonstrates that this results in more environmentally-friendly operating decisions. Point 122 CEEAG states that where aid is primarily required to cover short-term costs that may be variable, Member States should confirm that the production costs on which the aid amount is based will be monitored and the aid amount updated at least once per year. The aid must be designed to prevent any undue distortion to the efficient functioning of markets, and preserve efficient operating incentives and price signals, as set out in point 123 CEEAG.

- (203) In the present case, the aid aims at reducing the level of tax applicable to sustainable biogas and bio-propane, so that they become a competitive alternative to their fossil fuel equivalents for the final consumer (see recital (39)). Therefore, the aim of the aid is to trigger a more environmentally-friendly decision on the part of consumers. The Swedish authorities have confirmed that the costs on which the aid amount is based will be monitored annually and the level of aid updated if necessary (see recital (40)).
- (204) Point 130 CEEAG explains that the Commission will, in principle, consider that State aid for biofuels, bioliquids, biogas and biomass fuels exceeding the caps determining their eligibility for the calculation of the gross final consumption of energy from renewable sources in the Member State concerned in accordance with Article 26 of RED II, is unlikely to produce positive effects which could outweigh the negative effects of the measure.
- (205) As detailed in recital (17), no support is granted to food and feed crops-based biomass fuels, under the schemes.
- (206) Point 132 CEEAG states that for scheme benefiting a particularly limited number of beneficiaries or an incumbent beneficiary, Member States should demonstrate how the proposed measure will not lead to distortions of competition, for example, through increased market power.
- (207) The Commission notes, as the aid is granted in the form of a general tax exemption on sustainable biogas and bio-propane, it is unlikely that it will benefit a particularly limited number of beneficiaries. The Commission notes that in 2018, 16 companies, which have benefitted from the motor fuel scheme, submitted data for the monitoring reports for biogas used as motor fuel (see recital (44)).
- (208) Therefore, and without prejudice to the assessment on cumulation, the Commission reaches the preliminary conclusion that the relevant requirements of section 4.1.4 CEEAG are complied with.

3.3.3.5. Weighing up the positive and negative effects of the aid

- (209) Point 134 CEEAG states that, provided that all other compatibility conditions are met, the Commission will typically find that the balance for decarbonisation measures is positive (that is to say, distortions to the internal market are outweighed by positive effects) in light of their contribution to meeting Union energy and climate objectives, as long as there are no obvious indications of non-compliance with the 'do no significant harm' principle.
- (210) The Commission notes that the schemes will contribute to the achievement of Sweden's and the EU's energy and climate objectives and that the supported biomass fuels will comply with the sustainability and greenhouse gases emissions saving criteria set out in RED II. The Commission finds no obvious indications of non-compliance with the 'do no significant harm' principle.
- (211) Given the doubts raised on the proportionality of the schemes as regards cumulation, the Commission cannot at this stage conclude whether the positive effects of the schemes outweigh the negative effects on the internal market.

3.3.3.6. Companies in difficulty and under recovery order

- (212) As set out in recital (64), Sweden has confirmed that in order to be eligible for the aid, the direct beneficiaries may not be subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market and may not be an undertaking in difficulty.
- (213) Based on the above, the Commission concludes that the schemes comply with points 14 and 15 CEEAG.

3.3.4. Cumulation

- (214) Following Section 3.2.5.2. of the EEAG, aid may be awarded concurrently under several aid schemes or cumulated with ad hoc aid, provided that the total amount of State aid for an activity or project does not exceed the limits fixed by the aid ceilings laid down in the EEAG.
- (215) According to point 56 CEEAG, aid may be awarded concurrently under several aid schemes or cumulated with ad hoc or de minimis aid in relation to the same eligible costs, provided that the total amount of aid for a project or an activity does not lead to overcompensation or exceed the maximum aid amount allowed under these guidelines. If the Member State allows aid under one measure to be cumulated with aid under other measures, then it must specify, for each measure, the method used for ensuring compliance with the conditions set out in this point.

- (216) The Commission notes that it is not excluded that a producer may receive production aid and that its production may then be exempted from energy and CO₂ taxes in Sweden, to the extent that it meets the eligibility conditions detailed in section 2.2.
- (217) The Commission notes that such support is granted at different stages of the supply chain and has different direct beneficiaries. Production aid intervenes at the first stage (production) and the Swedish tax exemptions schemes intervene at the last stage (consumption). The aim of production support is to encourage investment in biogas production by providing producers higher or more stable revenues than the market would normally provide. The aim of a consumption scheme is to reduce the price of biogas for end consumers so that they choose to buy biogas over natural gas.
- (218) As considered by the General Court ⁽⁶⁷⁾, the tax exemptions in Sweden have no impact on production cost. They could result in an increase in demand which could in turn result in increased revenues for the producer. At the same time, as also considered by the General Court ⁽⁶⁸⁾, biogas that received a production subsidy would enable the producer to sell biogas at a price that can compete with natural gas.

