

# Exemptions for large-scale energy consumers under state aid scrutiny (Germany)

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## I. Introduction

Over the last decade, German governments have tried to establish the production and sale of energy from renewable sources on the energy market in order to exit nuclear and coal power technologies as soon as technically and economically possible. Given the huge nuclear disaster in the Japanese nuclear power plant in Fukushima in 2011, the German regulatory and legal framework regarding the energy sector was amended in 2011 under enormous public and political pressure to reach this goal in an even shorter period of time. By implementing different kinds of apportionments into the regulatory and legal framework, the government and the legislator tried to cushion the severe implications not only on electricity producers and grid dimensions but on prices for some privileged energy consumers as well. These apportionment mechanisms favour for instance producers of energy from renewable sources as they are guaranteed either a fixed price for the power feed-in or a market bonus for marketing their energy directly to power suppliers. On the other hand, large-scale energy consumers are protected from arising additional costs as well to alleviate the burden associated with the energy turnaround ('Energie-wende') by exemptions from grid fees or from apportionments to cover the bonuses for renewable energy producers. It did not take long for these apportionment mechanisms to raise the attention of the European Commission and become subject to EU State aid law scrutiny after various complaints of consumer associations given the fact that private households have to bear the main burden financing the envisaged material change of energy production under the current legal circumstances.

## Key Points

- Over the last decade, successive German governments have introduced regimes favourable to the production and sale of energy from renewable sources.
- There is considerable uncertainty as to the legality of these regimes under EU state aid law.

## II. German regulations in the energy sector under State aid law scrutiny

### A. German regulation on grid access fees

The first regulatory provision the European Commission took action against by its decision of 6 March 2013 to initiate the formal examination procedure was sec. 19 para. 2 s. 2 of the German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)) in force prior to its replacement in August 2013. This regulation allowed those consumers whose grid usage exceeded 7.000 hours per annum and whose gross energy consumption exceeded 10 GWh to apply for a (total) exemption from the obligation to pay grid fees. This advantage was triggered by an administrative decision issued by the German National Regulatory Authority, the Bundesnetzagentur ('BNetzA'). The application could be filed either by the grid operator or by the large-scale grid user.<sup>1</sup> The grid operator's lost revenues resulting from the exemption were invoiced to the upstream grid operators and—finally—'collected' by the transmission system operators (TSOs).<sup>2</sup> The TSOs were obliged to equalise the burden between them<sup>3</sup> through a

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1 Sec. 19 para. 2 s. 4 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

2 Sec. 19 para. 2 s. 6 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

3 Sec. 19 para. 2 s. 7 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

mechanism provided for by sec. 9 of the Combined Heat and Power-Act. According to an industry-wide binding decision of the BNetzA,<sup>4</sup> TSOs calculated a so-called 'sec. 19 apportionment' and invoiced it to downstream grid operators, who passed it on to their customers, ie to the suppliers and ultimately to the consumers.<sup>5</sup>

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 courts<sup>6</sup> 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 Art. 107 para. 1 TFEU.<sup>7</sup> At that time the European Commission—more precisely the Commission's legal service—referred to the ECJ judgment 'Preussen Elektra' and came to the preliminary conclusion to not classify the apportionment as State aid. Nevertheless, this evaluation did not prevent the Commission's Directorate-General for Competition from opening State aid proceedings against Germany in March 2013.

## B. EEG-Act (Renewable energy act)

The second apportionment mechanism in the energy sector to be scrutinised under State aid rules were the regulations implemented in the renewable energy act (Erneuerbare Energien Gesetz, EEG) including not only an apportionment to support the financing of the production of renewable energies<sup>8</sup> but also an apportionment to reduce charges for gross energy consumers<sup>9</sup> and for power supply companies delivering a specific quota of 'green energy' to their consumers<sup>10</sup> as well. Producers of renewable energies may choose between a fixed feed-in compensation per kWh well above the market price—guaranteed over a period of 20 years—when delivering to their distribution system operator (DSO) or a market premium covering the difference between the attained selling price and the fixed feed-in compensation when selling their produced energy directly to a third party. The latter option was introduced to encourage direct

business contracts and relationships for long-term market establishment of renewable energy producers.

