



Ruling Chamber 9

DECISION

In the administrative proceedings pursuant to section 29(1) of the Energy Industry Act (EnWG) in conjunction with section 56(1) first sentence para 2, second and third sentences EnWG in conjunction with Article 6(11) and Article 7(3) of Regulation (EC) No 715/2009 in conjunction with Article 10(3) first sentence of Regulation (EU) 2017/460

concerning the introduction of an effective inter-transmission system operator compensation mechanism within a market area ("AMELIE")

Ruling Chamber 9 of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn

represented by

the Chair	Helmut Fuß
the Vice Chair	Dr. Ulrike Schimmel and
the Vice Chair	Anne Zeidler

decided on 29 March 2019:

1. To be able to properly apply the same reference price methodology jointly, the transmission services revenue obtained within a market area will be reconciled as from 1 January 2020 in accordance with the following rules.

2. Before the start of a calendar year (reference period), for every transmission system operator in the market area, the likely transmission services revenue for the reference calendar year is to be established on the basis of the forecast capacity bookings, the common reference price and the reserve prices derived therefrom. The compensation payments are derived from the difference between the likely transmission services revenue established for the reference calendar year and the allowed transmission services revenue for the reference calendar year to be validated by the transmission system operator.
3. Where a transmission system operator's compensation payment is positive, monthly part payments in twelve equal instalments are to be paid not later than the fifteenth of the respective month, by 15 January 2020 for the first time, on a pro rata basis to all the transmission system operators in the market area with a negative difference.
4. Claims having arisen under no 3 shall lapse as a result of the compensation payments. A comparison against the actual revenues will not be made. Divergencies between allowed transmission services revenue and obtainable revenue will be offset individually for each enterprise via the regulatory account, with the compensation payments made and received being factored in.
5. The order for payment of costs is reserved.

Rationale

I.

- 1 The Ruling Chamber has opened own-initiative proceedings for the introduction of an effective inter-transmission system operator compensation mechanism within a market area.
- 2 Notification of the opening of proceedings was given in Official Gazette 05/2018 of 14 March 2018 and simultaneously on the Bundesnetzagentur's website.
- 3 The background to these proceedings is the network code on harmonised transmission tariff structures for gas (Regulation (EU) 2017/460), which entered into force on 6 April 2017 and which constitutes directly applicable European law yet also requires several implementing acts from the national regulatory authority. One of these acts, given the joint application of the reference price methodology by the transmission system operators within a market area, is the introduction of an effective compensation mechanism so as to reconcile divergences between obtained and allowed revenues.

- 4 The draft decision in German was published on the Bundesnetzagentur's website on 5 June 2018 for pre-consultation. The publication was accompanied by a brief statement that the final consultation required under Article 10(5) and (7) in conjunction with Article 26(1) of Regulation (EU) 2017/460 would begin and run for two months as soon as an English version had also been published on the website and in the Official Gazette. Legally binding, however, is solely the German version.
- 5 This publication, by analogy with section 73(1a) first sentence EnWG and section 28(2) para 4 of the Administrative Procedure Act (VwVfG), takes the place of the individual hearing required under section 67(1) EnWG for each person addressed.
- 6 During the pre-consultation, 11 responses to the draft determination were received, with one of them being a joint response from two undertakings. The responses received were published on the Bundesnetzagentur website on 19 July 2018. Some undertakings welcomed the proposed regulations unreservedly. The criticisms and suggestions from the other responses may be summarised as follows:

The compensation mechanism that was the subject of the consultation would lead to unfounded compensation payments that would not be proportionate to performance with the sole result of achieving cross-subsidisation between transmission system operators. Moreover, liquidity risks in the form of pre-financing would be borne by those transmission system operators that had a favourable cost structure and/or an optimistic booking forecast for the tariff calculation. This would create an incentive to be conservative in booking forecasts, leading ultimately to a higher level of tariffs and jeopardising transit through Germany, which would become less attractive as a result.

Regarding the forecast capacity bookings, it was commented that the derivation of forecasting capacity must be transparent. There were isolated calls for the Bundesnetzagentur to monitor the plausibility of individual capacity forecasts. It was also argued that the forecast for the likely transmission services revenue must be based on the same forecast capacity bookings as those that the calculation of the reference price is based on.

It was said to be unclear who would bear the risk of breaches of contract and consequential losses in tariffs. Moreover, there is no indication of how the procedure could be reversed in cases where customers successfully sued against the determination. The determination must not be allowed to lead to negative consequences for net-contributing TSOs in the course of the cost examination. The same applies to the efficiency benchmarking. The compensation amounts should be determined by the Bundesnetzagentur in annual proceedings because all civil law agreements between TSOs cannot be designed with legal certainty.

