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# Provision of subsidies to industrial companies

*The German practice*

Dr. Ulrich Scholz, LL.M., 24 November 2015

# Agenda

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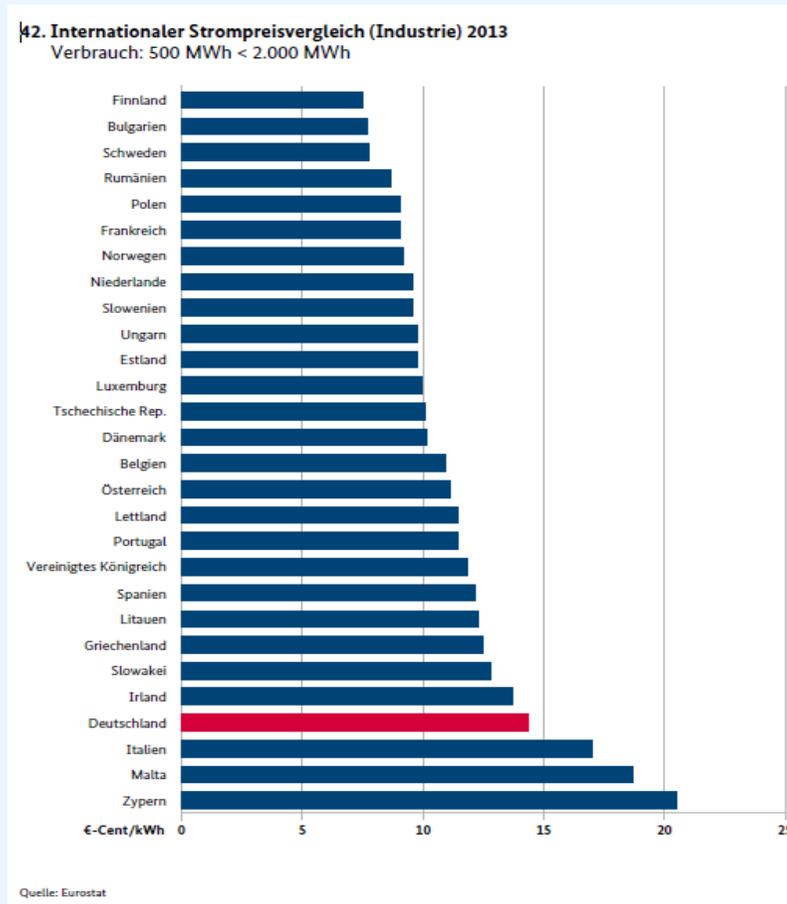
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# Overview