According to the German regulation on compensation mechanism (Ausgleichsmechanismusverordnung, Ausgl-MechV), the TSOs are obliged to repay these additional costs to the DSO who compensated the renewable energy producer under the EEG mechanism. The TSOs are then responsible for selling the produced energy as a whole on a spot market at the energy stock exchange EPEX. Subsequently, the power supply companies need to pay a calculated amount per supplied kWh to the TSOs equal to the TSOs' left discrepancy between paid tariffs to DSOs plus expenditures for marketing and selling renewable energies and the actual proceeds earned at the spot market. This discrepancy is called the 'EEG apportionment' and legally based on sec. 37 para. 2 EEG. The power supply companies are free to charge this levy to their customer's bills which they usually do for passing down the financial burden onto the next market level. The exact amount of the 'EEG apportionment' is calculated by the four operating TSOs in Germany as a forecast each October ahead of the next year.

Nevertheless industrial consumers of the manufacturing sector or railway sector whose energy consumption exceeded 1 GWh per annum are massively privileged in stages according to their annual consumption. For instance, a company consuming over 100 GWh annually only pays 0.05 Eurocent/kWh as 'EEG apportionment' at a maximum in contrast to 6.240 Cent/kWh paid by a regular consumer.<sup>11</sup> A German higher federal authority (Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)) is competent to issue these exemptions for qualified applicants if they comply with the legal requirements.<sup>12</sup> The TSOs' calculations about next years 'EEG apportionment' take these exemptions into consideration and hence raise the surcharge amount according to the sum needed to cover all compensations and expenditures paid by the TSOs.

Not only industrial consumers but also power supply companies can be excluded from the obligatory 'EEG apportionment' if they deliver a quota of 50 per cent of energy from renewable sources to their customers. Arising losses due to this exemption from the levy are equally taken into account when calculating the annual figure of the 'EEG apportionment'.

4 BNetzA, dec. of 14 December 2011, BK8-11-024.

5 Ernst/Koenig, Grid fee exemptions under German Energy Law for large-scale energy consumers—a State aid déjà vu?, EStAL 1/2013, p. 37.

6 Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), OJ EU No. C 85/1 of 9 April 2009, para. 79b.

7 See press release No. 29/2012 of 6 September 2012, [http://www.justiz.nrw.de/JM/Presse/presse\\_weitere/PresseOLGs/archiv/2013\\_01\\_Archiv/06\\_03\\_20131/index.php](http://www.justiz.nrw.de/JM/Presse/presse_weitere/PresseOLGs/archiv/2013_01_Archiv/06_03_20131/index.php).

8 Sec. 37 para. 2 EEG.

9 Sec. 40 ff. EEG.

10 So-called 'Grünstromprivileg', sec. 39 EEG.

11 [http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2013/131015\\_EEG-Umlage.html](http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2013/131015_EEG-Umlage.html) (17 March 2014).

12 Sec. 40 ff. EEG.

The European Commission opened the formal examination procedure on 18 December 2013 against all the different apportionment mechanisms included in the EEG Act as described above.

### III. Legal analysis applying State aid law

The cornerstone of the decision whether or not Sec. 19 para. 2 s. 2 of the German regulation on grid access fees and the different apportionment measurements contained in the EEG constitute illegal State aid lies in the Art. 107 para. 1 TFEU 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).<sup>13</sup> Even if the latter criterion is not explicitly included in the wording of Art. 107 para. 1 TFEU, the European Court of Justice (‘ECJ’) emphasises the degree of State control in its decisions.<sup>14</sup>

The control criterion is not only fulfilled due to the fact that grid fee exemptions are based on a regulation passed by the government and therefore can be attributed to the Member State<sup>15</sup> but also due to the controlling power the State can exercise on these apportionment measurements indirectly through the assigned TSOs as ‘administrators’.

