Subject: State Aid SA.50395 – Germany
Reform of the German Energy Act – Offshore-surcharge reduction for railway undertakings

Sir,

1. PROCEDURE

(1) On 27 October 2017 the German authorities notified to the Commission their intention to implement reductions for energy-intensive users from an offshore-surcharge financing the costs of connecting offshore wind farms to the electricity grid. These reductions will be introduced through an amendment\(^1\) of the German Energy Act (Energiewirtschaftsgesetz, 'EnWG'), which will enter into force on 1 January 2019. The notification was registered under case number SA.49416 (2017/N).

(2) On 23 November 2017, the Commission requested information from Germany. The German authorities replied on 14 December 2017.

(3) On 9 February 2018, a separate case was created regarding the reduction of the offshore-surcharge for railway undertakings under procedure SA.50395 (2017/N).

(4) The Commission sent a request for information in case SA.50395 on 16 February 2018. Germany provided the requested information on 7 March, 8 March and 9 March 2018.

(5) On 22 February 2018, Germany waived its right under Article 342 of the Treaty on the Functioning of the European Union (‘TFEU’) in conjunction with Article 3 of Regulation 1/582 to have the decision adopted and notified in German.

2. DESCRIPTION OF THE MEASURE:

2.1. Background

(6) The EnWG aims at an energy supply system that is increasingly based on renewable energies. Furthermore, the Renewable Energy Act 2017 (Erneuerbare-Energien-Gesetz, ‘EEG’) defines the objectives of enabling a sustainable development of the energy supply system in the interest of protecting the environment by reducing the costs of the energy supply to the economy and by ensuring that the share of electricity produced from renewable energy sources over total electricity consumption in Germany rises to 40-45 % by 2025, to 55-60 % by 2035, and at least 80 % by 2050. As regards the contribution of electricity generated from offshore wind installations to those targets, paragraph 4 EEG defines the target of reaching an installed capacity of 6 500 MW by 2020 and 15 000 MW by 2030.

(7) The EnWG provides for the legal framework for the planning, construction and operation of the lines connecting offshore wind installations to the main grid.

(8) Paragraph 17d EnWG obliges the transmission system operators (‘TSOs’) to build and operate the lines connecting offshore wind installations to the main grid according to the offshore network development plan (Offshore-Netzentwicklungsplan) and the area development plan (Flächenentwicklungsplan). In order to ensure that the financial burden resulting from the planning, building and operation of the connection lines is spread evenly between the TSOs in Germany, paragraph 17d (6) EnWG organizes a system, by which these costs are equalized among the TSOs before they are passed on to the end users via the network charges. The costs incurred may include for example costs for land and sea cables, plant engineering, service agreements with manufacturers, logistics (for example helicopter flights), as well as public fees and costs for external experts required during the planning procedure.

(9) A similar equalisation mechanism is set out in paragraph 17f EnWG which provides for the equalisation of compensation payments: Paragraph 17e EnWG provides for a system of compensating the operators of offshore wind installations for delays or interruptions in connecting them to the main grid. In particular, in case the connection was not completed in time or the feed-in from the offshore wind installation is not possible for more than 10 consecutive days, the operator can claim compensation from the TSO that is responsible for the regulatory zone as of the 11th day.


Like paragraph 17d (6) EnWG, paragraph 17f EnWG obliges the TSOs to equalize these compensation costs amongst them. However, according to paragraph 17f these additional costs are passed on to the end consumers via a liability-surcharge (Offshore-Haftungsumlage) which has to be paid in addition to the network charges.

2.2. The aid measure: introduction of surcharge reductions

By the Network Charges Modernisation Act Germany intends to harmonise the legal framework for the privileged treatment of certain categories of energy-intensive users, including railway undertakings, and to create a reliable framework for investors and calculable risks for the various actors involved in offshore wind projects.

As of 2019, the equalization mechanism set out in paragraph 17f EnWG will include both, compensation payments and connection costs, therefore creating a uniform equalization mechanism for TSOs under the EnWG, and introducing a new offshore-surcharge to be paid by the end consumer.

