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Subject: State aid SA.34045 (2013/C) (ex 2012/NN) – Germany

Exemption from network charges for large electricity consumers (§19 StromNEV)

Dear Sir,

The Commission wishes to inform the Federal Republic of Germany that, having examined the information supplied by your authorities on the measure referred to above, it 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) On 28 November 2011, the Commission received a complaint from the *Bund der Energieverbraucher,* an association that claims to represent small and medium-sized businesses and private electricity consumers. It was registered under the number SA.34045. The complainant argues that the exemption granted since 2011 from network charges to large electricity consumers (LEC) constitutes unlawful and incompatible State aid.

(2) On 8 December 2011, the Commission received another complaint from Stadtwerke Hameln, a local utility undertaking supplying the town Hameln with electricity, gas and drinking water. This complainant also argues that the exemption granted since 2011 from network charges to LEC constitutes unlawful and incompatible State aid. The complaint was registered under the same file SA.34045.

(3) Since December 2011, the Commission has been receiving letters from citizens complaining about the exemption from network charges granted in favour of LEC. They were added to the file.

(4) On 10 May 2012 the Commission forwarded the complaints mentioned in paragraphs 1 and 2 of this Decision for comments to Germany together with a request for information. Germany replied on 29 June 2012.

2. DESCRIPTION OF THE MEASURE:

2.1. Network charges in Germany

(5) In Germany network charges are established by network operators. They have, however, to be authorized by the regulator, i.e. the *Bundesnetzagentur*, "BNetzA".

(6) The *Stromnetzentgeltverordnung* (Regulation on network charges for electricity), "StromNEV", sets out principles governing the establishment of network charges (§16 and following of the StromNEV):

- Network charges must be cost-oriented (*Verursachungsgerechtigkeit*).
- Network charges are established depending on the network connection level but regardless of the physical distance between the place of supply of electrical energy and the place of removal.
- The network charge consists of two components: the first depends on the peak power and the second on the energy consumption. The first is calculated as the product of the applicable charge per kilowatt and the annual peak power demand in kilowatts of the respective user in the concerned year. The second is calculated as the product of the applicable charge in kilowatt hours and the amount of electrical energy consumed during the year by the user.
- Based on the principle that network charges must be cost-oriented, §16 (2) of the StromNEV states that network charges have to be calculated on the basis of a simultaneity factor (*Gleichzeitigkeitsgrad*). On the basis of the simultaneity principle, network charges are multiplied with a factor that varies between 0 and 1. This simultaneity factor is a measure of how much a consumer contributes to the peak power demand. A factor of for example 0.6 means that at the time the highest network power demand is measured this customer was taking from the network only 60 percent of his annual peak demand. The user must therefore pay only 60 percent of the maximum capacity.

2.2. The exemption

(7) Following an amendment that entered into force on 4 August 2011 but applicable as of 1 January 2011, §19(2) 2nd sentence[1] of the StromNEV states that end-users shall be exempted from network charges if their energy consumption reaches both 7,000 hours of use and 10 gigawatt hour of energy consumption.

(8) The exemption is granted only once the BNetzA has verified that the legal conditions are fulfilled. Once the verification is completed, the BNetzA delivers an authorisation that entitles the end-user to the exemption as of 1 January 2011 (provided all conditions were met at that date) and for an indefinite period.

2.3. Full compensation of Distribution System Operators by Transmission System Operators

(9) Given that the exempted end-users are connected to different network levels, the exemption leads to a financial burden (loss of revenues) both for transmission system operators (TSO) and distribution system operators (DSO).

(10) §19(2) of the StromNEV states that TSO have to compensate DSO for the loss of revenues resulting from the exemption.

2.4. Equalisation mechanism for TSO

(11) §19(2) of the StromNEV further states that TSO are obliged to equalize the sum of their payments to DSO and their own losses amongst them. For the detailed rules of how to carry out the equalization, § 19 (2) of the StromNEV refers to §9 of the Law on the promotion of combined heat and power (*Kraft-Wärme-Kopplungsgesetz, "KWK-Act"*), which is to be applied by analogy. The equalization serves to spread the financial burden between the TSO compared to the quantity of electricity supplied in their respective network area to end-users.

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[1] § 19 (2) 1st sentence StromNEV contains another provision whereby TSO and DSO may conclude contracts with customers having a specific consumption behaviour that justifies an individual network charge. This individually negotiated network charge may not be lower than 20% of the published normal network charge. This possibility to conclude individual network charges existed before the 2011 amendment and does not make part of the complaint.

