

**PUBLIC UTILITIES**

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## 1. INTRODUCTION

### 1.1 *Public utilities in Germany*

In Germany the appliance of infrastructure and universal services has traditionally been a public duty in modern state. However there is no constitutional range of public utilities as a general rule but normally a setting of organization and volume by the legislative authorities.<sup>1</sup>

Since the 1990ies many former publicly owned enterprises (like the „Deutsche Bundespost“) have been privatised. Henceforward we have two different kinds of public utilities: On the one hand there is a (private) „regulated industry“, which fullfills services in the areas of provision of energy (generation and transportation), telecommunication and railways. In many cases the main enterprises are legal successor of formely public enterprises such as “Telekom”, “Postbank” or “Deutsche Bahn“. The government has retained only small shareholdings in these enterprises. Instead, a special form of regulation has been established: Regulated industries are committed to share their network with competitors („Zugangsregulierung“ – regulation of access); also the proposal of services is under governmental control with regard to availability („Universaldienstleistungen“ – universal services) and adequate prices (“Entgeltregulierung“ – regulation of fees).

On the other hand, services in the areas of water supply, local provision of energy, local public transport, waste management and medical institutions are often offered by local public enterprises. Most of these duties are delegated by legislative acts. Those enterprises can be organized under public or civil law („Formenwahlfreiheit“). In many cases we see a public-private-partnership („gemischtwirtschaftliche Unternehmen“).

In 2010/2011 some memorable changes took place in questions concerning public utilities. First of all the Bundesverfassungsgericht has given its judgement about the binding by fundamental rights in cases of public-private enterprises („Fraport“).<sup>2</sup> Then there is the end of nuclear power plants by law in July 2011 (after the Fukushima disaster), which will

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<sup>1</sup> Wißmann, in: Hoffmann-Riem/Schmidt-Aßmann (Hrsg.), Grundlagen des Verwaltungsrechts, Band I, 2. Aufl. (i.E.), 2012, § 15 Rn. 10 ff., 57.

<sup>2</sup> See below 1. c).

lend to far-reaching changes in the cases of energy production and transportation.<sup>3</sup> In some sectors we see a „Re-Municipalization“ after a long time of privatization.

### ***1.2 Guidelines by European Law***

For both parts of public utilities there is important guidance by the Law of the European Union: Regulated industries are mainly formed by European directives. The normal organization of public administration in Germany is modified: The “Bundesnetzagentur” has been found as a separate higher federal authority for regulating the sectors Electricity, Gas, Telecommunications, Post and Railway. Its task is to provide for the further development of these markets. For the purpose of implementing the aims of regulation, the Agency has special rights of information and investigation as well as the right to impose graded sanctions. Those decisions are made by independent ruling chambers, which have a specific kind of discretion („Regulierungsermessen“).

The local public enterprises have to follow the EU laws on state aid and competition rules. In principle economic activities are not forbidden as long as they are out of privilege. The municipal ordinances decreed often give noticeably stricter guidelines: public enterprises must be justified by a public purpose and private undertakings must not be in an equally good position to provide the services.<sup>4</sup>

### ***1.3 Especially: Judgement „Fraport“ by the Bundesverfassungsgericht***

For a long time there were question marks whether enterprises owned by both private owners and the state (gemischtwirtschaftliche Unternehmen) are directly bound by the fundamental rights. In 2011 the Bundesverfassungsgericht set a clear concept: “The use of private-law forms of organisation does not exempt state authority from its being bound by the fundamental rights pursuant to Article 1.3 GG. Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private owners and the state (..) on which the public authority has a controlling

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<sup>3</sup> See below 2.1.

<sup>4</sup> Ziekow, Öffentliches Wirtschaftsrecht, 2. Aufl. 2010, § 7 Rn. 39 ff.; Vollmöller, in: Schmidt/Vollmöller (Hrsg.), Kompendium Öffentliches Wirtschaftsrecht, 3. Aufl. 2007, § 5 Rn. 33 ff.

influence, are directly bound by the fundamental rights. Pursuant to Article 1.3 GG, the fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law. They do not only apply to certain areas, functions or forms of action of the state's assumption of its responsibilities but comprehensively bind state authority in its entirety.”<sup>5</sup>

In this case an action against Fraport AG was unsuccessful in all instances, concerning the ban on demonstrating and on expressing one's opinion imposed with regard to the premises of Frankfurt Airport. Fraport Aktiengesellschaft is a stock corporation. The majority was shared in public ownership, (now) divided between the *Land* (state of) Hesse and the City of Frankfurt am Main.

