

Kurt Berlo, Wolf Templin, Oliver Wagner

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Remunicipalisation as an Instrument for Local Climate Strategies in Germany: The Conditions of the Legal Energy Framework as an Obstacle for the Local Energy Transition

Kurt Berlo, Wolf Templin and Oliver Wagner*

This article explores recent developments in the field of remunicipalisation in the German electricity market. Actually, the established socio-technical regime of the electricity market generates considerable inertia and impedes fundamental change. But regarding the energy transition (German Energiewende) a fundamental change is needed; it is essential to promote a broader range of actors and institutions to overcome the existing regime resistance. Many local policy-makers and municipalities in Germany discover chances and possibilities for local action which arise from remunicipalisation. The establishment of municipal power utilities offers the opportunity of implementing an independent energy policy at local level which is critical in creating a transformation to a sustainable energy system based on renewable energies and energy efficiency. The municipal ownership allows a strong governance towards more political influence on the local energy market but the current court decisions regarding the takeover of electricity grids taken by the former concession holder of municipal utilities (Stadtwerke) in Germany make it difficult to realise the full potential of energy policy at a local level. The requirements for a legitimate process are still very high and far too complex to be fulfilled by the local authorities without the help of specialised legal advice.

I. Introduction

Germany's energy sector was dominated by regional (largely privately owned) energy companies for a long time, while the municipal companies held a noticeable share of the local markets. The German legislation intention to liberalise the energy market in

1998 had a paradox effect. In subsequent years it triggered a wave of company mergers which resulted in the emergence of the 'Big Four' (RWE, E.ON, EnBW and Sweden's State owned Vattenfall), whereas the share and role of the municipal energy companies began to shrink. At that time, many analysts predicted a 'demise of the German municipal energy companies'.¹ However, for years now, the energy sector in Germany has been characterised by numerous launches of new municipal utility companies, not only in big centres like Hamburg and Berlin, but also in rural areas. After many years, when privatisation and outsourcing were the dominant trends across nearly all public services, the phenomenon of founding new municipal power utilities can be understood as a counter-movement to the paradigm of privatisation that had dominated the 1980s and 1990s.² Politics and economic policy have been dominated increasingly by neo-liberalism at that time. This process has been driven by political, legal and fiscal factors.

* Dr Kurt Berlo Project Coordinator at the Wuppertal Institute for Climate, Environment and Energy in the Research Group 'Energy, Transport and Climate Policy'. Dr Wolf Templin is specialist lawyer for energy law at the law office Boos Hummel & Wegerich. Oliver Wagner is Project Coordinator at the Wuppertal Institute for Climate, Environment and Energy in the Research Group 'Energy, Transport and Climate Policy.'

1 Helmut Wollmann, 'Provision of Public Services in European Countries: From Public/Municipal Private and Reverse?' (2011) 4 Croatian and Comparative Public Administration 889–910.

2 Bastian Busshardt, 'Analysing the Remunicipalisation of Public Services in OECD Countries' (Geschwister-Scholl-Institut für Politikwissenschaft, Ludwig Maximilians University 2014) 3; see also, David Hall, 'Re-municipalising municipal services in Europe' (report commissioned by the European Federation of Public Service Unions, 44 PSIRU, University of Greenwich 2012), 3.

There is now increasing evidence, particularly in the municipal water and energy sector, of trends in the opposite direction.³ According to this new trend, many local authorities realised their appreciation for public or citizen value.⁴ With remunicipalisation of local electricity and/or gas distribution grids, municipal utilities usually aim to be a player along the entire value chain: from procurement to production, supply and network operation at all stages. The German municipal power utilities are usually local multi-utility companies and almost all public service obligations can be pursued through them.

In addition to that, the energy transition (German *Energiewende*) offers plenty of new opportunities in energy supply and demand management on a local stage and the implementation of 100% renewable energy systems, hence, implies a transition away from central power production.⁵ Many cities, towns and villages have ambitious visions and targets to achieve 100% sustainable energy, energy neutrality, zero carbon emission or zero-impact of their communities.⁶ To achieve the national targets, to increase renewable energy production and to reduce the greenhouse gas emissions, the energy systems will have to change significantly in a number of areas.

