

# Legal Aspects of Electricity Tariff Fixation in Germany

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## Introduction

German and Italian electricity tariffs are the highest in Europe.<sup>2</sup> A United Kingdom (“UK”) consumer pays roughly a quarter less than in Germany. A medium-sized industrial company in Germany, for instance, would pay 7.5 cents per kilowatt-hour, while a similar company in Great Britain would pay only 5.5 cents.<sup>3</sup> The average costs in Germany for a private household are 18 cents per kilowatt-hour.<sup>4</sup> According to the consumer protection organization Association of Energy Consumers (“*Bund der Energieverbraucher*“) each average household pays about 100 € per year too much for electricity.<sup>5</sup> At the moment, large energy suppliers are planning a price-increase of more than 5%. German politicians and industrialists are aware that the inflated prices are detrimental to economic development which is already suffering from an ongoing structural crisis. For this reason, *Wolfgang Clement*, German Minister of Economy and Labour, submitted a draft for an amendment to the Energy Industry Act (“*Energiewirtschaftsgesetz*” – EnWG), which was passed by the Federal Cabinet on 28-7-04 and is now being processed for enactment in legislative procedure.<sup>6</sup> The aim is the creation of a legal framework for

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<sup>2</sup> See <http://www.vik.de/aktuell/pressemitteilungen/pm040719.htm>; s. also *Der Spiegel* 33/2004, p. 58.

<sup>3</sup> See Vorholz, *Ministers in favour of the Monopoly (Minister für das Monopol)*, “*Die Zeit*“ 33/2004, p. 19.

<sup>4</sup> See Eurostat, *Electricity Tariffs for Private Households in the European Union on 1 January 2004 (Strompreise für die privaten Haushalte in der EU am 1. Januar 2004)*.

<sup>5</sup> See *Die Welt*, 31 August 2004 (<http://www.welt.de/data/2004/08/31/326232.html?prx=1>).

<sup>6</sup> Draft of a Second Act for the Reorganization of the Power Industry Law (*Entwurf eines Zweiten Gesetzes zur Neuregelung des Energiewirtschaftsrechts*), BR-Drs 613/04, 13 August 2004; see [http://www3.bundesrat.de/coremedia/generator/Inhalt/Drucksachen/2004/0613\\_2D04.property=Dokument.pdf](http://www3.bundesrat.de/coremedia/generator/Inhalt/Drucksachen/2004/0613_2D04.property=Dokument.pdf).

further liberalisation of electric energy- and gas-markets, with special focus on the reduction of energy prices.

The energy industry is subject to conditions substantially different from other economic sectors, especially, dependence on a distribution network, high capital intensity and limited power storage capacity. These conditions favour the creation of monopolies and are not affected by new European directives and regulations or by national laws. Efforts to break these “natural monopolies” and lower prices must take these factors into consideration in order to reduce restrictions and agree on more favourable energy prices.

The aim of this article is to provide an overview on the substantial problems involved in the formation of energy prices in Germany. It will emphasize the reasons for high energy prices in Germany and possible means of price lowering. Owing to substantial differences between the electric energy market and the gas market the article is limited to the former.

It will begin with an overview of relevant European legal regulation and then explain the historical development of German energy legislation leading to the present EnWG. That is followed by an analysis of the composition of electric energy prices in Germany, which forms the central part of the article, together with an investigation of the conditions under which energy suppliers allow other companies the use of their networks (so called “*Netznutzungsentgelte*”), and of the national energy taxation and promotion of renewable energies. A review of prospective future developments concludes the article.

## The Framework of European Law

From the beginning, European Law took precedence over national energy law, through the establishment of the European Coal and Steel Community Treaty (ECSC) of 1951<sup>7</sup>, the European Economic Community (EEC), and the European Atomic Energy Community (Euratom) of 1957. However, since in the first year’s energy supply guarantee played a more important role than aspects of a common market, energy took no part in free trade at all and the energy sector only found its place very gradually.<sup>8</sup>

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<sup>7</sup> Expired on 23 July 2002, see Obwexer, *The end of the European Coal and Steel Community (Das Ende der Europäischen Gemeinschaft für Kohle und Stahl)*, *European Journal of Business Law (Europäische Zeitschrift für Wirtschaftsrecht – EuZW)* 2002, 517 ff.