This new offshore-surcharge will lead to a reallocation of the connection costs from the system of network charges into the surcharge system without increasing the total costs to be paid by the end consumer.

As from 1 January 2019 the Network Charges Modernisation Act will introduce surcharge reductions for certain categories of undertakings: For this purpose, paragraph 17f (5) EnWG will refer to paragraphs 27, 28 and 30 of the Act on Combined Heat and Power Generation (Kraft-Wärme-Kopplungsgesetz, ‘KWKG’) which describe the methodology to be used to calculate the level of the surcharge. For railway undertakings, paragraph 27c KWKG limits the offshore-surcharge to a maximum amount of 0,04 ct/kWh for the part of the annual consumption that exceeds 1 GWh at a consumption point in a given calendar year. If the railway undertaking demonstrates that the proportion between its total annual electricity costs and its total turnover of the last full calendar year has been higher than 4% (so called energy-intensive railway undertakings), the surcharge is limited to 0,03 ct/kWh for the electricity consumed beyond 1 GWh.

This decision concerns only the derogations provided for railway undertakings. Germany has notified the surcharge reduction for further categories of undertakings under procedure SA.49416 (2017/N), amongst others energy-intensive users as well as undertakings consuming electricity produced in an installation exclusively generating electricity from waste gases of steel production processes (Kuppelgase).

2.3. Beneficiaries, financing mechanism and form of the aid

Beneficiaries of the surcharge reduction are electricity-run railway undertakings as defined in paragraph 3 Nr. 40 EEG. These are any undertakings that, for the purpose of transporting persons or freight, operate vehicles like railway trains, magnetic levitation trains, electric tramways or other trains on rails that are similar in construction type or method of operation, or infrastructure necessary for the operation of such vehicles.
The offshore-surcharge reduction applies to railway undertakings reaching 1 GWh at a consumption point in a given year. According to paragraph 65 (7) EEG a consumption point is the sum of all points used for the operation of trains by the respective railway undertaking. Railway undertakings above this threshold shall benefit of the reduced surcharge for the amount exceeding 1 GWh, whereas railway undertakings below this threshold shall pay 100 % of the surcharge.

The reduction is granted directly by the grid operator on proof by the railway undertaking that the legal prerequisites are fulfilled. The offshore-surcharge is subject to supervision by the Federal Network Agency (Bundesnetzagentur).

According to the new paragraph 17f (5) EnWG, the measure is financed by the end consumers through a surcharge on electricity consumption which is collected as a supplement to network charges. Network operators are obliged to keep separate accounts in respect of the collected surcharge. The TSOs will determine each year the offshore-surcharge rate, calculated on the basis of kWh of electricity consumed, to be applied to all end consumers which do not benefit from a reduction. The level of the offshore-surcharge depends on the one hand on the projected costs for connection lines and compensation payments, as well as the projected supplies of electricity to the end consumers. On the other hand, the surcharge will take into account corrections for preceding years and the reductions for certain categories of end consumers as mentioned above.

2.4. **Objective of the measure**

The limitation of the offshore-surcharge for railway undertakings aims at containing their electricity costs and thereby maintaining their intermodal competitiveness compared to other more polluting forms of transport.

2.5. **Cumulation**

Germany confirms that if the aid is cumulated with other means of public funding, the total aid amount will stay within the limits set by the Railway Guidelines.

2.6. **Deggendorf principle and companies in difficulty**

Germany confirms that companies in difficulty are not eligible for aid and that no aid is given to companies with an outstanding recovery order by the Commission (so called 'Deggendorf principle').

3. **Assessment of the measure**

3.1. **Existence of aid**

By virtue of 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

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shall, in so far as it affects trade between Member States, be incompatible with the internal market."

(24) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) TFEU all of the following conditions need to be fulfilled. The financial support must:
- be granted by the State or through State resources,
- favour certain undertakings or the production of certain goods,
- distort or threaten to distort competition, and
- affect trade between Member States.

3.1.1. Economic activity and notion of an undertaking

(25) The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods and services on a given market is an economic activity.

(26) As the surcharge reduction is aimed at undertakings which offer railway transport of passengers or freight on a given market, the beneficiaries in question are undertakings according to that definition.