# Section 1

# Overview

## Electricity prices for industrial customers (2013)

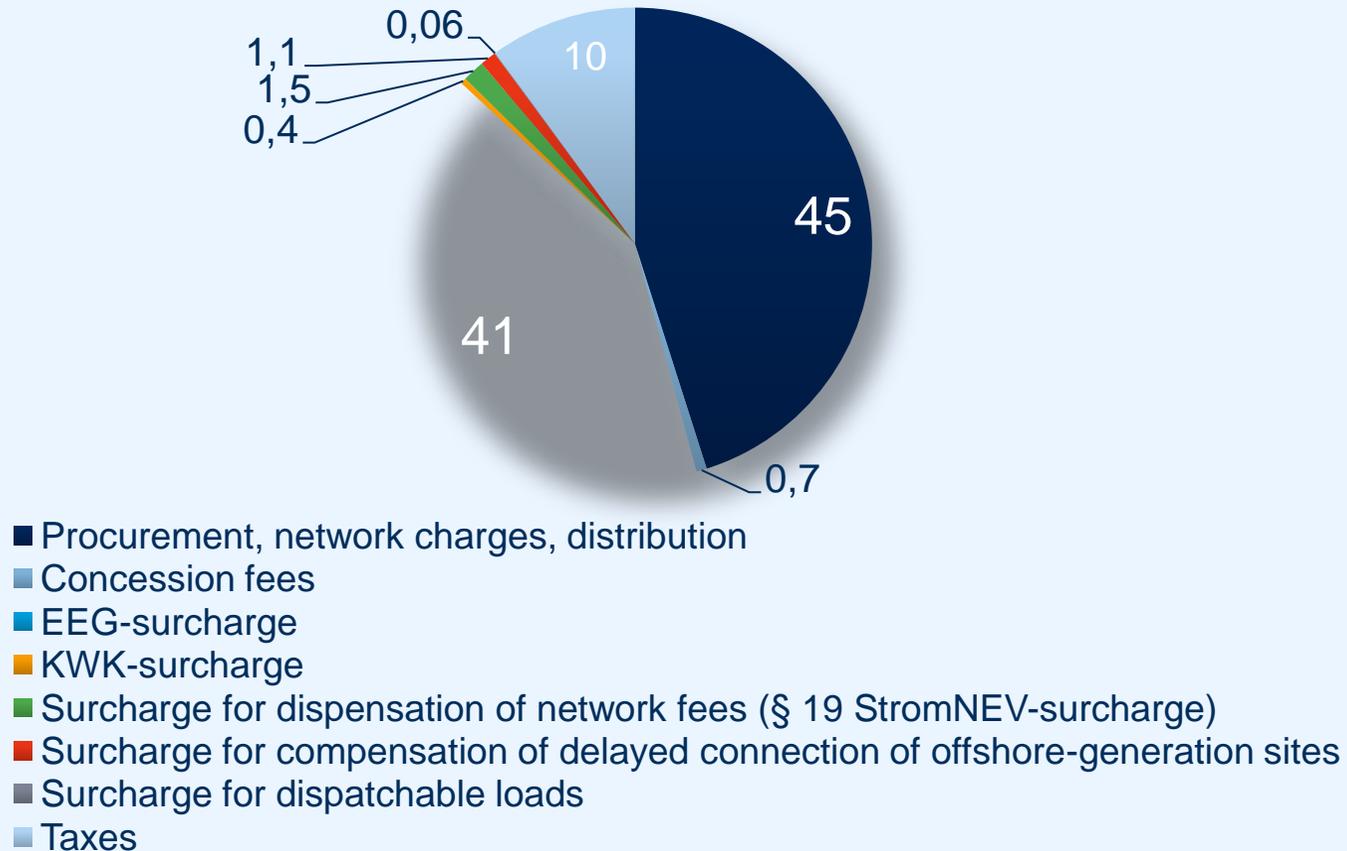


Source: Bundeswirtschaftsministerium, <http://www.bmwi.de/BMWi/Redaktion/PDF/E/energiestatistiken-energiepreise-energiekosten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>, slide 8.

# Overview

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Composition of the average electricity prices for industrial customers in 2014 (in percentages, rounded)



Source: Own diagram after figures of BDEW-Strompreisanalyse August 2015, Strompreis für die deutsche Industrie (inkl. Stromsteuer), Slide 22 of Presentation.

# Overview

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## Privileges for electricity-intensive consumers:

- Reduction of renewable energy surcharges (“EEG-Umlage”)
- Reduction of network charges
- Reduction of surcharges for cogeneration of heat and power (“KWKG-Umlage”)
- Reduction of concession fees (“Konzessionsabgabe”)
- Tax privileges

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# Reduction of network charges

