

## „Toward Regulated Network Access in German Electricity“

**3<sup>rd</sup> International Conference on Applied Infrastructure  
October 9<sup>th</sup> 2004, Berlin University of Technology**

**Rechtsanwalt Dr. Christian Theobald, Mag. rer. publ.**

### Becker Büttner Held

Rechtsanwälte, Wirtschaftsprüfer, Steuerberater  
Köpenicker Straße 9  
10997 Berlin

Telefon: 030 / 611 28 40 – 26

Telefax: 030 / 611 28 40 – 99

E-Mail: christian.theobald@bbh-berlin.de

Homepage: www.bbh-berlin.de

## Becker Büttner Held

Rechtsanwälte Wirtschaftsprüfer Steuerberater

- **Established 1970**
- **Offices in in Berlin, Marburg, Munich, Vienna**
- **70 professionals**
- **Specialized in particular on questions related to**
  - **Energy and Infrastructure Law**
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  - **Competition and Cartel Law**
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- **Interdisciplinary cooperation with experts from the technical field and business sector**
- **Successful representation of our clients in numerous landmark cases in the area of Energy Law, ("Electricity controversy" –East German Stadtwerke case, network use, brown coal clause, etc.)**
- **Clients: EU, Federal Government, *Bundesländer*, stock exchanges, brokers, internationally active supply and trading companies, new market participants, approximately 250 public utility companies (*Stadtwerke*), industrial companies...**



## Dr. Christian Theobald, Rechtsanwalt (attorney-at-law)

(contact: christian.theobald@bbh-berlin.de, ☎ 030/611 28 40 26)

- Born in Heidelberg in 1966
- Training as banker at the Deutsche Bank
- Studies of law and administrative science at the Universities of Freiburg in Breisgau, Speyer (DHV) and London from 1989 to 1994
- Member of the academic staff at the Max Planck Institute for International and Foreign Penal Law at Freiburg in Breisgau from 1989 to 1994
- Academic assistant at Deutsche Hochschule für Verwaltungswissenschaften (University of Public Administrative Science) of Speyer from 1995 to 1998
- Doctorate in the field of legal and institutional economics at Deutsche Hochschule für Verwaltungswissenschaften, Speyer
- lawyer at BBH-Berlin since 1998, member of the partnership since 2001
- Expert counsel for the German parliament (Economic committee) during the legislative drafting process of the EnWG (Energy Act)
- Numerous publications in particular on energy and utilities law; editor of the set of works "Energie- und Infrastrukturrecht (Energy and Infrastructure Law)" and the monthly journal "InfrastrukturRecht. Energie, Verkehr, Abfall, Wasser (Infrastructure Law. Energy, Traffic, Waste, Water)" (both published by C.H.Beck)
- Spokesman of the Studienkreis "Regulierung der Netzwirtschaften: Energie-Post-Telekommunikation-Verkehr (Institute for Regulation of Network Industries: Energy-Post-Telecommunications-Traffic)" at the Rheinische Friedrich-Wilhelms-Universität in Bonn
- Senior Fellow at the Rheinische Friedrich-Wilhelms-Universität in Bonn
- Lecturer on the energy industry at the Technical University of Berlin

## Structure

- 1. Three German competition models for the power and gas supply industries**
- 2. Contractual application of „competition in grids“ – governmental regulation or selfregulation?**
- 3. From negotiated to regulated grid access**
- 4. Next Steps**
- 5. Conclusion**

## 1. Three German competition models for the power and gas supply industries

- Competition in grids
- Competition between grids
- Competition for grids

## 2. Contractual application of „competition in grids“ – governmental regulation or selfregulation? (1)

- **The German legislator** only provides for a general **right to third party access, Section 6 Energy Act**
    - Third party access on the basis of negotiated network access
    - Request for third party access can only be denied under strict conditions
      - E.g. impossibility and unreasonable hardship
    - Initially, no provisions regarding network access for gas
      - Not until 2003 (Section 6a Energy Act)

⇒ Gas still behind electricity !
  - **Associations´ Agreements** provide for the actual network access
    - Legislator does not interfere with specific set-up of network access conditions
    - Associations´ Agreements negotiated by sectorial associations