3.1.2. Selective advantage

(27) The notified surcharge reduction as described above contains an advantage for railway undertakings compared to undertakings from other transport sectors and other sectors using electricity which have to pay the full offshore-surcharge. Measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid.

(28) The Court has ruled that in the case of exemptions from charges, in order to demonstrate 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. However, the concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that

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differentiated treatment results directly from the basic or guiding principles of that system of charges.  

(29) Railway undertakings are advantaged compared to other undertakings in general and in the transport sector in particular (such as airlines or undertakings operating vehicles) because the surcharge charged to them is reduced under certain conditions. Hence, when the network operator applies a limited surcharge, the respective electricity supplier is prevented from recovering the entire surcharge from the respective railway undertaking. This privilege of a limited surcharge for railway undertakings is not the result of the basic or guiding principle of that system, but it is based on an external objective, i.e. the environmental aim to privilege rail transport in the intermodal transport competition. 

(30) This advantage is selective because only railway undertakings can benefit from it. 

3.1.3. State resources and imputability 

(31) 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. The concept of "intervention through State resources" is intended to cover not only advantages which are granted directly by the State but also "those granted through a public or private body appointed or established by that State to administer the aid". In this sense, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings. 

(32) The mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved. It results from the case-law of the Court that it is not necessary to establish in every case that there has been a transfer of money from the State budget or from a public entity for the advantage granted to one or more undertakings to be capable of being regarded as State aid within the meaning of Article 107(1) TFEU. 


12 Judgment of the Court of Justice of 30 May 2013, Doux Élevage SNC and Coopérative agricole UKL-ARREE v CIDEF, C-677/11, ECLI:EU:C:2013:348, paragraph 34; Judgment of the General Court of 27 September 2012, France v Commission, T-139/09, ECLI:EU:T:2012:496, paragraph 60; Judgment of the Court of Justice of 19 March 2013, Bouygues and Bouygues Télécom v Commission and Others,
The Commission observes that for the offshore-surcharge, like in the case giving rise to the judgment in Association Vent de Colère\(^{13}\), the State has created a system within the law where the costs incurred by the network operators with regard to the connection lines are fully compensated by the surcharge imposed on electricity consumers. Germany established the offshore-surcharge by law and defined its purpose which is to finance the planning, the construction and the operation of lines connecting offshore wind installations with the main grid. The surcharge reduction for railway undertakings serves to maintain the intermodal competitiveness of the rail sector. Furthermore, the surcharge and its reductions are calculated on the basis of a methodology determined by law.

TSOs have been entrusted with collecting and calculating the surcharge according to the determined methodology and have to place the surcharge on a separate account so that the regulator can verify the absence of cross-subsidies between the various activities of the network operators. Also, deficits and surpluses of the collected surcharge are adjusted in the following year, thereby ensuring that network operators are entirely compensated for the extra costs resulting from the compensation payments and from their obligation to pay for the connecting lines, but also implying that they cannot use the revenue from the surcharge for anything other than the mentioned activity.

The surcharge reduction for railway undertakings constitutes an additional burden for the State as any reduction in the amount of the surcharge has the effect of reducing the amounts collected from the railways concerned. They have to be regarded as leading to losses in revenues that subsequently have to be recovered from other electricity consumers via an increased offshore-surcharge. Thus electricity consumers that do not benefit from a reduced surcharge are involved in the subsidizing of railways that benefit form a reduced surcharge. Based on those elements, the Commission concludes that the surcharge reduction for railway undertakings as described above is financed from State resources. The Commission refers in this context also to its assessment in its decisions concerning the EEG 2014\(^{14}\) and the reform of the KWKG\(^{15}\).

The reduced offshore-surcharge for railway undertakings is also imputable to the State, as it is granted by law. It is the State, through the network operators, on the basis of the relevant provisions of the EnWG and the KWKG that grants the entitlements to a reduced surcharge for railway undertakings.

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\(^{13}\) Judgment of the Court of Justice of 19 December 2013, *Vent De Colère*, C-262/12, EU:C:2013:851, paragraph 17.


