

Informative summary of content of German Energy Act (2005) and an abstract of the information on a German TSO website (both only informative character, taken from the internet)

Table of Contents

- I. Introduction
- II. Abolition of Antitrust Exemptions for the Energy Sector
- III. Control of Prices and Conditions
- IV. Grid Access and Power Transmission
- V. Promotion of Renewable Energy Sources
- VI. Enforcement

I. Introduction

In Germany, Energy Regulation is mainly subject to the Energy Industry Act (Energiewirtschaftsgesetz - hereinafter „EnWG“) which is Federal Law. The new EnWG dealing with the general structure of electricity and gas markets came into effect on 29 April 1998 and is directed towards the liberalization and deregulation of the German electricity and gas markets with the intention to lower prices for electricity and gas to a competitive level within in the European common market. The amending law serves to implement the EU Directive concerning common rules for the internal market for electricity into national law, in particular by changing the Energy Industry Act of 1935 and the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - hereinafter „GWB“). The EnWG aims to achieve a safe, reasonably-priced and ecological-oriented energy supply for the public benefit (§ 1 EnWG).

In accordance with the EU Directive, the EnWG lays down objective and non-discriminating principles for the taking up of energy supply and the construction of power plants and power lines. Due to Art. 21 (2) of the EU-Directive, under the new EnWG every undertaking intending to take up power generation or power supply is free to construct power plants or power lines. According to § 3 (2) EnWG, the permission to supply energy may only be rejected if the applicant does not have the necessary personal, technical or economical productivity or its activities would lead to less favorable conditions of supply for the entirety of customers in the market or to disadvantages in the remaining supply area of the existing supplier. Thereby the objective of a secure, low-priced and environment-protecting energy supply shall be adequately considered. No authorization is required to induct electricity in power grids of electricity undertakings and to supply customers beyond the public energy supply, as far as the supply mainly results from plants using renewable energies, cogeneration-plants or plants run by industrial undertakings for meeting its own requirements.

According to § 9 (2) EnWG, electricity utilities have to account separately for generation, transmission and distribution and for activities outside of the energy sector.

Territorial authorities are obliged to make public roads available for installation and operation of mains for the immediate supply of electricity to final customers in the territory in a non-discriminatory manner (§ 13 EnWG). Installation and operation of mains may be denied if the intended supply of electricity leads to an ousting of electricity generated in cogeneration-plants or in plants for the use of renewable energies or if the utility refuses to pay a reasonable concession fee. The term of agreements between utilities and territorial authorities granting the right to install and operate mains for the public supply of energy may not exceed 20 years (§ 13 (2) EnWG). With regard to concession fees to be paid to the territorial authority for the right of installation and operation of mains, the Federal Ministry of Economic Affairs has issued the Concession Fee Regulation (Konzessionsabgabenverordnung) in 1992 which regulates the calculation basis and the maximum amount of concession fees.

▲ *Start of page*

II. Abolition of Antitrust Exemptions for the Energy Sector

Until 1998, the former § 103 (1) No. 1 GWB exempted various demarcation agreements, i.e. agreements between public utilities supplying electricity and other utilities or territorial authorities where one of the parties agreed to refrain from the public supply of electricity in a certain territory through fixed mains. Furthermore, § 103 (1) No. 2 GWB exempted agreements between utilities and territorial authorities where the authority granted exclusively to one utility the right to install and operate mains upon or underneath public roads for the current or intended direct public supply of electricity to final consumers within the territory of such authority. These and other contracts exempted by § 103 (1) GWB were only subject to an abuse supervision by the cartel authority.

Not only due to these legal circumstances, the electricity and natural gas sectors in Germany have been characterized by their large number of enterprises (approximately one thousand) and by the strong involvement of municipalities. Exclusive concession contracts with municipalities and demarcation agreements have impeded competition. There are also cross-shareholdings between energy enterprises, industry and finance and among enterprises in the same sector. Although the tendency is towards privatization, there is also a mix of private/public ownership as the Laender and municipalities own shares in many electricity and natural gas enterprises. Municipal companies (Stadtwerke) are involved in natural gas distribution, electricity production and distribution as well as other activities such as public transport. Revenues from natural gas and electricity sales are partially used to finance other activities. Municipalities collect concession fees from gas and electricity distribution companies. Most of the energy suppliers used to have their own clearly demarcated market which was inaccessible to competing suppliers. Therefore, many German public utility enterprises were in effect monopolists in their regional and local markets.

The last years have seen enormous changes in the market structure, the most important being two mergers between the leading energy suppliers in Germany. In 2000, the Commission has cleared the merger between VIAG and VEBA on 13 June 2000, and the Federal Cartel Office (Bundeskartellamt) has cleared the merger between VEW and RWE on 3 July 2000. The two groups of undertakings resulting from these mergers are assumed to control the majority of the German energy markets.

