

E-Mobility | Germany increases incentives for investments in nationwide charging infrastructure

With its "Support Guideline Charging Infrastructure for Electric Vehicles in Germany" dated 15 February 2017, the Federal Ministry of Transport and Digital Infrastructure (*Bundesministerium für Verkehr und digitale Infrastruktur*) has launched a program for the granting of subsidies amounting to EUR 300 million. Its aim is to take account of the EU law obligation to install an appropriate number of publicly accessible charging points by the end of 2020. Already last year, the German legislator issued important regulatory requirements.

Based on current assessments by the German National Platform for Electric Mobility, Germany needs approx. 77,000 charging points in order to achieve the ambitious target of registering 1 million electric vehicles on German roads until 2020. Hitherto, not more than approx. 7,000 charging points have been installed in Germany, though. Hence, there is a need to install approx. 70,000 additional publicly accessible charging points. The pilot projects completed in the past have shown, however, the difficulties to operate charging points in the near future without state aid. For this reason, Germany will make available for the setup of a publicly accessible charging infrastructure EUR 200 million for 5,000 fast charging points and EUR 100 million for 10,000 standard charging points.

Financial support

The procedure of granting subsidies is initiated by calls for application. The first call for application has been published by the responsible Federal Authority for Administrative Services (*Bundesanstalt für Verwaltungsdienstleistungen*, "BAV") on 15 February 2017. Within the scope of this first call, applications for subsidies supporting the setup of a charging infrastructure can be submitted from 1 March 2017 until 28 April 2017 at the BAV. These applications will be generally approved according to the date of their submission. Subsidies will be granted until the maximum number of eligible fast charging points or the limit of support funds for standard charging points has been reached.

As regards further calls for applications, support will not be granted according to the date of submission of applications but by way of tendering. In the tendering process, support will principally be awarded to those appli-

cants whose projects cause the least support costs per kW charging capacity.

Subject matter of the financial support

Subject matter of the financial support is the setup of a nationwide publicly accessible charging infrastructure with one or more charging points including necessary grid connections (and, as the case may be, buffer storage units) as well as the assembly of the charging stations. Financial support does not extend to expenses for planning, permitting procedures and operation. A charging point is publicly accessible if it is located either on public roads or on private grounds, as long as the respective parking space is accessible for an undefined group of people or a group identifiable only by general characteristics. This definition also covers e.g. parking spaces of shopping malls or cinemas.

Amount of subsidies in first call for applications

In the first call for applications, funds amounting to EUR 10 million are made available for the installation of standard charging points, and 2,500 fast charging points will be supported by investment subsidies. The following intensity ceilings apply:

- 40% of the investment expenditures, capped at EUR 3,000 per charging point, for standard charging points with a capacity of up to 22 kW,
- 40% of the investment expenditures, capped at EUR 12,000 per charging point, for fast charging points with a capacity of up to 100 kW,
- 40% of the investment expenditures, capped at EUR 30,000 per charging point, for fast charging points with a capacity of 100 kW or more.

Additionally, the grid connection of a charging point site is supported with an amount of up to:

- 40% of the investment expenditures, capped at EUR 5,000, for the connection to the low-voltage grid,
- 40% of the investment expenditures, capped at EUR 50,000, for the connection to the medium-voltage grid.

Granted subsidies will be paid in arrears upon proof of expenditures.

Eligibility criteria

State support is subject to the condition that the realisation of the respective project has not been commenced before the official approval of funding. Generally, the conclusion of a supply or service agreement is considered a commencement of the realisation of a

project. Planning, permitting procedures etc. are not sufficient, though.

Apart from technical specifications (e.g. remote capabilities of the charging infrastructure), the following conditions have to be met:

- The minimum service life of the charging infrastructure must generally be six years.
- The electricity required for the charging process must be generated from renewable energies either locally (e.g. in photovoltaic plants) or elsewhere (to be proven by a certified green electricity supply contract).
- To be entitled to the maximum amount of subsidies, the charging station must be accessible 24

hours a day seven days a week.

- For state aid to be granted, the applicant has to determine the location for the charging point.
- The time until the realisation of a project shall in principle not be longer than twelve months.