Regarding the German energy transition, the existing regime in the field of the operating distribution grids is composed of stable assemblages of technical artefacts, organised in co-evolving market and regulatory frameworks. Therefore, a strong regime resistance can be observed.⁷ But for a successful energy transition a regime change is necessary and it is essential to promote a broader range of actors and institutions. This can also be recognised as more fea-

sible and advantageous in comparison to what is normally the case for a discrete technological change.⁸ The ownership of the municipal distribution grid plays an important role for a regime-shift and the integration of more renewable and other local energies, like the electricity produced from cogenerations. The establishment of municipal utilities can be understood as an important step to promote a reconfiguration of the relevant players in this field.⁹ Therefore, it is assumed that the distribution networks of municipal power utilities are the backbone of a turnaround in energy policy towards sustainable energy systems, while municipal utilities have the potential to play an important role in greenhouse gas reduction efforts by local governments.¹⁰ Municipal utilities are, thus, a central driving force for the transformation process in the German energy sector. Since nearly all existing grid concessions in the energy sector have been up for renewal in the period between 2012 up to the end of 2016, about two thirds of all German cities and towns are considering to buy back both the electricity generators and the distribution networks.¹¹ The founding of own utilities is the first important step to pursuing this strategy to exploit the full potential of a local energy policy. In the light of the above, 72 municipal utilities in the electricity sector that were newly founded between 2005 and 2012 have been counted.¹² Besides a climate protection strategy, financial reasons also play an important role for local decision makers. Local ownership triggers positive economic effects in areas where renewable energy power plants are located¹³ and municipal utilities are seen as a driver to increase investment in renewable energies on-site.¹⁴ According to

3 ibid Hall.

4 Kurt Berlo and Oliver Wagner, 'The Wave of Remunicipalisation of Energy Networks and Supply in Germany: the Establishment of 72 New Municipal Power Utilities' (ECEEE Summer Study Proc 2015) 559–569.

5 Karl Sperling, Frede Hvelplund and Brian Vad Mathiesen, 'Centralisation and decentralisation in strategic municipal energy planning in Denmark' (2011) 39(3) *Energy Policy* 1338 et seq, 1338.

6 Tineke van der Schoora and Bert Scholtens, 'Power to the people: Local community initiatives and the transition to sustainable energy' (2015) 43 *Renew Sustain Energy Rev* 666–675.

7 Kurt Berlo and Oliver Wagner, 'Strukturkonservierende Regime-Elemente der Stromwirtschaft als Hemmnis einer kommunal getragenen Energiewende. Eine Akteursanalyse aus der Multi-Level-Perspektive der Transitionsforschung' (2015) 4(4) *Zeitschrift für Sozialen Fortschritt* 233–253; see also, Frank W Geels, 'Regime Resistance against Low-Carbon Transitions: Introducing

Politics and Power into the Multi-Level Perspective' (2014) 31(5) *Theory, Culture & Society Special Issue: Energy & Society* 21–40.

8 Frans Berkhout, 'Technological regimes, path dependency and the environment' (2002) 12 (1) *Global Environmental Change* 1–4 [http://doi.org/10.1016/S0959-3780\(01\)00025-5](http://doi.org/10.1016/S0959-3780(01)00025-5) accessed 14 December 2015.

9 Martin Tischer et al, *Auf dem Weg zur 100% Region: Handbuch für eine nachhaltige Energieversorgung von Regionen* (B.A.U.M. Consult 2006) 60.

10 Elizabeth J Wilsona et al, 'Implementing energy efficiency: Challenges and opportunities for rural electric co-operatives and small municipal utilities' (2008) 36(9) *Energy Policy* 3383–3397.

11 Hall (n 2) 4.

12 Berlo and Wagner, 'The Wave of Remunicipalisation' (n 4).

13 David Jacobs, 'The German Energiewende – History, Targets, Policies and Challenges' (2012) 3(4) *RELP* 223 et seq.

14 Berlo and Wagner, 'The Wave of Remunicipalisation' (n 4) 562.

the German Renewable Energy Sources Act (the *Erneuerbare-Energien-Gesetz*, EEG), a precondition for receiving the sound support of a critical public is that the decentralised decisions are made close to the citizens concerned.

II. Local Authorities and Energy Governance: Political Struggle for Energy Transition in Germany

Typical key characteristics of energy infrastructures are that the systems are rigid and inert due to high degrees of capital intensity, considerable regulation and long lifetimes of physical assets. The resistance of the established regimes to any transformational change is historically based on collective market power and a monopolised nuclear-fossil power generation. Taking the example of structural transformation on the level of the local electricity grid, it can be determined that the established (old) regime is a major obstacle to successful transformation of the energy sector. The level of resistance, as well as the collective market power of the established regime with regard to local electricity grids significantly, delay the decentralisation process required for a transformation of the energy system and supports existing structures.¹⁵ Besides, it is shown that public utilities (*Stadtwerke*) in their function as local energy distributors are important key actors for the German *Energiewende* and meet a variety of requirements to promote a fundamental structural change. The trend towards remunicipalisation and the reestablishment of public utilities reveal the desire to further strengthen the scope of local politics.