The Bundesverfassungsgericht established that the “controlling influence” is the case if more than half of the shares are publicly owned. “The assumption that not only the shareholders but also the respective enterprise itself are directly bound by the fundamental rights corresponds to the enterprise's nature as a single operating entity; this assumption ensures an effective binding force of the fundamental rights irrespective of whether, to what extent and in what form the owner or owners can exert an influence under company law on the management of business and of how, in the case of enterprises with different public shareholders, a coordination of the influence rights of several public owners can be guaranteed.”<sup>6</sup> This guideline is formulated as a “general rule”, it will work for all sectors of public utilities.

## **2. INDIVIDUAL SECTORS**

### **2.1 Energy**

The German energy sector turns out to be very inconsistent. Though private companies entered the market early compared to other sectors of general public services,

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<sup>5</sup> BVerfG, Urt. v. 22.2.2011 – 1 BvR 699/06 -, [http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222\\_1bvr069906.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222_1bvr069906.html) (Download vom 1.12.2011). (Press release no. 18/2011 of 22 February 2011).

<sup>6</sup> BVerfG, Urt. v. 22.2.2011 – 1 BvR 699/06 -, [http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222\\_1bvr069906.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222_1bvr069906.html) (Download vom 1.12.2011). (Press release no. 18/2011 of 22 February 2011).

there were many local monopolies due to concession and demarcation contracts. On the level of power generation there are municipal enterprises operating, whose market share sums up to 54.2 % concerning electricity, 58.2 % concerning thermal energy and 67.7 % concerning the gas sector.<sup>7</sup> Since the corresponding legislation (EnWG)<sup>8</sup> came into effect in 2005 the energy sector has been facing regulation according the operation of electricity networks.<sup>9</sup> In the field of transmission system operators four private enterprises dominate the German market: Tennet TSO GmbH (= formerly E.ON), 50hz Transmission GmbH (= formerly Vattenfall), Amprion (= formerly RWE Transportnetz Strom GmbH; RWE still holds about 25 % of the shares)<sup>10</sup> and EnBW Transportnetze AG (a full subsidiary of EnBW which again is partly owned by the federal state Baden-Württemberg).

The most substantial change in the energy sector in 2010 and 2011 has been the (renewed) statutory nuclear phase-out in answer to the reactor catastrophe in Fukushima.<sup>11</sup> Seven older vessels have been removed from the network and decommissioned for good. The 13th amendment to the Atomic Energy Act (AtomG) dated from July 31st, 2011<sup>12</sup> takes back the lifetime extension (granted only three months earlier) and additionally sets a fix date (December 31st, 2022) for the final shutdown of all German nuclear power plants.<sup>13</sup> Therefore the decision to extend respectively to even expand nuclear power made in late 2010 is outdated; the German energy policy now focuses on a massive support of renewable energy (“Energiewende” – Energy Turnaround).<sup>14</sup>

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<sup>7</sup> Statistics given by VKU (“Verband kommunaler Unternehmen e.V.” – Association of municipally determined infrastructure, cf. [www.vku.de](http://www.vku.de)) dated from August 26th, 2011; see <http://www.vku.de/grafiken-statistiken/statistik.html> (latest download on December 7th, 2011).

<sup>8</sup> Second Amendment to the Revision of Energy management legislation, July 7th, 2005 (Federal Law Gazette I, p. 1970).

<sup>9</sup> Britz, in: Fehling/Ruffert (Ed.), *Regulierungsrecht*, 2010, § 9 Recital 1.

<sup>10</sup> Cf. the corresponding press release dated September 6th, 2011; see <http://www.rwe.com/web/cms/de/37110/rwe/presse-news/pressemitteilung/?pmid=4006769> (latest download on December 7th, 2011).