- 7 The Bundesnetzagentur on 5 June 2018 notified the regulatory authorities of the federal states of the opening of proceedings in accordance with section 55(1) second sentence EnWG and gave the authorities the opportunity to comment on the intended determination in accordance with section 58(1) second sentence EnWG. The Bundeskartellamt (Federal Cartel Office) on 5 June 2018 was likewise given the opportunity to state its views on the intended determination in accordance with section 58(1) second sentence EnWG.
- 8 The Committee of representatives of the federal state regulatory authorities on 26 April 2018 was given the opportunity to comment in accordance with section 60a(2) first sentence EnWG. Additionally, the text of the determination was transmitted to the Committee on 5 June 2018 for deliberation in the Committee meeting of 14 June 2018.
- 9 The draft decision (in German and additionally in English) was published on 17 October 2018 in the Official Gazette 20/2018 and on the Bundesnetzagentur website. This launched the consultation pursuant to Article 10(5) and (7) of Regulation (EU) 2017/460 at the same time as the final consultation pursuant to Article 26(1) and (2) of Regulation (EU) 2017/460. At the same time, the consultation documents were forwarded to the Agency within the meaning of Article 1(1) of Regulation (EC) No 713/2009 (ACER). The length of the consultation was set at two months.
- 10 On 7 November 2018, a workshop took place at the Bundesnetzagentur for the BK9-18/607 (AMELIE), BK9-18/608 (BEATE 2.0), BK9-18/610-NCG (REGENT-NCG), BK9-18/611-GP (REGENT-GP) and BK9-18/612 (MARGIT) determination proceedings. Further details on this workshop have been published online.
- 11 Comments made by market participants in the final consultation on the draft determination were published on the Bundesnetzagentur website on 17 January 2019. While some responses were, again, unreservedly positive about the proposed regulations, others repeated or intensified the criticisms and suggestions already made in the pre-consultation.
- 12 For further details reference is made to the content of the implementing acts.

II.

- 13 The Bundesnetzagentur, by means of this determination, is setting requirements for the introduction of an effective inter-transmission system operator compensation mechanism (entry-exit system) in accordance with Article 10(3) first sentence of Regulation (EU) 2017/460. The requirements of the Decision are addressed to all transmission system operators as defined in section 3 para 5 EnWG.
- 14 The determination falls under the responsibility of the Bundesnetzagentur as provided for by section 29(1) EnWG in conjunction with section 56(1) first sentence para 2, second and third sentences EnWG in conjunction with Article 6(11) and Article 7(3) of Regulation (EC) No 715/2009 in conjunction with Article 10(3) of Regulation (EU) 2017/460. The responsibility of the Ruling Chamber ensues from section 59(1) first sentence EnWG.
- 15 The requirements of this determination are issued on the basis of section 29(1) EnWG in conjunction with section 56(1) first sentence para 2, second and third sentences EnWG in conjunction with Article 10(3) first sentence of Regulation (EU) 2017/460. While section 29(1) EnWG makes provision generally for the regulatory authority to take decisions in the cases stated in said law by means of determinations or approvals and section 56 EnWG lays down when the Bundesnetzagentur is to become active in enforcing European law, Article 10(3) first sentence of Regulation (EU) 2017/460 provides for the introduction of an effective inter-transmission system operator compensation mechanism to enable the proper and joint application of the same reference price methodology. In doing so, Article 10(3) first sentence of Regulation (EU) 2017/460 refers to the requirement in Article 10(1) of Regulation (EU) 2017/460 according to which, in line with Article 6(3) of Regulation (EU) 2017/460, the same reference price methodology is to be applied jointly by all the transmission system operators within an entry-exit system within a Member State. Article 6(3) of Regulation (EU) 2017/460 provides greater specificity on this by making clear that the reference price methodology in an entry-exit system (market area) with more than one transmission system operator is to be applied in principle to all entry and exit points in the entry-exit system and is to be applied in principle jointly by the transmission system operators.
- 16 The Ruling Chamber has not made use of the possible alternative of ordering separate application of the reference price methodology under Article 10 paragraph 2(a), paragraph 3 second sentence of Regulation (EU) 2017/460 and of determining a corresponding compensation mechanism in compliance with the conditions set out in Article 10 paragraph 3(a) and (b) of Regulation (EU) 2017/460.
- 17 Hence the requirement set out in Article 10(1) of Regulation (EU) 2017/460 calling for the transmission system operators to apply the same reference price methodology jointly, applies without the Ruling Chamber having to take a decision to this effect. However, to enable the proper application of the same reference price methodology jointly, the introduction of an

