

Regional Developments

Germany

THE EXEMPTION FROM NETWORK CHARGES BENEFICIAL TO LARGE ELECTRICITY CONSUMING UNDERTAKINGS AND THE LEVY FOR THE COMPENSATION OF THESE “LOST PROFITS” PAYABLE BY OTHER USERS TO TRANSMISSION GRID OPERATORS (§ 19-SURCHARGE)

☞ Electricity transmission; EU law; Exemptions; Germany; Large businesses; Levies; Network access; State aid

Based on statutory regulations¹ operators of grids for electricity and gas include charges for the use of their grids in their prices. These charges are payable by suppliers, industrial users and consumers. By means of such charges the operators shall be enabled to extend their networks, which is essential for the achievement of the energy turnaround. The energy turnaround is the political aim by means of which the German Government intends to switch to renewable energy sources. A precondition of their use, particularly of wind resources available in northern Germany, is an expansion of the network system. These charges are indispensable in order to finance the expansion of grids. In order to achieve the nuclear energy phase-out by 2022, some 3800km of new electricity “Autobahnen” are needed to transport the electricity from the wind parks in north Germany to the industry in the south.² The operators of the four German electricity transmission grids, the *Amprion GmbH*, *TenneT 50 GmbH*, *50Hertz Transmission GmbH* and *TransnetBW GmbH*, assess that investments of some €21 billion may be necessary for the next 10 years.³

But the charges imposed upon users and consumers of electricity for the benefit of transmission grid operators leads to an increase in cost prices, particularly for large energy consuming undertakings. In order to prevent such energy intensive undertakings leaving Germany, the government introduced reductions and/or partial exemptions from these charges for the benefit of these undertakings. In turn, the government provided also for additional levies to be charged to other users in order to compensate the operators of transmission grids for “lost profits” caused by the reduction or exclusion of grid charges.

In a Statement of November 30, 2011, the Federal Government assessed⁴ that the benefits accruing to the electricity intensive industry by reason of special rules, reductions or exemptions from charges on the basis of the Energy Economy Act (EEG) amounted to some €1.5 billion in 2010. In the case of charges based on the Combined Heat and Power Act, the benefits for the electricity intensive industry amounted to some €45 million in 2011. Special beneficiary rules contained in the Electricity Grids User Charge Ordinance brought the electricity intensive industries advantages of some €180 million in 2010. The government considered that the income forgone due to tax benefits concerning energy consuming processes and methods amounted to €983 in 2010. The levies, which shall compensate transmission grid operators for “lost profits”, are provided for in laws and by-laws. For example, the reduction of the cost price for the benefit of electricity intensive undertakings according to the Combined Heat and Power Act was combined with an increase of the electricity price of some €0,003 kWh, which is imposed upon private households, trade and commerce and services.

The Federal government explained its policy⁵:

¹ For example the German Energy Economy Act or the Electricity Grids User Charge Ordinance.

² *Financial Times* of May 30, 2012, Netzentwicklungsplan: Vier Autobahnen für die Energiewende.

³ Netzentwicklungsplan Strom 2013, first draft by the operators of transmission grids, p.136, available at http://www.netzentwicklungsplan.de/NEP_2013_Teil_I.pdf [Accessed April 16, 2013].

⁴ Federal Government, Statement of November 30, 2011, Federal Parliament, Document No.17/7960, p.2.

⁵ Federal Government, Statement of November 30, 2011, Federal Parliament, Document No.17/7960, p.8.

“Compared with other European countries and on the international level German energy prices are relatively high. A considerable element of this fact consists of taxes and charges imposed upon energy prices in Germany. The energy price is particularly relevant for energy intensive undertakings in international competition. These industries contribute essentially to the production of basic materials and future relevant value-added chains in Germany. Additionally, they offer work for several hundred thousands of employees, and they generate tax income beyond the fields of energy and electricity taxes. Accordingly, the Federal government considers that these reliefs constitute a necessary and useful contribution for Germany’s future as an economic location.”

In 2010, the German electricity industry supplied some 48 million end users with electricity of which more than two million were industrial users and more than 46 million consumers households; the charges for the use of electricity transmission grids present roughly 20 per cent of the electricity price.⁶ Since 2005, these grid charges have had to be approved by the *Federal Network Agency* upon the application of transmission grid operators, and they are fixed on a national level. The approval is based on calculations including different factors such as certain legal requirements, concession fees, business taxes, costs arising from cross-frontier trade, certain investments and also costs for works councils imposed upon the operator by law.