*§ 19 StromNEV*

Section **2**

# Reduction of network charges

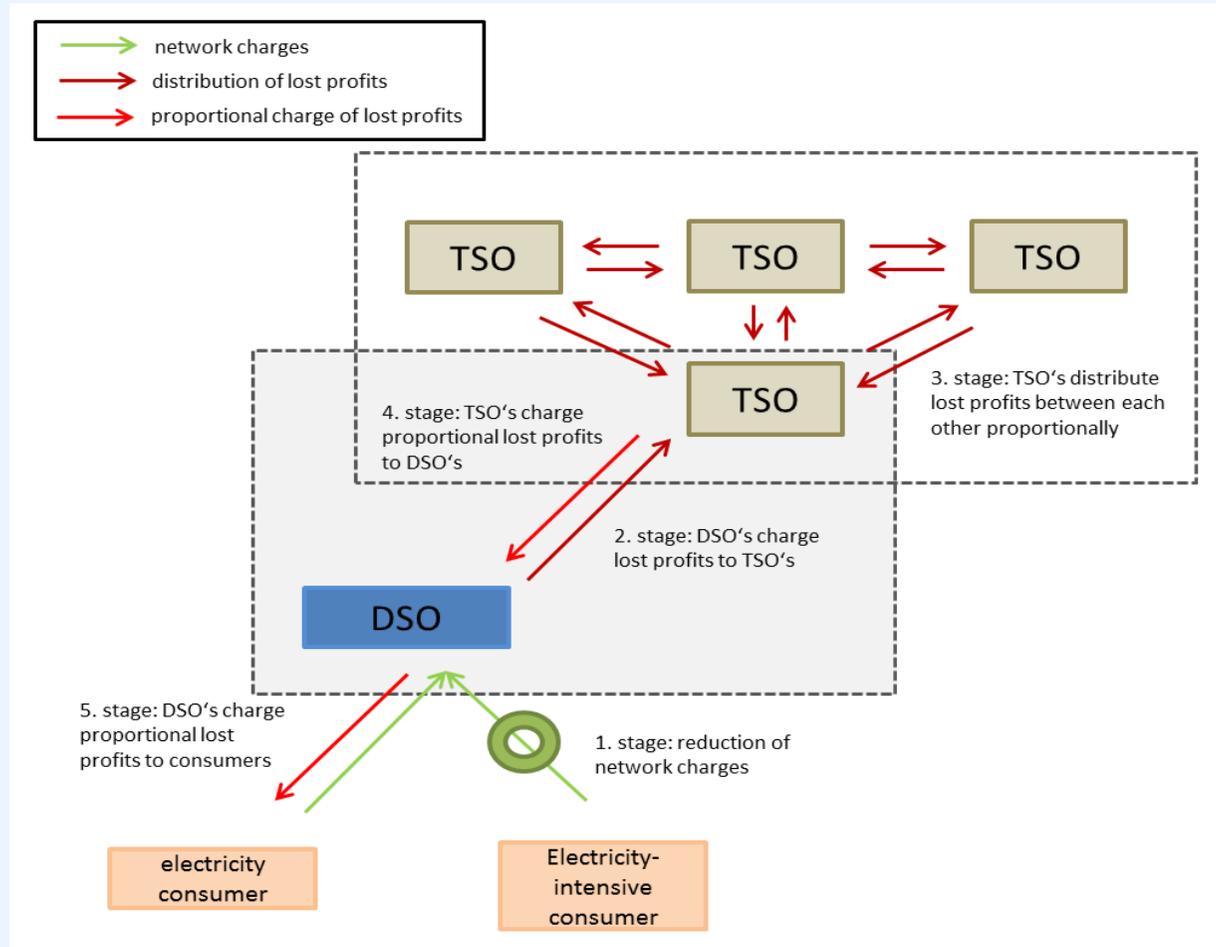
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## Operation mode

- Network operators need to offer an individual network charge for electricity-intensive consumers, if
  - consumer purchases electricity in at least 7.000 h/a and
  - electricity consumption exceeds 10 GWh/a.
- Individual network charges shall not be less than
  - 20%, 15% or 10% of the usual network charges, if consumer uses the network at least 7.000, 7.500 or 8.000 h/a respectively.
- Individual network charges require approval by Federal Network Agency.

# Reduction of network charges

## Operation mode: Apportionment of lost profits



# Reduction of network charges

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## Compatibility with European law: Illegal State Aid?

