

# Complaint Form

*Alleged breach of Union law by a Member State*

*Germany's non-compliance with Article 7 of the Energy Efficiency Directive*

## I. IDENTITY AND CONTACT DETAILS

### 1. Individuals

First Name: Sascha

Surname: Müller-Kraenner

First Name: Antje

Surname: von Broock

### 2. Organisations

Name: Deutsche Umwelthilfe e.V.

Sector / field of activity:

Deutsche Umwelthilfe e.V. (DUH) is a not-for-profit, politically independent, advocacy organisation founded in 1975 focusing on the protection of nature, the environment and consumers rights. The program areas of DUH include energy and climate change, sustainable transportation, air quality control, protection of nature and biodiversity, circular economy, municipal environment, environmental law, environmental education and consumer protection.

Location(s) where active:

Germany and EU-wide; national offices in Berlin, Hannover, Radolfzell as well as project offices in several other German cities.

Name: Bund für Umwelt und Naturschutz Deutschland e.V. (BUND) / (Friends of the Earth Germany)

Sector / field of activity:

BUND (Friends of the Earth Germany) is a non-profit, non-partisan, and non-confessional federal grassroots NGO with about 500.000 members and supporters. Organised in 2.000 local groups and initiatives and 16 regional BUND sections, committed and competent people are taking actions against the destruction of nature and the environment.

Above all, BUND's focus is on how we want to live in the future. What constitutes a sustainable political approach which is environmentally-friendly and ensures the right to an equitable existence for both our children and the people in the southern hemisphere? BUND is effectively involved in working on the enormous challenges of environmental policy. Our commitment to foster the use of renewable energies, to ban the production of genetically modified food and fodder, and to reduce the amount of toxic chemicals in everyday life is always based on concrete alternative options and solutions.

Since 1989 we have been the German partner organisation in the global Friends of the Earth network. Together with more than 70 other independent environmental organisations we take a worldwide stand against the exploitation of nature and the environment.

Location(s) where active:

Germany and international, in cooperation with our partner organisations in the global Friends of the Earth network.

**3. Addresses or registered offices**

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**4. I am submitting this complaint on behalf of someone else**

No.

**5. Correspondence from the Commission can be sent either to the complainant or to the complainant's representative**

Complainants

## II. DESCRIPTION OF THE SUSPECTED INFRINGEMENT OF UNION LAW

### 6. Descriptions of the facts and the reasons for the complaint

#### **Summary**

The complaint concerns the national implementation of the European Energy Efficiency Directive (EED) by Germany. Specifically the alternative measures notified by Germany according to article 7, paragraph 9. We find a *general lack of transparency and communication* from the German government concerning the implementation of the EED and especially article 7. This already starts with the energy statistics Germany uses as the baseline for their calculation of the 1.5 percent target, which differs from the Eurostat data.

Because of the huge variety of individual measures counted toward the saving target under article 7 and the notification to the Commission in several separate notifications, it is very difficult for national stakeholders from civil society and environmental NGOs to actually fully understand the implementation of article 7.

Our two major concerns about the notified policy measures under article 7 EED are:

- a) *Eligibility*: The measures do not correspond to the EED definition of policy measure, because they are not primarily designed to achieve end-use energy savings.
- b) *Exaggeration of savings*: The calculation of the assumed energy savings are set too high.

Both, the missing eligibility and the exaggerated level of energy savings lead to a gap between the actual and the reported energy savings.

Since article 7 is the cornerstone of the Energy Efficiency Directive and probably the most important delivery mechanism for energy efficiency in the EU, DUH and BUND have a strong interest in an ambitious and strong implementation of the EED in Germany.

#### **Energy statistics**

For calculating the baseline for the annual 1.5 percent energy saving target, member states are allowed to use their own energy statistics or data from Eurostat. The definition of the calculation basis is the *energy sales to final customers*, which is defined as all sales excluding energy transformed on-site, energy used for own use or energy use for the production of energy<sup>1</sup>. Energy generated by households for own use may also be excluded, but must be explained<sup>2</sup>.

The national data Germany uses (AG Energiebilanzen) does not match with the data from Eurostat, with the baseline in the national data being significantly reduced compared to the Eurostat data. The calculated average end energy consumption of Germany between 2010 and 2012 (excluding transport) amounts to 6475 PJ, which is little higher than the Eurostat data of 6372 PJ. The German Government reduces the given amount of 6475 PJ by 893 PJ because of auto-production. However, the reduction by auto-production in the Eurostat data is much lower (176 PJ).