With the amendment of the Energy Economy Act of August 4, 2011, the Federal government modified art.19(2) of the Electricity Grids User Charge Ordinance,⁷ introducing a complete exemption from the obligation to pay transmission grid charges for the benefit of those undertakings, which are large consumers of electricity. According to art.19(2) of the Ordinance those undertakings, which have an annual consumption exceeding 10 million kWh and a full use of at least 7,000 hours, may apply for exemptions to the competent *Federal Network Agency*.⁸ Such undertakings belong particularly to the branches of the aluminium, chemical and metal industries.⁹ The purpose of this amendment was to avoid an outflow of those undertakings from Germany. The motives of the amendment state¹⁰:

“Electricity intensive undertakings with a high base load (more than 7,000 hours of use per annum and an annual consumption in excess of 10 GWh) shall be exempted from charges for grid use, since they exercise a stabilizing effect upon the base load. Local factors should not play a role for the question of the exemption from charges for grid use according to Article 19(2) sentence 2 of the Electricity Grids User Charge Ordinance. In order to avoid any disproportional negative regional impact there shall be a levy established on the Federal level.”

In 2011, some 281 undertakings had asked for an exemption from the charges.¹¹ Whereas, in 2012, reductions and exemptions amounted to a value of some €300 millions, this figure is likely to double by 2013 according to estimations by the four operators of electricity transmission grids.¹²

⁶ Bundesnetzagentur, “Markt und Wettbewerb—energie—Kennzahlen 2010”, available at http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/BNetzA/Presse/Publikationen/MarktWettbewerb/BroschüreMarktWettbewerbEnergieKennzahlen2010pdf.pdf?__blob=publicationFile [Accessed April 16, 2013].

⁷ Electricity Grids User Charge Ordinance (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen—StromNEV).

⁸ Article 19(2) Sentence 2 of the Ordinance states: “If the consumption of electricity from a grid for the general supply for the own use amounts to at least 7,000 hours and if the consumption of electricity at that point of supply exceeds 10 gWh, the end user shall principally be exempted from the obligation to pay electricity grid user charges.”

⁹ See Federal Government, Federal Parliament Document No.17/9279, p.9.

¹⁰ Federal Parliament, Document No.17/6365, p.34.

¹¹ Federal Government, Federal Parliament Document No.17/9279, p.5.

¹² See <http://www.tagesschau.de/wirtschaft/netzentgelte100.html> [Accessed April 16, 2013].

Applications may be filed for the current year, but the exemption may be granted with indeterminate duration.¹³ Although the undertaking does not know whether it will actually meet the requirements of the Ordinance, e.g. a consumption in excess of 10 million kWh, it may nevertheless request the application for the exemption in the current year. An exemption granted with indeterminate duration will not automatically be revoked if the requirements are not met within a year. However, there will be a revocation if the undertaking does not meet the requirements for the two following years. A company has to prove the subsistence of any requirements within the first quarter of the following year.¹⁴ Any documentation necessary for the exemption has to be provided by the interested party through the operator of the transmission grids, which will be treated as the applicant.¹⁵

“Lost profits” ensuing from exemptions to operators of transmission grids shall be borne by other users. Article 19(2) sentences six to eight of the Electricity Grids User Charge Ordinance provides for a mechanism, whereby these “lost profits” are included into the charges of other users,¹⁶ namely those who use less electricity. On December 14, 2011 the *Federal Network Agency* issued a reasoned *Determination of the Procedure*,¹⁷ establishing a levy for the compensation of “lost profits”; the so-called “§ 19-surcharge”. This levy, which is applied from 2012 onwards, is based on art.19(2) of the Electricity Grids User Charge Ordinance, focusing on an allocation of costs as per their cause and aimed at the achievement of more transparency and legal security. At the beginning of this method of calculation in 2012, the Federal Network Agency permitted the use of target values. In its reasoned *Determination of the Procedure* the *Federal Network Agency* stated¹⁸:

“The levy according to Article 19 of the Electricity Grids User Charge Ordinance is necessary in order to maintain unitary economic conditions in Germany. It leads to unitary economic charges based on the consumption of the individual end user. The levy according to Article 19 of the Ordinance has a unitary procedure, which establishes identical conditions for actors on the German energy market by achieving the highest possible degree of transparency.”