<sup>8</sup> See Ludwig/Koopmann, *Development and Sources of Private Energy Law (Entwicklung und Rechtsquellen des privaten Energierechts)*, in Rayermann/Loibl (editors), *Energy Law (Energierrecht)*, 2003, p. 54 f.

Even today, the main topic of European energy law is still the creation of a common market, in connection with the liberalisation of energy markets. One of the main goals is the installation of a fair and competitive energy pricing system. The following regulations are relevant.

Foremost are relevant regulations on the free movement of goods (Art. 23 - 31 EEC) within the EC treaty. Both electricity and gas are goods in the sense of Art. 23 and 24 EEC and are tradable without restriction according to the rules of the common market. The rules of competition in Art. 81 - 89 EEC are also relevant. The prohibition of agreements between commercial undertakings in Art. 81 EEC, the prohibition of the abuse of a dominant market position in Art. 82 EEC, the regulations on public undertakings (Art. 86 EEC) as well as the prohibition of aids granted by states in Art. 87 EEC have a direct bearing on the liberalisation of the European energy market and subsequently on price formation.<sup>9</sup>

The harmonization clause of Art. 95 EC is the substantial connecting factor in European secondary law. To this end the European “council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.” The majority of energy law regulations were based on this premise, in view of the greater efficiency of the co-decision procedure covered by Art. 251 EC than the principle of unanimity as required by Art. 94 EC.<sup>10</sup>

The starting point for the liberalisation of the energy markets is the directive 96/92/EC<sup>11</sup> set up in 1997, which established common rules for the production of electrical power, its transmission and distribution for the EU-member states. The aim of this directive was the opening up of markets, by creation of non-discriminative grid access, enabling customer’s personal choice of energy supplier. This development should grow through several phases. An initial market opening index of 30% for electricity and 20 % for gas was required but most member states subsequently went beyond these proportions. Both Germany and Great

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<sup>9</sup> See Schneider, *The Legal Framework of European Energy Law (Vorgaben des europäischen Energierechts)*, in Schneider/Theobald, *Handbook of Energy Law (Handbuch zum Recht der Energiewirtschaft)*, 2003, p. 77 f.

<sup>10</sup> Ludwig/Koopmann, *op. cit.*, p. 57.

<sup>11</sup> 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, ABl. EG No. L 027 of 30. 1. 1997, p. 20.

Britain have had a nominally free energy market since 1998.<sup>12</sup> France, in an attempt to protect its own natural energy companies, was able to postpone European development on the liberalisation of energy markets in Europe for some time.<sup>13</sup> The directive demands further that there be a separation of energy production from transmission and distribution (financial unbundling).

In 2003 the former directive was replaced by the Electricity Directive 2003/54/EC<sup>14</sup> and the Gas Directive 55/30/EG.<sup>15</sup> Apart from the financial unbundling which was extended to include unbundling under company law the important contents of these directives are the guarantee of a non-discriminative grid access and the compulsion of member states to set up national supervision structures in the shape of regulating authorities. A time limit until 1-7-04 was set for the transferral of most legal requirements in these directives into national law. The energy industry has been given until 1-7-07 to implement the unbundling concerning company law.

One further relevant European act is Regulation 1228/2003 on cross-border exchanges in electricity which has been valid since 1-7-04.<sup>16</sup> The intention of this binding regulation is to improve competition by defining the rules of fair play in the transnational electricity trade. The regulation includes not only balance mechanisms between transmission network operators but also a fundamental ruling on grid access fees for cross-border transmissions and the assignment of transmission capacities. The installation of a regulatory board for the transnational electricity trade is also compulsory.

It could be said that European energy industry law has tightened the framework for individual national regulations over the last years. However much clearance was initially given for the implementation of liberalisation without a regulatory board, German experience indicates that all member states need such an authority.

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<sup>12</sup>German Electricity Association (VDEW), *Price Development from 1998 – 2003*, <http://www.strom.de/wysstr/stromwys.nsf/WYSFrameset1?Readform&JSript=1&..>

<sup>13</sup> See Schwarzer, *The Energy Market (Der Energiemarkt)*, in Rayermann/Loibl (Editors), *Energy Law (Energie recht)*, 2003, p. 17 ff.