<sup>11</sup> For further information about „Energiewende“, see <http://www.bmu.de/energiewende/downloads/doc/47467.php> (latest download on December 8th, 2011) and <http://bmwi.de/BMWi/Navigation/energie.did=405004.html> (latest download on December 8th, 2011).

<sup>12</sup> Federal Law Gazette I 2011, p. 1704.

<sup>13</sup> Sellner/Fellenberg, *NVwZ* 2011, p. 1025 (1026).

<sup>14</sup> Besides the Amendment to the Atomic Energy Act the “Energiewendepaket” contains „Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien“ (Revision of legal framework concerning the promotion of power generation out of renewable energies), July 28th, 2011 (Federal Law Gazette I, p. 1634), „Gesetz über Maßnahmen zur Beschleunigung des Netzausbaus Elektrizitätsnetze“ (Electricity Network Expansion Acceleration Act), July 28th, 2011 (Federal Law Gazette I,

## 2.2 Water

The water supply in Germany is to a large extent still carried out by public authorities.<sup>15</sup> According to § 50 I, II WHG (Law on water resources) the public water supply shall as a duty of general interest be primarily covered by making use of local water occurrences.<sup>16</sup> Generally there are local monopolies that are protected by concession and demarcation contracts and strengthened by statutory obligation of connection and usage.<sup>17</sup> According to VKU statistics the market share of municipal enterprises adds up to 76.3 %, statistics of BDEW<sup>18</sup> actually see the market share of water distribution companies owned by public authorities at about 96 %.<sup>19</sup>

Attempts to privatise the public water supply have not been successful so far.<sup>20</sup> The feeding-in of water provided by other distribution companies into the existent network is seen critically, as an intermixing technically comes along with an “extensive loss of quality”.<sup>21</sup> Furthermore there is no adequate interconnected network system.<sup>22</sup> Due to the

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p. 1690), „Gesetz zur Neuregelung energiewirtschaftlicher Vorschriften“ (Revision of prescriptions concerning energy industry regulation), July 26th (Federal Law Gazette I, p. 1554), „Erstes Gesetz zur Änderung schifffahrtsrechtlicher Vorschriften“ (First Law amending waterway legislation), July 22nd, 2011 (Federal Law Gazette I, p. 1512), „Gesetz zur Förderung des Klimaschutzes bei der Entwicklung in den Städten und Gemeinden“ (Act on the promotion of climate protection in municipal development), July 22nd, 2011 (Federal Law Gazette I, p. 1509), „Gesetz zur Errichtung eines Sondervermögens ‚Energie- und Klimafonds‘“ (Law on the establishment of a fund „Energy and Climate Fund“), July 29th, 2011 (Federal Law Gazette I, p. 1702).

<sup>15</sup> Laskowski, KritJustiz 2011, p. 185 (185). Whereas there is a special model in Berlin: The „Berliner Wasserbetriebe“ (Berlin Water Works) are run as a public-law institution, the City of Berlin however only owns 50.1 %, while 49.9 % of the shares are held by the private enterprises RWE and Veolia, cf. the figures on the website <http://www.bwb.de/content/language1/html/881.php> (Latest download on December 8th, 2011).

<sup>16</sup> So Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 1 f.

<sup>17</sup> Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 7 m.w.N. Also see the field exemption in § 131 VI GWB.

<sup>18</sup> Bundesverband der Energie- und Wasserwirtschaft (German Association of Energy and Water Industries), cf. [www.bdew.de](http://www.bdew.de).

<sup>19</sup> According to the statistics in „Branchenbild der deutschen Wasserwirtschaft 2011“, see [http://www.bdew.de/internet.nsf/id/40873B16E2024175C125785A00350058/\\$file/110321\\_Branchenbild\\_dt\\_WaWi\\_2011\\_Langfassung\\_Internetdatei.pdf](http://www.bdew.de/internet.nsf/id/40873B16E2024175C125785A00350058/$file/110321_Branchenbild_dt_WaWi_2011_Langfassung_Internetdatei.pdf) (latest download on December 7th, 2011). Similar figures (only 4 % of water supply in private hands) stated by the „18. Hauptgutachten der Monopolkommission“, Bundestag printed papers 17/2600, p. 49.