2.5. TSO are obliged to recoup their costs

(12) § 9 of the KWK-Act - to which §19(2) of the StromNEV refers (see previous paragraph of this Decision) - further foresees that the grid operators may pass on the additional costs which they have to bear as a result of the equalisation of costs between grid operators to final consumers.

(13) In addition, §19(2) of the StromNEV stipulates that §20 of the StromNEV is applicable by analogy. §20 of the StromNEV states that electricity grid operators have to demonstrate, prior to publishing their network charges for electricity, that the revenues of the charges are sufficient to cover their expected costs.

2.6. Compensation of TSO through the so-called "§19-surcharge"

(14) The BNetzA adopted on 14 December 2011 a decision in which it imposed on DSO the obligation to collect from end-users a surcharge called *"§19 Umlage"* (hereinafter the "§19-surcharge"). The BNetzA further imposes on the DSO the obligation to transfer the proceeds from this surcharge to the TSO.

(15) The purpose of its decision of 14 December 2011 is to establish with greater transparency and legal certainty and in a homogenous way the surcharge aimed at compensating TSO for the loss of revenues incurred as a result of the network charge exemption and the obligation to compensate the DSO.

(16) The amount of the special surcharge is not established by the BNetzA but will have to be calculated each year by TSO on the basis of the methodology set out by the BNetzA. This implies that TSO will have to determine on the one hand the forecasted financial losses resulting from the exemption and on the other hand the forecasted consumption in order to determine the surcharge per kWh. For the first year of operation (i.e. 2012), however, the BNetzA has set at EUR 440 million the amount that needs to be recovered through the §19-surcharge and serves as basis for the calculation of the surcharge. Of this amount, EUR 300 million need to be recovered in order to compensate for the loss of revenues resulting from the exemption from network charges granted to LEC. The remaining EUR 140 million is designed at covering financial losses resulting from individual network charges negotiated on the basis of §19(2) 1st sentence StromNEV[2]. The

[2] §19(2) 1st sentence StromNEV states: "*Ist auf Grund vorliegender oder prognostizierter Verbrauchsdaten oder auf Grund technischer oder vertraglicher Gegebenheiten offensichtlich, dass der Höchstlastbeitrag eines Letztverbrauchers vorhersehbar erheblich von der zeitgleichen Jahreshöchstlast aller Entnahmen aus dieser Netz- oder Umspannebene abweicht, so haben Betreiber von Elektrizitätsversorgungsnetzen diesem Letztverbraucher in Abweichung von § 16 ein individuelles Netzentgelt anzubieten, das dem besonderen Nutzungsverhalten des Netzkunden angemessen Rechnung zu tragen hat und nicht weniger als 20 Prozent des veröffentlichten Netzentgelts betragen darf*" *(If, on the basis of existing or forecasted consumption data, or on the*

individual network charges and the part of the §19-surcharge designated at compensating for them do not form part of this decision. This is due to the scope of the complaint the Commission has received and the resulting limitation of the preliminary investigation procedure. The Commission reserves the right to assess §19(2) 1st sentence StromNEV in a separate procedure. For the following years this amount will be calculated by TSO on the basis of forecasts.

(17) In addition, each year x+1, TSO will have to verify what the real need in terms of financial resources was for the previous year x. If the proceeds from the §19-surcharge exceed the amount actually needed to compensate TSO for the loss of revenues resulting from the exemption and the compensation of DSO, the surcharge in the year x+2 will have to be reduced by the difference. When the proceeds were insufficient, the surcharge will be adapted accordingly.

(18) In its decision the BNetzA has further decided that the financial loss resulting from the exemption for the year 2011 will be covered by means of the "Regulierungskonto" (see description in the following section 2.7).

2.7. Monitoring through the *Regulierungskonto*

(19) DSO and TSO are controlled by the BNetzA as far as their network costs and revenues are concerned.

(20) In order to incentivise network operators to a more efficient network management, Germany has established a system whereby the BNetzA establishes for 5 year periods maximum revenue levels that network operators are allowed to obtain from network users. The main elements of this system are established under the *Anreizregulierungsverordnung* (ordinance on the incentive regulation, "ARegV"). In order to establish this maximum revenue, network system operators are obliged to provide the BNetzA with various accounting data (including costs and revenues). The differences between the maximum revenue level and actually obtained revenues are booked on a special regulatory account (the so-called "*Regulierungskonto*") held by the BNetzA (§5 of the ARegV). When the difference reaches certain levels, network charges have to be adapted. Certain differences between incurred and forecasted costs are also booked on this account. At the end of the 5 years period various compensations take place between excess revenues and certain costs. Revenues exceeding allowed maximum

basis of technical or contractual conditions, it is obvious that the peak load contribution of a final consumer will predictably significantly deviates from the concomitant annual peak load of all power demands from the network or transformation stations network operators have to propose this end-user an individual network charge by exception to § 16, which takes due account of the specific usage patterns of the end-user and may not be less than 20 percent of the published network charges.)

revenue level that cannot be compensated with certain costs are used to balance reduced network charges in the following year or period.