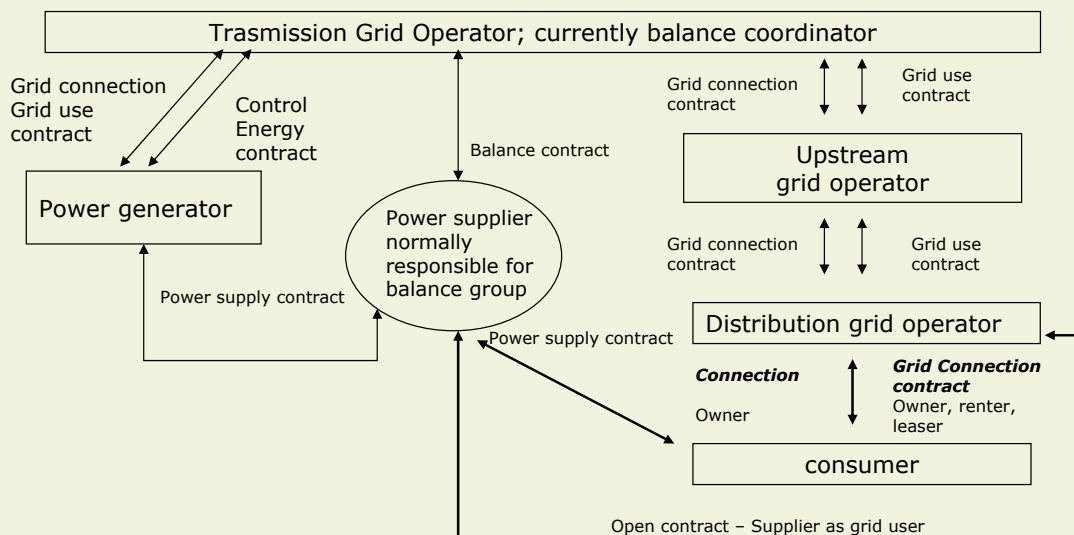
⇒ No binding legal quality
- ⇒ **Special situation in Europe !**

## 2. Contractual application of „competition in grids“ – governmental regulation or selfregulation? (2)

- Determination of economic and technical **conditions for network access**
  - Agreement of VV II plus (since January 1, 2002)
- **Core content:**
  - Transaction-based network access model
    - Successful in implementation/realization
    - Enables uniform trading point (380 OLV level)
    - Establishment of power exchanges
  - Criteria for the **determination of third party access fees**
    - Detailed calculation guidelines

## 2. Contractual application of „competition in grids“ – governmental regulation or selfregulation? (3)

Contract instruments according to the VV II Electricity Plus:

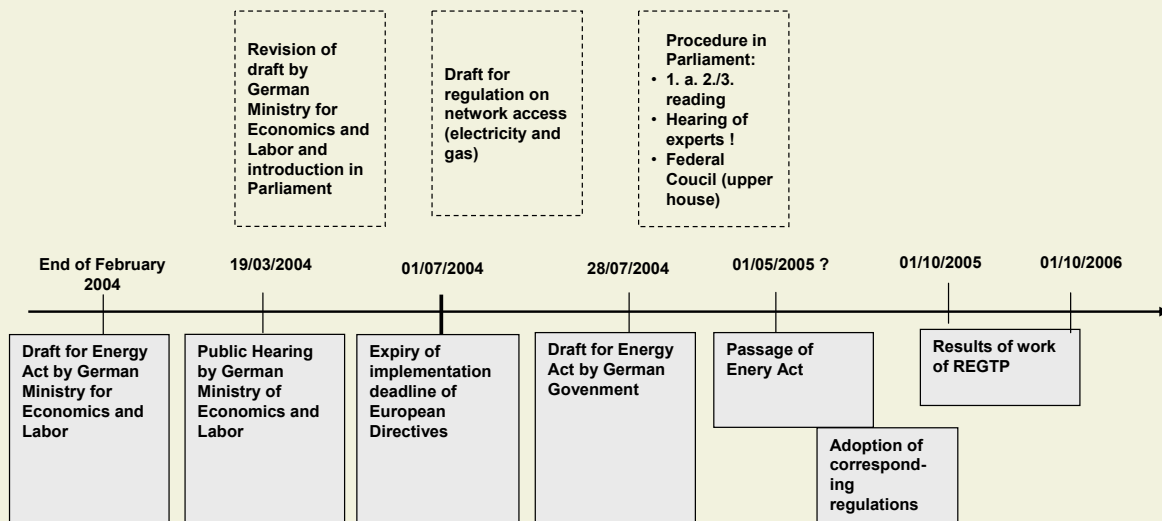


### 3. From negotiated to regulated grid access

#### Network access as main focus of regulation

Network access	1998	1999	2000	2001	2002	2003	2004	2005
Electricity								
If?								
How?								
How much?								