3.1.4. Distortion of competition and effect on trade between the Member States

(37) In accordance with settled case law\textsuperscript{16}, for a measure to distort competition, it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

(38) Under the measure in question, potential beneficiaries belong to the railway sector, which is open to competition between undertakings from different Member States.

(39) The Commission notes that when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.

(40) The Commission therefore considers that the reduced surcharge is liable to distort competition and to have an effect on intra-EU trade.

3.1.5. Conclusion on the existence of aid

(41) For the reasons stated above, the Commission considers that the reduced offshore-surcharge for railway undertakings constitutes State aid.

3.2. Lawfulness of the aid

(42) Pursuant to the standstill clause of Article 108(3) TFEU and to Article 3 of Council Regulation No 2015/1589 of 13 July 2015\textsuperscript{17} laying down detailed rules for the application of Article 108 TFEU, new aid measures must not be put into effect before the Commission has taken a decision authorising such aid.

(43) According to the new paragraph 118 EnWG, the measure cannot be implemented before the Commission has authorized the aid. Thus Germany complied with its obligation under Article 108 (3) TFEU.

3.3. Compatibility of the aid

(44) Article 93 TFEU states that "Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement of the discharge of certain obligations inherent in the concept of a public service".

(45) Regarding the operating aid to railway undertakings, the Commission has assessed the notified aid scheme on the basis of the Railway Guidelines, in particular section 6 (aid for coordination of transport) and its sub-section 6.3. (aid for reducing external costs and interoperability).

3.3.1. Eligible costs

(46) The transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits of including external costs in the pricing systems for access to transport infrastructure. As a result, there may be disparities between the different modes


of transport, which it may be appropriate to correct by way of public support for those modes of transport which give rise to the lowest external costs.

(47) The Railway Guidelines state in point 103 that, "as regards aid for reducing external costs, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes". Member States are therefore allowed to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail.

(48) The Railway Guidelines state in section 6.3.1. that Member States have to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport. The methodology used and calculations performed must be made publicly available.

(49) To assess the eligible costs for the measure at stake, Germany provided the Commission with two studies:

(a) The first study conducted in 2007\(^{18}\) estimates the annual external costs of transport in Germany in 2005. It only takes into consideration direct external costs (accident, noise, air pollution, climate costs, nature and countryside, downstream and feeder processes, additional costs in urban areas) and not indirect costs. In 2005, of an annual total of external costs of transport in Germany (passengers and freight) of EUR 80,4 billion, railway transport counted for 3,1% (EUR 2,5 billion), road transport for 96% (EUR 76,9 billion), domestic aviation for 0,6% (EUR 0,5 billion) and inland water transport for 0,5% (EUR 0,4 billion)\(^{19}\).

Table S-2\(^{20}\) of the same study compares average external costs of the various transport modes for passenger and freight transport in Germany in 2005: costs for passenger rail transport (EUR 21,2 per 1 000 passenger-kilometre ('\(Pkm\)')) are around three times less than costs for passenger road transport (EUR 64,5 per 1 000 Pkm) and the difference is even higher for freight transport, as costs for freight rail transport (EUR 9,5 per 1 000 ton-kilometre ('\(Tkm\)')) are around four times less than costs for freight road transport (EUR 38,9 per 1 000 Tkm).

(b) The second study conducted in 2011\(^{21}\) provides total external costs per inhabitant and year for EU-27 by country and transport mode (passenger and freight) and refers to data from 2008. It concludes that, in Germany in 2008, ca. 93,6% of external costs derived from road transport, whereas 2,5% derived from railway transport. According to Germany, this study confirms the results provided by the first study. The second study also provides data on average external costs for Germany in 2008 by country

\(^{18}\) See https://www.infras.ch/media/filer_public/e0/9d/e09d6897-1e68-4359-b559-d62b90890ee070300_externwe-kosten_management_summary.pdf.

\(^{19}\) See table S-1, page 5 of the study.

\(^{20}\) See table S-2, page 7 of the study.

\(^{21}\) See table 18, page 83 of the study.
and transport mode (excluding congestion): average costs for passenger rail transport amount to EUR 21.5 per 1 000 Pkm whereas the same data for road transport is EUR 87 per 1 000 Pkm. Average costs for freight rail transport amount EUR 9.3 per 1 000 Tkm whereas the same data for road transport is EUR 52.9 per 1 000 Tkm.

