



## Ruling Chamber 9

### DECISION

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

concerning the introduction of an effective inter-transmission system operator compensation mechanism within the single German market area ("AMELIE 2021")

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

represented by

the Chair Dr Christian Schütte,

the Vice Chair Dr Ulrike Schimmel

and the Vice Chair Roland Naas

decided on 11 September 2020:

1. Determination BK9-18/607 of 29 March 2019 ("AMELIE") will no longer be in force after 30 September 2021 owing to the merger of the two market areas into one single German market area. The claims under no 3 of that determination for the months October to December 2021 will also expire.

2. In order to allow for the proper application of the same reference price methodology jointly that will be regulated by determination BK9-19/607 ("REGENT 2021") as of 1 October 2021, from this time the transmission services revenue obtained within the single German market area will be reconciled in accordance with the following rules.

3. For the period from 1 October 2021 to 31 December 2021, the following applies:

For every transmission system operator, the likely transmission services revenue for the calendar year 2021 is to be established on the basis of the forecast capacity bookings for 2021, taking into account the merger of the market areas, the joint reference price for Germany and the reserve prices derived therefrom. A merger of the market areas that had already taken place on 1 January 2021 is to be used as a basis to determine the capacity forecast for 2021 and the parameters derived from it. The resulting yearly compensation payment is derived from the difference between the likely transmission services revenue established for the year 2021 and the allowed transmission services revenue for the whole of the calendar year 2021 to be validated by the transmission system operator. The compensation payments for each of the months October to December correspond to one twelfth of this difference.

4. For the period starting 1 January 2022, the following applies:

Before the start of a calendar year, for every transmission system operator, the likely transmission services revenue for the reference calendar year is to be established on the basis of the capacity bookings for the calendar year, the joint reference price and the reserve prices derived therefrom. The yearly compensation payment is derived from the difference between the likely transmission services revenue established for the reference calendar year and the allowed transmission services revenue for the reference calendar year to be validated by the transmission system operator. The monthly compensation payment corresponds to one twelfth of this difference.

5. Where a transmission system operator's monthly compensation payment is positive, it is to be paid not later than the fifteenth of the respective month on a pro rata basis to all the transmission system operators in the single German market area with a negative difference.
6. Claims having arisen under numbers 3 and 4 shall lapse as a result of the compensation payments under 5. A comparison against the actual revenue is not made. Divergences between allowed transmission services revenue and obtainable revenue will be reconciled individually for each enterprise via the respective regulatory account, with the compensation payments made and received being factored in.
7. If no revenue cap for the calendar year has yet been determined for a transmission system operator in accordance with section 4(1) of the Incentive Regulation Ordinance (ARegV),

the network costs necessary for network operation used as a basis for the decision on the approval of network access charges in accordance with section 23a EnWG are classed as allowed revenue within the meaning of this decision.

8. The right to order payment of costs is reserved.

## **Rationale**

### **I.**

#### **1. Background to the proceedings**

- 1 The background to both the earlier proceedings (BK9-19/607) and these proceedings (BK9-19/607) is the network code on harmonised transmission tariff structures for gas (Regulation (EU) 2017/460), which entered into force on 6 April 2017 and is directly applicable European law yet also requires several implementing acts from the national regulatory authority. One of these acts, given the joint application of the reference price methodology by the transmission system operators within a market area, is the introduction of an effective compensation mechanism so as to reconcile divergences between obtained and allowed revenues.
- 2 The Ruling Chamber has opened new own-initiative proceedings for the introduction of an effective inter-transmission system operator compensation mechanism in Germany. It was necessary to initiate proceedings because, given the merger of the two German market areas into one single market area planned for 1 October 2021, another decision had to be taken on the reference price methodology and the other points set out in Article 26(1) of Regulation (EU) 2017/460 for all transmission system operators (determination proceedings BK9-19/610, "REGENT 2021"). In this context, a decision about the (re)introduction of an effective compensation mechanism also has to be made at the same time.

#### **2. Course of proceedings**

- 3 Notification of the opening of proceedings was given in the Official Gazette 09/2019 of 15 May 2019 and simultaneously on the Bundesnetzagentur's website.
- 4 The regulatory authorities of the federal states were informed of the opening of proceedings on 11 October 2019 in accordance with section 55(1) sentence 2 EnWG.
- 5 The draft decision (the German version and, in addition, the English version) was published on 16 March 2020 on the Bundesnetzagentur website. The length of the consultation was set at two months.

- 6 This publication, by analogy with section 73(1a) sentence 1 EnWG and section 28(2) para 4 of the Administrative Procedure Act (VwVfG), takes the place of the individual hearing required under section 67(1) EnWG for each person addressed.
- 7 On 16 March 2020, the Bundesnetzagentur notified the regulatory authorities of the federal states of the opening of proceedings in accordance with section 55(1) sentence 2 EnWG and gave the authorities the opportunity to comment on the intended determination in accordance with section 58(1) sentence 2 EnWG. Likewise on 16 March 2020, the Bundeskartellamt was given the opportunity to state its views on the intended determination in accordance with section 58(1) sentence 2 EnWG.
- 8 For further details, reference is made to the content of the file.