<sup>14</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

<sup>15</sup> 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, ABl. L 176, S. 57.

<sup>16</sup> Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, ABl. L 176, S. 1.

## Historical Development of the German Energy Law Sector

### a) The Energy Industry Act (*Energiewirtschaftsgesetz*) from 1935

German energy law and its system can only be understood if something is known about their historical origin. The Energy Industry Act (*Energiewirtschaftsgesetz* - EnWG) created under National Socialist Rule in 1935 was the first energy law to cover the whole country.<sup>17</sup> This law remained in force until the opening of the market in 1998.<sup>18</sup> The aim of the 1935 Act was to arrange a supply of electricity and gas as safely and cheaply as possible.<sup>19</sup> Under the EnWG 1935 it was only possible to start supplying power after a permit had been granted by the state.

The central element of the EnWG 1935, described in § 6, was the general connection and supply obligation on the part of the power supply firm responsible for that particular area. The energy customers of the area for their part had a claim against the supplier.<sup>20</sup> There was no separation made between the electricity network and the electricity supply. In addition to this the possibility of a different supplier using the network did not exist. Since parallel cabling was not possible, this led to the creation of a power supply monopoly in one area.<sup>21</sup> Since the customer had no choice of supplier, there was no competition. According to § 7 EnWG 1935, energy prices were fixed in ordinance decrees.<sup>22</sup> Thus, in the shape of the *Reichsminister* of Economy and later the Federal Minister for Economy the state exercised a crucial influence on the German energy industry. This influence existed over many decades and ensured a high

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<sup>17</sup> Act to Promote Energy Industry of 13 December 1935 (*Gesetz zur Förderung der Energiewirtschaft vom 13. 12. 1935*), *RGBl. I p. 1451*.

<sup>18</sup> See Reuz, *From Monopoly to Competition (Vom Monopol zum Wettbewerb)*, Opladen, 2001.

<sup>19</sup> This is expressed in the preamble of the EnWG.

<sup>20</sup> See Ludwig/Koopmann, *op. cit.*, p. 30.

<sup>21</sup> The monopoly-like area protection was flanked by special arrangements under competition law in §§ 103 and 103 a of the former Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen -GWB*).

<sup>22</sup> See § 11 of the Energy-Industry-Act ("*Energiewirtschaftsgesetz*") and § 11 of the Federal Tariffs Regulation for Electricity (*Bundestarifordnung Elektrizität- BTOElt*) of 18. 12. 1989 (BGBl. I S. 2255) and the Regulation on General Tariffs for Gas Supply (*Verordnung über Allgemeine Tarife für die Versorgung mit Gas-Bundestarifordnung Gas - BTO-Gas*) of 10 February 1959 (BGBl. I p. 46).

standard of supply security<sup>23</sup> and comparatively low energy prices. The Act was not concerned with either competitive aspects or ecological considerations.

b) The 1998 Energy Industry Act (“*Energiewirtschaftsgesetz - EnWG*”).

The transference of the European Electricity Directive<sup>24</sup> into German law in 1998 marked a turning point for German energy industry law. The main body of the EnWG amendment led to the opening up of the energy markets for competition. This represented a fundamental change in the electricity generation industry.<sup>25</sup>

The contemporary EnWG differs substantially from its predecessor. § 1 EnWG was extended to include the environmental sustainability of an energy supply. State permit requirements for the deployment of energy supply were largely restricted (§ 3). The electricity supply network had to be so regulated within the electricity companies that a clear separation could be made between the transmission network and energy production and distribution. The aim of this distinction was to prevent cross-subsidization or any form of discrimination (§ 4 exp. 4 EnWG).

