A Legal Assessment of the Exemption of Electricity Producers from Transport Tariffs under EU Law

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Amsterdam Centre for European Law and Governance
Working Paper Series 2013 - 08

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ABSTRACT

This article contains an examination of the exemption from paying transport charges for producers, under European Union sector specific regulation and the European Union state aid rules. In the Netherlands and several other EU Member States, the energy authorities have decided that producers of electricity will not be charged for using the electricity network for transportation. These energy authorities are responsible for setting the tariffs and the related methodologies. The charges are meant to be paid to the network operator and thereby ensure that this network operator can recover the costs that are made to provide the service of transport to users of the network. Both producers and consumers are users of the network. Producers inject electricity that will be transported to consumers. These consumers take the electricity off the network. This article assesses whether exempting producers from contributing to the payment of these charges, can be considered legitimate under European Union law. First, the relevant provisions from the Third Energy Package are assessed. This legislative package does not contain provisions containing strict rules with regard to the allocation of transport tariffs on the electricity market. It does however contain the principle of non-discrimination. Whether or not this principle is infringed by the measure containing the exemption is doubtful. Secondly, the exemptions will be tested under the EU state aid doctrine. Whether or not the state aid rules are infringed by the exemption will depend of the interpretation of the specific elements of the state aid rules. Applying a broad interpretation of the state aid conditions will lead to the conclusion that the measures containing the exemption can constitute unlawful state aid as prohibited by the Treaty. Nevertheless, it is not that convincing that this conclusion would be the same if these conditions would be interpreted in a more strict way. It would thus be useful to notify the measures to the European Commission, in order for them to carry out investigations.
INTRODUCTION

Ever since the late 1990s, the European Union has intended to open up the electricity and gas markets to competition. By adopting three successive legislative packages, the European Union aimed at liberalising the energy sector. An important part of the electricity sector that is still regulated is the adoption of the tariffs for using the transmission and distribution networks. The national regulatory authority is competent to set these tariffs and/or the methodology to calculate them. The network operator must provide several services to make the electricity network available for use by the network users. One of the core duties of the network operator is to ensure that electricity can be transported on the network. Technically speaking, this service is hardly separable into different activities for different users. Some activities mainly benefit certain users (for example investments that are made to expand the network to the benefit of producers), but the core duty of the service is simply ensuring that electricity can flow from producer to consumer. Legally speaking, however, a division between two services (namely injection and take off) has, for example, been made by the Dutch Administrative Court for Trade and Industry on the basis of the Dutch Electricity Act. The relevance of this division shall be further elaborated in the next chapter. The network operator can recover the costs that it generates for providing services by imposing charges on the users of the network. The users of the network are producers as well as consumers (residential and non-residential users) of electricity.

In the Netherlands and several other Member States of the European Union, the entire amount of costs related to the transport service on the transmission network operator is competent to set these tariffs and/or the methodology to calculate them. The network operator must provide several services to make the electricity network available for use by the network users. One of the core duties of the network operator is to ensure that electricity can be transported on the network. Technically speaking, this service is hardly separable into different activities for different users. Some activities mainly benefit certain users (for example investments that are made to expand the network to the benefit of producers), but the core duty of the service is simply ensuring that electricity can flow from producer to consumer. Legally speaking, however, a division between two services (namely injection and take off) has, for example, been made by the Dutch Administrative Court for Trade and Industry on the basis of the Dutch Electricity Act. The relevance of this division shall be further elaborated in the next chapter. The network operator can recover the costs that it generates for providing services by imposing charges on the users of the network. The users of the network are producers as well as consumers (residential and non-residential users) of electricity.

2 Art. 37 first paragraph sub a of Directive 2009/72/EC.
3 E.g. transport service, measuring service, system service and connection service.
5 Art. 2 para. 18 of Directive 2009/72/EC.
network (which consists of the Extra High Voltage and High Voltage Level) is passed on to the consumer of electricity. This thus entails that in several Member States in the European Union, the producers of electricity are exempted from paying charges for transporting their electricity to the recipients. This essential service is thus provided to them for free, whilst in the meantime, the generated costs are entirely charged to the consumer.

There are different reasons why the producers are exempted from contributing to the recovery of the transport costs. First of all, Member States have invoked the objective of creating a level playing field as a reason to lower/abolish the transport charges for the producers. For example in the Netherlands, the former Energy Chamber (now subsumed by the Authority for Consumers and Markets) considered that the producers on the transmission network should not pay for the transport service on the ground that this seemed to be the tendency throughout the European Union. In the view of the Energy Chamber, following the trend in other EU Member States would contribute to fulfilling the objective of the creation of a level playing field in the EU internal energy market. The producers on the distribution network were already exempted from paying transport tariffs for other reasons which will be elaborated in the next chapter. Another important reason why the exemption of the producers has been introduced in the Netherlands is related to the legal and physical interpretation of the transport service. There can be discrepancies as to how the transport service must be approached from a physical and economic perspective. One line of reasoning leads to the conclusion that it is allowed to exempt producers of electricity. Advocates of this approach argue that in order for tariffs to be cost-oriented and the user pays-principle to be respected, it is enough to charge all costs to the consumers. The rationale behind this thought is that all injected electricity is also taken off and that recovering all costs by charging merely for take-off is thus justified. Hereby it seems as if it is argued that the costs are made

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6 For more information on the allocation of transport costs in the different Member States, see ENTSO-E ‘Overview of Transmission Tariffs in Europe: Synthesis 2013’ (2013).
8 E.g. the current Dutch Minister of Economic Affairs E.G.J. Kamp in Amendment 26 303, nr. 6: Memorandum after Report.
9 This principle requires that the ‘polluter’ pays for the costs that are made on his behalf. This shall be further elaborated in the next section.
exclusively for the consumer. According to others however, the service is provided for both producers and consumers. This latter standpoint can be supported by convincing arguments. Producers need the transport service to carry out their economic activities. Without this service, they will not be able to sell the electricity that they have generated to consumers, leading to a failure in carrying out their core activities and ultimately to bankruptcy. Therefore, it seems only natural to impose a proportionate amount of the transport charges on the producers. This article is based on the assumption that injection and take off of electricity are seen as inseparable services and that the transport service is provided for producers as well as consumers.

In this contribution the different physical and economic perspectives with regard to the beneficiaries of the transport services will receive attention, as they may impact the application of EU State Aid Law to the exemptions of the network tariffs. Indeed if producers can be seen as beneficiaries of the transport services, exempting them for a proportionate amount of these costs deserves some attention. It shall be examined whether or not the abovementioned allocation of transport costs is in conformity with European energy law and the European state aid law doctrine. Especially the latter doctrine can cause problems for the current exemptions for producers. It will be assessed whether or not there is reason to notify the current tariff exemptions to the European Commission for further investigation. This article will, however, begin with a legal analysis of the European secondary legislation (directives, regulations, guidelines) concerning transport charges in the electricity sector to study what room Member States have to manoeuvre in designing the regulation of the transport tariffs. It seeks to determine whether or not any concrete principles, provisions, requirements, guidelines or prohibitions exist with regard to the allocation of transport costs to the network users. The Third Energy Package will be thoroughly analysed, focusing on the legislative documents adopted for the electricity sector and guidelines\textsuperscript{10} that are adopted on the basis of these documents.

The reason for examining both sector specific EU energy law and state aid law can be explained by the relationship between primary and secondary European legislation. In general, secondary legislation (such as the Third Energy Package) is adopted to progressively harmonize the national energy laws in the EU Member States. Directives are the most valuable tools to do so. The extent to which a certain legal issue has been harmonized by secondary legislation determines the remaining role for primary EU law, enshrined in the provisions of the Treaty on the Functioning of the European Union (hereinafter: ‘TFEU’ or ‘Treaty’), the Treaty on the European Union, the Charter of Fundamental Rights of the European Union and general principles of Union law. The primary legislative sources namely set out the essential elements, whilst the secondary sources fill in the detail. The primary legislation is above all other sources of law on the hierarchical ladder. This does not necessarily mean that (secondary) energy law becomes irrelevant when competition issues arise. The exact relationship between primary EU law and sector specific secondary EU law is complex and will be reflected upon in the first chapter, after having explained the substance of the relevant secondary legislation in the EU energy sector. In the last chapter the state aid test will be applied. It shall be determined whether it is conceivable that the abovementioned exemptions constitute illegal state aid and deserve attention by the European Commission.