### 4. Next Steps in Germany



## New Energy Act – Summary of contents

I. General Regulations	II. Unbundling	III. Network operation	IV. Energy supply to consumers
<ul style="list-style-type: none"> <li>▪ Aim of the act</li> <li>▪ Definition</li> <li>▪ authorisation and obligation of disclosure</li> </ul>	<ul style="list-style-type: none"> <li>▪ legal and operational unbundling</li> <li>▪ Special regulation VNB</li> <li>▪ confidentiality</li> <li>▪ accounting unbundling</li> <li>▪ Monitoring tasks of REGTP</li> </ul>	<ul style="list-style-type: none"> <li>▪ Tasks NO</li> <li>▪ Network connection</li> <li>▪ Network access</li> <li>▪ General RVO-authorisation</li> <li>▪ Access to storage</li> <li>▪ Authority of REGTP</li> </ul>	<ul style="list-style-type: none"> <li>▪ Obligation of general supply</li> <li>▪ Compensatory supply</li> <li>▪ RVO</li> <li>▪ Misuse surveillance state authorities</li> <li>▪ Electricity labelling</li> </ul>

## New Energy Act – Summary of contents

V. Official approval of a plan, use of roads	VI. Security, energy supply	VII. Behörden	VIII. Verfahren	IX. Sonstige Vorschriften
<ul style="list-style-type: none"> <li>▪ Procedure of approval of a plan</li> <li>▪ Concessional contracts</li> <li>▪ Concessional fees</li> </ul>	<ul style="list-style-type: none"> <li>▪ Supply inventory</li> <li>▪ Monitoring</li> <li>▪ Call ofr bis of new production capacities</li> </ul>	<ul style="list-style-type: none"> <li>▪ REGTP</li> <li>▪ responsibility</li> <li>▪ Cooperation of authorities</li> <li>▪ General instructions</li> </ul>	<ul style="list-style-type: none"> <li>▪ Procedures before regulation authorities: investigation rights</li> <li>▪ Legal means</li> <li>▪ Cost income</li> <li>▪ sanctions / fines</li> </ul>	<ul style="list-style-type: none"> <li>▪ Law for the transitional period</li> <li>▪ Law on the organisation of the REGTP</li> </ul>

## From negotiated to regulated grid access

### Thesis 1:

Regarding the „if“ and „how“ of the grid access the present negotiated grid access has already become a regulated grid access by means of antitrust law (prohibition of discrimination). Finally the impact of VV II Electricity Plus for „good professional practice“ in the Energy Act of 20. May 2003 meant a change from negotiated to regulated grid access.

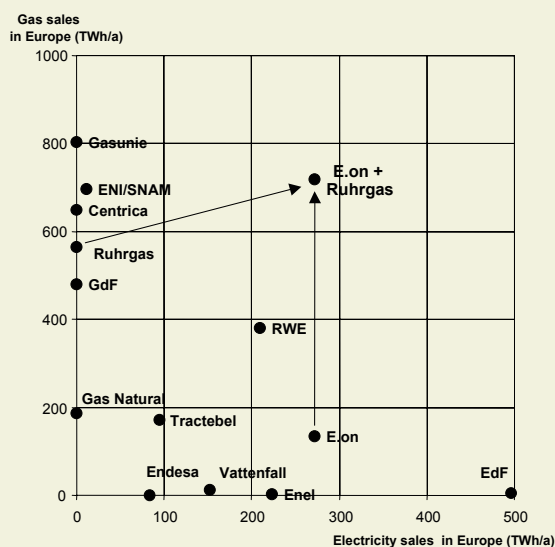
### Thesis 2:

Regulation and unbundling are two sides of the same medal, i.e. instruments of the grid access without discrimination. Unbundling means high transaction costs especially for about 700 small and middle electricity suppliers in Germany. This holds the danger of further vertical forward integration and thus of an increasing duopolisation.

## Enhanced Market Concentration: Mergers

- **Multitude of mergers** since beginning of liberalization
  - VEBA and VIAG: Merger to E.on
    - Biggest electricity supplier
  - RWE and VEW: Merger to RWE
    - Second biggest electricity supplier
  - EnBW: new shareholder EdF
    - EdF is only major foreign market participant
  - Vattenfall: different undertakings (mainly VEAG)
    - Result of duties to sell participations at mergers of VEBA/VIAG and RWE/VEW
    - Attempt to create "fourth force"; still unclear, whether possible
- ⇒ **Duopoly by E.on and RWE**
- **Culmination** of market concentration:
  - Integration of Ruhrgas into E.on-corporate group (2003)
    - ⇒ Biggest European supplier of gas and electricity

## Market Position of E.ON-Ruhrgas after Merger



- **Federal Cartel Office:** Merger leads to dangerous degree of vertical integration, which effects **47 %** of all gas delivered to operators in Germany.
- **Minister:** Merger necessary to secure enduring **international competitiveness**. Merger also enhances **security of supply**, as Germany depends on imports. Ruhrgas can contribute to productivity and delivery power of Russian gas industry



### Thesis 3:

Overshadowed by the discussion of the regulated grid access in Germany during the last five years the present oligopoly structure at network level and the energy production at a higher level than 1998 developed toward a duopoly. There is the danger that regulation and unbundling will be considered a cost driver of transaction costs and will thus jeopardise the actual aim of the European directives to lead to competition and a greater number of competitors.