To enable the domestic electricity market to enjoy fair competition it was necessary to allow access for secondary providers into the supply network. This was the key element of the EnWG 1998 which is still valid although future amendment is expected. The existing energy network user monopoly was dissolved. Unlike other EU-member states Germany has no regulatory board, but instead employed the so-called negotiated network access (“*Verhandelter Netzzugang*” - see § 5 EnWG 1998). Anyone wishing to transmit electricity through somebody else’s network is granted a claim to draw up a contract with the network owner. The price for using the network is decided on by mutual consent between the network owner and the energy supplier. The sum must lie within the limits of good practice, and not over that which the network owners charge within their own company or from connected companies (§ 6 exp. 1 EnWG 1998). The network owner can only deny access if the

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<sup>23</sup> The average interruption duration of electricity supply for each customer in minutes amounts to 15 min. per year in Germany, 63 min. per year in Great Britain and 191 min. per year in Italy (Council of European Energy Regulators, according to German Electricity Association - VDEW 2001).

<sup>24</sup> See above.

<sup>25</sup> See Ludwig/Koopmann, p. 32.

transmission is physically impossible or incompatible with internal company arrangements. The detailed computation of network-access prices is negotiated by different supplier associations; the results are the so-called associate agreements (“*Verbaendevereinbarungen*”)<sup>26</sup>. Relevant associations are the German Electricity Association (“*Verband der Elektrizitaetswirtschaft* - VDEW), the Umbrella Association of German Industry (“*Bundesverband der deutschen Industrie*” - BDI) and the Association of Energy- and Power Industries (“*Verband der Industriellen Energie- und Kraftwirtschaft*” - VIK). Adherence to the association agreements according to § 6 EnWG 1998 fulfils the conditions of good practice.<sup>27</sup>

At the same time as the amendment to the EnWG 1998 the Competition Act (“*Gesetz gegen Wettbewerbsbeschaenkungen*” - GWB)<sup>28</sup> was also altered. As a result the electric energy and gas companies were forced to renounce their pole position in competition law. The “Essential-Facilities-Doctrine” ensured, in addition, that misuse of a dominant market position is assumed only when a company denies access to its network to another supplier without sufficient reason, as specified in the law (§ 19 exp. 4 No. 4 GWB).

## **The Composition of the Electricity Tariff and Reasons for the Development of Prices**

A number of different factors affect electricity tariffs, of which national legislation is a relatively minor one.

### a) Composition of the Electricity Tariff

The electricity industry, government and the opposition all blame each other for the high price of electricity tariffs. While the power supply firms

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<sup>26</sup> Federal Legal Gazette(*Bundesanzeiger*), BAnz No. 85 b of 8. 5. 2002; the first associate agreement dated from May 1998; since January 2002 the associate agreement II plus is in use (“*Verbaendevereinbarung II plus*”).

<sup>27</sup> In the case of the associate agreement II plus this has been confirmed by the Higher Regional Court of Duesseldorf (OLG Duesseldorf, Decision of 11.02.2004 –Kart 4/03 (V), *Journal for New Energy Law* (*Zeitschrift fuer neues Energierecht*) ZNER 04, p. 76 ff.).

<sup>28</sup> Of 26 August 1998, BGBl. I p. 2546.

hold rising taxes as well as the subsidization of renewable energy sources responsible,<sup>29</sup> the consumer associations<sup>30</sup> believe that the considerable rise in electricity tariffs is a result of the existing oligopoly of the four main German power suppliers, despite the opening up of the energy market.

The component parts making up the price of electricity in Germany (other than fuel) are:

Network user charges:	32,64%
Concession fees:	9,76%
VAT:	16,00%
Electricity tax:	10,37%
Costs laid out by Renewable Energy Sources Act (“ <i>Erneuerbare Energien Gesetz</i> ” – EEG) and Power-Heat-Combination Act (“ <i>Kraft-Waerme-Kopplungsgesetz</i> ” – KWKG):	3,74%
Current Procurement, Marketing, Human Resources:	27,49%

An example for the calculation:<sup>31</sup>

Electricity bill €/month (3.550 kWh/a)	2000	2001	2002	2003
Production/transportation/sales	25,15	25,05	28,29	29,75
Concession fee	5,22	5,22	5,22	5,22
Cost distribution as laid down by KWKG	0,38	0,59	0,78	0,91
Renewable Energy Sources Act (EEG)	0,53	0,63	1,02	1,28
Green Tax/Electricity Tax	3,73	4,47	5,22	5,97
VAT	5,6	5,76	6,48	6,91
Total	40,61	41,72	46,99	50,04

<sup>29</sup> See, for example, “*Die Welt*” of 11 September 2004, <http://www.welt.de/data/2004/08/31/326232.html?prx=1>.

