

Legal Update

Infrastructure Environment Energy

German “Electricity Price Compensation”

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Businesses with high energy consumption processes may apply for state aid as compensation for the increase in the price of electricity due to the inclusion of indirect costs of CO₂ emissions until 30 May 2014 with respect to 2013 on an exceptional basis. In subsequent years, such applications may be made by 31 March of the year following the year to be compensated for. The applications must be filed with the German Emissions Trading Authority (Deutschen Emissionshandelsstelle, DEHSt) at the Federal Environment Agency. The calculation and the disbursement of state aid will only take place after the end of the application period; in 2014, this means after 30 May 2014. Disbursement will therefore likely only take place in the second half of 2014.

At the moment, however, companies must verify whether an application for state aid for 2013 in accordance with the on-going allocation proceedings for certificates for the allocation period as of 2013 should be made and, where applicable, should apply for this in time.

I. Background

In 2005, the European Emissions Trading System (EU ETS) was introduced. Its aim was to cost-efficiently reduce CO₂ emissions on a supranational level and to counteract climate change. European Directive 2003/87/EC created the legal basis for the world's largest trading system for emission certificates.

This Directive was significantly amended in important respects by Directive 2009/29/EC. According to Article 10a paragraph 6 of Directive 2003/87/EC, as amended in 2009, Member States may grant aid in favour of certain sectors or subsectors which are assumed to have a considerable risk of displaced CO₂ and hence,

which bear the costs of these CO₂ emissions as costs passed on in electricity prices. Reducing the danger of displaced CO₂ emissions is regarded as an environmental goal. In the absence of a binding international agreement on the reduction of greenhouse gas emissions, state aid seeks to prevent an increase in global greenhouse gas emissions occurring due to the relocation (displacement) of production activities to locations outside the European Union.

In order to reduce the risk of relocation of production activities to locations outside the European Union, in 2013, the German Federal Ministry of Economics and Technology issued the national-level "Directive on state aid for firms in sectors or subsectors in which it is assumed that there is a significant risk of displacement of CO₂ emissions when considering that the costs for the EU ETS certificates are passed on in the electricity price (state aid for indirect CO₂ costs)" (referred to here as the "Directive"). The Directive regulates the grant of state aid as compensation for the increase of electricity prices due to the inclusion of costs for greenhouse gas emissions ("electricity price compensation"). The legal basis for this Directive was also the "Guidelines on Certain State Aid Measures in the Context of the Greenhouse Gas Emission Allowance Trading Scheme Post-2012" (State Aid Guidelines) adopted by the European Commission. As a result of legal requirements on state aid issued by the European Commission, by way of a notice dated 23 July 2013, the German Directive was further amended and adjusted to the Commission's State Aid Guidelines.

II. Issues governed by the Directive

The cornerstones of German electricity price compensation are:

1. Generally, all businesses that manufacture products in one or more facilities in one of the sectors or sub-sectors listed in Annex II of the State Aid Guidelines are eligible to apply for the electricity price compensation. These sectors include, for example, iron ore mining and mineral extraction, the production of aluminium, lead, zinc, tin, iron and steel, the manufacture of chemicals, fertilisers, leather clothing, paper and cardboard, and cotton preparation.
2. The calculation of the total aid amount is derived from the sum of the amounts of the aid for individual facilities which are determined on the basis of a comprehensively-defined and differentiated system of formulas. A deductible is also provided for.
3. A requirement to file an application is created to the extent that for the calculation years 2013 to 2020, an aid application must be filed by 30 March of the year following the respective year for which aid is applied for. In addition, the Directive establishes certain administrative and procedural requirements, as well as competencies of authorities.
4. In accordance with the structure of the implementation process of the European Emissions Trading System, the Directive initially applies only to the time period of the third trading period, hence, for the calculation years 2013 to 2020.

EUR 350 million were provided for in the 2014 German budget in order to implement electricity price compensation in Germany.

III. Procedure

The DEHSt is the national authority in charge of granting electricity price compensation. On its homepage www.dehst.de, it provides links to application forms and a forms management system. Guidelines for applicants can also be downloaded from this website.

These guidelines provide general information on the application procedure. They are not designed to regulate each possible case (the grant of compensation must be determined on a case-by-case basis in any event). Instead, the guidelines summarise in a simplified manner once again the sectors that are permitted to apply for state aid according to the NACE amendment 1.1 (2007) under the EU State Aid Guidelines. The guide-

lines also describe the applicants entitled to aid in the basis of an attached list of Prodcom codes. The guidelines further explain that aid (i) is granted to businesses producing products within a sector entitled to state aid. Where energy efficiency benchmarks for these products that are eligible for aid already exist, the calculation of aid is based on these benchmarks. (ii) Where products are eligible for aid but no benchmark exists, the aid is calculated according to the energy consumed in the manufacture of these products. The aid is then adjusted by a uniform energy efficiency fallback-factor. Along with this quite complex means of deriving state aid amounts, the guidelines also contain definitions and exclusions.

IV. Self-generated energy

According to the State Aid Guidelines of the EU Commission, electricity price compensation should also generally be available where a business generates electricity itself. Annex IV of the State Aid Guidelines states:

*“In order to ensure equal treatment of sources of electricity and avoid possible abuses, the same CO₂ emission factor applies to **all** sources of electricity supply (own generation, electricity supply contracts and grid supply) and to all aid beneficiaries in the Member State concerned.”*

Number 3.11 of the Guidelines sets out that:

“The EU State Aid Guidelines define indirect CO₂ costs as “an increase of electricity prices due to the inclusion of costs for greenhouse gas emissions within the EU ETS” [...] and/or “greenhouse gas costs passed on in electricity costs” [...]. In general, electricity price compensation serves to compensate for these costs [...]. An energy supply contract includes CO₂ costs if at least a portion of the energy supplied was extracted from fossil fuel sources. This must be confirmed by the energy supplier to the state aid applicant using the energy designation in accordance with § 42 of the German Energy Industry Act (Energiewirtschaftsgesetz, EnWG). If no energy supply contract exists (e.g. for internal energy generation facilities), electricity consumption is only taken into account where the facilities producing the energy fall under emissions trading regulations and there is no entitlement to tariff payments under the German Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz, EEG). For energy generation facilities that are governed by emission trading regulations it is assumed that the generation of energy is connected to

CO₂ costs. For these facilities, compensation is granted irrespective of the fuels used and the actual CO₂ emissions of these facilities. Self-generated energy may also be attributed only to the facility in which it is actually used.”

appears likely to lose its exemption from the German Renewable Energy Sources Act (EEG) contribution as a result of the planned amendment of the EEG, many project constellations that – to date – have been economically viable will have to be reviewed in the coming months in respect of both electricity price compensation and the retention of the EEG contribution exemption privilege.

V. Conclusion

It remains to be seen how many of the questions that will arise in practical application have been resolved by the DEHSt Guidelines. In particular, the actual limitation of self-generated energy will be of interest. Since this

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the authors themselves: Dr. Liane Thau on +49 030 884 503-187 or by email to lthau@goerg.de and Hermann Dahlitz on +49 030 884 503-130 or by email to hdahlitz@goerg.de. For further information about the author/the authors visit our website www.goerg.com.

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