

The EU's AFIR regulation will impact operating models for charging stations – but how?

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This is the first in a series of articles dedicated to analyzing how the new legislation will impact businesses' operating models regarding e-mobility, etc.

In the late summer of this year, the European Parliament and the Council of the European Union adopted Regulation (EU) 2023/1804 on the deployment of alternative fuels infrastructure (**AFIR**). The AFIR will apply from 13 April 2024. It repeals the previous Directive 2014/94/EU on the deployment of alternative fuels infrastructure (AFID), which was implemented e.g. in Germany, by the Charging Station Ordinance (*Ladesäulenverordnung* – **LSV**).

One of the AFIR's main objectives is to lay down mandatory minimum targets for the deployment of publicly accessible recharging and refueling infrastructure for road vehicles. With that, the regulation's goal is to solve the uneven distribution of publicly accessible recharging infrastructure across the EU – a situation that the European Parliament and the Council feel jeopardizes the uptake of light-duty electric vehicles and thereby limits connectivity across the Union.

To reach that goal, **the establishment and operation of recharging points for electric vehicles will be developed as a competitive market with open access to all parties** interested in rolling out or operating recharging infrastructure for alternative fuels.

The main characteristic of **alternative fuels** is (at least partly) a substitution for fossil fuels and a potential to contribute to the decarbonization and enhancement of the environmental performance of the transport sector. As such, AFIR explicitly mentions electricity, hydrogen and ammonia. In this article, we are considering electricity as an alternative fuel.

Where electricity is concerned, the AFIR addresses the following issues, among others, and introduces specific measures:

Minimum targets for publicly accessible recharging points

The AFIR sets binding minimum targets for the establishment of publicly accessible charging infrastructure for road vehicles. It stipulates that publicly accessible alternative fuels infrastructure must be located at a site or on premises that are open to the general public, regardless whether (i) the alternative fuels infrastructure is located on public or private property, (ii) limitations or conditions apply in terms of access to the site or premise and irrespective of the applicable use conditions of the alternative fuels infrastructure. Even if the site is dedicated to a specific user group (e.g. the parking lot of a supermarket), this should not be considered an obstacle, as long as access to the infrastructure is not restricted to a limited and specific group of people (e.g. parking spaces in an office building to which only employees or authorized persons have access).

Non-discriminatory and transparent pricing

The prices charged by operators of publicly accessible charging points must be reasonable, easily and clearly

comparable, transparent and non-discriminatory. Operators of publicly accessible charging points must not discriminate between end users and mobility service providers (**MSP**) or between different MSPs in the prices they charge.

Smart metering and bidirectional recharging

Smart metering systems that enable the generation of real-time data, in conjunction with smart charging stations, can encourage charging at times of low general electricity demand and low energy prices. This can optimize charging, which is beneficial for both the electricity system and the end consumer. With this in mind the AFIR sets out that operators of recharging points must ensure that all publicly accessible recharging points operated by them and built after April 13, 2024 or renovated after October 14, 2024 are capable of smart recharging. Other measures to facilitate the integration of electric vehicles into the electricity system can be further facilitated through bidirectional recharging (vehicle-to-grid). To achieve this goal, each member state must prepare and submit to the Commission by December 31, 2024 a draft national policy framework for the development of the market for alternative fuels in the transport sector and deployment of corresponding infrastructure. The national policy framework must include, for example, measures – planned or adopted – that (i) are necessary to ensure that the deployment and operation of recharging points, including the geographical distribution of bidirectional recharging points, and (ii) contribute to the flexibility of the energy system and to the penetration of renewable electricity into the electric system.

In this Part One, we will assess if and how the new definition of (re)charging point operators (**CPO**) might impact business models – in particular for non-public charging stations – by directly affecting the electricity market regulatory framework.

Definition of CPO for publicly accessible charging infrastructure

Art. 2 (39) of the AFIR defines the “**operator of a recharging point**” as the entity responsible for the management and operation of a recharging point and that provides a recharging service to end users, including in the name and on behalf of a MSP. A **recharging service** is the sale or provision of electricity, including related services, through a publicly accessible recharging point (Art. 2 (53) AFIR). Since the AFIR is an EU Regulation, the respective definitions are directly applicable in all EU member states.

Generally, in the energy regulatory frameworks (e.g. in Germany according to the Energy Industry Act (*Energiewirtschaftsgesetz* – **EnWG**) and the LSV), rights and obligations are linked to the operators of electricity infrastructure. Accordingly, any provisions with respect to the CPO directly affect the energy regulatory framework. For example, **the relationships between CPOs, MSPs, electricity suppliers, customers of electric vehicles (EV) and third parties (e.g. the owner of the meter) are often determined based on the qualification of the roles of the market participants**. As these relationships include services as well as the supply of electricity, it is most important to have a clear determination of the respective roles.