¹³ Federal Network Agency: Leitfaden zur Genehmigung von Befreiungen von den Netzentgelten nach § 19 Abs. 2 s.2 StromNEV (December 2012), p.7, see: http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK4-GZ/2012/2012_1600bis1699/BK4-12-1656_BKV/Leitfaden.pdf?__blob=publicationFile [Accessed April 16, 2013].

¹⁴ Federal Network Agency: Leitfaden zur Genehmigung von Befreiungen von den Netzentgelten nach § 19 Abs. 2 s.2 StromNEV (December 2012), p.7, see: http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK4-GZ/2012/2012_1600bis1699/BK4-12-1656_BKV/Leitfaden.pdf?__blob=publicationFile [Accessed April 16, 2013].

¹⁵ Federal Network Agency: Leitfaden zur Genehmigung von Befreiungen von den Netzentgelten nach § 19 Abs. 2 s.2 StromNEV (December 2012), p.7, see: http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK4-GZ/2012/2012_1600bis1699/BK4-12-1656_BKV/Leitfaden.pdf?__blob=publicationFile [Accessed April 16, 2013].p.9.

¹⁶ Article 19(2) Sentences 6–8 of the Electricity Grids User Charges Ordinance obliges the operators of grids to compensate these “lost profits”: “They have to compensate (...) for these exemptions from charges according to sentence 2 by means of internal financial set-offs; Article 9 of the Combined Heat and Power Act is applicable by way of analogy. Article 20 is applicable by way of analogy. The conclusion of individual charges for the use of electricity grids is made with the proviso that the particular requirements according to sentences 1 and 2 are actually met.”

¹⁷ Federal Network Agency, Order of 14/12/2011—BK8-11-024—Concerning the Determination of the Compensation According to art.19 of the Electricity Grid User Charges Ordinance in Deviation from art.17(8) of the Electricity Grid User Charges Ordinance, see http://www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK8-GZ/2011/2011_001bis100/BK8-11-024_BKV/BK8-11-024_Entscheidung.pdf?__blob=publicationFile [Accessed April 16, 2013].

¹⁸ See fn.17 above, at p.18.

The *Federal Network Agency* based its authority to regulate the matter on art.24 cl.1 of the Energy Economy Act,¹⁹ combined with arts 30(2) cl.6 and art.17(8) of the Electricity Grids User Charge Ordinance and art.27(1) cl.12 of the Electricity Grids Access Ordinance.²⁰ The Agency stated²¹:

“This levy does not constitute an element of the charges for the use of electricity grids in the sense of Article 17(1) to (3) of the Electricity Grids User Charge Ordinance. The introduction of this levy provides another admissible element of a charge, as per the express reference in the motives of the Act, document of the Federal Parliament no. 245/05 p. 39). Article 27(1) clause 12 of the Electricity Grid User Charge Ordinance offers the possibility to render public further charges.”

The Agency considered that arts 30(2) cl.6 and art.17(8) of the Electricity Grids User Charge Ordinance²² authorise the regulating authority to determine additional charges for the whole German territory in order to balance such costs in a unitary and transparent manner. Addressees of the procedure are only those operators in the sense of art.3(9) of the Combined Heat and Power Act,²³ who operate grids of all mains voltages for the general supply of electricity.

The § 19-surcharge will be levied by the four operators of electricity transmission grids. The levy is payable by end-users. End-consumers are classed in three groups. Group A consists of end-users with an annual consumption below 100,000 kWh, the levy amounting to €0,00329/kWh in 2013. End-consumers of Group B, who have a consumption in excess of 100,000 kWh, will pay a levy of €0,0005/kWh for any such consumption. Conversely, those who work in production, which established Group C, will pay a maximum levy of €0.00025/kWh provided that their consumption exceeds 100,000 and that their energy costs amounted to at least 4 per cent of their turnover in 2012.²⁴

Numerous organisations and consumer associations complained about the preferential treatment of large energy consuming undertakings, which had to pay only reduced or no charges at all. They complained also about the imposition of the levy payable by ordinary or small consumers of electricity.²⁵ The government explained that it replied to the *Commission's* questionnaire on June 29, 2012.²⁶ On March 6, 2013, the *Commission* opened an in-depth investigation to find out whether an exemption for large electricity consumers from network charges granted in Germany since 2011 constitutes state aid. According to art.107 of the Treaty on the Functioning of the EU (TFEU)²⁷ state aid may not unduly distort competition in the EU.²⁸ According to the *Commission's* preliminary view, the § 19-surcharge may well constitute a state resource. It is also of the opinion that the exemption may give its beneficiaries a selective advantage over competitors in other member states, very likely causing a distortion of competition within the internal market. But