In sum, this article will focus on answering two important questions: (1) ‘Is the exemption from paying transport tariffs for producers on the electricity market compatible with the rules provided by European Union sector specific regulation?’ and (2) ‘Is this exemption compatible with the rules provided by European Union competition law and is there enough reason to notify the European Commission of these measures?’ The situation in the Netherlands will be used as an example, but it must be emphasized that this (potential) problem has a Union-wide dimension and will be approached from an EU law point of view.

12 Damian Chalmers, Gareth Davies, Giorgio Monti, European Union Law, 100 (2d ed., CUP 2011).
13 This will be further established below.
THE THIRD ENERGY PACKAGE

Secondary and primary legislation

The Third Energy Package consists of several legislative documents. The most important documents with regard to the exemption of network tariffs are Directive 2009/72/EC (hereinafter ‘the Electricity Directive’) and Regulation No. 714/2009 (hereinafter the ‘Electricity Regulation’). These are both specifically applicable to the electricity sector. Directives and Regulations are both secondary sources of European Union law. As mentioned earlier, these sources are created to fill in details and are often used for harmonization purposes. In principle, the primary legislation (such as the TFEU) prevails hierarchically over secondary legislation. Primary legislation sets out the essential elements and forms the legal basis for all following secondary legislation. Nevertheless, when both primary and secondary legal sources can be applied to a certain issue, the general approach is to first assess the applicability of the specific source of secondary law. This is referred to as the Tedeschi principle. Directives are binding to the addressees (the Member States), upon the result that needs to be achieved. It is left to the Member States to implement or transpose the Directives into national law. The Directives are, in principle, not directly applicable in the national legal order. Regulations are of general application and directly applicable in the national legal order. The latter sources do not need to be transposed into national legislation and are of direct application to its addressees.

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16 See supra n. 1 for the complete reference to the Directive.

17 See supra n. 10 for the complete reference to the Regulation.

18 Christa Tobler, Jacques Beglinger, Essential EU Law in Text, 102 (E.M. Meijerst Instituut hvg orac 2010).
A Legal Assessment of the Exemption of Electricity Producers from Transport Tariffs

The state aid rules, which will be extensively applied in the next chapter, are laid down in Arts 107, 108 and 109 of the TFEU. These form the starting point for a state aid investigation. Additionally, there are secondary sources of legislation which encompass some exemptions of certain categories of state aid from the state aid rules. The state aid rules form the core of this research. Not imposing transport charges on producers of electricity, even though they use the network, resemble a form of state aid. However, due to the presence of far reaching sector specific secondary legislation, it is relevant to first consider the relationship between the state aid rules and the Third Energy Package.

Space left for the application of the European state aid law

Case law of the European Court of Justice and academic literature has emphasized that sector specific rules and the rules on competition enforcement are complementary. Stimulating competition is an important objective of the Third Energy Package. The distinction between general competition law and sector specific regulation is in the literature often explained as follows: competition law is applied ex post, which means that action under the EU competition rules is justified by the existence of certain forms of anti-competitive conduct of one or more undertakings, whereas sector specific regulation is applied ex ante, namely before companies could cause any damage to competition and consumers. Under sector specific legislation, a national authority may set detailed specific requirements to regulate the behaviour of undertakings in order to avoid competition problems. After the liberalization of the energy markets, the transmission and distribution system operators have maintained a statutory monopoly with respect to the operation of the transport and distribution infrastructure.


20 Saskia A.C.M. Lavrijssen, Toezicht op de wholesalemarkten voor energie en de bescherming van consumentenbelangen 60 SEW Tijdschrift voor Europees en economisch recht 139 (2013); Case C-280/08 P Deutsche Telekom [2010] ECR I 09555, para. 222-228.


22 See Lavrijssen, supra n. 20, at 259.

23 Ibid.
infrastructure which are both economically and technically difficult to duplicate.\textsuperscript{24} Competition in the production and supply of energy can therefore only be achieved as new entrants can gain access to transport and distribution networks under transparent and non-discriminatory rates and conditions. In order to promote competition, the operators of the energy networks are subject to ex ante sector specific regulation. They have to grant access to their networks in accordance with the legislation and at conditions and tariffs established by the energy authority. If disputes occur, the energy authority may determine the conditions and the tariffs under which a party may gain access to the transport network.

Although the distinction between competition law and sector specific legislation is being characterized by referring to the ex ante/ex post dichotomy, in practice this distinction is less straightforward.\textsuperscript{25} By issuing guidance on the substantive application of competition law in a particular sector, a competition authority could actively influence the manner in which companies behave in that particular sector.\textsuperscript{26} Additionally, the Commission may also use its powers to accept commitments on the basis of EU competition law in such a way that it may in effect proactively influence the structure of a particular sector.

The Commission has taken the position that both sector specific legislation and competition law have a role to play in taking away problems regarding the Energy sector by allowing competition law enforcement and sector specific regulation to exist complementary.\textsuperscript{27} Authors such as Diathesepopoulos\textsuperscript{28}, Lavrijssen\textsuperscript{29} and Monti\textsuperscript{30} have clearly illustrated that the Commission uses competition law (enforcement) as a

\textsuperscript{24} According to EU law, vertical integration of distribution networks is still allowed. See supra n. 1, Art. 26.
\textsuperscript{26} Notice on the application of the competition rules to access agreements in the telecommunications sector – Framework, relevant markets and principles [1998] OJ C265/2.
\textsuperscript{28} See Diathesepoulos, supra n. 27.
\textsuperscript{29} See Lavrijssen, supra n. 22.
tool to accelerate the development of the internal energy market by using the commitment decisions in competition procedures in a way to achieve structural changes in the market structure of the energy sector. 31

While the objectives of the two sources of legislation are quite (but not completely) similar, the objectives of the sector specific regulation are, however, broader than those of the competition rules. 32

The Court has confirmed the parallel adoption of the competition law rules (which obtain constitutional status) and the sector specific rules and has determined that the competition law rules can be invoked when the sector specific legislation leave room for the restriction of competition. 33 It remains unclear, however, which legislation prevails when there is a conflict. The Court has determined in the Deutsche Telekom cases that although the competition rules are of great importance, they do not possess an absolute right of prevalence over the sector specific rules, 34 although Diathesepoulos 35 concluded differently. He stated that competition rules have a hierarchical superiority over sector specific rules, but that this must be combined with the efficiency provided by the latter rules. Its objectives are centred on some issues such as investment and capacity development. These are lacking within the scope of the competition rules. Furthermore, competition rules are aimed at short-term problem solving and the enhancement of competition, whilst the sector specific rules intend to fulfil the long-term objective of establishing a competitive internal energy market. 36 Also the fact that the sector specific rules are lex specialis gives them a functional priority over competition rules, sector specific rules must use the competition rules as an interpretative tool. 37 Even when sector specific rules are opted for to stimulate competition, the competition rules can always function as a

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31 See e.g. Diathesopoulous, supra n. 27, at 103.
32 See Lavrijssen, supra n. 22, at 143.
34 Id.; See also Monti, supra n. 30.
35 See Diathesopoulos, supra n. 27, at 100.
36 Ibid., p. 97.
37 See Diathesopoulos, supra n. 27.
reserve framework in case the sector specific regulation leaves certain anti-competitive practices and behaviour unaddressed.\(^{38}\)

A real conflict between the objectives the competition rules and the rules on electricity regulation would have to be examined by the Court.\(^ {39}\) The fact that competition law objectives are also (partly) covered by the specific sector regulations can be encouraging in terms of the complementary approach to complete internal energy market. However, it is not (yet) evident that a conflict between the objectives of competition law and the ‘other’ objectives of the sector specific regulation would automatically lead to a conclusion in line with the competition rules.

**The relevant provisions**

As mentioned in the previous paragraph, primary state aid law and secondary legislation can be applied to assess the exemptions of the network tariffs. Considering the fact that no doctrine prevails over another, it is logical to first assess the secondary sources of legislation. It is desirable to assess these documents because they might contain detailed and/or harmonising provisions regarding the cost allocation within the European electricity sector, whilst the European state aid doctrine is more of a general reserve nature.

**The Electricity Directive**\(^ {40}\)

The preamble of this Directive describes its several objectives. Amongst these are cross-border trade, efficiency gains and competitive prices,\(^ {41}\) the effective functioning of the four freedoms,\(^ {42}\) indiscriminate network access\(^ {43}\) and an equally effective level of regulatory supervision in each Member State.\(^ {44}\)

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\(^{38}\) *Ibid.*

\(^{39}\) See Monti, supra n. 30.

\(^{40}\) Directive 2009/72/EC.

