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TITLE OF THE RESEARCH PAPER: Do the 1998 Amendments of both the German Energy Industry Act and the Antitrust Act Provide for the Effective Liberalisation of the Energy Sector so as to Increase Compliance with European Competition Law in order to Enhance the Innovative Restructuring of European Energy Undertakings and to Improve the Utility Functions of their Business Consumers Seeking for Competitive Advantages by Cheaper Systems of Secure Energy Supply ?

ABSTRACT OF THE PAPER:

This research paper examines the process of the liberalisation of the German Energy Industries within the mid and the end 1990s. It highlights the progress with respect to the reduction of coal subsidies, the Feeding-In of Electricity Acts, the Energy Industry Act of 1998 and the 1998 reform of the Antitrust Act and underlines the progressive effects that were triggered by primary and secondary European Law, accompanied by the essential facilities doctrine. Great opportunities arise but remaining deficiencies regarding the gas industry are not neglected.

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STATEMENT OF ORIGINALITY

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Research Paper

Do the 1998 Amendments of both the German Energy Industry Act and the Antitrust Act Provide for the Effective Liberalisation of the Energy Sector so as to Increase Compliance with European Competition Law in order to Enhance the Innovative Restructuring of European Energy Undertakings and to Improve the Utility Functions of their Business Consumers Seeking for Competitive Advantages by Cheaper Systems of Secure Energy Supply ?

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LL.M. Programme

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Abbreviations

EC	European Communities
ECSCT	Treaty Establishing the European Coal and Steel Community, as Amended by the Treaty of Amsterdam
ECT	Treaty Establishing the European Economic Community, as Amended by the Treaty of Amsterdam
EnWG 1935	German Energy Industry Act of 13 December 1935, as lastly Amended in December 1977
EnWG 1998	German Energy Industry Act of 24 April 1998, as Amended in August 1998
Euratom Treaty	Treaty Establishing the European Atomic Energy Community, as Amended by the Treaty of Amsterdam
FEA1990	Feeding of Electricity Act of 7 December 1990
FEA1998	Feeding of Electricity Act of 7 December 1990, as Amended on 24 April 1998
Framework Bill	Framework Bill Regarding the Restructuring of the Energy Industry Law of 24 April 1998
GWB 1957	German Antitrust Act of 27 July 1957
GWB 1990	German Antitrust Act of 20 February 1990
GWB 1998	German Antitrust Act of 26 August 1998

GVSt	General Association of the German Coal Mining Industry [Gesamtverband des Deutschen Steinkohlebergbaus]
IEMD	Internal Electricity Market Directive
IGMD	Internal Gas Market Directive
MW	mega Watt
Reg.17	Council Regulation No. 17 of 6 February 1962
tce	tonnes of coal equivalent
TPA	Third Party Access
TWh	tera watt hour
VDEW	Association of public electricity utilities [Vereinigung Deutscher Elektrizitätswerke]
VIK	Association of Industrial Auto-Producers of Electricity [Vereinigung Industrielle Kraftwirtschaft]

Definitions

Auto-Producer	The term describes an undertaking generating electricity primarily designated for its own consumption.
Public Utilities	For the purpose of this paper, the expression public utilities refers to undertakings generating, transmitting or distributing, electricity or commodities for the general public. Therefore, the term is generally not related to public ownership or to a conduct of the business by means of administrative orders. However, there are three exceptions: Supply undertakings are included if they are either owned by public bodies, if they have strong capital links with the abovementioned grid companies or if their capacity exceeds 5 MW. This methodology is based on Section 1 2n Sentence No. 2 of the Feeding of Electricity Act of 1990. In a broader sense, it includes companies operating in the water, transport and telecommunications sector, too.

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Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning Common Rules for the Internal Market in Electricity, O.J. L 027, 30/01/1997, p 20.

Kommentar:

Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 Concerning Common Rules for the Internal Market in Natural Gas, O.J. L 204, 21/07/1998, p 1 (not yet completely implemented).

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1. Introduction

This paper will discuss the 1998 alterations of the Energy Industry Act of 1935, as heretofore lastly amended in 1977[1] [EnWG 1935], of the German Antitrust Act of 1957[2] [GWB 1957] and of the Antitrust Act of 1990, as hitherto lastly changed in 1997[3] [GWB 1990] as to whether the new Energy Industry Act of April 1998, as altered in August 1998[4] [EnWG 1998], the 1998 amendments of the GWB 1990[5] and finally the new Antitrust Act of August 1998[6] [GWB 1998]

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[1] Energy Industry Act of 13 December 1935, Law Gazette 1935 I 1451, Federal Law Gazette III 752-1 [Gesetz zur Förderung der Energiewirtschaft (Energiewirtschaftsgesetz) vom 13. Dezember 1935]; as Amended by Section 47 International Economy Act of 28 April 1961, Federal Law Gazette 1961 I 481; as Amended by Art. 193 Introductory Act regarding the Penal Code of 2 March 1974, Federal Law Gazette 1974 I 469; as Amended by Art. 18 Flexible Competence Act of 10 March 1975, Federal Law Gazette 1975 I 685; as Amended by Section 26 of General Contract Terms Act of 9 December 1976 Federal Law Gazette 1976 I 3317; as Amended by Art. 95 Nr. 9 Introductory Act regarding taxation procedures of 14 December 1976, Federal Law Gazette 1976 I 3341; as Amended by Art. 3 Energy Reform Act of 19 December 1977, Federal Law Gazette 1977 I 2750 (hereinafter, EnWG, 1977).

[2] Antitrust Act of 27 July 1957 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1957 I 1081 (hereinafter, GWB 1957).

[3] Antitrust Act of 20 February 1990 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1990 I 235; as Amended by Simplicity of Administration of Justice Act of 17 December 1990, Federal Law Gazette 1990 I 2847; as Amended by Alteration of Economic Statutes Act of 21 December 1992, Federal Law Gazette 1992 I 2133; as Amended by European Economic Area Implementation Law of 27 April 1993, Federal Law Gazette 1993 I 512; as Amended by Railway Reform Act of 27 December 1993, Federal Law Gazette 1993 I 2378; as Amended by Implementation Act Regarding the Berlin-Bonn Decision of 26 April 1994, Federal Law Gazette 1994 I 918; as Amended by Act Regarding Legal Professions of 2 September 1994, Federal Law Gazette 1994 I 2278; as Amended by Telecommunications Reform Act of 14 September 1994, Federal Law Gazette 1994 I 2325; as Amended by Companies Transformation Act of 28 October 1994, Federal Law Gazette 1994 I 3210; as Amended by Anti Corruption Act of 13 August 1997, Federal Law Gazette 1997 I 2038; as Amended by Communications Act of 17 December 1997, Federal Law Gazette 1997 I 3108; as Amended by Arbitration Reform Act of 22 December 1997, Federal Law Gazette 1997 I 3224 (hereinafter GWB, 1990).

[4] Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730 vom 24. April 1998; as Amended on 26 August 1998, Federal Law Gazette 1998 I 2521 [hereinafter EnWG 1998]. The EnWG1998 was introduced as Art. 1 of the Framework Bill Regarding the Restructruring of the Energy Industry Law [Gesetz zur Neuregelung des Energiewirtschaftsrechts], Federal Law Gazette 1998 I 730 (hereinafter, Framework Bill).

[5] Antitrust Act of 20 February 1990 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1990 I 235; as in 1998 Amended by Administration of fines Act of 26 January 1998, Federal Law Gazette 1998 I 156; as lastly Amended by the Energy Industry Act of 24 April 1998, Federal Law Gazette 1998 I 730.

[6] Antitrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521.

reform the regulatory framework of the energy sector to an extent that facilitates compliance not only of domestic cartel authorities but also of established and new businesses, dedicated to the energy industry either on the federal, regional or local levels, with the competition law regime of the European Communities [EC].

This approach may be primarily justified by the interests of industrial and commercial consumers whose competitiveness on global markets will benefit from purely market based energy prices[7] as new technical equipment allows flexible but efficient small scale power stations with high security of supply making obsolete major parts of the former tools of close public monitoring regarding the sector. Secondly, household consumers will see increasing utility functions owing to gains in productive efficiency that are passed to them which again will increase the allocative efficiency enabling them to spend higher proportions of their incomes for non basic needs.

Alternatively, the abolishment of Section 103 GWB 1990 with respect to the energy sector[8] - that formerly dispensed anti-competitive agreements of public utilities[9] from the general prohibition of cartels pursuant to Section 1 GWB 1990 - may alleviate the enforcement of environmental regulation as competitive forces create pressure to utilise the latest technology in order to increase energy efficiency and fuel economy which usually leads to lower emissions, too.

[7] e.g. Abolition of the former secondary legislation regarding electricity tariffs [Bundestarifordnung Elektrizität]that provided for detailed pricing provisions and was based on the EnWG 1935.
[8] infra 5.2 and 6.2.2: Section 103 b GWB1990 was included in April 1998 so that Section 103 GWB1990 was no longer applicable for electricity and gas.
[9] q.v. Definitions Section.

This research question may additionally be backed by both the interests of national and foreign energy investors - either located within or outside the EC - who will benefit from the German energy liberalisation if the former leads to increased tendencies towards market opening and higher levels of compliance of the domestic legislation with EC competition law. This shall improve the notion of legal security that was hitherto weakened by the amount of unpredictability previously attributed to the sector with respect to the decisions of ambient authorities and national courts obviously circumventing the wording of Art. 81 et seq. of the Treaty establishing the European Economic Community[10][ECT].

Another key-element for justifying the analysis is that the modifications of the traditional regulatory environment of the German energy industry may facilitate the convergence of competition laws of the member states of the EC as it is based on general EC Competition law and includes the pre-requisites of the Internal Electricity Market Directive[11][IEMD] and the Internal Gas Market Directive[12][IGMD] without abandoning the efficiency of administrative procedures already in place by avoiding an absolute legal harmonisation. This approach also takes the subsidiarity principle into account.

[10] Treaty Establishing the European Economic Community, March 25, 1957, 298 UNTS 11 (entered into force January 1, 1958) as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, ECT).

[11] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 027, 30/01/1997, p 20 (hereinafter, IEMD).

[12] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21/07/98, p 1(not yet completely implemented) (hereinafter, IGMD).