Concerning the economic attribution criterion however, ‘[advantages] must be granted directly or indirectly through State resources. This means that both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State are included in the concept of State resources within the meaning of Article 107(1) TFEU’.<sup>16</sup>

The Commission stretches in its opening decision regarding the grid fee regulation:

*As a consequence, the mere fact that the advantage is not financed directly from the State budget is not sufficient to*

*exclude that State resources are involved. Also, the originally private nature of the resources does not prevent them being regarded as State resources within the meaning of Article 107(1) TFEU. Hence, the mere fact that a subsidy scheme benefiting certain economic operators in a given sector is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned is not sufficient to take away from that scheme its status of aid granted by the State within the meaning of Article 107(1) TFEU.’<sup>17</sup>*

#### A. ECJ Case law concerning State involvement

In *PreussenElektra*,<sup>18</sup> the ECJ illustrates how to escape Art. 107 para. 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 immediately 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 (ie the producers of the favoured electricity) do neither rely on a direct nor indirect transfer of public money.<sup>19</sup> 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’.<sup>20</sup> This thin line of differentiation has been drawn by the ECJ in the judgment *Essent Netwerk*<sup>21</sup> to overcome the *PreussenElektra* rationale. In *Essent Netwerk*, the ECJ had to curtail in a first step the implications of its decision in the *Pearle* case,<sup>22</sup> 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’. In contrast, in *Essent Netwerk* ‘the payment of the amount of NLG 400 million to the designated company had been the subject of a decision by the legislature’.<sup>23</sup> In a second step, the Court distinguished the *Essent Netwerk*

13 *Ernst/Koenig*, Grid fee exemptions under German Energy Law for large-scale energy consumers—a State aid déjà vu?, EStAL 1/2013, p. 38.

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

15 *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, par. 37 ff; *CFI*, judgment of 12 December 1996, T-358/94, AR 1996, I-2109—*Air France/Commission*, paras. 63–65; *ECJ*, judgment of 22 March 1977, C-78/76, AR 1977, 595—*Steinike & Weinlig/Deutschland*, para. 21.

16 *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, Para. 37; judgment of 22 March 1977, C-78/76, AR 1977, 595—*Steinike & Weinlig/Deutschland*, para. 21; *ECJ*, judgment of 13 March 2001, C-379/98, AR 2001, I-2099—*PreussenElektra*, para. 58.

17 *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, para. 38f; *CFI*, judgment of 12

December 1996, T-358/94, AR 1996, I-2109—*Air France/Commission*, para. 61.

18 *ECJ*, judgment of 13 March 2001, C-379/98, AR 2001, I-2099—*PreussenElektra*; cf. *Koenig/Kühling*, ZUM 2001, 537.

19 *ECJ*, judgment of 13 March 2001, C-379/98, AR 2001, I-2099, paras. 59, 61, 66.

20 *European Commission*, dec. of 4 July 2006, Aid N317A/2006, paras. 48–53—*Wienstrom*.

21 *ECJ*, judgment of 17 July 2008, C-206/06, para. 73 subs.—*Essent Netwerk Noord BV*.

22 *ECJ*, judgment of 15 July 2004, C-345/02, AR 2004, I-7139, para. 37 ff.—*Pearle*.

23 *ECJ*, judgment of 17 July 2008, C-206/06, para. 73—*Essent Netwerk Noord BV*.

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’.<sup>24</sup> However, in *Essent Netwerk*, the ECJ ruled that the amounts paid to the designated company ‘constitute intervention by the State through State resources’ as ‘they represent an economic advantage and not compensation for the services provided by the designated company in order to discharge public service obligations’.<sup>25</sup>

In the opening decision concerning the EEG, the European Commission leaves no doubt about its narrow understanding of circumstances equal to those in the *PreussenElektra* judgment and consequently its wide approach on State attribution. The State attribution thereby subjects the apportionment mechanism to State aid scrutiny under the compatibility assessment according to Art. 107 para. 3 TFEU and therefore empowers the Commission to exercise its margin of discretion:

*The Court excluded the transfer of State resources in only very specific circumstances: For instance in PreussenElektra, the Court found that the Stromeinspeisungsgesetz (Electricity feed-in Act) [...] put in place a mechanism that was limited at directly obliging electricity supply undertakings and upstream electricity network operators to purchase renewable electricity at a fixed price, without any body administering the stream of payments. [...] There was no surcharge established by the State to compensate the electricity suppliers for the financial burden resulting from the supply obligation, and therefore, nobody had been appointed to administer such a surcharge and the corresponding financial flows.*<sup>26</sup>

## B. Subsumtion

The exemption of large-scale electricity consumers from the obligation to pay grid access fees<sup>27</sup> and the different apportionment mechanisms implemented in the EEG are right on the verge of *Essent Netwerk*.<sup>28</sup> 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 comparable to *Wienstrom*<sup>29</sup>). 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.