<sup>20</sup> Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 4 with further evidence. Critical Laskowski, KritJustiz 2011, p. 185 ff. The latest attempt by the „Monopolkommission“ (18. Hauptgutachten der Monopolkommission 2008/2009, Bundestag printed papers 17/2600, p. 49 ff.) has been rejected by the government (Statement dated December 17th, 2010, Bundestag printed papers 17/4305, p. 4 (Recital 12, 13)), cf. Laskowski, KritJustiz 2011, p. 185 (185).

<sup>21</sup> Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 6 with further evidence.

still existing market foreclosure and for the lack of sector specific legislation the area of water supply regulation in this respect takes an “exceptional position”.<sup>23</sup>

### **2.3 Rail**

During a long period rail traffic in Germany was exercised as a public responsibility by the Federation (“Bundesbahn”). That is why today the fundamental rules are still lying in the German Constitution (Art. 87e GG); furthermore the “Allgemeines Eisenbahngesetz” (AEG - General railway act) is to apply. The “Deutsche Bundesbahn” (German Federal Railway) was formally privatised in 1994 by the incorporation of the “Deutsche Bahn AG” (DB AG - German Railway Inc.). As part of the unbundling the infrastructure companies were spun off, when in 1999 “Deutsche Bahn Holding” was incorporated (now “DB Netz AG” – German Railway Network Inc.), holding 100 % of the shares of each “Deutsche Bahn AG” and “DB Netz AG”. The holding itself is fully owned by the German Federation. A scheduled partial privatization was cancelled in 2008. Beside the “Deutsche Bahn AG” there are 398 other railroad traffic companies, partly operated by municipal enterprises<sup>24</sup>, as well as 359<sup>25</sup> railroad infrastructure companies (that are to some extent identical with the traffic companies).<sup>26</sup>

The integration between the sub-companies of “Deutsche Bahn” is a typical problem of competition and regulation law. Concerning the unbundling of “Deutsche Bahn” the Bundesverwaltungsgericht (BVerwG - Federal Administrative Court) decided in 2010, that the infrastructure company “DB Netz AG” is not allowed to consult the legal department of “Deutsche Bahn Holding” which is at the same time owner of the traffic company “Deutsche Bahn AG”.<sup>27</sup>

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<sup>22</sup> Schalast, N&R 2005, p. 110 (111 f.).

<sup>23</sup> Kahl, in: Fehling/Ruffert (Ed.), Regulierungsrecht, 2010, § 14 Recital 21.

<sup>24</sup> Figures to download on [http://www.eba.bund.de/cln\\_033/nn\\_202596/DE/Infothek/Eisenbahnunternehmen/EVU/evu\\_\\_node.html?\\_\\_nnn=true](http://www.eba.bund.de/cln_033/nn_202596/DE/Infothek/Eisenbahnunternehmen/EVU/evu__node.html?__nnn=true) (latest download on December 8th, 2011).

<sup>25</sup> In comparison: „DB Netz AG“ runs 5982, „DB Regionetz AG“ another 275 stations. Figures to download on [http://www.eba.bund.de/cln\\_033/nn\\_204050/DE/Infothek/Eisenbahnunternehmen/EVU/evu\\_\\_node.html?\\_\\_nnn=true](http://www.eba.bund.de/cln_033/nn_204050/DE/Infothek/Eisenbahnunternehmen/EVU/evu__node.html?__nnn=true) (latest download on December 13th, 2011).

<sup>26</sup> Figures to download on [http://www.eba.bund.de/cln\\_033/nn\\_204046/DE/Infothek/Eisenbahnunternehmen/EIU/eiu\\_\\_node.html?\\_\\_nnn=true](http://www.eba.bund.de/cln_033/nn_204046/DE/Infothek/Eisenbahnunternehmen/EIU/eiu__node.html?__nnn=true) (latest download on December 13th, 2011).

<sup>27</sup> BVerwG, May 18th, 2010 – 3 C 21.09 -, = BVerwGE 137, 58-74.