<sup>30</sup> See, for example, Association of Energy Consumers (*Bund der Energieverbraucher e.V.*), [www.energienetz.de/index.php4](http://www.energienetz.de/index.php4).

<sup>31</sup> Source: German Electricity Association (VDEW), according to “*Frankfurter Allgemeine Zeitung*” of 5 February 2003, p. 13.

## b) Overcharged Network Users

Although theoretically with the new legislation of the EnWG 1998 a complete opening up of the market was achieved enabling companies to use second-party networks, in practice this has not happened. This is probably because the network access fees are too high to allow other companies to enter the market. So, although the network owners are obliged by law to allow third-party companies to transmit current through their network at the same tariff they charge themselves, in practice these tariffs have been artificially lowered by cross-subsidizing within the companies. According to estimates given out by the consumer organization, Association of Energy Consumers (“*Bund der Energieverbraucher*”), the energy companies made profits of € 10.56 billion from network user fees from householders alone while only 2 billion euros were invested in the network.<sup>32</sup> The network user fees in Germany are well above the average in comparison with the rest of Europe.<sup>33</sup> Compared with the UK, for example, they are currently up to three times as high. In spite of this, the large German network owners are planning to raise the transmission fees by, in some cases, almost 10%.<sup>34</sup>

EnWG 1998 has failed to deliver genuine competition. Although the German energy market is completely liberalized, there are four major trusts who split the market between them, almost monopolizing trade in their particular areas. The largest is *E.ON* with 12,9 billion euros turnover, followed by *RWE* (12.2 billion), *Vattenfall* (8.3 billion) and *EnBW* (7.4 billion).<sup>35</sup> It seems as though each has acknowledged the other’s area monopoly, and will not compete with each other. When, in addition to this, other companies are discouraged by high network access fees from participating, competition becomes well nigh impossible and the monopolists are able to set their prices to their own advantage. As a result

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<sup>32</sup> See [www.energienetz.de/index.php4](http://www.energienetz.de/index.php4).

<sup>33</sup> Bohne/ Frenzel, “Formal and Informal Order of the Access to the Electricity Market” (*Formale und informale Ordnung des Zugangs zum Strommarkt*), in Hendler/ Marburger/ Reinhardt/ Schroeder (Editors), *Journal of Environmental- and Technical Law (Jahrbuch des Umwelt- und Technikrechts)* 2003, 71, p. 363 ff.

<sup>34</sup> Thus RWE Electricity Transportation Ltd. (RWE Transportnetz Strom GmbH) plans an increase of the transmission fees on high voltage level of 9,6 %, see “*Die Welt*”, 31 August 2004, <http://www.welt.de/data/2004/08/31/326232.html?prx=1>.

<sup>34</sup> Draft of a Second Act for the Reorganization of the Energy Industry Act (BR-Drs 613/04), see above.

<sup>35</sup> Data from 2003, source: Dohmen, *Der Spiegel*, 33, 2004, p. 58 f.

liberalization of the energy market in Germany has largely failed and German prices remain the highest in Europe.<sup>36</sup>

### c) Taxes and Impacts of Ecological Motivation on Energy Prices

For their part, the four large power supply firms claim that the incumbent red-green coalition in the Federal Government is responsible for the high prices. It is a fact that tax and various ecologically based surcharges together amount to approx. 40%.<sup>37</sup> There is a distinction between eco-motivated surcharges like Electricity Tax (1), Renewable Energy Sources Act (EEG) and the Power-Heat-Combination Act (KWKG) (2) and the inevitable payments of VAT and concession fees (3).