### 1. Sec. 19 para. 2 s. 2 of the German electricity grid access fee regulation

Both criteria, ie the governmental scheme as the source of monies and the attribution to the Member State, are fulfilled under the regime 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.<sup>30</sup> In 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 ss. 2–4 provides for an entirely State administered implementing procedure. Its administrative mechanism, ie 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 ss. 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’.<sup>31</sup>

The Commission shares this view stating that the German State has—just like in the case of *Essent Netwerk*—imposed a surcharge/levy on the energy consumers in order to finance the advantage and appointed an undertaking to administer this surcharge according to the rules set up by the State to govern the use and destination of the levy. Surcharge amounts taken in that exceed the need for compensation and financial flows in general can be closely monitored and steered by the State.<sup>32</sup>

Especially, the governmental influence on how the exact apportionment amount is calculated according to a pre-defined method is capable to replace a direct

24 ECJ, judgment of 17 July 2008, C-206/06, para. 74—*Essent Netwerk Noord BV*.

25 ECJ, judgment of 17 July 2008, C-206/06, par. 75—*Essent Netwerk Noord BV*.

26 European Commission, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 93.

27 Sec. 19 para. 2 s. 2 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

28 *Ernst/Koenig*, Grid fee exemptions under German Energy Law for large-scale energy consumers—a State aid déjà vu?, EStAL 1/2013, p. 38.

29 European Commission, decision of 4 July 2006, SA. N317A/2006, paras. 48–53.

30 Sec. 19 para. 2 s. 4 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

31 *Ernst/Koenig*, Grid fee exemptions under German Energy Law for large-scale energy consumers—a State aid déjà vu?, EStAL 1/2013, p. 39.

32 European Commission, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, para. 49.

financial flow through State budget and therefore qualifies for the State attribution criteria:

*Also the fact that the TSO would calculate the level of the surcharge does not change the conclusion that State resources are involved. Indeed, the surcharge has been imposed by the State and the State has determined the methodology how to determine the surcharge. The TSO are not free to set the level of the surcharge as they wish. They can only calculate it on the basis of the methodology imposed by the BNetzA. In addition, for the first year of operation, the BNetzA has established itself directly the starting amount for the calculation of the surcharge [...].<sup>33</sup>*

This State attribution even becomes clearer with a view to the transitional rule in No. 10 of the operative provisions of the BNetzA decision,<sup>34</sup> 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. 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.<sup>35</sup>

This point of view is shared by the Commission stating that a regulating mechanism has been established by the BNetzA to compensate financial losses resulting from the exemption which does not leave the TSO to decide freely on the level of the § 19-surcharge nor freely decide on the destination of the § 19-surcharge.<sup>36</sup> Even if lost revenues are pre-financed by the TSOs, there is no change in categorising the levy to finance grid fee exemptions under the State attribution criterion as they do not have to bear the financial burden ultimately.<sup>37</sup>

As a result, the TSOs are assigned by governmental regulations to administer State resources and the State has determined how the apportionment mechanism is to be organised, how to calculate the exact levy, and how to further proceed with all revenues from this levy. Consequently, the TSO can be seen as a central administrative institution financing grid fee exemptions by order of the State.