The most important amounts in Eurostat are:

- Gross electricity generation Autoproducer CHP plants - Combustible Fuels (~110 PJ)

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<sup>1</sup> Article 7 (1) of Directive 2012/27/EU of the European Parliament and of the council (p. 15): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0027&from=EN>

<sup>2</sup> *ibid*

- Gross electricity generation Autoproducer electricity only - Combustible Fuels (~ 60 PJ).

The German Green Party asked the government to explain the significant difference between the German data and Eurostat (Minor Interpellation, *Bundesdrucksache* 18/7639; 7 March 2016). In its response the government explained that the German baseline is reduced by 893 PJ due to auto-production.

Although the government listed the items amounting to the named 893 PJ, with the largest items being fuel usage of industrial heat production (448 PJ) and Renewable Energies (234 PJ), there is no detailed explanation why the amount differs so much from the Eurostat data. There is no explanation of the calculation method used for the German data compared to the Eurostat data.

In our opinion the reduction of 893 PJ lacks transparency and justification and is most likely exaggerated, leading to a significant lower baseline and thereby annual energy savings. Germany should explain in detail why their data deviates so much from the Eurostat data.

#### **a) Eligibility of alternative measures**

Art.7.9 EED allows Member States to take other policy measures as an alternative to setting up an energy efficiency obligation scheme of Art.7.1 EED.

And according to Article 2.18 EED: ...“*policy measure means a regulatory, financial, fiscal, voluntary or information provision instrument formally established and implemented in a Member State to create a supportive framework, requirement or incentive for market actors to provide and purchase energy services and to undertake other energy efficiency improvement measures*”.

Germany decided to meet the requirements of article 7 by implementing alternative measures exclusively. There were 19 alternative measures reported by April 2016, the ones with the greatest anticipated savings are listed in table 1 below.

**Table 1:** Measures with the greatest anticipated savings under Art. 7.9 reported by Germany to the EU Commission in April 2016; own representation and translation (*Source: Mitteilung der Regierung der Bundesrepublik Deutschland an die Europäische Kommission vom 28. April 2016*<sup>3</sup>)

<b>Notifica- tion No.</b>	<b>Title of measure (German)</b>	<b>Title of measure (English)</b>	<b>Final energy saving in 2014 in PJ</b>
M 13	Energie- und Stromsteuer	Energy and electricity tax	74,0
M 02	Energieeinsparverordnung (Bestand)	Energy Savings Regulation (existing stock)	11,0
M 04	KfW-Förderprogramme zum energieeffizienten Bauen und Sanieren (CO <sub>2</sub> - Gebäudesanierungsprogramm)	KfW support programs for energy-efficient construction and renovation (CO <sub>2</sub> Building Renovation Programme)	5,3
M 01	Energieeinsparverordnung (Neubau)	Energy Savings Regulation (new building)	4,6
M 15	Luftverkehrssteuer	Aviation tax	4,2
M 06	Investitionsförderung in	Investment support in	2,7

<sup>3</sup>Communication from the Government of the Federal Republic of Germany to the European Commission of 28 April 2016: <https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficiency-directive/national-energy-efficiency-action-plans>, Annual reports 2016

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	Unternehmen	companies	
M 17	Beratungsprogramme des Bundes	Federal Advisory Programmes	2,2
M 16	Emissionshandel	Emissions trading	1,3
M 03	Erneuerbare-Energien-Wärme-Gesetz (EEWärmeG)	Renewable Energies Heat Act	0,8
M 08	Marktanreizprogramm zur Förderung der Nutzung erneuerbarer Energien im Wärmemarkt (BAFA-Teil)	Market incentive program to promote the use of renewable energies in the heating market (BAFA part)	0,6

According to article 7 EED second subparagraph of paragraph 9, policy measures may comprise a variety of policy measures, among others as specified under point a): “energy or CO<sub>2</sub> taxes that have the effect of reducing end-use energy consumption” or point d): “standards and norms that aim at improving the energy efficiency of products and services, including buildings and vehicles, except where these are mandatory and applicable in Member States under Union law”.

Furthermore, the definition given for policy measures in the Commission Staff Working Document (SWD (2013) 451) / Guidance Note on the EED<sup>4</sup> excludes measures that are primarily intended to support policy objectives other than energy efficiency or energy services as well as policies that trigger enduses savings that are not achieved among final consumers.

Also, if measures are adopted in compliance with other European directives and guidelines without exceeding the required minimum levels set out in those directives, they should be excluded from counting towards the savings target under article 7 EED<sup>5</sup>.