\(^{41}\) *Ibid.*, Recital 1; also: real choice for all consumers, new business opportunities, higher standards of service and contribution to security of supply and sustainability.

\(^{42}\) See *supra* n. 4, Recital 3.


\(^{44}\) *Ibid.*
Access to the network and the principle of non-discrimination

In order to use the network, one must have access to it. A ‘system user’ according to Art. 2 paragraph 18 of the Directive is ‘a natural or legal person supplying to, or being supplied by, a transmission or distribution system’. In other words, anyone who uses the network to either inject or take off electricity is a system user. This means that a producer uses the system for taking off the necessary energy that it produces, as well as injecting the produced electricity which then will be transported to its destination through the network. According to recital 4 of the Electricity Directive, the access to the network shall be indiscriminate. Recital 32 entails the obligation for the national authorities to adopt non-discriminatory tariffs for access to the network, which should be applicable to all system users. This recital is translated into the provision of Art. 32, which imposes the obligation to ensure a system of third party access to the transmission and distribution systems without discrimination between system users. Considering the fact that there is a distinction between different system users made in the adoption of these tariffs (such as in the Netherlands resulting from the LUP decision and the decision not to charge producers on the distribution network for the transport costs made for injection), the question is whether this means that the authority responsible for the adoption of these tariffs failed to comply with the requirement of non-discrimination.

Non-discrimination: EU essentials

Before this analysis can be carried out, it is important to mention some essentials about the application of the principle of non-discrimination within the energy sector and a few other sectors. The principle of non-discrimination stems from the general principle of equality and is one of the fundamental principles of Community law. The principle must be interpreted as a prohibition of treating comparable cases differently as well as treating different cases in the same manner. It is important to note that this principle is applied in line with the effet utile approach, meaning that the European Court of Justice has considered that the principle must be interpreted

45 Case C-17/03 VEMW and Others [2005] ECR I-5016, para. 47.
46 Ibid., para. 48.
47 Id.
in pursuance of the Electricity Directives and the completion of the competitive internal electricity market.  

**Categories of consumers**

Further, two important conclusions by Kruimer have to be considered. First of all, the ECJ seems to allow different norms for different categories of users. This entails that producers on the transmission level are allowed to be treated different than producers on the distribution level. They receive different services, by different network operators and with different advantages and disadvantages. Users receiving the same service on the same network level are considered to belong to the same category. This would thus entail that producers and consumers on the same network level belong to the same category, unless, perhaps, injection and take-off are considered as different services. Several authors have taken the position that injection and take off are considered as separate activities and it would be difficult to argue that differential tariffs are not allowed under the current regime. The interpretation of the transport service is therefore essential. If injection and take off are considered to be different services, the recipients could perhaps be considered as different categories of users. In that sense a producers injecting electricity can be treated different than a consumer taking off electricity. It would however remain questionable whether charging the costs made for one category on another category would be in line with the user pays-principle and the prohibition of cross-subsidization. This will be briefly discussed later. It can also be advocated that the transport service is one and the same service for both the producers and the consumers on a given voltage level. Within a category of users, discrimination is not allowed. In that sense, it can be argued that treating producers on the transmission or distribution level different than the consumers on the same network level is discriminatory. In order for this line of argument to succeed, it must be accepted that

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50 See Kruimer, supra n. 48.
it seems there are costs made in the interest of the producers wishing to inject
electricity. The producers should contribute to the costs made by the network
operator to provide the service of the transportation of generated electricity. This is
realized for both the consumers’ as well as the producers’ interests. If one would
argue that the service is only provided for consumers, this would lead to the
conclusion that no discrimination takes place because the same norms apply to all
users: transportation costs are revoked through charging the only beneficiary – the
consumer. This interpretation is somewhat unconvincing, considering the fact that
producers are just as dependent on the network operator’s efforts as the consumer.
The service consists of allowing generated electricity to be transported through the
network to consumers, not merely of granting electricity to consumers.

Between competitors

The second important aspect of the principle of non-discrimination is the fact that
the Court seems to apply it only to competitors.\textsuperscript{52} It is still undetermined how this
will evolve but as of yet there are no signs of the Court prohibiting discrimination on
the energy market other than between competitors.\textsuperscript{53} Besides that, the Court seems to
apply the principle of non-discrimination in a comparable way in public
procurement law,\textsuperscript{54} telecommunications law and competition law.\textsuperscript{55} It would most
likely be impossible to advocate that the producers and consumers are in competition
with each other. It would thus again depend on the interpretation of the ECJ of the
principle of non-discrimination in the energy sector. If the principle is interpreted
strictly and a measure would only be discriminatory when differentiating between
competitors, than it would probably be concluded that exempting producers from
paying transport charges would not breach the principle of non-discrimination. If the
ECJ would interpret the principle in a more broad way, it could capture the
exemption from paying network charges, making it illegal.

Other provisions: cross-subsidization and cost-reflectivity

The Electricity Directive does not provide any provisions referring to the
allocation of transport costs between users on the electricity network. The Directive

\textsuperscript{52} Ibid.
\textsuperscript{53} See Kruimer, supra n. 48, at 7.
\textsuperscript{54} Ibid., p. 16-17.
\textsuperscript{55} Id. p., 18-19.
however, contains the principle of cost-reflectivity. This principle is laid down in Art. 37 paragraph 8 of the Electricity Directive and results from the need for a non-discriminatory and unbundled, open market.\textsuperscript{56} In order for the market to fully liberalize it is important that the network charges are imposed indiscriminately on all categories of system users, not favouring any particular user. In order to avoid discriminating tariffs between e.g. two retailers, the Directive requires all network tariffs to be adopted in a cost-reflective way. The tariffs that are calculated in the several Member States which may be incurred by the network operators in exchange for the provided transportation services must reflect the costs that are made in order to be able to provide the services plus a reasonable return of investments. The combination of the non-discrimination principle with the cost reflection-principle is aimed to result in fair and low prices for users of the network, stimulating the network operator to carry out its activities as efficient as possible and intends to ensure that discriminating between different users within the same category does not occur.

Unfortunately, the Directive does not seem to touch upon the core issue of this research. It does not cover the issues of cross-subsidization\textsuperscript{57} or cost allocation, besides the prohibition of cross-subsidization for unbundling reasons.\textsuperscript{58} This entails that the Directive does not strictly prohibit that costs generated for a specific user are being charged on another user. This is somewhat disappointing. As shall be established later, this principle does exist in the gas sector. It would depend on the application of the principle of non-discrimination whether or not the exemption from network tariffs for producers is allowed. If not, it could possibly be justified, although this would depend on whether or not there is a legitimate aim, and whether the measure is suitable, reasonable and proportionate. It can be argued that this is

\textsuperscript{56} See Gräper & Schoser, \textit{supra} n. 51, at 45.


\textsuperscript{58} Art. 31(3) of the Electricity Directive states that: ‘Electricity undertakings shall, in their internal accounting, keep separate accounts for each of their transmission and distribution activities as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidization and distortion of competition. art. separate undertakings, with a view to avoiding discrimination, cross-subsidization and distortion of competition.’; Art. 37(f) of the Electricity Directive states that the national regulatory authorities have the obligation of: ‘ensuring that there are no cross-subsidies between transmission, distribution, and supply activities’.
not the case. Evident guidance on this matter is, however, not provided by the Electricity Directive.

**The Electricity Regulation**

The other important legislative document of the Third Energy Package with regard to the electricity market is the Electricity Regulation. The most important article in this regard is Art. 14, which sets some requirements which must be taken into account when adopting and imposing charges for access to the electricity network. This article, however, leaves a large margin of appreciation to the national authorities on the domestic level. When calculating charges for access to the network or establishing the methodologies to calculate these charges, the principles of non-discrimination, cost-reflection and transparency have to be taken into account. Further, the charges may not be distance related and the need for network security is important. The second paragraph of the article states that ‘the level of tariffs applied to producers and/or consumers’ which seem to allow for an exemption from paying transport charges for producers. The Member States are at least granted a rather large margin of appreciation with regards to allocating the transport costs among the different users. The predecessor of this article in the preceding Regulation 1228/2003 was more extended and additionally stated that:

‘Producers **and** consumers (‘load’) **may** be charged for access to networks. The proportion of the total amount of the network charges borne by producers shall, subject to the need to provide appropriate and efficient locational signals, be **lower** than the proportion borne by consumers.’

This does not contain any clear answer. The wording ‘may’ as well as the wording ‘and/or’ in Art. 14 of Regulation 714/2009 seem to suggest that the margin of discretion of the Member States is not being narrowed by these Regulations.

