

## When is the operation of an e-charging station commercial?

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The number of e-vehicles is continuously increasing and the market for e-charging stations - whether in your own garage or in public spaces - is booming. As a result, the number of service providers whose business model consists of the installation, operation, maintenance, billing, etc. of e-charging stations is also on the rise. There is no doubt that they operate commercially. But what about those devices that are operated by local authorities, condominium associations, property management companies or even private property owners? And what does "operate" mean in this context?

"Operation", in this context, refers exclusively to the sale of electricity via e-charging stations and is therefore - if the activity is carried out commercially - subject to the scope of application of the Trade, Commerce and Industry Regulation Act ("GewO")<sup>1</sup>. According to the wording of the GewO, an activity is carried out commercially if it is operated.

- independently (= on one's own account and at one's own risk),
- regularly (= the activity is actually or intentionally designed for a certain duration or for repetition / continuation, whereby a one-off exercise is also sufficient if "according to the circumstances of the case, the intention of repetition can be inferred or if it requires a longer period of time"<sup>2</sup>) and
- with the intention of achieving a profit or other economic advantage, irrespective of the purpose for which it is intended (= not only monetary profit is meant, but also any other positive effect that serves the business objectives, such as the consolidation of existing business relationships, the expansion of the customer base, increasing the level of awareness, etc.<sup>3</sup>).

Incidentally, it makes no difference whether the intended income or other economic advantage from the activity is to be achieved in connection with an activity that falls within the scope of the GewO, or in connection with an activity that is not subject to this federal law.

<sup>1</sup> VwGH 18.9.2019, Ro 2018/04/0010.

<sup>2</sup> § 1 Abs 4 GewO. Dies trifft insbesondere auf die Tätigkeit des Bauträgers zu, die in der Regel die längerfristige Abwicklung eines Bauvorhabens (und seine Verwertung) zum Gegenstand hat, bei der der Bauträger beim Abschluss einer Vielzahl von Vertragsverhältnissen im eigenen oder fremden Namen nach außen in Erscheinung tritt. Die aus den äußeren Umständen abzuleitende Ertragsabsicht ist etwa dann zu bejahen, wenn ein Bauträger im Rahmen seiner Tätigkeit das Ziel verfolgt, Einnahmen aus (nur) einem Bauprojekt zu erzielen, mögen diese aus dem Verkauf des Objektes als Ganzes oder in Einheiten oder durch die Bestandgabe eines (Teil-)Objektes stammen (*Gruber/Pallege-Barfuß*, GewO<sup>7</sup> § 1 (Stand 22.9.2018, rdb.at) § 1 mwN).

<sup>3</sup> VwGH 9.9.2015, Ra 2015/03/0031.

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Conversely, activities that are carried out to satisfy one's own needs, (i.e. the operation of a charging station to charge one's own car) are expressly not commercial.<sup>4</sup>

If a charging station is not only intended for personal use, but also to sell electricity (for a fee, or to achieve another economic advantage), it is considered commercial.

Within its regulatory regime, trade law differentiates between independent and regulated trades. There is an inherent increased risk potential for the latter, which is why the practice of regulated trades is subject to stricter practice requirements (proof of competency) and practice of them requires approval. All trades that are not expressly classified as regulated trades in the GewO are independent trades and do not require any proof of qualifications.

According to the "Federal List of Independent Businesses" (as at August 7, 2023), the "operation of a gas station" is listed as an independent business. It is arguable that this also includes e-charging stations; depending on the design, an increased risk potential cannot be assumed per se. This means that although no proof of qualification is necessary for the exercise, the regulations of the GewO, for example with regard to general exercise requirements (personal authorisation, appointment of commercial managing directors) or business registration, still apply.<sup>5</sup>

Depending on the design and type, an operating system approval procedure may have to be carried out, particularly in cases of "specifically unusual or dangerous local circumstances", for example situations in a hazardous area, the blocking of emergency exits, explosion-proof areas, the blocking of access routes or in cases of (technically) unusual implementation methods.

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<sup>4</sup> The concept of commerciality in the GewO does not correspond to the tax regulations for commercial operations. The sales tax term "commercial or professional activity" also has a different content than the rest of the tax law, so that, for example, private withdrawals can also be subject to sales tax.

<sup>5</sup> The GewO itself regulates in § 157 activities that gas station operators may provide to drivers in addition to dispensing fuel, for example the sale of motor vehicle accessories, travel goods, food, etc. § 52 GewO stipulates an obligation to report the exercise of commercial activities using vending machines intended for self-service by customers. However, charging stations are explicitly excluded from applicability here.

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