By introducing the AFIR, the EU thus directly amends the applicable law regulating the respective electricity market. These laws should be subject to electricity market directives and regulations regardless whether this was intended. This seems a bit contradictory, as the charging infrastructure will be subject to a (separate?) competitive market, yet the energy (infrastructure) markets in the EU are regulated. European legislation also recognizes this to the extent that it has stated in Recital 31 of the AFIR that the development of non-grid and off-grid infrastructure for electric vehicles, the interaction of that infrastructure with the electricity system and the rights and responsibilities assigned to the different actors in the electricity mobility market have to be consistent with the principles established by Directive (EU) 2019/944 (Internal Electricity Market Directive).

The AFIR's definition of CPO is much more detailed than, for example, the current definition under German law, where the definition of “operator” follows the usual definition of operators in many areas of public law and in particular the EnWG and the Federal Immission Control Act (*Bundesimmissionsschutzgesetz* – **BImSchG**). Thus, the main criterium is the execution of decisive influence on the operation based on the legal, economic and factual circumstances (Section 2 No. 8 of the LSV). **The decisive factor is who bears the technical and operational risk for the charging point.** This definition provides no indication as to whether the CPO must offer recharge services itself or whether it does so in the name of and on behalf of an MSP or if it can hold end-customer relationships for these services.

Currently, the specific business model for how to facilitate charging sessions, is not relevant for determining who qualifies as a CPO. There is also no requirement that the CPO itself directly provides power to the charging customers. It is rather possible to have a CPO that engages MSPs to run the backend and also provide power to the charging customer (in simple terms: The CPO runs the power socket).

The new AFIR definition of CPO is ambiguous and unclear in its scope; it seems to be based (only) from the perspective of a charging station user (i.e. the EV customer) and not from the perspective of the operators of the charging station infrastructure.

The wording of the AFIR thus leaves room for the following interpretations:

If the definition in the AFIR for CPO is understood broadly, the current approach of exercising decisive influence is still comprised by the definition and could also suffice to become a CPO. The definition in Art. 2 (39) AFIR could be understood to exemplify certain business models (e.g., the CPO providing power in the name and on behalf of the MSP), but it does not make these business models statutory for becoming a CPO.

If the definition of CPO were to be understood narrowly, i.e. based strictly on the wording, the CPO would only be one, namely the one who provides the charging service to the end user (Art. 2 (39) of AFIR: “the entity [...] that provides a recharging service to end users”). This would in most cases be the MSP, based on the definition in Art. 2 (36) AFIR: “‘mobility service provider’ means a legal person that provides services in return for remuneration to an end user, including the selling of recharging or refuelling services.” According to such narrow interpretation, being the operator of the backend and holder of the charging customer contracts would be decisive to be the CPO; thus, the MSP might become the operator in many of the current business models.

Based on the impact of such a definition on the qualification of market roles in the electricity market, the EU Commission – the Commission’s Directorate-Generals for Mobility and Transport (**DG Move**) and for Energy (**DG Energy**) along with national regulatory authorities should carefully consider the broad interpretation of the definition, as there is no indication that the AFIR is intended to compromise the current market models.

Alignment with CPOs under RED III

Directive (EU) 2023/2413 regarding the promotion of energy from renewable sources (**RED III**) refers to “economic operators that supply renewable electricity to electric vehicles through public recharging points” (Article 25 (4); OJ L, 2023/2413, October 31, 2023, page 52). It further stipulates that these economic operators will receive credits for supplying renewable energy to the transport sector. The underlying intention of this provision is, in our view, the supply of renewable energy irrespective of the supplier. The use of the term “economic operator” shows that RED III introduces yet another definition or “role,” or simply takes a different view. This might indicate that the CPO does not necessarily need to be the supplier of charging power. This underscores the need for a broad understanding of the definition of the CPO in the AFIR.

Impact on non-public charging stations

There is also a risk that the definitions in the AFIR will also affect non-public recharging infrastructure, even though the AFIR only relates to public recharging points. This could be because the CPO of **non-public** charging stations (behind the meter) are in many EU member states qualified according to the CPO definition of **public** charging stations (even though this does not necessarily apply directly).

If, for example, the MSP becomes the CPO of non-public charging stations (behind the meter), in some European countries (e.g. Netherlands) the power supply behind the meter to the CPO might be prohibited as an unlawful reselling of power if there is no corresponding license. Given that the CPO definition directly defines the role of CPOs according to the electricity market regulatory framework in most EU member states, it potentially alters roles and responsibilities and should thus be considered carefully.

Way forward

The EU Commission and national regulatory authorities should clarify that the definition of CPO is **not** to be understood in a narrow sense and, in particular, not with respect to the non-public sector.

We have received information that the DG Move, which is responsible for the EU Commission's policy on transport for private and professional purposes, is currently preparing a guidance on how the AFIR regulations are to be understood. However, at present we are unable to estimate when such guidance will be published. In particular, it will be interesting to see whether the guidance will be published before the AFIR regulations come into force in April 2024.

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