2.8. Aid amount and beneficiaries

(21) The exemption is granted only to those undertakings having an electricity consumption of 7,000 hours of use and 10 gigawatt hour of energy. Those are large electricity consumers. They mainly belong to various branches of the manufacturing sector like industrial gas production, chemical industry, paper industry, etc.

(22) According to the applications published on its website, the BNetzA has received already more than 200 requests in 2011 and 2012 for an exemption under §19(2) 2nd sentence of the StromNEV. However, not all exemption requests have been granted yet[3].

(23) The TSO have published the level of the §19-surcharge on a joined website[4].

(24) The estimated financial losses related to the exemption from network charges granted to LEC corresponds to EUR 300 million for 2012.

3. ASSESSMENT

3.1. Existence of State aid

(25) Under Article 107(1) TFEU, 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, in so far as it affects trade between Member States, is incompatible with the internal market.

3.1.1. Existence of a selective advantage and impact on competition and trade

(26) The concept of advantage within the meaning of Article 107 TFEU embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect[5].

[3] Source: website of the BNetzA: http://www.bundesnetzagentur.de/cln_1911/DE/DieBundesnetzagentur/Beschlusskammern/BK4/Pargra_19Abs2Satz2/NetzentgelteParagr19Abs2_Satz2_bkv_node.html.

[4] See joined website http://www.eeg-kwk.net/de/file/Internetveroeffentlichung_Paragraph_19StromNEV.pdf

[5] Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1, 19; Case C-6/97 *Italy v Commission* [1999] ECR I-2981, 15; C-251/97, *France v Commission*, C-251/97, Rec. 1999, p. I-6639, paragraph 35.

(27) Electricity consumers normally have to pay a charge for using the electricity network. The exemption constitutes therefore a deviation from the principles applied in Germany for the establishment of network charges, as described under section 2.1 of this Decision. By exempting large electricity consumers from the network charges, the State has thus relieved them from a charge they normally have to bear as network users.

(28) The Commission therefore considers at this stage that the exemption thus confers an advantage to LEC.

(29) In order to prove that an advantage is selective, the Commission has to prove that the measure at stake creates differences between undertakings which, with regard to the objective of the measure in question, are in a comparable factual and legal situation. The concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question[6].

(30) With regards to network charges, all network users are in the same factual and legal situation, as they all use the network.

(31) The Commission considers at this stage that the advantage is selective. It is granted only to undertakings having an energy consumption of 7,000 hours of use and 10 gigawatt hour of energy. Only certain undertakings in certain industrial sectors are capable of fulfilling these conditions. It flows from the applications for an exemption published on the website of the BNetzA that the exemption will apply only to a limited number of undertakings and that those undertakings belong mainly to certain branches of the manufacturing sector such as industrial gases, chemical industry, paper industry. The exemption thus applies to certain undertakings only, and is therefore at this stage to be considered selective, because it treats undertakings which are in the same factual and legal situation differently.

(32) According to the case law of the Court, the Member State which has introduced such a differentiation between undertakings in relation to charges may show that it is actually justified by the nature and general scheme of the system in question[7].

(33) The Commission notes that, given that Germany considers that the measure at hand does not involve aid because it does not involve State resources, Germany has not provided any elements that would show that the exemption would be in the logic of the system. Germany has

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6 Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 42; Case C -279/08 P, *NOx emission trading scheme*, paragraph 62.

7 Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 43; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 80; Case C -279/08 P, *NOx emission trading scheme*, paragraph 62.

merely briefly and in general stated that the exemption from network charges is justified on the basis of the stabilising effects that large electricity consumers allegedly have on the network. The Commission notes, however, that Germany has not submitted any information to substantiate this effect. Nor has Germany indicated how this element would be in line with the logic and nature of the system of network charges.

(34) The Commission notes that in respect of the objective of network charges, that is coverage of the costs for building and maintaining the network on the basis of the rules mentioned under section 2.1 of this Decision, undertakings having exceeding the energy consumption defined in §19(2) 2nd sentence of the StromNEV are in the same situation as all other undertakings. It does therefore not seem to be in the logic of the network charge system to fully exempt undertakings having a large energy consumption.

