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The CJEU declares German self-consumption facilities to violate EU law

Which consequences will the judgment have?

On 28 November 2024 (Case C-293/23) the CJEU declared provisions on self-consumption facilities in the German Law on energy management (EnWG) to be in violation of Union law. The impact the judgment will have can hardly be foreseen. It calls into question whether self-consumption facilities can remain exempt from the obligations energy supply networks are subject to under EU and German law. Find out more about the consequences the judgement will have in this article.

The CJEU judgment on the concept of self-consumption facilities is causing great uncertainty in the German economy.

The self-consumption facility was previously the only way for network operators to not be subject to the obligations set out in paragraph 11 et seq. of the EnWG. Above all no network fees had to be paid for its use. This made the self-consumption facility very popular, especially in the industrial park sector and the housing industry. All of this is now fundamentally called into question by the CJEU judgment.

Find out what the judgment means for the future of self-consumption facilities and how companies should deal with it:

1. The case brought before the CJEU

The energy supply company ENGIE Deutschland GmbH (ENGIE) launched a project for the construction and operation of two combined heat and power plants to supply four residential buildings (96 dwellings on a site measuring 9,000 m² and 160 dwellings on a site measuring 25,500 m²) in Zwickau (Saxony, Germany) with electricity generated by the company itself. ENGIE applied to the electricity distribution system operator for network connections for two separate self-consumption facilities within the meaning of point 24a of Paragraph 3 of the EnWG (self-consumption facility insignificant with regard to guaranteeing undistorted competition). When the distribution system operator refused those requests on the ground that the facilities in question were not self-consumption facilities, ENGIE applied to the competent Regulatory Authority for an order requiring the distribution system operator to connect its facilities to the distribution system. However, those requests were refused on the same ground.

ENGIE appealed against this decision before the Dresden Higher Regional Court and the Federal Court of Justice which referred the question to the CJEU by initiating a preliminary reference procedure as to whether the Directive on common rules for the internal market for electricity (Directive 2019/944) prohibits a national regulation that exempts a company (ENGIE) from the obligations of a distribution system operator in the present case.

2. The decision of the CJEU

In its judgment, the CJEU interprets points 28 and 29 of Article 2 and Article 30 to 39 of Directive 2019/944 and concludes that ENGIE's facilities are distribution systems. According to the CJEU's definition, a distribution system is a system used to transport electricity at high, medium or low-voltage for sale to wholesale or final customers.

According to the CJEU, the only relevant criteria for determining whether a system constitutes a distribution system are the voltage of the electricity transported (which must be at least low voltage) and the category of customers for which the electricity transported is intended (wholesaler or final customer). However, according to the CJEU, the criteria set out by the EnWG, such as the fact that the system is operated by a private entity, to which a limited number of generation and consumption units are connected, are not relevant.

According to the CJEU, Member States are not entitled to exclude networks, like the German self-consumption facility, from the scope of Directive 2019/944.

3. How authorities, courts and legislatures deal with the judgment

Since its publication, the energy sector and industry have been discussing whether the judgment only pertains the individual case of ENGIE or whether it will ultimately mean the end of self-consumption facilities.

It can be assumed that the German Federal Court of Justice and the Dresden Higher Regional Court will adopt the CJEU's arguments and conclude that the facilities in question are distribution systems. Although these judgments will only have an „inter partes" effect, i.e. bind the parties to the legal dispute, courts and authorities will have to interpret the term „self-consumption facility" according to the CJEU judgment in future – even if it does not match the wording of point 24a of Paragraph 3 of the EnWG.

The judgment also obliges the German legislature to change the EnWG so that it complies with Directive 2029/944.

According to the CJEU, the German legislature is not entitled to exclude certain facilities from the obligations of distribution system operators under Union and German law, regardless of whether it calls the exception a „self-consumption facility" or uses another term. According to the judgment, derogations or exemptions from the obligations to which distribution system operators are subject are permitted only if they are referred to in the Directive. However, the Directive only allows derogations or exemptions in the form of citizen energy communities, closed distribution systems, small connected systems or small isolated systems.

For the transition period, i.e. until the EnWG is changed, the German Federal Network Agency (Bundesnetzagentur) must find a suitable approach for dealing with the judgment. It has not yet commented on how it plans to proceed in this regard. The Agency's initial statements in response to corresponding inquiries unfortunately give little hope for a short-term (and viable) solution.

4. The implications of the judgement for self-consumption facilities

Many of today's self-consumption facilities will meet the criteria set out by the CJEU for determining whether an energy facility constitutes a distribution system. That the judgment only covers self-consumption facilities pursuant to point 24a Paragraph 3 of the EnWG and does not cover the much more relevant self-consumption facility pursuant to point 24b of Paragraph 3 of the EnWG (self-consumption facilities companies use to supply their own premises with energy)

will not be relevant. In our opinion, the judgment also applies to those kinds of self-consumption facilities. This is because, according to the CJEU, it does not matter that a network is operated by a private entity, to which a limited number of generation and consumption units are connected or that only a certain amount of electricity is transported, as those attributes do not constitute relevant criteria within the meaning of Directive 2019/944.

A self-consumption facility pursuant to point 24b of Paragraph 3 of the EnWG could therefore only be allowed under EU law if its operator consumes 100% of the transported electricity.

As the continued operation of self-consumption facilities probably won't be possible, the transfer to a closed distribution system could be necessary, especially for larger energy facilities. As a result, these facilities would in future be subject to the rules laid down in Paragraph 11 et seq. of the EnWG – apart from the few derogations and exceptions set out in Paragraph 110 of the EnWG for closed distribution systems.

