

Grid Fee Exemption under German Energy Law for Large-Scale Energy Consumers – A State Aid Déjà Vu?

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I. The German regulatory and legal framework

The German regulatory and legal framework regarding the energy sector was amended in 2011 after the huge nuclear disaster in the Japanese nuclear power plant in Fukushima. The German government decided overnight to exit nuclear power technology faster than planned. The first couple of plants were shut down within days after the decision. Since then, Germany's policy aims at a material switch to energy from renewable sources ("*Energiewende*") and has had severe implications not only on electricity producers and grid dimensions but on prices as well. To protect and improve the German industries' position in international competition, several exemptions are in place to spare costs to the industry or at least to alleviate the burden associated with the *Energiewende*. However, a mechanism that exempts large-scale energy consumers from grid fees completely, to the disadvantage of all other grid users, is subject to EU State aid rules scrutiny, even if State budgets or public cash-flows are not directly involved.

According to sec. 19 para. 2 s. 2 of the German regulation on grid access fees (*Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen* (StromNEV): "the regulation"), consumers whose grid usage exceeds 7.000 hours per annum

and whose gross energy consumption exceeds 10 GWh can apply for an (total) exemption from the obligation to pay grid fees. This advantage depends on an administrative decision taken by the National Regulatory Authority in charge, i.e. the *Bundesnetzagentur* ("*BNetzA*"). The application can be filed either by the grid operator or by the large-scale grid user (sec. 19 para. 2 s. 4). The grid operator's lost revenues resulting from the exemption are invoiced to the upstream grid operators and – finally – "collected" by the transmission system operators (sec. 19 para. 2 s. 6). The transmission system operators are obliged to equalize the burden between them (sec. 19 para. 2 s. 7) through a mechanism provided for by sec. 9 of the Combined Heat and Power-Act (the *Kraft-Wärme-Kopplungsgesetz*).

According to an industry-wide binding decision of the *BNetzA*,¹ transmission system operators calculate a so called "sec. 19 apportionment" and invoice it to downstream grid operators, who pass it on to their customers, i.e. to the suppliers and ultimately to the consumers.

II. Proceedings before the Higher Regional Court of Düsseldorf

Two appellants initiated preliminary proceedings against this grid fee exemption and "sec. 19 apportionment" mechanism. The Higher Regional Court of Düsseldorf (Germany) thereupon initiated an *amicus curiae procedure* under the notice of the *European Commission* regarding the enforcement of State aid law by national courts² on 27 August 2012 and asked the *European Commission* for a statement whether or not the exemption of large-scale electricity consumers from the obligation to pay grid fees under German energy regulatory law constitutes State aid according to Article 107(1) TFEU.³ Further 166 principal proceedings on this issue are expected to take place in the Spring of 2013.

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1 *BNetzA*, decision of 14.12.2011, BK8-11-024.

2 Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), OJ EU No. C 85/1 of 9.4.2009, para. 79b.

3 See press release No. 29/2012 of 6.9.2012, http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20120906_Befreiung_Netzentgelte/index.php.

III. State aid according to Article 107(1) TFEU?

Whether or not the grid fee exemption and the "sec. 19 apportionment" mechanism constitute illegal State aid according to Article 107(1) TFEU is subject to lively discussions in Germany. If this were the case, the breach of the stand-still-clause under Article 108(3) s. 3 TFEU would result in the inapplicability of sec. 19 para. 2 s. 2 of the regulation, the return of financial advantages (including interests) and private enforcement. Under the jurisdiction of the German Federal Court of Justice (*Bundesgerichtshof*) directly or indirectly affected competitors of large-scale energy consumers favoured by the mechanism could furthermore successfully file claims for disclosure, the return of advantages, omission and damages.⁴

The cornerstone of the decision whether or not such an exemption constitutes illegal State aid lies in the Article 107(1) formula "aid granted by a Member State or through State resources". In other words, the decisive question focuses on the governmental origin of monies (economic attribution criterion) and the attribution to a Member State (control criterion). Even if the latter criterion is not explicitly contained in the wording of Article 107(1) TFEU, the *European Court of Justice* ("ECJ") emphasises the degree of State control in its decisions.⁵

In *PreussenElektra*⁶ the ECJ illustrates how to escape Article 107(1) TFEU avoiding the strict control through State aid law: There is no "aid granted by a Member State or through State resources" in place if a private electricity supplier is obliged by binding and directly applicable law to take delivery of electricity generated from renewable sources at regulated minimum prices. The reasoning of the ECJ is based on the notion that the resulting economic advantages of certain undertakings (i.e. the producers of the favoured electricity) do neither rely on a direct nor indirect transfer of public money.⁷ If – on the contrary – not only obligations to buy at (higher than market) prices fixed by law apply, but if prices are invoiced and paid out by a governmentally dominated clearing agency, aid is granted "through State resources".⁸ This thin line of differentiation has been drawn by the ECJ in the judgment *Essent Network*⁹ to overcome the *PreussenElektra* rationale. In *Essent Network* the ECJ had to curtail in a first step the implications of its decision in the *Pearle* case,¹⁰ implying monies collected by an industrial association, which were used for