From the measures listed in table 1 above, as well as of the other measure notified to the Commission by Germany, some are in our opinion not eligible to be counted as measures towards the savings target under article 7 EED. Examples of measures of the notification from April 2016 in question are:

### **M03: Renewable Energies Heat Act**

- Saving for 2014 notified in April 2016: 0,8 PJ (see table 1)
- Expected Saving Total from 2014-2020: 21PJ (According to 3<sup>rd</sup> NEEAP 2014<sup>6</sup>)

<sup>4</sup> European Commission guidance (SWD(2013) 451) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013SC0451>: “This wording excludes policy measures that are primarily intended to support policy objectives other than energy efficiency or energy services as well as policies that trigger enduses savings that are not achieved among final consumers.” (p. 10)

<sup>5</sup> European Commission guidance (SWD(2013) 451) states that “only savings that go beyond the minimum requirements originating from EU legislation can count”(p. 15) and “Standards and norms that are 'mandatory and applicable in Member States under Union law' do not count” (p. 11)

→ Adopted in compliance with the Directive on Energy Performance of Buildings (EPBD - 2010/31/EU), not exceeding minimal requirements and thereby not pursuant to article 7, 9. d) EED.

#### **M15: AviationTax**

- Saving for 2014 notified in April 2016: 4,2 PJ (see table 1)
  - Expected Saving Total from 2014-2020: 29PJ (According to 3<sup>rd</sup> NEEAP 2014)
- Purpose of this tax is to create revenue, emissions, noise pollution and congestion all provide economic rationales for aviation taxes. The tax is not designed to deliver end-use energy reductions or other energy efficiency improvements and is thereby not pursuant to article 7, 9. a) EED.

#### **M16: Emission Trading**

- Saving for 2014 notified in April 2016: 1,3 PJ (see table 1)
  - Expected Saving Total from 2014-2020: 41 PJ (According to 3<sup>rd</sup> NEEAP 2014)
- Emission trading is implemented into German law by the Greenhouse Gas Emission Trading Act from 2004, implementing EU Union law. It does not exceed the requirements of the European Emission Trading Directive (Directive 2003/87 / EC).

Another example of a policy measure notified by Germany as an alternative policy measure to achieve energy savings under article 7 EED is:

#### **M14: HGV Toll**

- Expected Saving Total from 2014-2020: 21 PJ (According to 3<sup>rd</sup> NEEAP 2014)
- HGV Toll is a distance-based road use charge for heavy goods vehicles on German motorways and some highways. The toll rates (toll per kilometer) depends on the number of axles of the vehicle, and (since 2015) on emission categories. The HGV Toll does not create a supportive framework, requirement or incentive for market actors to provide and purchase energy services and to undertake other energy efficiency improvement measures. End-use energy savings are not its primary purpose.

From the complainants' point of view, these measures are examples of measures that do not comply with guidelines and conditions set under the EED and that are thereby not eligible to count towards Germany's efforts to increase efficiency. Still, if the measures were excluded, this would automatically lead to a gap towards the national savings target.

#### **b) Exaggeration of saving levels**

Another concern related to the national implementation of the EED, specifically concerning alternative measures notified by Germany according article 7, paragraph 9, is the level of the notified energy savings from efficiency measures. The calculation of the assumed energy savings is in our opinion in many cases set too high and/ or does not reflect the state of implementation of the measure appropriately.

An example of a measure, that has been reported as contributing to the energy savings target under Article 7 EED, but that has not been implemented to the expected amount so

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<sup>6</sup> Communication from the German Federal Government to the European Commission pursuant to Article 7 of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency/ 3rd NEEAP 2014, Annex II

far, is the Energy Efficiency Network Initiative, a measure from the German 'National Energy Efficiency Action Plan' (NAPE)<sup>7</sup>:

### **Energy Efficiency Network Initiative**

- Notified Saving until 2020: 74,5 PJ (according to NAPE 2014)

This measure is one of the cornerstones of energy savings and part of the measures notified from the national energy efficiency action plan (NAPE) and reported on to the EU Commission in April 2016<sup>8</sup>.

However, from the intended 50 networks to be set up in the first year, only about 30 were registered until December 2015<sup>9</sup>. It is true, that the Energy Efficiency Network Initiative recently gained some momentum and more networks have been established this year. Still it can be expected that the initial delay in implementing this policy measure will continue and lead to less overall energy savings than planned.

The energy efficiency networks initiative serves as an example for a policy measure with energy savings calculated towards the fulfilment of the requirements of the EED, but that are exaggerated and / or do not reflect the state of national implementation. The complainants estimate, that several energy savings counted toward the 1,5 percent annual savings goal of article 7 EED have not been achieved yet and will most likely not be achieved to the expected extend, thereby increasing the gap towards the national savings target.