Subsequently, it has to be stressed that regulation is only a pre-requisite of the creation of an internal energy market. The real challenge is whether cross-border activities of national and international investors are subject to cost saving potentials to an extent that will help to overcome autonomously liberalised national energy markets in order to establish an internal European one with even greater economic benefits[13].

The research question will be addressed by means of a description of the traditional industry structure and the factual application of the former regulatory framework. Then, a detailed analysis of the features of the 1998 reforms is undertaken with due respect towards the EC competition law framework including the IEMD, the IGMD and the essential facilities doctrine.

It will be concluded that the recent reforms realise sufficient cost saving potentials in order to boost cross border energy investments in order to assist in creating the internal energy market.

[13] European Commission, Opening up to Choice The Single Electricity Market, Brussels 1 January 1999, p 2-3 and p 20; Commission, Report From the Commission the Council and the European Parliament on State of Liberalisation of the Energy Markets, COM (1998) 212 final, Brussels 7 April 1998, p 3; Commission, 2nd Report to the Council and the European Parliament on Harmonisation Requirements Directive 96/92/EC Concerning Common Rules for the Internal Market in Electricity, COM (1999) COM (199)) 203 final, p 3.

2. Background: Structure of the German Energy Industry until 1998

The traditional energy industry structure shall be initially reported with regard to public or private ownership, public or private means of management, regulatory regimes and the scope for the applicability of competition law.

Although the exploration, exploitation of all fossil fuel sources and the related commercial onshore[14] and offshore[15] activities are regulated by the Natural Resources Act of 1980[16] accompanied by a plethora of provisions including company, labour, technical and environmental legislation[17], a careful analysis of the German energy industry before 1998 has to consider the fact that other elements of the regulatory regime contain profound dis-congruencies regarding different fuel sources and purposes of primary and secondary energy production[18].

2.1 Oil industry

The oil industry in the Germany is traditionally exclusively privately owned and managed[19]. In contrast to many other energy related activities, general antitrust

[14] Land and territorial sea.
[15] Exclusive economic zone and continental shelf.
[16] Natural Resources Act of 13 August 1980 [Bundesberggesetz], Federal Law Gazette 1980 I 1310; as Amended on 26 January 1998, Federal Law Gazette 1998 I 164.
[17] e.g. Federal Aerial Pollutants' Prevention Act of 15 March 1974 [Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge(Bundes-Immissionsschutzgesetz - BImSchG)], Federal Law Gazette 1974 I 721, 1193, as lastly Amended on 19 October 1998, Federal Law Gazette 1998 I 3178; Environmental Impact Assessment Law of 12 February 1990 [Gesetz über die Umweltverträglichkeitsprüfung], Federal Law Gazette 1990 I 205, as lastly Amended on 18 August 1997, Federal Law Gazette 1997 I 2081: This statute implements the Environmental Impact Assessment Directives. For several years, the introduction of a comprehensive Environmental Code is discussed and a draft law is already published.
[18] Purposes include electricity generation, industrial/household heat, cold, powering of combustion engines.
[19] Matlary, J.H., Energy Policy in the European Union (1st ed.) (London, U.K., MacMillan Press Ltd, 1997) pp 32-34.

principles apply since the Cartel Law of 1923[20] and GWB 1957 came into effect[21]. The domestic principles are modified by the direct effect of EC competition law[22] with respect to measures having an appreciable effect on trade between Member States. As the oil industry was virtually ignored as a matter of supranational EC policies prior to the first oil crisis of 1973, regulatory modifications were introduced by the Security of Petroleum Supply Act[23], which implements the (amended) Oil Stocks Directive[24], by Directives limiting the usage of fuel oil for electricity generation[25] and demanding minimum fuel stocks attached to thermal power plants[26]. Fuel oil accounts for 1.1 % of electricity generation in 1992[27].

[20] Cartel Law of 2 November 1923 [Notverordnung vom 2.11.1923], Law Gazette 1923 I 1067, 1090: It provided for a regulatory regime that allowed the authorities to prohibit abuses of dominant positions that was never implemented properly by the authorities.
[21] However, in 1933, statutes were introduced that obliged industrial undertakings to conclude mandatory cartel agreements with competitiors in order to facilitate state control on the economy. This development was stopped by the anti cartel laws of the allies on which the GWB 1957 itself is based. e.g. U.S. Military Government Act No. 56 of 28 January 1947; UK Ordinance No. 96 of 9 June 1947; French Ordinance No. 96 of 9 June 1947; q.v. V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 13.
[22] Direct effect of primary ec law applies if a norm has a clear wording, is not subject of many exemptions, intends to serve individual's interests (controversial!) and effective judicial review is applicable; q.v. L. Krämer, Focus on European Environmental Law (2nd ed.) (London, U.K., Sweet & Maxwell, 1997) p 79; direct Effect of secondary q.v. L. Krämer, Focus on European Environmental Law (2nd ed.) (London, U.K., Sweet & Maxwell, 1997) p 80; R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 394.
[23] Security of Petrol Supply Act of 20 December 1974 [Gesetz zur Sicherung der Energieversorgung bei Gefährdung oder Störung der Einfuhren von Erdöl, Erdölerzeugnissen oder Erdgas (Energiesicherungsgesetz 1975), Federal Law Gazette 1974 I 3681, as lastly Amended on 26 August 1998, Federal Law Gazette 1998 I 2521.
[24]Council Directive 98/93/EC of 14 December 1998 amending Directive 68/414/EEC Imposing an Obligation on Member States of the EEC to Maintain Minimum Stocks of Crude Oil and/or Petroleum Products O.J. L 358, 31/12/98 p 100 (hereinafter, Oil Stocks Directive).
[25] Council Directive 75/406/EEC on Restrictions on the Use of fuel oil O.J. L 178 14/0775 p 26.
[26] Council Directive 75/339/EEC Obliging the Member States to Maintain Minimum Stocks of Fossil Fuel at Thermal Power Stations, OJ L 153 13/06/75 p 35.
[27] q.v. Annexes at 8.4 .

In the 1990s, the competitive environment of the sector is exemplified by both flexible developments of oil refineries[28] and the divestiture of the formerly state promoted upstream company Deminex[29].

Therefore, it could be summarised that the oil business itself is not directly affected by the recent regulatory reforms. However it must be stressed that oil companies will gain opportunities to invest in electricity and gas companies owing to liberalised markets. The opportunity to build up capital links is enhanced by the financial weaknesses of the municipalities who used to operate the local supply businesses for electricity and gas.

2.2 Lignite Industry

The state owned open cast lignite industry in the south east the GDR was privatised after the re-unification and contracted by 73% until 1996[30]. In Western Germany, private ownership is available[31] but it is nowadays dominated by Rheinbraun[32]. Regarding electricity generation, inter fuel competition exists with respect to nuclear, oil and natural gas and lignite accounts for 139 TWh in 1997[33]. However, the regulatory regime prevents the entities public supplying electricity from competing against each others owing to Section 103 both of GWB 1957 and GWB 1990[34].

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[28] Some companies wer merging due to overcapacities (Karlsruhe) whereas a new refinery was recently built (Elf Mittteldeutsche Erdölraffinerie) and others expanded (Wilhelmshaven).
[29] Deminex was established in 1969 and was run with government support until 1989 in order to secure petroleum supply. It was broken up in 1998; q.v. V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 16 (January 1999).
[30] V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 11 (January 1999).
[31] The major production area is located in North Rhine-Wesphalia and a new project "Garzweiler II" was heavily disputed within the government of the federal state.
[32] V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 11 (January 1999): Rheinbraun produces 96% of Norh Rhine-Westphalian Lignite and 55% of the privatised undertakings Laubag. Rheinbraun is a subsidiary of the grid company RWE.
[33] 136 TWh accounted for 30% of electricity generation in 1992; q.v. Annex.
[34] The dogmatic structure of section 103 GWB 1957/1990 is analysed infra, at 3.4 .

2.3 Hard Coal Producers

Although the hard coal industry is privately owned, its structure is weakened by the factual monopoly of the Ruhrkohle AG[35]. From the very beginning, the Treaty Establishing the European Coal and Steel Community[36] [ECSCT] had central influence on the industry as the High Authority pursued a liberal policy[37] against the cartels of coal producers in North Rhine-Westphalia in 1952[38]. However, its efficacy has been weakened significantly since the beginning of over-supply crises in 1958/59 when France and Germany protected domestic coal against ECSC imports and the High Authority's attempt to remove these barriers was blocked[39] as Italy and The Netherlands were even more interested in cheaper world market imports. Parallely, the Members failed to agree on a common subsidies policy[40]. The most obvious reasons for the decline of the ECSC are related to the cheap oil imports in the 1960s and macroeconomic decline of the steel industry which made the Commission arguing that the treaty

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[35] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 77 (1996). However, 6 different undertakings are operating in the 1980s, q.v Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 15. Recently, Ruhrkohle AG and Saarbergen merged and the new entity is named Deutsche Steinkohle; q.v. V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 11 (January 1999).

[36] Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 UNTS 140 (entered into force July 23, 1952) as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, ECSCT).

[37] Matlary, J.H., Energy Policy in the European Union (1st ed.) (London, U.K., MacMillan Press Ltd, 1997) p 15.

[38] The French cartels of coal producers in Nord/Pas de Calais were dissolved as well.

[39] Matlary, J.H., Energy Policy in the European Union (1st ed.) (London, U.K., MacMillan Press Ltd, 1997) p 15: The High Authority requested emergency powers.

[40] Matlary, J.H., Energy Policy in the European Union (1st ed.) (London, U.K., MacMillan Press Ltd, 1997) p 15.

should expire although some of its supranational powers, the ECSC levy, and the competition regime of Art.65 ECSC will be lost[41].

2.4 Electricity Industry

Since the beginning of the 20th century, the German electricity industry operated by means of demarcation and exclusive concession agreements which created regional and local monopolies regarding public supply of electricity[42]. Parallely, a hybrid structure of private and public ownership evolved: Firstly, nine private undertakings controlled the lion's share[43] of public electricity generation - primarily baseload power stations. These operate the high voltage transmissions grids[44] and generally concentrated on wholesale agreements concluded with regional distribution companies[45]. Secondly, ca. 63 private regional distribution companies own the distribution networks, generally neglect electricity generation[46] and focus on downstream activities like purchases of electricity from generators and enter into wholesale and retail agreements. 57 of these undertakings are controlled by shareholdings of the abovementioned grid companies[47].