## 2. EEG apportionment mechanisms

A very similar rationale compared with the grid fee exemptions was chosen by the Commission in its opening decision concerning the different mechanisms implemented in the EEG in order to finance both renewable energies and exemptions from apportionment fees. Based on the previous ECJ decisions as described above, the Commission draws the same conclusion for the sec. 37 para. 2 EEG apportionment stating clearly that the support for energy from renewable sources is not financed by private means but by financial resources controlled by the state:

*[...] the Commission observes that the State can control, direct and influence the administration of the funds at stake: the State intervenes at both the level of the advantage (feed-in tariffs) and its financing (the entire system of the EEG-surcharge). The State has defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also provided the financial resources to cover the costs of the support to RES electricity and electricity from mining gas. Contrary to what was the case in Doux Elevage, the EEG-Surcharge stems from the State and is not a private initiative of the TSOs.<sup>38</sup>*

The mechanism to collect and redistribute the levy is strictly tied to the state's specific purpose to finance renewable energy production and underlies detailed statutory provisions and a close monitoring leaving no scope of action to the TSOs:

*The TSOs are not free to establish the surcharge as they want and are strictly monitored in the way the surcharge is calculated, levied and managed. Also, the way they sell the EEG electricity is monitored by the State. The provisions governing the establishment of the EEG surcharge ensure that the surcharge provides a sufficient financial cover to pay for the support for RES electricity and electricity from mining gas as well as for the costs implied by the management of the system. It does not allow for more. The TSOs cannot use the EEG-surcharge to finance any other type of activity, and financial flows are to be kept on separate accounts.<sup>39</sup>*

The same critical mechanism is applicable to manage the legal exemptions from the EEG apportionment: If a power supply company delivers energy to a privileged undertaking, the competent TSO to collect the levy can only claim a reduced amount for each delivered energy

<sup>33</sup> *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, para. 58.

<sup>34</sup> BNetzA, dec. of 14 December 2011, BK8-11-024.

<sup>35</sup> Sec. 5 para. 4 s. 2 German regulation on grid access fees (Verordnung über die Entgelte für den Zugang zu Elektrizitätsversorgungsnetzen (StromNEV)).

<sup>36</sup> *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, para. 59 f.

<sup>37</sup> *European Commission*, Opening decision, 06 March 2013, SA.34045 (2013/C) (ex 2012/NN), C(2012) 8765 final, para. 61.

<sup>38</sup> *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 137.

<sup>39</sup> *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 137.

unit from the supplier. This amount corresponds to the EEG levy that the supplier was able to charge the privileged consumer with according to the exemption rules laid down in sec. 40 ff. EEG. These so-called exemptions for gross energy consumers (Energieintensive Unternehmen, EIU) from the EEG levy result in an increased amount of the EEG apportionment per kWh for all energy consumers as the TSOs need to take revenue losses due to these exemptions into account when calculating the exact amount that is necessary to cover costs resulting from market premiums or fixed feed-in compensations to producers of renewable energy. This ‘on top levy’ to cover for consumers that only pay a reduced levy is an extra surcharge virtually running through the TSOs budget and being monitored by the State as well as the original EEG surcharge itself. It guarantees that the TSOs are not financially burdened by the exemptions but virtually pass on the losses down to lower market levels, at first to the power suppliers and finally to every energy consumer paying the full levy amount, as most suppliers will take advantage of their right to claim the EEG surcharge—including the on top amount added to cover for losses by exemptions—from the customers they supply. The four German TSOs compensate each other according to sec. 43 para. 3, sec. 36 EEG taking exemptions from the levy for privileged energy consumers into account.

The State attribution criterion is not only fulfilled by this economic attribution but also by the control aspect, as the German higher federal authority BAFA (Bundesamt für Wirtschaft und Ausfuhrkontrolle, supervised by the German federal Ministry for Economic Affairs and Energy) decides about all applications from companies eligible for exemptions under the EEG Act.<sup>40</sup> Even though the authority’s decision is strictly bound to the legal requirements and leaves no scope for deviations according to the authority’s assessment, an approval is still needed and a positive decision relies on the authority’s consent declaring all submitted documents prove eligibility for the legal requirements to be granted the exemption.<sup>41</sup> This decision therefore contains a regulatory element which attributes the power of decision to a State institution.<sup>42</sup>

The State involvement described by the Commission is also not lessened by the fact that both the TSOs and the power supply companies are not legally obliged to charge the levy to the lower market levels.<sup>43</sup> Lost revenues by exemptions are to be collected and compensated between the four regional TSOs.<sup>44</sup> The legal framework in the EEG Act gives the TSOs an entitlement to claim the extra amount needed for the apportionment to finance the exemptions for privileged consumers from power supply companies.<sup>45</sup> Hence they have the option to pass the burden on to their customers. Due to economic reasons, there is no doubt that the levy will be—and de facto is—passed down until it reaches the last link in the chain, ie the energy consumer. By virtue of these legal instructions, the State has a significant influence on how the apportionment mechanism is operated.