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60 Dimo Stoilov, Yulian Dimitrov, and Bruno François, ‘Challenges facing the European power transmission tariffs: The case of Inter-TSO compensation’ (2011) 39/9 Elsevier Energy Policy, 2.
Recital 14 also mentions charges for access to the network and even speaks of a balance between consumption and generation. This nevertheless does not seem to entail a general user pays-principle. The recital, as well as Art. 14, seems to be restricted to prescribing a prohibition of cross-subsidization with regard to locational signals. Locational signals are created in order to stimulate producers to operate efficiently. If in a certain area there is a lot more generation than consumption, it could be considered unfair that the few consumers in that region are required the pay for all the costs that are made for all the generated electricity when they do not need it. The electricity is transported elsewhere. These producers can, under a system of locational signals, be charged for a proportionate amount of transport charges because their strategy of locating their injection leads to imbalances between demand and supply, causing an intensive use of the network to transport the electricity to (other) consumers. This is not the same as a general obligation to allocate the costs according to the prohibition of cross-subsidization. It merely states that a system of locational signals may be applied, which may then entail an obligation for users to pay for their share in the total costs. Unfortunately, no further guidance can be found in the Electricity Regulation.

**Guidance from the Gas Regulation**

The Third Energy Package also contained legislative documents created for the gas sector. It can be interesting to assess how that sector is regulated. The user pays-principle is implemented in a more explicit and straightforward manner in this Regulation. Art. 13, which contains the framework or tariffs for access to the network, explicitly prohibits cross-subsidization between network users. Within this sector, the Member States have the obligation to respect the user pays-principle when adopting the tariffs for transport on the gas network. Besides, the European Commission has expressed its intentions with regard to tariffs and methodologies for users of the gas network. First of all, the Commission determines in its interpretative note on tariffs for access to the national gas transmission network regulated under

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Art. 3 of Regulation 1775/2005\(^\text{63}\) (the forerunner of Regulation No. 715/2009\(^\text{64}\)), that cross-subsidies between system-users must be avoided in order to improve competition, thus prohibiting cross-subsidies between different competing system users. The difference between the two Regulations can be explained with referral to the technical nature of gas and electricity, as it is not possible to actually control the direction of electricity.\(^\text{65}\) The molecules of gas can, however, be directed and controlled by the network operator. In the Netherlands 40% of the transport costs is being charged to the injecting users, whilst the remaining 60% can be found on the consumer’s bill. The reason for these percentages was that there were more entries than exits.

**Regulation 838/2010\(^\text{66}\) Part B**

The last legislative document of relevance for the regulation of the network tariffs in the electricity market is Regulation 838/2010. This source of EU legislation stems from the Electricity Regulation\(^\text{67}\) and is binding and directly applicable in all Member States. Part B of this Regulation applies to the issue at matter. The reasoning behind this piece of legislation can be found in recital 10 of the preamble, which states that ‘average charges for access to the network in Member States should be kept within a range which helps to ensure that the benefits of harmonization are realized’. This confirms the intentions of the Institutions to create harmonization of the transmission charges on the internal energy market.

The first point of Part B of the Regulation determines that annual average transmission charges paid by producers must be within given ranges. The third point determines what these ranges are and it creates four different categories. The first category includes all Member States except for Denmark, Sweden, Finland, Romania, Ireland, Great Britain and Northern Ireland. The transmission charge for the producers in these Member States shall be within a range of 0 to 0,5 EUR/MWh. In


\(^{64}\) See supra n. 682.

\(^{65}\) Kirchoff's first law determines the flow of electricity.


\(^{67}\) Art. 18, fifth para.of Regulation (EC) 714/2009.
Denmark, Sweden and Finland, the charges for the producers shall be within a range of 0 to 1,2 EUR/MWh. In Ireland, Great Britain and Northern Ireland the charges for the producers shall be within a range of 0 to 2,5 EUR/MWh and in Romania the charges for the producers shall be within 0 and 2,0 EUR/MWh.

Unfortunately, there is very little explanatory documentation about this Part of the Regulation. The differing ranges most likely result from the different methodologies and policies within the EU. In the United Kingdom and Scandinavian Member States, for example, the authorities have opted for a system of locational signals. Locational signals are created in order to stimulate producers to operate efficiently. If in a certain area the generation capacity is in excess of consumption, it could be considered unfair that the few consumers in that region are required to pay for all the costs that are made for all the generated electricity. The electricity is transported elsewhere. These producers can, under a system of locational signals, be charged for a proportionate amount of transport charges because their strategy of locating their injection leads to imbalances between demand and supply, causing an intensive use of the network to transport the electricity to (other) consumers. Creating locational signals can stimulate producers to spread their injection activities amongst the locations of demand in the Union. Therefore, the maximum annual average tariff charged on the producers within these Member States is higher than in, for example, the Netherlands. It remains unclear, though, how the Commission has established the abovementioned ranges. It seems as if it has based them on the existent practices of the Member States. Perhaps it tried to avoid further discrepancies between the different Member States, but real harmonization is still somewhat lacking. It can be stated that the guidelines contain ranges as a minimum amount of harmonization. Member States are required to stay within these ranges (on an annual basis, taken over all the producers on transmission level), but still possess the freedom to establish transmission transport tariffs within these ranges. This is in line with the requirements of the minimum harmonization doctrine of Art. 114 TFEU, which is the basis of Regulation No. 714/2009.

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68 Ibid. second para. conjunction fifth para. sub a.
69 Regulation No. 714/2009 Preamble.
With regard to this research it is relevant to analyse how the margins should be interpreted. Considering the exemption for producers from paying transport tariffs in some Member States, it is evident that, in these Member States, an annual average charge of 0 EUR/MWh is imposed. The ranges all contain a minimum of 0 EUR/MWh. Whether or not this may include 0 EUR/MWh or must be between this amount and the given maximum remains unclear. The wording of ‘within a range of’ may suggest that this is the case and that the Commission intended to ensure that producers would be required to contribute to the costs derived from the transport of electricity. On the other hand, adopting this Regulation would have been a possibility for the Commission to explicitly mention whether or not producers are allowed to be excluded from paying these tariffs (save for any exemptions mentioned by Regulation 714/2009). The fact that the Commission did not elaborate on this issue, could reaffirm that there is no obligation on the national regulatory authorities to oblige producers to pay for transport costs on the basis of the Third Energy Package. On the other hand, guidelines like these are required to be consistent with the piece of legislation in which it finds its legal basis. As determined above, the user pays-principle is not explicitly mentioned for in the entire Electricity Regulation. However, the fact that the measures taken by the Member States must be in line with the Treaty (of the Functioning of the European Union) suggests that any guideline must respect the norms laid down by the competition rules.

The user pays-principle/prohibition of cross-subsidization is one of the core principles of European competition law, although it is dependent on the effects on competition and the facts of the case. In other words, cross-subsidization is prohibited under competition law when it has restrictive effects on competition.\(^70\) Art. 107 TFEU,\(^71\) for example, prohibits any favouring measure by a Member State to certain undertakings which may distort competition. Cross-subsidization must be read implicitly in this article. Allowing for certain undertakings to be at an economic advantage by taking away part of their costs (and imposing them on others) is a clear example of a grant or aid,\(^72\) but only when it is incompatible with the objectives of the European competition rules. In general, as Hancher states, ‘Commission concern

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\(^70\) See the next section for an analysis of the role of competition law and the outcome of the State Aid rules.

\(^71\) This will be revisited thoroughly in the next section.

\(^72\) This will be elaborated more thoroughly in the next paragraphs.
has been limited to the cross-subsidization of services under competition through unfair revenue or profit levels or cost allocation methods; the subsidization of the reserved sector by revenues generated in the competitive sector is not problematic\(^73\).

The priority for the Commission thus seems to lay with unfair cost allocation, which is detrimental to competition. An important and actual dilemma is the fact that the transport charge for producers is set on zero in several Member States, while it is at least convincing that producers are partly responsible for the costs made for the transportation of electricity on the network, due to the fact that the transport service is provided in the interest of its business. This could possibly not be in line with the prohibition of cross subsidization that restricts competition and the State aid provisions. Therefore the ranges set out by the Commission when adopting these guidelines are at least questionable and might not be consistent with the Treaty and the Regulation that provide their legal basis.