(50) Germany concludes that as the main competitor of both, passenger and freight railway transport is road transport, the external costs generated by the rail sector have to be compared to those generated by road. As road transport represents the highest cost differential with rail, the Commission finds this approach reasonable.

(51) Both the above mentioned studies are public and can be accessed via the internet. They are based on data on external costs which are methodically founded. Both studies explicitly justify the methodology and calculations used. Moreover, the Commission compared the methodology of the two studies with the methodology used in the Commission's handbook on estimation of external costs22 and reaches the conclusion that the methodology of the two studies is very similar to that of the Commission's handbook. In addition, the figures and values of the two studies and the handbook are in the same range of magnitude. The Commission is of the opinion that the comparative cost analysis in the two studies provided by Germany is reliable and fully transparent.

(52) Finally, the Commission has itself carried out an assessment in which it analysed the average external costs for railway and for road transport in Germany on the basis of the following cost elements: accidents, noise, pollutants, climate costs, infrastructure and congestion23. This internal study estimates that total costs for Germany for rail amount to EUR 7.3 per 1 000 Tkm, whereas the same data for road transport result in an amount of EUR 30.6 per 1 000 Tkm.

(53) The Commission notes that the calculation of external costs in the transport sector implies complex calculations and long term data investigations. This results in a significant delay between the period studied and the establishment of the final results. The two studies submitted by Germany show a very similar result, although a three year period has passed in-between the studies. Furthermore, the results are similar to the more recent internal study performed by the Commission. Taking into consideration the significant difference between external costs from rail transport and external costs from road transport, the Commission finds it very unlikely that, even if more recent data would differ from the above mentioned studies, the aid amount would exceed the eligible costs set out by the Railway Guidelines.

(54) The Commission therefore considers that the data presented by Germany is valid and that the resulting conclusions can be taken into consideration for the compatibility assessment. The Commission's own assessment confirms the finding of the studies presented by Germany.


3.3.2. Necessity and proportionality of the aid

(55) The Railway Guidelines state in point 6.3.2. that for aid for reducing external costs, the aid has to be strictly limited to compensating the opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. There is a presumption of necessity and proportionality of the aid when the intensity of the aid for reducing external costs stays below 30% of the total costs of rail transport, and up to 50% of the eligible costs.

(56) Where there are several competing options which cause higher levels of pollution then rail transport, the limit corresponds to the highest cost differential among the various options.24 As stated above (see recital 50), the Commission deems it appropriate to assume that road transport represents the highest cost differential with rail.

(57) The Commission notes that in the present case, the intensity of the aid stays below 30% of the total costs of rail transport as energy costs in railway transport can reach a maximum of 20% of total costs.25 The reduced offshore-surcharges correspond to a small part of the energy costs. Hence, even a full exemption from the surcharge would not lead to an aid intensity of more than 30% of the total cost of rail transport.

(58) The Commission also finds that the aid intensity is not above the maximum of 50% of the eligible costs. According to the study submitted by Germany mentioned in recital 49 (a), the difference between overall external costs for rail (EUR 2.5 billion) and road transport (EUR 76.9 billion) amounts to around EUR 74.4 billion per annum.

(59) The exact amount of the reduction of the offshore-surcharges is difficult to estimate, as it is linked to future costs for connection lines and compensation payments, as well as the economic activity and the electricity consumption of the railway sector and the specific business development of the eligible railway undertakings.

(60) However, Germany has indicated that based on the connection costs currently included in the network charges, they expect the connection costs in 2019 to amount to approximately EUR 1.26 billion. Furthermore, the transferable costs under the liability surcharge in 2017 are estimated to amount in total to EUR 244 million. Based on these assumptions, the future offshore-surcharges to be paid by the end consumer is estimated to amount to EUR 0.33/kWh. Germany forecasts the corresponding surcharge reduction for railway undertakings under paragraph 27c KWKG to amount to EUR 35 million per annum.