From the perspective of transition research an issue emerges about which strategies, methods and instruments are used by the existing energy economic

and energy political regime to confront the trend of decentralisation, remunicipalisation and the founding of public utilities.

The most important insignia of the existing regime with whom multifaceted transformation processes (that fundamentally question previously 'established processes') are attempted to obstruct, are targets that preserve vested rights, perseverance of established structures, maintenance of power and control, stabilisation of markets and turnovers, and the continuation of old business models.

In accordance with transition research basically 'four regime elements' on the local distribution grid level for electricity and gas have been identified – as Figure 1 shows – unfolding strong structure conserving impacts and structurally preserving the existing distribution grid business.¹⁶

In the first place, a triopoly consisting of the German companies E.ON, RWE, and EnBW dominates the distribution grid business for power and gas. These companies own more than 50% of the electricity and gas concessions in Germany. Because of their knowledge and their long-term ownership of more than 10,000 distribution grid concessions, the former concession holders are superior to cities and municipalities during the competitive tendering procedure for concessions.

In the second place, these companies, in their role as former concession holders, have a large repertoire of methods for preserving vested rights on the distribution grid level to thwart the intentions of remunicipalisation by the municipalities.¹⁷ They claim, for example, excessive grid prices from the new concession holder and refuse the release of grid-relevant data in time, the delivery of the grid, threaten with job losses, tempt with sponsoring activities that are linked with 'If-Then' requirements and so forth. This leads to an asymmetric competitive situation that most of the municipalities cannot cope with and, therefore, with competitive tendering procedures they leave the field to the dominant market position of the triopoly.

In the third place, the legal requirements for competitive tendering procedures lead to an unfair competition. Sections 46 and 48 of the Energy Economy Law (*Energiewirtschaftsgesetz*, EnWG) contain regulations that unilaterally reinforce the existing market position of the former concession holders, e.g. currently insufficient regulations for determining the grid price in Section 46 EnWG, the opportunity for ces-

15 Berlo and Wagner, 'Strukturkonservierende Regime-Elemente' (n 7) 233-253

16 Kurt Berlo and Oliver Wagner, 'Widerstände und Chancen von Rekommunalisierungen' (2015) 2 *Solarzeitalter* 41-45; see also, Kurt Berlo, Oliver Wagner 'Triopol nutzt seine Markt- macht – E.ON, RWE und EnBW vs. Rekommunalisierung' (2015) 4 *Zeitschrift für Alternative Kommunal Politik (AKP)* 23.

17 Kurt Berlo and Oliver Wagner, 'Auslaufende Konzessionsverträge für Stromnetze – Strategien überregionaler Energieversorgungsunternehmen zur Besitzstandswahrung auf der Verteilnetzebene' (Expert report commissioned by the parliamentary group Bündnis 90/Die Grünen, Wuppertal Institut 2013).