**Conclusions**

The sector specific EU legislation contains some provisions that are related to the allocation of transportation charges on the electricity market. Both the Electricity Directive and the Electricity Regulation contain some provisions about the possibility to access the network and the principles that must be taken into account when calculating the charges for this access. The most important principle is that of non-discrimination. This principle has two implications; equal cases must be treated equally and different cases may not be treated the same. With regards to the energy sector, it seems as if the Court only prohibits discrimination within the same category of users which are in competition with each other. In that sense it would be difficult to argue that producers and consumers may not be treated differently, considering the fact that they do not compete with each other.

Unfortunately there is no clear prohibition of cross-subsidization within the EU Electricity legislation. The tariffs must be set in a transparent and non-discriminatory manner. Besides, it is important that the tariffs reflect the costs. This, however, seems to entail that the network operator must provide the services as efficiently as possible and that the tariffs that it may incur can only be as high as efficient costs and a

\(^73\) See Hancher, *supra* n. 62, at 514.
reasonable profit. This does not seem to entail the user pays-principle. This thought is strengthened by the fact that the user pays-principle is explicitly mentioned in the Gas Regulation. The technical nature of the flow of gas explains why the Gas Regulation incorporates the user-pays principle and provides for a positive transport charge for producers.

Besides the Electricity Directive and the Electricity Regulation, the guidelines of Regulation 838/2010 Part B are also relevant. They are created to ensure more harmonization within the Union and contain ranges for the annual average transmission tariffs for producers within the European Union. It would be useful to know how these ranges were created, how they must be interpreted and most importantly, if they are in line with the prohibition of non-competitive cross-subsidization. But if these guidelines prescribe that the annual average transmission charge for producers may be zero and if it would be decided by the Institutions that this does not create any problems with regard to the prohibition of anti-competitive cross-subsidization, this would entail that exempting producers on the transmission level from paying transport charges is allowed. However, the intentions and legality of the guidelines are controversial.

**EUROPEAN STATE AID LAW**

After having established that the (more specific) secondary legislation does not provide a convincing and unequivocal answer to the question of whether it is allowed to exempt producers on the electricity market from paying transport tariffs, the next logical step is to examine the situation in the light of the EU state aid doctrine. The Electricity Directive prescribes the relevance of the Treaty and general EU principles, by stipulating in Art. 43 first and second paragraph that any measure taken pursuant to the Directive must be in conformity with the Treaty and the principles of proportionality, non-discrimination and transparency. As is elaborated above, EU energy legislation and EU competition law (which comprises of, amongst others, the state aid provisions of Art. 107-109 TFEU) are complementary and coexist. 74 The European Commission has expressed its desire to enforce the

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74 As is also recognized in recital 37 of Directive 2009/72/EC.
competition law rules in order to safeguard access to the transmission network. It states in its Communication, ‘Making the Internal Market Work’, that it ‘will continue to enforce antitrust and State aid rules in the energy sector to ensure that when barriers to competition that are lifted by regulation are not reinstated by the actions of undertakings or public authorities that could lead to distortions on the market’. This mainly occurs on a case-by-case basis.

Some scholars are skeptical about whether or not the competition law enforcement rules are adequate to further develop the internal energy market, mainly because of its ad hoc nature. However, if the exemption from paying charges only for producers can be characterized as unlawful state aid, it would definitely have to be brought to the attention of the European Commission. The Commission could then carry out a thorough investigation and, if necessary create the basis to correct market failure. In that sense, the enforcement of the competition rules would contribute to the creation of an internal energy market, even though it is ‘just’ on a case-to-case basis. In this article, the focus shall be limited to the material test of Art. 107 of the Treaty of the Functioning of the European Union. One of the most important principles in state aid law is that the competent authority investigating a possible illegal state aid must carry out an effect based approach. In other words, it is of less importance what the object of a certain conduct is. Even when the object is not anti-competitive but the effects/consequences are, this results in an infringement of the competition rules. It entails that the legal notion of state aid is an objective one rather than a subjective one. It is based on objective circumstances such as the effects and not on subjective circumstances such as the intentions. With regard to the effect-based approach of the Commission, a reference

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7 Ibid., p. 8.
8 Id.
must be drawn to the non-binding State Aid Action Plan by the European Commission,\textsuperscript{83} in which the Commission aims at a more economic approach of state aid control,\textsuperscript{84} less bureaucracy and better targeted enforcement of the state aid rules.\textsuperscript{85} The more economic approach is chosen in order to fulfill the Lisbon objectives. The following paragraph will emphasize the four conditions of Art. 107 first paragraph of the TFEU.

The four conditions

In order to be able to speak of unlawful state aid, the conditions of Art. 107 first paragraph TFEU must all be fulfilled.\textsuperscript{86} The order is irrelevant, although the Court first examines whether there is an intervention by the State; second it considers if it affects trade between Member States; third it determines whether it confers an advantage on a selective recipient; and fourth, it assesses whether it distorts or threatens to distort competition.\textsuperscript{87}

State Resources

The criterion of state resources has been applied by the ECJ quite inconsistently. In principle, the condition requires that the measure must be granted through State resources. The Court has, however, established different approaches of dealing with this requirement; narrow and broad. The essence of the broad approach is that ‘any measure which confers economic advantages on specific undertakings, and which is the result of conduct attributable to the State’ constitutes state aid, regardless of whether it involves any financial burden for the State.\textsuperscript{88} The narrower approach requires States resources to be involved.\textsuperscript{89} Besides, the measure must be imputable to the State.\textsuperscript{90} An important fact is that ‘the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore

\textsuperscript{84} Id., p. 4.
\textsuperscript{85} Id., p. 13.
\textsuperscript{86} E.g. Case T-34/02 Le Levant [2006] ECR II-00267, para. 110.
\textsuperscript{87} Id.
\textsuperscript{88} Kelyn Bacon, European Community Law of State Aid, 70 (O U P, New York 2012); e.g. Opinion AG Jacobs, para. 115.
\textsuperscript{89} E.g. Case C-73/91 Sloman Neptun [1993] ECR I-887.
\textsuperscript{90} Case C-379/98 Preussen Elektra [2001] ECR I-2099.
being subsidies in the strict meaning of the word, are similar in character and have the same effect’. 91 This broadening of the term ‘resources’ might be applicable to the exemption at stake. In the Netherlands, the transport charges for producers are mitigated (or in reality just diminished) by the former DTe (now ACM).

In order for the condition to be fulfilled under the strict approach, the resources must be or have been under the control of the State. When resources are granted through funds in the hands of public or private undertakings, the funds in question must be under State control and therewith available to the public authorities, 92 in order to speak of state aid. There may raise some difficulties regarding the tariff exemptions in this regard. The costs which are not paid by producers are being charged on any user taking off electricity and do not directly imply a financial burden or the loss of resources by the State. The costs which are now not paid, are normally paid to network operators, which are by no means State institutions, nor do they possess public resources, although the State does possess all the shares of the network operators. The resources are under State control as far as the national regulatory authority sets the tariffs and methodologies to calculate the tariffs, but the income of these charges is not available to the public authorities. Another difficulty results from the fact that the network operators have the right to recover their costs through tariffs and do so by charging them on the consumer and thus do not ‘miss out’ on any resources. Therefore, the exemption of the transport charges would perhaps not meet the requirement of ‘state resources’ if the narrow interpretation would be used. 93

On the other hand however, it could be argued that state resources are involved, as the network operators in the Netherlands are in the hands of the Dutch State, which possesses 100% of the shares. More specifically, the transmission networks are in the hands of the State, whereas the distribution networks are controlled by the regional authorities. It is in principle the network operator that relieves the injector from its charges whereby it in fact provides services for which it does not require any compensation (even though it is regulated that the network

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93 Bacon (88), at 74.
operator should be able to recover its costs through tariffs). It fills this gap by imposing charges on another user, which do not only cover the costs that are made in its own interest, but also the costs that are made to the benefit of producers. It is crucial that the resources must have been at the disposal of the State at a certain moment. It could be argued that this is the case because the State possesses all the shares of the network operators. The network operators are also to a certain extent under control of the State. They have certain obligations imposed on them by legislation; They should send in a proposal for the transport tariffs based on their expected costs plus a reasonable profit. This proposal has to be approved by an independent national regulatory authority. The regulatory authorities are, however, part of the State.