(35) Undertakings having applied for an exemption are active in particular in the manufacturing industries, such as industrial gas sector, chemical industry, paper industry. Those sectors of the economy are competing with undertakings from other member States. The exemption thus at this stage is to be considered to have an impact on trade between Member States and to distort competition.

3.1.2. Imputability

(36) The exemption from network charges has been provided through a law. It is imputable to the State.

3.1.3. Existence of State resources

(37) For advantages to be capable of being categorised as aid within the meaning of Article 107 TFEU, they 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[8].

(38) 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.

(39) 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[9]. Hence, the mere fact that a subsidy scheme benefiting

[8] Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58.

[9] Case T-358/94 *Air France* v *Commission* [1996] ECR I-2109, paragraphs 63 to 65.

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[10].

(40) In this connection, the Court has stated in *Steinike,* a case that concerned a fund set up for the promotion of products of the German agricultural, forestry and food industry and financed *inter alia* by contributions from undertakings in the agricultural, forestry and food sector that[11]:

"The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid".

(41) The same line was followed in the *Italy v Commission* Court case. It concerned contributions paid by employers to funds providing for unemployment and family allowances; Italy had argued that no State resources were involved because the contributions were not paid by the entire collectivity. The Court ruled that[12]:

"As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 92, even if they are administered by institutions distinct from the public authorities."

(42) Also, the Court indicated in its 1985 *France v Commission* case that[13]:

"(…) the mere fact that a system of subsidies which benefits certain traders in a specific sector is financed by a parafiscal charge levied on every supply of national goods in that sector is not sufficient to divest the system of its character as aid granted by a Member State".

(43) This line of reasoning was also applied in *Essent*[14]. In that case, the Court had to assess a system which foresaw that the operators of the Dutch electricity network collect a surcharge from private electricity clients and pass on the proceeds of that charge to SEP, a joint subsidiary of the four electricity generators, in order to compensate the

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[10] Case T-139/09 *France v Commission*, paragraph 61, not yet published, available under curia.europa.eu.

[11] Case 76/78 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21.

[12] Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 16.

[13] Case 259/85 *France* v *Commission*, paragraph 23.

[14] Case C-206/06 Essent [2008] ECR I-5497.

latter for so-called "stranded costs". The Court found that the Dutch system involved State resources[15].

(44) In this case, the Court first observed that the surcharge constituted a State resource:

"*In that regard it must be borne in mind that those amounts have their origin in the price surcharge imposed by the State on purchasers of electricity under Article 9 of the OEPS, a surcharge with regard to which it has been established, in paragraph 47 of this judgment, that it constitutes a charge. Those amounts thus have their origin in a State resource.*"

(45) This surcharge had to be transmitted by network operators to SEP which had to collect the proceeds and use them up to a certain amount defined in the law in order to cover stranded costs.

(46) In this connection, the Court observed that SEP had been appointed by the law to manage a State resource[16]:

"*Likewise, the measure in question differs from that referred to in Case C-379/98 PreussenElektra [2001] ECR I-2099, in which the Court held, at paragraph 59, that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity. In the latter case, 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*.

(47) By contrast, in *PreussenElektra*, the Court found that the *Stromeinspeisungsgesetz* (Electricity feed-in Act), in its version of 1998, did not involve a public or private body established or appointed to administer the aid[17]. This conclusion appears to be based on the observation that the *Stromeinspeisungsgesetz* puts 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.[18] The situation under the *Stromeinspeisungsgesetz* was characterized by a multitude of bilateral relationships between renewable electricity generators and electricity suppliers and downstream electricity suppliers and upstream electricity suppliers. There was no surcharge imposed on consumers to

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[15] Case C-206/06 Essent [2008] ECR I-5497, point 66.

[16] Case C-206/06 *Essent* [2008] ECR I-5497, point 74

[17] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, point 58 and 59.

[18] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, point 56. See also Case C-206/06 *Essent* [2008] ECR I-5497, point 74, where the Court notes that in *PreussenElektra*, the undertakings had not been appointed by the State to manage a State resource.

compensate the electricity suppliers for the financial burden and nobody by way of consequence had been appointed to channel or centralise such a surcharge.

(48) In the light of those principles, the Commission has examined whether the exemption has to be considered as financed through State resources as of 2012 once the §19-surcharge was in place and in 2011 before the §19-surcharge has been imposed, but when the shortfall was covered from the *Regulierungskonto*.