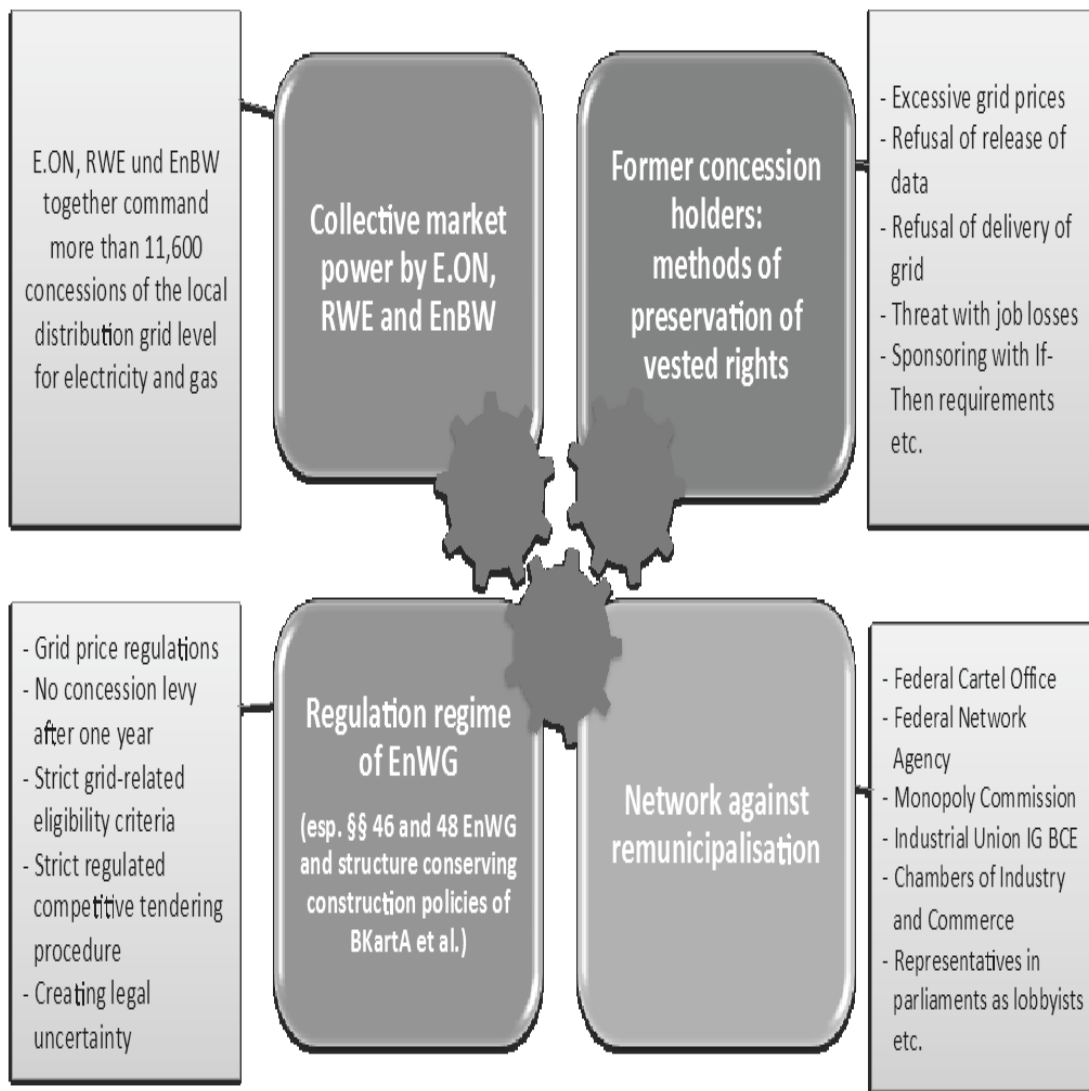


Figure 1: Centre of power with preserving regime elements of the public distribution grid level for electricity and gas.

Source: Compiled by the authors.

sation of payment of concession levy after one year, and the application of strict grid-related eligibility criteria. Consequently, legal competitive tendering procedures have virtually become impossible, resulting in interminable and expensive judicial contentions.

In the fourth place, meanwhile a powerful network is operating severely against remunicipalisation and

municipal interests to make takeovers on the distribution grid level for electricity and gas. Agenda setting and spin doctoring rank among the activities of the network. Consistently it is claimed that remunicipalisations are linked with a split-up and fragmentation of the German distribution grid landscape which leads to inefficiencies. Moreover, studies and surveys are being ordered that are supposed to prove

high financial risks for cities and municipalities concerning a remunicipalisation and that targeted aims are predominantly not achievable. In this context, important institutional players are: the Federal Cartel Office (*Bundeskartellamt*, BKartA), the Federal Network Agency (*Bundesnetzagentur*, BNetzA), the Monopoly Commission (*Monopolkommission*), the Federation of German Industry (*Bundesverband der Deutschen Industrie*, BDI), many local Chambers of Industry and Commerce (*Industrie- und Handelskammer*), the Industrial Union Mining, Chemistry, Energy (*Industriegewerkschaft Bergbau, Chemie, Energie*, IG BCE) and the Initiative New Social Market Economy (*Initiative Neue Soziale Marktwirtschaft*, INSM).

III. Current Decisions of Courts and Competition Authorities in Germany Create Obstacles for an Active Local Energy Policy

For many municipalities in Germany, remunicipalisation of their energy supply is an attractive option. However, these projects are faced with numerous difficulties. The statutory requirements are insufficiently differentiated and the courts are very critical in their decisions. It is, therefore, very difficult to award a concession contract to an energy supply company in a manner that satisfies the courts' requirements. Nevertheless, the situation has somehow improved over the last years because the multitude of court decisions and decisions made by competition and regulatory authorities have contributed to a clearer picture on how to design the proceedings. But the requirements for a legitimate process are still very high and the demands on the local authorities are far too complex to be fulfilled without the help of specialised legal advice.