¹⁹ Article 24 cl.1 of the Energy Economy Act states: “The Federal Government is authorized to regulate by means of Ordinances with the consent of the Federal Council: 1) to determine the conditions for the access to grids including the procurement and performance of compensatory payments or methods for the determination of these requirements and methods for the determination of charges for the access to grids in application of Articles 20 to 23.”

²⁰ Verordnung über den Zugang zu Elektrizitätsversorgungsnetzen—StromNZV.

²¹ See fn.17 above, at p.18.

²² Article 30(2) cl.6 of the Electricity Grid User Charges Ordinance states: “(2) The Authority competent for the regulation may establish determinations in order to ensure: ... 6. Appropriate charges in deviation of Article 17(8)”

²³ Combined Heat and Power Act (Kraft-Wärme-Kopplungsgesetz—KWKG).

²⁴ See fn.17 above, at p.24.

²⁵ For example, the Registered Association Federation of Energy Consumers complained to the EU Commission's Directorate General for Competition against the exemption from charges for the use of electricity grids according to art.19(2) of the Electricity Grid User Charges Ordinance.

²⁶ See Federal Parliament, Document No.17/10700, p.9.

²⁷ Article 107(1) of the Treaty on Functioning of the European Union—TFEU—states: “(1) Save as otherwise provided in the Treaties, 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.”

²⁸ See EU Commission, Press Release No.IP 13/191 of March 4, 2013.

the *Commission* will carefully examine whether the exemption can be justified by an objective of common interest and, if so, whether this will outweigh any negative impact on competition.

The outcome of the *EU Commission's* investigation is of particular interest, since the other elements of German energy law contained in the Renewable Energies Act²⁹ could be conceived as state aid. The Renewable Energies Act supports the development of technologies for the production of electricity from renewable energies. Its aim is to ensure an increase of the share of electricity derived from technologies using wind energy, hydro-energy, solar energy, geothermic energy, biomass energy, landfill, sewage, or mine gas. Operators of renewable energy installations receive a guaranteed feed-in remuneration for the sale of generated electricity. Operators of grids are obliged to take the supply, arts 21 and 8(1) of the Renewable Energies Act, and a resulting increase of costs is passed on to the end user, who has to pay the “*EEG-levy*” collected by energy suppliers.³⁰ In 2013, the “*EEG levy*” amounts to net €0,05277/kWh.

There were also complaints against the Federal Network Agency's determination concerning the § 19-*surcharge* to German courts. Before the *Court of Appeal of Düsseldorf* there are some 100 cases pending. On March 6, 2013, the court held³¹ that the Federal Network Agency's procedure for the grant of exemptions from electricity transmission grids charges for the benefit of large electricity consuming undertakings was unlawful and without effect, and it repealed the Agency's regulations concerning the exemption. The court held³² that the provisions of the Energy Economy Act did not constitute a sound basis for the exemption from network charges. In particular, the court found that the Act authorized the Federal government (in art.24 Sentence 1 cl.1) to establish methods for the determination of charges for the access to grids in the application of arts 20–23. But this, however, does not include a complete exemption from such charges. Articles 21(1) and (2) of the Energy Economy Act require merely that the terms and charges for access to grids must be appropriate, non-discriminatory and transparent. Supplementarily, art.24 Sentence 1 cl.3) of the Act provides that in particular cases the regulating authority may provide for individual charges for access to grids or prohibit this.³³ The court concluded that the power of regulation referred not to the “if”, but only to the “how” concerning the assessment of charges for the access to grids.³⁴ Accordingly, the Agency may only regulate the method for the calculation and payment of charges, but not a total exemption from this obligation.

The *Court of Appeal of Düsseldorf* doubted that the exemption from access charges was compatible with EU law. The Directive 2009/72 of July 13, 2009 concerning common rules for the internal market in electricity provides in art.32(1) for non-discriminatory third-party access to grids for transmission and distribution on the basis of published tariffs.³⁵ Such access must be available for any admitted users, and it must be non-discriminatory. Article 21(1) of the Energy Economy Act implements this provision into German law. From the fact that the remuneration for access to grids has to be based

²⁹ Renewable Energies Act (Erneuerbare-Energien-Gesetz - EEG).