effective compensation mechanism is required under Article 10(3) first sentence of Regulation (EU) 2017/460. Such a compensation mechanism is necessary because the revenue obtained from the reference price and the reserve prices derived therefrom does not reflect the transmission system operator's specific costs or allowed revenue. A transmission system operator whose specific tariff is less than the reference price applicable throughout the market area will, as a result of the uniform reference price or reserve prices derived, collect more than it should properly collect. A transmission system operator whose specific tariff is more than the reference price will not, as a result of the reference price or reserve prices, be able to obtain its allowed revenue. Thus the whole purpose of the compensation mechanism is to reconcile the transmission services revenue obtained in the market area in such a way that every transmission system operator, in selling the volumes of gas on which tariffication is based, really does obtain its allowed transmission services revenue by means of inter-transmission system operator compensation payments.

- 18 Under the wording of the Regulation, the sole demand made of the compensation mechanism is that it be "effective". Effectiveness in this context means purely and simply that the compensation mechanism must be suitable to bring about the above objective of reconciling revenues in such a way that every transmission system operator really can obtain its allowed revenue. As the reference price is established on the basis of estimates in respect of sales volumes, additional revenue or shortfalls in revenue are probable throughout the market area even when the reference price methodology is applied jointly. These additions and shortfalls are to be offset in accordance with section 5 of the Incentive Regulation Ordinance (ARegV) via the regulatory account.
- 19 The requirements are to be implemented pursuant to Operative Part 1 as from 1 January 2020 and hence included in the publication referred to in Article 29 of Regulation (EU) 2017/460. Under Article 38 of Regulation (EU) 2017/460 Chapters II, III and IV of the Regulation will apply as from 31 May 2019; thus Article 10 of the Regulation is also covered, coming as it does under Chapter II. Accordingly, the transmission system operators must apply the reference price methodology jointly for the first time in respect of the tariff year 2020, which also necessitates an effective compensation mechanism as from that time.
- 20 Operative Part 2 specifies how the compensation payments are to be established. The likely transmission services revenue for the reference calendar year is initially to be established for every transmission system operator in the market area on the basis of the forecast capacity bookings, the common reference price and the reserve prices derived therefrom. Transmission services in this connection and hereafter are, as defined in Article 3 second sentence paragraph 12 of Regulation (EU) 2017/460, the regulated services that are provided by the transmission system operator within the entry-exit system for the purpose of transmission. These are to be distinguished from non-transmission services. Non-transmission services,

under Article 3 second sentence paragraph 15 of Regulation (EU) 2017/460, are the regulated services other than transmission services [...] that are provided by the transmission system operator.

Forecast capacity bookings are the same capacities that are used for the calculation of the reference price. That means that the values to be applied in the forecast capacity bookings must not deviate from the values upon which the calculation of the reference price and the reserve prices derived therefrom are based. Without this requirement, it would be possible for each transmission system operator to create its own obligation to pay compensation or claim to compensation. This would have the result that in the market area as a whole, compensation claims and compensation obligations would no longer be equal to each other under normal circumstances and the objective of the determination – to ensure that each transmission system operator really can obtain its allowed transmission services revenue – could not be attained.

- 21 To establish the transmission system operator's likely transmission services revenue, the common reference price or the reserve prices derived therefrom are to be multiplied by the forecast capacity bookings in observance of the determinations in Article 27(4) and Article 28 of Regulation (EU) 2017/460.
- 22 The compensation payments can be calculated in the following from the difference between the previously established likely transmission services revenue for the reference calendar year and the allowed transmission services revenue to be validated by the transmission system operator for that calendar year. The allowed operator-specific transmission services revenue that is subject to validation reflects the revenue cap determined, and adjusted if necessary, in accordance with section 29(1) EnWG in conjunction with sections 32(1), 4(1) and (2) ARegV for the particular year of the regulatory period, minus that part of the revenue cap accounted for by non-transmission services. If, for instance, Operator A has allowed transmission services revenue of €100 and likely transmission services revenue of €50 and Operator B has allowed transmission services revenue of €50 and likely transmission services revenue of €100, Operator A has a claim to compensation of €50 and Operator B has a compensation obligation of €50.
- 23 Operative Part 3 lays down and makes clear that the transmission system operators whose likely transmission services revenue is more than the validated allowed transmission services revenue must, in the reference calendar year, make monthly payments of twelve equal instalments not later than the fifteenth of the respective month, by 15 January 2020 for the first time, on a pro rata basis to all the transmission system operators in the market area with a negative difference, that is to say to all transmission system operators whose likely revenue is less than their allowed transmission services revenue. Continuing the above example this means that Operator B has to pay Operator A €4.17 monthly ($\frac{€50}{12}$ months). The procedure is exactly the same when more than two transmission system operators are active in the market