#### (1) Electricity Tax

An electricity tax ("*Stromsteuergesetz*" – StromStG<sup>38</sup>), governed by the Electricity Tax Act, was introduced under the ecological tax reform in 1999. The point of this tax is continuously to raise the price of electricity in the hope of encouraging energy saving and, at the same time, to increase the demand for production procedures that use less energy. The price of electricity for the consumer is governed by a tax initially charged to the energy producers. As of 2002 this tax amounts to 20.50 euros per megawatt/hr (2.5 cent per kw/hr) with reductions for users of environment-friendly energy, such as that from renewable energy sources. The tax in 2001 brought a total sum of € 4.3 billion. Electricity produced with energy using wind-force, methane, sewage gas, biomass and solar and geothermal energy, as well as hydro-electric power (plant-generator up to 10 megawatts) is completely tax-free.<sup>39</sup>

The electricity tax at present amounts to 10% of the price. Since there are no plans to raise this percentage, it cannot be blamed for the rising prices.

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<sup>36</sup> See also Smeddinck, The Evaluation Clause in § 8 EnWG - Innovation Control by Energy Law (*Die Evaluierungsklausel in § 8 EnWG – Innovationssteuerung durch Energierecht*), *Journal for New Energy Law (Zeitschrift fuer neues Energierecht)* ZNER 2002, 295, 299 f.

<sup>37</sup> Source: Dohmen, *Der Spiegel*, 33, 2004, S. 61.

<sup>38</sup> From 24 March 1999 (BGBl I S. 378, 2000 I S. 147); see *Rodi*, in: Schneider/Theobald (see above), Electricity Tax Act ("*Stromsteuergesetz*"), p. 1075 ff.

<sup>39</sup> See [http://www.bundesfinanzministerium.de/Service/Lexikon-Steuern-A-Z\\_580.1392/Lexikon/Stromsteuer.htm?abc=S](http://www.bundesfinanzministerium.de/Service/Lexikon-Steuern-A-Z_580.1392/Lexikon/Stromsteuer.htm?abc=S).

(2) Power and Heat Combination Act (“*Kraft-Waerme-Kopplungsgesetz - KWKG*”) and Renewable Energy Sources Act (*Erneuerbare Energien Gesetz - EEG*)

The Renewable Energy Sources Act<sup>40</sup> is of particular interest. It is the intention of the federal government to raise the contribution of solar, wind and waterpower, bio- and geothermal energy to the total energy production grid to at least 12,5% by 2010 with a view to achieving at least 20% by 2020.<sup>41</sup> In order to achieve this power from renewable energy sources should be bought by the nearest network owner at a higher price than traditionally produced electricity (§§ 3 ff. EEG).<sup>42</sup> This network owner transfers the increase in costs to the next transmission network operator, after which the costs are shared between all German transmission networks. Finally, all electric -energy suppliers delivering power to consumers are obliged to buy electricity produced from renewable energy sources from the transmission network operators. In this way the production from renewable sources is not directly state-subsidized. Rather, it is the large energy supply companies who foot the bill, before passing on all the increased costs to the consumers at a ratio of one to one. The production of wind-energy has benefited particularly from this form of support, contributing 5.59% towards total energy production of 2003.<sup>43</sup>

Further ecologically motivated surcharges on the electricity price are the result of the Power-Heat Combination Act (KWKG).<sup>44</sup> With § 1 of this Act, environmental protection, in the shape of an annual reduction of 20 – 23 m tons of CO<sub>2</sub>, through support, modernization and development of power-heat-coupling plants and introduction of gas cells is envisaged. The Act is intended to remain valid until 31. 12. 2010 unless extended. The support of these plants is similar to the procedure in the case of the Renewable Energy Sources Act (EEG). The energy produced by these

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<sup>40</sup> The revised version entered into force on 1 August 2004 (Federal Law Gazette –“*Bundesgesetzblatt*”- BGBl. I, p. 1918 ff.).

<sup>41</sup> See the reasons for the Renewable Energies Act given by the Federal Government, Bundestag – Materials (*Bundestags-Drucksache*) BT-Drs 15/2864.

<sup>42</sup> See for details Brandt/Reshöft/Steiner, *Renewable Energy Sources Act (Erneuerbare Energien-Gesetz)*, 2001, § 3, edge- number 1 ff.; Schneider, “Environmental Energy Law” (*Energieumweltrecht*), in Schneider/Theobald, *op. cit.*, p. 998 ff.

<sup>43</sup> See <http://www.wind-energie.de/informationen/zahlen-zur-windenergie/031231-dewi-zahlen.pdf>.