- EU Commission initiated state aid-procedure on 6th of March 2013\* regarding former version of subsidy.
- Problem: resources for refunding of lost profits are not, at any time, property of the state. Nevertheless use of state resources? Commission's view:
  - not necessary, that resources are held by state
  - source of funds:
    - apportionment is laid upon TSO's by state;
    - method and volume of apportionment is determined by state;
    - no discretion of TSO's in relation to cost and revenue items.
  - application of funds: TSO's must only use funds for compensating lost profits of DSO's
- State aid (+)

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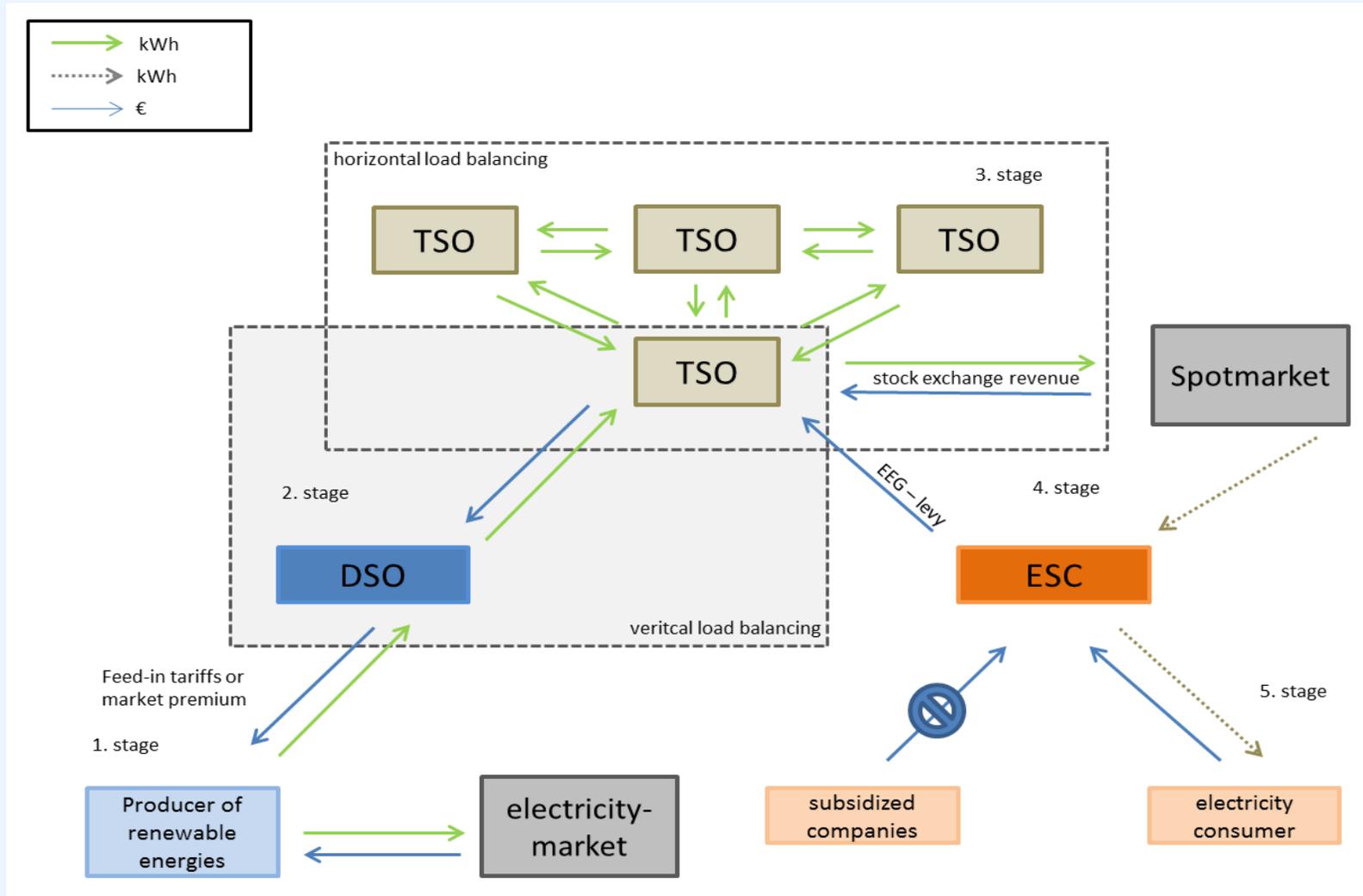
\* *European Commission*: C(2012) 8765 final, SA.34045 (2013/C) (ex 2012/NN).