(61) Taking these estimates into account, the Commission takes the view that the aid amount for railway undertakings is very unlikely to exceed the maximum aid amount of EUR 37.2 billion (50% of eligible costs).

24 See point 109 of the Railway Guidelines.

3.3.3. Incentive effect

(62) The Railway Guidelines stipulate in point (110) that: "At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road". Finally, according to point (111) of the Railway Guidelines, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

(63) Germany states that these requirements are fulfilled: According to Germany, the demand for different transport modes is mainly determined by duration and costs of the respective transport mode. A reduced offshore-surcharge will reduce the overall costs of the railway undertaking. Such reduction is likely to be reflected in the ticket prices as the surcharge reduction will be publicly known. The reduced surcharge for railway undertakings will therefore contribute to maintain rail passenger and freight numbers and to prevent a shift back to road transport.

(64) Germany has explained that there is also a realistic prospect that the measure will keep traffic transferred to rail. Due to the offshore-surcharge, the competitive situation of electrified railway undertakings is deteriorated compared to other transport modes. A reduced surcharge will reduce the negative impact of the surcharge on railway undertakings and thus support the competitiveness of railway undertakings.

(65) The Commission considers that, taking into consideration that the surcharge is limited to 0,04 ct/kWh or 0,03 ct/kWh, and that electricity costs for rail transport amount to a maximum of 20 % of total costs, Germany's claim that the reduced offshore-surcharge will be reflected in the final prices of railway transport appears reasonable. With the reduced surcharge it is likely that the transport prices for rail will be lower which in turn may positively affect demand for train transport services. Accordingly, the Commission takes the view that the measure in question will help to maintain rail traffic compared to a situation where the full surcharge would have to be paid and will therefore support a long-term shift of traffic to rail.

(66) Hence, the Commission concludes that the requirements of points (110) and (111) of the Railway Guidelines are fulfilled.

3.3.4. No effects on competition contrary to the common interest

(67) The positive effects of the aid measure have to be compared against any negative effects in the form of distortions of competition within the railway sector. In the following, this analysis is done in particular with respect to any legal eligibility criteria which might discriminate against competitors of beneficiaries, in the sense that potential market entrants would not be eligible for reduced surcharges from the very start of operations.

(68) Under paragraph 27c KWKG, the reduced offshore-surcharge will only apply to railway undertakings reaching 1 GWh of consumption at a consumption point in a given year. Railway undertakings below the threshold of 1 GWh shall pay 100 % of the surcharge. Thus all undertakings, new entrants and incumbents alike, pay the full surcharge on the first GWh of consumption.
The Commission had to examine to what extent the existence of this threshold introduces discrimination between small and large railway undertakings.

The Commission consulted CER (Community of European Railway and Infrastructure Companies)\(^{26}\) and Mofair e.V.\(^{27}\) in 2014, when assessing the EEG 2014\(^{28}\). In that assessment the Commission had to assess a similar question, i.e. whether a threshold of 2 GWh would discriminate small railway undertaking compared to large railway undertakings. The submissions of both associations stated that railway undertakings with energy consumption levels below the threshold of 2 GWh could only be found in particular cases, with business models restricted to specific operations, like for example heritage and tourist railway companies, test drives, seasonal special excursions, vehicle transfer, etc. CER stated that on the basis of averaged data, an average railway undertaking (for example in the freight transport service) will already exceed 2 GWh per year with only the use of one locomotive eight hours per day. Therefore, both associations stated that these operations would not concern business activities that are carried out in competition with other, regular railway activities and could not see any impact on intermodal competition. The Commission finds this assumption reasonable.

The Commission recognizes the need to apply a minimum threshold for the measure, as the necessity of a minimum of electricity consumption ensures the right proportion between the benefit of a reduced surcharge and the considerable costs (both for the administration as well as the applicant) linked to an application for reduction. Taking into consideration the information provided by the two railway associations, the Commission concludes that these assumptions are equally valid for a threshold of 1 GWh and that on balance the threshold of 1 GWh can be justified. This finding is in line with the Commission decisions concerning the reform of the KWKG\(^{29}\).