³⁰ See the information platform of the German operators of transmission grids, available at <http://www.eeg-kwk.net/de/EEG-Umlage.htm> [Accessed April 16, 2013].

³¹ Court of Appeal of Düsseldorf of March 6, 2013, File No.VI-3 Kart 65/12 [V], complainant: Stadtwerke Ilmenau GmbH, see http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2013/VI_3_Kart_65_12_V_Beschluss_20130306.html [Accessed April 20, 2013].

³² See note above, paras 92 et seq.

³³ See also Court of Appeal of Düsseldorf of December 12, 2012, File No.VI-3 Kart 46/12(V), para.37, available at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2012/VI_3_Kart_46_12_V_Beschluss_20121212.html [Accessed April 16, 2013].

³⁴ See fn.31 above, at [110].

³⁵ Directive 2009/72 of July 13, 2009 concerning common rules for the internal market in electricity, Article 32—Third-party access—1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with art.37 and that those tariffs, and the methodologies—where only methodologies are approved—are published prior to their entry into force.

on costs, it follows in the *court's* view that differences in prices must reflect different costs for access. Accordingly, a particularly intensive use should not be able to justify an exemption from the payment of charges but only a corresponding reduction; that is to say an individual remuneration. The fact that high consumption may contribute to the stability of networks may be an appropriate criterion for establishing remuneration, insofar as it is apt to impact the costs of the grids and, consequently, reduce the remuneration of other users. But this means that the maker of the Ordinance could only reduce the charges and not provide for a complete exemption, which is not related to a justification based on the principle of cost causation. Additionally, the *court* found that the modification of the Electricity Grids User Charge Ordinance by Parliament on August 4, 2011 was not formally correct, because the Bill which intended the amendment did not have the necessary correlation in relation to the *Ordinance*. The court also considered that a total exemption from the electricity grids user charge was incompatible with requirements of equality, imposed by art.3 of the German Basic Law. It may be expected that the *Federal Network Agency* will file a complaint on points of law against the Court of Appeal of Düsseldorf's judgment to the *Federal Supreme Court*.

These legal uncertainties caused the Federal Ministry of Economy and Technology to draft a bill for a reform of the Electricity Grids User Charge Ordinance. The Ministry informs on its website about plans to modify the present Ordinance³⁶:

“There will be graded electricity grid user charges for large consumers based upon annual consumption and hours of use. This will ensure an appropriate participation of this group of users in the costs of grids.”

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Spain

UNBUNDLING NATURAL GAS TRANSPORTATION IN SPAIN

☞ EU law; Gas transporters; Implementation; Natural gas; Ownership; Spain

The regulatory path

Based on the assumption that only if the unbundling process is effective, is it possible to create a liberalised internal market, both the 2003 Electricity Directive and the 2003 Gas Directive required the legal unbundling of distribution system operators and transmission system operators from supply companies? But legal unbundling was not enough. In the so-called Third Package¹ on Energy Liberalisation, unbundling was reinforced and it has now become full ownership unbundling. However, in the European style, certain compromises and temporary exceptions had to be contemplated. Member States needed to implement full ownership unbundling of transportation operators (TSO) by the end of March 2013. As an exemption, Member States may allow operators that were vertically integrated as of September 3, 2009 to opt to use other unbundling formulae either: (i) to use an independent system operator (ISO); and (ii) to implement an independent transmission operator (ITO). Nevertheless, as regards electricity and gas distribution legal and functional unbundling means that distribution companies

³⁶ See the Federal Ministry of Economy and Technology, <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/novelle-strom-und-gasnetzentgeltverordnung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> [Accessed April 16, 2013].

¹ The Third Package consists on the following regulations approved in July 2009: (i) Directive 2009/73 concerning common rules for the internal market in gas (the Gas Directive); (ii) Directive 2009/72 concerning common rules for the internal market in electricity; (iii) Regulation 715/2009 on conditions for access to the natural gas transmission networks; (iv) Regulation 714/2009 on conditions for access to the network for cross-border exchange of electricity; and (v) Regulation 713/2009 on the establishment of the Agency for the Cooperation of Energy Regulators ACER.