Another measure from the NAPE has not been implemented at all:

### **Tax relief on energy renovations**

- Notified Saving until 2020: 76 PJ (according to NAPE 2014)

This measure did not pass legislative approval in Germany and has never been implemented. So far the government has not presented an alternative solution how to compensate for the energy savings reported to the commission in April 2016. To the knowledge of the complainants the German government did not inform the European Commission about the failure of the policy measures and the resulting gap toward archiving the annual 1.5 percent savings goal.

### **Conclusion**

The alternative measures Germany notified under Article 7, paragraph 9 EED are not sufficient to reach the annual savings target and the promised saving potential. We identified a huge threat that Germany will fail to reach their 2020 efficiency target under these conditions and strongly plead that additional action should be taken on national level.

### **7. Does the complaint relate to the EU Charter of Fundamental Right, which applies only to the implementation of Union law (Article 51)?**

No.

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<sup>7</sup> German National Efficiency Action Plan, German Acronym: NAPE (in Germanys notification to the EU Commission from April 2016 also referred to as NEEAP):

<http://bmwi.de/DE/Mediathek/publikationen,did=672756.html>

<sup>8</sup> See: Communication from the Government of the Federal Republic of Germany to the European Commission of 28 April 2016: <https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficiency-directive/national-energy-efficiency-action-plans>, Annual reports 2016

<sup>9</sup> Press Release 03/12/2015: „Jahrestag der Initiative für 500 Energieeffizienz-Netzwerke“:

<https://www.energie-effizienz-netzwerke.de/een-de/aktuelles/meldungen/meldungen.php>

**8. If possible, please provide a list of documents or evidence in support of your complaint (including the national measures concerned) that you can send to the Commission if it so requests.**

**Table 2:** List of documents / evidence in support of our complaint

<b>Study/Documents</b>	<b>Short Summary/Important Findings</b>
<a href="#"><u>Ecofys</u></a> : Schafft Deutschland die neuen EU-Energieeinsparziele mit bestehenden Instrumenten? – Ermittlung der Umsetzungslücke zur Erreichung der Zielvorgaben der EU Energieeffizienzrichtlinie (Study, October 2012)	Evidence of lacking eligibility of national policy measures notified to the Commission and revision of expected energy savings from national efficiency measures
<i>Fraunhofer für System- und Innovationsforschung (ISI)</i> : Gapometer Presentation by Fraunhofer ISI Institute on the "Gapometer-Tool" (December 2015)	Correction of saving potential of notified measures leaving a wide gap the comply with the annual savings target
<a href="#"><u>Coalition for Energy Savings</u></a> : Implementing the EU Energy Efficiency Directive: Latest analysis of Member State plans for end-use energy savings targets (Article 7) (Updated analysis, 2015)	Pointing towards major deficits with transparency and communication
<a href="#"><u>Ricardo-AEA</u></a> : Study evaluating the national policy measures and methodologies to implement Article 7 of the Energy Efficiency Directive (Report for DG Energy, February 2015)	Evidence of insufficient implementation of the EED in Germany
<a href="#"><u>ENSPOL</u></a> : Energy Saving Policies and Energy Efficiency Obligation Scheme D3.1: Report on Alternative schemes to Energy Efficiency Obligations under Article 7 implementation (March 2015)	Identification of financial risks for implementation of efficiency policies
<a href="#"><u>Press Release (DENEFF)</u></a> : DENEFF-Analyse: NAPE verfehlt 20 Prozent - Energiesparziel (NAPE-Meter) (15 October 2015)	National Action Plan Energy Efficiency (NAPE) fails to deliver promised energy savings and misses energy savings target by 20 percent
<a href="#"><u>Press Release (BMW)</u></a> : Neues "Anreizprogramm Energieeffizienz" als sinnvolle Alternative zur steuerlichen Förderung der energetischen Gebäudesanierung (5 May 2015)	Ministry of Economic Affairs announcing the retraction of measures (tax deductions) notified to the European Commission

III. APPEALS / LEGAL ACTIONS / OTHER ACTIONS

**9. Have you already taken action in the EU country concerned to attempt to solve this problem, or are you aware of any action in the country concerned covering the issue you raise in this complaint?**

Yes.

**10. If you answered yes to point 9, what actions have you already taken in the country concerned to tackle the problem?**

**Administrative action:**

Since 2014 several minor interpellations have been submitted to the German government by members of the green party, inquiring about the state of transposition of the EED into



national law, about the calculations for the 1.5 percent savings target under article 7, as well as about specific measures notified under article 7 paragraph 9 EED. The minor interpellations (including answers) can be found in [Bundesdrucksache](#) (Bundestag printed paper): 18/665 from 2014.02.35, 18/2450 from 2014.09.01, 18/7102 from 2015.12.17 and 18/7639 from 2016.03.07.