### **3. Responses**

During the consultation, eleven responses to the draft determination were received, with one of them being a joint response from two undertakings. While some undertakings welcomed the proposed regulations, others made critical comments and suggestions.

The transmission system operators had initially unanimously proposed adjusting the tariffs in the fourth quarter of 2021 owing to possible frictions arising from the market area merger. The compensation amounts in accordance with AMELIE in the fourth quarter were then to be determined by means of an overall comparison and would thus be derived from the difference between the likely transmission services revenue established for the year 2021 and the allowed transmission services revenue to be validated by the transmission system operator. In addition, the compensation payments made or received in the months January to September were to be factored in. The resulting amount would then correspond to the compensation payment for the months October to December.

Six of the responses positively acknowledged the mechanism presented in AMELIE or solely stated that they supported the proposal made by FNB Gas. It was pointed out that Article 10(3) sentence 1 of Commission Regulation (EU) 2017/460 required an effective compensation mechanism to be established in order to allow for the proper application of the same reference price methodology. Support was given for the approach of Ruling Chamber 9, which reconciles the transmission services revenue obtained in the market area in such a way that every transmission system operator obtains its allowed transmission services revenue – taking into account the sales volumes that were also used as the basis for establishing the reference price. These transmission system operators considered this approach to be reasonable and appropriate and recommended that no additional comparison on the basis of actual revenue should be made. Additional revenue and shortfalls in revenue should be reconciled individually for each enterprise

via the regulatory account of each network operator. The risk involved in forecasting volumes should therefore remain as before with the individual transmission system operators.

Four responses not only expounded the problem of the frictions arising from the market area merger, but also called into question the appropriateness of the compensation mechanism in itself. These responses may be summarised as follows:

These network operators took the view that the compensation mechanism that was the subject of the consultation would lead to unfounded compensation payments that would not be proportionate to performance. Since compensation payments were determined on the basis of the expected capacity marketing and there was no possibility of subsequently deviating from the planned capacity marketing or defaulted receivables, those transmission system operators that had a favourable cost structure and/or a lower revenue cap would be systematically disadvantaged. Liquidity and default risks would be borne in particular by the net-contributing transmission system operators. These operators were affected to a greater extent by negative consequences with respect to their revenue situation, cost base and efficiency benchmarking. It was therefore necessary to take account of actual revenue in determining the compensation amounts.

## II.

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

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

- 14 Under the wording of the Regulation, the sole demand made of the compensation mechanism is that it be "effective". Effectiveness in this context means purely and simply that the compensation mechanism must be suitable to bring about the above objective of reconciling revenues in such a way that every transmission system operator really can obtain its allowed revenue. As the reference price is established on the basis of estimates in respect of sales volumes, additional revenue or shortfalls in revenue are probable throughout the market area even when the reference price methodology is applied jointly. These additions and shortfalls are to be reconciled in accordance with section 5 ARegV via the regulatory account.
- 15 In accordance with operative part 1, determination BK9-18/607 ("AMELIE") will no longer be in force after 30 September 2021. It will be replaced by this determination on the same subject, which will apply as of 1 October 2021 in accordance with operative part 2, ie there will be a "seamless" transfer from its predecessor.
- 16 Operative parts 3 and 4 set out how the compensation payments for October to December 2021 and for the subsequent years from 2022 onwards are to be determined.
- 17 The likely transmission services revenue for the reference calendar year – in the case of 2021, using the assumption that the market area merger had taken place at the beginning of that calendar year – is initially to be established for every transmission system operator in the single German market area on the basis of the forecast capacity bookings, the common reference price and the reserve prices derived therefrom.
- 18 The transmission system operators' proposal for setting an adjustment factor for the fourth quarter of 2021 and determining the compensation payments by means of an overall comparison was unanimously withdrawn. Once the transmission system operators had been able to determine the specific consequences of the market area merger, it was clear that this effect was considerably smaller than expected. Thus no changes were needed to the draft determination.
- 19 Transmission services in this context and hereafter are, as defined in Article 3 sentence 2 point 12 of Regulation (EU) 2017/460, the regulated services that are provided by the transmission system

operator within the entry-exit system for the purpose of transmission. These are to be distinguished from non-transmission services. Non-transmission services, under Article 3 sentence 2 point 15 of Regulation (EU) 2017/460, are the regulated services other than transmission services that are provided by the transmission system operator.