## **2.4 Telecommunication**

In Germany the telecommunication market has been passed into private hands in a particular resolute way (Art. 87f GG<sup>28</sup>). Today, the “Deutsche Telekom AG” (German Telekom Inc.) is a largely privatized enterprise. However, the German Federation still holds 14.95 % of the shares, the state-run “Kreditanstalt für Wiederaufbau” (Reconstruction Loan Corporation)<sup>29</sup> holds another 17.02 %.<sup>30</sup>

By Art. 87f Par. 2 Sect. 1 GG the German Federation is obligated to guarantee a basic service.<sup>31</sup> Due to the advances in technology this is more about partaking in this progress (e.g. faster internet), less about losing previous standards (which is still imaginable in the area of wired technologies though).

Actual regulation applies on companies with “significant market power”<sup>32</sup> that are obligated to provide universal services where necessary. The regulation carried out by the BNetzA relates to network access (obligation on companies with significant market power, §§ 19-25 TKG) and remuneration control (§§ 30-39 TKG) based on a previous market definition (§ 10 TKG) and market analysis (§ 11 TKG).

## **2.5 Post**

Similar to the area of telecommunication, the German legislator was bound to effect privatization by Art. 87f GG. The “Deutscher Bundespostdienst” (German Federal Postal Service) was converted into “Deutsche Post AG” (German Mail Inc.) in 1995

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<sup>28</sup> In Germany the directives of the first generation (Directive on implementation of open network provision 90/387/EG, Directive on general authorization and individual licenses 97/13/EG, Directive on interconnection 97/33/EG, Directive on personal data and protection of privacy 97/66/EG; Regulation on unbundled access Nr. 2887/2000) caused a substantial change an administrative law. Again the same applies for the Reform in 2002 (Framework Directive 2002/21/EG, Authorization Directive 2002/20/EG, Access Directive 2002/19/EG, Universal Service Directive 2002/22/EG, Directive on privacy and electronic communications 2002/58/EG).

<sup>29</sup> Public-law institution, to 80 % owned by the Federation, to 20 % by the States („Länder“).

<sup>30</sup> Statistics dated September 2011, see <http://www.telekom.com/dtag/cms/content/dt/de/8822> (latest download on December 6th, 2011).

<sup>31</sup> „Universaldienst“ (Universal service), cf. §§ 78 ff.TKG.

<sup>32</sup> Ruthig, in ders./Storr, Öffentliches Wirtschaftsrecht, 3rd edition, § 6 Recital 592.



(known as “Postreform II”), too. In 2000, the company went public, in 2010 30.5 % of the shares were still held by KfW-Banking Group.<sup>33</sup>

The German Federation bears responsibility for providing universal services (Art. 87f GG), but can put companies with significant market power in charge, §§ 11 ff. PostG (Postal Act) via the Bundesnetzagentur. The regulation in the area of postal services focuses less on network access (see § 29 PostG though) but on remuneration control, §§ 19 ff. PostG.

In 2011 the German legislator has enacted a revision of PTSG<sup>34</sup> concerning both the postal and the telecommunication area, which enables him to put the large service provider in charge of maintaining the corresponding infrastructure at times of crisis. Some real innovation has been brought by the legislation on de-mail-services<sup>35</sup> which is the bases for the launch of “E-Postbrief” (a secured electronic document dispatch) by “Deutsche Post AG”.<sup>36</sup>

### 3. CONCLUSION

Public utilities play a decisive role in the German economy. They operate especially there, where a free market is not able to effect the required performance because of high or extremely differing costs at multiple sites or because of existing natural monopolies. Concerning the role of the state several possibilities arise: As a renderer of service, as one party in public-private-partnerships or as a regulating authority. In the future these differing models will still be seen side by side in the miscellaneous sectors in Germany.

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<sup>33</sup> Annual report 2010, see [http://www.dp-dhl.com/content/dam/Investoren/Publikationen/DPDHL\\_Geschaeftsbericht\\_2010.pdf](http://www.dp-dhl.com/content/dam/Investoren/Publikationen/DPDHL_Geschaeftsbericht_2010.pdf) (latest download on December 6th, 2011).

<sup>34</sup> Law to ensure postal and telecommunication services under special circumstances, March 24th, 2011 (Federal Law Gazette I, p. 506 and 941).

<sup>35</sup> De-mail-Act, April 28th, 2011 (Federal Law Gazette I, p. 666).

<sup>36</sup> For further information see Gramlich, Das Postrecht in den Jahren 2010/2011, N&R 2011, p. 253 (258 f.).