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[41] q.v. Commission, Communication From The Commission To The Council And To The European Parliament, Future of the ECSC Treaty, SEC (91) 407 final, Brussels 15 March 1991 p 7-10: The Commission argued in favour of the expiry of the ECSCT in July 2002 as the loss of some of the more comprehensive supranational elements including the ECSC levy and Art. 65 ECSCT is compensated by the abolition of obsololet regimes and the possibility of incorporating these tools into the ECT by means of secondary legislation pursuant to Art. 308 ECT.
[42] G. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 367.
[43] 455.5 TWH were publicly generated in 1994. Around 366 TWH, i.e. 80% is produced by the grid companies.
[44] RWE, Preußen Elektra, Bayernwerk, VEAG, VEW, HEW, EVS, Badenwerk, BEWAG. They are called "Verbundunternehmen".
[45] VEAG, Bayernwerk, Preußen Elektra restrain from delivering final consumers whereas HEW and BEWAG regularly supply final consumers owing to geographic demarcations.
[46] Additionally the existing capacities are only accounting for peak-load.
[47] L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 235.

Thirdly, around 570 horizontally integrated companies owned by municipalities are generally responsible for low voltage grid and the local supply of electricity, gas, water and public transport which rarely engage in generation. Growing budgetary pressures in the 1990s initiated a tendency to reduce the public ownership[48]. Approximately 10% of the local utilities are linked to the national grid companies[49]. A mandatory privatisation of these structures is extremely unlikely: Although an expropriation would definitely no contravene the constitutional property guarantee as the Federal constitutional court held that municipalities are not entitled to invoke civil rights[50], municipalities are granted a constitutional right to organise local affairs in full discretion and responsibility[51] and energy supply is deemed to belong to this category.

2.5 Natural Gas Industry

The gas industry in Germany can be characterised as follows: Two private companies - BEB[52] and Mobil domestically produce and import natural gas. Additionally, Seven other private supra-regional companies import the commodity of which Ruhrgas is dominating the transmission business. It has an important minority shareholding in the second largest transmission undertaking VNG, acquired capital links in Central Europe, engaged in upstream activities in

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[48] This can be described as creeping privatisation: G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 83 (1996).

[49] L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 235.

[50] BVerfGE 61, 82. It is regarded as a legal confusion if a civil right designed to protect individuals against the state is invoked by a municipality. Although it is granted a separate public legal personality its resources are strictly bound to attain public goals which are defined by the federal or regional governments. Art. 14 I 1 of the Constitution is not applicable.

[51] Art. 28 of the Constitution [Grundgesetz]. With respect to these matters, the Federal States are only allowed to implement a legal review and are prevented from implementing own policies.

[52] BEB is a JV between Esso and Shell; q.v. V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 14 (January 1999).

the North Sea and participates in the Interconnector pipeline[53]. However, it is recently challenged by Wintershall which constructed an own set of 1500km transmission pipelines in order to reach its consumers[54]. More than 700 regional distribution and local supply undertakings exist[55]. The latter are identical with the horizontally integrated state owned local electricity supply undertakings. According to the electricity sector, the municipalities are privatising the entities and the shares are mainly purchased by the influential supra-regional transmission companies so as to create vertically integrated dominating entities.

2.6 Nuclear Industry

Apart from scientific projects the nuclear industry is privately owned and conducted by the electricity companies who operate the transmission grids. The safety, technical and environmental aspects are governed by the Nuclear Energy Act[56]. The competition law regime was determined by the Section 103 GWB 1957/1990. Although the Euratom Treaty[57] was designed to provide for integrated and co-ordinated research activities[58] and a common market[59] its efficiency is poor owing to divergent interests of the founders. Germany was

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[53] V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 14 (January 1999).
[54] Wintershall is a JV between BASF and GAZPROM.
[55] V.Baum, *Praise for the country's energy sector is hard-earned*, Petroleum Economist 14 (January 1999).
[56] Nuclear Energy Act of 15 July 1985 [Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz)], Federal Law Gazette 1985 I 1565; as lastly Amended on 6 April 1998, Federal Law Gazette 1998 I 694. The first Nuclear Act was issued on 23 December 1959, q.v. Federal Law Gazette 1959 I 814.
[57] Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 UNTS 259 (entry into force January 1, 1958), as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, Euratom Treaty).
[58] Art. 4 et seq. Euratom Treaty. Especially France was interested in research regarding enrichment plants: Matlary, J.H., Energy Policy in the European Union (1st ed.) (London, U.K., MacMillan Press Ltd, 1997) p 17.
[59] Art. 92 et seq. Euratom Treaty.

especially interested in cheap uranium purchases from the U.S. whereas Italy focused on domestic research programmes. The development of the German nuclear sector was later impeded by the government support for the coal industry: Licensing of new power stations partly seemed to depend on contracting obligations to purchase hard coal for public electricity generation from the coal producers[60]. Other drawbacks arose from the public awareness regarding insufficient safety regulations since the late 1970s that led to massive protests against the construction of new reactors[61] in the early 1980s. In the aftermath of Chernobyl accident and the inappropriate reaction of the authorities[62], the long projected reprocessing plant in Wackersdorf/Bavaria was highly disputed, too, before it was abandoned on economical considerations. In recent years, even the regular transports to reprocessing sites in France or the U.K. and to final disposal sites in Lower Saxony were disrupted. A major political drawback happened when scientists discovered that the transportation cases indeed emitted high doses of radioactivity[63]. The business environment is becoming increasingly difficult owing to the negotiations between the federal government and the plant operators regarding the closure of the remaining installations which are affected by the recent criticisms against the reprocessing standards of British Nuclear Fuels. In 1992, 150 GWh were generated from

[60] Statement of the Electricity Supply Companies in the "Jahrhundertvertrag" proceedings of the Commission, q.v. Commission Decision of 22 December 1992 Relating to a Proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02/03/93 p 16 at p 20.
[61] e.g. civil turmoil against the construction of the Brokdorf reactor near Hamburg.
[62] q.v. F. Vester, Bilanz einer Ver(w)irrung, Berichte und Argumente zum Umdenken nach Tschernobyl (München, Germany, Heyne, 1986) p 21.
[63] The cases are called "Castor-Behälter". The then Minister of Environment Ms Merkel was accused of utter mis-management. Recently, she became the party leader of the CDU in opposition.

nuclear plants[64].

2.7 Renewables

With respect to renewable energy sources it has to be differentiated between well established hydroelectric power stations without significant enhancement capabilities[65] and wind, solar, waste[66] and biomass power stations of which the economic viability still depends on further research. Within the second group solar power is promoted by investment promotion schemes[67]. Generally, generation by the second group is facilitated by the Feeding of Electricity Act[68] [FEA1990/1998] if the sites are not operated by public utilities[69]. The law obliges the ambient grid companies to purchase power generated from renewable fuel sources at relatively high prices. Accordingly, the operation of small privately owned wind power stations became lucrative particularly in areas exposed to the sea in northern parts Germany.

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[64] This equaled 32 % of total electricity generation; q.v. Annexes at 8.4 .
[65] The installed capacity accounts for 8351 mw leading to a generation of 4800 GWh in 1992 which equals 4.4 % of total electricity generation: q.v. Annexes.
[66] gas related to sites containing solid or liquid waste; q.v. Section 1 Feeding of Electricity Act of 7 December 1990[Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Stromeinspeisungsgesetz)], Federal Law Gazette 1990 I 2633; as Amended by the Framework Bill.
[67] 1000 Roofs Programme and 100,000 Roofs Programme; q.v. Pielow, J-C., *National Report Germany: The Political Initiatives on Economic and Legal Instruments Concerning the Implementation of the Kyoto Protocol*, International Bar Association Conference Proceeding, Section on Energy and Natural Resources Law, Academic Advisory Group 1998-2000, Mojácar Spain 22 and 23 May 1999, at p 22-23 (Section 3.6.2).
[68] Feeding of Electricity Act of 7 December 1990 [Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Stromeinspeisungsgesetz)], Federal Law Gazette 1990 I 2633; as Amended by the Framework Bill Regarding the Restructruring of the Energy Industry Law of 24 April 1998 [Gesetz zur Neuregelung des Energiewirtschaftsrechts], Federal Law Gazette 1998 I 730 (hereinafter, FEA).
[69] Section 1 2nd sentence No.1-2 FEA; q.v. Section on Definitions.

3. Regulatory framework of the German Energy Industry prior to 1998

This chapter will provide the core features of the former regulatory regime with respect to generation, transmission, distribution of electricity and gas including elements of the usage of the fuel sources of coal, gas and renewables for electricity generation.

3.1 Complex Network of Agreements Promoting the Usage of Domestic Coal for Public or Auto-Generation of Electricity from 1981 to 1995

As early as 1977, the Federal Ministry of Economics promoted a highly complex system of subsidies in order to guarantee mandatory amounts of hard coal used as a fuel source for electricity generation which involved contracts between the coal producers' association[70] [GVSt] and either the association of public electricity utilities[71][VDEW] or the one of auto-producers[72][VIK]. In April 1980, the system was revised by a set of agreements which was called the Century Contract[73].

[70] General Association of the German Coalmining Industry [Gesamtverband des Deutschen Steinkohlebergbaus] (hereinafter, GVSt).
[71] Association of public electricity utilities [Vereinigung Deutscher Elektrizitätswerke] (hereinafter, VDEW). An agreement between GVSt and VDEW on the sale of German Coal was concluded on 10 May 1977 and was designed to operate from 1 January 1978 till 31 December 1987. A similar agreement was made between the GVSt and the steel industry [Hüttenvertrag].
[72] Association of Industrial Auto-Producers of Electricity [Vereinigung Industrielle Kraftwirtschaft] (hereinafter, VIK). An agreement between GVSt and VIK on the sale of German Coal was concluded on 22 August 1977 and was designed to operate from 1 January 1978 till 31 December 1987.
[73] "Jahrhundertvertrag"; q.v. Commission Decision of 22 December 1992 Relating to a Proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 16.