3.3.4.1. Cumulation with production aid at national level

- (219) As seen in recital (60), the Swedish authorities explained that cumulation between the tax exemptions and measures granting investment aid is possible and needed for reaching a level playing field between biogas/bio-propane and the equivalent fossil fuels. They also explained that investment aid amounts that had been granted to producers of biogas/bio-propane will be included in the capital costs and thereby taken into account for the compensation monitoring by the SEA.
- (220) On this basis, the Commission reaches the preliminary conclusion that the schemes are in line with Section 3.2.5.2. of the EEAG, in the case of cumulation with that production aid at national level ⁽⁶⁹⁾.
- (221) Similarly, the Commission reaches the preliminary conclusion that the schemes are in line with point 56 CEEAG, in the case of cumulation with that production aid at national level.

3.3.4.2. Cumulation with production aid in certain Member States

- (222) The Commission has received information on the evolution of the biogas market in Sweden, according to the country of origin. Landvärme has provided information on the proportions of biogas imported and produced domestically (see recital (78)). The data provided by Landvärme shows that the biogas market in Sweden has grown over time. The amount of Swedish biogas has remained constant, while, based on guarantees of origin, the amount from Denmark has continuously increased between 2015 and 2019. The data suggests that the amount from other countries has grown as well.
- (223) Once biogas is injected into the gas grid, it is indistinguishable from natural gas. GOs issued for the purposes of the RED II have the sole function of showing to a final customer that a given share or quantity of energy was produced from renewable sources. GOs are tradable. GOs have a market value that should be taken into consideration for the relevant support schemes ⁽⁷⁰⁾. The data provided by Landvärme suggest that an increasing number of GOs stemming from Denmark have been sold in Sweden, representing a volume higher than the Swedish production in 2019. As the GOs are tradable, it is not certain whether the Swedish buyers have bought them from Danish producers.
- (224) Sweden has provided information on the origin of the raw materials for biogas used as motor fuels (see recital (87)). The data provided by Sweden show that the share of energy produced with raw materials from Denmark amounted to 26 % in 2018 and 19 % in 2019, the main part coming from Sweden (69 % and 71 % respectively). Sweden explains that a reasonable assumption is that biogas is produced in the same country as the country of origin of the raw material.
- (225) The schemes have remained in place with no significant changes over the years.
- (226) Insofar as it can be established that there was an increase of imports from Denmark, the Commission notices that the data provided also indicate that imports from other countries have increased as well. The Commission questions what the determinants of the growth of the biogas imports are and whether this can be explained by the Swedish measures and the measures by certain other Member States, notably by Denmark (including by the potential combination of those measures).

⁽⁶⁷⁾ EU:T:2022:853, para. 25.

⁽⁶⁸⁾ EU:T:2022:853, para. 25.

⁽⁶⁹⁾ EU:T:2022:853, para. 89-91 and 108.

⁽⁷⁰⁾ See article 19 of RED II: 'Member States shall ensure that when a producer receives financial support from a support scheme, the market value of the guarantee of origin for the same production is taken into account appropriately in the relevant support scheme'.

- (227) As detailed in Section 2.7, Landwärme claims that such combination of aid may result in an overcompensation of producers who received production aid in another Member State, and of Danish biogas producers in particular. In the Commission's understanding, Landwärme specifically refers to the aid provided to biomethane producers in Denmark under cases SA.35485.
- (228) The Commission notes that in its assessment of overcompensation, the SEA annually checks whether the cost of biogas on the Swedish market remains higher than the cost of its fossil counterpart, including taxes.
- (229) With regard to the potential cumulation of the notified Swedish tax schemes and the production aid granted notably by Denmark, the Commission notes that the Swedish authorities explained that any aid granted to a producer, in Sweden or in another Member State, is taken into account either directly or indirectly in the assessment of overcompensation (see recital (43)). If the taxpayer is a producer, the aid granted at production level will directly be reflected in the production costs used for the overcompensation test. If the taxpayer is a fuel supplier or importer Sweden submits that the price included in the test is likely to reflect the aid granted at production level.
- (230) The Commission also notes that Denmark has put in place a control mechanism to check the absence of overcompensation of Danish producers (see recitals (93) to (96)). The Commission notes that all revenues, including revenues from guarantees of origin, are included in the funding gap analysis.
- (231) At this stage of the procedure and in view of the elements brought to its attention, the Commission has doubts about the proportionality of the schemes in view of the potential cumulation of the aid granted under the schemes in question with the aid granted by Denmark to biogas producers. The Commission seeks to clarify whether the alleged cumulation is for the same eligible costs and if so, whether this provides overcompensation in favour of producers that receive production aid in Denmark when they sell biogas in Sweden. The Commission also seeks information from interested parties in case they might have concrete evidence that in their view would suggest overcompensation by the Swedish schemes to producers in cases where production aid is granted by another Member State.
- (232) With reference to the market developments referred to above (see recitals (222) to (224)), the Commission seeks clarification on the impact of the combination of aid granted in Sweden under the schemes and aid granted by other Member States to biogas producers on the growth of imports in Sweden of biogas produced in other Member States, notably Denmark.

4. CONCLUSION

On the basis of the currently available information and the elements described above, the Commission seeks clarification and solicits comments on the proportionality of the aid in view of the potential cumulation of the aid granted under the schemes in question with production aid granted by Denmark and potentially other Member States to biogas producers and whether such cumulation provides overcompensation in favour of those producers when they sell biogas in Sweden. The Commission seeks clarification and solicits comments concerning, in particular, the points raised in section 3.3.4 of this decision.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Sweden to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Sweden that Article 108(3) TFEU has suspensory effect and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

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