Some guidance has been provided by the Commission and the Court in recent decades regarding the interpretation of the concept of state resources. The effects of the measure matter and, amongst others, depend on the type of measure. The fact that the revenues of an undertaking are increased by a State measure, for example by encouraging the establishment of certain undertakings in that Member State, can be regarded as granted through State resources.94 This is comparable to the intentions of the DTe (the former ACM) in the Netherlands, although the fact remains that no State resources seem to be involved. It is important that no direct transfer is required to have taken place. The fact that the State foregoes revenue that it would otherwise have received also suffices.95 This is important for the exemption for the producers; considering the fact that they do not receive any resources, they are just not required to pay charges which they would normally have to pay to the network operators. However, it was determined by the Court in Van Tiggele96 and PreussenElektra97 that the mere fact that the State obliges certain private third parties to commit to a certain transaction does not involve State resources. In Sloman Neptun98 it even sets that the fact that private parties which are obliged to pay for certain costs or activities and therefore possess less taxable capital whereby the tax revenues of the State are lowered, does not involve State resources. However, the Commission has also

94 Ibid., p. 76.
95 Id., p. 75; Case C-172/03 Heiser [2005] ECR I-1627, Opinion of AG Tizzano para. 52.
96 Case 82/77 Openbaar Ministerie of the Kingdom of the Netherlands v van Tiggele [1978] ECR 25.
operated in a contrary way in a case on a compensation fund in Luxembourg.\footnote{Luxemburg compensation fund (Case C43/02) Commission Decision 2009/476/EC [2009] OJ L 159/11.} The Commission determined that in the period of 2001 until 2008, the State of Luxembourg collected compulsory contributions from electricity consumers which it would subsequently pass on to producers of green electricity via distributions.\footnote{Ibid., para. 56.} It then applies the \textit{Stardust Marine} case,\footnote{Case C-482/99 \textit{Stardust Marine} [2002] ECR I-4397.} in which the Court had determined that once resources had come under State control, they would remain under State control. Therefore, the Commission decided that the compensation fund in the Luxemburg electricity market met the first part of the strict criterion of State resources. Hancher also mentions this possibility by referring to two other decisions by the Commission.\footnote{See Hancher, supra n. 62, at 481.} She explicitly states that ‘the State aid designates that a component of the end users’ purchase price must be paid to an intermediary over which it exercises some control, and then in turn paid to a particular group of beneficiaries, the measure has been classified as State aid.’\footnote{Ibid.} These cases, although containing different approaches and outcomes, provide some guidance considering the application of the condition of ‘state resources.’ For the criterion (under the strict approach - involvement of State Resources and imputability to the State) to be met, the State must have had the possibility to dispose of the funds.\footnote{Ibid., para. 41.}

It remains uncertain whether or not the exemption of the network tariffs fulfils the criterion of State influence, at least with the strict application. Under the broader application, though, State resources do not have to be involved. It suffices if a measure is imputable to the State, which entails that state resources do not have to be involved, as long as the grant is a consequence of a measure which is attributable or imputable to the State. It has been determined in various cases that it is not necessary for the Government of the Member State to directly impose the relevant measure. Aid granted by public or private bodies established or appointed by the State to administer the aid can also fulfil this requirement.\footnote{E.g. Joined Cases C-67, 68 & 70/85 \textit{Van der Kooy} [1985] ECR 00219, para. 36.} According to the Court, aid resulting from legislative measures is necessarily imputable to the State as
legislative power is one of the constitutional powers of the State. The mere fact that the State has control over public undertakings adopting the measures is not enough; the public authorities have to be involved in the adoption of the measures. It thus results that, even though an undertaking has far reaching independence, the criterion of State influence can be met if the State was involved in the adoption of the measure. This can be important for the future, considering the fact that the Third Energy Package requires national regulator authorities to be independent from its Member States. It could be advocated that a future decision setting the transport charge for producers on zero is not imputable to the State and merely taken by the independent national regulatory authority. But this would be somewhat unconvincing. The national regulatory authority namely forms part of the State and is still required to act according to the policy guidelines set by the government and parliament. And, it is clear that the existing decisions have been taken under control of the State and that this seems to remain unchanged, considering the fact that the Minister is still central in the debate surrounding the possible adjustments to the allocation of transport costs.

Whether or not the second criterion of State aid is met depends on the scope of the application. If the broad interpretation is followed it is most likely to be met considering the fact that the legislative measure is adopted by the State. Under these circumstances it is irrelevant that the aid is not granted through State resources. The strict approach could entail more difficulties but it is conceivable that this approach would also lead to the fulfilment of the condition of state resources. A notification to the European Commission would be desirable in order to receive more clarity about how this criterion should be applied in this regard.

Economic Advantage

The determination of the question whether a measure invoked by the State actually contains aid to the specific undertaking(s) in question is dependent on whether or not there is any economic advantage or benefit granted. The ECJ usually examines ‘whether an undertaking obtains an economic advantage which it would

not have received under normal market conditions.’ A distinction must be made between whether a State exercises its sovereign or public functions or whether it performs as a market participant. The latter entails that a comparison must be drawn between the State and a comparable commercial undertaking on the market, in order to assess whether the State granted the aid in order to expand its own gains or to simply support one of more specific undertakings.

A comparison can be drawn with the Ryanair Ltd. case, where the Commission stated that the private investor principle did not apply to the Walloon Region with regard to the fixing of landing charges, because this activity would fall within the legislative and regulatory competence of this region and is not an economic activity. The Court, however, disagreed with the Commission. It determined that it must first of all be determined whether the activities where economic activities as described in settled case law. It stated that ‘the fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of airport infrastructure, which is an economic activity’. The charges must be seen as a remuneration of the services, even though the level of the charges and the service rendered to its users is weak. This approach by the Court can also be applied to the situation at stake in the electricity market concerning the charges for transport on the network. Fixing these charges was influenced or taken out by the State, which is directly connected with the infrastructural and investment-related activities of the network operators. The services provided by the network operators to its users are related to the charges, which are set by the (by now independent) national regulatory authorities, which must base their decisions on prevailing legislation. The charges in the Ryanair Ltd. case where explained as remuneration for services that were to be considered as fees and not as taxes. In the case of the Dutch exemption the same would probably apply, regarding the fact that the charges are set to recover costs that were made for specific purposes plus a reasonable amount of profit. Considering the fact that the measure will most likely by regarded as an

108 See Bacon, supra n. 93, at 29; see e.g. Case T-46/97 SIC v Commission [2000] ECR II-2125, para. 78.
109 See Bacon, supra n. 88, at 30.
111 Ibid., paras 86 and 87, Case 118/85 Commission v Italy [1987] ECR 2599, para. 7.
113 Ibid., para. 89.
economic activity, the following logical step would be to carry out the private investor test.

\textit{The private investor test}

As has already been briefly described above, the private investor test is centred on the expectations of what an undertaking would do under normal market conditions. The question is whether a commercial undertaking under normal economic conditions would grant such an advantage to the producers of electricity. There is probably no situation conceivable in which any economic undertaking would simply exempt the producers from their charges for services that they do provide. The services are being provided for which costs are made. The only way to recover these, while maintaining these exemptions, is by imposing them on the consumers. It seems unconceivable that any commercial undertaking would do this. Especially when considering that the exemption causes producers to operate less efficient by e.g. locating themselves in congestion regions, which leads to high investments for the network operators, which then again have to be imposed on the consumers. It does, however, remain a matter of interpretation of whether or not the service is provided for generation just as much as it is for load. If so, than it could be argued that no comparable commercial undertaking would do so. It would be difficult to advocate that the Dutch energy authority was (and is) acting as an economically stimulated undertaking executing its commercial intentions, as well as it seems that there is no such ‘normal market comparator’ in the market. The decision is taken with regard to the public interest of improving the Member State’s own export position by allowing the producers to compete on an equal footing with producers in several other Member States. It is not a ‘grant’ that might result in economic benefit to the aiding State through e.g. an attractive interest rate. It is more likely that the Dutch energy authority performed purely as a public authority, wishing to improve the position of its own producers on the European internal energy market. Hereby it has given an important advantage to this sector of electricity producers, considering the fact that they are exempted from paying the largest part of the costs which are made for them as system users.
Selectivity

The third criterion to consider is the selectivity criterion. The measures must favour ‘certain undertakings or the production of certain goods’\(^{114}\) in order to be considered ‘state aid’. Selective measures which are prohibited under the concept of state aid law may include measures taken by Member States in order to strengthen all of its own producers in a certain sector in order for them to, e.g., be able to compete with the producers of other Member States or to create and support ‘national champions’ in order for them to be able to be an important player on the European internal market. These measures could lead to market fragmentation, which could harm the overall competitiveness of the Union. This at least shows some comparisons with the rationale behind the decision to set the Dutch transmission transport charge for producers on zero, where the Dutch energy authority expressed the desire to take away the transport costs for the producers in order to increase exports.