1. The Regulatory Framework

a. Competitive Situation and Current Legal Situation Regarding the Energy Sector

A nationwide competition for distribution grids has developed. This is a consequence of the integration of Section 103a (4) into the Act against Restraints of Competition (*Gesetz gegen Wettbewerbs-*

beschränkungen, GWB) in 1980: It limited the duration of concession contracts to 20 years and stated that all contracts that were in existence at that time would end on 31 December 1994 at the latest. The concession contracts that were newly concluded back then are now coming to an end.

The expiry of these contracts provides municipalities with the opportunity to repurchase the distribution grids and to establish new public utilities. The grid operation forms the core element of the municipality's business activities regarding energy supply. The operator receives a guaranteed annual yield and is able to offer employment to a number of people needed to manage the grid. A municipality's public utility is, therefore, often linked to its grid operation. For these reasons, the expiry of a concession contract can be the initial spark that leads to the remunicipalisation of the energy supply.

Past experiences have shown, however, that local authorities are often unable to cope with the legal and economic issues associated with awarding concessions. This is partly due to the long contract duration, which means that the authorities only have to deal with these problems once every 20 years. The intention to remunicipalise the energy supply adds to the complexity of the process. Conducting these procedures in a legally unobjectionable manner can be challenging for numerous reasons: The statutory requirements, which are set down in Section 46 EnWG are too undifferentiated. And while there are many decisions by courts and competition authorities on the awarding of concession contracts, these are not always consistent with each other. It is, therefore, very difficult for the local authorities to know and understand all these different decisions and to use them as a basis for conducting their procedures. Additionally, these decisions have a strong focus on competition law, further complicating remunicipalisation projects of energy supply.

b. The Concession Contract's Role in Energy Law

The concession contract regulates the relationship between a municipality and a private or public energy supply company regarding the use of public space. Section 46 (2) 1 EnWG (2005) defined concession contracts as

contracts between energy supply companies and municipalities regarding the use of public ways (eg, public roads, streets, squares, bridges etc) for

the construction and operation of power or gas lines, which are part of the municipality's general supply network.

The development of a grid-based electricity and gas supply in Germany ran parallel to the development of the law of concession contracts. From its very beginning, the energy supply has been closely connected to the social, technical and economic developments of the last 120 years.¹⁸ Within the context of the decrease of police power regarding sovereign administrative actions at the end of the 19th century, the municipality's duties were increasingly fulfilled under private law. It is for that reason that concession contracts were based on contract law (civil law). With the transition from the German Empire to the Weimar Republic and the first Energy Act, which was passed in 1935, more and more limitations were introduced into the law of concession contracts. The freedom of contract (private autonomy) has been limited by requirements under public law, eg the maximum contract period of 20 years, which was introduced in Section 103a (1) 1 GWB.¹⁹ Concession contracts were included in the Energy Act in 1998 [Section 13 (2) 1 – now Section 46 (2) 1] to create a 'competition for electricity and gas distribution grids'²⁰ when this act was amended to implement the European directives about the internal energy market.

The statutory requirements for concessions enable the distribution grid operator (concession holder) to use the municipality's public ways. Under Section 18 (1) 1 EnWG, distribution grid operators, whose grids are general supply networks, are obligated to publish 'general terms and conditions for network connection and use' for low pressure gas provision and low voltage electricity provision respectively and to connect everyone under these conditions. The connectee, thus, has a statutory right to be connected to the general supply network. In this way, a 'universal service' for connection is provided for all residents of a community.

The specific conditions and requirements of connections are set down in the ordinances for low voltage connection (*Niederspannungsanschlussverordnung*, NAV)²¹ and for low pressure connection (*Niederdruckanschlussverordnung*, NDAV)²². The concession contract itself is based on the right of public ways to construct and operate electricity and gas lines. The contract is not confined to providing the

concession holder with a right of way, however. In return, the concession holder is obligated to pay a concession fee. These fees account for 3% of the municipal income and are of high significance for local politics. In 2012, the concession holders paid a total of €3.3 billion to municipalities in Germany.²³

These payments are particularly important to the municipalities, because energy supply varies very little in times of economic crises, during which income from business taxes can decrease significantly.²⁴

c. The Municipalities' Influence on Local Energy Supply

The basis for a municipality's influence on its energy supply is Section 28 (2) 1 of the constitutional Basic Law for the Federal Republic of Germany (*Grundgesetz*, GG)²⁵. The courts²⁶ and the accurate (as well as prevailing) opinion in legal literature²⁷ agree that local energy supply is covered by the guarantee of self-government for municipalities as set down in Section 28 (2) GG. This is a consequence of the close connection between the municipalities' ownership of public ways on the one hand and local energy supply on the other hand, which makes it a 'local affair' (Section 28 (1) GG)²⁸. Thus, the safeguarding of energy supply is a task of the municipal-