3.1.3.1. Existence of State resources after 2012, i.e. after the BNetzA imposed the §19-surcharge

(49) As will be shown more in detail below, the Commission observes that, as was the case in *Essent*, the State has imposed a special levy/surcharge on electricity consumers that is designed to finance the advantage. In addition, like in *Essent*, the State has appointed an undertaking to administer the charge. Also, like in *Essent*, the State has established rules governing the use and destination of the surcharge; In particular, the State has determined what has to be done with any surcharge collected in excess of the amount necessary to finance the advantage. Finally, like in *Essent*, there are control mechanisms in place that allow the State to monitor the financial flows.

DSO do not bear the financial burden: they are entirely compensated by TSO

(50) The State has foreseen that DSO are completely compensated for the loss of revenues resulting from the exemption. Indeed, §19(2) of the StromNEV obliges TSO to compensate DSO for the financial burden resulting from the exemption at the level of DSO.

TSO do not bear the financial burden: they are compensated through the §19-surcharge

(51) The State has foreseen that the financial losses of the TSO are compensated through a special surcharge, the §19-surcharge, that is collected by the DSO and transmitted to their respective TSO. The purpose of the special surcharge is to compensate TSO for the costs and loss in revenues stemming from the exemption (at their network level) and the obligation to compensate DSO.

(52) The surcharge has been imposed by the State. The BNetzA is a public authority. In the German administration it has the status of a *Bundesoberbehörde* (high federal administrative authority). It is active in domains belonging to the portfolio of the Ministry for economic affairs and technology. In its areas of activities (telecommunication, postal sector, railway, electricity and gas) it is entrusted with the administrative/executive tasks of the federal State. It acts under the supervision of the Ministry for economic affairs and technology that towards the BNetzA constitutes the *Bundesoberstbehörde* (highest federal administrative authority). Its president and vice-presidents are nominated by the Minister. It also has a council ("Beirat") that is composed of representatives of the Bundesrat and Bundestag[19].

(53) Germany considers that the advantage is financed through private means because the surcharge does not transit through the State budget but is paid by other private parties. Also, Germany puts forward that TSO have to pre-finance the advantage, determine the level of the surcharge themselves and are free to use the surcharge as they wish.

(54) The Commission observes that the concept of State resource within the meaning of Article 107 (1) TFEU does not require that the financial resources transit through the State budget. As recalled under paragraphs (38) and (39) of this Decision, the Court has ruled that the concept of State resources within the meaning of Article 107(1) TFEU also includes aid schemes financed through contributions imposed on the private sector and does not require that the aid is financed from the State budget.

(55) In addition, the Commission notes that in *Essent*, the levy imposed by the State did not transit through the State budget either before being paid out to SEP. The surcharge concerned was imposed on electricity consumers and the Court nonetheless considered it to qualify as a State resource.

(56) Based on the above, the Commission does not share the view of the German authorities that the aid would be financed through private means because the surcharge would be imposed on the end-user and does not transit through the State budget.

(57) The Commission further notes that in *PreussenElektra*, the undertakings concerned (the local public electricity supply undertaking and the upstream electricity supply undertaking) had both to bear part of the financial burden resulting from the purchase obligation: the local supplier as long as the kilowatt hours to be compensated were below 5% of the total kilowatt hours supplied by it and the upstream supplier for the kilowatt hours exceeding 5% up to 5% of the total kilowatt hours supplied by the local supplier). In *PreussenElektra*, the State had

[19] See § 1, §3, §4 and §5 of the "*Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*" of 7 July 2005 (BGBl. I S. 1970, 2009).

not established any surcharge to compensate these undertakings for the financial burden resulting from the purchase obligation.

(58) 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 at EUR 440 million for both §19(2) 1st and 2nd sentence and at EUR 300 million for §19(2) 2nd sentence of the StromNEV (see paragraph (16) of this Decision).

(59) In addition, the BNetzA has established a regulating mechanism whereby any revenue in excess of what is necessary to compensate the financial losses resulting from the exemption and the obligation to compensate DSO leads to a reduced surcharge in the second following year (see paragraph (17) of this Decision).

(60) TSO can thus neither freely decide on the level of the §19-surcharge nor freely decide on the destination of the §19-surcharge.

(61) The Commission further considers that the fact that the TSO would to a limited extent pre-finance the aid does not alter the conclusion that they do not have to bear the financial burden ultimately. They get completely compensated through the §19-surcharge. The Commission has already found in several cases[20] that advantages granted by means of a purchase obligation imposed on certain undertakings that were compensated or reimbursed by the State (through a fund for instance) constituted State aid even though the advantage was pre-financed by private operators. The decisive element is that the State has established a levy or a surcharge that serves to compensate the private operator for the financial burden resulting from the advantage that the State has obliged him to grant to other undertakings. In a way, also in *Essent*, SEP (that was the administrator of the aid as well as the recipient and beneficiary of the aid) had pre-financed the stranded costs. This did not alter the circumstance that the levy imposed by the State and collected by SEP to compensate the stranded costs constituted a State resource.

