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Status of public utilities companies in Germany and in the EU

I. Introduction

In recent years, the sector of public utilities has undergone fundamental changes all over Europe. Whole industries and branches that formerly were state-owned have been privatised. The concept of a European internal market has forced the Member States to open themselves for competition in sectors which over decades have been dominated by monopolies. Similar efforts are taken in countries that are still preparing themselves for membership in the European Union and seeking access to the internal market. Special problems arise in the so-called network-markets. Electricity, gas, telecommunication, postal services and railways have in common that all of them depend on the use of networks. Therefore, effective competition in these areas presupposes free access to such networks and their utilisation by non-owners at fair and transparent prices. So far, for a number of reasons this has proved extremely difficult to achieve. Another obstacle is seen in the relatively small number of providers who are able to dictate their conditions to all.

Pars pro toto, this contribution deals with the impact European legislation had on the German energy sector (electricity and gas) as well as on German railways.[1)] As regards energy, the German Federal government is at present debating on a long-term concept for the period until the year 2020. It can hardly be disputed that until now, there is no real competition in Germany in the areas of electricity and gas, although in theory monopolies no longer exist. Especially on the gas market concentration is too high to allow for any serious

1. German legislation is now easily accessible via internet, under www.gesetze-im-internet.de.

competition. Prices know only one direction: upward. What irritates customers most is the fact that energy prices in Germany are well above the European average.

Therefore, and in accordance with European directives, in 2005 a new regulatory authority has been created in Germany: the "Federal Networks Agency for Electricity, Gas, Telecommunication, Post and Railways" (Bundesnetzagentur für Elektrizität, Gas, Telekommunikation,[2] Post[3] und Eisenbahnen). The Federal Networks Agency is an independent and neutral supreme authority within the scope of business of the Federal Ministry of Economy and Technology which has its seat in the former capital Bonn. Its main task is to provide for more liberalisation and deregulation in the respective markets and to implement the European directives mentioned below (see II 1). By the way, its predecessor was the former regulatory authority for Post and Telecom. In 2005, the new Agency was charged with regulating also the network supply with electricity and gas. Starting from 1 January 2006, it has in addition become competent for the regulation of the railway system. The Agency also runs a hotline for consumers' questions and complaints.

II. Electricity and gas

1. European law

In its endeavours to create an internal market in electricity, the European Union has set a legal framework in the directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, which has been replaced by the homonymous directive 2003/54/EC of 26 June 2003.[4]

The directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply[5] has established a framework for a competitive internal gas market.

2. The German reform of 1998

For Germany, these directives triggered far-reaching changes for the providers of electricity and gas. A new Law on Electricity and Gas Supply (Energy industry act = "Energiewirtschaftsgesetz") went into force on 29 April 1998, abolishing a more than 60 years old monopoly in the field of electricity. Before, each energy provider had a supply area for himself, in which he held an area monopoly that was recognised by law. In 1998, these closed supply areas were eliminated. At least de iure, the energy markets have thus been completely opened for competition. The practical results, however, have been comparatively modest so far, as can be seen from the high prices the customers still have to pay. The 1998-system was based on the principle voluntary self-control which did not produce lasting results.

2. See Telekommunikationsgesetz (TKG) of 22 June 2004, BGBl. I 2004 p.1190.
3. See Postgesetz (PostG) of 22 December 1997, BGBl. I 1997 p. 3294.
4. O.J. 15.7.2003 L 176/37.
5. O.J. 29.4.2004 L 127/92.

3. The German reform of 2005

The Energy industry act 1998 has been replaced by the current Law on Electricity and Gas Supply (EnWG) of 7 July 2005.[6] The main changes in comparison with the 1998 legislation are the following:

- All network operators are now obliged by law to make available their networks to all customers for an appropriate money consideration, without any discrimination.
- Access to the networks is regulated (and no longer negotiated by associations).
- The network operators may charge only such money consideration as has been approved ex-ante on the basis of special regulations (e.g. for gas see Regulation on considerations for access to gas supply networks (Gasnetzentgeltverordnung.[7].
- The regulatory authorities supervise the network operators. Authorities may be invoked by the customers for settling disputes quickly.
- The big energy providers must separate their network area from all their other economic activities (so-called unbundling), so that the customers shall have different contact persons within one and the same utilities company for contracts to supply and for contracts on network utilisation/network connection.
- Access to gas networks has been reformed completely. The customer only needs a contract on feeding in and a contract on discharging with the two respective network operators in order to get access to all German gas networks.

Starting from May 2006, all electricity network tariffs must be approved in advance by the Federal Network Agency. To this purpose, all of the (more than 900) operators had to apply for an approval of the network tariffs. A similar system of approved network tariffs shall apply for gas network operators.

Until 1 July 2007, household-tariffs for electricity in their total height have to be approved by the Ministers of Economy of the Länder. In future, control shall be restricted to network tariffs only. Gas prices in their total height are and shall be exempt of any approval.

Under the new EnWG, there are two separate fields of regulation, namely electricity and gas networks, as well as electricity and gas products.

a) Electricity and gas networks

For the networks, monopolies still exists in practice, because as a rule there is only a single provider available. The utilization and the network connection are based on contracts. The statutory source can be found in the EnWG and in a number of regulations on the access, power connection and remuneration for using the networks. The competence lies with the Federal networks agency and with the corresponding Länder authorities.

6. Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG), BGBl. (Bundesgesetzblatt = Federal Law Gazette) I 2005 p. 1970.
7. Verordnung über die Entgelte für den Zugang zu Gasversorgungsnetzen – GasNEV – of 25 July 2005, BGBl. I 2005 p. 2197.

In a recent decision, the Appellate Court of Düsseldorf [8)] has obliged the grid gas networks operators to report to the Federal Networks Agency in detail on the composition of gas prices. All operators have been requested to provide the Agency with the relevant information.

b) Electricity and gas products

As regards the products of electricity and gas, several traders are in competition with each other. Delivery is based on supply contracts for electricity or gas. The legal basis is the Law against restraint of competition (Gesetz gegen Wettbewerbsbeschränkungen).[9)] The competent authorities are the Federal Cartel Office and the Länder-Cartel-Authorities.

4. Electricity and gas companies

So far, most of the electricity providers in Germany have networks of their own. After the first reform of 1998, approximately 100 new providers appeared on the scene, trying to offer cheaper energy, but excessive network user fees made most of them un-competitive, so that only six network-independent suppliers of electricity managed to remain in business. As regards gas, until now consumers were not allowed to change their supplier, but after dramatic increase of prices in recent times, this system came under heavy pressure and is being changed. Still, the situation on the gas market for private households does not differ much from the times before liberalisation.

Leading energy provider in Germany is E.ON AG (Düsseldorf) which has been formed in 2000 as a result of a merger between former VEB and VIAG and has a strong position not only in the German gas and electricity supply, but also worldwide. In fact, E.ON AG is at the same time the world's largest investor-owned power and gas company, operating in more than 20 European countries (including Central and Eastern Europe) and in the United States. Energy providers in Germany are mostly organized in the "Verband der Verbundunternehmen und Regionalen Energieversorger in Deutschland" (VRE).

The biggest electricity providers in Germany today are E.ON Energie AG, RWE, EnBW and Vattenfall (as the four "energy giants"), who set the rules. Altogether, approximately 950 operators of electricity networks exist in Germany, most of them organized in the German Electricity Association (Verband der Elektrizitätswirtschaft - VDEW - e.V.).

The leading position in gas industry is held by E.ON Ruhrgas. Current statistics show approximately 700 operators of gas networks in Germany.

Many companies operate on the regional or municipal level only. E.ON Hanse AG is among the largest regional energy providers in Germany, offering electricity and gas, but also heat etc.

Stadtwerke München (Munich Cities Utilities SWM) may serve as an example of a service provider on the level of municipalities, since it is one of the largest in the country.

8. SPIEGEL ONLINE, 13 April 2006.
9. Gesetz gegen Wettbewerbsbeschränkungen (GWB), revised text of 15 July 2005, BGBl. I 2005 p. 2114.

SWM is organized as a limited liability company, with the city of Munich as sole associate. Its scope of activity includes, inter alia distribution of gas and electricity.

III. Railways

1. European guidelines

Railway reform in Europe goes mainly back to the directive 91/440/EEC of 29 July 1991 on the development of the Community's railways[10)] and other directives adopted in the nineties. They have since been supplemented by infrastructure package directives (First Railway Package) and the Second Railway Package Directives. One key issue is the separation of network and operation of railways. Another is the creation of an entire network of European track systems until 15 March 2008.

2. The German railway reform

The railway age in Germany began with the opening of the famous line section between Nuremberg and Fuerth in the year 1835. Since 1886, German railways have been almost exclusively state-owned. The year of 1949 marked for the Federal Republic of Germany the formation of the Deutsche Bundesbahn (German Federal Railways), whereas the German Democratic Republic (DDR) kept the former "Reichsbahn". Both Bundesbahn and Reichsbahn were state-owned enterprises. After the German reunification, Bundesbahn and Reichsbahn were at first kept separate. In 1994, they were merged and the Deutsche Bahn AG was founded. In order to do this and to convert them into a business enterprise, as a first step for privatisation, the German constitution (Grundgesetz) had to be changed (see the new articles 87 letter e and 143a GG).

In 1996, competence for short-distance rail traffic was transferred to the Länder, and since then the Deutsche Bahn is faced with growing competition from private business rivals. Privat railways are normally organized in the form of capital companies, whose registered capital is held by private investors, but sometimes also by public authorities (Länder, districts, cities etc.). Some railways are even own establishments of a municipality subject to public law. The private railways are members of the Union of German Transportation Companies (Verband Deutscher Verkehrsunternehmen – VDV).

Initially, the Deutsche Bundesbahn had to struggle with enormous deficits which have however been largely outsourced to the State. Privatisation is intended for around 2008, but the concept is not clear yet. Whereas the management of Deutsche Bahn AG plans to privatise also the tracks and supports an integrated system, many political experts in the field of transport favour a concept under which the Federal State shall remain the sole owner of all tracks and only the operation of the railways shall be privatised. Anyway, in the not so far future shares of the Deutsche Bundesbahn AG shall be traded at the stock-exchange.

10. O.J. 24.8.1991 L 237/25.

Access to the railway-network is guaranteed to the competitors of Deutsche Bahn AG by law. Starting from 1 January 2006, the Federal Network Agency (see above I) shall also be competent for supervising access to the railway-infrastructure. Details are regulated in the Regulation on non-discriminatory access to the railway-infrastructure and on the principles for charging fees for the use of the railway-infrastructure (Eisenbahninfrastruktur-Benutzungsverordnung - EIBV) which went into force on 1 August 2005.[11)]

11. BGBl I 2005 p. 1566.