With the abolition of antitrust exemptions for the energy sector, the prohibitions of the GWB are generally applicable to energy supply contracts, which are now treated like all other (long-term) contracts. It is highly disputed under which conditions such contracts are prohibited and therefore invalid under §§ 1, 19 or 20 GWB or under Article 81 or 82 EEC Treaty and for which term they may be at least partly valid due to § 139 of the Civil Code (BGB) or due to a salvatorial clause. Also, many questions with regard to both parties' claims in case a contract is found to have been invalid in the past are pending before the courts at the moment.

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III. Control of Prices and Conditions

The former special price control for the energy sector under § 103 (5) No. 2 GWB which was based on a comparison of prices in comparable markets has been abolished.

Under current law, only tariffs charged to private households, agricultural concerns and small

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commercial properties (so-called tariff customers) are subject to approval by the Price Supervision Authorities of the Laender (in general the Ministry of Economic Affairs) under the [Federal Regulation on Electricity Tariffs \(Bundestarifordnung Elektrizität – BTOElt\)](#) of 18 December 1989. Tariffs must be authorized by the Supervisory Authority in advance before they may be applied. The aims of the price control after the BTOElt are the protection of tariff customers against excessively high prices, the protection of utilities by guaranteeing them reasonable profits, the protection of the environment and the sparing use of resources.

Furthermore, the fixing of tariffs may fall under prohibitions of the GWB, the [Act Against Unfair Trade Practices \(Gesetz gegen den unlauteren Wettbewerb - UWG\)](#), the Rebate Act (Rabattgesetz) or EC Competition Law (Articles 81 and 82 EEC Treaty). For instance, provided the energy supplier holds a dominant position in the market, the price control of § 19 GWB or of Article 82 EEC Treaty may apply. In this context, the finding of a dominant market position mainly depends on the definition of the relevant geographic market which is highly disputed with regard to German electricity markets.

In order to secure the supply of end customers, § 10 EnWG obliges utilities supplying end customers in a municipal territory to publish General Terms and Conditions and General Tariffs for the supply in low-voltage grids and to grid-connect and to serve customers pursuant to these conditions and tariffs, provided that the grid connection and the supply is not unacceptable for the utility because of economical reasons. The utilities are restricted in their negotiations of supply conditions with so-called tariff-customers (i.e. private households, agricultural groups and small commercial properties) by the Regulation on General Conditions for the Supply of Energy to General Customers (Verordnung über Allgemeine Bedingungen für die Elektrizitätsversorgung von Tarifkunden - AVBEltV) which has been issued by the Federal Ministry of Economic Affairs on 21 June 1979.

Different general tariffs for different municipal territories are only allowed if the supplier proves reasonable justification, that the discrimination does not lead to increased prices for any customer and that the price differences for all customers are appropriate.

Autoproducers or customers being provided by third electricity suppliers cannot rely on this so-called compulsory connection and supply under § 10 EnWG. These customers may only claim to be connected and supplied to the extent and on conditions being economically acceptable for the utility.

In contrast to the supply to tariff-customers, the terms and conditions for the supply of distributors and industrial customers with electricity depend solely on the negotiations between the utility and the customer.

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IV. Grid Access and Power Transmission

The amendment of the EnWG fully opens up the German power market for competition. Every customer shall have free choice of his supplier. Electric power can be transported by transmission or, as an exemption, up to the end of 2005, by way of the so-called single-buyer system. This differs from transmission primarily in that under the single-buyer system the customer cannot establish an independent relation with a third-party supplier because the latter has to deliver the electricity to the single buyer.

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Competition on the electricity market is expected to take place primarily by use of the currently existing grid. Construction of new power lines is unlikely to play a major role. The new law contains an explicit right to access the power grid (§ 6 EnWG – negotiated third party access). Grid owners are obliged to transport the energy to the consumer under conditions no less favorable than for comparable services to affiliated enterprises. In addition to § 6 EnWG, a right to access power grid may result from § 19 (4) No. 4 GWB. These rights are enforceable in civil courts. Furthermore, in case of unjustified refusal of third party access, damage claims are possible. Nonetheless, there are a few enumerated exceptions where third party access can be denied. In particular, third party access may be refused if transmission is impossible or inappropriate for operational or any other reasons. In determining appropriateness account shall be taken of whether

- a district-heat-oriented cogeneration plant or a renewable-energy generation plant is put to a disadvantage or
- electricity from abroad is transmitted and whereas in the export country the domestic customer cannot also be supplied by third parties (so-called Reciprocity Clause; valid until the end of 2006) or
- power generation from East German lignite would be endangered (so-called Lignite Protection Clause (Braunkohleschutzklausel); valid until the end of 2005 at the latest).