Regulatory framework

Besides the financial support, the regulatory framework is a substantial driver for the establishment of different operator models. For a long time, it was unclear if charging points are legally part of the grid - and their operators therefore subject to the general obligations regarding connection to and use of the grid laid down in the German Energy Industry Act (*Energiewirtschaftsgesetz*, "EnWG") - or if a specific, more flexible regulatory framework applies. The German legislator decided this question last year and made important decisions in this regard. Further specifications and modifications of the regulatory framework are still needed, though. In particular, European requirements have to be implemented in the domestic law.

Application of the EnWG up to the charging station

The EnWG now contains clarifications on the classification of (publicly accessible and other) charging stations as consumption points and on the legal rights and duties resulting herefrom as well as on requirements for their operators.

Charging station not part of the grid but consumption point

By amendment to the definition of end consumers in section 3 no. 25 EnWG ("*the procurement of electricity of*

Key issues - financial support

- First applications for financial support may be submitted at the BVA from 1 March 2017 onwards
- Publicly accessible charging points including grid connection and assembly of the charging station are eligible for support
- Granting of financial support requires, *inter alia*, a minimum service life of the charging station of six years and procurement of electricity generated from renewable energies for the recharging process
- After the first call for applications, support will be granted in tendering processes based on the least support costs per kW charging capacity

charging points is to be considered equal to end consumption within the meaning of this statute and regulations issued under this statute") operators of charging points for electric vehicles are - within the scope of the EnWG - equated with end consumers as regards their procurement of electricity. This implements the industry's request for charging points not to be considered part of the grid and for operators of charging points not to be *per se* considered energy supply companies. The legal duties under the EnWG shall thus in principal apply only up to the charging station, not to the station itself, though. A differing concept, after which charging points would be part of the grid and would have to be financed by grid fees, would not only obstruct practicality but would also hamper the necessary private investments into the construction of the charging infrastructure as well as the further development of business models (*Bundestag* publication 18/7317, page 114).

EnWG duties applicable only in the relations between grid operator or energy supplier and charging point operator

For the application of legal duties under the EnWG that means the following:

- Operators of charging points are entitled *vis-à-vis* grid operators to non-discriminatory connection to the grid (section 17 EnWG) and non-discriminatory use of the grid (section 20 EnWG).
- The EnWG is not applicable, though, to relations between operators and customers of charging points - this was decided by the German legislator through its classification of charging points as end consumption.

- Accordingly, there is no duty of charging point operators to serve customers with basic or substitutional supply (sections 36 et seq. EnWG) and the passing-on of electricity at the charging points is not subject to the transparency and information duties applicable to energy supply contracts and invoices (sections 40 et seq. EnWG).
- Operators of charging points are not obliged to notify energy supplies (section 5 EnWG) but - subject to a respective regulation still to be issued - they are required to register the charging points in a so-called market master data registry (*Marktstammdatenregister*) (section 111f no. 2 lit. b)cc) EnWG).

The equation of electricity procurement by the charging points with end consumption only applies to the EnWG and regulations issued under it, but not to other statutes regulating end consumption of electricity differently. For this reason, the obligation of charging point operators to pay the renewable energy surcharge for electricity supplied to their customers principally remains in place (cf. the explanatory memorandum, *Bundestag* publication 18/7317, page 73).

Operation of charging points by electricity supply companies, distribution system operators and other companies

Various market players can be operators of charging points. The explanatory memorandum of the law amending the definition of end consumers in section 3 no. 25 EnWG (*Bundestag* publication 18/7317, page 73) explicitly refers only to the operation of charging points by electricity supply companies. In the absence of provi-

sions stating otherwise, other companies like distribution system operators or other market players (especially automobile manufacturers, IT companies or joint ventures) may participate in the setup and operation of the charging infrastructure, too.