<sup>44</sup> Act for the Preservation, the Modernization and the Development of Power-Heat Coupling of 19 March 2002 (*Gesetz fuer die Erhaltung, die Modernisierung und den Ausbau der Kraft-Waerme-Kopplung vom 19. 3. 2002*), BGBl. I p. 1092.

plants must also be bought by the closest adjacent network operator. A surcharge is placed as set down in § 7 KWKG in addition to the agreed fee and, again, the costs must be spread evenly among the network operators in the whole country.

The charges incurred by the EEG and KWKG amount to approximately 4% of the electricity tariff. In no way can this low percentage of the total price be held responsible for the current increase in electricity tariffs.

## (2) Further Fees

Both VAT, at present 16%, and concession fees which energy suppliers must pay to the municipalities, are charged in addition to the electricity tariffs. Neither of these can be understood as ecologically motivated. VAT is charged in Germany for every domestic business transaction.<sup>45</sup> Concession fees are charged by the municipalities for the usage of communal property if cables are laid by network operators. The sum, which is dependent on the population of the town, is charged by the municipalities for the usage of public roads when laying cables or gas pipes.

Since both these fees existed before the introduction of ecologically motivated surcharges they cannot be used to explain the rise in prices either.

## d) Results

Taking the development of electricity prices into account it becomes obvious that, although there is a high increase in charges due to EEG/KWKG and electricity tax, owing to their low percentage contribution to the total electricity price of approximately 14% it is minimal. However, there have been major increases in the costs of production, transport and distribution. The reasons for this lie largely with the energy production companies and in the going prices for energy sources such as coal, gas and oil. Considering the fact that the network transmission carries approximately 32% of the total non-fuel price of electricity, any rise in costs will affect the electricity price enormously.

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<sup>45</sup> See § 1 exp. 1 No 1 Value Added Tax Act (*Umsatzsteuergesetz –UstG*).

## **Future Development of the German Energy Sector**

### **a) Opportunities for the Lowering of Prices**

There are two ways of lowering electricity tariffs in Germany: namely the reduction of fees or the removal of monopolies in the electricity market.

It would be possible to reduce the electricity tariffs by lowering the tax or lowering or abolishing the subsidies for renewable energy sources and power-heat-coupling. This would be a major political decision. Considering budget deficits and the difficulties caused by ever-increasing prices for traditional finite energy resources, it is safe to say that not even a conservative government's legislation would have much impact. Should the ecologically motivated charges be abolished, it would have little effect on the rising electricity tariffs. On the contrary, a removal of the EEG and the KWKG would cause great legal difficulties since investors in renewable energy plants have been guaranteed delivery into the net at a rate higher than traditionally produced electricity.

The overpriced network access fees mark the greatest obstacle preventing a general liberalization of the electricity market. A reduction of the present high level of network access fees in relation to the total electricity tariff would appear the best way of lowering electricity costs for the consumer. To achieve this there are plans to amend the Energy Industry Act (EnWG).

### **b) A Critical View on the Planned Amending of the EnWG**

The draft produced by the Federal Government for the amendment of the Energy Industry Act (EnWG) has increased the previous 24 paragraphs to 118. The draft is built around three main components, namely EnWG, a transitory act and the installation of the Federal Regulation Board.

The modified version of the EnWG covers the following aspects: General Rules, Unbundling, Regulation of Networks, Energy Supply to the Consumer, Planning and Traffic Line Usage, Security and Energy Supply Reliability, Regulation Board, Procedures and Miscellaneous Guidelines.

A major change from the previous EnWG is the inclusion of consumer protection. Although subjects such as the conversion from finite energy resources to sustainable energy sources, the increase in electricity efficiency and the promotion of decentralized electricity and gas production were requested by the NGOs, none has been included in the draft.

A more detailed unbundling than in the present EnWG is planned. The idea behind this is the prevention of cross-subsidization between the line operation and other areas of the energy industry within vertically integrated power supply firms. It is hoped that this can be achieved through unbundling under company law. The only exception to this rule would be companies supplying fewer than 100,000 customers. Unfortunately criticism has been made that the generous transitory regulation will give little incentive to companies to comply with the new terms before 2007.