A certain level of autonomy for the TSOs when exercising their mandate to act as a quasi-authority fulfilling the assigned task to administer the apportionment management does not change the State control aspect. For instance, sec. 37 para. 2 EEG leaves the calculation details of how to proceed with higher or lower revenues collected through the apportionment than previously calculated to the TSOs. Even if this regulation gap is not filled by a more precise regulation of the Federal Network Agency for instance (as it happened in case of sec. 19 para. 2 StromNEV), the State involvement is still at such a significant level that the State control criterion is not affected.<sup>46</sup> The classification of the TSOs as private companies with a certain ‘room for manoeuvre’ does not alter the fact that their role is a substitute for an administrative task imposed by the State that can only be fulfilled by an actor close enough to the market system at an operative level to be able to regulate surcharges effectively. It is safe to say that the State would have most likely left the task to its own authorities (for instance, the *BNetzA*) if there wasn’t such an established and well working regulatory cooperation of the group of the four regional TSOs under sufficient control of the National Regulatory Authority already.

The TSOs accomplish an equal task when calculating losses caused by the so-called ‘Grünstromprivileg’ (sec.

40 [http://www.bafa.de/bafa/de/energie/besondere\\_ausgleichsregelung\\_eeg/](http://www.bafa.de/bafa/de/energie/besondere_ausgleichsregelung_eeg/) accessed 17 March 2014.

41 Bundesministerium für Wirtschaft und Energie, Hintergrundinformationen zur Besonderen Ausgleichsregelung, Antragsverfahren 2013 auf Begrenzung der EEG-Umlage 2014, Berlin, 27 January 2014, [http://www.bafa.de/bafa/de/energie/besondere\\_ausgleichsregelung\\_eeg/publikationen/bmwi/eeg\\_hintergrundpapier\\_2014.pdf](http://www.bafa.de/bafa/de/energie/besondere_ausgleichsregelung_eeg/publikationen/bmwi/eeg_hintergrundpapier_2014.pdf) accessed 17 March 2014.

42 For a different point of view see *Lübbig/Fuchs*, The German Renewable Energy Act (EEG)—Unlawful State Aid? A legal assessment on occasion of the State Aid Proceedings by the European Commission against Germany, ENLR 2/2014, p. 121 ff.

43 For a different point of view see *Lübbig/Fuchs*, The German Renewable Energy Act (EEG)—Unlawful State Aid? A legal assessment on occasion of the State Aid Proceedings by the European Commission against Germany, ENLR 2/2014, p.121 ff.

44 Sec. 43 para. 3, sec. 36 EEG.

45 Sec. 37 para. 2 EEG.

46 For a different point of view see *Lübbig/Fuchs*, The German Renewable Energy Act (EEG)—Unlawful State Aid? A legal assessment on occasion of the State Aid Proceedings by the European Commission against Germany, ENLR 2/2014, p. 121 ff.

39 EEG): This exemption privileges power supply companies by reducing the compulsory levy when purchasing a certain percentage of their energy from renewable sources. Lost revenues are ‘collected’ at the TSOs’ market level and redistributed down the lower market levels by allocating the ‘on top’ payment needed to refinance this privilege within the consumers EEG apportionment as an increased amount per kWh. Comparable with the EEG surcharge and to the exemptions for EIU, the state remains involved at various levels of this mechanism of apportionment:

*In this connection, the Commission notes that according to the information at hand, the German State remains involved on the level of the cap. The BNetzA must specifically ensure that only suppliers fulfilling all conditions of § 39 of the EEG-Act benefit from the reduction of 2ct/kWh. With regard to the transfer of resources the reduction of 2 ct/kWh results in a decreased amount collected by EEG-surcharge for the TSOs. The reduction therefore implies a renouncement to State resources.<sup>47</sup>*

In the Commission’s analysis, the ‘surcharge needed to finance exemptions from the surcharge’ as the virtual amount being shifted from non-privileged consumers to privileged consumers becomes especially apparent:

*In a second step, the EEG-surcharge reduction and the corresponding decrease in EEG resources for the TSOs is set off at a later stage by a mechanism that compensates the foregone revenues by increasing the amounts raised by the EEG-surcharge for the remaining (non-capped) consumption. The mechanism of § 39 of the EEG-Act results in the level of the surcharge being higher for the other electricity consumers. The loss of revenues induced by the reduction is thus ultimately financed from the EEG-surcharge, which - as established above - has at this stage to be considered as a State resource.<sup>48</sup>*

### C. Common Market Compatibility

In principle, the EEG apportionment (sec. 37 para. 2 EEG) can be declared compatible<sup>49</sup> with the Common Market according to Art. 107 para. 3 TFEU under the current Community guidelines on State aid for environmental protection,<sup>50</sup> nevertheless formal approval by the Commission is required.

However, this reasoning cannot be applied to the exemptions from the levy for gross energy consumers

(sec. 41 EEG) due to the danger of distortion of competition:

*However, the Commission doubts that, as results from case-law and decision practice, aid aiming at reducing cost differences between Member States and improving the competitiveness of undertakings toward undertakings from other Member States or at preventing relocation in other Member States can be viewed as being in the common interest. Aid that aims at reducing cost disparities with other Member States distorts competition, as the aid measure would protect German industry over other EU/EEA competitors, thus potentially leading to a race of subsidies.<sup>51</sup>*

The privilege for power supply companies according to sec. 39 EEG is not compatible with the principle of free movement of goods as well as it may cause discriminatory effects towards importing producers of energy from renewable sources.<sup>52</sup>

In this context, the Advocate-General’s opinion concerning the ECJ’s pending case Ålands Vindkraft AB versus Energimyndigheten needs to be taken into consideration<sup>53</sup>: He suggests the Court may declare Art. 3 para. 3 of the Renewable Energy Directive (2009/28/EC) incompatible with the principle of free movement of goods as the directive allows Member States to exclude renewable energy producers of a different Member State from their respective national support scheme. A justification under aspects of environmental protection is not applicable for this case according to the Advocate-General’s opinion.

### IV. Legal consequences

If the grid fee exemption and the ‘sec. 19 apportionment’ mechanism constitute illegal State aid according to Art. 107 para. 1 TFEU, the breach of the stand-still-clause under Art. 108 para. 3 s. 3 TFEU results 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, BGH*) 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.<sup>54</sup>

47 *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 145f.

48 *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 147.

49 *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 153.

50 Community guidelines on State aid for environmental protection, 2008/C 82/01.

51 *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 231.

52 *European Commission*, opening decision of 18 December 2013, SA.33995 (2013/C) (ex 2013/NN), C(2013) 4424 final, para. 257.

53 *Advocat-General Yves Bot*, opinion of 28 January 2014, C-573/12—Ålands Vindkraft AB/Energimyndigheten.

54 *BGH*, judgment of 10 February 2011, I ZR 136/09—*Airport Frankfurt-Hahn*, paras. 23, 60; I ZR 213/08—*Airport Lübeck*, paras. 20, 29.

Especially for the EEG-Act, a preliminary inapplicability imposed by Art. 108 para. 3 TFEU implies dramatic consequences: The current legal system of apportionment and exemption mechanisms would have to be suspended until the Commission declares a significant ‘reconstruction’ of the EEG-Act as compliant with State aid rules. According to settled case law of the ECJ concerning parafiscal levy funding of regulations that constitute State aid, the financial source (in this case: the EEG apportionment) needs to be included in State aid control procedures comprising the prohibition of implementation (Art. 108 para. 3 TFEU) for advantages financed by this kind of funding.