3.1.1 Agreement between GVSt and VDEW

A contract between the GVSt and the VDEW obliged the coal producers and the public utilities to enter into sales agreements regarding 511.5 mega tonnes of coal equivalent [tce][74]. The contract was divided into three five year commitment periods of which the first lasted from January 1981 to December 1985. This period involved 151 mega tce and demanded annual purchases of 30.2 mega tce. The second period lasted from January 1986 to December 1990 and required an even larger sum of 173 mega tce[75]. In practice, the utilities only took delivery of 168 mega tce[76]. It had been concluded that the third period which ran until December 1995 provided for aggregated purchases of 187.5 mega tce - i.e. annually 37.5 mega tce. However, the annual purchase obligation was reduced to 34.4 mega tce as a result of the 1989 coal talks with the government [77]. Additional flexibility was introduced by the covenant that the utilities were obliged to take an annual delivery of a fifth of each commitment period minus 15% whereas the coal producers must offer at least 15% more than their commitment[78]. Differences should be settled by the end of each period. Prices were set by the Federal Minister for Economic Affairs according to the Electricity-From-Coal Law[79].

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[74] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 77 (1996).
[75] i.e. 34.6 mega tce per year.
[76] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 16.
[77] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 15.
[78] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 15. Flexibility allowed to cope with mild, severe climate and expressed the ill-conceived expectation of future competitiveness of domestic coal.
[79] Electricity-from-Coal Act of 12 December 1974, as Amended on 19 April 1990, Federal Law Gazette 1990 I 917.

3.1.2 Agreement between GVSt and VIK

The purchase agreement between GVSt and VIK showed a similar pattern. The VIK members were bound to negotiate sales agreements by 31 December 1980. The first commitment periods from 1980 to December 1988 provided for the annual sale of 8.8 mega tce and the second period until December 1995 for 9.8. mega tce. The flexibility mechanism stated that the minimum purchase obligation equalled 1/15 of the total commitment minus 15%. Although the account had to be settled at the end of the first period a difference of 15% the annual sum could be carried forward into the second period[80]. In 1989, the purchase obligation of the VIK members was reduced to 6.5 mega tce[81].

3.1.3 Compensatory Government Payments

In a second step, the government compensated the utilities so as to offset the differences between the world market price of hard coal and its domestic equivalent for the expensive purchase obligations by means of payments[82]: Firstly, third country imports of coal are subject to a licensing regime under the Law on Tariff Quotas for Solid Fuels[83]. Secondly, the Electricity-From-Coal Act[84] inaugurates a compensatory fund[85] that authorises payments to an utility which enters into a long-term purchase obligation of domestic coal.

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[80] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 15.
[81] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 17.
[82] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 77 (1996).
[83] Licenses are granted pursuant to the Law on Tariff Quotas for Solid Fuels of 15 September 1980, Federal Law Gazette 1980 I 1945.
[84] Electricity-from-Coal Act of 12 December 1974, as Amended on 19 April 1990, Federal Law Gazette 1990 I 917.
[85] "Ausgleichsfonds zur Sicherung des Steinkohlebergbaus".

The payments are calculated on the basis of the difference between the price for domestic coal and the world market prices for fuel oil and coal.

3.1.4 Hard Coal Levy until 1994

Subsequently, the final consumers of electricity were made liable to pay a specific levy[86] in order to establish the abovementioned compensatory fund. However, the system was abandoned owing to a ruling of the federal constitutional court on 11 October 1994 who held that the federal state was not competent to impose a hard coal levy as it infringed its taxation powers pursuant to Art.104a et seq. of the Constitution[87].

3.1.5 Implications of European Law on the Centenary Contract

The Commission has gradually intensified the application of Art. 81 ECT and Art. 66 ECSCT Law with respect to coal subsidies.

The applicability of Art. 81 I ECT or 66 ECSCT was initially disputed as it was claimed that a lack of a EC competition policy would prevent the application of Art. 81 I[88] and others stated that a factual lack of inter EC coal trade would prevent the applicability or that the associations agreements were as such not legally binding on the individual companies[89]. As a matter of last defense it was claimed that Art. 86 II ECT would justify an infringement of Art. 81 I ECT as the agreements were deemed to be a proportional tool to attain the security of supply[90], to avoid stranded investments with respect to major rationalisation

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[86]"Kohlepfennig".
[87] Constitution of 23 May 1949 [Grundgesetz], Federal Law Gazette 1949 I 1; as lastly Amended on 16 July 1998, Federal Law Gazette 1998 I 1822.
[88]J. Seliger, *German Coal Supply Arrangements and the European Internal Market*, JENRL 241 (1989).
[89] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 17.
[90] J. Seliger, *German Coal Supply Arrangements and the European Internal Market*, JENRL 242 (1989).

measures in 1980 and to alleviate social cohesion in the coal regions[91]. Since neither technical reasons nor extreme security of supply considerations of the oil shock era are prevailing anymore[92], it is now common sense that the said contracts in combination with the compensatory scheme interfere with Art. 81 I ECT as they are agreements between undertakings that affect trade between member states. Even if one insists on using the disputed appreciation criterion (rule of reason) in Art. 81 ECT[93], it is fulfilled in these cases. The agreements also intend to reduce the competition on the relevant product market of electricity fuel sources in Germany. Furthermore, it is not relevant whether the association agreements are itself legally binding on the members as they definitely have the rank of gentlemen's agreements which are accepted as subjects of competition law[94].

Therefore, there is no scope for negative clearance procedures under Art.2 Reg.17 but the Commission may use its exclusive competence to grant derogation from Art. 81 I ECT pursuant Art. 81 III ECT and Art. 4-8 Reg.17 provided that the agreements are notified under Art. 4 Reg.17.

On 30 June 1986, the Commission defined common rules governing member states' subsidies with regard to the hard coal industry[95]. The regime covered the

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[91] Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02.03.93 p 17.

[92] The introduction of small highly efficient plants, better information and communications technologies and less urgent security of supply concerns let liberalisation nowadayys prevail over the idea of large scale generation natural monopolies, non storage-ability and internalisation of transactions cost that long supported integrated utilities. An exemption are small isolated systems; q.v. R. Pritchard, *Electricity Industry Reforms in the Aftermath of the Asian Economic Crisis - An Australian Perspective*, OGLTR 244 and 245 (1999).

[93] Any comprehensive consideration of interests within Art. 81 I is opposed by V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 420-421.

[94] G. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 412 and 36.

[95] Statements of the parties; q.v. Commission Decision 2064/86/ECSC of 30 June 1986 Establishing Community Rules for State Aid to the Coal Industry, O.J. L 177, 01.07.86 p 1.

period from July 1986 to December 1993 and intended to oblige the member states to pursue a limit set of objectives while granting subsidies:

- improvement of competitiveness of the addressees
- improvement of security of supply
- expansion of economically viable capacities
- mastering of economic and social cohesion related to the decline of the coal industry

Although the Commission had unconditionally justified the compensatory government payments for 1987 pursuant to Art. 81 III; Art. 4 et seq. Reg.17[96], it attached additional conditions on the dispense that was issued for 1988[97]:

- The Federal government was required to provide a strategy for reducing the state aids.
- A gradual phasing out of compensation payments was mandatory.
- A plan regarding the restructuring, modernisation and rationalisation of the coal industry was demanded.

Later, the government stated that the outcome of the 1991 coal talks had included these pre-requisites. As a result of a court action of the GVSt against the 1988 derogation, the Commission retroactively added million 200 DM[98]. In the same decision payments of DM 4.9 million were derogated for 1989[99]. For 1990, DM 4.6 million were accepted[100]. In late 1992, subsidies for 1991 and

[96] Commission Decision 87/451/ECSC, O.J. L 241, 25/08/87 p 10 and Commission Decision 89/296/ECSC O.J. L 116, 28/04/89 p 52. The derogated payments equal DM 3,793 billion.
[97] Commission Decision 89/296/ECSC, O.J. L 116, 28/04/89 p 52. The Commission approved DM 4.7 billion in grants. This amount was later increased.
[98] Comission Decision 90/632/ECSC O.J. L 346, 11/12/90, p 18: additional DM 200 million.
[99] Comission Decision 90/632/ECSC O.J. L 346, 11/12/90, p 18.
[100] Comission Decision 90/633/ECSC O.J. L 346, 11/12/90, p 20.

1992 were legalised[101]. Finally, the Centenary Contract was itself exempted for a period between June 1989 an December 1995 on the condition that the purchase obligations of the utilities and the auto-producers do not exceed 34.4 mega tce or 6.5 mega tce pursuant to Art. 81 III ECT; Art. 4-8 Reg.17[102].

A new regulatory regime regarding coal subsidies of member states was introduced by the Commission in December 1993 covering the period from 1994 to 2002[103]. Compared with the 1986 system, the criteria which justify subsidies are narrowed down significantly. Art. 2 states that the objectives of the aid must be related to the

- achieving economic viability
- solving social disparities owing to reductions of coal production
- improving environmental standards.

Additionally, it must be distributed equally[104]. Especially, the anti-competitive operating aid which eliminates the difference between operating costs and selling price is limited by a set of narrow criteria in Art. 3[105]. All other aids will be only permissible if the are either related to a closure plan or to exceptional costs or linked to research or improved environmental standards[106].

[101] Commission Decision 93/66/ECSC of 25 November 1992, O.J. L 21, 29/01/93 p 33.
[102] q.v. Art. 1 and 2 of Commission Decision of 22 December relating to a proceeding under Art. 85 of the Treaty and Article 65 of the ECSC Treaty, O.J. L 50, 02/03/93 p 26.
[103] Commission Decision 3632/93/ECSC of 28 December 1993 Establishing Community Rules for State Aid to the Coal Industry, O.J. L 329, 30/12/93, p 12.
[104] Art. 2 II of the abovementioned decision.
[105] The aid must not exceed the foreseeable revenue, must be a subject of an annual review, must not cause a selling price below the world market, must be notified to the Commission and must not affect the competition between coal consumers. Additionally a rationalisation plan is mandatory under Art. 3 II of the abovementioned decision.
[106] Art. 4-7 of the abovementioned decision.