- 20 Forecast capacity bookings are to be understood as the same capacities that are used for the calculation of the reference price. That means that the values to be applied in the forecast capacity bookings must not deviate from the values upon which the calculation of the reference price and the reserve prices derived therefrom are based. Without this requirement, it would be possible for each transmission system operator to create its own obligation to pay compensation or claim to compensation. This would have the result that in the market area, compensation claims and compensation obligations would no longer be equal to each other under normal circumstances and the objective of the determination – to ensure that each transmission system operator really can obtain its allowed transmission services revenue – could not be attained.
- 21 As this determination is applicable as of 1 October 2021, the compensation payments for the months of January to September 2021 will be determined in accordance with the "Amelie" determination (BK9-18/607). These are derived from the difference between the likely transmission services revenue established for the year 2021, not taking account of the merger of the market areas, and the allowed transmission services revenue for this calendar year to be validated by the transmission system operator. To determine the transmission system operator's likely transmission services revenue, capacity bookings for the calendar year assuming that the two market areas remain in existence for the whole of 2021, the resulting reference price for each market area and the reserve prices derived therefrom are to be taken into account before the start of 2021. One twelfth of this difference forms the basis of the compensation payment for each of the months January to September.
- 22 For the months October to December 2021, the compensation payments are determined in accordance with operative part 3. These are derived from the difference between the likely transmission services revenue established for the year 2021, based on a merger of the market areas introduced at the beginning of the year, and the allowed transmission services revenue for this calendar year to be validated by the transmission system operator. To determine the transmission system operator's likely transmission services revenue, capacity bookings for the calendar year assuming that the merger of the market areas had already taken place on 1 January, the reference price for the single German market area and the reserve prices derived therefrom are to be taken into account before the start of 2021. One twelfth of this difference forms the basis of the compensation payment for each of the months October to December.
- 23 The market area merger on 1 October 2021 thus leads to an adjustment of the compensation payments based on the changing parameters (capacity bookings, reference prices and reserve prices) as of the fourth quarter of 2021. The merger also has the consequence that the



compensation is not paid only among the transmission system operators within a market area, but among all German TSOs. The role of network operator can therefore also change at this time.

- 24 Operative part 5 lays down and makes clear that the transmission system operators whose likely transmission services revenue is more than the validated allowed transmission services revenue must, in the reference calendar year, make monthly payments in equal instalments not later than the fifteenth of the respective month, on a pro rata basis to all the transmission system operators with a negative difference, that is to say to all transmission system operators whose likely revenue is less than their allowed transmission services revenue. This creates a claim to compensation or an obligation to pay compensation in relation to the other transmission system operators in the single German market area.
- 25 The allowed operator-specific transmission services revenue that is subject to validation reflects the revenue cap determined, and adjusted if necessary, in accordance with section 29(1) EnWG in conjunction with sections 32(1), 4(1) and (2) ARegV (hereinafter referred to as "revenue cap") for the particular year of the regulatory period, minus that part of the revenue cap accounted for by non-transmission services.
- 26 Under operative part 6, the claims having arisen under the earlier operative parts lapse through fulfilment as a result of the compensation payments actually made in the reference year. A comparison against the actual revenue is not made. Divergences between allowed transmission services revenue and obtainable revenue (additional revenue or shortfalls in revenue) will be reconciled individually for each enterprise via the regulatory account of each network operator, with the compensation payments made or received being factored in. This means that additional revenue obtained or shortfalls in revenue incurred in the market area is/are not evenly distributed via the transmission system operators in the market area, which would have necessitated a further compensation mechanism based on actually obtained revenues. The individual operators thus continue to bear the risk involved in forecasting their particular volumes.
- 27 With the rules set out above, the Ruling Chamber has made use in correct manner of the discretion granted under Article 10(3) sentence 1 of Regulation (EU) 460/2017 in respect of the design of the compensation mechanism. It has exercised its discretion in line with the purpose of empowerment and has observed the legal limits of discretion. The purpose of legal empowerment is to introduce a compensation mechanism, as is necessary when the reference price methodology is applied jointly, to ensure that each transmission system operator really can obtain its allowed transmission services revenue, aside from the usual fluctuations resulting from additional revenue or shortfalls in revenue. Hence only the design of the compensation mechanism is a discretionary matter for the regulatory authority or Ruling Chamber; the introduction of a compensation mechanism in itself is obligatory. The requirements of this determination are suitable to achieve the objective set by legal empowerment. The requirements ensure that the transmission system operators will be able to obtain their allowed transmission

services revenue, the compensation payments being factored in. Moreover, the requirements are both necessary and proportionate; a more lenient means is not obvious.

- 28 Regarding costs, a separate notice will be issued as provided for by section 91 EnWG (para 8).
- 29 Since the determination is issued in relation to all transmission system operators within the meaning of section 3 para 5 EnWG, the Ruling Chamber is giving public notification of the determination in place of service pursuant to section 73(1) sentence 1 EnWG in accordance with section 73(1a) sentence 1 EnWG. Public notification is brought about under section 73(1a) sentence 2 EnWG by publication of the operative part of the determination, the notification of appellate remedies and a brief statement that the decision in full has been published on the regulatory authority's website and in the Bundesnetzagentur's Official Gazette. In accordance with section 73(1a) sentence 3 EnWG the determination is considered to have been served on the day on which two weeks have elapsed since the date of public notification in the regulatory authority's Official Gazette.

### **Notification of appellate remedies**

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

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

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

Bonn, 11 September 2020

Chair

Vice Chair

Vice Chair

Dr Christian Schütte

Dr Ulrike Schimmel

Roland Naas