In order to assess whether this criterion is met, a comparison must be drawn with others who have a ‘comparable legal and factual situation’\(^{115}\) which must be in the same Member State.\(^{116}\) The fact that the Dutch DTe (the former ACM) intended to improve the export/competitive position of the Dutch electricity producers by exempting them from paying transport charges as such is thus not enough. Several cases of the Court have proven that certain measures can be qualified as state aid, even though there is no geographical selectivity.\(^{117}\) This is an important consideration seeing the fact that this would probably be difficult to meet in this case. The decisions in the Netherlands apply to all domestic electricity producers and can therefore not be considered geographically selective. As mentioned above, a comparison with electricity producers abroad cannot accomplish the fulfilment of this criterion. Another important manner of establishing selectivity is that of material selectivity. Material selectivity may depend on various different circumstances and is


\(^{116}\) Case C-408/04 P Commission of the European Communities v Salzgitter AG (Salzgitter II) [2008] ECR I-2767, para. 109.

considered to be a rather case-to-case and vague criterion. Difficulties arise when applying this criterion to this research topic because it would require comparing different system users instead of competing undertakings. Fortunately, there are several cases that may provide us with the necessary guidelines, relevant for this research. It is important to notice that the Court has interpreted the selectivity requirement in a broad way.\footnote{Jakub Kocuibinski, \textit{Selectivity criterion in state aid control}, 2 Wroclaw Review of Law, Administration and Economics 1, 8 (2012).} Even an entire economic sector can be regarded as a beneficiary and therefore its economic advantages granted through State resources can constitute aid.\footnote{Case 248/84 Germany \textit{v} Commission [1987] ECR 4013, para. 18.} The general wording of the Court reads that a comparison must be drawn with “undertakings that are in a ‘comparable legal and factual situation,’\footnote{E.g. Case C-143/99 Adria-Wien Pipeline [2001] ECR I-08365, para. 41; Case C-409/00 Spain \textit{v} Commission [2003] ECR I-1487, para. 47; Case C-88/03 Portugal \textit{v} Commission [2006] ECR I-7115, paras 54 and 56; Case T-210/02 RENV, British Aggregates Association \textit{v} Commission [2012] (not published yet), para. 47.} in the light of the objective pursued by the measure in question.”\footnote{See Bacon, supra n. 88, at 81.} The fact that the Court seems so take the approach that the comparison must be drawn with other \textit{undertakings} might be problematic considering the fact that end-users are not always undertakings. In the CETM-case\footnote{Case T-55/99 Confederación Española de Transporte de Mercancías (CETM) \textit{v} Commission of the European Communities [2000] ECR II-3207.} however, the Court seems to have used a different wording, referring to ‘users of commercial vehicles.’ However it must be noticed that the Court does not explicitly take a position leaving the approach consisting of using comparable (competing) undertakings, nor did the Advocate-General take such a position. Besides, the disadvantaged users in this case were larger undertakings anyway. Following the Court’s jurisprudence, the comparison must be drawn with undertakings in the same Member State. In that regard, (only) the following comparison remains useful.

\textit{Producers versus other undertakings (generation versus load)}

Amongst consumers there are obviously undertakings which do not produce and inject electricity but which are solely taking off the network for the production of other goods or to provide services. In fact, both types of undertakings (thus, electricity producing and others) are users of the network. However, any producing undertaking is being exempted from its paying obligations arising from the user

\footnote{118 Jakub Kocuibinski, \textit{Selectivity criterion in state aid control}, 2 Wroclaw Review of Law, Administration and Economics 1, 8 (2012).}
pays-principle. It are only these undertakings who enjoy the benefit of not paying a ‘suitable’ amount of charges for the costs which are made in the interest of their activity (which is the transportation of generated electricity in order to sell). A possible way to fulfil the criterion of selectivity is by focusing on ‘certain productions of goods’ instead of just on ‘certain undertakings’. Entire economic sectors can even fall under this scope. The Adria-Wien Pipeline judgment\textsuperscript{123} will illustrate this in the broadest sense. There are other examples in the Commission’s practices.\textsuperscript{124} Although these are slightly less broad, they are still interesting. In the Adria-Wien Pipeline judgment, undertakings that primarily produced material economic goods were granted energy tax revenue. The Court ruled that this measure constituted state aid within the meaning of Art. 107 TFEU. This judgment can be applied to the topic of this article.

In the Netherlands, undertakings that produce electricity are granted an exemption which does not apply to other undertakings. It exempts producers from paying a reasonable and proportionate charge for using the electricity network. It seems highly convincing that the undertakings that produce electricity can be compared with other undertakings just as the Court compared producers and other undertakings in Adria-Wien Pipeline. In this case the fact was that one type of undertakings using the network was not being charged for the transport services that are delivered for its objectives, while the other type of undertakings was. In that regard, it is irrelevant how the service(s) is/are being interpreted. If it would be determined that the transport service is one inseparable service, then the producers would be exempted from paying a proportional amount of the costs relating to this service. If the service would be separated into injection and take-off related services, than the producers would be exempted from paying for a service that is provided specifically for them. In any sense, it is important to keep in mind that the Court has ruled in the past that benefiting entire sectors can lead to the selectivity criterion being fulfilled.

\textsuperscript{123} Case C-143/99 Adria-Wien Pipeline [2001] ECR I-08365.
Further guidance on selectivity and preferential access to infrastructure

In the past decades, some guidance about relevant considerations regarding the criterion of selectivity in access to infrastructure cases has been provided. These findings are important because in this article, the funding of infrastructure which much be accessible to anyone is central. Applying different conditions to the users in order to recover the costs that are made to guarantee this access to the infrastructure (which is essential to use it) can be considered selective. An important factor when assessing the selectivity here, is whether or not a presumably beneficial undertaking meets the costs for the services that are installed for its benefit.\textsuperscript{125} According to Hancher, this criterion applied in e.g. the \textit{Matra} case\textsuperscript{126}; however, the facts of the case are decisive to ascertain whether there is selectivity. It is not an absolute rule, but when ‘a public authority undertakes to provide infrastructure such as road or rail services to improve connections to a new or upgraded site on which energy production facilities are to be sited, it may well be concluded that this could amount to a selective benefit.’\textsuperscript{127} A relevant factor is whether or not the new infrastructure benefits only the producers or also the wider public. If some projects require extensive investments because of the preferences of producers, it can be argued that the costs are made more in their interest than in the interest of other users. In this sense, the costs that can be recovered by the network operator are related to investments in the network, which ultimately improve transportation facilities. If these are driven by producers, it would only be reasonable that those producers would contribute. Otherwise the investments could be seen as selective benefits, possibly amounting to state aid within the meaning of Art. 107 TFEU.

In sum, in \textit{Adria-Wien Pipeline} it seemed to be irrelevant that the undertakings were not competing. Under this broad interpretation of the Court, the selectivity criterion would be met. As mentioned earlier, the competition law enforcement occurs on a case-to-case basis. Therefore it still remains unclear how the Commission or the Court would decide on this matter. It is rather unclear whether the selectivity criterion would be met. Under the broad interpretation of the Court, it is highly conceivable that it would. This reaffirms the need to notify the measures to the Commission for further investigation.

\textsuperscript{125} See Hancher, supra n. 62, at 507.
\textsuperscript{126} Case C-225/91 \textit{Matra} [1993] ECR I-3203.
\textsuperscript{127} See Hancher, supra n. 62, at 508.
Restriction of competition and effect on interstate trade

The question whether an aid distorts competition and whether it affects interstate trade can be answered together.\(^{128}\) In the assessment of these conditions, it is important to first mention some basic rules about their application. After this, the Dutch situation will be tested under the provided scope of the conditions. Finally, an effects-based approach shall be taken. The two conditions remain distinct and independent in their application. It is e.g. possible for a measure to distort competition in a certain region but to have no effect on interstate trade. The Court repeated its existing rulings by stating that ‘aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities in principle distorts competition.’\(^{129}\)

Considering the fact that injecting electricity is a usual activity (it is the only way to carry out its economic activity of selling of its generated electricity), this seems to be fulfilled. However, this only means that competition is ‘in principle’ distorted. The analysis of both the (potential) distortion of competition and the effect on interstate trade must be made on an \textit{ex ante} basis. Actual effects do not need to be shown. As a rule of thumb only measures that strengthen the position of one or more undertakings in relation to its competitors can be qualified as a distortion of competition.\(^{130}\) The competitive position of the undertaking(s) before the adoption of the measure must be central.