(62) Finally, the Commission notes that the BNetzA has explained in its decision of 14 December 2011 that the §19-surcharge is a charge in the sense that it does not correspond to a general network charge

[20] Case N 571/2006 RES-E support programme (Ireland), OJ C 311, 21.12.2007; Case C 43/2002 Fonds de compensation dans le cadre de l'organisation du marché de l'électricité (Luxembourg), OJ L 159, 20.6.2009; Case N 94/2010 Feed in tariffs to support the generation of renewable electricity from low carbon sources (United Kingdom), OJ C 166, 25.6.2010; Case SA.33384 (2011/N) Green Electricity Act 2012 (Austria), OJ C 156, 2.6.2012.

(*allgemeines Netzentgelt*) but constitutes "*another charge*" within the meaning of Article 17 (8) StromNEV and has to be collected separately from the general/normal network charges. It has a special purpose: compensate TSO for the financial losses resulting from the exemption and the obligation to compensate DSO for the financial losses resulting for the latter from the exemption.

TSO have been designated to administer a State resource and the State has established the destination of the surcharge

(63) The TSO constitute the central point of the entire financial mechanism designated at financing the exemption. On the basis of the information provided to the Commission, they have been designated/appointed by the State to administer the financial flows linked to the exemption and the §19-surcharge.

(64) On the basis of §19(2) StromNEV and the decision of the BNetzA of 14 December 2011, they have to :

- compensate DSO for the loss in revenues resulting from the exemption at the level of DSO
- equalise between themselves the financial burden resulting from the exemption at their level and from the obligation to compensate DSO.
- (jointly) establish the §19-surcharge on the basis of forecasted financial loss of revenues and forecasted electricity consumption
- publish the §19-surcharge
- compare the total §19-surcharge actually paid with the actual financial loss resulting from the exemption (is-situation). They subsequently have to take the difference into account when establishing the §19-surcharge of the following years
- use the proceeds of the §19-surcharge in order to compensate their own loss of revenues (resulting from the exemption, the obligation to compensate DSO and to equalise).

(65) As a result, the four German TSO centralise on the one hand the costs resulting from the exemption and on the other hand centralise the proceeds of the §19-surcharge. In effect, jointly, they act similarly to a fund. This is also witnessed by the central website www.eeg-kwk.net they are jointly running and the creation of a joint project group Horizontaler Belastungsausgleich (PG HOBA)[21], which has the task of creating the economic and administrative and organisational

[21] http://www.eeg-kwk.net/de/Aufgabe%20PG%20HOBA.htm, visited on 19.11.2012.

framework for administering the flows of money necessary to implement the §19-surcharge.

(66) On the basis of these elements, the Commission considers at this stage that the TSO are administering the §19-surcharge and that this specific task and all related operations has been conferred upon them by the law and the BNetzA.

(67) The Commission therefore concludes on the basis of the current information that the TSO have been appointed/designated by the State with the task to administer the §19-surcharge and that the revenues from the §19-surcharge constitute a State resource.

(68) Germany underlines that in the present case it is not the BNetzA that collects, receives, administers and distributes the §19-surcharge but the network operators. It seems that Germany considers that this would prevent the §19-surcharge from constituting a State resource given that network operators are not public bodies.

(69) However, as the Court has indicated in *Steinike*, also a private body can be appointed with the administration of a State resource.

(70) Germany seems to consider that contrary to what was the case in file SA.26036[22] no entity has been designated or appointed with the administration of the §19-surcharge.

(71) The reason for this position is not clear since Germany has itself admitted that the TSO administer the §19-surcharge.

(72) It would seem that Germany takes the view that for a body to be appointed/designated to administer a charge it has to be the only one. Germany points out that in *Essent* only SEP had been appointed to administer the surcharge while in the present case all TSO and DSO participate in the collection of the §19-surcharge.

(73) It is not clear on what legal ground it would be required that only one entity is designated to administer an aid/a charge in the entire country in order for a surcharge to qualify as State resource.

(74) Even in *Essent*, SEP was not the only entity involved in the administration of the levy: in fact the levy was first collected by the DSO before being transferred to SEP.