3.2 Hard Coal State Aid Regime from 1996 to 2005

Art.1 of the new Electricity-from-Coal Act of 19 July 1994[107] introduces a greatly simplified system of subsidies for the period from 1996 to 2005. In contrast to its predecessor, it does neither involve the public utilities nor guarantee fixed annual sums of coal sales to the producers. It simply establishes an annual sum of subsidies which shall be used in order to offset the difference between the productions costs and the world market price for coal. Consequently, the commercial risk is turned to the coal producers because the amount of coal that could be sold to the electricity generators on the basis of the world market prices entirely depends on the spread between the former and domestic prices[108]. Additionally, the system gradually reduces the annual sum of state aids[109]. This increases the leverage on producers to improve their competitiveness therefore implementing Art. 2 and 3 of the abovementioned Commission's coal subsidy scheme[110].

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[107] Electricity-from-Coal Act of 19 July 1994 [Gesetz zur Sicherung des Einsatzes von Steinkohle in der Verstromung und zur Änderung des Atomgesetzes und des Stromeinspeisungsgesetzes], Federal Law Gazette 1994 I 1618.

[108] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 78 (1996).

[109] 1996: DM 7.5 billion; 1997-2000 DM 7 billion. If the difference between domestic and world market hard coal stays at DM 200 per t, ca. 32 mega tonnes can be sold at world market prices, q.v.
L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 244.

[110] Commission Decision 3632/93/ECSC of 28 December 1993 Establishing Community Rules for State Aid to the Coal Industry, O.J. L 329, 30/12/93.

3.3 Renewables

Prior to 1990, auto-producers of electricity were allowed to sell excess capacities to the public utilities on the basis of the so called avoided cost principle. This principle was established under section 103 V No. 4 GWB1957/1990 which provides for a specific mechanism against abuses of dominant positions by utilities when these take advantage of anti-competitive agreements that are dispensed from Section 1 GWB 1957/1990 pursuant to Section 103 GWB1957/1990.

Avoided Costs are specified with respect to omitted fuel costs and long term investments by an association agreement between the association of auto-producers and its counterpart of the utilities, the German Grid Association [DVG][111].

As the avoided cost principle does not support the economic operation of small power stations with renewable fuel sources by independent producers[112], the government, interested in increasing the use of renewables, introduced the Feeding-of-Electricity Act of 1990 [FEA1990]. This Act obliged the ambient utilities to purchase power from independent operators of the said power stations at guaranteed prices of 75% of the average electricity price[113]. The latter accounted for DM 0.19 per kWh in 1994[114].

On these grounds, the utilities contested the FEA1990 in courts as the price guarantee might contain an illegal levy imposed on the grid companies

[111] German Grid Association [Deutsche Verbundgesellschaft] (hereinafter, DVG).
[112] A producer is deemed to be independent if neither a capital link to utilities is available nor he operates plants beyond 5 MW.
[113] q.v. Section 2 and 3 FEA1990. Section III 3 FEA 1990 defines the "average price".
[114] L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 244.

combination with an immediate subsidy in favour of the independent generators. The supporting argument was, that such a levy was deemed to be beyond the taxation powers of the government similar to the "Kohlepfennig" levy in the centenary Contract framework[115].

However, this approach is not convincing as the FEA1990 does not introduce any liability of final consumers to pay any levy. Furthermore, it is not a levy imposed on utilities, as levies and taxes must not be related to specific benefits of the liable entities in German tax law. As the price guarantee is attached to the (unwanted) economic benefit of additional electricity purchases at determined prices, the entire price is closely related to said benefits so that no levy or tax is available.

FEA1998 increases the general price guarantee with respect to the purchase obligation to 80% of the average electricity price of utilities[116] whereas large hydro, waste sites will only receive 65% with regard to capacities beyond 500 kW[117] while solar power producers will attain 90%[118]. Section 4 FEA1998 defines a complex hardship clause. Firstly, the liability of local suppliers under Section 3 FEA1998 is transferred to regional utilities if they are obliged to fed in green energy to an amount exceeding 5% of their entire electricity sales under Section 4 I 1 FEA1998. Secondly the regional utility is exempted, if his obligation under Section 2 and 4 I 1 exceeds 5% of sales pursuant to Section 4 I 2; 4 I 1 FEA1998.

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[115] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 81 (1996).
[116] Section 2; 3 I FEA1998.
[117] Section 3 I 2nd sentence FEA 1998.
[118] Section 3 II FEA 1998.

If no regional utility is available, the purchase obligation is void regarding power stations that are completed in the calendar year after this derogation became applicable[119]. To avoid retail price increases owing to fed in green energy, a second hardship clause is added[120].

3.4 Anti-Competitive Agreements between Utilities Supplying Electricity or Gas for the General Public

Sophisticated horizontal and vertical agreements restricted competition by creating regional monopolies for the public supply of electricity and gas were maintained between the three types of utilities, i.e. the integrated utilities[121], the regional distribution companies[122] and the local suppliers[123]. Such agreements were traditionally deemed to be necessary to fulfil the security of supply obligation, the minimum prices criterion and the public welfare objectives of the preamble of EnWG1935[124].

Although the agreements clearly violated Section 1[125] or 15, 18[126] GWB1957 so that one could expect that Cartel authorities would prevent their conclusion or execution[127], Section 103 GWB1957/1990 legalised the said contracts between utilities until April 1998.

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[119] Section 4 I 3 FEA 1998.
[120] Section 4 II FEA1998.
[121] Utilities which primarily generate electricity (i.e. base load) and operate the transmission grids and increasingly on relevant capital stakes of regional and local operators. Rarely retail operations.
[122] Utilities which rarely generate electricity (i.e. only peak load) and operate distribution grids. Sometimes retail sales.
[123] Municipality owned utilities with virtually no generation which sometimes operate the low voltage grid and primarily engage in retail selling.
[124] q.v. BGHZ 59, 42, 45; BGH, NJW 1957, 2065; BGH NJW 1974,901, 902; G. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 370.
[125] Section 1 GWB1957/1990 only covers anti-competitive horizontal agreements, i.e. between actual or potential competitors.
[126] Sections 15,18 GWB1957/1990 prohibit vertical agreements.
[127] Section 37a GWB1990 was the legal basis for actions against infringements.

3.4.1 Demarcation Contracts

Pursuant to Section 103 I No.1 GWB1957/1990, a horizontal demarcation contract was available if two neighbouring utilities agreed on abstaining from operating networks (on private premises) in areas where they had not concluded exclusive concession agreements with the municipalities regarding networks on public ground.

Similarly, a vertical demarcation agreement was available if two non-integrated-utilities within the same area agreed on abstaining from entering into new downstream activities[128].

3.4.2 Exclusive Concession Agreements

An exclusive concession agreement is available under Section 103 I No. 2 GWB1957/1990 if a privately owned utility and a municipality conclude that the latter is obliged to issue an exclusive concession to the contractor regarding the operation of electricity or gas networks on public ground. The licensee is bound to pay concession fees of which the details were regulated by an Ordinance on Concession Tariffs[129]. Prior to 1992, the concession fees were based on gross sales. Thereafter, the sold amount of kWh was relevant.

3.4.3 Vertical Agreements Fixing Maximal Retail Prices

Section 103 I No.3 GWB1957/1990 derogates vertical agreements in which (supra-) regional utilities oblige local utilities not to exceed these retail prices that the former utilities charges their own final consumers.

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[128] q.v. K. Markert, *Application of European and German Competition Law to Energy Utilities in Germany*, OGLTR 222 (1996).

[129] Ordinance on Concession Tariffs for Electricity and Gas of 1941, as Amended on 9 January 1992, Federal Law Gazette 1992 I 12 and 407. The ordinance was based on Section 7 EnWG1935. Section 11 EnWG1998 authorises the Federal Ministry of Economics to issue a new Ordinance.

3.4.4 Network-Agreements

Finally, one utility is permitted to lease parts of its network exclusively to a second utility as long as the latter engages in public supply[130].

3.4.5 Restrictions of Derogations

In order to avoid abuses by means of the described derogated agreements, certain restrictions applied. Firstly, Section 103 II GWB1957 inter alia prevented utilities from interdicting regional supply of competing energy sources when demarcation or concession agreements were concluded. Additionally, a notification was mandatory in order to obtain a derogation of demarcation, concession and network agreements[131]. Section 103 V GWB1957 vested the cartel authorities with the power to prohibit abuses of dominant positions related to exempted contracts. Finally, it has to be stressed that the exception only covered Section 1, 15 and 18 GWB1957 so that the remaining provisions, e.g. merger control were applicable.

3.4.6 Ineffective Antitrust Law Amendments of 1980

In 1980, a provision was introduced which limited the duration of new demarcation, exclusive concession and network agreement to twenty years[132] whereas old agreements expired in 1999 at the latest[133]. However, the industry tried to circumvent this provision by means of dubious contractual clauses[134]:

- automatic renewal clauses
- right of utilities to renew clauses

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[130] Section 103 I No.5 GWB1957/1990.
[131] Section 103 III; 9 GWB1957.
[132] Section 103 a I-III GWB1957, as Amended in 1980.
[133] Section 103 a IV GWB1957, as Amended in 1980. Old agreements generally expired on 1 January 1995. If a agreement did not last for 20 years in 1995, it would exceptionally end after 20 years of notification, i.e. in December 1999 at the latest.
[134] Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 372.

- long term electricity or gas purchase obligations of the municipalities
- compensation clauses in case of non-renewal of exclusive concessions

As the efficacy of these clauses was disputed, legal security was poor and a change of the utility remained unlikely. Consequently, the reform was a failure.

4. Application of the Former Regulatory Instruments until 1998

With regard to the application of the former regulatory instruments it can be differentiated between purely domestic procedures and those affected by primary application of EC law owing to the effet utile principle so as to secure the efficacy of EC law against diverging Member States' policies.

4.1 Inefficient Domestic Procedures

For a long time, the domestic cartel authorities tried to implement the former regulatory tools - especially the control of abuses regarding dispensed contracts pursuant to Section 103 V GWB1990 - in a more comprehensive way. However, the results were not impressive at all as the courts generally overruled the administrative decisions.

This was facilitated by blanket terms within Section 103 V GWB1990. The extremely vague wording, which required to consider the objectives of the dispensation under Section 103 I GWB1990, could easily be used to restrict the scope of Section 103 V GWB1990 because the courts honoured the traditional doctrine that all industrial activities related to gas and electricity should be treated as special sectors as regional monopolies were regarded as mandatory to guarantee the security of supply at reasonable prices[135].