Key issues - regulatory framework

- The EnWG provides for clarity regarding the classification of charging stations as consumption points
- Various market players, including joint ventures, may be operators of charging points
- The EU standard for plugs ensures Europe-wide technical interoperability
- The regulatory framework allows for the implementation of different operator models

Distribution system operators have to consider, though, that the operation of charging points for electric vehicles could make them become vertically integrated energy supply companies (section 3 no. 38 EnWG), meaning they would have to comply with EnWG provisions on informational, legal, operational, and accounting-related unbundling (sections 6a to 7a EnWG) because it remains at least debatable if the equation of electricity procurement of charging points with end consumption in section 3 no. 25 EnWG also prevents the passing-on of electricity to third parties at the charging point from being qualified as "*distribution of electricity*" within the meaning of section 3 no. 38 EnWG.

Apart from that, distribution system operators should already now pay attention to the additional requirements outlined by the European Commission in its proposal for a revised Internal Market in Electricity Directive (COM(2016) 864 final, part of the so-called EU Winter Package). According to article 33 of this proposal, Member States shall permit distribution system operators the operation of charging points only if, *inter alia*, no other parties have shown interest in the operation after an open and transparent tendering procedure. Moreover, the activities of distribution system operators regarding the operation of charging points shall phase out if public consultation indicates that other market players could also operate such points. Wit

h this provision, the European legislator makes clear that it does not, in the long-term, consider the operation of charging points a primary task of distribution system operators and underlines the potential of e-mobility for other market players.

Specific law by regulation and general civil law starting at the charging station

The "Regulation on technical minimum requirements for the secure and interoperable installation and operation of publicly accessible charging points for electric vehicles" (*Ladesäulenverordnung*, "LSV") of 2016 as well as the European Directive on the deployment of alternative fuels infrastructure (Directive 2014/94/EU) contain further provisions for the installation and the operation of the charging infrastructure.

Ensuring technical interoperability through the LSV

The LSV provides that all standard and fast charging points commissioned from 17 June 2016 onwards shall at least be equipped with electrical sockets or couplings of type 2 pursuant to DIN EN 62196-2, edition December 2014 (alternating current) or of type Combo 2 pursuant to DIN EN 62196-3, edition July 2012 (direct current). This system, also referred to as "Mennekes-plug", has been set out in annex II of Directive 2014/94/EU as European standard and thus ensures technical interoperability beyond German borders.

Possibility to implement different operator models

The LSV does not contain any provisions on the contractual relations between charging point operators and their customers as well as third party service providers. Corresponding requirements are however contained in the Directive 2014/94/EU, which still need to be implemented in domestic law though. A respective follow-up regulation to the LSV has already been announced. It will have to take into account especially the following requirements set-out in the Directive 2014/94/EU:

- Operators of publicly accessible charging points shall be free to purchase electricity from any EU electricity supplier, subject to the supplier's agreement.
- Operators of charging points shall be allowed to provide electric vehicle recharging services to customers on a contractual basis, including in the name and on behalf of other service providers.
- All charging points accessible to the public shall provide for the possibility for electric vehicle users

to recharge on an *ad hoc* basis without entering into a contract with the electricity supplier or operator concerned.

The Directive 2014/94/EU thus provides for a flexible framework allowing for different models for the operation of charging points. It is a compulsory requirement for publicly accessible charging points though that users of electric vehicles are entitled to *ad hoc* recharging (by way of roaming).

This requirement resulting from the Directive 2014/94/EU has already been reflected in the support guideline of 15 February 2017. Eligibility for support requires allowing also the customers of other service providers to use the charging point. In addition, applicants have to ensure that no authentication is required or that an authentication only serves cashless payment transactions.

Duty of transparent and non-discriminatory pricing

Pursuant to article 4 para. 10 of Directive 2014/94/EU, the Member States shall ensure that prices charged by the operators of publicly accessible charging points are reasonable, easily and clearly comparable, transparent and non-discriminatory. This provision has not yet been implemented in German law. As Germany is obliged to its implementation and a corresponding provision is therefore to be expected in the follow-up regulation to the LSV, operators of charging points should take this provision into account in the development of their operator models already now. Moreover, the operator models should consider the German standard contract terms law (sections 305 et seq. BGB) as well as the requirements resulting from competition law.

The German Energy & Infrastructure Team is at your disposal for more detailed explanations.

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