The burden of proof for these exceptions is imposed on the owner of the grid. Furthermore, discrimination against third party users is prohibited. They have to be treated on equal terms as subsidiaries of the owner.

According to § 6 (2) EnWG, the Federal Ministry for Economic Affairs is authorized to regulate the arrangement of third party access contracts and the criteria for the calculation of transmission fees, as far as regulation is necessary to achieve a reliable and fair priced supply, environmental protection and effective competition. However, state regulation may be unnecessary as long as the Energy Industry is able to self-organize third party access according to the objectives of the EnWG and as far as disputes concerning third party access are limited to some individual cases which can be solved by applying antitrust law. Accordingly, German power plants and industrial consumers agreed upon general guidelines for transmission fees to be paid for the use of the grid in order to avoid a state regulation. On 22 May 1998, the Federal Association of the German Industry (Bundesverband der Deutschen Industrie - BDI), The Association of Energy and Power Industry (Verband der Industriellen Energie- und Kraftwirtschaft - VIK) and the Association of German Energy Producers (Vereinigung Deutscher Elektrizitätswerke - VDEW) concluded the „Agreement Among Associations on Third Party Access" (Verbändevereinbarung I). The Bundeskartellamt gave its consent to this agreement, and also the EC Commission signaled its approval. On 13 December 1999, the Verbändevereinbarung I was replaced by the so-called Verbändevereinbarung II which is still under review by the Bundeskartellamt and the EC Commission.

The Verbändevereinbarungen are binding only on the associations BDI, VIK and VDEW as contracting parties. The energy suppliers being members of the contracting associations are not bound by them. The Verbändevereinbarungen are regulations containing specific standards for the electricity sector and guidelines for third party access agreements between electricity undertakings and electricity customers.

Since grid operators are not legally bound by the Verbändevereinbarung, they are free to conclude

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individual agreements with either electricity undertaking who wants to transmit electricity or with customers who want to be supplied with energy by way of transmission. If no agreement is reached, § 6 (1) EnWG and § 19 (4) No. 4 GWB apply. Pursuant to § 6 EnWG and § 19 (4) No. 4 GWB, third party access has to be granted under conditions no less favorable than for comparable services to affiliated undertakings. According to §§ 315, 316 of the Civil Code (Bürgerliches Gesetzbuch), the grid operator has the right to fix the amount of transmission fee in his fair judgment. If the potential grid user does not agree to the transmission fee fixed by the grid operator, he has to bring an action against the grid operator in the competent court to decide on the question of reasonableness.

§ 6 (1) EnWG and § 19 (4) No. 4 GWB do also apply if the grid operator and the grid user agree to apply the *Verbändevereinbarung*, since both provisions are compulsory law which cannot be superseded by private agreements.

In addition to the *Verbändevereinbarungen*, further non-binding, private standards concerning third party access have been stipulated i.e. the Grid Code of October 1998, which contains regulations for the feeding in of electricity from power plants and for the transmission of electricity in transmission grids, the Distribution Code of May 1999 which stipulates standards for the feeding in and the transmission in distribution grids, the Metering Code of May 1999, which regulates measuring procedures, and the *Verbändevereinbarung* for gas which has been concluded on 4 July 2000.

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V. Promotion of Renewable Energy Sources

The EnWG declares reliability of supply, fair pricing and environmental protection as its objectives. Renewable energy sources (e.g. wind, water and solar energy) are privileged under the Renewable Energy Act (Gesetz für den Vorrang Erneuerbarer Energien or Erneuerbare-Energien-Gesetz) of 29 March 2000 and the Combined Heat and Power Act (Kraft-Wärme-Kopplungsgesetz) of 12 May 2000. According to § 3 of the Renewable Energy Act, grid owners are obliged to access energy suppliers producing energy exclusively by water, wind, solar, geothermal, natural gas, marsh gas or biomass and to purchase the electricity generated in such plants at certain minimum rates as provided for in § 4 - 8 Renewable Energy Act.

▲ *Start of page*

VI. Enforcement

A special authority responsible for the deregulation of the energy sector does not exist in Germany, although there have been proposals for an Authority with similar tasks as the Regulatory Authority for Telecommunications and Postal Services. As far as deregulation is governed by the GWB, it is enforced by the Federal Cartel Office (Bundeskartellamt), by the Cartel Authorities of the States (Laender), which are generally departments of the Ministry of Economy, and by private parties. Other regulatory affairs as the permission of energy plants and the enforcement of the EnWG are carried out by a number of different authorities, mainly by the Ministries of the German States (Laender). However, to a considerable extent regulatory energy law in Germany is enforced by private parties before the civil courts and in negotiations, which is demonstrated by the *Verbändevereinbarung* mentioned above.