[135] The price control under Section 103 V 2 No.2 was inefficient since the 1970s; q.v. BGHZ 59, 42, 47 et seq. (1972); BGHZ 68,23, 33 and 36 (1977).

Thereby, the value of Section 103 V 2 No.4 GWB1990 that introduced a kind of negotiated TPA, was minimised[136] as the owner of a network was able to refuse applications for access as long as one copied the commercial terms of the would-be competitors with respect to the final consumers: The courts rejected the idea that anyone could be obliged to grant access to competitors to its own detriment[137]. Finally, Section 103 V GWB1990 lost any practical efficacy.

4.2 Domestic Procedures Based on EC Competition Law

The 1998 reform was preceded by attempts of the cartel authorities to abolish concession and demarcation agreements, which supported the regional electricity and gas monopolies, by means of Art. 82 ECT as EC competition law does - if one refuses to apply Art. 86 II ECT - not recognise any exemptions with respect to the mentioned sectors[138]. The national authorities are - apart from matters under Art. 81 III ECT[139] - competent to apply EC competition law unless the Commission initiates its own proceedings[140]. However, the cases were

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[136] Schneider, J-P, *Regulation of the Electricity Industry in Germany after Liberalisation*, p 5, due to be published in JENRL 2000.

[137] BGHZ 128, 17, 33 et seq. (1995); BGH NJW 1996, 2656.

[138] Bundeskartellamt v Ruhrgas AG, WuW/E 2648 (2653 et seq.), Related court proceedings: BGH EuZW 1997, 381 and preliminary ruling of the ECJ; Bundeskartellamt v Stadt Nordhorn WuW/E 2859, 2863 et seq., related court proceeding Kammergericht Berlin WuW/E OLG 9795 and preliminary ruling of the ECJ, an exclusive concession agreement was interdicted; Bundeskartellamt v Ruhrgas and Thyssengas WuW/E 2778 (1995): a horizontal demarcation agreement is indicted on the basis of Section 47 GWB1990 and Art. 81 I ECT; Bundeskartellamt v VNG/EVG and Wingas/WIEH WuW/E 2721 (1995): a vertical demarcation agreement is in-validated; Bundeskartellamt v Stadt Kleve: no decision against the exclusive concession agreement as the Commission initiated own proceedings so that domestic entities lost competence under Art. 6 III Reg.17; Wingas v Stadtwerke Dortmund, EuZW 1997, 381, 384: A municipality concluded an exclusive concession agreement and tries to protect the local utility from direct sales to a local consumer by Wingas.

[139] arg. ex Art. 9 I Reg.17.

[140] arg. ex Art. 9 III Reg.17. The relation between domestic and EC competition law is generally fourfold: Firstly, EC law and domestic law are parallelly applicable if a measure infringes both systems. Secondly, EC law overrules domestic law domestic law if only the former is violated. Thirdly, if EC Law is honoured, domestic law may not prevent a conduct (no double barrier theory!). Finally, if the scope of EC law is not affected owing to missing effect on trade between member states, the domestic law may prevent an action, q.v. G. Kühne, *Jurisdiction to Enforce*

subject of domestic judicial review and preliminary ruling procedures under Art. 234 ECT so that they became obsolete as they had not been decided when the Framework Bill was enacted.

5. Regulatory Reform of April 1998

In order to implement the IEMD, the Federal Parliament enacted the Framework Bill of 24 April 1998 which introduces EnWG1998, Section 103b GWB1990, FEA1998 and several transitional provisions[141].

5.1 EnWG 1998

Compared to the criteria of security of supply and reasonable energy pricing according to the preamble of EnWG1935, the new Act also takes environmental concerns in to consideration[142] which is reflected by a renewed definition section[143].

5.1.1 Licensing System and Direct Lines

The licensing system for utilities is amended as well. Significantly, the following activities do not require a license:

- The feeding of electricity into the utilities' grids[144]
- Power generation for individual consumers[145]

  if either renewable fuel sources are utilised, combined heat and power or industrial auto-generation are available[146].

Competition Law in Europe: an Analysis of the European and German Legal Regimes, JENRL 73 (1998). However, the scope of the Merger Regulation forms a genuine lex specialis.
[141] Art. 1-5 of the Framework Bill.
[142] Environmental Sustainability is inter alia quoted in Section 1 EnWG1998.
[143] Sections 2 EnWG1998: The term of environmental sustainability is defined.
[144] Section 3 I No.1 EnWG1998.
[145] i.e. no public supply in terms of Section 10 I EnWG1998 pursuant to Section 3 I No. 2 1st variant EnWG1998.
[146] Section 3 I No. 2 2nd and 3rd variant EnwG1998.

The latter exemption - in conjunction with the abolition of the exclusivity term in traditional concession agreements regarding the use of public land for energy networks between utilities and municipalities[147] and in combination with Section 13 EnWG1998 obliging municipalities to enter into non discriminatory negotiations for new concession agreements - definitely vests these producer groups with the right to negotiate concession agreements with municipalities as to the construction of direct lines. Therefore Art. 21 IEMD is implemented.

However, the wording of Section 13 EnWG and the necessary appreciation of environmental and public building law interests make clear, that there is only a claim to negotiate a contract rather than an individual public right to immediately erect the line. This right may be enforced by civil court actions in combination with damages[148] or by requesting the domestic cartel authorities[149] or the Commission to act.

5.1.2 Public Electricity Networks, Feeding-In of Electricity, Unbundling

With respect to electricity networks, the utilities are obliged not only to operate networks that are adequate for public supply but also to publish technical connection criteria [150]. The commercial aspects of feeding in electricity have to be objective and must be applied in a non discriminatory manner[151].

The efficacy of these provisions is strengthened by the obligation of vertically integrated utilities to separate electricity generation from any activity related

[147] q.v. Section 103 I GWB1990 is revoked in April 1998 by Section 103b GWB1990 and Art. 4 Section 1 Framework Bill states that exclusive concession agreements will generally be regarded non exclusive concession agreements.
[148] e.g. Sections 894 ZPO, 276, 249, 252 BGB; Sections 19 IV No.4, 20 I, 33 GWB1998, 249, 252 BGB.
[149] Authorisation of the cartel authorities to interdict illegal conduct pursuant to Section 32 GWB1998. This administrative Act may be enforced by coercive means.
[150] Section 4 I and II EnWG1998.
[151] Section 4 III EnWG1998.

transmission networks (at least) in management terms[152]. Thereby, Art.7(6) IEMD is implemented without taking advantage of the flexible wording "at least" in Art.7(6) IEMD which covers stricter forms of market liberalisation. For instance, at least legal unbundling would be superior as it is a more efficient tool to remove commercial incentives to discriminate against different network users[153]. Finally, the most straightforward option would be ownership unbundling between generation, transmission, distribution and supply activities[154] as it is not justified that the European or German Energy legislator omit any reference to discriminations with respect to access to the distribution networks. However, the essential facilities doctrine of American origin, which was recently introduced to European competition law by the Commission and got approval of the ECJ, and its newly established basis in Section19 IV No.4 GWB1998 will hopefully provide the necessary legal incentive for utilities not to discriminate against consumers with respect to medium and low voltage networks[155].

5.1.3 Negotiated Third Party Access or provisional Single Buyer Alternative

Again based on the essential facilities doctrine, the IEMD obliges the Member States to introduce either regulated or negotiated third party access [TPA] to transmission and distribution networks[156] or the single buyer system. Negotiated TPA is implemented by Section 5 and 6 EnWG1998. Owing to powerful pressure groups[157], a lex specialis single buyer system is temporarily applicable

[152] Section 4 IV EnWG1998. Management unbundling is chosen by Scotland and France as well.
[153] Legal unbundling is applied in Ireland, Belgium, Luxemburg, Austria.
[154] It is applied in England, Wales, Spain, Sweden, Finland.
[155] The essential facilities doctrine is scrutinised infra, at 6.2.
[156] Negotiated TPA Art. 16, 17 I IEMD; Regulated TPA Art. 16, 17 IV IEMD; Single Buyer Art. 16, 18 IEMD. The essential facilities doctrine is assessed infra, at 6.2.
[157] The political pressure is highlighted by V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 377.

for any region on request of utilities[158]. Negotiated TPA only vests a right on applicants to negotiate access contracts with the relevant utilities on the basis of objective, transparent and non discriminative criteria rather than granting an immediate right[159]. The Ministry of Economics is authorised to specify general contractual terms for negotiated TPA by secondary legislation[160] but this is only deemed to be essential if no associations' agreement is concluded with respect to TPA. The first one was partly a failure in terms of secretiveness[161] and competition law as the good strategy of a postage stamp access fee was humiliated by a distance related surcharge so that "pancaking" is facilitated and especially competitors from other member states are weakened[162].

The future of the liberalisation mainly depends on the narrow interpretation of the clause to refuse TPA on ground of (physical) impossibility or economic non-viability.

Generally, the principles of security of supply, reasonable pricing and environmental concerns are decisive[163] and the burden of proof is transferred to the utilities[164]. Secondly, the seriousness of arguments underpinning refusals is exemplified by Section 6 III EnWG1998: It is not only necessary that hypothetical TPA would prevent the transport of electricity produced by either efficient and environmentally sound power stations, co-generation plants or by

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[158] Section 7 and 8 EnWG1998. Authorisations of single buyers will expire on 31 Decebmer 2005.
[159] Art. 16 and 17 I IEMD. q.v. V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 377.
[160] Section 6 II EnWG1998.
[161] Schneider, J-P, *Regulation of the Electricity Industry in Germany after Liberalisation*, p 12, due to be published in JENRL 2000. Furthermore, the agreement is itself not legally binding as it violates Section 1 GWB1998.
[162] It expired on 30 September 1999.
[163] Section 6 I 2 with reference to Section 1 EnWG1998
[164] Section 6 I 2 EnWG1998.

plants fuelled by renewables. Additionally, it is required that the future TPA would have to be responsible for economic losses of the said plants even if alternative marketing options are considered[165]. Thirdly, Art. 4 Section 2 Framework Bill enforces the reciprocity exemption of Art. 19 V IEMD: Therefore, a German utility is allowed to refuse TPA to foreign applicants until 31 December 2006 if the category of consumers does not belong to the eligible consumers in the country of origin of the applicant. Lastly, Art. 4 Section 3 Framework Bill extends the scope for refusals of TPA in the eastern parts of Germany in order to protect the lignite industry until 31 December 2003 or 2005.