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# Reduction of renewable energy surcharges

*§§ 63 ff. EEG 2014-Act*

# Reduction of renewable energy surcharge



Source: Own illustration based on Commission, SA.33995, Official Journal 2014 C 37/80.

# Reduction of renewable energy surcharges

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## Operation mode: Renewable energy surcharges pursuant to EEG-Act 2014

- Subsidies for renewable energies cause different costs:
  - market premium for direct marketing:
    - producers of renewables sell their electricity directly on the market;
    - they are entitled to obtain a market premium from the network operator;
    - amount of market premium is fixed by law.
  - feed-in tariffs (small scale production facilities):
    - network operators have to pay fixed purchase prices to producers of renewables.
- Costs of subsidies are rolled on by network operators to electricity customers (renewable energy surcharge)
- Electricity-intensive customers can apply for a reduction of surcharge.

# Reduction of renewable energy surcharges

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## Operation mode: Reduction of renewable energy surcharges („Besondere Ausgleichsregel“, BesAR)

### Provisions:

- Application at Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA);
- Company belongs to a branch defined in amendment 4 to EEG-Act;
- Electricity consumption of company exceeds 1 GWh/a;
- Depending on classification pursuant to amendment 4 to EEG-Act, Electricity-cost-intensity of company adds up to at least 17% or 20% and
- Company runs a certified energy- or environment-management system.

# Reduction of renewable energy surcharges

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## Legal consequences:

- No reduction of surcharge for electricity consumption up to 1 GWh (retention);
- For electricity consumption that exceeds 1 GWh, surcharge is limited to 15% of the regular surcharge;
- Cap of surcharge to a maximum of
  - 0,5% of average gross value during the last three business years, if electricity-cost-intensity adds up to at least 20%;
  - 4% of average gross value during the last three business years, if electricity-cost-intensity is below 20%;
- Cap of surcharge must not fall below 0,05 Cent/kWh at particular extraction points or 0,1 Cent/kWh at all other extraction points.

# Reduction of renewable energy surcharges

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## EEG 2012: Illegal State Aid?

### Proceedings

- 18.12.2013: Commission instituted State aid-proceedings against Germany with regard to EEG-Act 2012
  - *Commission*, Invitation to submit comments pursuant Article 108(2) TFEU of 18.12.2013, Official Journal 2014 C 37/73.
- 28.2.2014: Action of Germany against institution of State aid-proceedings (abandonment of action on 28.4.2015)
- 25.11.2014: Final decision of Commission
  - *Commission*, Decision (EU) 2015/1585 of 25.11.2014, Official Journal 2015 L 250/122.
- 2.2.2015: Action of Germany against decision from 25.11.2014, pending in court.

# Reduction of renewable energy surcharges

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## Potential State aids

Distinguish two different subsidies:

- Support of producers of renewable energy
- Reduction of renewable energy surcharges for electricity-intensive consumers („Besondere Ausgleichsregelung“, BesAR)

But: Commission does not always distinguish measures clearly but assesses support of producers of renewables and BesAR in a holistic manner.

# Reduction of renewable energy surcharges

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## Existence of State aid

- Problem: resources are not, at any time, property of the state. Can they nevertheless be seen as „State resources“?
- Commission applies three criteria:
  - Introduction and definition of the levy
  - Designation of a body to administer the levy
  - Monitoring by the State
- State has introduced surcharge and defined its purpose and destination
  - it serves to finance a support policy developed by State;
  - TSO's cannot use revenue from surcharge for anything else than EEG financing;
  - Reduction of EEG-surcharge reduces amounts collected from electricity-intensive consumers by electricity suppliers.