By far the strongest criticism however has been expressed in relation to the third section of the draft, in which the fixing of network access fees is dealt with. The basis for this fixing are the costs of a management-biased energy industry (§ 21 exp. 2 of the draft). Details are to be regulated by statutory order ("*Rechtsverordnung*"). The calculation of access fees, solely based on costs, stands in contrast to the principles of fair competition in the eyes of the critics. In addition to this, the regulatory board can only bring decisions to bear on the conditions and methods for the fixing of net access fees but is unable to set price limits. Since prior permission of the tariffs by the adjustment authority is not intended, control as to whether the rules were kept by the line operators would predominantly take place *ex post facto*. Only should the tariffs be higher than average would the adjustment authority take action (settlement proceeding according to § 21 exp. 3 and 4 EnWG-draft). The competency of the adjustment authority is set down in §§ 29 ff EnWG-draft. This competency includes specifying or altering the regulation governing net access and, should line operators show misconduct to second parties, they may be reprimanded and in the case of such behaviour the ill-gained profit may be fined (§ 33 EnWG-draft). Apart from this, persons and groups, in particular, consumer protection associations, are granted the right to an investigation after allegations of misconduct on the part of a line operator (§ 31 exp. 1 EnWG-draft). Such persons are also allowed damages in the case of non-fulfilment of terms or misconduct on the part of the line operator (§ 32 EnWG-draft). In certain circumstances a successful claim can result in profit gained by misconduct being syphoned off and handed over to the State (§ 34 EnWG-draft). On top of this a fine can be imposed according to § 95 EnWG-draft. The overall result of these measures is a continuing control of net access fees and also of the electricity price for the authorities and consumers.

Both arrangements for taxing surplus profits (borrowed from Anglo-American law) and damages liability in misconduct cases seem powerful

means of asserting pressure on line-operators. This draft is been questioned by some critics since the tariffs already seem exorbitant. The demand is made for differentiated regulations, in other words, that the basis for cost fixation be effective production and supply without the addition of fictitious components and perhaps even inflated profits.

A further substantial point of criticism concerns the strong position of the Federal Ministry of Economy and Work, as foreseen by the draft, although the federal adjustment authority (“*Regulierungsbehörde*”) is responsible for the adjustment according to the seventh part of the draft. In order to give competence directives this body is under the auspices of the Federal Ministry of Economy and Labour. Neither the Ministry of Environment nor Consumer Protection has the ability to exercise much influence so there is a danger that the goal of comprehensive consumer protection cannot be reached. There is also an accusation of strong personal connections between the Federal Ministry of Economy and Labour and the power industry. It is feared that the adjustment authority will not be unbiased in its decision-making, as demanded in Art. 23 of the Domestic Electricity Market Directive, but will rather follow the interests of the power industry.

### c) Final Critical View

When seen in context, it becomes obvious that the shape of the proposed draft will not make much headway towards a genuine liberalization. The adjustment authorities’ hands are tied in strong contrast to the telecoms area. State regulations governing the conditions for net-access, including the methods for the setting-out of these conditions as well as methods for the fixing of prices for net access (§ 24 sentence 1 of the draft) take the place of negotiated net access. It is to be expected that this will not be much more transparent. Genuine liberalization and de-monopolizing can only take place if all conditions are clear. In its present form the draft does in fact look suspicious as though the underlying goal lies in securing the preservation of the *status quo* within the power industry.

The Federal Ministry of Economy and Labour claims that a law governing the security of energy supply in the interests of the energy industry is necessary.<sup>46</sup> It is not evident, however, that increased competition must lead to power cuts. This eventuality could be prevented by other means, e.g., by appropriate security requirements for power

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<sup>46</sup> See Vorholz, Ministers in favour of the Monopoly (*Minister für das Monopol*), *Die Zeit*, No 33, 2004, p. 19.

supplier or line operators. The 6<sup>th</sup> part of the draft deals specifically with the security and reliability of power supply.

The draft is at present (September 2004) in the initial stages of the legislative procedure. Since it is subject to the consensus of the Second House of Parliament (“*Bundesrat*”), in the course of being passed through the “*Bundesrat*,” it will probably undergo many changes. As it stands at the moment, it does not look as though the draft will have a positive effect on competitive electricity tariff formation in Germany.

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