In order to cope with the structural transparency deficiencies of negotiated TPA, Art. 17 III IEMD demands regular publications of indicative access fees. This is implemented by Section 6 IV EnWG1998. Section 6 is not regarded as an authorisation for cartel authorities who rely on their powers within GWB1998[166]. Finally, the single buyer model did not receive major relevance in Germany.

5.1.4 Annual Accounts

The next part of the EnWG1998 inter alia deals with separation of annual accounts so as to prevent cross subsidisation within integrated utilities and to implement Art 14 IEMD.

[165] Section III EnWG1998.

[166] J. Schütze, *Germany: Practical Experience with the Liberalisation of the Electricity Market,* CEPMLP Conference Proceeding "Converging European Energy Markets", Brussels, 23 and 24 September 1999.

5.1.5 Public Connection and Supply Obligation

Generally, utilities are required to connect and supply all consumers in areas in which they engage in public supply[167]. General tariffs and supply conditions of utilities are regulated by secondary legislation[168].

5.1.6 Non Exclusive Concession Agreements and Concession Fees

As mentioned above[169], Section 13 EnWG1998 is a part of the legal reform to terminate exclusive concession agreements with respect to the use of public land for energy equipment. However, the fees for the future non exclusive concessions, as regulated by Section 14 EnWG1998 in combination with secondary legislation[170], will continue to be a major source of income for municipalities. It is stated that companies to whom TPA is granted are also subject to these fees[171].

5.2 Amendments of GWB1990

Art. 2 of the Framework Bill adds Section 103b to the GWB1990 which simply exempts the electricity and gas industry from the scope of Section 103 GWB1957/1990 that was so crucial for the maintenance of the regional monopolies of utilities with respect to generation, transmission, distribution or supply by means of the above discussed anti-competitive agreements.

5.3 Alterations of FEA1990

FEA1990 is amended by Art. 3 of the Framework Bill. These amendments have already been discussed[172].

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[167] Section 10 EnWG1998.
[168] Section 11 EnWG1998.
[169] q.v. supra at 5.1.1 Licensing System and Direct Lines
[170] Section 14 II EnWG authorises the Federal Ministry of Economics to issue a new Ordinance regarding concession fees.
[171] Section 14 III EnWG.
[172] supra at 2.7 and 3.3 .

5.4 Transitional Regulation

Art. 4 Framework Bill introduces several transitional provisions. First of all, the existing concession agreements are generally validated as non exclusive concession agreements[173] so as to safeguard the concession fees as a major source of municipalities' revenues. The remaining provisions were analysed above[174].

6. Regulatory Framework of August 1998

In August 1998, the Antirust law was substantially modified[175] in order to increase the compliance with EC competition law. The major amendments deal with horizontal agreements, related block exemptions and a new individual exception, the abuses of dominant positions and amended exemptions for specific industries.

6.1 General Prohibition of Cartels and Vertical Agreements

Contrarily to GWB1990, horizontal anti-competitive agreements between actual or at least potential competitors on relevant product markets are automatically void[176] so that administrative acts are no longer required to declare an infringing agreement invalid[177]. Furthermore, concerted behaviour is included in the scope of the general prohibition that was heretofore treated by a subsidiary norm[178]. The level of compliance with Art. 81 I-III ECT is also raised by the introduction of a provision which allows individual exemptions by cartel authorities[179].

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[173] Art. 4 Section 1 Framework Bill.
[174] Art. 4 Section 2-3 deal with refusals of TPA; q.v. supra at 5.1.3
[175] GWB1998 was enacted which became effective on 1 January 1999.
[176] Section1 GWB1998.
[177] Indictment, based on the authorisation in Sections 37a; 1 GWB 1990.
[178] Section 25 GWB1990.
[179] Section 7 GWB1998.

In contrast to Section 15 GWB1990, vertical agreements determining the contents of agreements with a third party are no longer valid until an expressive indictment order is issued: The said behaviour is initially void[180] so that convergence with Art. 81 ECT is partly achieved. However, several inconsistencies with EC law remain in place. Firstly, the traditional domestic differentiation between horizontal and vertical agreements with respect to validity, invalidation and exemptions is maintained[181]. Even the sub-division of vertical agreements in content-obligations, freedom to contract limitations and licensing agreements with different legal consequences is upheld[182]. As a matter of fact, this difference is partly minimised as most vertically divided companies are able at least to threaten to engage in related upstream or downstream activities so that they become potential competitors which is sufficient for the application of Section 1 GWB1998. Secondly, a new discretionary individual exemption in Sections 10, 7 GWB1998 makes it more difficult to define the scope for block exemptions under Sections 4-5, 9 GWB1998. Although these inconsistencies are legally acceptable, as competition law belongs to the area of parallel competences of the EC and its Member States[183], they nevertheless challenge efficient implementation. For instance, it is more difficult for domestic authorities to apply different sets of rules with respect to restraints of competition purely affecting domestic trade or those related to trade between Member States.

Kommentar: wrong emmerich p 113; Materials to the Bill Federal Parlament Gazette 13/9720 p 35 and 50.

[180] Section 14 GWB1998; q.v. White Paper Regarding GWB1998, Federal Parliament Gazette [Bundestagsdrucksache] 13/9720 p 35 and 50, V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 113.
[181] Horizontal Agreements are governed by Section 1-12 GWB1998; Vertical Agreements are regulated by Section 14-18 GWB1998.
[182] Vertical Agreements with exclusive supply clauses are still valid as long as they are invalidated by the authorities under Section 16 No.2 GWB1998.
[183] R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 136.

6.2 Abuses of Dominant Positions

The control of abuses of dominant positions is significantly strengthened by the new Competition Act[184].

6.2.1 Direct Effect of the Prohibition of Abuses of Dominant Positions

Formerly, abuses of dominant positions fulfilled Section 22 I-III GWB1990 but legal consequences like indictments of factual acts or in-validation of contracts would only apply if cartel authorities took discretionary action under Section 22 IV-V GWB1990. Today, abusive measures are automatically void so that applicants can enforce their rights[185] and factual compliance with Art. 82 ECT is achieved[186].

6.2.2 Establishment of the Essential Facilities Doctrine in German Laws

The second improvement consists of the incorporation of the essential facilities doctrine into German competition law by means of Section 19 IV No.4 GWB1998.

American antitrust authorities had established the principle that the interruption of supply to frequently served consumers by dominant undertakings was regarded as a breach of Art. 2 Sherman Act[187] unless a special justification is available[188]. A justification may be available if the measure is a suitable, necessary and proportional tool to achieve legitimate objectives[189].

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[184] Sections 19 et seq. GWB1998.
[185] primary remedies: claim to abstain from future violations under Section 33 1st variant GWB1998; the applicant may also ask the cartel authority to act under Section 32 GWB1998; secondary claims for damages under Section 33 2nd variant GWB1998, Sections 276; 249 et. seq. BGB.
[186] Section 19 I GWB1998.
[187] Sherman Act of 1890.
[188] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 214, 216 and 461. The burden of proof regarding justifications is on the owner of the item.
[189] For instance, refusals to deliver consumers may be justified in cases of fuel shortages that the dominant producer is facing.

The rationale is that dominant entities with respect to a product market shall be prevented from distorting competition on related upstream or downstream markets[190]. Later, it was extended to the refusal of dominant entities to serve new consumers. Finally, the refusal of said undertakings to share essential facilities with competitors was included[191]. An item, i.e. goods and services[192], intellectual property rights[193] or business secrets, is deemed to be essential if the duplication by a competitor is currently either not feasible or not reasonably desirable owing to the economic concept of natural monopolies[194], environmental or constitutional concerns. Constitutional concerns are included as German municipalities have the constitutional right[195] to determine local aspects of citizens' lives which includes energy supply[196]. Therefore, the state cannot force a municipality to authorise the usage of public or private land for energy equipment. However, this power can be regarded as an essential facility so that the constitutional tension between Art. 28 GG and the constitutional values on which competition law[197] is based has to be defined by the courts.

The control of the essential facility itself constitutes the dominance on the relevant product market[198]. The relevant product market is defined according to

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[190] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 214.
[191] US cases dealt with access to railroads, United States v Terminal Railroad Association 224 US 383 (1912), news agencies, Association v United States 326 US 1 (1945), electricity transmission and distribution networks, Otter Tail Power Co v United States 410 US 366 (1973), sport stadiums, Hecht v Pro Football Inc 436 US 956 (1978), telephone networks, MCI Communications Corp v AT&T 708 F2d 1081, 1132 (7th circuit) cert den'd 464 US 891 (1983).
[192] tangible goods like premises, manufactured products or intangible goods (services).
[193] ECJ Case 241 and 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission Supported by Magill TV Guide Ltd*, ECR I 6 April 1995.
[194] White Paper regarding GWB1998, Federal Parliament Gazette [Bundestagsdrucksache] 13/9720 p 73.
[195] Art. 28 GG.
[196] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 79 (1996).
[197] e.g. Art. 2, 12, 14 GG.
[198] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 217.

identical or like products with similar functions as judged by ordinary consumers accompanied by geographical aspects. A refusal is available, if the operator does not grant access in spite of its feasibility. It is disputed if this doctrine should be restricted by additional criteria in order to secure its status as a narrow exception of general private law which generally allows the owner to freely determine the use of his property[199]. , it is equally important to address the adequate remuneration for access.

The doctrine is gradually introduced to EC competition law by European authorities[200]. In 1974, it would be held inconsistent with Art. 82 ECT, if a dominant raw material producer ceases to supply consumers because it is planned to enter markets for manufactured products[201]. Then, it was enhanced to refusals to supply and later to refusals to grant access to essential facilities, especially with respect to seaports[202], booking systems[203], interline operations[204]

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[199] e.g. abitrary refusal criterion.

[200] M. Furse, Competition Law of the UK and EC (1st ed.) (London, U.K., Blackstone Press Ltd., 1999) p 252 and 255; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 277.

[201] ECJ Case 6-7/73 *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp v Commission* [1974] CMLR 309 (1974).