# Reduction of renewable energy surcharges

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- TSO's are designated by State to administer the surcharge
    - EEG-Act entrusts TSO's with a series of obligations and monitoring tasks;
    - TSO's are „central point in the functioning of the system“.
  - TSO's are monitored by State
    - BNetzA has enforcement powers, which it can use to fine all operators involved in the system;
    - Reduction of EEG-surcharge needs to be approved by an authority (BAFA).
- Conclusion of Commission:
- Support of producers of renewable energy: State aid (+)
  - „Besondere Ausgleichsregelung“, BesAR: State aid (+)

# Reduction of renewable energy surcharges

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## Compatibility of BesAR with the internal market

Provisions of Sections 3.7.2 and 3.7.3 of the 2014 Guidelines on State aid for environmental protection and energy (EE-GL):

- Costs resulting from the support of renewable energies;
- Aid should be limited to sectors that are exposed to a risk to their competitive position
  - either by the fact, that the sectors are listed in Annex 3 of the 2014 Guidelines
  - or by the fact, that the undertaking has an electro-intensity of at least 20% and belongs to a sector with a trade intensity of at least 4% at Union level;
- beneficiaries must pay at least 15% of the surcharge;
- Member States can further limit the amount of costs to particular percentages of the undertakings gross value (4%, in some cases 0,5%).

# Reduction of renewable energy surcharges

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- Commission's conclusion: BesAR pursuant to EEG 2012 only partially meets provisions of EE-GL.
  - *But:* Aid granted can be declared compatible with the internal market to the extent that it complies with an adjustment plan.
  - Germany has submitted an adjustment plan, that provides a recovery and meets the provisions set out by the Commission.
  - The adjustment plan was implemented in the EEG-Act 2014.
- As far as the reduction of surcharge meets the conditions in the adjustment plan, it is compatible with Art. 107 TFEU. Benefits that go beyond the adjustment plan have to be refunded.

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# Tax privileges

*§§ 9a, 9b, 10 Stromsteuergesetz*

Section **4**

# Tax privileges

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- § 9a StromStG: Waiver of electricity tax in favour of particular production processes of industrial customers (e.g. electrolysis, particular working stages in production of glass, ceramic, asphalt)
  - Commission, N 820/2006: *No state aid.* Germany has established energy tax system, which taxes consumption of energy for purposes of heating and fueling. Consumption of energy products for other purposes is not taxed. Tax waiver lies within logic of national tax system and is therefore no aid.
- § 9b StromStG: tax relief in the amount of EUR 5,13/MWh for industrial customers
  - State aid? Exemption pursuant to general block exemption regulation (EC) 800/2008, OJ 2013 C 169/5.
- § 10 StromStG: Further possibilities of reduction of electricity taxes, if industrial customer establishes an energy-management-system
  - State aid? Exemption pursuant to general block exemption regulation (EC) 800/2008, OJ 2013 C 169/31.
- Similar provisions for gas pursuant to EnergieStG.

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# Further subsidies to industrial companies

# Further subsidies to industrial companies

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## Reduction of surcharge for cogeneration of heat and power

- For electricity consumption beyond 1 GWh/a, network charges shall not increase 0,04 Cent/kWh or 0,03 Cent/kWh, if in the latter case
  - customer is industrial consumer and
  - electricity costs exceed 4% of last business years' turnover.
- State Aid? Germany has notified KWKG-Act 2016 to Commission.

## Reduction of concession fees

- Network operators have to pay concession fees to municipalities for using public streets for laying of wires;
- Network operators can charge concession fees to customers.
- Network operator shall not charge concession fees to special contract customers, whose yearly average charges for electricity supply per kWh are below average revenue per kWh that is achieved with supply of all special contract customers.
- Similar provisions for gas.

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# Conclusion

# Conclusion

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- Numerous privileges for electricity-intensive companies in Germany regarding
  - network charges
  - fostering of renewable energies
  - fostering of cogeneration of heat and power
  - concession fees
  - taxes.
- Several of the privileges establish a reduction of surcharges, which were introduced by the state but are applied by private network operators.
- In the latter case, the qualification as State aid is questionable.

# Thank you for your attention!

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