"a purely commercial purpose and had nothing to do with a policy determined by the authorities". By contrast, in *Essent Network* "the payment of the amount of NLG 400 million to the designated company had been the subject of a decision by the legislature".¹¹ In a second step, the Court distinguished the *Essent Network* case from the facts of *PreussenElektra*. In *PreussenElektra* "the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources."¹² Ending up in the conclusion that the payments "constitute intervention by the State through State resources"¹³ the ECJ ruled in *Essent Network*:

"2. Article 87 EC must be construed as meaning that the amounts paid to the designated company under Article 9 of the Transitional Law on the electricity generating sector (*Übergangsgesetz Elektrizitätsproduktionssektor*) of 21 December 2000 constitutes 'State aid' for the purposes of that provision of the EC Treaty in so far as they represent an economic advantage and not compensation for the services provided by the designated company in order to discharge public service obligations."

The exemption of large-scale electricity consumers from the obligation to pay grid access fees according to sec. 19 para. 2 s. 2 of the German electricity grid access fee regulation is right on the verge of *Essent Network*. The decisive question is whether the exemption is directed individually and on a case-by-case basis by an agency controlled by the State (also com-

4 BGH, judgment of 10.2.2011, I ZR 136/09, para. 23, 60 – *Airport Frankfurt-Hahn*; I ZR 213/08, para. 20, 29 – *Airport Lübeck*.

5 Jaeger, *European State Aid Law Quarterly* (EStAL 3) 2012, 535 et seq. has recently argued that the controlling criterion should be abandoned.

6 ECJ, judgment of 13.3.2001, C-379/98, AR 2001, I-2099 – *PreussenElektra*; cf. Koenig/Kühling, ZUM 2001, p. 537.

7 ECJ, judgment of 13.3.2001, C-379/98, AR 2001, I-2099, para. 59, 61, 66.

8 Commission, dec. of 4.7.2006, Aid N317A/2006, para. 48-53 – *Wienstrom*.

9 ECJ, judgment of 17.7.2008, C-206/06, para. 73 subs. – *Essent Network Noord BV*.

10 Case C-345/02, *Pearle*, [2004] ECR I-7139, paras. 37 ff.

11 Case C-206/06, *Essent Network Noord BV*, [2008] ECR I-05497, para. 73.

12 *Essent Network Noord BV* (fn. 11), para. 74.

13 *Essent Network Noord BV* (fn. 11), para. 75.

parable to *Wienstrom*¹⁴). According to this rationale, an involvement or burden of official public budgets is not necessary to constitute State aid as long as the administration of the scheme is dominated by a State agency. Both criteria, i.e. the governmental scheme as the source of monies and the attribution to the Member State, are fulfilled under the regime of sec. 19 para. 2 s. 3 of the regulation due to the conditioning of the grid access fee exemption by a decision of the National Regulatory Authority on a case-by-case basis and on application of either the grid operator or the large-scale electricity consumer as the beneficiary (sec. 19 para. 2 s. 4). By contrast to the *PreussenElektra* feed-in-scheme of renewable electricity at fixed (higher than market) prices, prescribed by generally binding law and implemented by virtue of private law contracts without a transposing decision of any public authority, sec. 19 para. 2 s. 2-4 provides for an entirely State-administered implementing procedure. Its administrative mechanism, i.e. the decision-making of the National Regulatory Authority upon application of either the grid operator or the

large-scale electricity consumer as the beneficiary, can be compared to administrative procedures on granting public subsidies. Even if the apportionment does not pass official public budgets, the exemption scheme under sec. 19 para. 2 s. 2-4 is State-administered through the case-by-case procedure applied by the National Regulatory Authority and refinanced entirely through a *virtual* State controlled "apportionment budget". This State attribution even becomes clearer with a view to the transitional rule in No. 10 of the operative provisions of the *BNetzA* decision,¹⁵ according to which lost grid revenues for the year 2011 are not covered by any apportionment, but are written to the regulatory account according to sec. 5 of the German incentive regulation ordinance. Under the aforementioned regulatory provision, the *BNetzA* is empowered to level out differences between predicted and actual revenues from grid fees. According to its sec. 5 para. 4 s. 2 the imbalance resulting from differences is distributed equally over the next regulatory period and compensated within the regulatory account being set up by the *BNetzA*.

IV. Conclusion

Can State attribution according to EU State aid law be more apparent?

¹⁴ Commission decision C(2006) 2955 of 4 July 2006 on Austrian feed-in tariffs, Aid N317A/2006, para. 48-53.

¹⁵ *BNetzA*, decision of 14.12.2011, BK8-11-024.