[202] Commission Decision 94/19/EC of 21 December 1993, O.J. L 15 18/01/94 p 8, at p 16, (*Sea Containers v Stena sealink II*);
Commission decision 94/119/EC, O.J. L 55, 18/02/94 p 52 (*Stena Sealink v Danish Minister for Transport*), the case deals with the Port of Roedby;
Commission Decision of 11 June 1992, 22nd Annual Report on Competition Policy (1992, point 219) (*B&I Line v Sealink*) and 255 CMLR (1992), Sealink operates the port of Holyhead;
Commission Decision, 25th Annual Report on Competition Policy (1995, point 43) and Press Release IP (95) 492 of 16 May and 677 CMLR (1995) (*Irish Continental Group v Morlaix Chamber of Commerce*), the Chamber is operator of the Port of Roscoff);
Commission Decision, 23rd Annual Report on Competition Policy (1993, point 234) (*Sealink*);
Comission Decision 90/632/ECSC O.J. L 346, 11/12/90, p 18.

[203] Commission Decision 88/589/EEC of 4 November 1988 Relating to a Procedure under Art. 86 of the EEC Treaty, O.J. L 317, 24/11/88, p 47 (*London European v Sabena)*.

[204] Commission Decision 92/213/EEC of 26 February 1992 Relating to a Procedure pursuant to Art. 85 and 86 of the EEC Treaty, O.J. L 96, 10/04/92 p 34 (*British Midland v Air Lingus*). A dominant carrier for a special destination is prevented from terminating interline agreements without significant reasons (e.g. bad reputation, creditworthyness). An interline agreement allows any agent of another carrier to sell a combined ticket having included consecutive flights of the dominant carrier.

and telecommunication networks[205] provided that the facility itself or in combination with a transport route of strategic relevance forms a substantial part of the common market[206]. The strictest approach includes that non discriminatory terms of access shall be facilitated by management unbundling[207]. However, capital extensive facilities like newspaper delivery networks are not covered[208].

Section 19 I GWB1998 is violated if an undertaking abuses a dominant position in terms of Section 19 II GWB1998 and it is accompanied by Paragraph IV that contains an explanatory catalogue: it states that an abuse is available if an undertaking refuses to grant access to networks or infrastructural items of which shared usage is a factual or legal pre-requisite for competing on markets for related up- or downstream products. Additionally, a proportional remuneration has to be offered. The controlling entity carries the burden of proof to justify its refusal on legitimate grounds[209].

As a matter of fact, this regime is generally very similar to the essential facilities doctrine as it is embedded in Art. 82 ECT. However, section 19 GWB1998 slightly differs as it applies by its wording only to networks/infrastructure and not to intellectual property.

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[205]ECJ Case 241 and 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission Supported by Magill TV Guide Ltd*, ECR I 6 April 1995.
[206] Commission Decision 22nd Annual Report on Competition Policy (1992, point 219) (*B&I v Sealink*), Sealink operates the Port of Holyhead; Hancher, L. and P-A Trepte, *Competition and the Internal Energy Market*, ECLR 153 (1992) with respect to ECJ Case 179/90 Port of Genua.
[207] Commission Decision 94/19/EC of 21 December 1993 Relating to a Proceeding pursuant to Art. 86 of the EC Treaty, O.J. L 15 18/01/94 p 8, at p 16, (*Sea Containers v Stena sealink II*); Commission Decision 98/190/EC of 14 January 1998 Relating to a Proceeding under Art. 86 of the EC Treaty, O.J. L 72 11/03/98, p 31 (*Flughafen Frankfurt AG*); Commission decision 94/119/EC, O.J. L 15, 18/02/94 p 52 (*Port of Roedby*).
[208] ECJ Case 7/97 *Oscar Bronner GmbH & Co.KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, opinion of the Advocate General, q.v. O.J. C 20, 23/01/99 and M. Furse, Competition Law of the UK and EC (1st ed.) (London, U.K., Blackstone Press Ltd., 1999) p 257.
[209] K. Markert, *Prospects and Problems for German Gas Competition*, OGLTR 37 (1999).

It must not be neglected that several difficulties remain unsolved by a norm as general as this. In contrast to three leges speciales, i.e. provisions for the telecommunications industry[210] and the railroad industry[211], which expressively oblige the network owner to negotiate with applicants in good faith[212], this is not clear with respect to gas networks under Section 19 IV No.4 GWB1998.

Additionally, the implementation of the doctrine is weakened as the specific statutes are applied by special regulators and administrative courts compared with Section 19 GWB1998 that is enforced by cartel authorities and reviewed by civil courts.

6.2.3 Future Problems attached to Section 19 IV No.4 GWB1998

A drawback of the reform is that section 19 IV No.4 GWB1998 does not address the difficulty how capacity limitations of gas pipelines shall be treated as these are sometimes created with intention by means of long-term gas sales agreements with take-or-pay agreements. A second challenge is whether owners of said facilities may be requested to expand the capacity of their pipelines in order to avoid justified refusals. Thirdly, it can be questioned whether an extensive application of the provisions addressing the doctrine may impede future investments regarding possible essential facilities. As the gas industry is virtually ignored by the Framework Bill it is not clear whether the former

[210] Essential Facilities doctrine with respect to telecommunication networks, q.v. Section 35 Telecommunications Act of 25 July 1996 [Telekommunikationsgesetz (TKG)], Federal Law Gazette 1996 I 1120, as Amended on 26 August 1998, Federal Law Gazette 1998 I 2521.

[211] Essential Facilities Doctrine regarding railroad networks, q.v. Section 14 Railroad Act of 27 December 1993 [Allgemeines Eisenbahngesetz (AEG)], Federal Law Gazette 1993 I 2378, 2396 and Federal Law Gazette 1994 I 2439, as Amended on 26 August 1998, Federal Law Gazette 1998 I 2521.

[212] Section 36 Telecommunications Act of 25 July 1996 [Telekommunikationsgesetz (TKG)], Federal Law Gazette 1996 I 1120, as Amended on 26 August 1998, Federal Law Gazette 1998 I 2521 and Section 14 IV-V Railroad Act of 27 December 1993 [Allgemeines Eisenbahngesetz

exclusive concession covenants can be maintained as non exclusive agreements in analogy to Art. 4 Section 1 Framework Bill as it is ordered for like contracts of the electricity industry[213].

New unanswered challenges also deal with the formation of buyer cartels who bundle their regional demand in order to lower prices. These cartels are currently promoted by the Chambers of Commerce as they may be justified by Section 4 II GWB1998[214]. According to these deficiencies, a specific implementation of the IGMD by means of amendments of the ENWG1998 is highly desirable.

7. Conclusion

This paper has discussed the fundamental changes of the regulatory framework of the German energy industries since the beginning of the 1990s. Although several inconsistencies remain, the primarily the decrease of coal subsidies reforms, the FEA1998, the Framework Bill and finally GWB1998 provide for a liberalised high-technology based development of the energy industries that increases allocative and productive efficiency not only of the energy sector but also of the economy as a whole. The decision not to restrict the initial number of eligible consumers is of major significance as it highlights that the times of secretive and powerful lobbying of powerful utilities that dominated the least efficient reforms between 1980 and 1990 has irrevocably passed.

(AEG)], Federal Law Gazette 1993 I 2378, 2396 and Federal Law Gazette 1994 I 2439, as Amended on 26 August 1998, Federal Law Gazette 1998 I 2521.

[213] q.v. K. Markert, *Prospects and Problems for German Gas Competition*, OGLTR 38 (1999).

[214] q.v. Lübeck Chamber of Commerce, Brochure on Energy Liberalisation for Small and Medium Sized Enterprises (1999); K. Markert, *Prospects and Problems for German Gas Competition*, OGLTR 39 (1999).

The deregulation will surely attract growing numbers of revenue-seeking energy-investors as well. The level of convergence between German and EC competition law has significantly increased so that the implementation of European policies by domestic entities is strengthened without contravening the subsidiarity principle. If the tendency towards mergers is closely monitored[215], it can be predicted that the long-term competitiveness of European businesses will benefit.

[215] q.v. Economist, *Germany's electrical storm,* 98 (13 November 1999).

8. Annexes

8.1 Three Fold Structure of the German Electricity Undertakings prior to 1998

[Omitted in the online version, please contact the author]

Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks, in*

European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 235

8.2 Capital links between the German Integrated Electricity Companies (Generators and Transmission System Operators) in 1994

[Omitted in the online version, please contact the author]

Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks, in*

European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 233 with reference to M. Stelte, Energy Databank, Berlin, 1994 and 1996.

This table exemplifies how the combined electricity utilities are linked. It has to be stressed that HEW is partly owned by the Federal State Hamburg. However, the percentage of the public shareholding has decreased significantly in the 1990s because of budgetary constraints. The same development is likely to happen with regard to the local supply companies operated by municipalities which leaves plenty of room for both anti-competitive take-overs by the integrated utilities of the first level[216] or pro-competitive acquisitions by foreign investors provided that the latter are subject of proper competition on their home markets.

[216] G. Kühne, *Incremental Regulatory Reform and Antitrust Law in the Energy Sector: the German "Middle of the Road" Approach,* JENRL 83 (1996).

8.3 Installed Power Capacity of the Combined Electricity Companies in MW in 1994

[Omitted in the online version, please contact the author]

Source:

Vereinigung Deutscher Elektrizitätswerke (ed.), VDEW Statistik 1994 (Frankfurt, Germany, VWEW Verlag, 1995).

8.4 Fuel Sources of Installed Capacity and Electricity Generation Utilities in 1992

[Omitted in the online version, please contact the author]

Source:

Bundesministerium für Wirtschaft, Die Elektrizitätswirtschaft in der Bundesrepublik Deutschland 1994 (Frankfurt, Germany, 1996) pp. 44, 47 .

8.5 Transmission, Distribution and Supply Grid Operators in 1994

[Omitted in the online version, please contact the author]

Source:

Mez, L., *The German Electricity Reform Attempts: Reforming Co-optive Networks, in* European Electricity Systems in Transition - A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 239.

8.6 Structural Model of Liberalisation of the Electricity Supply Industry

[Omitted in the online version, please contact the author]

Source:

Pritchard, R., *Electricity Industry Reforms in the Aftermath of the Asian Economic Crisis - An Australian Perspective*, OGLTR 249 (1999).