18 In more detail: Wolf Templin, *Recht der Konzessionsverträge* (1st edn, C.H. Beck 2009) 29 et seq.

19 Fourth Act amending the Act against Restraints on Competition of 26 April 1980, BGBl. I, 458 (4. GWB-Novelle). The goal was to prevent the system of regional monopolies from solidifying and losing the flexibility to react to utility requirements; Peter Becker and Wolfgang Zander, AfK (1996) 262.

20 OLG Düsseldorf IR (2008) 115.

21 Ordinance for low voltage connection (NAV).

22 Ordinance for low pressure connection (NDAV).

23 Statistisches Bundesamt, cited from: Immesberger, *Das neue Recht der Konzessionsabgaben* (1st edn, Loseblatt 1998) I-3, 6.

24 Templin, *Recht der Konzessionsverträge* (n 18) 302 et seq.

25 See for a detailed description of the foundations of the guarantee of self-government regarding local energy supply: Fabio Longo, *Neue örtliche Energieversorgung als kommunale Aufgabe* (3rd edn, Nomos-Verlag 2010) 89 et seq; Templin, *Recht der Konzessionsverträge* (n 18) 188 et seq.

26 BverfG NJW 1990, 1783; BverwG BVerwGE 98, 273, 275 et seq; BGH RdE 1996, 193.

27 Hans Jarass and Bodo Pieroth, 'GG' (8th edn, C.H. Beck 2006) art 28, recital 13; Damm JZ 1988, 841; Püttner DÖV 1990, 463; Hermes, *Der Staat* 31 (1992), 296 et seq; Templin, IR 2009, 103; in detail: Templin, *Recht der Konzessionsverträge* (n 18) 188 et seq.

28 Templin, *VerwArch* 100 (2009) 536 et seq.

ities. In a current judgment, the Germany's Federal Court of Justice (*Bundesgerichtshof*, BGH) has confirmed the role of municipalities regarding the awarding of concessions.²⁹

2. Requirements for Concession Procedures as Set out by Courts and Competition Authorities

The principle of non-discrimination, set down in Section 46 (1) EnWG, obligates the local authorities to base their decision on objective selection criteria, specified by the Energy Act.³⁰ The aim is to award the concession to the bidder, whose material and human resources and professional expertise and operational concept qualify him as the best company to operate the grid in the manner required by Section 1 EnWG. The BGH prioritises the so-called 'Section 1 EnWG criteria'. However, municipalities are allowed to establish and weigh additional criteria as long as it is objective and related to the concession contract's subject matter. This includes a permissible economic utilisation of the right of way. It is the court's opinion that the purposes of Section 1 EnWG have to take priority over other criteria.³¹ Regarding permissible clauses in concession contracts, the BGH points out qualitative differences between the bidders regarding system operation and installation, including clauses about underground power lines, the laying of empty conduits and the removal of disused infrastructure. Additionally, the court permits clauses and criteria regarding concession fees and instalment payments, municipality discounts, consequential costs, termination clauses and rights to information. Other criteria the local authorities may use are the municipality's potential influence on efficiency, security and affordability of the system operation (§ 1 EnWG criteria) as well as the safeguarding of the planning sovereignty in case of grid or capacity extensions and modernisations. At present, a draft bill

is under discussion and in a consultation process incorporating some important requirements to create reliable legal conditions for the renewal of concession contracts. In this context, Section 46 (2) EnWG is being revised by the Government, but under the known conditions it will not significantly change the situation for local authorities.

3. Obstacles to Realising Remunicipalisation After the Awarding Process

After a community-owned company has been chosen or a remunicipalisation lies ahead, the previous concession holders usually use all legal means to prevent it. In many cases, the current or previous concession holders interfere with the awarding process or the take-over of grids, making it more difficult to carry out a non-discriminatory concession process. Take-over processes are regularly delayed by this, in many cases this happens because judicial clarifications are needed, which can take several years to be resolved. These competitive obstructions are not limited to individual cases but are a nationwide phenomenon. Apparently, this obstructive behaviour is part of the big distribution network operators' group-wide strategies. Their current acts of obstruction in cases in which they have either lost the concession during the competition or fear they will lose it can be summed up as follows:

- Towards the local authorities: exertion of influence during the awarding process with the aim of preventing a concession decision to their disadvantage by means of direct influence on the decision-makers;
- None (or limited) communication of data regarding the technical and economic situation of the grid;
- Refusal to pay the concession fee following the expiry of the contract, even though Section 48 (4) EnWG states a legal obligation to do so for the duration of one year;
- *Towards the new concession holder*: Refusal to hand-over information about the grid as well as a total refusal to negotiate a purchase contract or termination of these negotiations.³²

These practices have thus far failed to encourage the courts and authorities to remind concession holders

29 BGH NZBau 2014, 306.

30 BGH NZBau 2014, 306.

31 BGH NZBau 2014, 307.

32 Peter Becker and Wolf Templin, 'Missbräuchliches Verhalten von Netzbetreibern bei Konzessionierungsverfahren und Netzübernahmen nach §§ 30, 32 EnWG' (2013) (1) Zeitschrift für neues Energierecht (ZNER) 10-18.

of their legal obligations under the energy and competition laws and to take judicial action against them. Quite the contrary, so far the focus has been solely on the municipalities. But there is nothing new to this fact. The conclusion of concession contracts was regulated even before the creation of the EnWG 1935 and even then obligations were imposed only upon the municipalities. The same applies for the EnWG 1935. During that time, there was a circular issued by the Minister of the Interior for North-Rhine Westphalia³³ that regulated the conclusion of concession contracts only with regard to the municipalities. In 2010, the Competition Authority of Lower Saxony (LKartB) published guidelines on concession contracts under the (new) EnWG 2005.³⁴ In these guidelines, only the municipalities were qualified as dominant companies, meaning they had to comply with the rules set down in Section 19 and 20 GWB during the process of awarding concessions (eg, non-discriminatory provision of data to all applicants). When it became apparent that municipalities depend on their current concession holders to be able to provide this information, LKartB derived a contractual accessory obligation for the concession holder to disclose this information to the municipalities as their contracting party from the principle of good faith (Section 241 (2), 242 BGB).³⁵ They did not, however, see that the concession holders are dominant companies themselves.

The Federal Cartel Office and the Federal Network Agency continued and intensified this one-sided view in their Joint Practical Guide.³⁶ The authorities do not recognise other markets than the market for granting right of way in return for payment (on which market the municipalities are supposed to be dominant companies). Other markets (and the possibility of a dominance of the concession holders) are explicitly not recognised. In the views expressed by the authorities, these markets are to be treated as mere annexes to the awarding of the concession.³⁷ It is, therefore, not surprising that the Federal Cartel Office has so far only investigated municipalities for alleged abusive conduct as prohibited by Sections 19 and 20 GWB.³⁸

The Federal Network Agency has thus far blocked any abuse proceedings concerning concession contracts because the Federal Network Agency and the Federal Cartel Office agree in their Joint Practical Guide that the Federal Cartel Office should be responsible for the awarding of concessions³⁹ and the Fed-

eral Network Agency should be responsible for claims arising from the statutory obligations in Section 46 (2) EnWG regarding the take-over of networks.⁴⁰ The authorities rejected the Federal Network Agency's responsibility during the phase before the conclusion of the concession contract because they are of the opinion that neither the applicants nor the municipality are connected to the concession holder by a statutory obligation arising from Section 46 (2) EnWG.⁴¹ These statements have become obsolete as far as the obligation to provide data is concerned because the EnWG 2011 grants the municipality a statutory right against the concession holder in Section 46 (2) 4 EnWG.⁴²

Nevertheless, thus far the BNetzA has, though taking a stand in favour of new concession holders during take-over proceedings regarding the obligation to provide information⁴³ and the obligation to hand over the network⁴⁴, not addressed the evident unfairness of the former concession holders' behaviour. In the cases where the BNetzA has taken some action, it did so on the basis of the general rule in Section 65 EnWG. It did not, however, apply the prohibition of abusive behaviour set down in Section 30 (1) in conjunction with Section 30 (2) EnWG. The same is

33 'Abschluss von Verträgen auf dem Gebiet der Energiewirtschaft durch Kommunen' of 24 February 1989 - reproduced in Paul Münch, *Konzessionsverträge und Konzessionsabgaben* (3rd edn, Kommunal- und Schul-Verlag 1993).

34 LKartB (Lower Saxony) Guidelines for the conduct of a competitive concession process in accordance with § 46 EnWG, Ministry of Lower Saxony for economy, work and traffic, 'Energiekartellrecht' (March 2010) <www.mw.niedersachsen.de/live/live.php?&navigation_id=5511&article_id=16017&_psmand=18> accessed 21 January 2016.