If self-consumption facilities have to be turned into closed distribution systems, it is possible that they no longer qualify for certain subsidies, such as the tenant electricity surcharge which requires that the subsidized electricity is not being transported in an energy network. However, the German legislature could provide a remedy here without violation of Directive 2019/944.

Smaller energy facilities could transfer into a citizen energy community. According to Directive 2019/944, small enterprises which employ fewer than 50 persons and whose annual turnover does not exceed EUR 10 million are also eligible for citizen energy communities.

5. Which consequences will the judgment have for the energy sector and the industry?

On the energy sector and the industry, the CJEU judgement will have a massive impact. This is due to the fact that the German law refers to the term „self-consumption facility" in a lot of different provisions which evoke direct legal consequences. Which rules apply if the legal reference point „self-consumption facility" no longer exists?

Industry and industrial park sector

The operation of a distribution system requires an *authorisation of the Regulatory Authority* (Paragraph 4 of the EnWG). If the (former) self-consumption facility is (henceforth) to be classified as a distribution system (due to a violation of Directive 2019/944) because the self-consumption facility does no longer exist in German law, the operator will require such an authorization.

Obtaining the required authorisation will cost the operator considerable effort and money. Maintaining the authorisation will probably also be a challenge for the (former) self-consumption facility operator due to the complex regulatory requirements of the EnWG.

Furthermore, the *obligation to grant everyone network access* (Paragraph 17 and 20 et seq. of the EnWG) will also apply to the (former) self-consumption facility operator in future. The distribution system operator cannot deny third parties connection to and use of the (former) self-consumption facility. This basically forces him to expand the (former) self-consumption facility, which in turn leads to increasing costs. These costs must be

passed on to the network users, so that the *free use of the self-consumption facility* (an important economic advantage) is not applicable any longer. The authorization of the network fees by the competent Regulatory Authority and the required application procedure will tie up time and specialist staff at the (former) self-consumption operators.

Finally, it is likely that the *activity report in accordance with Paragraph 6b of the EnWG* will have to be prepared much more frequently future, as groups of companies will suddenly find themselves operating electricity networks. Any entity which operates a distribution system within their group of companies and also trades energy, for example, will be considered a so-called „vertically integrated energy supply company" – and will therefore be subject to the provisions of the EnWG on *accounting unbundling*.

The CJEU judgment raises the question how Regulatory Authorities will deal with issues that have arisen in the past. Violations of the obligations according to the EnWG are administrative offenses and punishable by fines (Paragraph 95 of the EnWG). The (former) self-consumption facilities have been violating the provisions of the EnWG applicable to distribution system operators for many years. In this respect, we assume that the Federal Network Agency will exercise its discretion to refrain from imposing fines and define a transitional period for the companies concerned to achieve compliance with the EnWG. However, this cannot be absolutely certain.

The CJEU judgment is likely to have a massive impact on the German industry. Our observations should by no means be seen as conclusive: in their day-to-day legal practice, companies will be confronted repeatedly with issues relating to the elimination of the self-consumption facility as a result of the CJEU judgment, at least as long as the Federal Network Agency and the German legislature (within the requirements the judgment and Directive 2019/944 lay down) aren't providing any relief.

However, we would not call this the „end" for the self-consumption facility – contrary to what other legal advisors are suggesting. Directive 2019/944 pursues certain objectives, such as the liberalization of the electricity market and consumer protection. The German law refers to the term „self-consumption facility" in various provisions that are neither affected by the purpose of the Directive nor contradict its objectives. An example is Paragraph 1a of the Electricity Tax Regulation (Stromsteuer-Durchführungsverordnung), which, inter alia, determines that self-consumption facility operators are energy suppliers and therefor obligated to pay electricity tax. The obligation to pay electricity tax is irrelevant within the meaning of Directive 2019/944.

Housing sector

Even before the CJEU judgment operating self-consumption facilities in the housing industry meant an extensive coordination with the upstream energy supply network operator, for example to determine the measurement concept for the tenant electricity model (Mieterstrom). This extensive coordination is now likely to become standard procedure. The resulting delays in connecting these self-consumption facilities to the energy network will have a negative impact on the completion of projects, especially new construction projects in the housing sector. It is to be expected that distribution system operators will take a restrictive approach at connecting new self-consumption facilities, at least until the Federal Network Agency takes a position.

This is certainly not a positive development for the housing sector which has recently been increasingly successful in supplying electricity via tenant electricity concepts (Mieterstromkonzepte) or shared supply models (Modell der gemeinschaftlichen Gebäudeversorgung). These models must remain economically viable in order to make a contribution to the energy transformation. We assume that the Federal Network Agency and the German legislature will soon attempt to develop a new regulatory framework that is adapted to the special needs of the housing industry, particularly for self-consumption facilities that only supply energy to one (residential) building.

The judgment's consequences for larger facilities that supply energy to entire districts are likely to be far more complicated. The CJEU judgment explicitly concerns those larger systems, meaning that there should be significantly less room for interpretation here. Should such self-consumption facilities be classified as distribution systems in future, these projects could become unprofitable.

6. Conclusion

The consequences of the CJEU judgment are significant. Their full impact cannot be fully assessed yet.

On plant networks which are very common in the German industry and which have so far avoided the obligations distribution system operators are subject to by being classified as self-consumption facilities the judgment is likely to result in further effort and costs.

We recommend observing the reaction of the Federal Network Agency closely. If no satisfactory transitional solution is found, it may be advisable to take legal action against any coercive measures taken by the authorities.

When entering into contractual agreements relating to self-consumption facilities with third parties, it is advisable to take the CJEU judgment and upcoming changes to the EnWG into account.

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