In its answers the German Government mostly referred to official procedure, failing to comprehensively and satisfactorily justify the eligibility of individual measures under article 7, e.g. HGV Toll or Emission Trading and the calculation of end use savings.

#### **Other action:**

In March 2016 DUH wrote a letter to the Federal Ministry of Economic Affairs and Energy [BMWi] (addressed to the Head of Directorate General II, Energy Policy – Heating and Efficiency, Mr. Thorsten Herdan) stating our support for the German efforts in increasing energy efficiency, but also expressing our concern of Germany not reaching the savings target under Article 7 EED. In this letter, we also specifically inquired about alternative measures notified according to Article 7 paragraph 9 EED.

In his answer to our letter Mr. Herdan emphasizes that Germany consistently implements the EU specifications and asserts that Germany will reach the saving goal laid out in article 7 EED. Furthermore, in this answer BMWi claims the eligibility of the Renewables Energies Heat Act, the HGV Toll and the Emission Trading as an alternative measure under article 7, 9 EED. However, we disagree with this opinion, as established in section 6 of this complaint.

#### **Action through media work:**

Since 2014, DUH and BUND have directly targeted the German Governments' efforts on energy efficiency repeatedly via press releases, thereby also addressing gaps in fulfillment of the EU requirements:

The press releases from DUH can be found in the [DUH press archive](#):

2014: „Unverbindlich und ungenügend: Deutsche Umwelthilfe kritisiert Nationalen Aktionsplan Energieeffizienz“ (2014.12.02)

12.12. 2014: BUND-Analyse: Minimalprogramm Klimaschutz 2020 (Page 5-6:  
[http://www.bund.net/fileadmin/bundnet/pdfs/klima\\_und\\_energie/141203\\_bund\\_klima\\_energie\\_aktionsprogramm\\_klimaschutz\\_bewertung.pdf](http://www.bund.net/fileadmin/bundnet/pdfs/klima_und_energie/141203_bund_klima_energie_aktionsprogramm_klimaschutz_bewertung.pdf))

2015: „Energieeffizienz: Bundesrat muss steuerlicher Abschreibung der Gebäudesanierung zustimmen“ (2015.01.25); „Klimaschutz im Gebäudebereich: Bundesregierung verschleppt notwendige Investitionsimpulse“ (2015.02.23); „Steuerliche Abschreibung der energetischen Gebäudesanierung endgültig gescheitert – Bundesregierung im Klimaschutz handlungsunfähig“ (2015.02.26); „Bundesregierung setzt beim Thema Energieeffizienz weiterhin auf das Prinzip Hoffnung“ (2015.11.18); „Bundesregierung verschläft Energieeffizienz im Gebäudebereich,“ (2015.12.03)

*BUND Kommentar zur COP 21: Den schlafenden Riesen Energieeffizienz aufwecken für den Klimaschutz* (03.12.2015;  
[http://www.bund.net/themen\\_und\\_projekte/klima\\_und\\_energie/internationale\\_klimapolitik/un\\_klimakonferenzen/kommentar\\_3122015/](http://www.bund.net/themen_und_projekte/klima_und_energie/internationale_klimapolitik/un_klimakonferenzen/kommentar_3122015/))

**11. Please indicate whether you have already contacted other EU institutions and bodies to request help in solving your problem?**

No.

**12. Have you already contacted any of the institutions or bodies dealing with problems of this nature? If yes, which one(s) and what was the outcome?**

DUH and BUND are in regular contact with a number of (non-governmental) organisations in Brussels as well as in Berlin, discussing matters of the national implementation of the EED in Germany and other Member States. Among these organisations are:

Coalition for Energy Saving, the European Environmental Bureau and Friends of the Earth Europe in Brussels, DNR (German League for Nature, Animal Protection and Environment) and the coalition *#effizienzwende* (Alliance of national representatives from industry and society) in Berlin.

DUH and BUND submitted a response to the Public Consultation for the Review of Directive 2012/27/EU on Energy Efficiency.

**13. If, after examining your case, the Commission decides that SOLVIT is better placed to deal with it, do you agree to your complaint being transferred to SOLVIT?**

Yes, we agree that the Commission can transfer our complaint to SOLVIT.

**IV. CONFIDENTIALITY – DATA PROTECTION**

We authorise the Commission to disclose our identity in its contacts with the authorities of the EU country against which we are lodging a complaint.