(75) The same is true in this case: DSO have to collect the §19-surcharge and to transfer it to their respective TSO. In its network area each TSO (there are 4 in Germany) centralises the proceeds from the §19-surcharge.

[22] Commission decision of 8 March 2011, Austria, Aid to energy intensive businesses, Green Electricity Act (Ökostromgesetznovelle 2008).

(76) For certain aspects of the financing/compensation mechanism, the TSO have to act jointly (equalisation and establishment of the §19-surcharge). In the Commission's view, these collective tasks are a further indication that the TSO together have been appointed to administer the §19-surcharge in accordance with rules, criteria and procedures established by the State.

(77) Germany has also underlined that TSO were free to use the money as they wished and did not have to transfer any exceeding §19-surcharge to the State as was the case in *Essent*.

(78) The Commission however, cannot share this view since it results from the applicable texts that TSO cannot use the §19-surcharge as they wish nor in fact levy any surcharge as they would like.

(79) First the surcharge is levied only for one purpose: compensation of the financial burden resulting from the exemption and the obligation to compensate DSO. Second, any proceeds in excess of the amount required to compensate for that financial burden will lead to financial corrections in the form of a reduced surcharge in year x+2. Germany has itself indicated that through this correction mechanism the §19-surcharge could not lead to any overcompensation.

(80) As to the fact that the exceeding surcharge is not transferred to the State budget the Commission does not consider at this stage that it prevents the conclusion that State resources are involved.

(81) In *Essent* the levy was imposed for one year only and in order to compensate SEP for stranded costs up to an amount of NLG 400 000 000; it seems then normal that the State indicates that the money in excess of that amount has to be transferred to the State budget. Similarly, given that the system is conceived to be continued every year and is (in the year x) based on forecasts it seems only natural that the State would require that 1) a corrective mechanism is foreseen and 2) that corrections take the form of a reduced surcharge for the year x+2. In the Commission's view the decisive element is that the State has determined the destination and purpose of the surcharge and has also established what use was to be made of any surcharge in excess of what was needed to compensate TSO for the financial burden resulting from the exemption and the obligation to compensate DSO. By doing so the State has retained control over the surcharge.

(82) Germany has also indicated that contrary to what was the case in *Essent*, there are no monitoring mechanisms in place.

(83) The Commission notes first that this would not alter the conclusion that the TSO have been appointed to administer a State resource and that they are not free to use it as they wish. For that reason already, it considers at this stage that the resources are under State control.

(84) In addition, the Commission notes that contrary to what Germany states there are monitoring mechanisms in place. Indeed, through the mechanism of the *Regulierungskonto* described under paragraph (20) of this Decision the BNetzA necessarily monitors the financial flows relating to the §19-surcharge. In fact the BNetzA has used already certain elements of the mechanism and instruments of the *Regulierungskonto* and the *Anreizregulierungsverordnung* (ARegV) in the decision of 14 December 2011. For instance, DSO are to transmit information to TSO for the establishment of the §19-surcharge by using form C2 with heading "*Mitteilungspflichten der Stromnetzbetreiber gemäss §28 Nr.3 und Nr. 4 ARegV*". In addition, the BNetzA has indicated that the financial burden resulting from the exemption in 2011 will be accounted for by way of the *Regulierungskonto*.

3.1.3.2. Existence of State resources before the §19-surcharge was imposed

(85) The §19-surcharge entered into force in 2012. The exemption for LEC entered into force already in 2011 (applicable as of 1 January 2011).

(86) §19(2) of the StromNEV sets out that TSO have to entirely compensate DSO for the financial losses resulting from the exemption. TSO are then obliged to equalise their respective financial losses between each other. For the equalisation mechanism, §19(2) StromNEV refers to §9 of the KWK. §9 of the KWK-Act further foresees that the grid operators may pass on the additional costs which they have to bear as a result of the equalisation of costs between grid operators to final consumers.

(87) §19(2) of the StromNEV also declares applicable by analogy §20 of the StromNEV. §20 StromNEV states that grid operators have to establish network charges so as to be able to cover their network costs. If the Commission's understanding of §20 is correct, this means that TSO – contrary to the situation under §9 of the KWK-Act – not only have the possibility, but the obligation to include the additional costs resulting from §19 (2) of the StromNEV into the user charge.