In the Netherlands the ‘charge’ is imposed on all generators, depending on its voltage level (although they both pay no transport charges at this moment). If one would wish to access the market of electricity producers it would be able to do so without being charged by the Dutch government, considering the fact that the charges are set on an equal footing for any producer (within its ‘own’ category). But other factors are also relevant. According to the Court, these include the intensity of competition within the given sector\(^{131}\) and the fact whether an economic sector is liberalized.\(^{132}\) The electricity sector has recently been liberalized on a European

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\(^{128}\) See Bacon, supra n. 87, 93.

\(^{129}\) \textit{Ibid.}, at 96.


Union level. In first instance it might be difficult to apply the “restriction of competition” test within one Member State, considering the fact that at this moment, all producers are exempted and there are no real conceivable competing comparisons. The Court, however, has declared that it is not strictly necessary to establish the existence of actual competing undertakings in order to prove that competition is or can be distorted. An improvement of the financial position of an undertaking or a sector as a whole suffices to establish that the competitive position is strengthened. It is thus enough to conclude that the Dutch producers of electricity have a strengthened competitive position in comparison to other undertakings and an improved financial position in general. That seems to be evident.

Applying the conditions and the abovementioned considerations to the Dutch exemption

The financial position of the entire sector of electricity producers in general has bettered due to the fact that they are not charged with transport tariffs for injection and thus have less costs than they would have if the user pays-principle would be applied, in a way that the importance of transport for producers on the one hand and consumers on the other would be weighed differently. In a Romanian case the Commission simply reasoned that: ‘This advantage strengthens the position of energy generators in relation to their competitors in the EU and therefore has potentially distorting effects on competition.’ This test incorporates the condition of effect on interstate trade and can probably be met quite easily. Here again, in fact even more strongly, the fact that the measures are granted in a (recently) liberalized sector advocates in favour of qualifying it as aid. Even though such a conclusion cannot be made merely on the intentions of the Member State imposing the measure, it is clear that it took into account the fact that Dutch electricity producers had to be protected against e.g. the German electricity producers and that it would be difficult for them to compete against the producers in Member States where the G charge was set on zero. Besides this it seems logical that exempting producers from costs that are made on their behalf (as well) leads to an improved financial and competitive

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133 See Bacon, supra n. 87, 96.
134 Ibid.
135 Green certificates for promoting electricity from renewable sources (Case C(2011) 4938) SA. 33134 2011/N – RO, para. 46.
136 See Bacon, supra n. 9387, at 98.
137 See para. I.3.1.2.
position. The research by the Dutch ECN\textsuperscript{138} already showed that raising the G charge (within the ranges of Regulation 838/2010 Part B) would eventually lead to fewer exports and more imports.\textsuperscript{139} The main restriction lays on the cross-border transportation, which is something that the Third Energy Package aims to increase.\textsuperscript{140} Electricity is a good that is traded across Europe. The reason for the Dutch DTe (and similar national regulatory authorities in other Member States) is to protect its own producers against the competitive strength of producers that are settled in other Member States. The Dutch regulatory authority reacted by taking away the disadvantage in order to improve their competitive position. Hereby, exports would increase whilst imports (especially from Germany) would decrease. This is very similar to the case of Cassa di Risparmio de Firenze,\textsuperscript{141} where the Court ruled that granting aid to an undertaking may help to maintain or increase domestic activity and block new market penetration. It also emphasized the fact that the undertaking was enabled to penetrate the market of another Member State.\textsuperscript{142} The Court decided that this restricted competition and had an effect on interstate trade. The circumstances are quite similar to those in the Netherlands, where some undertakings are strengthened in order to compete within the European Union. The Commission reasoned similarly in its decision on Romanian green certificates by stating that ‘The energy produced by the beneficiary companies concerned might be subject to intra-EU trade, therefore granting green certificates under the notified measures is likely to affect the trade between Member States’.\textsuperscript{143}

The Court has also expressed its thoughts on these questions in another similar case, focusing more on possibly justifying effects of the state aid measures. It stated in Italy v Commission that ‘the fact that a Member State seeks to approximate, by unilateral measures, conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in

\textsuperscript{139} Ibid., p. 22.
\textsuperscript{140} Commission, ‘Making the Internal Market Work’ (Communication) COM (2012) 663 final p. 6.
\textsuperscript{141} Case C-222/04 Ministero dell’Economica e delle Finanze v Cassa di Risparmio de Firenze [2006] ECR I-325
\textsuperscript{142} Ibid., para. 143.
\textsuperscript{143} Green certificates for promoting electricity from renewable sources (Case C(2011) 4938) SA. 33134 2011/N – RO, para. 47.
question from their character as aid’ 144. The Commission similarly decided that Sweden could not bring its tax regime in line with neighbouring States without it constituting aid. 145 The theory behind this is that approximating conditions of competition in a particular sector of the economy to those prevailing in other Member States can still have negative consequences for the internal market if it possesses negative competitive effects. 146 The reasoning of the Court in these two cases can be analogously translated to the transport tariff exemption as established by the Dutch energy authority. Indeed, it also provided these benefits for the Dutch electricity producers on the transmission level because that would allow them to be on the same level as producers in other EU Member States such as Germany. Following the interpretation of the Court in the Italian and Swedish cases, this would thus not be allowed. If restriction of competition and effects on interstate trade occur, this cannot be justified by referring to a comparison with other Member States.

The effects-based approach; assessing the results of the measure

As is mentioned above, the Commission tends to focus on the effects of a measure when assessing whether or not it constitutes state aid. Therefore, it is important to seek what the measure actually means for competition and interstate trade. It can be questioned how imposing a part of the costs on the producers would lead to more efficiency. The producers would have more costs than they have now, which could increase their competitive pressure. A relationship with their general efficiency is difficult to make, however. Why would they not try to operate as efficiently as possible already? One conceivable and perhaps even convincing difference is that when applying the same conditions on a transmission and distribution level; this would take away the incentive for producers to inject on the latter. This could be harmful when it comes to using the network as efficiently as possible. The Commission has expressed concerns in a non-binding consultative paper that certain tax exemptions can ‘bear the risk to discourage the efficient use of resources.’ 147

144 Case C-298/00 P Italy v Commission [2004] ECR I-4087, para. 61.
Another thought concerns the comparison with other Member States. The British producers are under more competitive pressure than German producers. Whilst acting less efficiently, the German producers can still sell their electricity against lower prices than British producers. It would however be too bluntly to conclude that the measure has efficiency-harming effects. The German producers still have to compete with each other and with producers injecting in other Member States with the same charges. The competitive difference is caused by a gap in the harmonization of the transport charges and it would be difficult to merely blame the Member States that have implemented a zero transport charge for the injection of electricity.

In conclusion, it remains doubtful whether the measure establishing a zero transport charge for the injection of electricity actually causes distortion of competition and an effect on interstate trade as explained by the Court. On the one hand it possesses some characteristics and the intentions behind the measure seem analogously applicable to cases in which the Court and Commission have qualified such conduct as aid. On the other hand, it is very conceivable that any restriction of competition and interstate trade is caused by different charges. Harmonization could be the only ‘fair’ solution. In that regard, it is a positive sign that ENTSO is working on network codes for the harmonization of network charges on the EU internal energy market.148 These codes are expected in 2014.

CONCLUSION

The allocation of transport charges on the EU electricity market is an interesting topic of debate. Whether exempting producers from paying these charges is justifiable is very doubtful. It is a matter of interpretation of the service itself, the purpose and recipient of the service, the principle of non-discrimination and the European state aid rules. It would be desirable for the European Commission to start an investigation into the measures exempting the producers from paying transport charges, both on the basis of secondary and primary legislation. The principle of non-discrimination could be breached. However, if the tendency towards a focus on

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148 For more information on (the development) of these network codes, see https://www.entsoe.eu/major-projects/network-code-development/.
'competing undertakings' when interpreting the non-discrimination principle would continue, this could lead to the conclusion that undertakings which produce electricity can be treated differently from their non-competitors. Only the equal treatment of the producers on the transmission level and producers on the distribution level (which are different categories) could then be problematic in light of the principle of non-discrimination. It would be up to the ECJ to provide more clarity, if it will have a chance to rule on this matter, for instance in a preliminary procedure that can be initiated by a national court that has to judge on the legality of a network regulation decision adopted by a national authority. The measure in question (and similar measures having the same effect in other Member States) could constitute state aid, depending on a restrictive or broad approach in applying the state aid conditions. Considering the fact that it is possible for all the conditions to be fulfilled (depending on the approach taken) and the fact that the measure has effects on consumer welfare, the economic welfare of other undertakings and competition in general, it would be more than welcome for the measures to be notified to the European Commission.