Furthermore, companies that have been privileged under the EEG-Act as State aid beneficiaries will need to think about on-balance provisions for possible State aid recovery claims (sec. 249 para. 1 HGB, German Commercial Code) or at least for the illegality interest until a formal approval for the State aid by the Commission is issued. The Commission’s legal service is strictly monitoring the observance of the inapplicability rule of Art. 108 para. 3 TFEU. In this context, the ECJ judgment of 21 November 2013 (Case C-284/12) concerning the binding effect of opening decisions of the Commission adds an aggravating dimension to the Commission’s opening decision for the EEG-Act of 18 December 2013: According to the Court in case of the initiation of a formal examination procedure by the Commission ‘national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.’<sup>55</sup> With this judgment, the ECJ sanctions the implementation of national measures constituting a *possible* breach of State aid rules without the Commission’s permission. In case of the EEG-Act, this would firstly lead to the inapplicability of the apportionment mechanism and secondly to the duty for State aid beneficiaries to ensure that possible State aid recovery claims are covered by on-balance provisions which alone bear the risk of insolvency for some companies. In case of the EEG apportionment mechanism, a huge financial gap may arise due to massive savings in energy costs over the previous years by advantages such as exemptions granted by the EEG-Act.

## V. Political dimension

Under this dramatic threat, political debate about a tremendous legislation amendment of the EEG-Act has been hitting headlines over the last couple of months in Germany. On 8 April 2014, German federal minister for economic affairs and energy Sigmar Gabriel has succeeded in finding a compromise in cooperation with the European Commission surveying the process in terms of State aid scrutiny. Unlike the opening decision of the European Commission suggested some of the current privileges for gross energy consumers and other exemptions in the EEG-Act will still be part of the EEG *de lege ferenda* with the Commissions formal approval, but apparently not to the current vast extent.<sup>56</sup> Before this agreement with the Commission, it seemed much more likely that only apportionment mechanisms that serve the original goal of the EEG-Act—supporting renewable energy producers in terms of covering production costs and market integration, hence especially sec. 37 para. 2 EEG—were eligible for a classification as being compatible with the common market according to Art. 107 para. 3 lit. c TFEU under the current guidelines on State aid for environmental protection. Under political pressure especially from Germany and France, the new guidelines on State aid for environmental protection coming into effect on 1 July 2014 grant exemptions from surcharges for renewable energy financing such as the EEG apportionment mechanisms for 65 different industries.<sup>57</sup> This again leaves the average German energy consumer with the burden to finance the change to energy from renewable sources instead of gross energy consumers. However, this agreement and the new guidelines do not prevent the Commission from enforcing State aid scrutiny consistently according to the TFEU: no matter how this agreement is shaped in detail the Commission has no margin about indispensable legal requirements such as the illegality interest that is required to be paid by the State aid recipient for the period of time until State aid has been formally declared compatible with the market according to Art. 107 para. 3 TFEU by the Commission.<sup>58</sup> Hence competitors of State aid beneficiaries are enabled to make use of private enforcement to ensure the interest repayment to whoever granted the State aid which holds up a significant financial threat to the

55 ECJ, judgment of 21 November 2013, C-284/12—Deutsche Lufthansa/Ryanair, para. 42.

56 <http://www.tagesschau.de/wirtschaft/eeg-rabatte110.html> accessed 13 April 2014.

57 <http://www.fr-online.de/energie/energie-wende-schnell-schneller-gabriel,1473634,26805752.html> accessed 13 April 2014.

58 ECJ, judgment of 12 February 2008—C-199/06—CELF, para. 52.

recipients of State aid in the energy sector privileged by the EEG Act or the electricity grid access fee regulation.

### A. Conclusion

The German energy sector's different apportionment mechanisms aiming at financing the energy turnaround are currently under massive State aid law scrutiny. Future will show how the Commission can enforce State aid

requirements in contrast to political attempts to protect the industry from rising energy costs due to the shift to renewable energies. Nevertheless, it needs to be taken in mind that no political agreement and bargaining can overcome binding European law laid down in the TFEU and the ECJ's case law, at least not in terms of private enforcement actions before independent national courts.

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