35 *ibid.* 10.

36 See Joint Practical Guide of BKartA and BNetzA, (Gemeinsamer Leitfaden von Bundeskartellamt und Bundesnetzagentur zur Vergabe von Strom- und Gaskonzessionen und zum Wechsel des Konzessionsnehmers), 2nd edition of 21.05.2015, recital 19, available on the Internet at <<http://bit.ly/2cJClkl>> accessed 21 January 2016) (BKartA and BNetzA Gemeinsamer Leitfaden); Steinbeck/Templin (2015) ZNER 307.

37 *ibid.* BKartA and BNetzA Gemeinsamer Leitfaden, recital 19.

38 BKartA, Decision of 21 November 2011 Ref B 10 17/11 *Markleeberg*, recital 24; BKartA, Decision of 22 June 2012, Ref B 10 – 16/11 *Puhlheim*, recital 46.

39 BKartA and BNetzA Gemeinsamer Leitfaden (n 36) recital 11.

40 *ibid.* recital 10.

41 *ibid.*

42 BT-Drs. 17/6072, 88.

43 BNetzA, Decision of 19 June 2012, Ref BK6-11-079.

44 BNetzA, Decision of 26 January 2012, Ref BK6-11-052.

true for the courts. In cases where the courts had to decide about actions brought by municipalities or energy supply companies (regarding either claims to provide information during the awarding process,⁴⁵ or the take-over of a network⁴⁶ or claims for property transfer during a take-over⁴⁷) they also failed

to take into consideration the dominance and the abusive behaviour of concession holders. Even the latest court rulings regarding concession awarding procedures hold only the municipalities responsible as monopolists.⁴⁸

This practice does not contribute to facilitating the take-overs of networks.

45 Claims made during interim measure proceedings have thus far been rejected – incorrectly – for the reason that an interim measure would anticipate the main decision: OLG Brandenburg VersorgW 2010, 149; LG Potsdam, Decision of 2 December 2009, Ref 2 O 326/09; during main proceedings: OLG Frankfurt, Judgment of 14 June 2011, Ref 11 U 36/10 (Kart) – beck online, BeckRS 2011, 21503, 10.

46 OLG Schleswig ZNER 2006, 154; OLG Frankfurt a.M. RdE 2008, 146; OLG Koblenz ZNER 2009, 146; LG Frankfurt RdE 2010, 347 et seq.

47 OLG Schleswig, RdE 2006, 203; LG Kiel, ZNER 2005, 331; OLG Frankfurt a.M. ZNER 2008, 57; OLG Koblenz ZNER 2009, 146.

48 BGH NZBau 2014, 303 and KZR 66/12; BGH, Decision of 3 June 2014, Ref EnVR 10/13; OLG Düsseldorf, Decision of 17 April 2014, Ref VI-2 Kart 3/13 (V); OLG Karlsruhe, Judgment of 26 March 2014, 6 U 68/13 (Kart); LG Köln, Judgment of 6 June 2014, 90 O 169/13; LG Stuttgart, Judgments of 2 October 2014, Ref 11 O 182/14 and 11 O 181/14; LG Düsseldorf, Judgment of 11 December 2014, Ref 37 O 96/14.

IV. Conclusions

Many and especially newly established municipal utilities prioritise a strategic adjustment towards a portfolio with a larger share of renewable energy. In particular the newly established *Stadtwerke* can be considered as a central actor in the implementation of the German *Energiewende* due to their sustainable energy policy. It can be assumed, that new *Stadtwerke* and the take-over of the local grid concessions play a key role for sector dynamics towards a fundamental energy transition which requires a reconfiguration of the relevant players. In light of the German *Energiewende*, the establishment of new municipal utilities and a change in the grid ownership is part of a structural change. But all structural changes converting existing organisational forms evoke conflicts. Currently, municipalities are in a disadvantaged position. Regarding the legal framework, there are many unsolved problems and conflicts. Indeed, the transformation process on local stage is slowed down by shortcomings in the legislative framework and regulations. Action is required in order to promote the German right to local self-government in the field of energy legislating. The substantial transformation which is needed, in terms of policy, legislation and structures, has not yet taken place. Municipal utilities should not be disadvantaged in their work by unfair conditions legitimated by the legal energy framework. A much-needed municipal friendly reform of the Energy Economy Law EnWG would be a first step in the right direction although more needs to be done.