(88) On this basis, the Commission considers at this stage that even before the BNetzA adopted its decision of 14 December 2011, §19 (2) StromNEV contained a mechanism having the following characteristics:

- the mechanism grants LEC an advantage (the exemption from network charges) and this advantage is imputable to the State (advantage granted in the law)
- the advantage is financed through a surcharge (additional charge imposed on users, see §19(2) sentences 7 and 8 of the

StromNEV in combination with §9 of the KWK-Act and §20 of the StromNEV)

- the surcharge would have been administered by TSO; indeed, like after 2012, TSO would have been under the obligation to compensate DSO in full, would have been under the obligation to equalise the amounts between themselves and would have been under the obligation to collect additional charges from users to cover the difference; they would not have had the possibility to impose additional charges for more than the difference and would still have been monitored by way of the Regulierungskonto.

(89) It would thus seem that the financing systems of the exemption would have been very similar to the system as it is in place since the adoption of the decision of 14 December 2011 of the BNetzA.

(90) This is also what Germany considers. Indeed Germany has explicitly indicated that the decision of the BNetzA was a mere application/clarification of §19(2) of the StromNEV and that the BNetzA did not impose or establish anything more than what was already provided for by §19(2) of the StromNEV.

(91) On this basis, it would seem that the reasoning developed under section 3.1.3.1 of this Decision applies mutatis mutandis to §19(2) of the StromNEV before the adoption of the decision of 14 December 2011 and that §19(2) of the StromNEV entailed State aid already before the adoption of the decision of 14 December 2011.

(92) In addition, the BNetzA has indicated that the loss of revenues for 2011 would be taken into account in the *Regulierungskonto* in accordance with §5 ARegV. This would seem to imply that loss of revenues could be compensated with any surplus on the *Regulierungskonto*. Given that the BNetzA, a public authority, controls and owns the *Regulierungskonto*, this could constitute a further reason for finding that State resources are involved.

(93) The Commission invites Germany to provide more information on that point. In particular, information about the exact meaning of the reference to §20 of the StromNEV is needed. Also more information is required in general about the functioning of the *Regulierungskonto* and about the way the financial burden resulting from the exemption in 2011 will be accounted for by way of the *Regulierungskonto*, as decided by the BNetzA on 14 December 2011.

3.1.4. Preliminary conclusion on the existence of aid

(94) Based on the elements mentioned above and the information available at this stage, the Commission concludes that the exemption from network charges compensated with the §19-surcharge constitutes State aid in favour of large electricity consumers as of 2012. The

Commission also considers that at this juncture, it has doubts as to the existence of State aid already in 2011, i.e. before the §19-surcharge was imposed. The Commission invites Germany to submit the additional information listed in the previous paragraph.

3.2. Compatibility

(95) Based on the information currently available, the Commission has come to the preliminary conclusion that the exemption of large electricity consumers from network charges constitutes State aid after 2012 but could also constitute aid already before. The Commission may declare such aid compatible with the internal market, provided that the conditions set out in Article 107 (3) c TFEU are met. According to settled case-law, it is for the Member State to put forward any grounds of compatibility and to demonstrate that the conditions thereof are met[23].

(96) The Commission notes that, given that Germany considers that the measure at hand does not constitute aid, it has not brought forward any grounds for its compatibility.

(97) Germany has merely stated that the exemption from network charges is justified on the basis of the stabilising effects that large electricity users have on the network without, however, substantiating this stabilising effect, nor indicating – should this stabilising effect exist - under which provisions and for what grounds this may allow the Commission to declare the aid compatible with the internal market.

(98) At this juncture, the Commission comes to the preliminary conclusion that the exemption mechanism constitutes operating aid, because it relieves the beneficiaries from network charges, which they would normally have had to bear in their day-to-day operations. According to the case-law, operating aid is in principle not compatible with the internal market because it has the effect in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any of the objectives of the aforesaid exceptions[24].

(99) The Commission has therefore at this stage doubts as to its compatibility with the internal market and in accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to open the formal investigation procedure, thereby inviting Germany to submit its comments as well as the requested information.

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[23] Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 140.

[24] Case T-459/93 *Siemens SA* v *Commission* [1995] ECR II-1675, paragraph 48. See also Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, 8 July 2010, ECR 2010 II-141 paragraphs 46-48; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30, with further references

4. CONCLUSION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Germany to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. In particular, the Commission requests Germany to provide information on the exact meaning of the reference to §20 of the StromNEV, information in general about the functioning of the *Regulierungskonto* and about the way the financial burden resulting from the exemption in 2011 will be accounted for by way of the *Regulierungskonto*, as decided by the BNetzA on 14 December 2011

It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to remind the Federal Republic of Germany that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Federal Republic of Germany 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.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate for State Aid
State Aid Greffe
1049 Brussels
Belgium

Fax No: (0032) 2-296.12.42

For the Commission

Joaquín ALMUNIA
Vice-President