▲ *Start of page*

§ 19 Technische Vorschriften

(1) Betreiber von Elektrizitätsversorgungsnetzen sind verpflichtet, unter Berücksichtigung der nach § 17 festgelegten Bedingungen für den Netzanschluss von Erzeugungsanlagen, Anlagen zur Speicherung elektrischer Energie Elektrizitätsverteilernetzen, Anlagen direkt angeschlossener Kunden, Verbindungsleitungen und Direktleitungen technische Mindestanforderungen an deren Auslegung und deren Betrieb festzulegen und im Internet zu veröffentlichen.

(2) Betreiber von Gasversorgungsnetzen sind verpflichtet, unter Berücksichtigung der nach § 17 festgelegten Bedingungen für den Netzanschluss von LNG-Anlagen, dezentralen Erzeugungsanlagen und Speichereinrichtungen, von anderen Fernleitungs- oder Gasverteilernetzen und von Direktleitungen technische Mindestanforderungen an die Auslegung und den Betrieb festzulegen und im Internet zu veröffentlichen.

(3) Die technischen Mindestanforderungen nach den Absätzen 1 und 2 müssen die Interoperabilität der Netze sicherstellen sowie sachlich gerechtfertigt und nichtdiskriminierend sein. Die Interoperabilität umfasst insbesondere die technischen Anschlussbedingungen und die Bedingungen für netzverträgliche Gasbeschaffungen unter Einschluss von Gas aus Biomasse oder anderen Gasarten, soweit sie technisch und ohne Beeinträchtigung der Sicherheit in das Gasversorgungsnetz eingespeist oder durch dieses Netz transportiert werden können. Für die Gewährleistung der technischen Sicherheit gilt § 49 Abs. 2 bis 4. Die Mindestanforderungen sind der Regulierungsbehörde mitzuteilen. Das Bundesministerium für Wirtschaft und Technologie unterrichtet die Europäische Kommission nach Artikel 8 der Richtlinie 98/34/EG des Europäischen Parlaments und des Rates vom 22. Juni 1998 über ein Informationsverfahren auf dem Gebiet der Normen und technischen Vorschriften und der Vorschriften für die Dienste der Informationsgesellschaft (ABl. EG Nr. L 204 S.

37), geändert durch die Richtlinie 98/48/EG (ABl. EG Nr. L 217 S. 18).

(4) Betreiber von Energieversorgungsnetzen, an deren Energieversorgungsnetz mehr als 100 000 Kunden unmittelbar oder mittelbar angeschlossen sind oder deren Netz über das Gebiet eines Landes hinausreicht, haben die technischen Mindestanforderungen rechtzeitig mit den Verbänden der Netznutzer zu konsultieren und diese nach Abschluss der Konsultation der Regulierungsbehörde vorzulegen. Die Regulierungsbehörde kann Änderungen des vorgelegten Entwurfs der technischen Mindestanforderungen verlangen, soweit dies zur Erfüllung des Zwecks nach Absatz 3 Satz 1 erforderlich ist. Die Regulierungsbehörde kann zu Grundsätzen und Verfahren der Erstellung technischer Mindestanforderungen, insbesondere zum zeitlichen Ablauf, im Verfahren nach § 29 Absatz 1 nähere Bestimmungen treffen.

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Governemental authorities

- [Bundesministerium für Wirtschaft \(BMW\) - Federal Minister of Economics](#)
- [Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie \(BMBWF\) - Federal Minister of Education, Science, Research and Technology](#)
- [Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit \(BMU\) - Federal Environment Ministry](#)
- [Strahlenschutzkommission \(SSK\) - Commission on Radiological Protection](#)
- [Umweltbundesamt - Federal Environment Agency](#)

An abstract of the information on the Energy industry act related to gas transmission on a German TSO website (both only informative character, taken from the internet)

Energy Act (EnWG)

The German Energy Act (EnWG) forms the backbone for effective and reliable operation of electrical power grids.

As one of Germany's four transmission grid operators, TenneT is obligated to provide a safe, reliable and efficient power supply grid (Sec. 11, Para. 1, Energy Act). The purpose of this act is to continue to ensure efficient, economical, user-friendly and ecological, capacity-related supply of electricity and gas to the general public (Sec. 1, Para. 1, Energy Act)

Part 5 (planning approval, use of right-of-ways) contains regulations for implementation of grid expansion measures. Construction, operation as well as modification of high and very-high overhead lines with a rated voltage of over 100 kV required planning approval by the responsible authorities pursuant to state law (Sec. 43, Sent. 1, No. 1, Energy Act).