area. If, for instance, an Operator A in the market area (comprising four transmission system operators) has a compensation obligation of €40, an Operator B has an obligation of €20, an Operator C has a claim to compensation of €35 and an Operator D has a claim to compensation of €25, Operator A must meet its compensation obligation of €40 by paying Operators C and D a monthly sum on a pro rata basis. That means having to pay Operator C €1.94 monthly (€23.33/12 months) and Operator D €1.39 monthly (€16.67/12 months). The same applies to Operator B. Operator B, too, has to meet its compensation obligation of €20 by paying Operators C and D a monthly sum. Specifically, it has to pay Operator C €0.97 monthly (€11.67/12 months) and Operator D €0.69 monthly (€8.33/12 months). Thus Operative Part 3 creates a claim to compensation or an obligation to pay compensation in relation to the other transmission system operators in the market area.

- 24 Under Operative Part 4, the claims having arisen under Operative Part 3 lapse through fulfilment as a result of the compensation payments actually made in the reference year. A comparison against the actual revenues is not made. Divergencies between allowed transmission services revenue and obtainable revenue (additional revenue or shortfalls in revenue) are offset individually for each enterprise via the operator-specific regulatory account, with the compensation payments made and received being factored in. This means that additional revenue obtained or shortfalls in revenue incurred in the market area is/are not evenly distributed via the transmission system operators in the market area, which would have necessitated a further compensation mechanism based on actually obtained revenues. The individual operators thus continue to bear the risk involved in forecasting their particular volumes.
- 25 The Ruling Chamber, with the rules set out above, has made use in correct manner of the discretion granted under Article 10(3) first sentence of Regulation (EU) 2017/460 in respect of the design of the compensation mechanism. It has exercised its discretion in line with the purpose of empowerment and has observed the legal limits of discretion. The purpose of legal empowerment is to introduce a compensation mechanism, such as is necessary when the reference price methodology is applied jointly, to ensure that each transmission system operator really can obtain its allowed transmission services revenue, aside from the usual fluctuations resulting from additional revenue or shortfalls in revenue. Hence only the *design* of the compensation mechanism is a discretionary matter for the regulatory authority or Ruling Chamber; the introduction of a compensation mechanism in itself is obligatory. The requirements of this determination are suitable to achieve the objective set by legal empowerment. The requirements ensure that the transmission system operators will be able to obtain their allowed transmission services revenue, the compensation payments being factored in. Moreover, the requirements are both necessary and proportionate; a more lenient means is not obvious.

- 26 Regarding costs, a separate notice will be issued as provided for by section 91 EnWG.
- 27 Since the determination is issued in relation to all transmission system operators within the meaning of section 3 para 5 EnWG, the Ruling Chamber is giving public notification of the determination in place of service pursuant to section 73(1) first sentence EnWG in accordance with section 73(1a) first sentence EnWG. Public notification is brought about under section 73(1a) second sentence EnWG by publication of the operative part of the determination, the notification of appellate remedies and a brief statement that the decision in full has been published on the regulatory authority's website and in the Bundesnetzagentur's Official Gazette. Service of the determination is deemed to have taken place under section 73(1a) third sentence EnWG on the day on which two weeks have elapsed since the date of public notification in the regulatory authority's Official Gazette.

Notification of appellate remedies

Appeals against this Decision may be brought within one month of its service. Appeals should be filed with the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (address: Tulpenfeld 4, 53113 Bonn). It is sufficient if the appeal is received by the Higher Regional Court of Düsseldorf within the time limit specified (address: Cecilienallee 3, 40474 Düsseldorf).

The appeal must be accompanied by a written statement setting out the grounds of appeal. The written statement must be provided within one month. The one-month period begins with the filing of the appeal; this deadline may be extended by the court of appeal's presiding judge upon request. The statement of grounds must state the extent to which the decision is being appealed and its modification or revocation sought and must indicate the facts and evidence on which the appeal is based. The appeal and the written statement of grounds must be signed by a lawyer.

The appeal does not have suspensory effect (section 76(1) EnWG).

Bonn, 29 March 2019

Chair

Vice Chair

Vice Chair

Helmut Fuß

Dr. Ulrike Schimmel

Anne Zeidler