The Commission considers that the provisions of paragraph 27c KWKG stipulating the conditions for the application of a reduced surcharge to railway undertakings ensure an equal treatment between existing railway undertakings and new entrants, i.e. newly created railway undertakings. According to paragraph 27c KWKG, any railway undertaking that can demonstrate a minimum electricity consumption of 1 GWh in a given calendar year, will benefit from a reduced surcharge, limited to the amount of 0,04 ct/kWh. This is valid for any railway undertaking, regardless at which moment in time during the calendar year the respective railway undertaking has started its activity. Thus

\(^{26}\) CER represents a number of railway undertakings, their national associations and infrastructure companies operating in the EU. According to the CER, its members represent about 61 % of the rail network length, more than 84 % of the rail freight business and about 99 % of rail passenger operations in EU EFTA and EU accession countries.

\(^{27}\) The Netzwerk Europäischer Eisenbahnen e.V. & mofair e.V. represents private, independent railway undertakings that are operating in regional passenger transport. (see http://www.netzwerk-bahnen.de/mitglieder.html). Its stated objective is to develop the conditions for fair competition in the railway sector and in this context ensure non-discriminatory regulation.


\(^{29}\) See recitals 61 to 67 of the KWKG Decision.
new entrants can rely on the reduction already in their first year provided that their consumption exceeds 1 GWh. A further reduction of the surcharge to the amount of 0,03 ct/kWh is possible, if the railway undertaking can demonstrate that the proportion between its total annual electricity costs and its total turnover of the last full calendar year has been higher than 4%. The demonstration of data of a full calendar year is however only possible for existing railway undertakings, it is not possible for newly established railway undertakings that started their activity in the course of the respective calendar year.

(73) In its decision concerning the reform of the KWKG, the Commission considered that the condition of the demonstration of the data of a full calendar year does not lead to a considerable disadvantage for newly established railway undertakings compared to established railway undertakings\textsuperscript{30}: newly established railway undertakings do benefit from a reduced surcharge to the amount of 0,04 ct/kWh. In this respect they are equally treated with established railways. Only the difference to the further reduction of 0,01 ct/kWh is not possible for newly established railway undertakings during their first year of establishment, which would result in an increased surcharge of EUR 100 per GWh. As of the first full calendar year they can equally benefit from the reduction to 0,03 ct/kWh.

(74) The Commission considers that the arguments under the KWKG decision are equally valid for this case as the respective provision in paragraph 27c KWKG is identical. The financial disadvantage for newly established railway undertakings only in their first year of activity seems to be indeed not very high compared to the overall electricity costs of railways, as they can benefit from the reduced surcharge of 0,04 ct/kWh. Moreover, the measure in question will be made transparent and is publicly available, so that any potential market entrant is able to take its eligibility provisions into account when considering market entry.

(75) The Commission therefore considers that any possible discrimination would not outbalance the positive effects of the measure and that there is no distortion of competition contrary to the common interest.

3.3.5. Conclusion on the compatibility of the aid

(76) The aid measure at stake fulfils the criteria of the Railway Guidelines and can therefore be considered compatible with the internal market under Article 93 TFEU.

4. Commitments from Germany on the Duration

(77) The Railway Guidelines state in point (97) that, in view of the rapid development of the transport sector and hence the need for coordinating it, any aid notified to the Commission on the basis of Article 93 TFEU has to be limited to a maximum of five years, in order to allow the Commission to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal.

(78) Hence, the Commission authorises the present aid scheme only for a period of five years from the entry into force of the measure. Germany commits to re-notify the measure, in case it intends to modify the scheme or to continue the surcharge reduction for railway undertakings beyond this period.

\textsuperscript{30} See recitals 70f. of the KWKG Decision.
5. **AUTHENTIC LANGUAGE**

(79) Germany has waived its right to have the decision adopted in German. The authentic language will therefore be English.

6. **CONCLUSION**

(80) The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 93 TFEU.

(81) The present decision is valid for five years in respect of the reduced offshore-surcharge for railway undertakings.

(82) If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: [http://ec.europa.eu/competition/elojade/isef/](http://ec.europa.eu/competition/elojade/isef/).

Your request should be sent electronically to the following address:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully  
For the Commission  

Margrethe VESTAGER  
Member of the Commission